Neutral Citation Number: [2020] EWHC 2951 (QB)

Case No: QB-2018-006618

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2020

Before :

THE HONOURABLE MRS JUSTICE TIPPLES

- -

Between :

Tony Greenstein	**Claimant**
- and -	
Campaign Against Antisemitism	**Defendant**

- -
- -

David Mitchell (instructed via the **Public Access Scheme**) for the **Claimant**
Adam Speker QC (instructed by **RPC LLP**) for the **Defendant**

Hearing date: 26th October 2020

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Approved Judgment

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

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down will be Friday 6 November 2020.

The Honourable Mrs Justice Tipples DBE:

Introduction

1. This is principally a libel action, but includes claims under the Data Protection Act 1998 ("**the 1998 Act**") and for misuse of private information. The defendant has applied for summary judgment in respect of the libel claims, and for orders that the other claims be struck out under the *Jameel* jurisdiction.

2. The proceedings were issued on 14 February 2018 and the claimant, who describes himself as a "well-known political activist with a focus on issues related to anti-racism, anti-facism and Palestine", complains about five articles published by the defendant on the website antisemitism.uk on 26 February 2017, 30 July 2017, 25 September 2017, 3 January 2018 and 24 January 2018.

3. On 14 February 2019 there was a trial of preliminary issues of meaning and fact/opinion before Nicklin J and judgment was handed down on 15 February 2019, with neutral citation [2019] EWHC 281 (QB). The five articles were referred to by Nicklin J as, respectively, the First to Fifth Articles, and they are set out in full in the Appendix to his judgment. There is therefore no need for these five articles to be appended to this judgment.

4. Nicklin J ordered that:

    a. The First Article bears the following natural and ordinary meanings about the claimant. That the: "the claimant: (i) was anti-semitic; (ii) had lied when he claimed in The Guardian newspaper that the International Definition of Anti-Semitism prevents criticism of Israel; (iii) had lied to the Charity Commission when he claimed that the CAA was a right-wing political Zionist organisation that is not concerned with fascist groups who were anti-semitic Holocaust deniers; and/or (iv) had committed several criminal offences including offences of dishonesty, vandalism and drug possession".

    b. The meanings at paragraph (a)(i) to (iii) are expressions of opinion. The meaning at paragraph (a)(iv) is an allegation of fact. The meanings at paragraph (a)(i) to (iv) are defamatory of the claimant at common law.

    c. The Second, Third and Fourth and Fifth Articles each bear the natural and ordinary meaning: "the claimant was anti-semitic".

    d. The meanings at paragraph (c) are each expressions of opinion and defamatory of the claimant at common law.

5. The claimant sought permission to appeal this order, which was refused by Asplin LJ on paper on 25 March 2019.

6. Having determined the preliminary issues, on 15 February 2019 Nicklin J gave directions for the service of amended statements of case and, in accordance with the directions timetable set by the judge, an amended particulars of claim, amended defence and amended reply have all been served. Further, on 16 July 2019 the

defendant served a Part 18 request for further information upon the claimant, which was answered on 12 August 2019.

7. On 28 April 2020 the defendant issued an application for summary judgment, alternatively that the claim be struck out.

The defendant's application

8. The defendant's application notice seeks the following relief, namely:

    a. pursuant to CPR Part 24.2, there be summary judgment for the defendant on the defence of honest opinion under section 3(4)(a) of the Defamation Act 2013 ("**the 2013 Act**") in respect of the meanings at paragraphs 4.1, 4.2, 4.3 and 4.7 of the amended particulars of claim, which are the meanings determined by Nicklin J (and set out at paragraph 4(a) and (c) above);

    b. pursuant to CPR Part 3.4(2) the claim, alternatively paragraphs 7.2 and 8 of the amended particulars of claim and paragraphs 22 (and sub-paragraphs thereof), 23.1, 25.1 and 26 (and sub-paragraphs thereof) of the amended reply be struck out;

    c. as a consequence of the rulings in paragraphs 8(a) and (b) above or that the claim is an abuse of process, there be judgment for the defendant overall; and

    d. costs.

9. The application is supported by the evidence in Part 10 of the application notice, together with a witness statement from Mr Gideon Falter, the defendant's chief executive ("**Mr Falter**"), dated 20 April 2020. The claimant served a witness statement in answer to Mr Falter's witness statement on 20 October 2020, which runs to some 184 paragraphs over 27 pages.

The issues

10. At the hearing before me the defendant was represented by Mr Adam Speker QC and the claimant was represented by Mr David Mitchell.

11. The issues to be determined are as follows:

    a. The court, having found that the words complained of meant that the claimant was an antisemite and that that meaning was an opinion and the statement complained of indicated as much, whether the defendant is entitled to summary judgment on the basis that, on any admitted fact which existed at the time (26 February 2017, being the date the First Article was published), an honest person could hold the said opinion about the claimant.

    b. The court, having found that the words complained of meant that the claimant had lied when he claimed in *The Guardian* that the International

Definition of Anti-Semitism ("**IDA**")[1] prevents criticism of Israel and that that meaning was an opinion and the statement complained of indicated as much, whether the defendant is entitled to summary judgment on the basis that, on any admitted fact which existed at the time (26 February 2017, being the date the First Article was published), an honest person could hold the said opinion about the claimant.

c. The court, having found that the words complained of meant that the claimant had lied to the Charity Commission when he claimed that the defendant was a right-wing political Zionist organisation that is not concerned with fascist groups who were antisemitic Holocaust deniers and that that meaning was an opinion and the statement complained of indicated as much, whether the defendant is entitled to summary judgment on the basis that, on any admitted fact which existed at the time (26 February 2017, being the date the First Article was published), an honest person could hold the said opinion about the claimant.

d. Whether the malice pleas at paragraphs 22 to 22(6)(d), 23.1, 25.1 and 26 (and sub-paragraphs thereof) of the amended reply should be struck out under CPR 3.4(2).

e. Whether the data protection and misuse of private information pleas should be struck out under CPR 3.4(2)(b).

