Neutral Citation Number: [2024] EWHC 39 (Comm)

Claim No: CC-2023-MAN-000069

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

CIRCUIT COMMERCIAL COURT (KBD)

Before His Honour Judge Pearce sitting as a Judge of the High Court

BETWEEN:

GOVDATA LIMITED

Claimant

-and-

INDEED UK OPERATIONS LIMITED

Defendant

- -

- -

Mr IAN SKEATE instructed by way of direct access for the **Claimant**

MS CLAIRE OVERMAN instructed by **Lewis Silkin LLP** for the **Defendant**

Hearing date: 1 November 2023

Judgment handed down: 12 January 2024

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JUDGMENT

INTRODUCTION

1. The Claimant is a company that (according to its website) is a market leader in Public Sector business and provides specialist advice to assist companies that are looking to gain access to government business.

2. The Defendant operates an employment website, that lists jobs and also provides a facility for the anonymous posting of information about employers. From the material in the hearing bundle, it would appear that those posts are typically from ex-employees speaking of their experience of working for the particular company - certainly the four reviews identified by the Claimant in this case are said to come from its former employees.

3. The Claimant contends that certain anonymous reviewers have posted reviews that are critical of the Claimant and its management on the Defendant's website. It alleges that those reviewers are (or at least may be) guilty of wrongdoing vis-a-vis the Claimant (or certain employees of the Claimant). It brings this claim in an attempt to identify putative wrongdoers on the basis that it has no other way of identifying them. The order sought is broadly speaking of a kind that has been developed by the court in a line of cases, generally known as Norwich Pharmacal orders.

4. In accordance with other courts that have dealt with applications similar to this, I shall call the anonymous reviewers the "targets." This is in the sense that their identity is the target of this application.

5. At the beginning of this hearing, I ruled that, notwithstanding the parties' names had been anonymised in the court list, there was no good basis for anonymising them in the judgment. I gave my reasons for that ruling at the time. Accordingly, the parties may be identified by name.

THE CLAIM AS PLEADED

6. This claim is brought pursuant to CPR Part 8. The Claim Form, issued on 8 September 2023, pleads the Claimant's case as follows:

"*The Defendant, via its operation on the website www.indeed.com has facilitated the wrongdoing of others in that forum on dates between 01/01/2018 to 28/02/2023. The wrongdoing comprised of statements about the Claimant published on the website by*

the forum users whose identities are currently unknown to the Claimant. The statements contain seriously defamatory allegations about the Claimant.

The Claimant is entitled to seek redress in relation to the statements which contain seriously defamatory allegations.

The Claimant wishes to inspect the information requested so as to be able to take legal action or seek other redress.

The Defendant is able to provide the information from which the individuals identities can be ascertained.

The Claimant is not able to identify the persons responsible for the postings unless the Defendant provides the requested information ."

7. The order sought by the Claimant is put in these terms in its Draft Order:

"*The Respondent must by 4.00pm on 18th August 2023 carry out a reasonable search to locate the information sought below and make and serve on the Applicant a witness statement stating whether that Information is now in its control, and to the extent that such information was once but is no longer in its control and what has happened to that information.*

1.1 We require all personal identifiers of the publishers of the posts on Indeed of the reviews detailed at pages 2 to 5 of the bundle containing the comments we wish to take further legal action on. These include but are not exclusive to the registrants name, age, location, IP address, telephone and mobile numbers and email addresses. We additionally require information on whether they have logged into or created an identity via a 3rd party identity verification such as Facebook or google in order to create an account. (the Information).

2 The Applicant has permission to use the information provided pursuant to this Order for the purposes of bringing proceedings for Defamation, libel and any other such actions we are so advised to pursue in respect of untrue and malicious information posted against the company and its employees/shareholders/directors."

8. The Claimant relies in support of the application on statements from its Chief Executive Officer, Mr Christian Victor Hugo, dated 21 March 2023 and 26 October 2023 and from its Chief Operating Officer, Ms Kelly Ann Hugo, dated 5 May 2023 and 26 October 2023. The Defendant relies on statements from Mr Thomas Dowling of Indeed Ireland

Operations Ltd dated 25 October 2023 and Ms Anne Mannion of its solicitors of the same date.

AMENDMENT

9. By Application Notice dated 23 October 2023, the Claimant applied to add Mr Christian Victor Hugo and Ms Kelly Ann Hugo as Claimants. Mr Hugo is identified in some of the reviews by job title, though Ms Hugo is not. Nevertheless it might be arguable that they are people to whom the reviews are referring and therefore might be relevant Claimants.

10. If, as the Claimant contends, this claim is good without the addition of Mr Hugo and Ms Hugo, their addition as Claimants would not be necessary because GovData itself would be able to achieve the remedy it seeks. If, as the Defendant contends, the claim is doomed to failure for reasons unrelated to the fact that Mr and Ms Hugo are not parties, their addition to the claim would add nothing.

11. It is only if the underlying claim is otherwise good but fails for want of joinder of one or both of Mr and Ms Hugo that their addition to the claim would be necessary to achieve the Claimant's purposes. Accordingly, I propose to consider the claim to determine whether this is so before determining the amendment application.

12. There is a second manner in which the Claimant seeks to change the way it puts this application, albeit that in this respect there is no formal application before the court. The Claim Form does not identify which reviews the Claimant says should be the subject of the order sought. The Draft Order provided on the application seeks the disclosure of "*all personal identifiers of the publishers of the posts on Indeed of the reviews detailed at pages 2 to 5 of the bundle containing the comments we wish to take further legal action on*." This is a reference to the four reviews which appear at pages 17 to 21 of the Hearing Bundle (Reviews 1, 2, 3 and 4 respectively). Those Reviews are dealt with individually below.

13. However, in his oral submissions, Mr Skeate for the Claimant invited the court to make a broader order, identifying other anonymous reviewers who had used the Defendant's website. The existence of other reviews that have been removed from the website is referred to in paragraph 9 of Mr Hugo's witness statement of 21 March 2023, and indeed in that statement he refers to obtaining relief in respect of other reviews.

14. I deal further below with the lack of detail of other reviews in respect of which the Claimant seeks an order. There is of course nothing to prevent a party seeking an order on different terms than the draft that it produces in its application, but the failure to produce a draft order encompassing the other reviews creates considerable difficulty in making such an order. There can be no doubt that a Norwich Pharmacal Order in respect of anonymous reviews which could no longer be shown to the court would require careful drafting to ensure that the Defendant was clear as to what it was obliged to disclose.

THE LAW – NORWICH PHARMACAL ORDERS

15. The requirements for Norwich Pharmacal orders are not in issue. They are summarised in Mitsui & Co Ltd v Nexen Petroleum Ltd [2005] EWHC 625 (Ch) at [21]:

> *"(i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;*
>
> *(ii) there must be a need for an order to enable action to be brought against the ultimate wrongdoer;*
>
> *(iii) the person against whom the order is sought must be (a) mixed up in so as to have facilitated the wording; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued*."

16. If these requirements are met, the Court has a discretion whether to make the order sought. The court should only make an order if it is necessary and proportionate in all the circumstances (see Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29). In Rugby Football Union v Viagogo Ltd [2012] UKSC 55, the Supreme Court identified ten non-exhaustive factors to which the court should have regard in determining the grant of relief:

    a. the strength of the possible cause of action contemplated by the applicant for the order;
    b. the strong public interest in allowing an applicant to vindicate their legal rights;
    c. whether the making of the order will deter similar wrongdoing in the future;
    d. whether the information could be obtained from another source;
    e. whether the respondent to the application knew or ought to have known that they were facilitating arguable wrongdoing;

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

g. the degree of confidentiality of the information sought;

h. the privacy rights under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of the individuals whose identity is to be disclosed;

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

j. the public interest in maintaining the confidentiality of journalistic sources.

