Neutral Citation Number: [2023] EWHC 2478 (KB)

Case No: QB-2020-004165

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2023

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

- -

Between :

CORINNA ZU SAYN-WITTGENSTEIN-SAYN **Claimant**

– and –

HIS MAJESTY JUAN CARLOS ALFONSO VICTOR MARIA DE BORBÓN Y BORBÓN **Defendant**

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Jonathan Caplan KC, Andrew Green KC, Adam Chichester-Clark, Andrew Legg & **Nina Ross** (instructed by Kobre & Kim (UK) LLP) for the Claimant

Adam Wolanski KC, Derek O'Sullivan KC, Clara Hamer & **Alexander Thompson** (instructed by Velitor Law) for the Defendant

Hearing dates: 18th-21st July 2023

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Approved Judgment

This judgment was handed down remotely at 12pm on 6th October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE COLLINS RICE

Mrs Justice Collins Rice :

Introduction

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1. The Claimant is an international businesswoman. She describes herself as a strategic consultant working with high-net-worth individuals and leading companies around the world. She does so through a portfolio of companies of her own. She is a Danish national and has been a long-term resident of Monaco. She has a home in England.

2. The Defendant was King and head of state of Spain from 1975 until his abdication in favour of his son on 18th June 2014. He retired from public life in 2019. He remains domiciled in Spain, but since August 2020 has been living in Abu Dhabi (UAE).

3. The parties were in an intimate relationship between 2004 and 2009. Their relationship came to public attention in April 2012 in the aftermath of an elephant-hunting trip to Botswana which the Claimant arranged, which both attended, and from which the Defendant returned injured. That trip, its purpose and resourcing, and the parties' relationship, attracted public criticism.

4. The Claimant says she has suffered intrusive, intimidatory and adverse episodes ever since. She connects them with a payment of €65m she says the Defendant made to her soon after the Botswana trip and while he was still convalescing, in June 2012. She says he told her at the time it was an unconditional gift, but has since been putting her under improper pressure to allow him to control or make use of it, and she now suspects its original purpose was ulterior.

5. The Claimant has issued, and pursues, proceedings in the High Court of England and Wales, describing the episodes of which she complains and attributing them to the Defendant. She alleges this to be a course of conduct by him amounting to the tort of unlawful harassment.

6. The Defendant initially challenged the High Court's jurisdiction to try the claim, on grounds that his alleged conduct was subject to state immunity, arising from his past and present constitutional position in Spain. His challenge failed at first instance, but partially succeeded (on grounds of state immunity as a former head of state) in the Court of Appeal, which struck out parts of the claim relating to certain alleged episodes occurring before his abdication.

7. He now asks the Court to strike out (or give summary judgment on) the remainder of the claim, on a range of bases including further jurisdictional grounds, defective pleading and there being no realistic prospect of its success.

8. The Claimant meanwhile seeks permission to amend her claim, including to deal alternatively with the matters struck out by the Court of Appeal, to add further particulars of harassment, and to extend her claimed heads of liability and loss to include personal injury and an enhanced range of financial losses.

9. Both sets of applications were directed to be heard together. Directions were given for each party to provide a skeleton argument in support of their own application, and then to respond to their opponent's skeleton by way of a further skeleton each. That resulted in a total of 374 pages of skeleton argument, in advance of a four-day hearing of legal submissions on the multiple and diverse matters raised by these applications.

10. This is hard-fought litigation. Three years after the claim was issued, it has still only reached the stage at which the material question is how far, if at all, the Defendant can properly be expected to enter a defence to it. Notwithstanding, on this occasion, as at earlier stages of this litigation, the Defendant records his emphatic denial that he engaged in, or directed, any harassment of the Claimant, or conduct which was intended to cause physical or mental or emotional distress to her; he rejects her allegations to the contrary as untrue and inconsistent with previous public statements made by her.

PART I: JURISDICTION

A. PRELIMINARY

11. The Defendant's previous challenge to the High Court's jurisdiction to adjudicate on his conduct asserted state immunity. The outcome was a Court of Appeal ruling that this was not a general bar to the High Court's jurisdiction to entertain the Claimant's claim. But it did restrict the extent to which the claim could rely on certain previously-pleaded episodes in which the alleged involvement of the Defendant could only have been 'under colour of authority' of his previous constitutional position.

12. By his present application, the Defendant returns to the question of jurisdiction, but on an entirely different basis. This challenge relates not to the (personal or constitutional) capacity in which he is alleged to have acted, but to the nature of the tort pleaded and the geographical location in which it is alleged to have happened. He says the Claimant cannot make out the special jurisdictional basis, on which she accepts she necessarily relied in the first place, in bringing a harassment claim in England against a defendant domiciled in Spain.

13. The jurisdictional starting point in these circumstances is EU Regulation 1215/2012, the 'Brussels Recast Regulation' or BRR (and its predecessor texts). The BRR is the principal EU instrument allocating geographical jurisdiction, as between the courts of constituent Member States, over private law disputes with a transnational or international dimension. It is uncontroversial the BRR in principle has (post-Brexit) legal effect in this case. It is uncontroversial it establishes a default that in a case like this – a tort action brought against a single defendant for which no other specific provision is made – the claim must be brought in the courts of a defendant's country of domicile; and the courts of other countries will lack jurisdiction accordingly. It is uncontroversial also that the BRR provides a limited exception to that default provision, in the form of 'special jurisdiction' for foreign courts, in particular circumstances where not all of the components of the tort arise in the country of a defendant's domicile. The special jurisdiction depends on the relevant 'harmful event' itself occurring within the territory of the foreign court.

14. In the form in which it emerged from the Court of Appeal, the Claimant's claim is in the statutory tort of harassment, pleading a course of conduct, subsequent to his abdication, for which the Defendant is said to be responsible. Remedies sought include general damages (for anxiety and distress, and consequential financial losses), special damages (for medical treatment, additional security and measures to mitigate reputational damage), and injunctive relief.

15. In the form in which the Claimant now wishes to proceed with it, her claim in (post-abdication) harassment is contextually amplified as to the course (or 'courses') of conduct alleged, including by way of some new geographical detail as to the component episodes. It is extended to include new alleged incidents of harassment, notably by publication. The particulars of general damages include a claim for psychiatric injury. The particulars of special damages now include (very substantial) losses of business and income, and the costs of successfully defending legal and investigative procedures in the USA and Switzerland. And she wishes to add a claim in the tort of intentional infliction of injury, relying on the same course of conduct and the harmful effects said to have been deliberately produced by it.

16. The parties dispute the applicability of the BRR special jurisdiction to the pleaded factual circumstances of the Claimant's claim. However, the Claimant also says she need not demonstrate the applicability of the special jurisdiction, because the Defendant has already, by his own conduct of this litigation so far, conclusively 'submitted to the jurisdiction' of the High Court. It is not controversial that 'submission to the jurisdiction' is an alternative route to the assumption of jurisdiction by the High Court over a claim brought against a non-domiciled defendant. But the Defendant maintains he has not done so.

B. SUBMISSION TO THE JURISDICTION

(a) Legal framework

17. The BRR itself permits (subject to exceptions) parties to agree to submit to the jurisdiction of a court in a country other than that of a defendant's domicile or one in which special jurisdiction is established. It also provides, at Art.26, that '*apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction*'. By actively defending a claim in a foreign court, in other words, a defendant is taken to submit to its jurisdiction.

18. As a matter of High Court procedure, jurisdictional challenge and submission to jurisdiction are dealt with generally by Civil Procedure Rule 11, which provides as follows:

> **11. Procedure for disputing the court's jurisdiction**
>
> (1) A defendant who wishes to –

(a) dispute the court's jurisdiction to try the claim; or

(b) argue that the court should not exercise its jurisdiction

may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

(2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.

(3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

(4) An application under this rule must –

(a) be made within 14 days after filing an acknowledgment of service; and

(b) be supported by evidence.

(5) If the defendant –

(a) files an acknowledgment of service; and

(b) does not make such an application within the period specified in paragraph (4),

he is to be treated as having accepted that the court has jurisdiction to try the claim.

(6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including –

(a) setting aside the claim form;

(b) setting aside service of the claim form;

(c) discharging any order made before the claim was commenced or before the claim form was served; and

(d) staying the proceedings.

(7) If on an application under this rule the court does not make a declaration –

(a) the acknowledgment of service shall cease to have effect;

> (b) the defendant may file a further acknowledgment of service within 14 days or such other period as the court may direct; and
>
> (c) the court shall give directions as to the filing and service of the defence in a claim under Part 7 or the filing of evidence in a claim under Part 8 in the event that a further acknowledgment of service is filed.
>
> (8) If the defendant files a further acknowledgment of service in accordance with paragraph (7)(b) he shall be treated as having accepted that the court has jurisdiction to try the claim.
>
> (9) If a defendant makes an application under this rule, he must file and serve his written evidence in support with the application notice, but he need not before the hearing of the application file –
>
> (a) in a Part 7 claim, a defence; or
>
> (b) in a Part 8 claim, any other written evidence.

(b) Procedural history

19. The Claimant issued her claim in October 2020, and served the Defendant with it, in Spain, in early 2021. The accompanying form N510 asserted the right to do so without permission of the court. That entails the application of CPR 6.33, which in turn refers to the jurisdictional provisions of sections 15A-15E of the Civil Jurisdiction and Judgments Act 1982. The form therefore includes a proforma section declaring the claim to be one the court has the power to determine on these grounds, either because the defendant is domiciled in the UK or because the defendant is domiciled in another Member State jurisdiction, which must be named. The Claimant ticked this provision, and identified Spain as the Defendant's country of domicile.

20. The Defendant filed an acknowledgment of service on 4th June 2021, which ticked the box '*I intend to contest jurisdiction*'. In response to an application notice dated 6th June 2021, he obtained, by Order of Master Davison dated 10th June, retrospective extension of time for filing his acknowledgment of service, relief from sanctions, and confirmation that '*any application under CPR 11(4) must be issued on or before 4pm on 28 June 2021*'.

21. By application notice of 18th June 2021:

> The Defendant seeks an order that the Court has no jurisdiction to try the claim because the Defendant is immune under ss.20, 14 and 1(1) of the State Immunity Act 1978 ('SIA'). The Defendant additionally would contest the jurisdiction of the Court on grounds that England is not the appropriate forum, but before doing so seeks directions that this would not constitute a

> submission to the jurisdiction under s.2(3) of the SIA. The Defendant further seeks to set aside the service on the Defendant out of the jurisdiction, which was improperly effected.

Section 2 SIA says a State is deemed to have submitted to a jurisdiction, so that state immunity otherwise enjoyed is lost thereby, if it has '*taken any step*' in the proceedings otherwise than only for the purpose of '*claiming immunity*'.

22. The challenge to jurisdiction on grounds of state immunity proceeded towards a hearing. Meanwhile, inter-partes correspondence ensued on the potential alternative or additional matters mentioned by the Defendant, in the course of which he indicated a further intention to apply to strike out the claim based on the 'jurisdictional scope' of the Protection from Harassment Act 1997. The parties agreed, and it was so ordered by consent by Order of Nicklin J of 21st October 2021, that '*in so far as the Defendant's application relates to issues of forum and the jurisdictional scope of the Claimant's claim under the Protection from Harassment Act 1997, then these issues are to be adjourned at the hearing* [of the state immunity application, then listed for December 2021] *for such directions, if any, as may be necessary on a date to be fixed*'.

23. Following hand-down of the High Court judgment on 24th March 2022, and a subsequent consequentials hearing, further directions were given in relation to the Defendant's application, by Order of Nicklin J dated 29th March 2022. This provided for the Defendant, by 4pm on 15th July 2022, to:

> confirm in writing to the Claimant whether he intends to pursue the Forum Issue, and, if so, file and serve an Application Notice and witness evidence setting out each of the grounds and any facts and matters upon which he intends to rely ('the Forum Application'); and
>
> make any application to strike out all or part of the Amended Particulars of Claim, if so advised, in respect of the Harassment Jurisdiction Issues or otherwise, and setting out the facts, grounds and matters on which he intends to rely ('the Strike Out Application').

These directions were given '*without prejudice to the Defendant's continuing objection to the Court's jurisdiction on grounds of immunity (in respect of which the Defendant makes no waiver or submission to the jurisdiction by agreeing any of the directions that follow)*'.

24. On granting permission to appeal the High Court's determination of the state immunity application, compliance with these directions was stayed by Order of the Court of Appeal. Following determination of the appeal, the Court of Appeal gave directions in December 2022 for a case management conference in the High Court and for the parties to liaise to agree a replacement timetable for the directions given in the Order of 29th March. By a consent order of 10th February 2023, a replacement deadline of 15th March 2023 was provided for the Defendant to comply with, subsequently extended to 22nd March.