12. In response to these issues the claimant maintains that the dispute between the parties is not suitable for summary determination and requires investigation at trial. This is because the facts relied on by the defendant in support of its honest opinion defence are "not objective and true facts upon which an honest person could hold the relevant opinion", the malice plea is properly pleaded and requires determination at trial and the abuse of process challenge is unarguable.

Relevant law

13. There was no dispute between the parties in relation to the relevant law. Rather, the issue was how it should be applied in relation to the undisputed facts of this case.

Procedure

14. It was common ground that:

a. The court can grant summary judgment under CPR Part 24.2 to a defendant on the basis that there is no real prospect that a defence of honest opinion will fail: *Morgan v Associated Newspapers Ltd* [2018] EWHC 3960 (QB), Nicklin J at [46]; *Carruthers v Associated Newspapers Ltd* [2019] EWHC 33 (QB), Nicklin J ("***Carruthers***") at [24] to [33]. Summary judgment can also be granted where there is no prospect that a claimant will succeed in proving malice (see, for example, *Carruthers* at [32]).

[1] Also referred to in places as the International Holocaust Remembrance Alliance or IHRA definition.

b. The approach the court should adopt when considering applications for summary judgment is set out in *Easy Air Limited v Opal Telecom Ltd* [2009] EWHC 339 (Ch) (and approved by the Court of Appeal in *AC Ward & Son v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24]). Summary judgment is for plain cases that are not fit for trial: *Suresh v Samad* [2017] EWHC 76 (QB), Warby J at [10(4)].

c. The court can exercise its powers to strike out a statement of case under CPR 3.4(2)(b) in respect of a defamation claim where the litigation is pointless and wasteful or "[does] not serve the legitimate purpose of protecting the claimant's reputation" as such a claim is an abuse of process: see *Jameel v Dow Jones & Co Inc* [2005] QB 946, CA; *Lait v Evening Standard Ltd* [2011] 1 WLR 2973, CA at [42]; *Gatley on Libel and Slander* (12th Edition; 2013) ("***Gatley***") at para 30.48 – Proceedings which are not "worth the candle"; *Jameel* abuse of process).

Defence of honest opinion

15. The defence of honest opinion is now contained in section 3 of the 2013 Act, and the old common law defence has been abolished: section 3(8). Section 3, so far as material, provides:

> "(1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
>
> (2) The first condition is that the statement complained of was a statement of opinion.
>
> (3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of opinion.
>
> (4) The third condition is that an honest person could have held the opinion on the basis of – (a) any fact which existed at the time the statement complained of was published; …
>
> (5) The defence is defeated if the claimant shows that the defendant did not hold the opinion …"

16. It is only sub-sections 3(4)(a) and 3(5) that are relevant in relation to the defendant's application. This, again, was common ground between the parties. The first condition was determined by Nicklin J (see paragraph 3 above) and the claimant does not challenge that the second condition is met (see [2019] EWHC 281 (QB) at [30] to [31], [39] and [41]).

17. Mr Speker made the following points in his skeleton argument in relation to section 3(4):

a. At common law, the objective limits of comment were '*exceedingly wide'*. The question is *could any honest person, however prejudiced he might be, or however exaggerated or obstinate his views, have written this criticism?* (see *Gatley* at para 12.27; *Tse Wai Chun Paul v Albert Cheng* [2001] EMLR 31, CFAHK ("***Cheng***") at [20] *per* Lord Nicholls). A judge or jury has no right to apply the standard of its own taste or measure the right of the critic accordingly. Further, the issue is not whether anyone agrees with the opinion.

b. The revised statutory defence is intended to be as generous, if not more so, than the common law: see, for example, *Burki v Seventy Thirty Ltd* [2018] EWHC 2151 (QB), HHJ Parkes QC at [224]-[232].

c. A claimant cannot undermine the basis of the expressed opinion by relying upon other relevant exculpatory facts that would have a bearing on whether a hypothetical person could have expressed the relevant opinion: see *Carruthers* at [28] to [31].

d. There must be at least one admitted fact which existed at the time of the publication from which an honest person could hold the opinions found. Further, the fact or facts must be admitted or incapable of being disproved, given the defendant's application is for summary judgment.

18. From the terms of his skeleton argument, and his oral submissions, I did not understand Mr Mitchell to take issue with these propositions on behalf of the claimant. However, Mr Mitchell reminded me that, in order to succeed with an honest opinion defence, the statement of opinion must be based on *true* facts: see *Morgan v Associated Newspapers Ltd* [2018] EMLR 25, 577 at [25], per Nicklin J.