17. The decision in Viagogo involved consideration of the privacy of potential wrongdoers who were allegedly selling rugby tickets at more than their face value. Whilst it clearly involved issues of privacy, it did not, unlike the instant case, involve any issue of freedom of expression.

18. The particular factors in play in cases that do involve arguments about freedom of expression were considered by Nicklin J in Davidoff v Google [2023] EWHC 1958. Like this case, the claimants in Davidoff were seeking to identify targets who had posted anonymous reviews (in that case, reviews of a firm of estate agents). Again as in this case, the claimants stated an intention to commence proceedings in defamation and/or malicious falsehood (though as we shall note later, certain other causes of action may be in play here). Having noted that the order sought raised issues under both Article 8 (respect for private and family life) and Article 10 (freedom of expression) of the European Convention on Human Rights, Nicklin J stated at [30]:

"*Article 10 protects both speech by an identified individual and anonymous speech. Whilst anonymity on the Internet can be used as a cloak behind which to harm others by unlawful acts, not all anonymous speech is of this character. Such speech, particularly in a political context, as a dimension of freedom of expression, can have a real value and importance. It also has a long pedigree both in the United Kingdom and the United States... "*

Nicklin J went on to state:

"[31] As a starting point …, where a Norwich Pharmacal order is sought to unmask an anonymous online poster, the terms of that order are likely to interfere with the privacy interests of the target. Depending on the nature of the speech, for example if anonymity is (or maybe) being used to avoid recrimination/retribution/punishment (e.g. a whistle-blower), it may also interfere with the Article 10 rights of the target (and the respondent), see e.g. Standard Verlagsgesellschaft mbH."

In applying the Viagogo factors, the court was required to focus on whether there was sufficient justification for interference with Article 8 and/or 10 rights. He said at [33]:

"An intense focus on the comparative importance of the specific rights being claimed requires an applicant for a Norwich Pharmacal order to demonstrate more than simply an arguable case that s/he has been the subject of a civil wrong. S/he must show that a claim that has sufficient weight or substance to outweigh the countervailing rights of the target. Viagogo factor (1) requires, an assessment of the strength of the underlying claim relied upon, which is consistent with the obligation to examine the claim articulated in Standard Verlagsgesellschaft mbH. For practical purposes, this means that an applicant applying for Norwich Pharmacal relief must demonstrate, in the evidence in support of application, that s/he has, at least, a claim with a real prospect of success."

Nicklin J warned at [41]:

"*In most cases, proper respect for (and protection of) any engaged Article 10/8 rights is likely to be achieved by the Court making a careful assessment of whether there has been an arguable wrong and the strength of the identified cause(s) of action, and whether the public interest in allowing an applicant to vindicate his legal rights is outweighed by any countervailing interests of the target. Norwich Pharmacal orders will not be granted, speculatively to strip away online anonymity, unless the Court is satisfied that justice requires it. The danger of too lax an approach is obvious. The subject of an unfavourable publication may have many reasons for wanting to identify his/her online critic, not all of which would provide a justification for a Norwich Pharmacal order. The jurisdiction is not to be used to satisfy curiosity or to enable any form of revenge or retribution. It exists to do justice by enabling someone who can demonstrate that s/he has been the victim of an arguable wrong, for which s/he wishes to seek legitimate redress, to obtain an order from the Court that will assist him/her to do so by assisting in the identification of the wrongdoer***."**

19. In determining whether any particular cause of action against a target has a real prospect of success for the purpose of making an order of the kind sought here against a third party, the Claimant invites me to apply the same test as that applied on applications for summary judgment, which is usually identified by reference to Swain v Hillman [2001] 1 All ER 91 (though the court should also bear in mind the factors referred to by Lewison J in Easyair v Opal Telecom [2009] EWHC 339 and the other cases usefully summarised at [24.3.2] and [24.3.3] of the White Book). I accept that this is the test that Nicklin J set in Davidoff for a claimant to obtain relief in this kind of case. However, he was clearly not saying that it was sufficient in order for relief to be granted that the claimant show an arguable case, since his warning in paragraph 41 of his judgment would be redundant were that so. Rather, he was identifying the Swain v Hillman test as a threshold criterion. Even if the Claimant shows an arguable case, it is necessary that the court also conduct the assessment referred to at [41] of Davidoff before granting relief.

THE PROSPECTIVE CAUSES OF ACTION AGAINST THE TARGETS

20. The Claim Form identified defamation as the prospective cause of action against the targets. Mr Hugo's statement might be taken to suggest that malicious falsehood is in the contemplation of the Claimant as a potential claim and reference is made to harassment. Mr Skeate's skeleton argument mentions, in addition to defamation and malicious falsehood, the possibility of claims in harassment, assault, breach of employment contract, breach of privacy and what are described as "*the economic torts*." In addition, in correspondence the Claimant has referred to the possibility of claims based on misfeasance in public office and "*computer misuse."*

21. It is relevant to consider the elements of these causes of action in turn in order to consider whether the Claimant shows that it has a real prospect of success.

22. In respect of a claim in defamation, I rely on the summary of law in Davidoff at [47] to [54].The significant parts of that judgment may be summarised, as far as relevant to the instant claim, as follows:

    a. Such a claim would require evidence that:

        i. a statement had been made that refers to the Claimant;

        ii. the statement was published by the target;

iii. the statement was defamatory of the Claimant;

b. The test of whether a statement is defamatory was set out by Warby LJ in Millett v Corbyn [2021] EMLR 19 at [9]:

"*At common law, a meaning is defamatory and therefore actionable if it satisfies two requirements. The first, known as 'the consensus requirement,' is that the meaning must be one that 'tends to lower the claimant in the estimation of right-thinking people generally 'The Judge has to determine 'whether the behaviour or views that the offending statement attributes to a claimant are contrary to common, shared values of our society': Monroe v Hopkins [2017] 4 WLR 68 [51]. The second requirement is known as the 'threshold of seriousness.' To be defamatory, the imputation must be one that would tend to have a 'substantially adverse effect' on the way that people would treat the claimant: Thornton v Telegraph Media Group Ltd [2011] 1 WLR 1985 [98]...*"

c. At common law, once these matters are established, falsity, malice and damage are presumed in favour of the Claimant. This would equally apply to their claims, were Mr and/or Ms Hugo to be added as claimants.

d. However, by reason of section 1 of the Defamation Act 2013 where (as here) the Claimant trades for profit, it must also show that *"the publication has caused or is likely to cause serious harm to the reputation of the claimant."* The "*serious harm*" requirement is not met unless the harm to the claimant's reputation *"has caused or is likely to cause the body serious financial loss."* This requirement would not apply to Mr and Mrs Hugo, were they to be joined as claimants in the action.