25. On 21st February 2023, the Defendant confirmed by solicitors' correspondence that he did not intend to pursue an objection to service of the claim. On 22nd March, his solicitors wrote, with reference to the directions, to confirm that '*our client will not be arguing that England and Wales is not the appropriate forum. However, our client does apply to challenge the jurisdiction of this court under EU Regulation 1215/2012 in respect of certain parts of your client's claim.*' and that he intended to apply for a terminating ruling.

26. The Defendant's application of 22nd March applied for strike-out, for summary judgment, and '*further or alternatively, pursuant to CPR 11 the Court should declare that it does not have jurisdiction in respect of certain allegations made in the Particulars of Claim*'. That was on the basis that '*the Claimant has failed to plead a basis on which the relevant harmful event occurred within the jurisdiction for the purposes of Article 7(2) of EU Regulation 1215/2012*'.

27. This was expanded in the accompanying witness statement from the Defendant's solicitor. That identified that the claim had necessarily relied on the BRR special jurisdiction from the outset (in identifying the Defendant's non-domiciled status), and outlined a case that the Claimant had not established a good arguable case that (all of) the relevant 'harmful event' had occurred within the jurisdiction.

28. By Order of 3rd April 2023, Nicklin J listed this formulation of the Defendant's application to be heard at the hearing already listed in anticipation. The Claimant's responsive witness statement of 26th April briefly noted that the BRR challenge appeared to constitute largely '*matters for legal submission in due course*'.

29. By solicitors' letter of 19th June 2023, the Claimant put the Defendant on notice that '*at the hearing in July our client will submit that the Jurisdiction Application is substantially out of time and defective on that basis. Your client is deemed to have accepted and/or submitted to the jurisdiction. Further and in any event your client has taken steps in the proceedings by making his application to strike out and/or seek summary judgment dated 22 March 2023. It is no longer open to your client to seek to make a new jurisdictional complaint at this stage of the proceedings. Indeed, it is abusive to do so.*'. The Claimant did not, however, in the event pursue the argument that the Defendant had 'taken steps in the proceedings' by virtue of applying for a terminating ruling.

(c) The parties' positions

(i) The Claimant's challenge

30. Mr Green KC, for the Claimant, analyses this state of affairs as follows. The Claimant's reliance on the BRR special jurisdiction was indeed plain from the outset. Any challenge to it could and should have been made by application within 14 days of the Defendant filing his acknowledgment of service, as required by CPR 11(4). Instead, out of the blue, the Defendant seeks to make the challenge now, 20 months out of time. The effect of that, as provided for by CPR 11(5), is that he must be taken to have submitted to the jurisdiction of the English courts.

31. Mr Green KC says the Defendant made no effective reservation of his position on jurisdiction (otherwise than on state immunity grounds) over this period, and can rely

on none of the directions Orders to have done so. On the contrary, the only potentially relevant matters reserved were (a) service out, (b) the extraterritorial application of the Protection from Harassment Act, and (c) a possible *forum non conveniens* argument. The first of these is not pursued. The second is not a jurisdictional challenge at all, but a dispute about statutory scope. The third is not a point of dispute about the court's jurisdiction under CPR 11(1)(a), it is an argument under CPR 11(1)(b) for a court to exercise its discretion not to *retain* jurisdiction; it therefore assumes rather than disputes that the court has jurisdiction in the first place. The trailing of none of these issues, therefore, foreshadowed a challenge to the BRR special jurisdiction, and the Defendant's position to do so has not been reserved.

32. Mr Green KC's primary submission is that to try challenging geographical jurisdiction now is an abuse of process. He relies on the observations of Popplewell J (as he then was) about CPR 11 and serial challenges in *IMS SA v Capital Oil and Gas Industries Ltd [2016] 4 WLR 163* at [33]-[37], and on the observations of the Court of Appeal in *Koza Ltd v Koza Altin [2021] 1 WLR 170* at [30]-[42] about serial interlocutory proceedings. He says the 'unitary code for jurisdictional challenges' provided by CPR 11 does not envisage sequential challenges on different grounds. Where multiple potential bases for jurisdictional challenge exist at the outset, they must be brought together. Popplewell J's observations in the *IMS* case were directed to sequential applications first as to the *existence* of jurisdiction and then as to the *exercise* of jurisdictional discretion, but, says Mr Green KC, they apply (if anything *a fortiori*) to sequential applications trying to challenge general jurisdiction on alternative grounds. Here, it was plainly open to the Defendant to challenge jurisdiction on the alternative grounds of state immunity and the non-application of the BRR special jurisdiction from the outset: no relevant change of circumstance is suggested, and neither ground involves concession of jurisdiction on the other ('*The Prestige' [2020] 1 WLR 4943* – headnote: '*if a state combined a claim for immunity and a claim disputing jurisdiction in the same application, it did not thereby submit to the jurisdiction*').

33. Mr Green KC says that, in the alternative, to the extent that the plain breach of CPR 11(4) could be the subject of an application for retrospective extension of time and relief from sanctions, such relief should be refused as failing the test set out in *Denton v White [2014] 1 WLR 3926 (CA)*: (a) the Defendant's BRR challenge is egregiously late and wholly unanticipated, notwithstanding the careful choreography of directions given at his own request and in his own interests throughout these proceedings to date; (b) no good reason appears for the course of events, other than the failure of the Defendant's former legal team to take the point in good time; (c) in all the circumstances, the Claimant is significantly prejudiced by the late addition of the BRR challenge.

(ii) The Defendant's response

34. Mr Thompson, for the Defendant, responds along the following lines. There is no abuse of process, and the facts are distinguishable from those of the cases on which the Claimant relies. This is not a case where a defendant is trying to have a second go at the same sort of issues as have already been determined against him – for example by trying to make serial cases based respectively on mandatory and then discretionary jurisdiction but rehearsing largely the same factors. In addition to pursuing what had been a wholesale mandatory non-jurisdiction argument based on state immunity, the Defendant had reserved his position on jurisdiction throughout.

35. That, says Mr Thompson, was carefully and expressly done on the basis that the Defendant had not wished to proceed before the High Court in any respect which could possibly jeopardise his primary case – namely that he was entitled by virtue of his constitutional position not to answer this claim in any way – by actively pursuing any parallel argument which could be regarded as inconsistent with that position or concessionary of it. That was explicitly why no other application of any sort was made before the determination of the state immunity challenge; and the wisdom of that cautious approach is only illuminated by the fact that even in the weeks before the hearing, the Claimant was suggesting that the application to strike-out on this and other grounds was itself a submission to the jurisdiction. *The Prestige* case is not clear authority that the simultaneous pursuit of entirely independent jurisdictional challenges is without substantial risk of cross-contamination. This is not in any event a case in which *a state* is pursuing serial applications. It is a case in which an individual is challenging jurisdiction to the extent to which the Court of Appeal has held he was not acting in a state capacity.

36. Mr Thompson says the Defendant's reserved position on jurisdiction was recognised by the parties, and both the High Court and the Court of Appeal, at all times. Throughout the period until at least March 2023 the Defendant had been incontestably entitled to apply to challenge jurisdiction on a *discretionary* basis *sequential to determination of* the state immunity argument. He could have applied throughout that period to add a BRR challenge without a serious issue of abuse of process being raised. The fact that the same practical result as had been signalled from the outset was now being sought, not by *additional* alternative means but by alternative means *alone*, did not create an abuse where none had existed before.

37. Mr Thompson says there has never been any *actual* submission to the jurisdiction of the Court by virtue of any step taken by the Defendant. Jurisdiction was actively resisted in total up to and including the determination of the Court of Appeal, and the question of jurisdiction fully reserved by careful directions thereafter. It is irreconcilable with the active pursuit of a CPR 11 challenge to suggest that that by itself necessarily imports a full concession of jurisdiction on all other possible bases, and certainly not where reservation of future position is clearly signalled. If CPR 11 is truly a unitary scheme, then the question of abuse cannot turn simply on a switch from a discretionary to a mandatory basis of challenge.

38. As to *deemed* submission by virtue of CPR 11(5), Mr Thompson says there is no possible argument for that before February 2023 when, following the decision of the Court of Appeal, the Defendant indicated he was not pursuing the service challenge. Until that point, his CPR 11(1) challenge was extant. To the extent there is any arguable deemed submission by virtue of lapse of the CPR 11(4) timetable thereafter, Mr Thompson says an application for extension and relief from sanctions should be granted. The period is of a few weeks only and has resulted in no practical delay to hearing and resolving the jurisdictional issue according to the listing and timetable already provided for. The reasons are obvious: the preparation and recalibration of the Defendant's secondary jurisdictional challenge, on which his position had been fully reserved, in response to his lack of complete success on the state immunity challenge. And it is fair and proper to do so in all the circumstances.

39. Those circumstances are said to include the fact the Claimant was explicitly put on notice of the BRR challenge in March but raised no point as to submission for fully

three months. By that time, the application had been listed for a hearing on its merits for two months, with the Claimant evidently indicating in her witness statement that it was her expectation that it would indeed so proceed. By the time she raised the point in June, the parties had inevitably prepared in full for a trial of the merits of the Defendant's application. A challenge based on submission could and should have been brought immediately the BRR was raised, by way of an application for a default judgment on the BRR application, or by requiring the Defendant to file a defence, which are the usual next steps for a Claimant asserting there is no proper jurisdiction question to try.

(d) Consideration

(i) Abusiveness

40. The Defendant's original jurisdictional challenge, based on state immunity arising out of his past and present constitutional status, did not rely on any issue going to the legal nature or merits of the claim. It focused simply on the Defendant's status, and the capacity in which he was being alleged to have acted. It appears by all accounts to have been brought, and treated throughout by the courts, as a self-contained preliminary issue.

41. It is not difficult to understand why. The immunity challenge had a distinctive legal character, further maintained now by the Defendant in his opposition to the Claimant's amendment application (and discussed in the second part of this judgment). It asserts not only that a foreign court could not determine legal liability on the claim, but also that he himself could not be made subject to the powers of the foreign court – whether procedural, evidential or adjudicative – at all, otherwise than for the *sole* purpose of establishing *state immunity itself*. His assertion of immunity was total – hence, logically, including immunity from the English courts' powers to require him to address any other jurisdictional challenges in the meantime, or indeed otherwise to comply with its rules. It is no surprise therefore that the courts directed the remission of *all* other legal applications canvassed at the time, in full, until after the question of state immunity had been decided.

42. The Defendant's reservation of his jurisdictional position pending resolution of the state immunity issue in these circumstances was apparently *intended* to be comprehensive, rather than to have deliberately conceded anything predicated on the failure in whole or part of his principal case. There is no indication in the litigation history of any conscious agreement or understanding otherwise, by the parties or the courts, at the time. Nothing else was actively being addressed or progressed in the meantime.

43. The Defendant's subsequent BRR challenge is not therefore abusive in the sense of being at odds with his primary position, or with any concession he may be taken deliberately or necessarily to have made, or as being an attempt to relitigate any matter already decided. On the contrary, there is a careful logic in his seeking to establish only sequentially whether (a) there was absolute jurisdictional incompetence in any court other than Spain's over him and his actions, and only if not, proceeding to (b) a BRR challenge, which does require a measure of active engagement with the legal and factual nature of the claim brought. There was at least an arguable inconsistency in running these arguments together. The plain words of section 2 SIA recognise taking '*any step in the proceedings for the purpose only of claiming immunity*' as the *sole* permissible

litigation step not having the effect of conceding jurisdiction. Bringing a BRR challenge does not fit into those words.

44. Nor is there any necessary logic that future pursuit of a jurisdictional challenge on a discretionary ground (as the Defendant originally intimated he was minded to do) entails a necessary concession that a challenge on a mandatory ground could not be pursued as well or instead (indeed the ***IMS*** case, on which the Claimant relies, is authority to the contrary, in indicating that where mandatory and discretionary grounds arise on the same factors they can and should generally be pursued simultaneously in the alternative).

45. The Defendant, by bringing the BRR challenge, does not seek to revisit, relitigate or reopen any matter on which the courts have been addressed and reached a final determination, or on which he has made an actual or necessary concession in substance. I am not persuaded in these circumstances that, apart from the potential application of CPR 11(5), this application is *abusive* in a sense which precludes further discretionary consideration of its fairness or the curing of any procedural defects which may be complained of.

(ii) Deemed submission and relief from sanctions

46. CPR 11(5) provides for deemed submission only in the event that *no* jurisdiction application is made within the 14 days. The Defendant brought a validated application. It is not suggested here that submission is deemed by virtue of CPR 11(7) and (8). This is not said to be a case in which the Court of Appeal has not 'made a declaration' of immunity: there was no apparent expectation following its judgment that the Defendant was expected to file a second acknowledgment of service nor that directions for the filing of a defence were in contemplation. On the contrary, the expectation was, and extended timetable provision was made for, the further pursuit of the extant challenge and/or a second application under CPR 11(1).