Malice

19. The test under section 3(5) is the same as the test for malice under the common law: see *Yeo v Times Newspapers Ltd (No. 2)* [2015] 1 WLR 3031, Warby J ("***Yeo***") at [27]. At common law the correct test for malice in the context of an honest opinion defence is honesty of belief: see *Cheng* at [25] and [79], per Lord Nicholls (approved in *Joseph v Spiller (Associated Newspapers Ltd intervening)* [2011] AC 852, SC at [67] to [68] and [108]; and see *Yeo* at [27]). The test for malice is hard to establish and "in practice this issue is seldom likely to be explored, for the burden is on the claimant and how can he set about proving that the defendant did not believe what he said?": see *Joseph v Spiller* at [108].

20. An allegation of malice is an allegation of dishonesty (*Thompson v James* [2013] EWHC 585 (QB), Tugendhat J at [16]; *Gatley* at para 28.6). Paragraph 2.9 of the Practice Direction 53[2] sets out that "if the defendant contends that any of the words or matters are honest opinion … and the claimant intends to allege that the defendant acted with malice, the claimant must serve a reply giving details of the facts or

[2] The claim was issued before 1 October 2019 and this was the paragraph of the Practice Direction in force at that time.

matters relied on." Implicit in this is that the details given must comply with the relevant principles of pleading: see *Yeo* at [29] to [33]. Further, the court must be vigilant to see these principles are applied, as they represent an important safeguard for freedom of expression: see *Yeo* at [35].

21. Against that background, I now turn to each of the defamation claims.

The defamation claims

(1) The opinion that the claimant was an antisemite

22. The meaning found by Nicklin J was a general charge that the claimant was an antisemite. The term antisemite is not defined. This is important as the defendant maintains that this means that the court does not have to grapple with arguments over the correctness of the IDA definition and its examples of possible contemporary antisemitism. However, the defendant accepts that the IDA definition is useful in providing examples of the type of conduct and speech that could lead an honest person to believe that someone is antisemitic.

23. The claimant take issue with this approach. He maintains that the IDA definition is central to the defendant's honest opinion defence; the defendant has misapplied and misused the IDA definition in order to attack the claimant for political reasons, and not on the basis that he is antisemitic; and that the defendant's reliance on the IDA definition is "generally problematic, particularly so in the context of its honest opinion defence". The claimant maintains that it is the IDA definition of antisemitism which is at the heart of this dispute and gives rise to a factual dispute that can only be determined at trial.

24. I disagree. The claimant's approach overlooks the finding made by Nicklin J that "the claimant was antisemitic" was an expression of opinion and that that finding does not include any definition of "antisemitic". The situation might have been different if Nicklin J had found that the first meaning at paragraph 4(a)(i) above was an allegation of fact as, in the context of a truth defence, the IDA definition might have been relevant. However, that is not this case.

25. I therefore agree with Mr Speker that the issue is whether an honest person could believe the claimant to be an antisemite and the claimant's arguments in relation to the IDA definition, together with the complaint that it has been "selectively quoted" in the amended defence, are irrelevant.

26. The particulars of honest opinion are set out at paragraph 9 of the amended defence. The IDA definition is alleged at paragraph 9.1 and 9.2. At paragraph 9.4 the defendant alleges that Baroness Chakrabarti in her report for the Labour Party in June 2016 concluded that the use of the word "Zio" has been accepted to be antisemitic. The claimant does not dispute this, but seeks to dispute the allegation that "this conclusion on the use of the word is also widely accepted".

27. The defendant alleges at paragraph 9.5 that the claimant has a twitter account with the handle @TonyGreenstein, on which he has posted over 20,500 tweets since he

joined the social media platform in May 2012. The claimant does not dispute that fact, but alleges that the defendant "deliberately misrepresents" his tweets (paragraph 8 of the amended reply), which the defendant alleges are "almost all … about Jews and Israel and they are unremittingly hostile towards, and abusive about, Jews, Israel, and supporters of Israel". However, apart from one tweet posted on 7 September 2016 (which the claimant says was the result of his account being hacked, and which the defendant does not rely on for the purposes of this application), Mr Greenstein admits that he wrote all the tweets alleged between 15 December 2014 and 22 January 2017 (paragraphs 9.5.1-9.5.4, 9.5.6-9.5.13 of the amended defence), and therefore pre-date the First Article. These tweets are therefore all what the claimant says in the language he has chosen to use. The examples are not disputed in Mr Mitchell's skeleton argument.

28. For example, at 11.21pm on 6 May 2016 the claimant tweeted: "AmYisraelChai is the Zionest equivalent of HeilHitler". AmYisraelChai means "The people of Israel live". The claimant does not dispute that he wrote this statement, rather he maintains that it is artificial to treat a tweet in isolation (paragraph 9.2.2 of the amended reply) and that the context of this tweet was "the case of Itamar Ben Gvir who shouted "Am Yisrael Chai" at the Temple Mount in September 2015. Gvir glorifies the terrorist Baruch Goldstein who murdered 29 and wounded 125 Palestinian Muslim worshippers in Hebron in 1994". However, the context or the additional facts that the claimant wishes to rely on are irrelevant in relation to honest opinion defence: see *Carruthers* at [28] to [30]. The claimant's tweet compares the people of Israel to the Nazis and, on any objective assessment, an honest person could have held the opinion that that was an antisemitic statement from the claimant.