23. Again, in respect of the tort of malicious falsehood, I refer to the judgment of Nicklin J in Davidoff, this time at [55] to [62] summarising the relevant principles as being:

a. The Claimant must show that:

i. a statement has been made that refers to the Claimant, its property or business;

ii. the statement was false;

iii. the statement was published by a target;

iv. the statement was published maliciously.

b. The Claimant must also show that it has suffered special damage, unless *"the words upon which the action is founded are calculated to cause pecuniary damag*e" to the claimant (section 3(1) of the Defamation Act 1952). As the Court of Appeal makes clear in George v Cannell [2022] EWCA Civ 1067, this requirement will be met if the statement of which complaint is made is *"of such a nature that, viewed objectively in context at the time of publication, financial loss is an inherently probable consequence or, putting it another way, financial loss is something that would probably follow naturally in the ordinary course of events."*

24. The time limit for bringing a claim in defamation or malicious falsehood is, by virtue of Section 4A of the Limitation Act 1980, one year from the date of publication. It will be noted that two of the four reviews identified by the Claimant as allegedly defamatory were published more than one year before the issue of the instant proceedings; a claim against the target in respect of any of them would by now be time barred by the operation of Section 4A. Section 32A of the Limitation Act 1980 allows the court to disapply Section 4A. Sharp LJ said of this power in Bewry v Reed Elsevier UK Ltd [2014] EWCA Civ 1411:

"The discretion to disapply is a wide one, and is largely unfettered: see Steedman v BBC [2001] EWCA Civ 1534; [2002] EMLR 17 at 15. However it is clear that special considerations apply to libel actions which are relevant to the exercise of this discretion. In particular, the purpose of a libel action is vindication of a claimant's reputation. A claimant who wishes to achieve this end by swift remedial action will want his action to be heard as soon as possible. Such claims ought therefore to be pursued with vigour, especially in view of the ephemeral nature of most media publications. These considerations have led to the uniquely short limitation period of one year which applies to such claims and explain why the disapplication of the limitation period in libel actions is often described as exceptional."

25. In respect of the tort of harassment:

a. This arises under section 1 of the Protection from Harassment Act 1997 ("the 1997 Act") where:

i. a person (that is to say an individual – see section 7(5) of the 1997 Act) pursues a course of conduct which amounts to harassment; and

ii. that person knows or ought to know that the course of conduct amount to harassment of the other.

b. "Harassment" for this purpose includes alarming a person or causing them distress – see Section 7(3) of the 1997 Act.

26. A claim in assault might be made out if the Claimant showed that a target had used or threatened unlawful violence towards the Claimant.

27. Claims in breach of contract require of course evidence of the target having breached an identified contractual term. It is suggested in oral submissions that the targets might be in breach of terms as to confidentiality in their employment contracts. However, neither the contractual terms nor the alleged manner of breach is set out.

28. As regards a breach of privacy claim, the suggestion that domestic tort law protects privacy in general terms is open to debate. This judgment is certainly not the place to have such a debate. I accept that English law provides some protection against the unwarranted publication of private information.

29. The Claimant has referred to a claim based on "the economic torts." The possible significance of such torts has been suggested in no more than this generic way in the Claimant's skeleton argument. In his oral submissions, Mr Skeate accepted that it was not possible on the material before the court to suggest that any conspiracy could be alleged, but he argued that the reviews might amount to an unlawful means tort. This tort, carefully analysed in OBG v Allen [2007] UKHL 21, was described by Lord Hoffman at [51] of his judgment as consisting of *"acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant."* As the House of Lords had held in OBG v Allen and the Supreme Court confirmed in Secretary of State for Health v Servier Laboratories [2021] UKSC 24, it is central to this tort that the unlawful means have affected the third party's freedom to deal with the claimant.

30. Misfeasance in public office has been said by the Law Commission (see their publication, "Misconduct in Public Office" 2020) to involve showing that a public officer acting as such has, without reasonable excuse of justification, wilfully neglected to perform their duty or wilfully misconducted themselves to such a degree as to an amount to an abuse of the public's trust in the office holder.

31. As to the vague assertion of a claim for "computer misuse," there are various respects in which the use of computers for malign purposes or in unauthorised circumstances may amount to a tort. The Claimant has not identified any especially relevant circumstances so I cannot further identify what cause of action is here being referred to. The Defendant says in its skeleton argument that the Claimant may be suggesting that there is some criminal breach of the Computer Misuse Act 1990.

THE REVIEWS

32. As I have noted, the Claimant has, in its draft order, identified four reviews that are specifically targeted:

Review (1) of 31.5.18:

> *"**Intense and stressful***
>
> *I have been working here just a short while as an administrator. The pressure is quite intense and I've not felt adequately supported. After persevering a few weeks I handed in my notice to a bemused manager. Not everything is as it appears until you begin working in such a place.*
>
> ***Pros***
> *Salary is ok for the location*
> ***Cons***
> *Very very stressful and lack of support"*

In reply to that review, the following was posted on 6 June 2018:

> *"**Official response from GovData***
> *This is not a truthful comment as you only worked here for 4 weeks and had in that time scale had lied about your skill set and also used personal data for your own benefit therefore I was not bemused when you handed in your notice the day after you had your warning about using personal data and also that you were not trustworthy to continue to be working within a HR/Recruitment area.*
> *As for the fact you say you were not support you claimed that you were management level therefore had wages to that standard and this was clearly not true. The only thing that bemused anyone within the whole office was the fact that you were not terminated straight away for gross*

misconduct after abusing other staff members details for your own gains. As was clearly stated in the written notice you were given.

I do hope the next place you become employed is not fooled by your lies and ensures that you can actually do the work you say you can and that no personal data is available to you."

Review (2) of 14.8.21:

*"**Extremely toxic environment***

Bad management that borders on being abusive to it's employees and a toxic workplace culture that encourages a frightening level of contempt between staff. All of which encouraged by the CEO. Avoid this company at all costs.

Pros

Free parking

Cons

Hostile management & CEO, No training"

Review (3) of 29.9.22:

*"**Negative Experience***

"I did not have a good time at GovData. There is a lot of pressure to perform at all times but with very little training or coaching. If the CEO likes you then you'll be fine, but he doesn't seem to like many people. Lots of overtime expected as standard and no time owing can be taken. A culture of fear and paranoia instilled from the top.

Pros

Nice office, could bring my dog to work

Cons

Overtime on most days, CEO's leadership style is undesirable"

Review (4) of 8.1.23

*"**Don't even bother applying.***

The culture at this company is shocking. I come to the conclusion that the only reason this company still has employees is because they've been made to feel so worthless that they think they can't do any better.

Management your typical incompetent bosses that got where they are by default in the 90s. Nothing spectacular but working here isn't worth dealing with that until you find something else.

Pros

Easy to get to, Parking

Cons

Poor Management, High Staff Turnover"

33. As to other reviews of which the Claimants complain, there is next to no detail within the evidence as to the content of the reviews. The high water mark of the particularisation of these reviews is paragraphs 7, 8 and 10 of Mr Hugo's first witness statement:

"[7] This matter arises due to the publishing on Indeed of frequent, malicious, untrue and damaging and hurtful allegations on the Indeed website by anonymous 'user(s)' who make a range of statements collectively against the company, GovData Ltd, and variously, personalised to myself, other colleagues, managers, shareholders. The current various fake reviews are attached at pages 2 to 5 of the bundle.

[8] These comments began several years ago. Despite frequently complaining to Indeed and seeking removal, which was done on several occasions, the abuse is a campaign of hate and harassment, damaging to the business, and to the reputation and mental health of employees, including those personally targeted. In fact, it has reached a point where even unbeknownst to the directors and other staff, some staff have taken it upon themselves to personally object to the way in which the company is being defamed…

[10] The allegations continue to be made, and some are removed whilst others, entirely at the whim of the publisher, Indeed, remain there to damage our business and persons. The reviews are becoming increasingly fanciful but vicious and abusive in nature as we continue to try and navigate post Covid growth. We need to know who this individual or individuals working in collusion are so that we can bring proceedings against them for personal reputational damage and clear financial damages for the company."