47. An issue arises about the lapse of a month between the service challenge being abandoned and its replacement by the BRR challenge. Extension of time and relief from sanctions are sought to cure any possible deeming effect. As to whether this should be granted, my starting point on the ***Denton*** test is that both timing and explanation are accounted for in the above analysis. This claim has always been apparent as having a transnational or international quality. That 'geographical' legal issues were raised by that was plainly acknowledged from the outset, by the parties and the courts, as matters for potential future resolution. The Defendant had given provisional indications as to the possible raising of statutory scope or *forum non conveniens* challenges, and the Courts gave directions taking their cue from that. That can readily be understood as a pragmatic step to give provisional directional effect to the stated intention to pursue subsequent alternative challenges without prejudice to the immunity challenge. It cannot readily be understood as a determinative crystallising out of all potentially relevant legal issues capable of arising, much less the disposal or exclusion of any matters *not* referred to. It paved the way for a second CPR 11(1) challenge, rather than determining its character or limiting its scope. There is no trace of any argued or considered basis on which it could have done otherwise.

48. In any event, the Claimant *necessarily* relied on the BRR special jurisdiction in bringing this claim, and did so, from the outset. That was always a matter on which she

necessarily acknowledged she could be called upon to satisfy a court before it was prepared to proceed to try the claim, including on the basis that the court questioned the matter of its own motion. It was not put to me that the Defendant was to be taken to have '*entered an appearance*' for the purposes of Art.26. The Claimant was put on notice of the BRR challenge at a time when she had been (and it appears still was) long expecting the final articulation of the Defendant's position on the 'geographical issues'. I am not told she took, or abstained from taking, any step in this litigation on any other basis.

49. Further, the Claimant did not raise the matter of submission to the jurisdiction until shortly before what the Defendant was reasonably expecting to be a trial of the merits of his application. The hearing was listed as such without demur. No application was made for the Defendant to be put to the defence of the claim, nor alternatively for judgment in default of a defence, on the basis of submission to the jurisdiction. The hearing of his jurisdiction application proceeded accordingly, with full argument on the merits of the application. It was not suggested the Claimant was at any practical disadvantage in making her case fully and fairly. On the contrary, her case was put both fully and forcefully.

50. I bear in mind the overriding objective of enabling the court to deal with cases justly, expeditiously and at proportionate cost. In all the circumstances, I am satisfied of the fairness of proceeding to make a substantive determination of the jurisdictional challenge, argued out in full before me. Whether this is a case the English courts can properly try on an actively contested jurisdictional basis is an important matter, with implications beyond the parties and the continuation of the present proceedings in this country, including for the courts of other countries. To the extent necessary, I extend time and grant the Defendant relief from sanctions accordingly.

C. THE SPECIAL JURISDICTION OF THE BRUSSELS RECAST REGULATION

(a) Legal framework

(i) The BRR

51. There is a degree of consensus between the parties as to how the BRR works. I do not understand the following high-level summary to be controversial.

52. The BRR regulates the distribution, as among member states, of jurisdiction over private law litigation, with a view to promoting the interests of justice by avoiding jurisdictional disputes, and providing clarity and certainty as to forum. Its general rule is set out in Article 4.1:

> Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the Courts of that Member State.

The default rule that legal claims must be brought against defendants in their own country is itself a fundamental legal principle. It expresses a prima facie entitlement of

defendants to be sued in their home state, and not to face the jeopardy of lawsuits in foreign countries. That in turn is underpinned by considerations of predictability and certainty from the perspective of a defendant (the involuntary party in legal proceedings), and by a policy opposed to unfair 'forum shopping' by claimants choosing jurisdictions most legally favourable and forensically convenient to themselves. There is no prima facie entitlement for claimants to bring claims in *their* own country (or another country of their own choice). The Defendant in this case is agreed to be domiciled in Spain; the default rule is therefore engaged.

53. But the BRR also provides for instances of 'special jurisdiction'. They include, by Article 7(2), that a person domiciled in one Member State may be sued in another Member State '*in matters relating to tort, delict, or quasi-delict, in the courts for the place where the harmful event occurred or may occur*'. So an action for harassment, as with any other tort, may be brought in the High Court against a defendant domiciled in Spain if the 'harmful event' occurred in England and Wales.

54. The BRR's recitals explain the underlying legal policy here further:

> The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.
>
> In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action, or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

Predictability and certainty for defendants remains a touchstone, but the special jurisdiction recognises that, consistently with that, it may 'in a few well-defined situations' promote the interests of justice for claims to be tried by the court local to the tortious 'harmful event' alleged. These will be cases where there is a 'close connection' between the national court and the event, facilitating, for example, the obtaining of documentary and witness evidence from within the jurisdiction.

55. According to EU law principles of interpretation, the instances of special jurisdiction, as exceptions to the fundamental rule, are to be construed narrowly. The Court of Justice of the European Union (CJEU) gave further guidance on the correct approach to Art.7.2. It noted in *Handelskwekerij GJ Bier BV & Stichting Reinwater v Mines de Potasse d'Alsace SA [1979] ECC 206* that the 'harmful event' had two aspects: the

'event giving rise to the damage' and the occurrence of the damage itself – in other words, cause and effect. It acknowledged that the 'place where the harmful event occurred' can be hard to interpret in situations where the 'place of the event giving rise to the damage' and the 'place where the damage occurs' are not themselves in the same single country. Its solution (at [24]) was that a defendant may be sued, at the option of a claimant, *either* in the courts for the place where the damage occurred *or* in the courts for the place of the event which gives rise to and is the origin of that damage.

56. The principles of narrow construction, and the policy considerations underlying both the general rule and the special jurisdiction, indicated to the CJEU a degree of further refinement of each of these limbs. Broadly speaking, the 'place where the damage occurred' is limited to the place of *proximate* and direct damage, in contradistinction to indirect (or 'ricochet') damage and to consequential loss; and the 'place of the event' is the place of the *originating* event, or the 'event which sets the tort in motion', in contradistinction to any subsequent contributory episodes. These refinements are said to be indicated by the need for both certainty and the closest of forensic ties to the foreign court.

57. The present case does not include a claim for defamation but it does include a claim for harassment by publication, and there is some measure of acceptance between the parties that the relevant jurisprudence at least potentially applies. The tort of defamation – particularly in the internet age, where publication across national boundaries became a norm – remained persistently difficult to fit into this 'harmful event' framework. And what a claimant may obtain by way of *remedies* in any given foreign country once jurisdiction is established, is a further question raised in a particularly acute form by that tort. The CJEU grappled with these questions in a series of defamation cases. The reference in the BRR recitals mentions defamation in particular, but as one example of '*violations of privacy and rights relating to personality*'. So I set out the defamation framework as at least a potential reference point for harassment.

58. The CJEU tackled the jurisdictional problems of 'international libel' in ***Shevill & Ors v Presse Alliance SA [1995]2 AC 18*** by focusing on what the BRR says about the 'particularly close connecting factor' between the action and the court, and 'the sound administration of justice and the effective conduct of proceedings', being the reasons for the special jurisdiction. It concluded that the injury caused by a defamatory publication occurs in the places where the publication is distributed, when the victim is known in those places. What became known as the *Shevill* Rule therefore stated that claimants had a choice. They could *either* proceed in defamation against defendants where the latter are domiciled, for *global* remedies for *all* the harm caused; *or* they could proceed in any or all countries where there is an actionable harmful event – a tort committed – for the harm caused by *that* completed tort in *that* country. If the latter choice was taken, it was the national law of that country which determined whether there was a completed tort and if so what could be recovered there. So a claimant had two routes to global remedies: the general jurisdiction based on defendant's domicile, or (if *all* of the 'harmful event' did not happen in a different single country) a cumulative mosaic of actions in different countries relying on the special jurisdiction each time. (The latter might or might not be preferable to claimants depending on local tort laws.)

59. When ***Shevill*** returned from the CJEU to the UK courts, the House of Lords took the opportunity to reaffirm that what constituted the 'harmful event' was to be determined

by the national court applying its own substantive law. In other words, the preliminary jurisdictional question for the High Court was whether a claimant could show to the requisite standard that all the components of a tort *actionable in the UK* were present (*Shevill v Presse Alliance (No.2) [1996] AC 959*). The position was further clarified in *Marinari v Lloyds Bank [1996] QB 217*. There the CJEU held that the *Shevill* Rule did not extend the special jurisdiction to each and every place where *any* adverse consequence of a libel could be felt. It did not, in particular, include a country where a claimant had suffered financial loss *consequential* to damage arising elsewhere.

60. The CJEU had further cause to refine the *Shevill* Rule in *eDate Advertising GmbH v X [2012] QB 654*. There, it was grappling with the particular difficulty facing claimants taking the 'mosaic' route to a global remedy in international libel cases in the internet age, when both cause and effect (publication and reputational damage) can take place across borders. So the CJEU held that, in those circumstances, if a claimant establishes jurisdiction in any country other than the defendant's country of domicile – that is to say, on the basis of sufficiently establishing a completed tort actionable in that country – then the claimant may be able to establish a *global remedy*, rather than merely a piece of the remedial mosaic in that country *if* they can also establish that that country is their 'centre of interests' ('COI') (see *Mahmudov v Sanzberro* [2022] 4 WLR 29).

61. That concept of a claimant's 'centre of interests' has itself been the subject of further attention by the CJEU and by the English courts, in the context of the exercise specific to defamation actions of establishing the locus of reputational harm. *Napag Trading Ltd v Gedi Gruppo Editoriale SPA [2021] EMLR 6* is an example. At [162], Jay J states in terms that 'centre of interests' is a 'subordinate issue' – the primary jurisdictional issue is the question of the locus of the harmful event. Citing *Marinari*, he put the position in this way at [26]:

> …even if the First Claimant's 'centre of interests' were held to be in England and Wales for present purposes, it would not automatically follow that its claims could be sustained. As a prior condition it would have to be established that there has been publication in England and Wales and that the First Claimant has suffered 'serious harm' (including 'serious financial loss') here, both being matters of domestic law…"

The 'centre of interests' concept, in other words, emerged in the context of the need to fit the phenomenon of internet libel into the BRR special jurisdiction rules, and was designed to ensure that a claimant can easily identify the court other than that of the defendant's domicile in which, having established jurisdiction, they may then sue for a global remedy – and that defendants can reasonably foresee before which foreign court they may be so sued. That is, of course, from the perspective of the defendant, a foreign court in the singular.

(ii) Approaching jurisdictional questions

62. In this case, the parties have proceeded on the basis that I must hold in mind both the autonomous (internationally consistent) meaning of the 'place of the harmful event' together with the guidance on that provided by the CJEU, and, at the same time, the function of national tort law in identifying the legally relevant 'harm' in the first place. Authority for that appears (in a non-defamation case) in the decision of the Supreme

Court in *JSC BTA Bank v Ablyazov & Anor [2020] AC 7272* per Lord Sumption and Lord Lloyd-Jones JJSC at [32]-[33]. Having confirmed that the expression '*place where the harmful event occurred*' required an autonomous interpretation, the judgment continues:

> However, the requirement of an autonomous interpretation does not mean that the component elements of the cause of action in domestic law are irrelevant. On the contrary, they have a vital role in defining the legally relevant conduct and thus identifying the acts which fall to be located … In particular, whether an event is harmful is determined by national law.

63. Approaching the question of the special jurisdiction therefore requires considering the autonomous question of whether England is either the place of the 'event giving rise to the damage' or the place 'where the damage occurs'; and the relevant 'event' and 'damage' are determined by English tort law. The latter requires consideration of whether the relevant components of an actionable tort, occurring in England, have been made out to the relevant standard.

64. The 'relevant standard' is well established – it is a 'good arguable case'. I have directed myself to what the Supreme Court said about that in *Goldman Sachs v Novo Banco SA [2018] 1 WLR 3683* at [9], and to the further guidance of the Court of Appeal in *Kaefer Aislamientos v AMS Drilling Mexico [2019] 1 WLR 3514*. It is a fact-sensitive and flexible test.

65. A claimant is required by this test to do more than merely raise an issue, but does not have to go so far as to establish a case on the balance of probabilities. Another way of putting the test is to ask whether a claimant has 'the better of the argument'. To address that, first, a claimant must 'supply a plausible evidential basis' that the necessary components of the tort's actionability are present within the jurisdiction. Second, if there is an issue of fact about that, or some other reason for doubting whether it applies, the court must take a view on the material available 'if it can reliably do so' at the interlocutory stage. Third, if no reliable assessment can be made, it will be sufficient if there is a plausible, albeit contested, basis for it. The test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced.