29. On 15 December 2014 the claimant wrote: "I loathe racist scum and Jewish Nazis like you." The claimant accepts he wrote that tweet. On 16 September 2016 the claimant wrote "yes the holocaust did happen and you Zios have been milking it ever since even though u collaborated with the Nazis" and this tweet was sent in response to a tweet from 'joe soap' which said "what bollocks. Any excuse to hate Jews. You are no better than neo Nazis. I suppose the holocaust didn't happen". On 8 January 2017 the claimant tweeted: "of course Zios have no shame. That is why they use the holocaust victims to justify their own racist barbarism". The claimant accepts he wrote all of these tweets, but seeks to rely on context to defend them (paragraph 10.1 and 10.5 of the amended reply). That is no answer and, on any objective assessment, an honest person could form the view that these tweets, in which the claimant has referred to "Jewish Nazis", used the word "Zios" (which he knows is antisemitic: see paragraph 26 above) and, having done so, referred to collaboration with the Nazis, were antisemitic statements he made.

30. There are many other allegations made by the defendant in the amended defence in support of its honest opinion defence. However, many of the facts alleged post-date 27 February 2017, and were not therefore in existence at the date of publication of the First Article, or the date of the facts is not alleged, and it is unclear whether they were in existence on the date of publication or not. I cannot take these into account for the purpose of the defendant's application. Likewise, I do not think it is relevant for the purposes of this application, to take into account Mr Speker's point that the claimant is seeking to shut down the defendant, a charity which was set up to, and does, campaign against antisemitism. This is because, as Mr Mitchell submitted,

this is not one of the facts and matters that the defendant has pleaded in paragraph 9 of its amended defence in support of its honest opinion defence.

31. Nevertheless, even putting all those matters on one side, I have formed the clear view that Mr Speker's submissions are correct. The claimant's tweets are determinative of the defendant's summary judgment application. This is because an honest person plainly could express the opinion that the claimant was an antisemite based only on the tweets which he posted before 27 February 2017. The claimant has no real prospect of succeeding on this issue. On the basis of the admissions in the amended reply, the defendant can demonstrate that the third condition under section 3(4)(a) will be met.

Malice

32. The next point is whether, in answer to this, the malice is properly pleaded for the purposes of section 3(5). The relevant allegations are at paragraph 22 of the amended reply:

> "[22.] Further or alternatively, in publishing the words complained of the defendant its servants or agents) did not hold the opinion that the claimant was an anti-semite. Whilst the defamatory articles are unattributed and the defendant has not disclosed their author(s), if required to specify a person for the purposes of section 3(5) Defamation Act 2013, the claimant identifies the defendant's chief executive, Mr Gideon Falter:
>
> PARTICULARS
>
> (1) The defendant acted in retaliation and out of spite following the claimant's change.org petition dated 6 February 2017 and complain to the Charity Commission dated 8 February 2017 seeking that the Charity Commission deregister it.
>
> (2) The defendant maliciously referred to the claimant's historic and spent convictions. The claimant refers to paragraph 26 below.
>
> (3) In spite of its close interest in the claimant and his history of political activism the defendant deliberately omitted any reference to his lifetime's work opposing racism including anti-semitism. The claimant repeats paragraph 12.2 to 12.5 above and refers to paragraph 28 below.
>
> (4) The defendant deliberately distorted and misapplied the working definition [the IDA definition] against the claimant. The claimant repeats paragraphs 5.1 and 5.2 above.
>
> (5) The defendant is inconsistent, hypocritical and opportunistic in its purported policing of anti-semitism, deliberately ignoring acts of anti-semitism committed by its political allies, particularly when perpetrated against its political opponents, including the claimant. It ignored the claimant's following complaints of genuine anti-semitism …

(6) The defendant is dishonest or reckless as to the truth in alleging anti-semitism against its targets: … [The claimant then alleges that (a) in 2009 Mr Falter made a false accusation against Mr Rowan Luxton, a senior civil servant and Head of the Foreign Office's South Asia desk; (b) in 2017 the defendant deliberately misrepresented tweets of the newly-elected Palestinian Vice President of the University of Exeter's Students' Guild, Ms Malaka Shwaikh; (c) Mr Falter falsely alleged anti-semitism against Dr Gould in an attempt to force the University of Bristol to dismiss her; (d) in 2017 the defendant made false accusations against Jackie Walker].

33. The claimant maintains that this allegation of malice is properly pleaded and should not be struck out. Mr Mitchell submitted that the claimant has identified Mr Falter as a person responsible for the words complained of and who had the state of mind required to constitute malice at law; the pleading in malice is clear and precise; the pleading of dishonesty accords with *Three Rivers District Council v Governor and Company of the Bank of England (No. 3)* [2003] 2 AC 1, HL at [191], per Lord Hobhouse; and the plea is consistent with malice rather than its absence (see *Yeo* at [35]).