Although the reviews referred to at the end of paragraph 7 of the statement are in fact simply those reviews referred to in paragraph 32 above, it would seem from the reference to reviews that have been removed and to the fact that such reviews are

"*personalised"* to several people other than Mr Hugo himself that he is in fact referring to more than simply the four reviews set out above.

PRELIMINARY ISSUES

34. Some of the Claimant's arguments can be dealt with swiftly and do not merit prolonged consideration, in particular:

    a. The suggestion of collusion between reviewers;

    b. The suggestion that the reviewers are "*entirely fake":*

    c. The attempt by the Claimant to rely on reviews other than the four set out at paragraph 32 above;

    d. The Claimant's reliance on causes of action other than defamation and malicious falsehood.

35. It will be noted from the passage in paragraph 10 of Mr Hugo's first witness statement that he speaks of reviewers "*working in collusion."* There is no direct evidence that reviewers have in some way worked together to criticise the Claimant or to cause it harm. The content of the four identified reviews does not show any clear indication of collusion – whilst all four contain criticism of the management of the Claimant company, the criticism is in different terms. Mr Hugo, as CEO is identified for particular criticism in reviews [2] and [3], but again the criticism is not in the same terms. Moreover each of the reviews contains at least some positive as well as negative comment. Whilst the positive comments would be unlikely to outweigh the negative points in the eye of a reader who was thinking of applying for a job with the Claimant, the overall tone of the reviews simply does not point to collusion.

36. During the course of his oral submissions for the Claimant, Mr Skeate acknowledged that he was not able to show prima facie evidence of some conspiracy between the reviewers to target the Claimant, though he argued that the order sought might lead to the disclosure of information that showed there was collusion between the targets. It is undoubtedly the case that there is insufficient material before the court to show an arguable case of conspiracy between the reviewers whether of the identified reviews or of other reviews.

37. On a separate issue, at paragraph 14 of his witness statement, Mr Hugo speaks of the reviewers in these terms:

"*these people, from the timings, language and even job titles of the individuals are entirely fake and have no correlation to anyone genuinely leaving our firm*."

This is a surprising assertion given that, in respect of review [1], the Claimant appears from the response to have identified the author as a former employee in respect of whose behaviour the Claimant was critical. During the course of his submissions, Mr Skeate dealt with the assertion that this response seemed to show that the Claimant knew who the author was (a matter of some relevance given the second criterion referred to in Mitsui v Nexen). In reply to the argument that there was no "*need*" for an order where the Claimant already knew the identity of the author of the review, he said that the Claimant had no more than a suspicion of the person's identity at this stage and needed the order sought to confirm that suspicion. I will return to that point below, but the ability of the Claimant to make even a guess at the author as a former employee contradicts Mr Hugo's comments that the people are "*entirely fake."* Further, the assertion that the timings and/or language and/or job titles referred to in the reviews show them to be fake is not otherwise explained. If it is said to be true of the four identified reviews, it was open to the Claimant to explain the assertion. Not only has it failed to do so but its identification of the author of the first review directly contradicts the Claimant's argument. If on the other hand it is said to be a reference to other reviews that have been deleted, the Claimant has failed to provide any explanation for what information is said to show that the reviewers were fake. There is no material from which the Claimant can draw the prima facie case that any of the reviews (again whether identified or not) is not in fact a comment from an ex-employee, whatever its motivation or purpose.

38. In so far as the Claimant seeks to rely on reviews other than those particularised in the Claim Form, the claim as formulated cannot succeed. The failure to make even a rudimentary attempt at drafting such an order demonstrates the weakness of the Claimant's position. The problem could be put in two different ways:

    a. In the absence of any attempt to describe the contents of the reviews the court has no basis to conduct the assessment anticipated in Davidoff or even to determine whether the alleged claims against the targets have a real prospect of success. Mr Hugo's description in paragraph 7 of his first statement of *"frequent, malicious, untrue and damaging and hurtful allegations"* is far too vague.

b. How could the court even frame an order when it does not know the basics of what the reviews are alleged to say or to have said? If the Claimant had made some attempt to particularise them, this might be possible, but absent any such attempt, it would seem that the court would have to define the reviews which the Defendant was obliged to respond to as those being any review which is "*critical*" of the Claimant, a definition far too wide to meet the targeted circumstances in which this kind of order might be made. Even that terminology might be said to introduce a level of subjectivity and to be lax which is not consistent with the jurisprudence for the making of this kind of order.

39. The Claimant complains that, if the Court does not make the order sought, it is not in a position to particularise its case. However, the Claimant must have some material from which to have reached the conclusion that an order might be justified. On the Claimant's case, that might be limited to a person's recollection of what was said in a review that has now been deleted, but to begin to meet the threshold requirements for bringing a claim, such a person would have to be able to describe why they considered any particular review to be defamatory, a malicious falsehood or to fall within any of the other potential wrongs identified. If the Claimant does not attempt to do so, it would appear that it is simply targeting any review that is critical. This would clearly not come close to satisfying the Davidoff test.

40. It follows that the Claimant is not entitled to an order based upon reviews which have not been identified and where there has been no attempt to particularise them. Given the complete failure of attempt to give particulars, it is not necessary for the purpose of this judgment to identify what particulars might suffice.

41. Further, if the application were amended to add Mr and/or Ms Hugo as Claimants, the argument would be no stronger. An amendment for this purpose would not be proper.

42. Accordingly, this application can only succeed to the extent that the identified reviews referred to at paragraph 32 above are shown to be the potential subject of a claim against the respective targets.

43. Further, in respect of the identified reviews, there is simply no material to support the following causes of action:

a. Assault: none of the reviews involved the use or threat of violence.

b. Breach of contract: There is no identified term as to obligations of confidentiality. I accept that this may be difficult where the targets are not identified (since the relevant employment contract could not be identified) and that in any event the contractual term as to confidentiality may be an implied term that at least arguably was owed by any employee. However, there is no material from which it can be concluded that any of the reviews involved the use of confidential information and therefore even arguably amounted to a breach of confidentiality

c. Breach of privacy: As I have indicated, there may be circumstances in which misuse of private information is actionable in tort. Here however, no private information is identified and any argument is bound to fail.

d. "The economic torts:" I have noted above that the potential relevance of such tortious liability its said to lie in the possibility that there is an "unlawful means" claim here. The difficulties in this argument are obvious. What are the alleged unlawful means? Is this any more than simply restating the other torts which are the subject matter of the claim, especially defamation and/or malicious falsehood? Mr Skeate was not able to identify any way in which it could be said that the reviews may have harmed the Claimant other than by their direct consequence on its reputation. In those circumstances, the tort here relied on simply adds nothing to the other causes of action. In particular, I can see no basis for moulding that tort to fit factual circumstances which are in fact actionable applying other well-established tortious tests.

e. Misfeasance in public office: I do not see any possible basis for invoking this tort. Apart from anything else, none of the targets are alleged to be public office holders and none appear to have been acting in any public office.

f. "Computer misuse:" The Claimant's complete failure to identify any alleged tort leaves me incapable of judging this argument, though it is far from obvious to me what tort could be relevant. For example, if some offence under the Computer Misuse Act 1990 were alleged, I would need to have explained what the alleged offence is said to comprise and how that offence is actionable at the suit of the Claimant. The case as currently particularised wholly fails to do either.