(iii) The elements of harassment

66. Harassment is a statutory tort. Section 1 of the Protection from Harassment Act 1997 provides as follows.

> **1. Prohibition of harassment.**
>
> (1) A person must not pursue a course of conduct—
>
> (a) which amounts to harassment of another, and
>
> (b) which he knows or ought to know amounts to harassment of the other.
>
> (1A) A person must not pursue a course of conduct —

(a) which involves harassment of two or more persons, and

(b) which he knows or ought to know involves harassment of those persons, and

(c) by which he intends to persuade any person (whether or not one of those mentioned above)—

(i) not to do something that he is entitled or required to do, or

(ii) to do something that he is not under any obligation to do.

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

(3) Subsection (1) or (1A) does not apply to a course of conduct if the person who pursued it shows—

(a) that it was pursued for the purpose of preventing or detecting crime,

(b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or

(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

67. Section 7 of the Act makes further provision as follows:

7. Interpretation of this group of sections.

(1) This section applies for the interpretation of sections 1 to 5A.

(2) References to harassing a person include alarming the person or causing the person distress.

(3) A "course of conduct" must involve—

(a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person, or

> (b) in the case of conduct in relation to two or more persons (see section 1(1A)), conduct on at least one occasion in relation to each of those persons.
>
> (3A) A person's conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another—
>
> (a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and
>
> (b) to be conduct in relation to which the other's knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring.
>
> (4) "Conduct" includes speech.
>
> (5) References to a person, in the context of the harassment of a person, are references to a person who is an individual.

68. There are accordingly a number of key components of the tort. Crucially, there must be a *course of conduct* – two or more acts, that is things said or done, direct or indirect. (A course of conduct is not an essential component of the Claimant's intended additional base of liability – intentional infliction of injury – but that is what she chooses in fact to rely on in the claim she wishes to bring.) Indirect acts include participation by helping or encouraging others, or by material or active approval for a course of conduct (*Majrowski v Guy's & St Thomas's NHS Trust* [2007]1 AC 224 per Lord Hope at [20]).

69. The nature of the tort of harassment was considered more generally by Nicklin J in *Hayden v Dickinson* [2020] EWHC 3291 (QB). He characterised it as '*a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress'*. The conduct '*must cross the boundary between that which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the border from the regrettable to the objectionable, the gravity of the misconduct must be of an order which would sustain criminal liability*' ([40]).

70. He continued with the following survey of the relevant authorities on harassment ([44]):

> i) Harassment is an ordinary English word with a well understood meaning: it is a persistent and deliberate course of unacceptable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress; "a persistent and deliberate course of targeted oppression": *Hayes v Willoughby* [1], [12] per Lord Sumption.

ii) The behaviour said to amount to harassment must reach a level of seriousness passing beyond irritations, annoyances, even a measure of upset, that arise occasionally in everybody's day-to-day dealings with other people. The conduct must cross the boundary between that which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the border from the regrettable to the objectionable, the gravity of the misconduct must be of an order which would sustain criminal liability under s.2: *Majrowski* [30] per Lord Nicholls; *Dowson* [142] per Simon J; *Hourani* [139]-[140] per Warby J; see also *Conn v Sunderland City Council* [2007] EWCA Civ 1492 [12] per Gage LJ. A course of conduct must be grave before the offence or tort of harassment is proved: *Ferguson v British Gas Trading Ltd* [17] per Jacob LJ.

iii) The provision, in s.7(2) PfHA, that "references to harassing a person include alarming the person or causing the person distress" is not a definition of the tort and it is not exhaustive. It is merely guidance as to one element of it: *Hourani* [138] per Warby J. It does not follow that any course of conduct which causes alarm or distress therefore amounts to harassment; that would be illogical and produce perverse results: *R v Smith* [24] per Toulson LJ.

iv) s.1(2) provides that the person whose course of conduct is in question ought to know that it involves harassment of another if a reasonable person in possession of the same information would think the course of conduct involved harassment. The test is wholly objective: *Dowson* [142]; *Trimingham* [267] per Tugendhat J; *Sube* [65(3)], [85], [87(3)]. "The Court's assessment of the harmful tendency of the statements complained of must always be objective, and not swayed by the subjective feelings of the claimant": *Sube* [68(2)].

v) Those who are "targeted" by the alleged harassment can include others "who are foreseeably, and directly, harmed by the course of targeted conduct of which complaint is made, to the extent that they can properly be described as victims of it": *Levi v Bates* [34] per Briggs LJ.

vi) Where the complaint is of harassment by publication, the claim will usually engage Article 10 of the Convention and, as a result, the Court's duties under ss.2, 3, 6 and 12 of the Human Rights Act 1998. The PfHA must be interpreted and applied compatibly with the right to freedom of expression. It would be a serious interference with this right if those wishing to express their own views could be silenced by, or threatened with, proceedings for harassment based on subjective claims by individuals that they felt offended or insulted: *Trimingham* [267]; *Hourani* [141].

vii) In most cases of alleged harassment by speech there is a fundamental tension. s.7(2) PfHA provides that harassment includes "alarming the person or causing the person distress". However, Article 10 expressly protects speech that offends, shocks and disturbs. "Freedom only to speak inoffensively is not worth having": *Redmond-Bate v DPP* [2000] HRLR 249 [20] per Sedley LJ.

viii) Consequently, where Article 10 is engaged, the Court's assessment of whether the conduct crosses the boundary from the unattractive, even unreasonable, to oppressive and unacceptable must pay due regard to the importance of freedom of expression and the need for any restrictions upon the right to be necessary, proportionate and established convincingly. Cases of alleged harassment may also engage the complainant's Article 8 rights. If that is so, the Court will have to assess the interference with those rights and the justification for it and proportionality: *Hourani* [142]-[146]. The resolution of any conflict between engaged rights under Article 8 and Article 10 is achieved through the "ultimate balancing test" identified in *In re S* [2005] 1 AC 593 [17] per Lord Nicholls.

ix) The context and manner in which the information is published are all-important: *Hilson v CPS* [31] per Simon LJ; Conn [12]. The harassing element of oppression is likely to come more from the manner in which the words are published than their content: *Khan v Khan* [69].

x) The fact that the information is in the public domain does not mean that a person loses the right not to be harassed by the use of that information. There is no principle of law that publishing publicly available information about somebody is incapable of amounting to harassment: *Hilson v CPS* [31] per Simon LJ.

xi) Neither is it determinative that the published information is, or is alleged to be, true: *Merlin Entertainments* [40]-[41] per Elisabeth Laing J. "No individual is entitled to impose on any other person an unlimited punishment by public humiliation such as the Defendant has done, and claims the right to do": *Kordowsk*i [133] per Tugendhat J. That is not to say that truth or falsity of the information is irrelevant: *Kordowski* [164]; *Khan v Khan* [68]-[69]. The truth of the words complained of is likely to be a significant factor in the overall assessment (including any defence advanced under s. 1(3)), particularly when considering any application interim injunction (see further [50]-[53] below). On the other hand, where the allegations are shown to be false, the public interest in preventing publication or imposing remedies after the event will be stronger: *ZAM v CFM* [2013] EWHC 662 (QB) [102] per Tugendhat J. The fundamental question is whether the conduct has additional elements of oppression, persistence or unpleasantness which are distinct

> from the content of the statements; if so, the truth of the statements is not necessarily an answer to a claim in harassment.
>
> xii) Finally, where the alleged harassment is by publication of journalistic material, nothing short of a conscious or negligent abuse of media freedom will justify a finding of harassment. Such cases will be rare and exceptional: *Thomas v News Group Newspapers Ltd* [34]-[35], [50] per Lord Phillips MR; *Sube* [68(5)-(6)].

71. Nicklin J's summary was approved by the Divisional Court in *Scottow v Crown Prosecution Service [2021] 1 WLR 1828*. The Court continued (at [25]):

> Three further points may be added:
>
> (1) A person alleging harassment must prove a "course of conduct" of a harassing nature. Section 7(3)(a) of the PfHA provides that, in the case of conduct relating to a single person, this "must involve … conduct on at least two occasions in relation to that person". But this is not of itself enough: a person alleging that conduct on two occasions amounts to a "course of conduct" must show "a link between the two to reflect the meaning of the word 'course'": *Hipgrave v Jones* [2005] 2 FLR 174, para 74 (Tugendhat J). Accordingly, two isolated incidents separated in time by a period of months cannot amount to harassment: *R v Hills* [2001] 1 FLR 580, para 25. In the harassment by publication case of *Sube v NewsGroup Newspapers Ltd* [2020] EMLR 25 I adopted and applied this interpretative approach, to distinguish between sets of newspaper articles which were "quite separate and distinct". One set of articles followed the other "weeks later, prompted, on their face, by new events and new information, and they had different content": paras 76(1) and 99 (and see also para 113(1)).
>
> (2) As Ms Wilson reminded us, where the claimant is, by choice, a public figure that should influence any assessment of whether particular conduct amounts to harassment of that individual; such a person has "inevitably and knowingly laid themselves open to close scrutiny of their every word and deed", and others can expect them to be more robust and tolerant accordingly: *Porubova v Russia* (Application No 8237/03) (unreported) 8 October 2009, para 45, and domestically, *Trimingham v Associated Newspapers Ltd* [2012] 4 All ER 717, paras 249–250.
>
> (3) In a case of alleged harassment by publication the court, in order to protect the right to freedom of speech,
>
> > "should take account of the extent to which the coverage complained of is repetitious and taunting, as opposed to being new, and prompted by some fresh newsworthy event. The

> imposition of liability in respect of coverage that falls in the latter category will be harder to justify": *Sube* at para 106(2).

72. An essential element of 'harassment' is therefore that a course of conduct is something more than a series of events attributed to the same person. A 'course of conduct' is more than the additive sum of its parts. A *nexus* between the activities complained of is required; a court must assess whether the acts complained of are separate or linked together to form a specific and coherent whole. Whether the activities can be classified as a course of conduct will depend on factors such as '*how similar they are in character, the extent to which they are linked, how closely in time they may have occurred, and so on*': *Merelie v Newcastle Primary Care Trust [2004] EWHC 2554 (QB)* at [22].

73. As well as distinctive linkage, essential for establishing a course of conduct, the necessary *quality* of the course of the conduct must be established – including its oppressiveness, persistence, and gravity to a quasi-criminal degree. This is a fully objective test.

(b) Consideration

(i) The 'harmful event': English tort law

74. The jurisdictional question is whether, in this claim, England is the place of the alleged harmful event – the event giving rise to the claimed damage and/or the place where the claimed damage occurs (the Claimant relies on both). To begin answering that requires close attention to the domestic law definitions in the first place. As the authorities put it, '*the component elements of the cause of action in domestic law … have a vital role in defining the legally relevant conduct and thus identifying the acts which fall to be located … In particular, whether an event is harmful is determined by national law*'.

75. The tort of harassment is a relatively recent addition to English law. Unsurprisingly, I was shown no domestic authority dealing with High Court jurisdiction over a pure harassment claim in a contested case such as the present (involving both alleged words and deeds, and not brought ancillary to a defamation action). I was given no information about the availability or otherwise of an equivalent cause of action in other BRR jurisdictions, and shown no direct overseas comparator in applying the BRR special jurisdiction.

Course of conduct

76. The English tort is distinguished by several notable features. These start with that central requirement for a 'course of conduct'. As a bare minimum, that means at least two episodes attributable to a defendant. Then there must be meaningful linkage – a pattern – connecting the events, *over and above* the defendant's involvement. Next, the course of conduct must be targeted at the claimant. But the essence of the tort is then the *quality* of the course of conduct. The authorities emphasise a demanding standard for passing the threshold of unlawfulness. The course of conduct must be more than unwanted, unreasonable and upsetting. It must be persistent, oppressive, and of a gravity on a par with criminality. That tortious quality is plainly evaluative and highly fact-sensitive. And it must be assessed *objectively* – a claimant's subjective feelings about it is not the qualitative test.

77. All of this makes real demands on the pleading of a harassment claim. A claimant must identify the 'acts of the defendant' relied on, why they are said to constitute a course of conduct, and how it is said the objective qualitative test is passed on the pleaded facts. That may be shortly done in the most egregious cases. But harassment is not confined to open confrontation; it may also be constituted more insidiously. Where a claimant relies on the cumulative and corrosive effect of a large number of indirect or low-level episodes, they may need to spell out more explicitly what they say makes it a course of conduct of the necessary quasi-criminal quality. This is not just a matter of the strength of a claimant's case. It is a matter of the definition of the tort.