34. The defendant disagrees and maintains that the pleading of malice in paragraph 22 of the amended reply is defective on its face and can be struck out under CPR Part 3.4(2). Mr Speker submits that:

    a. Each particular must be more probative of the existence of malice on the part of Mr Falter than its non-existence. There is nothing pleaded which is directed at why it is said that Mr Falter does not hold the belief that the claimant was an antisemite. Since that is so, there is no proper plea of malice. Whatever motive is levelled against Mr Falter, the case law is clear in that he must be shown to be dishonest and the particulars must be more probative of the existence of dishonesty than its non-existence.

    b. Paragraphs 22(1) to (4) are mere assertion and provide no support for the plea that Mr Falter did not hold the opinion expressed, namely that the claimant was an antisemite.

    c. Paragraph 22(1), namely acting in retaliation or out of spite, does not show that that Mr Falter did not hold the opinion expressed and will not defeat the defence under section 3(5) of the 2013 Act (which is consistent with where the common law had reached in *Cheng*).

    d. As for paragraph 22(2), dragging in irrelevant material, even if true, again, does not go to whether the opinion expressed was held.

    e. As for paragraph 22(3), failing to mention other matters, even if true, does not go to whether the opinion expressed was held.

f. An allegedly inconsistent approach, as pleaded in paragraphs 22(5) and (6), even if true, does not go to demonstrating that Mr Falter did not hold the opinion expressed.

35. I agree with Mr Speker's submissions. The allegation that the defendant may have been motivated by ill-will or spite, as alleged at paragraph 22(1), is irrelevant: see section 3(5) of the 2013 Act. The particulars at 22(2) to 22(6) do not support a plea that Mr Falter, as the defendant's chief executive, did not hold the opinion that the claimant was antisemitic. I agree that these particulars are mere assertion, and do not support a case that Mr Falter did not believe what he said. Indeed, at paragraph 22(6) the allegations do not relate to anything said by the defendant or Mr Falter directed at the claimant. These allegations relate to other people and are irrelevant. This is because the particulars have to be more consistent with the presence of malice on the part of Mr Falter in relation to what he said about the claimant, rather than with its absence. The claimant cannot make out that case by reference to what it is alleged Mr Falter has said about other people. I agree with the defendant that this plea of malice is insufficient and should be struck out.

36. Further, I have reached this decision by reference to the contents of the statements of case, rather than based on any part of Mr Falter's evidence.

(2) The opinion that the claimant had lied when he claimed in The Guardian newspaper that the International Definition of Anti-Semitism prevents criticism of Israel

37. The IDA (or International Holocaust Remembrance Alliance) defines antisemitism as:

> "a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations or antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities."

38. The definition continues by explaining that:

> "To guide IHRA in its work, the following examples may serve as illustrations: Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic …"

39. The claimant does not dispute that he was well aware of the IDA definition, its contents and terms before 16 December 2016 (see paragraph 11.2 of the amended defence; paragraph 23 of the amended reply). The claimant was therefore well aware that "criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic".

40. However, in the letter to *The Guardian*, which was published on 16 December 2016, the claimant wrote (in a letter signed by the claimant and over 60 others) that the IDA definition: "has nothing to do with opposing antisemitism, it is merely designed to silence public debate on Israel's crimes against the Palestinians …".

41. Given the claimant accepts he was well aware of the IDA definition, its contents and terms before 16 December 2016, in my view an honest person clearly could express the opinion on 26 February 2017, the date the First Article was published, that the claimant had lied when he claimed in *The Guardian* newspaper that the IDA definition prevents criticism of Israel. The claimant has no real prospect of succeeding on this issue and the defendant can demonstrate that the third condition under section 3(4)(a) will be met.

42. The claimant has not alleged malice in relation to this publication. Rather, he has relied on the allegations of malice at paragraphs 22 and 26 of the amended reply. The allegation at paragraph 22 is directed at the opinion the claimant was antisemitic, and is inadequate for the reasons set out above. Paragraph 26 relates to the allegation of fact that the claimant had committed several offences and has nothing do with this publication and is, in any event, inadequate for the reasons set out below. The allegations pleaded in the amended reply do not support a case in malice, namely that Mr Falter did not believe that the claimant lied when he claimed in *The Guardian* newspaper that the IDA definition prevents criticism of Israel.

(3) The opinion that the claimant had lied to the Charity Commission when he claimed that the CAA was a right-wing political Zionist organisation that is not concerned with fascist groups who were antisemitic Holocaust deniers

43. The defendant's case on section 3(4)(a) is set out at paragraphs 12 to 13.3 of the amended defence. In particular, paragraph 13 alleges:

> "13. The third condition, under section 3(4) … is met by any or some of all of the following facts and matters which existed at the time the statement complained of was published, which remains online, and from which an honest person could have held the opinion that the claimant had lied to the Charity Commission when he claimed that the CAA was a right-wing political Zionist organisation that is not concerned with fascists who were anti-semitic Holocaust deniers.
>
> 13.1 Paragraphs 9.1 to 9.17.4 above are repeated and 15.1 and 15.2 below are repeated.
>
> 13.2 On a date unknown, the claimant told the Charity Commission that the CAA was not concerned with fascist groups who were Holocaust deniers.
>
> 13.3 The claimant is very interested in the defendant and what it says in its website. He would have read on the website that the defendant challenges neo-Nazis and right-wing extremists as part of its work. At the time the claimant first complained to the Charity Commission about the CAA, the defendant had recently launched a private prosecution against far-right Holocaust denier, Alison Chabloz; had informed the Crown Prosecution Service ("CPS") that it was intending to privately prosecute neo-Nazi leader Jack Renshaw unless

> it acted; and had successfully taken the CPS to judicial review for its failure to prosecute neo-Nazi leader, Jeremy Bedford-Turner. Amongst the articles published on the CAA website, which the claimant would have seen, the following about Neo-Nazis have been published: [the titles of nine such articles are then listed]."