44. It follows from the above that the remainder of this judgment deals only with:

    a. the four reviews expressly referred to;

    b. the causes of action in defamation and/or malicious falsehood.

THE CLAIMANT'S CASE

45. In dealing with the various reviews, the Claimant's starting position is that the Defendant holds the information that it seeks to assist in identifying the reviewers. This much is not in dispute.

46. Further, the Claimant contends that it has no other means of identifying the authors of the reviews than by the voluntary disclosure of information by the Defendant (which it will not provide) or by this Court making the order now sought. Whilst this is not in dispute in respect of reviews [2] to [4], the Claimant does seemingly have material to identify the author of review [1]. However, the Claimant contends that it has no more than a suspicion of the identity of the author – the material sought from the Defendant would confirm their identity.

47. Yet further, the Claimant contends that the Defendant is "mixed up" in the wrongdoing sufficient to justify an order being made. As Nicklin J noted at paragraph 102 of his judgment in Davidoff, where a claim is brought against the operator of a website on which the alleged wrongdoer has posted an anonymous review, "*there is little doubt that the website has become mixed up in the wrongdoing because it has, through its platform or service, enabled and facilitated the publication complained of."* This principle applies here.

48. It follows that, on the Claimant's case, the court's decision as to whether to grant an order turns solely on the issue of the alleged wrongdoing of the targets, the other threshold criteria having been met. The Claimant contends that its claims (whether limited to those in defamation and malicious falsehood or more broadly covering the other causes of action identified above) are more than merely fanciful. The Claimant can show a real prospect of success in respect of each of the reviews.

49. In terms of the Davidoff balancing exercise, the Claimant points out first that, in that case, Nicklin J identified the value of anonymous speech in the traditions of the United Kingdom and the USA. At paragraph 30 he stated:

"As the Court of Appeal noted in Motley Fool, Article 10 protects both speech by an identified individual and anonymous speech. Whilst anonymity on the Internet can be used as a cloak behind which to harm others by unlawful acts, not all anonymous speech is of this character. Such speech, particularly in a political context, as a dimension of freedom of expression, can have a real value and importance. It also has a long pedigree both in the United Kingdom and the United States. As Lord Neuberger noted, extra judicially:

> *"It is unsurprising that the most robust protection of anonymous speech is to be found in US law. In McIntyre v Ohio Elections Commission (1995) 514 US 334, a case on a statute prohibiting anonymous political literature, it was famously said by Justice Stevens that:*
>
> > *'Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honourable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.'"*

The modern equivalent of the anonymous pamphleteers of 200 years ago are anonymous online commentators, such as "The Secret Barrister", for whom anonymity is an important dimension of the exercise of their rights of freedom of expression."

50. In contrast to the protection of political or religious opinions, cases such as the instant one are concerned with a much lower level of freedom of expression in the context of comments that (it is said) harm and are intended to harm the commercial interest of the Claimant, rather than to protect their own beliefs or challenge the beliefs of others. The interests of the targets in their anonymity are, on the Claimant's case, less worthy or protection (or at least worthly of less protection) than those of the kind of case that Nicklin J had in mind in Davidoff.

51. Furthermore, the comments made here are (it is said on behalf of the Claimant) not simply statements of opinion but statements (at least in part) of fact. The example given is the assertion in review (2) that the workplace culture is "*toxic".* The Claimant contends that, where the anonymous comments that are being targeted are statements of fact (or at least mixed statements of fact and opinion), the balance will more readily fall in favour of making an order sought to identify the author. The rationale behind this distinction is not entirely clear from the Claimant's arguments although it would seem to lie in the argument that it will be more straightforward to prove that a statement is

actionable as defamatory or a malicious falsehood if it is at least in part a statement of fact.

52. The Claimant contends that there is evidence that reviews such as those on the Defendant's website have caused damage to its business. In this regard, my attention is drawn to a document attached to Mr Hugo's witness statement, headed "*Reviews Affecting Sales."* The document purports to bring together a number of sources of material as evidence that the Claimant's business has been harmed by what people have discovered from searching details of the Claimant's business online.

THE DEFENDANT'S CASE

53. I have noted above that the Defendant accepts that it has the relevant information to identify the authors of the four identified reviews. It may have the information to identify the authors of other anonymous reviews that have now been deleted, so long as they are clearly identified[1]. Further, the Defendant does not dispute that, save in respect of review (1), the Claimant is unlikely to be able to obtain the information necessary to trace the target from any other source. Yet further the Defendant does not dispute that it is "*mixed up*" in the alleged wrongdoing in a manner that would make it the potential subject of a Norwich Pharmacal type order.

54. However, the Defendant contends that, when considering the balancing exercise anticipated in Davidoff, the Claimant's argument fails adequately to deal with the rights of the targets as anonymous posters whilst overstating the strength of the cases against the targets.

55. Dealing first with the claims that are intimated against the targets, the Defendant contends that each of the claims is weak even without consideration of the evidence of any loss flowing from the alleged torts:

    a. Of review (1), the Defendant points out that this claim is significantly out of time. The Claimant has known (or at the very least has suspected that it knows) the identify of the poster for over 3 years, yet there is no evidence that it has taken any steps against that person, whether to establish their identity with

[1] I had understood during the hearing that the Defendant was able to identify the authors of now deleted reviews so long as the reviews themselves are clearly identified. Having sent out this judgment in draft, I was told that this was not necessarily the case and could only be known if the reviews themselves were first identified. Whilst this may be a discrete arguable ground for refusing relief, I have not determined the case on this issue and would have required further submissions if it had affected the outcome of the application. In the event it does not.

greater certainty or to seek relief for the wrongdoing. Any argument for the disapplication of the limitation period would be very weak. Of course, it would be for the target of the current application to take that line of defence, but the likelihood of the point being successfully taken must be very high. In any event, the Defendant contends that it is far from clear that a statement of the kind in review (1) that the pressure of a job is quite intense and that an employee has not felt supported are capable of being defamatory and/or of being shown to be false. They are statements of the perception of the author not of objective fact. Even if capable of being defamatory, the Defendant contends that it is not clear to whom the statement is targeted. Is it said to be defamatory of the Claimant itself or of Mr/Mrs Hugo? If the latter, why would the reader of the comment think it referred to either of them?

b. Again, review (2) would be out of time for a claim in defamation or malicious falsehood. Although the Claimant may not know the identity of the reviewer, it has taken no steps until now to establish that identity. Further the language of the review is largely that of opinion rather than assertion of fact, though perhaps not so obviously as review (1). Whilst there is one reference to Mr Hugo as CEO, the review is not highly critical of him and arguably would not make the reader think less highly of him. There is no reference to Ms Hugo or her role in the Claimant.

c. Yet again review (3) would be out of time for a claim in defamation or malicious falsehood though only marginally so such that the Defendant would accept that an argument to permit the claim to continue under Section 32A of the Limitation Act would be stronger. Further, like review (2), the Defendant accepts that somewhat stronger language of this review may make a claim in defamation or malicious falsehood more arguable though again there is no express reference to Ms Hugo.

d. In respect of review (4) a claim against the author would have been in time if brought at or shortly after the hearing on 1 November 2023 so a limitation argument is not likely to be a serious bar to the contemplated claim. However the Defendant doubts that the contents of this review are capable of being held to be defamatory or a false statement.