78. It is for a claimant to choose in the first place what episodes to rely on, how to identify and describe their interconnectedness, and what they say makes a course of conduct quasi-criminal. That defines the target a defendant has to aim at. It may turn out not to be necessary for a claimant to establish factually each and every pleaded act of a defendant at trial. But that does not make every pleaded course of conduct infinitely divisible, nor does it alter the fact that a harassment claimant must start by defining and describing the 'course of conduct' complained of and what is said to make it tortious. A collection of events will not do. Again, it is for a claimant to identify whether a single course or multiple courses of conduct are alleged, and there may be choices about that. But what the claimant alleges to constitute harassment, if it is *capable* of doing so, defines what they must then be ready to prove. That imposes an important discipline on the drafting of harassment pleadings.

79. To re-emphasise, it is a course of conduct of the necessary quality which constitutes the tort, and which must be so pleaded – that composite entity, not any individual act or collection of acts. It is that entity which is the relevant harmful causative 'event' in the first limb of the BRR special jurisdiction test, the 'event' which must then be 'located'.

Acts of a defendant

80. The course of conduct must be composed of acts of a defendant. A second distinguishing feature of the statutory definition is the provision it makes for attributing to a defendant the conduct of others. There is no indication in the Act (or the authorities) that it affects the ordinary law of agency in respect of a course of conduct – or any constituent element of it – undertaken by another on a defendant's behalf. But it does appear intended to affect the ordinary law of auxiliary or joint liability, by deeming a *person's conduct on any occasion*, if aided, abetted, counselled or procured by another, to be the conduct, *on that occasion,* of *both*.

81. Read together with the indication in ***Majrowski*** that a tortious course of conduct may be composed of both direct and indirect acts of a defendant, where '*indirect acts include participation by helping or encouraging others, or by material or active approval for a course of conduct*', that produces an expansive ambit of conduct for which a defendant will be liable *as principal*. To put this another way, the *actus reus* course of conduct of the tort of harassment is capable of being made up of acts done straightforwardly by a defendant to a claimant *and/or* a range of acts done by a defendant in relation to third parties – provided always the course of conduct is targeted at the claimant.

Harassment by speech

82. A third distinguishing feature of the tort is that harassment may be constituted, in whole or in part, by oral speech or written publication. But defendants do have rights to freedom of expression protected by Art.10 ECHR, and the definition of the tort is limited accordingly. Art.10 is capable of protecting speech which is offensive, unreasonable, and causative of alarm, anxiety or distress. It protects journalism and the freedom of the press. The definition of the tort defers to these protections.

83. Harassment by speech, moreover, remains concerned with the oppression of a claimant by a defendant; it is not concerned with the protection or vindication of a claimant's reputation. It is entirely possible for a claimant to be harassed by defamatory publications; these are not mutually exclusive causes of action. But then the focus of the harassment claim must be on their cumulatively oppressive rather than individually defamatory quality. The courts are astute in claims involving harassment by speech to ensure that a claimant is not in effect seeking to circumnavigate the demands of defamation law (including the short limitation period) by bringing what is in substance a defamation claim in the form of a harassment action. I deal with these issues more fully in the second part of this judgment.

Being harassed

84. A fourth distinguishing feature of the tort is that the statutory definition does not itself specify the causation or production of any particular results by the course of conduct: a conundrum for the test of the 'place of direct damage' in the second limb of the BRR special jurisdiction test. It simply provides that the course of conduct must, judged *wholly objectively*, amount to 'harassment'. In other words, the causative conduct of 'harassment' and the effect of 'being harassed' are set out in the statutory definition as sides of the same coin.

85. The picture built up by the authorities might suggest that the course of conduct must not only be targeted at another person, and calculated to cause them alarm, fear or distress; it must in fact cause them alarm, fear or distress. But whether that is to be understood as part of the constituent elements of actionability, or merely a statement of the obvious – that a remedy is unlikely to be forthcoming for a harassing course of conduct without at least that degree of impact – is perhaps a moot point, considered further below. In any event, it is clear enough again from the statutory definition that it is the grave and oppressive course of conduct itself, rather than any isolated constituent element of that course of conduct, which must cause the relevant effect.

86. At the same time, evaluating whether the gravity and oppression of the course of conduct is sufficient to cross the threshold into constituting harassment will no doubt be informed by its objective propensity to cause unacceptable effects. The definition of the tort, in other words, does not easily crystallise out into clear and simple cause-and-effect components. That does not make the definition of the tort circular, but it does perhaps make it to a degree iterative, and certainly illustrates its high degree of fact-sensitivity. If a claimant 'being harassed', or being caused alarm, fear or distress, is an essential component of the tort, then that, no less than harassment itself, is difficult to describe as an 'event', or a state of affairs with an easily graspable point of precipitation, or even as very readily separable into direct and indirect harm.

87. Identifying, and then locating, the 'harmful event' of harassment as a matter of English tort law is not, in all the circumstances outlined above, a simple exercise. It is certainly

not one which can be undertaken without reference *from the outset* to the particular factual matrix alleged. But put at its most general, I have to consider whether the Claimant has a good arguable case (pleaded and on at least a plausible evidential basis) that the Defendant *has harassed* her, and/or that she has *been harassed* by him, and that either or both of those *took place in England*.

(ii) The alleged 'course of conduct'

88. The Defendant brings his jurisdictional challenge on the basis that not only has the Claimant not adequately established English jurisdiction over the whole of her claim, she has not even properly and coherently addressed the issue. As Mr Thompson put it, she has always purposed '*to bring an extremely multijurisdictional tort action in a single country which is not the proper forum to determine the entirety of the dispute*'. So, he says, the Claimant had to choose either (a) to sue in the Defendant's country of domicile, Spain, bringing in all of the events on which she relies as forming a composite course of conduct, and the cumulative consequences for herself of that course of conduct, or (b) to sue only on such parts of the course of conduct in relation to which she could establish coherent and causative action by the Defendant in England, *itself* amounting to a qualifying course of conduct; and/or direct harm to herself in England.

89. But, says Mr Thompson, she has done neither. She does not plead or evidence either a tortious and causative *course of conduct* by the Defendant *in England*, or direct harm sustained by her *in England*. Instead, she relies on an aggregated course of conduct the components of which occurred in various different countries; and, asserting neither domicile nor habitual residence herself in England, and being a person resident in Monaco and with an international business model and an international lifestyle, she makes a claim of aggregated or cumulative harm caused to herself, without adequate reference to geography, seeking a global remedy for it. That, he says, is simply to fail to engage with the geographical jurisdictional issues at all.

90. That jurisdictional challenge has prompted both evidence directed to it from the Claimant and further proposed amendments to her pleadings. I consider first the question of the pleading and evidence of a causative course of conduct by the Defendant *in England*. That is because of the centrality of the concept of course of conduct to the tort. The Claimant's primary case focuses not on the 'cause' limb of the special jurisdiction but on the 'effect' limb. But as I have set out, the two are more closely interrelated and harder to analyse separately in harassment than they may be in simpler torts.

91. Mr Thompson developed his argument by working from the bottom up, challenging first the Claimant's ability to rely on the individual components of her pleaded 'course of conduct' item by item, with reference to the geography of each item. The Claimant says he is not, as a result, to be taken to have made a *wholesale* jurisdictional challenge on the 'cause' limb. But, as I shall explain, that is indeed and inevitably the implication of the challenge he makes.

92. The Defendant is correct in the first place to say that the Claimant does not plead an (exclusively) *English* course of conduct as such. Some of the constituent events she attributes to the Defendant are said to have taken place in England. Others are variously said to have taken place specifically in Spain, Monaco, Abu Dhabi, Austria, Riyadh, Switzerland, Los Angeles, New York, Tahiti and the Bahamas. A significant number

have no geographical attribution at all, not least because the claim attributes them to the Defendant on only an inferential basis in the first place, without speculating where he might have been. So the Claimant has chosen to plead an international course (or, as she wishes to amend her particulars, 'courses') of conduct which includes constituent acts in the UK.

93. This is itself a problematic position to take on a question of English jurisdiction over a harassment claim. The 'causative' limb of the special jurisdiction test demands a tortious *course of conduct* within the jurisdiction: that is the core definition of the tort. Individual events are not enough unless they themselves add up to a tortious course of conduct – of the necessary connectedness, oppressiveness and gravity – in their own right. Otherwise there is no completed causative *actus reus* of the tort within the jurisdiction – the 'harmful event' did not take place here.

94. The Claimant nowhere says that the exclusively English 'acts of the Defendant' relied on add up to a distinct 'course of conduct' in their own right, or, if so, how. Instead, I am invited to agree that the High Court is entitled to assume jurisdiction '*over those pleaded acts of harassment that took place in England*' and that England is where '*much of the campaign of harassment has been conducted*'. But neither of those establishes the necessary basis for an assumption of jurisdiction based on the completed *actus reus* of harassment – a qualifying course of conduct – having occurred in England. 'Acts of harassment' (if not an oxymoron) does not identify a tort.

95. (I consider the question of the geographical, or territorial, scope of the Protection from Harassment Act in the second part of this judgment. I do not need to resolve it in order to resolve the jurisdictional question, since the logic of that question works in reverse. *Even if* a course of conduct composed wholly or partly of foreign acts could amount to harassment in English law, the causative limb of the BRR special jurisdiction requires a completed causative tortious course of conduct having taken place physically *within the jurisdiction*. Actionability in England is a necessary, but not a sufficient, condition for jurisdiction. Art.7(2) of the BRR is concerned not only with the domestic definition of the 'harmful event' but, crucially, with where the 'event' happened. The essential, and autonomously-defined, close practical connection with an English court is not otherwise established. Inclusive geographical scope provisions do not obviate the need to address that fundamental point, and the *facts* of location.)

96. If the Claimant has not identified, pleaded or evidenced a coherent *course of conduct in England* amounting to the completed actus reus of harassment, she has given no basis for discerning a good arguable case to that effect. It is not enough simply to invite a court to *infer* such a course of conduct by asking it to work out, item by item, which events in a pleaded international course of conduct are said to have been perpetrated by a defendant in England and then asking it to discern for itself whether that might arguably add up on any basis to a harassing course of conduct within the jurisdiction – much less simply to assume it does.

97. It is for harassment claimants to identify and plead the course of conduct which they say is tortious, and say why. A collection of incidents will not do. Nor can a claimant simply invite a court to assume or infer that any possible *subset* of the course of conduct pleaded must necessarily itself be taken to constitute a *pleaded* tortious course of conduct, whether of the character alleged overall or otherwise. That is by no means the logic of the tort. It *matters*, for all the reasons going to the nature of harassment set out

above, what is pleaded by way of a course of conduct, both as to quantity and quality and, crucially, as to combination and totality. A pleaded course of conduct cannot automatically be taken to comprehend a pleading that *any* two or more constituent acts themselves constitute a tortious course of conduct. And the Claimant does not actually so plead or suggest in any event.

98. We nevertheless spent a considerable amount of time at the hearing on the suggested exercise of trying to sort the pleaded constituent acts of the Defendant into those completed in England and those not, on the basis of whether the pleading and evidence supported that categorisation. The unsatisfactory nature of that exercise demonstrated its inappropriateness, not least because it did not recognisably yield any clear proposition as to what exactly was being said in the end about what it all added up to. But just because we did spend so much time on it, I record the following brief observations on the issues arising, before returning to my principal conclusion.

99. First, the Claimant is now recognisably asserting (including in her responsive witness statement of 12th July 2023, and in the proposed amendments to her pleadings) that a number of individual acts of the Defendant himself (that is to say, in person) pleaded as part of the overall course of conduct took place in England. Some of the indications to that effect are, however, of quite a generalised, suppositional or allusive nature, and their weight-bearing potential is correspondingly attenuated. But others are more specific and more directly tackled in her evidence, including phone calls made to and meetings with her, and actions addressed to her indirectly through third parties close to her. Of these, even if I cannot 'reliably' take a view that they took place as alleged, in the absence of denial or contrary evidence from the Defendant it is said I am able to discern an ostensibly 'plausible evidential basis' for being sufficiently satisfied that these events at least took place in England.

100. A substantial number of the incidents said to have taken place in England are not, however, said to have been undertaken by the Defendant in person. They are said to have been undertaken by others, and inferences invited, *including by reference to the pattern of the overall pleaded course of conduct*, that he was behind them. That is not necessarily fatal from the perspective of domestic law. The tort of harassment takes an expansive view of what amounts to potentially constituent acts of a defendant, including 'indirect acts' (participation by helping or encouraging others, or by material or active approval for a course of conduct), and auxiliary and joint acts with others. That expansive view is not unconnected to the focus of the tort on a course of conduct, and the associated core process of discerning a pattern to events in all the potentially relevant circumstances. But there are a number of more particular questions arising here on a jurisdictional challenge.

101. First, if these are being pleaded as primary *acts of the Defendant* then an issue arises about whether, to be capable of constituting *his* acts *within the jurisdiction*, the participation etc itself has to be within the jurisdiction. Is it enough, in other words, if the third parties act within the jurisdiction, but all of the Defendant's participatory acts took place elsewhere? I was taken to no direct authority to help answer that particular question, and there is no pleading or evidence addressed to it.