44. The claimant does not dispute any of the particulars alleged in paragraph 13 of the amended defence, or that the articles refer to right-wing fascists. Rather the claimant denies "that the third condition of the defence (section 3(4) [of the 2013 Act]) is met by any, some or all of the particulars set out at paragraph 13 of the amended defence" and he alleges that an honest person's opinion would be informed by a number of other matters he has set out at paragraph 25.2 of the amended reply. However, these other matters are nothing to the point given the nature of the test under section 3(4)(a).

45. Given there is no dispute that the claimant accepts he is very interested in the defendant and what it says in its website, that he would have read on the website that the defendant challenges neo-Nazis and right-wing extremists as part of its work, and that articles on the defendant's website refer to right-wing fascists, in my judgment it is obvious that on 26 February 2017, the date the First Article was published, an honest person could express the opinion that the claimant had lied when told the Charity Commission that the CAA was not concerned with fascist groups who were Holocaust deniers. The claimant has no real prospect of succeeding on this issue and the defendant can demonstrate that the third condition under section 3(4)(a) will be met.

46. The claimant has not alleged malice in relation to this publication. Rather, he has relied on the allegation of malice at paragraph 26 of the amended reply. Paragraph 26 relates to the allegation of fact that the claimant had committed several offences and has nothing do with this publication and is, in any event, inadequate for the reasons set out below. The allegations pleaded in the amended reply do not support a case in malice, namely that Mr Falter did not believe that the claimant lied to the Charity Commission about the CAA.

(4) The allegation of fact that the claimant had committed several criminal offences including offences of dishonesty, vandalism and drug possession

47. The fourth meaning found by Nicklin J is a factual meaning, which has been admitted to be true (paragraph 15 of the amended defence; paragraph 26 of the amended reply).

48. To succeed on this meaning the claimant must prove malice: section 8(5) of the Rehabilitation of Offenders Act 1974 ("**the 1974 Act**"). This is accepted by the claimant: paragraph 26 of the amended reply. The defendant's application is that the malice plea at paragraph 26 of the amended reply should be struck out as the "particulars" do not found a case in law, and have no reasonable prospect of succeeding (paragraphs 3(3) and 10(6) of the application notice).

49. In this context malice has a different meaning to the test under section 3(5) of the 2013 Act. A claimant must demonstrate that, in relation to section 8(5) of the 1974 Act, the conviction is published with some irrelevant, spiteful or improper motive: see *Herbage v Pressdram* [1984] 1 WLR 1160, CA at 1164 *per* Griffiths LJ. Further, in *KJO v XIM* [2011] EWHC 1768 (QB), Eady J explained:

> "In the relatively few cases in which it is possible to set up a case of malice, the argument will generally be based on the proposition that the individual defendant must have known that the defamatory words complained of were false, or at least have been reckless in that regard. That could hardly be put forward on the present facts, since the basic fact of the conviction is acknowledged to be accurate. Any plea of malice, therefore, would have to be advanced on the alternative ground, canvassed by Lord Diplock in *Horrocks v Lowe* [1975] AC 135, that the defendant, while knowing the words to be true, published them with the dominant motive of injuring the claimant's reputation. That is almost untrodden territory in the (more usual) context of qualified privilege, but it is possible that on the present facts the claimant might succeed in establishing that motive …." (underlining added)

50. The allegation of malice at paragraph 26 is in the following terms:

> "26. … the defendant was actuated by an irrelevant, spiteful or improper malice which was the dominant purpose for the publication. Whilst the defamatory article is unattributed and the defendant has not disclosed the author(s), if required to specify a person for the purposes of section 8(5), Rehabilitation Offenders Act 1974, the claimant identifies the defendant's chief executive, Mr Falter;
>
> PARTICULARS
>
> (1) The defendant's motive was to smear the claimant as a criminal.
>
> (2) The claimant's convictions were for summary-only offences. They were over thirty-years-old. The current period of rehabilitation under section 5 of the Rehabilitation of Offenders Act 1974 is 12 months from the date of conviction. For decades the claimant has been a rehabilitated person within the meaning of section 4 of the Act who was to be treated as though he had "not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction".
>
> (3) These historic, spent convictions were part of the claimant's private life.
>
> (4) The defendant did not refer to the fact that these convictions were spent or that the claimant was protected by the provisions of the Rehabilitation of Offenders Act 1974. The defendant can be taken to have known about these provisions and deliberately ignored them. It proclaims its legal activism concerning the criminal law at paragraph 1.13 of the article as well as at paragraph 13.3 of the amended defence.

(5) Moreover, its reference to the claimant's historic and spent convictions at paragraph 1.11 of the article was gratuitous and irrelevant to the subject matter of the article. It was followed by an equally gratuitous and irrelevant smear suggesting he was a misogynist. The defendant's dominant purpose was character assassination.

(6) The defendant has falsely claimed at paragraph 15.3 of its amended defence that the claimant was accusing it of lying and denying that he was an anti-semite. The claimant did neither. The allegations of both lying and anti-semitism were levelled by the defendant against him, without any advance warning, for the first time in its article.

(7) The claimant repeats paragraph 22 above."

51. The claimant submits that his malice plea is properly pleaded and particularised in paragraph 26 of the amended reply.