56. Turning to the right of privacy of the person posting an anonymous review, at paragraph 31 of his judgment in Davidoff, Nicklin J made clear that such posters have an interest in their privacy. The Defendant contends that this applies just as much to someone posting a review of an estate agent whose services they have sued (as in Davidoff itself) or their former employee (as here) as it does to the political pamphleteer or indeed the author of the Secret Barrister.

57. The Defendant asks me to bear in mind the terms upon which reviewers post on the Defendant's website. They include the following:

"*1. The reviews you submit are anonymous.*

…

3. Identifiable information is not shared with the company you review. However, Indeed may honor subpoenas, search warrants, law enforcement or court-mandated requests to disclose user content you have provided, your identity, or other information.

4. These are your personal experiences and opinions, and those can be emotionally charged. However, any content that is unlawful, fraudulent, discriminatory, threatening, abusive, libelous, defamatory, obscene, or otherwise objectionable, or that contains sexual, ethnic, racial, or other discriminatory slurs, or that does not include relevant or constructive content is not allowed on Indeed and we reserve the right to remove such content."

58. It is apparent from this text that, whilst reviewers should realise that their identity might be disclosed in certain circumstances, the expectation is that reviews will be anonymous.

59. That is not to say that the anonymity of the poster is necessarily worthy of protection. The Defendant acknowledges the passage at paragraph 112 of his judgment in Davidoff, where Nicklin J said, *"where there is a real basis on which to suspect or conclude that a person has used anonymity merely as an expedient by which s/he hopes to avoid identification and the potential consequences of their online activity the Court is likely to attach limited weight to the need to protect that anonymity."* However the use of anonymity here is not an expedient to avoid the reviewers taking responsibility for their words; rather it is the very condition that frees them to make the comments in the first place. It would be inimical to free speech to allow the disclosure of the identity of those

who would not post their comments if they believed that their identity would be disclosed.

60. In the exercise of the discretion to make an order, the Defendant asks me to bear in mind that, although the Claimant acted as a litigant in person until shortly before the hearing before me, it has shown a degree of legal sophistication, for example copying in a legal email address to its correspondence. It has purported to express opinions on legal matters, for example in an email from Mr Hugo dated 24 October 2023 where he says to the Defendant's solicitors, *"I would welcome an explanation please. We wrote to you today and to the court in reference to the requirement to amend the claim form and the intent of your client to resist the amendment, necessitating an application to be made. We will have counsel on the day and shall seek our costs on an indemnity basis. I see no reason whatsoever for your objection, nor any validity in law. Further, in response to your original correspondence and defence, I found it to be ill founded and furthermore, outside of your client's boundaries as a party to these proceedings. It is not for you to 'pre-try' a case of defamation, or for that matter any other action that may arise from unmasking the malicious and damaging allegations made on your client's website."* In so far as the Claimant seeks the indulgence of the court for lack of specificity in its application, the court should bear in mind that it has behaved as though it has either received legal advice or has relevant legal knowledge on the issues before the court.

61. As to the argument that the reviews complained of have caused damage to the Claimant, the witness statement of Anne Mannion exhibits several reviews from sources other than the Defendant. At paragraph 11, she sets out various reviews on Google that show some significant dissatisfaction with the Claimant from a variety of sources. Overall, she states that the average rating of the Claimant on Google is 4.1/5. This compares with the average rating on the Defendant's platform which, according to Mr Dowling's statement, is 4.5/5. This would suggest that the publications on the Defendant's platform are likely to be a lesser cause of harm to the Claimant than those on Google.

62. The Defendant points out that this is consistent with the Claimant's own material in the document referred to at paragraph 52 above. None of the material in that document indicates that it is reviews on the Defendant's website that have caused potential customers not to place business with the Claimant. In so far as any specific reasons are given, the sources cited are either reviews on Google or reports of Employment

Tribunal proceedings, neither of which are attributable to the reviews on the Defendant's site.

63. Further, the Claimant, in particular through the communications of Mr Hugo, has shown itself willing to act aggressively to protect its position. A particularly striking example of this is an email from Mr Hugo to one Dale Rowland dated 12 April 2021, which can be seen online in a review posted by Mr Rowland on Google and exhibited by Ms Mannion. The context of this email is not clear, but the text in the bundle reads as follows:

"You are a very rude and gutless little weasel. Never write anything you wouldn't have the guts to say directly to someone's face. Insulting me is fine, insulting my integrity as a person, not my job role, I will respond to appropriately. I will be back in the UK shortly. You will then be able to make your nasty spiteful immature comments to my face. As for your inadequate understanding of what you were all told back in December, I will now refresh your very selective memory.

If your brains were not in your arse you would be able to add up, that the new closers are now in month 5, hence their last month was month 4, are you able to count along so far?

They fully understand their target is now in place, the sales team (who have been there for 4 months and more) will also realise that. Yet you want to blame me? Are you sure it isn't John, or Simon, or Brendan as previously?

In short everyone but pathetic little Dale. Typical shite inadequate salesperson, remembers the bits that suit them and blame everyone else but themselves for their crap performance. I am delighted you were too stupid to realise your mistake. Whether you left now or at the end of April, the commission position would be no different. Suggesting I don't honour contracts is not going to go down well AT ALL with me! You cheeky lying little arsehole. You want to talk about contracts? Where was your performance each month to hit targets? Did I ever personalise it with you or anyone else? You want to get personal? No problem with me. Let's do that eh?

That's what you were employed to do. Failure. Stop snivelling and go and better yourself for the benefit of your new employer. The fact you were prepared to take a non commission and bonus paid role shows how you don't even have the self image of a proper salesperson…"

64. A similar tone can be seen in the Claimant's response to one of the Google reviews from Mr Kishour Zahid.

65. Ms Mannion's researches also show that, if one searches on line against the Claimant's name, one may well turn up reports of proceedings in the Employment Tribunal. This is of interest when one considers the points made within the Claimant's document headed "Reviews Affecting Sales," in which customers who are said to have decided against placing business with the Claimant refer not to reviews by former employees, but, amongst other things, reports of employment tribunal hearings and negative reviews on Google.

66. Taken together, this material would indicate that, not only is it unlikely, looked at prospectively, that negative reviews on the Defendant's platform, as opposed to the contents of other reviews and other material available online, would cause loss to the Claimant (or Mr and Mrs Hugo), the evidence points in the direction that in fact any losses that could be said to have arisen had other causes.

DISCUSSION

67. In considering the evidence as to loss, I bear in mind that the issue only arises at an interim stage and that the Claimant (and Mr and/or Ms Hugo, if they are joined as Claimants either in this case or in subsequent litigation against the wrongdoers) may be able to marshal considerably more evidence as to the effect of the reviews. The Claimant has clearly made some effort to show the effect of the reviews on it, but, for reasons identified by the Defendant and noted above, not only does it fail to show any financial loss attributable to the reviews, its evidence tends to suggest that any loss actually has other causes, such as reports of proceedings in the Employment Tribunal and/or reviews on Google which can not be laid at the door of the Defendant's platform.

68. Further, Mr and Ms Hugo have taken no steps to show that they personally have suffered reputational loss due to the reviews. They are therefore driven back on to the presumption of loss. In respect of the claim in defamation, that loss is presumed without more, but in respect of the claim in malicious falsehood, it requires proof that the words are calculated to cause pecuniary damage. I am satisfied that there is no material before the court from which that inference can be drawn.