102. Second, if these are being pleaded not as primary acts of the Defendant but his secondary acts through agents or co-perpetrators – and agency is expressly pleaded – Mr Thompson raises two specific problems. The first is that no particulars of agency

are pleaded and no direct evidence offered as to the alleged relationship between the Defendant and the perpetrators – it is entirely a matter of inference, or rather supposition. These incidents include episodes described as surveillance, intrusion or being followed by unknown persons, the connection to the Defendant apparently relying entirely on context and suspicion – or, the Defendant says, on nothing but speculation. Inference must have a graspable basis, to distinguish it from guesswork. If what is being alleged is covert and anonymised harassment, then of its nature deniability is of the essence and attribution a problem. It is, however, a problem claimants do have to grapple with.

103. The rather greater problem is, however, that the attribution of the acts of others to a Defendant does not appear, on the authorities, to be solely a matter for domestic law to resolve, but rather to engage to at least some degree the autonomous test for BRR special jurisdiction. The Defendant takes me in this respect to the decision of the CJEU in *Melzer v MF Global UK Ltd [2013] QB 1112*. This is a case which is not on all fours factually with the present case, not least in relation to the parties before the court. It is also a case the effects of which appear to be a matter of debate among the leading commentators. Nevertheless, the CJEU's analysis proceeds from first principles and includes the following:

> [32] The question might arise under what conditions, where there are a number of perpetrators, the acts of one of them could be imputed to the others in order to sue the latter before the courts in whose jurisdiction those acts have taken place. In the absence of a concept common to the national legal systems and the European Union enabling such imputation to be made, the national court would probably refer to its national law.
>
> …
>
> [34] The use of national legal concepts … would give rise to different outcomes among the Member States liable to compromise the aim of unifying the rules of jurisdiction …
>
> [35] Furthermore, a solution which consists in making the identification of the connecting factor dependent on assessment criteria having their source in national substantive law would be contrary to the objective of legal certainty since, depending on the applicable law, the actions of a person which took place in a Member State other than that of the court seised might or might not be classified as the event giving rise to the damage for the purpose of the attribution of jurisdiction …. That solution would not allow the defendant reasonably to predict the court before which he might be sued.
>
> [36] Moreover, in so far as it would lead to allowing the presumed perpetrator of a harmful act to be sued before the courts of a Member State within whose jurisdiction he has not acted, on the basis that the event giving rise to the damage occurred there, that solution would go beyond the situations

> expressly envisaged in that regulation and, consequently, would be contrary to its general scheme and objectives.
>
> [37] That being said, it must be recalled that the fact that it is impossible for the court within whose jurisdiction the presumed perpetrator did not himself act to take jurisdiction on the ground that it is the place of the event giving rise to the damage in no way compromises the applicability of the rules of jurisdiction, both general and special …
>
> [38] The fact remains that the perpetrator of a harmful act may always be sued … before the courts in whose jurisdiction he acted or, otherwise, in accordance with the general rule, before the court for the place where he is domiciled.
>
> …
>
> [40] It follows from the foregoing that, in circumstances such as those in the main proceedings, in which only one among several presumed perpetrators of the alleged harmful act is sued before a court within whose jurisdiction he has not acted, an autonomous interpretation … precludes the event giving rise to the damage from being regarded as taking place within the jurisdiction of that court.

104. I do not, and do not need to, take from this any clear principle that the acts of an agent cannot constitute the acts of a principal for the purposes of the 'cause' limb of the jurisdictional test where the agent acts in one jurisdiction on the authority of a principal in another. But I was shown no clear authority for the contrary principle either. And I do take from ***Melzer*** at least the thoughts that (a) the BRR concerns itself *in principle* with the issue of a causal act by one person being attributed to another under national law for the purposes of determining jurisdiction, because that tends against the fundamental principles of certainty, predictability and the proximity of a *defendant's* conduct to the courts of another country and (b) great care needs to be taken with appeals to intuition as to the 'right' outcome in such matters, when the starting point is the fundamental principle of a defendant's entitlement to be sued in his place of domicile, subject only to limited exceptions of a predictable nature made in the interests of the effective administration of justice.

105. These sorts of issues, cropping up as they did in the course of an invited attempt to *infer* a completed course of harassing conduct by the Defendant in England, illustrate the problem with the exercise in the first place. I certainly cannot take 'a reliable view' on the evidence provided as to exactly which of the pleaded episodes were acts of the Defendant taking place in England. In most cases the Claimant cannot give any direct *evidence* herself of the Defendant's involvement, or where he was, and she has provided no evidence from anyone else at this stage. This is not even a 'plausible evidential basis' for being able to identify the potentially relevant 'English episodes'. But in any event, the key point remains that she does not plead, evidence or even explain how and

why I can work on the basis that any collection of English episodes arguably does or could add up to a tortious *course of conduct*.

106. It is simply the wrong approach. The jurisdictional test cannot be satisfied by doing no more than identifying a collection of English acts featuring in a pleaded international course of conduct and inviting an inference that they themselves add up to an actionable course of conduct in their own right – even if, contrary to my conclusion, the Claimant had sufficiently succeeded in identifying such a collection. The right approach works the other way around. It has to *start* with the pleaded identification of an English course of conduct and then establish that, through pleaded constituent acts of the Defendant in England. Whether any 'English subset' of a pleaded international course of conduct amounts to an actionable tort in its own right must itself be pleaded and evidenced. It cannot be assumed as matter of logic to have that quality: harassment is a distinctively *cumulative* tort, and pleading a whole course of conduct as harassment does *not* imply pleading that any subset of it must itself constitute harassment (even though it may). That cannot be taken to speak for itself, and it cannot be left to others – either to a court dealing with a jurisdictional question or to a defendant faced with defending a claim in England – to make what they will of a collection of English events. If a claimant relies on a complete and coherent course of conduct constituting harassment having taken place in England to establish English jurisdiction, it must be identified and evidenced *as such.* This Claimant has not done that. Any collection of events she might have sufficiently established within the jurisdiction do not automatically sort themselves into a sequence of the necessary coherence, connectivity, persistence and gravity.

107. The Claimant pleads an international course of conduct. In itself, that is by definition not a tortious 'event' which took place in England. She has not persuaded me as her pleadings and evidence stand, that she has the better of the argument that the Defendant executed any more limited tortious course of conduct in England. She has not even identified or described, or provided a corresponding evidential basis, plausible or otherwise, for, a tortious course of conduct in England. She has barely 'raised an issue' about it. So I have no basis for concluding there is a good arguable case for the High Court assuming jurisdiction over her claim on the basis that *the causative harmful event which she pleads* happened in England. I cannot speculate on whether she might successfully have been able to plead and evidence a tortious course of conduct in England. But she has not, on this occasion, done so. Of course, this is not her primary case on the special jurisdiction in any event. It is to her primary case I now turn.

(iii) The place where the damage occurred

108. The parties have very different views about the correct approach to this issue. The Claimant says the position is straightforward: the 'damage' of harassment is alarm, fear and distress, so the place where the damage occurred is the place where the Claimant becomes aware of harassing events and experiences alarm, fear and distress as a result; and on the facts, she has done so in England. The Defendant says that is to ignore the autonomous rules about *direct* damage; he says the Claimant's case is based on the consequential, and not the immediate, effects of the causative event and does so by impermissibly 'pooling' or aggregating the impact of all the incidents she complains of. He says that, instead, it is necessary to look at the different instances of impact pleaded – trespass to property, an individual act of publication, and so on – and apply the autonomous rules about impact, to work out where the *proximate* damage of these events took place.

109. There are substantial problems with both of these proposed approaches. The Defendant's solution raises all the difficulties just discussed of failing to get to grips with the fact that the causative 'event' of the tort we are dealing with is a *course of conduct*, and jurisdiction will depend on where the damage caused by *that* 'event' occurs. The impact of any individual constituent episode of that course of conduct is simply not the legally relevant 'damage' as defined by English tort law. Any individual episode need have no particular effect at all – it is the cumulative, oppressive effect of the total course of conduct which is of the essence of the tort. (And it is also the cumulative effect of a course of conduct on which the Claimant wishes to rely for her proposed new personal injury claim.)

110. But the Defendant's objections to the Claimant's approach in turn focus on three problematic aspects: lack of congruence itself with the definition of the tort, dissonance with the autonomous principles of the special jurisdiction, and sustainability on the facts.

111. As noted above, the statutory definition does not specify that a claimant should in fact have suffered alarm, fear, distress or any other symptom of harassment. That may well in practice be what a harassment claimant sues for compensation *for*. But it is not fanciful to posit the possibility of a completed tort productive of other symptoms. Harassment is about oppression, which may be productive of disempowerment, the curtailment of personal autonomy in daily life and invasion of privacy rather than any particular emotional reaction. And the English statute is about *protection* from harassment. It is a tort in which injunctive relief – stopping the course of conduct – is a dominant remedy. The nature and quality of any alarm, fear or distress experienced by a claimant may lie principally in the prospect of the continuation of the conduct, rather than being a neatly separable symptom of past historic events. The legally relevant damage of harassment is, more simply, just 'being harassed'.

112. Mr Thompson says even if the production of alarm, fear or distress *is* regarded as a component of the tort in English law, that would have to qualify as indirect, rather than direct, damage (as would any new head of damage in personal injury) for the purpose of the autonomous definition. For that purpose, the place of direct damage is the place where the immediate consequences of the causal event occur or where the damage initially manifests itself, to the exclusion of the place where the indirect harm or subsequent consequences are suffered. Mr Thompson distils that formulation from the CJEU jurisprudence on place of harm (the leading cases on the BRR special jurisdiction are *Dumez France SA and Tracoba SARL v Hessische Landesbank [1990] ECR I-00049* and *Marinari v Lloyd's Bank Plc [1996] QB 217*; the Rome II decision in *Lazar v Allianz SpA C-350/14* is also relied on). These cases are of course potentially analogous only – there is no direct authority on harassment. But Mr Thompson says their logic applies inexorably to the present case.

113. That is because to suggest the 'place of damage' is the place where a harassment claimant hears about an episode and experiences anxiety etc is offensive to the underlying principles of the special jurisdiction. It is territorially adventitious – the location of a claimant's discovery and emotional reactions is a happenstance which may bear no direct relationship to the causative event at all. It is wholly unpredictable by a defendant. It is uncertain – it relies on an amorphous state of mind, fluctuating over time, as to which no single identity in time or place could possibly be attached. And, most fundamentally of all, it 'tends to the domicile of the claimant'. A claimant's

developing or continuing state of mind is co-located with a claimant. A claimant's location is determined entirely autonomously by them. That gives a claimant complete control over jurisdictional locus in a way which is unpredictable for, and unfair to, a defendant, and repugnant to the principles of the BRR.

114. The CJEU's analysis in ***Dumez*** went as follows, and Mr Thompson says its logic applies equally here:

> [16] In that connection the Convention, in establishing the system for the attribution of jurisdiction, adopted the general rule that the courts of the defendant's domicile would have jurisdiction (Title II, Article 2). Moreover, the hostility of the Convention towards the attribution of jurisdiction to the courts of the plaintiff's domicile was demonstrated by the fact that the second paragraph of Article 3 precluded the application of national provisions attributing jurisdiction to such courts for proceedings against defendants domiciled in the territory of a Contracting State.
>
> [17] It is only by way of exception to the general rule whereby jurisdiction is attributed to the courts of the defendant's domicile that Title II, Section 2, attributes special jurisdiction in certain cases, including the case envisaged by Article 5(3) of the Convention. As the Court has already held (*Bier v Mines de Potasse d' Alsace*, paragraphs 10 and 11), those cases of special jurisdiction, the choice of which is a matter for the plaintiff, are based on the existence of a particularly close connecting factor between the dispute and courts other than those of the defendant's domicile, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.
>
> 18 In order to meet that objective, which is of fundamental importance in a convention which has essentially to promote the recognition and enforcement of judgments in States other than those in which they were delivered, it is necessary to avoid the multiplication of courts of competent jurisdiction which would heighten the risk of irreconcilable decisions, this being the reason for which recognition or an order for enforcement is withheld by virtue of Article 27(3) of the Convention.
>
> 19 Furthermore, that objective militates against any interpretation of the Convention which, otherwise than in the cases expressly provided for, might lead to recognition of the jurisdiction of the courts of the plaintiff's domicile and would enable a plaintiff to determine the competent court by his choice of domicile.
>
> 20 It follows from the foregoing considerations that although, by virtue of a previous judgment of the Court (in Mines de Potasse

> d' Alsace, cited above), the expression "place where the harmful event occurred" contained in Article 5(3) of the Convention may refer to the place where the damage occurred, the latter concept can be understood only as indicating the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-delictual liability, directly produced its harmful effects upon the person who is the immediate victim of that event.