52. The defendant, on the other hand, maintains that the claimant's plea that the dominant and improper motive of referring to the claimant's convictions was to smear the claimant is hopeless and the particulars in paragraph 26 of the amended reply do not set up a case more probative of the existence of malice than its non-existence.

53. The first point the defendant makes is that the inclusion of the convictions was explained in the First Article itself:

> "[1.11] Mr Greenstein is not above lying. In letters to *The Guardian* he has stated that the International Definition of Antisemitism prevents criticism of Israel, when, in fact, it explicitly states that it does not, confirming that: "criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic." He has claimed that Campaign Against Antisemitism is a lobby group acting on behalf of the Israeli government, a ridiculous allegation that would not stand up to any examination or audit. In this context, then, it is entirely relevant to mention that Mr Greenstein has previous criminal form for brazen deception, having past convictions for credit card theft and subsequent use, vandalism, drug possession and a number of other petty crimes…" (underlining added)

54. I agree with the defendant, this reason provided in the article is clearly plausible: it is more likely the claimant is lying because he has dishonesty convictions. Further, there is no basis for the claimant to doubt this conclusion and no such basis is identified in paragraph 26 of the amended reply.

55. The second point relates to the particulars of malice. Mr Mitchell dealt with malice at paragraphs 56 to 67 of his skeleton argument, and also in his oral submissions. However, he did not address in any detail the specific criticisms of his pleading made by Mr Speker at paragraph 55 of his skeleton argument. Rather, Mr Mitchell submitted this was an obvious attempt to smear the claimant as a criminal and as a character assassination. However, it is necessary to analyse each of the particulars alleged to see whether this is one of those "relatively few cases" where it is possible

for the claimant to set up a case in malice. In my view it is not, and I agree with the submissions made by Mr Speker in relation to paragraph 26 of the amended reply:

a. Paragraph 26(1) is mere assertion.

b. Paragraph 26(2) is assertion, and does not support a plea of malice.

c. Paragraph 26(3) is irrelevant given the 1974 Act allows reference to spent convictions in the context of a defamation claim, subject to proof of malice.

d. Paragraph 26(4) is correct but does not support a plea of malice;

e. Paragraph 26(5) is mere assertion. The explanation for the inclusion of the convictions is provided in the article, namely having accused the claimant of lying it is relevant that he has been convicted of offences of dishonesty. The claimant has not pleaded any facts to support a claim that the dominant improper purpose was something else.

f. Paragraph 26(6) is mere assertion.

g. Paragraph 26(7) imports the malice plea at paragraph 22 of the amended reply. Paragraph 22 is inadequate for the reasons explained above, and do not in any event support a case that these convictions were included maliciously.

56. I therefore agree with the defendant that the malice plea at paragraph 26 of the amended reply should be struck out under CPR Part 3.4(2)(a).

The other claims

Claim under the 1998 Act

57. This claim relates to the reference to the claimant's spent convictions in the First Article and is set out at paragraph 7 of the amended particulars of claim. Mr Mitchell conceded in his skeleton argument that paragraph 7.2 should be struck out. That leaves the following allegations made by the claimant under the 1998 Act:

> "7. Further or alternatively, the publication of the statement at paragraph 3.1.6 above ["Mr Greenstein has previous criminal form for brazen deception, having past convictions for credit card theft and subsequent use, vandalism, drug possession and a number of other petty crimes"] amounts to a breach of section 4(4) of the [1998 Act] for which the defendant is liable to the claimant in damages for distress under section 13 of the Act:
>
> 7.1. The purported information in paragraph 3.16 above ("the claimant's personal data") is sensitive personal data within the definitions at section 2(g) of the Act, of which the claimant is subject.
>
> …

7.3. In processing the claimant's personal data the defendant has failed and continues to fail to comply with principle 1 in part 1 of schedule 1 to the Act in that:

7.3.1. the defendant has not processed the claimant's personal data fairly and lawfully, because the data is irrelevant purported information about minor criminal offences from over 30 years ago, and its publication is unnecessary for any legitimate purpose, defamatory and intrusive; and

7.3.2. none of the conditions in schedule 2 or schedule 3 to the Act is met.

7.4 The processing of the claimant's data by the defendant has caused and continues to cause distress, hurt and intense embarrassment to the claimant."

58. The defendant accepts that it is a data controller processing personal information in relation to the claimant on its website.

59. The defendant's application that this claim should be struck out is made on the basis that what remains of the claimant's case should be struck out "because to allow it to continue would be an abuse of the process of the court" (paragraph 3(4) of the defendant's application notice; paragraph 25 of the amended defence). The application is therefore based on the *Jameel* jurisdiction. The reference in the application notice at paragraph 3(4) to CPR Part 3.4(2)(c) is, it appears, a typographical error as it is CPR 3.4(2)(b) which refers to the court's jurisdiction to strike out a statement of case if it appears "the statement of case is an abuse of the court process or is otherwise likely to obstruct the just disposal of proceedings". The defendant also relies on the evidence in paragraph 42 of Mr Falter's witness statement in which he says "there is a good reason to believe that Mr Greenstein is not even bringing this claim to vindicate his own reputation but rather it is part of his fight to discredit the [IDA] definition and CAA" and he then produces and refers to a document written by the claimant entitled "Why I am Suing the *Campaign Against Anti-Semitism* for Libel and Why I Am Asking for Your Help".