69. It is of course the case that, were the Claimant to obtain disclosure of the details of reviewers, it might be able to find material to support its contention that comments were

made with intent to cause damage and/or its suspicion that there is collusion between reviewers. The failure to make the order sought might therefore deprive the Claimant of the ability to vindicate its rights. This risk was recognised by Nicklin J at paragraph 83 of his judgment in Davidoff, but, as he said there, this does not relieve the Claimant of the burden of proving the necessary ingredients of the tort on which it relies in support of the making of an order.

70. In considering the various reviews, I shall look at the contents of each and the evidence that the Claimant, Mr Hugo and/or Ms Hugo have suffered any loss as a result of each or all of them. In my judgment, the cases against the authors of each of the reviews, whether in defamation or in malicious falsehood, are distinctly problematic, although some are stronger than others. I shall deal with the reviews one by one, subdividing them according to potential cause of action and potential claimant. Where I use the word "*weak,*" I mean a claim or argument that does not, on the material placed before the court, meet the Swain v Hillman test of having a real prospect of success.

71. Dealing with review (1), I consider this to be a very weak basis for a claim against any of the Claimant, Mr Hugo and/or Ms Hugo for the following reasons.

a. Defamation claim by the Claimant:

i. The claim is out of time under Section 4A of the Limitation Act 1980. An application to extend time for bringing the claim under section 32A of the Act would be very unlikely to succeed given for how long the Claimant has at the very least suspected that it has known the identity of the reviewer.

ii. The argument that this review is defamatory of anyone is weak since it contains statements of opinion or perception that would be difficult to contradict. It is not clear why those statements would have a substantially adverse effect on how people would treat the Claimant, Mr Hugo and/or Ms Hugo.

iii. The Claimant has poor prospects of showing that the review has caused serious harm to its reputation.

b. Malicious falsehood claim by the Claimant:

i. The claim is out of time under Section 4A of the Limitation Act 1980. An application to extend time for bringing the claim under section 32A of the Act would be very unlikely to succeed given for how long the Claimant has at the very least suspected that it has known the identity of the reviewer.

ii. The arguments that this review is false and/or was published maliciously are weak since it contains statements of opinion or perception that would be difficult to contradict.

iii. There is no evidence to show that the Claimant, Mr Hugo and/or Ms Hugo have in fact suffered pecuniary damage as a result of the publication and such material as there is would indicate that any losses have other causes.

iv. There is no material from which to draw the conclusion that the words were calculated to cause pecuniary damage to the Claimant, Mr Hugo and/or Ms Hugo.

c. Defamation claim by Mr Hugo:

i. As 71(a)(i) and (ii) for the Claimant. Also,

ii. The reader would be very unlikely to understand this review to be a reference to Mr Hugo as opposed to any other manager at the Claimant.

d. Malicious falsehood claim by Mr Hugo:

i. As 71(b)(i), (ii), (iii) and (iv) for the Claimant. Also,

ii. The reader would be very unlikely to understand this review to be a reference to Mr Hugo as opposed to any other manager at the Claimant.

e. Defamation claim by Mrs Hugo:

i. As 71(a)(i) and (ii) for the Claimant. Also,

ii. The reader would be very unlikely to understand this review to be a reference to Ms Hugo as opposed to any other manager at the Claimant.

f. Malicious falsehood claim by Mrs Hugo:

i. As 71(b)(i), (ii), (iii) and (iv) for the Claimant. Also,

ii. The reader would be very unlikely to understand this review to be a reference to Ms Hugo as opposed to any other manager at the Claimant.

72. Dealing with review (2), I consider this to be a weak case as against the Claimant and Mr Hugo, and to be very weak as against Ms Hugo.

a. Defamation claim by the Claimant:

i. The claim is out of time under Section 4A of the Limitation Act 1980. An application to extend time for bringing the claim under section 32A of the Act would be unlikely to succeed given the length of time since the review was published. The mere fact that the identity of the author was not known does not greatly assist since no steps appear to have been taken to identify the person earlier.

ii. The contents of the review are capable of being defamatory of the Claimant and Mr Hugo on the basis that they include factual assertions relating to bad management in the Claimant and encouragement of this by Mr Hugo which may have a substantially adverse effect on the way that people would treat the Claimant itself and/or Mr Hugo.

iii. The Claimant has poor prospects of showing that the review has caused serious harm to its reputation.

b. Malicious falsehood claim by the Claimant:

i. The claim is out of time under Section 4A of the Limitation Act 1980. An application to extend time for bringing the claim under section 32A of the Act would be unlikely to succeed given the length of time since the review was published. The mere fact that the identity of the author was not known does not greatly assist since no steps appear to have been taken to identify the person earlier.

ii. The contents of the review are capable of amounting to a malicious falsehood actionable against the Claimant and Mr Hugo on the basis that they include factual assertions relating to bad management in the Claimant and encouragement of this by Mr Hugo.

iii. There is no evidence to show that the Claimant, Mr Hugo and/or Ms Hugo have in fact suffered pecuniary damage as a result of the

publication and such material as there is would indicate that any losses have other causes.

iv. There is no material from which to draw the conclusion that the words were calculated to cause pecuniary damage to the Claimant, Mr Hugo and/or Ms Hugo.

c. Defamation claim by Mr Hugo:

i. As 72(a)(i) and (ii) for the Claimant.

d. Malicious falsehood claim by Mr Hugo:

i. As 72(b)(i), (ii), (iii) and (iv) for the Claimant.

e. Defamation claim by Mrs Hugo:

i. As 72(a)(i) and (ii) for the Claimant. Also,

ii. There is no material from which the reader would conclude that this review referred to Ms Hugo.

f. Malicious falsehood claim by Ms Hugo:

i. As 72(b)(i), (ii), (iii) and (iv) for the Claimant.

ii. There is no material from which the reader would conclude that this review referred to Ms Hugo.

73. Dealing with review (3), I consider this to be a weak claim against the Claimant, but to give rise to an arguable claim in defamation against Mr Hugo and Ms Hugo.

a. Defamation claim by the Claimant:

i. The claim is out of time under Section 4A of the Limitation Act 1980. However, since the present claim to identity the target was brought less than 12 months from the date of publication, the court might apply Section 32A in favour of the Claimant, Mr Hugo and/or Ms Hugo.

ii. The contents of the review are capable of being defamatory of the Claimant, Mr Hugo and/or Ms Hugo on the basis that they include factual assertions relating to a bad culture in the Claimant instilled "*from the top"* which is capable of being a reference to Mr and/or Mrs Hugo,

and which would have a substantially adverse effect on the way that people would treat the Claimant itself and Mr and/or Ms Hugo.

iii. The Claimant has poor prospects of showing that the review has caused serious harm to its reputation.

b. Malicious falsehood claim by the Claimant:

i. The claim is out of time under Section 4A of the Limitation Act 1980. However, since the present claim to identity the target was brought less than 12 months from the date of publication, the court might apply Section 32A in favour of the Claimant, Mr Hugo and/or Ms Hugo.

ii. The contents of the review are capable of being proved false, in which case they may be proved to have been made maliciously. They may be taken to refer to Mr and/or Ms Hugo as well as the Claimant itself on the basis that they include factual assertions relating to a bad culture in the Claimant instilled "*from the top"* which is capable of being a reference to Mr and/or Mrs Hugo.

iii. There is no evidence to show that the Claimant, Mr Hugo and/or Ms Hugo have in fact suffered pecuniary damage as a result of the publication and such material as there is would indicate that any losses have other causes.

iv. There is no material from which to draw the conclusion that the words were calculated to cause pecuniary damage to the Claimant, Mr Hugo and/or Ms Hugo.

c. Defamation claim by Mr Hugo:

i. As 73(a)(i) and (ii) for the Claimant. But also,

ii. Given the presumptions of falsity, malice and damage referred to at paragraph 21(c) above and the fact that Mr and Ms Hugo are not trading for profit, they may be able to make out an arguable cause of action in defamation.

d. Malicious falsehood claim by Mr Hugo:

i. As 73(b)(i), (ii) (iii) and (iv) for the Claimant.

e. Defamation claim by Ms Hugo:

i. As 73(a)(i) and (ii) for the Claimant.

ii. As 73(c)(ii) for Mr Hugo.

f. Malicious falsehood claim by Ms Hugo:

i. As 73(b)(i), (ii) (iii) and (iv) for the Claimant.