115. The immediate, direct and harmful consequences of a harassing course of conduct is the experience of being harassed – being the object of a defendant's sustained, persistent and intrusive oppression. That experience is a dynamic state of affairs in which a claimant may find themselves progressively at the mercy of the control the defendant seeks to exert over their freedom, autonomy and peace of mind. How they feel about that need not be a fixed thing, qualitatively, temporally or geographically. How then is the 'place of damage' to be made practical sense of in a harassment claim?

116. The logical starting point is that a claimant must at least establish they have *experienced harassment* within the jurisdiction they assert. To the extent that that brings together, or even elides, the 'cause' and 'effect' limbs of the jurisdictional test, that is not accidental and not easy to avoid; harassment is a course of conduct expressing a toxic and non-consensual, actual or asserted, *interrelationship* between the parties. In a case in which the claimed harassment, and the claim of being harassed, relate exclusively to matters within the same jurisdiction then that will be a straightforward basis for a court in that jurisdiction to deal with the matter. But that is not the present case.

117. The Claimant here does not identify or plead any specific experience of *harassment* – of the course of conduct she pleads – *in England*. She pleads an international course of conduct, part-constituted by acts of the Defendant in England, which she experienced wherever she happened to be at the time, which was sometimes in England. Her experience of being harassed by the course of conduct she relies on, in other words, she says is not divisible – whether by reference to individual constituent acts or by reference to geography. It must be regarded as a complete experience.

118. I am inclined to agree with that. The experience of *being harassed*, which is the obverse of the harassing course of conduct pleaded, is no more inherently divisible than its causative course of conduct. But if that experience cannot be said to have been sustained in a *single* country – for example because a claimant is domiciled, habitually resident or physically present in that country throughout (leaving aside any *de minimis* absences) – on what basis can the English courts assume jurisdiction over a unitary, but in the present case multinational, experience?

119. As the Claimant's particulars of claim emerged from the Court of Appeal, they contained scant reference of any sort to the locus of her experience of harassment. They state simply that she is someone '*who has been a resident of Monaco since 2008 and who lives in London and in Shropshire*'. She now seeks to amend that to say '*she was a resident of Monaco between 2008 and 2019. She lived in London for periods of time in 2012-2013 and lives in Shropshire (Chyknell Hall) from around 2015*'. She also proposes an amendment to say she '*lived between England and Monaco until about 2012, and from about the summer of 2012 to date she has spent most of her time in*

England'. A further proposed amendment is to the effect that '*For the entire post-abdication period* [ie since June 2014], *the Claimant has lived, or primarily lived, in England and it is in England that she has spent most of her time*'.

120. Her first witness statement, accompanying her application to amend (CSW1, 19th April 2023) states that she became a Monaco resident in April 2008 and had a Monaco residency permit for an unbroken period from then until it expired in October 2021. She bought a London home in January 2012 (initially in the name of one of her companies), but its refurbishment was not complete until 2013. She found herself spending an increased amount of time in London from 'around 2013': her son was at school in Surrey and her legal, PR and medical teams were based in London; and from 2014 she was overseeing the development of a penthouse at the Defendant's request (or insistence) there. She says she became '*a full-time resident in the United Kingdom*' in April 2018.

121. Her recent evidence (CSW5, 12th July 2023) states that '*I bought my home in Eaton Square in January 2012, and from around 2013 I found myself spending an increased amount of time in London*'. And she says that all of the incidents pleaded as amounting to a harassing course of conduct '*have added to the stress and anxiety which I have continued to suffer in my day-to-day life in England*'.

122. I note in the first place that all of this does not present an entirely clear and consistent picture in and of itself. A son being at boarding school, accessing professional services and 'overseeing' a refurbishment project may suggest reasons for *visiting* the jurisdiction, but little bright light on the period between 2014 and 2018 is shed otherwise. It is not clear what the Claimant herself understands by being a 'full time resident' in the UK from that date, nor what being recognised as a resident of Monaco between that date and 2021 entailed in practice. On her own (revised) account, she was a resident of Monaco until 2019, a period which overlaps with becoming a 'full time' UK resident in April 2018, and which covers the first four or five years of the course of conduct she now pleads.

123. In this connection, Mr Wolanski KC, for the Defendant, also draws my attention to a number of inconsistent accounts the Claimant has given publicly in the past about her whereabouts. She is quoted in a media interview in 2013 as saying '*I spend most of my time in Monaco but for work reasons I am a citizen of the world*'; and in another media interview in 2016 as saying Monaco had been her '*adopted home*' for the past eight years – the place she happily returns after all her travels. Of course, neither of these was evidence given on oath. However, testimony given to a Swiss court in 2018 that '*I still own the Eaton Square apartment. I live there with my son when I am in London. The rest of the time I live in Monaco.*' does seem to have been.

124. In any event the Claimant does not say – and these pleadings and this evidence do not amount to – anything other than that she experienced the course of conduct she pleads in a fully ambulatory manner, wherever she happened to be at the time. She does not dispute that her working life, business interests and lifestyle were distinctively international over the period of the pleaded course of conduct. She does not give anything like a coherent or complete picture of the place of England – as opposed to anywhere else – in her total *pleaded* experience of being harassed. She pleads an experience which is indivisible, ambulatory and not recognisable as distinctively English. She may have experienced or reacted to a number of acts of the Defendant

while she was in England. But that is not the same as experiencing the causative tortious act – the course of conduct she pleads – in England rather than anywhere else.

(iv) Conclusions

125. The Claimant's pleaded case sets out *both* a fully international course of conduct *and* a fully international experience of that course of conduct. I was shown no authority coming anywhere near supporting an assumption of English jurisdiction over a foreign-domiciled Defendant in such circumstances. Both the closest analogous reasoning of the European and domestic courts, and analysis from uncontroversial first principles, pull in the opposite direction.

126. Her case, put at its highest, pivots on the *extent* to which *some* of the causative course of conduct, and *some* of her effective experience of it, have an English locus. But that extent is neither clearly particularised nor obvious on its face. And a case based on *extent*, in either regard, is not congruent with the constituent elements of the tort of harassment nor the autonomous requirement for location. To satisfy the 'effect' limb of the special jurisdiction test, the Claimant needs to show she experienced *the* direct effect of the causative event (here, the alleged harassing course of conduct) immediately and directly in England. That means not just *an* effect or *some* effect or the continuing consequences of a past effect, but the legally relevant effect: the effect on which she necessarily relies, the experiencing of the pleaded course of conduct, in real time. I have been given no sufficient basis for understanding that that happened in England. A fully ambulatory experience is not recognisable from any authority I was shown as capable of founding jurisdiction based on the *unique place* in which it occurred. It is a proposition which tends towards prioritisation of the domicile, or the self-determined locus from time to time, of a claimant, rather than being rooted in any geographical specificity of immediate effect; as such it does not indicate the close practical connection between the High Court and the constituent elements of the pleaded tort or the evidence that would be needed to establish it.

127. I can perhaps conveniently deal briefly at this point with the extent to which the Claimant's geographical 'centre of interests' featured in the argument before me. It will be recollected that this concept was developed in the ***eDate*** case as part of the developing jurisprudence on allocating jurisdiction over 'internet libel'. The course of conduct pleaded in the present case includes acts of publication. But I cannot see that the concept of 'centre of interests' assists the Claimant, for any or all of the following reasons.

128. First, for the reasons set out in ***Mahmudov***, COI is not a freestanding route to the establishment of the special jurisdiction in any event. It is a principle developed to enable a libel litigant who has already established the special jurisdiction to claim a global remedy.

129. Second, although Mr Thompson said he conceded the potential relevance of COI to harassment by speech, that is not a concession I have any obvious basis for accepting. The concept of COI is intimately bound up with establishing the component, specific to the tort of defamation, of damage to reputation, on the basis that where a claimant's COI is, there their reputation is predominantly established. That does not read across in any obvious way to other torts, whether or not capable of being constituted by online publication.

130. Third, the acts of publication featuring in this claim are pleaded as only *part* of the overall course of conduct. No distinctive course of conduct constituted purely by publication is identified, pleaded or evidenced. (The Claimant does say she wishes to amend her pleadings to allege '*the Defendant carried on a course of conduct amounting to harassment of the Claimant by aiding, abetting, counselling or procuring the publication of three articles in the Spanish press*' between 2014 and 2015. But, as discussed further in the second part of this judgment, Mr Caplan KC did not seek to develop any case relying on this as constituting a freestanding course of conduct, and Mr Green KC, in addressing me on these publications and some of the issues they raised, did so on the basis they constituted a part of the overall course of conduct pleaded.) No argument is made that COI is relevant in any way to the (remainder of the) overall course of conduct which *is* pleaded.

131. And fourth, the Claimant does not plead or evidence that she has a single COI – and that it is England – in any event. That is not simply to be inferred from what she says about time spent here or homes lived in. It needs to be fully established on the facts, not least in a case where, on her own account, her place of 'residence' is said to have changed part-way through the relevant period, and her business interests are global.

132. Finally, I am conscious that the whole of the foregoing analysis, and the conclusions I have reached, amount to a significant challenge for any claimant in any truly 'international harassment' case – where *both* parties, and *both* cause and effect (the alleged course of conduct and the alleged experience of being harassed) are not confined by national boundaries – in trying to bring a claim otherwise than in the courts of the defendant's country of domicile. I have explained how a claimant trying to meet that challenge needs to direct their efforts, and that the Claimant in this case has not accurately directed hers to the necessary targets. I have discerned no 'good arguable case' on any relevant basis that, on the pleading and evidence to date, this Claimant can oblige this Defendant to answer for her complaints about him to the English High Court.

133. I have also explained why that should be considered neither a surprising nor a counter-intuitive outcome. The Claimant might have sued the Defendant on the whole claim in Spain (if Spanish delict law so permits – the jurisdiction rules are not designed to facilitate forum shopping, if not). Or she might have limited her claim in the High Court, by pleading and evidence, to a course of conduct and/or an experience of harassment which is clearly and distinctively English. If that has a flavour of the choice given to claimants in international libel cases by the ***Shevill*** Rule – to sue on an indivisible basis in a defendant's domicile, or proceed on a mosaic basis by pleading a completed intra-jurisdictional tort on a country-by-country basis – that may be no accident either. But the Claimant here has done neither, and she has no basis on the authorities for simply expecting to have the best of both worlds.

134. If, however, contrary to the foregoing analysis and conclusions, I had been able to conclude there was no *general* jurisdictional bar to the progress of this case in the High Court, it would have been necessary for me to turn to the arguments otherwise made about the future of this claim on their own merits. In the second part of this judgment, I do so on that alternative hypothesis, not least because the merits were fully argued out before me, and in the interests of the overriding objective. These are interlocutory matters only; of course, I venture no further into the merits of the claim than interlocutory procedure permits or requires. I start with the additional issues about

particular jurisdictional bars raised by the Claimant's application to amend her pleadings, and the Defendant's objections to the Court's acceding to them.

PART II: THE MERITS OF THE APPLICATIONS

A. STATE IMMUNITY

(a) Statutory framework

135. The State Immunity Act 1978 ('the SIA') provides as follows:

> **General immunity from jurisdiction**
>
> **1.-**(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
>
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.
>
> …
>
> **Personal injuries and damage to property**
>
> **5.-**A State is not immune as respects proceedings in respect of—
>
> (a) death or personal injury; or
>
> (b) damage to or loss of tangible property,
>
> caused by an act or omission in the United Kingdom.
>
> …
>
> **States entitled to immunities and privileges**
>
> **14.-**(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—
>
> (a) the sovereign or other head of that State in his public capacity;

> (b) the government of that State; and
>
> (c) any department of that government,
>
> but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.
>
> …
>
> **Heads of State**
>
> **20-**(1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—
>
> (a) a sovereign or other head of State;
>
> (b) members of his family forming part of his household; and
>
> (c) his private servants,
>
> as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.
>
> (2) The immunities and privileges conferred by virtue of subsection (1)(a) and (b) above shall not be subject to the restrictions by reference to nationality or residence mentioned in Article 37(1) or 38 in Schedule 1 to the said Act of 1964.
>
> …
>
> (5) This section applies to the sovereign or other head of any State on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of State in his public capacity.

(b) The Defendant's initial challenge

136. The Claimant's original particulars of claim pleaded a course of conduct extending over a period both before and after the Defendant's abdication, and included activities said to have been carried out (at the Defendant's instigation) by the Centro Nacional de Inteligencia (CNI) – the Spanish national intelligence agency – and its head, General Sanz Roldán.