60. The claimant takes a point on the defendant's application notice and submits that the defendant has failed to apply for summary judgment or strike out the claimant's case under the 1998 Act (eg. as disclosing no reasonable grounds for bringing the claim under CPR Part 3.4(a)). The claimant also maintains that he is entitled to recover damages for the reputational harm and damage he has suffered (see *Aven v Orbis Business Intelligence Ltd* [2020] EWHC 1812 (QB), Warby J at [197]), the claim under the 1998 Act is not an abuse of process, and should be allowed to proceed to trial. Further, the claimant disputes Mr Falter's evidence in relation to abuse of process and the purpose of the proceedings (see, for example, paragraphs 135 and 136 of his witness statement).

61. The starting point, in respect of information disclosed in legal proceedings held in public, is that a person will not enjoy a reasonable expectation of privacy (see *NT1 v Google llc (Information Commissioner intervening)* [2018] 3 WLR 1165, Warby J

("***NT1 v Google***") at [166(2) to (3)]). Therefore, if a person wishes to allege a right to privacy in respect of such information, it is necessary to particularise the basis on which, as a result of the balancing exercise identified in *NT1 v Google*, that information has become private. In this case, the claimant has identified the age of the convictions, but no other particulars are provided.

62. However, the defendant has not sought to strike out this claim on the basis that it discloses no reasonable basis for bring the claim under the 1998 Act or for summary judgment on the basis that the claimant has no real prospect of succeeding on this claim. Indeed, were this not the case, the defendant would not have needed to have recourse to the *Jameel* jurisdiction to strike out the claim (see *Alsaifi v Trinity Mirror Plc*, [2018] EWHC 1954 (QB), Nicklin J ("***Alsaifi***") at [46]).

63. In *Alsaifi* Nicklin J explained that "at heart of any assessment of whether a claim is *Jameel* abusive is an assessment of two things: (1) what is the value of what is legitimately sought to be obtained by the proceedings; and (2) what is the likely cost of achieving it?" (see [44]). Further, more recently the same judge in *Tinkler v Ferguson* [2020] 4 WLR 89 explained:

> "47. Nevertheless, the *Jameel* jurisdiction to strike out claims as abusive ought to be reserved for exceptional cases: *Stelios Haji-Ioannou v Dixon* [2009] EWHC 178 (QB) [30], per Sharp J. Courts should not be too ready to conclude that continued litigation of the claim would be disproportionate to what could be legitimately achieved. The conclusion must be that it is impossible "to fashion any procedure by which that claim can be adjudicated in a proportionate way": *Ames v Spamhaus Project Ltd* [2015] 1 WLR 3409 [33]-[36] per Warby J, citing *Sullivan v Bristol Film Studios* [29]-[32] per Lewison LJ."

64. I see the force in Mr Speker's submissions that, if I am against the claimant on the fourth alleged libel (which I am), then the value of what is legitimately sought to be obtained from the pursuit of this claim may be very little, if any (ie because there is no actual or prospective harm to the claimant). However, I do not have any information or evidence in relation to the cost of pursuing this claim and, without any such evidence, I am not in a position to reach any view that the continued litigation of this claim is disproportionate or that this is an exceptional case in which the *Jameel* jurisdiction should be exercised. Therefore, save for paragraph 7.2 of the amended particulars of claim, I refuse the defendant's application to strike out this claim.

Claim in misuse of private information

65. In paragraphs 8 and 9 of the amended particulars of claim the claimant alleges:

> "8. Further the claimant's personal data is private information, information which falls within the scope of the claimant's private life under Article 8 of the European Convention on Human Rights, and/or information in which the claimant has a reasonable expectation of privacy. The publication of the claimant's private information by the defendant in the

> circumstances set out above is an actionable misuse of the claimant's private information for which the defendant has no justification.
>
> 9. As a result of the defendant's misuse of the claimant's private information, the claimant has suffered and continues to suffer distress, hurt and intense embarrassment."

66. As with the claim under the 1998 Act, the defendant's response is that this claim: (i) does not add materially to the claim in libel and that it serves "no purpose and is liable to be struck out" (see paragraph 81 of the amended defence); (ii) it is not properly particularised; and (iii) should be struck out as an abuse of process under the *Jameel* jurisdiction.

67. The claimant takes essentially the same points set out at paragraph 60 above in relation to the way the defendant has framed its strike out application in respect of this claim. It seems to me that this claim goes hand in hand with the claim under the 1998 Act and, as with that claim, I am not in a position to reach any view on the information before me that the continued litigation of the claim for misuse of private information is disproportionate or that this is an exceptional case in which the *Jameel* jurisdiction should be exercised. I therefore refuse the defendant's application to strike out this claim.

Conclusion

68. The result therefore is that the defendant is entitled to summary judgment under CPR Part 24.2 on the honest opinion defences; the malice pleas (at paragraphs 22, 23,25 and 26 of the amended reply) shall be struck out under CPR Part 3.4(2)(a); paragraph 7.2 of the particulars of claim shall be struck out (as a result of the claimant's concession); and the defendant's applications to strike out the claims under the 1998 Act and for misuse of private information are dismissed.

69. The disposal of the defamation claim substantially reduces the size of this litigation. Decisions about the future case management of this claim will include devising a procedure by which the remaining parts of the claim can be adjudicated in a proportionate way. That will include consideration whether the claim should remain in the High Court or be transferred to the County Court and I will invite the parties' submissions on this issue.