74. Dealing with review (4), I consider this to be a weak claim against each of the Claimant, Mr Hugo and Ms Hugo.

a. Defamation claim by the Claimant:

i. The claim is out of time under Section 4A of the Limitation Act 1980. However an application under Section 32A would have reasonable prospect of success on the basis that the claim to identify the target was made less than 12 months after publication. The argument is the stronger for the fact that, had a judgment favourable to the Claimant been handed down *ex tempore* at the hearing before me, any claim against the author or review (4) might have been brought in time.

ii. The argument that this review is defamatory of anyone is weak since it contains statements of opinion or perception that would be difficult to contradict and which in any event do not obviously refer to Mr and/or Ms Hugo. It is not clear why those statements would have a substantially adverse effect on how people would treat Mr Hugo and/or Ms Hugo.

iii. The Claimant, Mr Hugo and Ms Hugo have poor prospects of showing that the review has caused serious harm to their reputations.

b. Malicious falsehood claim by the Claimant:

i. The claim is out of time under Section 4A of the Limitation Act 1980. However an application under Section 32A would have reasonable prospect of success on the basis that the claim to identify the target was made less than 12 months after publication.

ii. The argument that this review is a malicious falsehood is weak since it contains statements of opinion or perception that would be difficult to

contradict or to show as being made maliciously and which in any event do not obviously refer to Mr and/or Ms Hugo.

iii. There is no evidence to show that the Claimant, Mr Hugo and/or Ms Hugo have in fact suffered pecuniary damage as a result of the publication and such material as there is would indicate that any losses have other causes.

iv. There is no material from which to draw the conclusion that the words were intended to cause pecuniary damage to the Claimant, Mr Hugo and/or Ms Hugo.

c. Defamation claim by Mr Hugo:

i. As 74(a)(i), (ii) and (iii) for the Claimant.

d. Malicious falsehood claim by Mr Hugo:

i. As 74(b)(i), (ii), (iii) and (iv) for the Claimant.

e. Defamation claim by Mrs Hugo:

i. As 74(a)(i), (ii) and (iii) for the Claimant.

f. Malicious falsehood claim by Ms Hugo:

i. As 74(b)(i), (ii), (iii) and (iv) for the Claimant.

75. It follows that the only case that I consider to be arguable is that on behalf of Mr and Ms Hugo in respect of review (3). I consider the threshold requirements for a Norwich Pharmacal order to be made out in respect of a prospective claim brought by Mr and/or Ms Hugo arising from the contents of that review.

76. I therefore turn to consider whether on the facts of the case, the interest of Mr and Ms Hugo in obtaining an order that might enable them to vindicate their rights in respect of their arguable claim is outweighed by the interest of the target. I bear in mind the words of Nicklin J in paragraph 41 of his judgement in Davidoff cited above, and in particular the need to ensure that, in the context of revealing the identity of those who make comments anonymously, the Court should be careful to ensure that any order it makes has the purpose of vindicating a right to seek legitimate redress for the wrong suffered rather than some other motive such as seeking revenge.

77. I am troubled here by the manner in which the Claimant and Mr and Ms Hugo have gone about this litigation for several reasons:

a. Their approach to the identity of the correct claimant has been casual. Whilst I appreciate that the distinction between the claim being brought by the company or by Mr and Mrs Hugo as individuals is a relatively nuanced argument that may not be obvious to non-lawyers, the Claimant appears to be a sophisticated company which, for example, copies in (or purports to copy in) its legal team to correspondence through the use of an email address, legal@govdata.co.uk and which firmly asserts its legal position. As I have indicated, in correspondence, it has shown an ability to assert its purported legal rights in firm terms.

b. The Claimant's scatter gun tactic in respect of causes of action is inappropriate. It has alleged a variety of claims without any explanation of the basis of the claims. The majority appear to be simply unarguable, either on the grounds that the legal elements cannot be made out or that the material relied on in support of the claims does not bear the meaning for which the Claimant contends. This is concerning conduct for a company and its senior management when they are required to show that their actions are simply an attempt to vindicate a legitimate complaint.

c. The Claimant's approach to those critical of it can be noted in the documents referred to above and relied on by the Defendant in support of the argument that the cause of any reputational problems that the Claimant may have is likely to lie other than with the material published on the Defendant's website. One might consider that the email from Mr Hugo dated 12 April 2021 provides some support for the criticism that the anonymous reviewers have made of the Claimant company and its management. More importantly, it shows that Mr Hugo is willing to act aggressively in correspondence in a way that suggests that his aim might be to exact revenge rather than to vindicate his rights.

78. Taken together these matters cause me concern that the Claimant and Mr and Ms Hugo are conducting this litigation not with a view to seeking redress for genuine interference with their rights but rather with a view to closing down any and all criticism of their business.

79. I balance against this the interests of the reviewer. Given the absence of any evidence that reviewers have acted in concert, the author of review 3 must be taken for present purposes to have acted alone. I have rejected the suggestion that this is a fake review in the sense that it was not authored by someone who had worked for the Claimant. Though strongly worded, the review purports to reflet the opinion of the author. There is no reason to think that the author is trying to use the anonymity that the website affords to cause harm to the Claimant (or Mr and Mrs Hugo) rather than to express an opinion. Doubtless that person believed that they would remain anonymous. The person would not expect to be the victim of litigation brought by the Claimant or Mr and Ms Hugo, still less to be the subject of vitriolic communication of the kind in which Mr Hugo has engaged before. Further, even accepting the presumption in favour of loss caused by a malicious false or defamatory statement, the evidence points to other causes for loss. If this were proved to be a defamatory statement, the loss that flowed from it must be minimal, in the light of other material before the court that is critical of the Claimant or its management.

80. Weighing these factors, the balance comes down firmly against granting relief. Whilst I accept that there may be stronger arguments for protecting anonymity in cases involving the expression of deeply held political or religious beliefs, there is a public interest generally in those who post anonymous comments having their anonymity respected as Nicklin J made clear in Davidoff. The harm to the interest of the author losing anonymity is greater than the harm to Mr and Ms Hugo being prevented from pursuing a claim which, if successful, is likely to be of minimal value and which could only go a small way to vindicating the rights that they consider to have been infringed by people posting on the Defendant's platform.

CONCLUSION

81. It follows from the above that amendment to the Claim Form to permit the addition of Mr and Ms Hugo as claimants would be pointless because I would in any event refuse the relief sought. I therefore refuse the application to amend. I refuse the Claimant's own application for relief for reasons identified above.

82. For the sake of clarity, had I been persuaded that Mr and Ms Hugo would have been entitled to relief if joined as claimants, I would have granted that application since the Claimant made clear from an early stage in the litigation that it was seeking this

amendment and the prejudice to them from being refused relief that they would otherwise have been entitled to outweighs any prejudice to the Defendant from permitting the amendment.