137. As we have seen, on 18th June 2021, before service of any defence, the Defendant applied for an order declaring the High Court had no jurisdiction to try the claim, because he was immune in relation to *all* the matters complained of under a combination of sections 1(1), 14 and 20 of the SIA. The application was advanced on the bases that

(a) in relation to the period before his abdication, the allegations related to the acts of a head of state in his public capacity (the 'functional immunity' basis) and (b) he continued thereafter as 'sovereign emeritus' and a member of the current King of Spain's household and family (the 'personal immunity' basis). The Defendant himself did not serve any evidence in support of the application.

138. The Defendant's application failed on all grounds in the High Court (*Corinna Zu Sayn-Wittgenstein-Sayn v HM Juan Carlos Alfonso Victor Maria de Borbón y Borbón [2022] EWHC 668 (QB)*). The Court held:

> (a) he was not entitled by virtue of his special constitutional position in Spain as a 'sovereign' (emeritus), to the personal immunity afforded under section 20(1)(a) SIA following his abdication;
>
> (b) nor was he a member of the household of King Felipe VI for the purposes of immunity under section 20(1)(b) SIA;
>
> (c) so far as the pre-abdication acts were concerned, the claim for harassment was not (even arguably) within the sphere of governmental or sovereign activity for the purposes of section 14(1) SIA; on the contrary, harassment was an act any private citizen could perform;
>
> (d) as for the individual acts relied upon as part of the course of conduct amounting to harassment, these did not give rise to functional immunity under section 14(1) SIA;
>
> (e) in particular, in relation to an alleged covert operation to gain entry to the Claimant's home in Monaco, a case of functional immunity under section 14(1) SIA was not made out on the basis of the case as it then stood, but if evidence subsequently emerged which suggested that those who arranged or undertook the search were "state-sponsored" the issue could be revisited;
>
> (f) in relation to other acts alleged to have been carried out by General Sanz Roldán, the mere fact that the General was Director of the CNI was not enough to justify treating harassing threats, by email or telephone, as having been done in that capacity;
>
> (g) the Claimant's reliance on the exception to state immunity in section 5 SIA was rejected because her claim included no claim to have sustained a recognised psychiatric injury as a result of the alleged harassment and was therefore not a claim for personal injury within the terms of section 5 SIA.

139. The Court also indicated that parts of the original pleading were ambiguous as to the details of the pre-abdication acts alleged and the role of General Sanz Roldán in particular. The judgment stated (at [75]) that the Claimant should '*make it clear in her Particulars of Claim that the acts alleged against General Sanz Roldán are said to be*

acts of his in his personal capacity, not as head of the CNI or other official capacity'. She was given permission to amend accordingly.

(c) The decision of the Court of Appeal

(i) Basis of appeal

140. The Court of Appeal gave limited permission to appeal, confined to challenging the High Court's findings that the Defendant had no claim to functional immunity under section 14(1) SIA – that is to say, points (c)-(g) above. The High Court's findings on lack of personal immunity (points (a) and (b)) did not therefore proceed to challenge on appeal, and continue to stand.

141. The permitted grounds of appeal were as follows:

> (i) in reaching his substantive conclusion, the judge adopted an erroneous approach to the legal test by considering only whether the cause of action (namely, harassment) was of a nature that any private citizen could perform, and by failing to conduct a closer analysis of the individual acts alleged and, in particular, to consider whether they were done "under colour of authority" whatever their motive;
>
> (ii) the judge wrongly proceeded on the basis of an anticipated amendment, in the absence of any formal application to amend, without sight of draft proposed amendments or any examination of the merits of the proposed amendment. He compounded the error by giving permission to amend on an anticipated basis in the course of hearing the state immunity application and this constituted a serious procedural irregularity; and
>
> (iii) wrongly and in error of law, the judge concluded that he could defer resolution of the immunity plea in relation to the alleged targeting of the respondent's home in Monaco (pleaded at paragraph 16 of the Particulars of Claim) and relied on this possibility in support of his dismissal of the immunity claim.

142. By a judgment handed down on 6th December 2022 (*Corinna Zu Sayn-Wittgenstein-Sayn v HM Juan Carlos Alfonso Victor Maria de Borbón y Borbón [2023] 1 WLR 1162*), the Court of Appeal allowed the Defendant's appeal on the first two grounds.

(ii) The legal framework applied

143. This was the Court's summary of the state of the relevant caselaw on the SIA:

> 16. State immunity (*ratione personae*) attaches for acts performed by a head of state while in office. But even after a head of state (or other agent of the state) leaves office, they continue to enjoy immunity *ratione materiae* for acts performed by them as head of state (or agent of the state) while in office, under sections 1(1) and 14(1) or section 14(2) SIA. In *R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet*

Ugarte (No 3) [2000] 1 AC 147 ("Pinochet No3"), Lord Goff identified the critical question to be addressed in deciding whether immunity *ratione materiae* applies as follows (at 210B):

> "The effect is that a head of state will, under the statute as at international law, enjoy state immunity *ratione personae* so long as he is in office, and after he ceases to hold office will enjoy the concomitant immunity *ratione materiae* in respect of acts performed [by him] in the exercise of his functions [as head of state], the critical question being 'whether the conduct was engaged in under colour of or in ostensible exercise of the head of state's public authority'... In this context, the contrast is drawn between governmental acts, which are functions of the head of state, and private acts, which are not."

17. The explanation for this was given by Lord Phillips in *Pinochet No3* at 286A:

> "There would seem to be two explanations for immunity *ratione materiae*. The first is that to sue an individual in respect of the conduct of the state's business is, indirectly, to sue the state. The state would be obliged to meet any award of damages made against the individual. This reasoning has no application to criminal proceedings. The second explanation for the immunity is the principle that it is contrary to international law for one state to adjudicate upon the internal affairs of another state. Where a state or a state official is impleaded, this principle applies as part of the explanation for immunity. Where a state is not directly or indirectly impleaded in the litigation, so that no issue of state immunity as such arises, the English and American courts have nonetheless, as a matter of judicial restraint, held themselves not competent to entertain litigation that turns on the validity of the public acts of a foreign state, applying what has become known as the act of state doctrine."

18. The immunity is that of the state. It can therefore only be waived by the state itself. As Lord Saville explained in *Pinochet No3* at 265:

> "These immunities belong not to the individual but to the state in question. They exist in order to protect the sovereignty of that state from interference by other states. They can, of course, be modified or removed by agreement between states or waived by the state in question."

19. Moreover, it is not open to this court to adjudicate upon the legality of the foreign state's acts. As Lord Millett said in *Pinochet No3* at p. 270:

> "The immunity is available whether the acts in question are illegal or unconstitutional or otherwise unauthorised under the internal law of the state, since the whole purpose of state immunity is to prevent the legality of such acts from being adjudicated upon in the municipal courts of a foreign state. A sovereign state has the exclusive right to determine what is and is not illegal or unconstitutional under its own domestic law."

20. Where a claim is brought against officials, servants or agents of a foreign state in respect of acts done by them, the foreign state is entitled to claim immunity for its servants or agents as it could if sued itself.

21. If state immunity is established, it is for a claimant to establish, to the civil standard, an exemption to that immunity (for example, under section 5 SIA).

22. Whenever the question arises under the SIA as to whether a state is immune by virtue of section 1 or not immune by virtue of one of the exceptions, the question must be decided as a preliminary issue in favour of the claimant, in whatever form and by whatever procedure the court may think appropriate, before the substantive action can proceed: *J.H. Rayner Ltd. v. Department of Trade* [1989] Ch 72 per Kerr LJ at 194 and Ralph Gibson LJ at 252. If there are disputed matters of fact upon which the claim for immunity would depend, then the court can direct the trial of those matters as a preliminary issue: *Al-Adsani v Government of Kuwait* (1996) 107 ILR 536, at 550-551, per Ward LJ. Before taking that course, the court assumes the facts pleaded in the claimant's statement of case to be true, and determines whether they would give rise to immunity if true: *Jones v Ministry of the Interior of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270 per Lord Bingham at [13]; *Belhaj v Straw* [2017] AC 964 per Lord Sumption JSC at [179].

…

36. The test under section 14(1) SIA requires consideration of whether the appellant, at a time when he remained the sovereign, was acting in a private or public capacity.

37. Clear guidance on the correct approach to questions of functional immunity was given in *Jones v Ministry of Interior of Saudi Arabia*, where the claimants alleged that they were tortured by members of the Saudi Arabian police. They brought civil proceedings against both the responsible officers and the Kingdom of Saudi Arabia itself. This court held that the Kingdom was protected by state immunity but because torture cannot constitute an official act, the officers' conduct fell outside the scope of their official activity, and they were not therefore

protected by the immunity. The House of Lords (in speeches of Lord Bingham of Cornhill and Lord Hoffmann with whom the other members of the committee agreed) held that both were protected.

38. At [12] Lord Bingham explained:

> "12. International law does not require, as a condition of a state's entitlement to claim immunity for the conduct of its servant or agent, that the latter should have been acting in accordance with his instructions or authority. A state may claim immunity for any act for which it is, in international law, responsible save where an established exception applies. …"

He referred to the commentary on article 4 of the International Law Commission ("ILC") Draft Articles on the Responsibility of States for Internationally Wrongful Acts issued in 2001, which states:

> "A particular problem is to determine whether a person who is a state organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. *Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the state.*" (emphasis added)

He observed that article 7 took the matter further in relation to acts in excess of authority, by making clear that the conduct of an organ, entity or person

> "empowered to exercise elements of the governmental authority shall be considered an act of the state under international law *if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.*" (emphasis added)

Lord Bingham referred to the commentary on article 7, which referred to the emphasised expression "if the organ, person or entity acts in that capacity", continuing:

> "This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the state. In short the question is whether they were acting with apparent authority."

39. He said that state immunity is a procedural rule going to the jurisdiction of the national court – where it applies, the national

court has no jurisdiction to exercise. It is an absolute preliminary bar, precluding any examination of the merits: "*A state is either immune from the jurisdiction of the foreign court or it is not. There is no half-way house and no scope for the exercise of discretion.*": [33].

40. Lord Hoffmann started with the proposition that, as a matter of international law, the same immunity that protects the state against suit in a foreign domestic court, also protects the individuals for whom the state is responsible: [66]. The acts for which the state is responsible are "*acts done under colour of public authority, whether or not they are actually authorised or lawful under domestic or international law.*": [74]. Ulterior or improper motives of the person concerned, or where the person may be abusing public power, are all irrelevant: [76]. At [78] Lord Hoffmann held:

> "78. It seems thus clear that a state will incur responsibility in international law if one of its officials, under colour of his authority, tortures a national of another state, even though the acts were unlawful and unauthorised. To hold that for the purposes of state immunity he was not acting in an official capacity would produce an asymmetry between the rules of liability and immunity."

41. This was the approach correctly applied to uphold the immunity of the former President of Ukraine under section 14 SIA in *Surkis* where Calver J rejected the argument that the alleged conduct was undertaken for private purposes, holding that it arose out of the President's position and his ability through that position to exert influence over other public officials. The fact that the President was said to be abusing his power for reasons of his own was held to be irrelevant. Similarly in *Fawaz Al Attiya v Hamad Bin-Jassim Bin-Jaber Al Thani* [2016] EWHC 212 (QB), a claim against a former senior public official of Qatar who allegedly had a private grievance against and induced other public officials to take detrimental action against the claimant, Blake J (at [25]) found it difficult to see how the "two hats can be severed and how the alleged private motive in inducing the torts can be separated from the public office that gave the defendant the status and the ability to direct others and issue instructions."

42. Having identified the approach, and notwithstanding the amended pleadings in this case, it is appropriate to start my consideration of the claim to functional immunity by reference to the case as originally pleaded in the Particulars of Claim, which is assumed for these purposes to be true.

(iii) The Court of Appeal's analysis

144. Having reviewed the state of the law and the necessary approach, the Court of Appeal applied the law as follows in reaching its conclusion that the Defendant had established his claim to functional immunity. I set out its reasoning in full, since I am required to apply it directly and in detail to the matters before me on the parties' applications.

> 50. A state can only act through individuals, whether they are employees or agents of the state. As *Jones v Ministry of Interior of Saudi Arabia* makes clear, where a state organ (like the CNI) acts through individuals (as it inevitably must) it is irrelevant that the person concerned may have had ulterior or improper motives or may be abusing public power. Nor is there any requirement of international or domestic law that such persons were acting in accordance with their instructions or authority as a condition for entitlement to state immunity. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the state. The state's immunity in respect of such persons is fundamental to the principle of state immunity.
>
> 51. Accordingly, although the question, strictly speaking, is whether the appellant rather than General Sanz Roldán and/or his agents were acting in a public or private capacity, in reality, the role of General Sanz Roldán and the other CNI operatives is determinative. If they were acting in a public capacity, the appellant must have been acting, at least apparently, in a public capacity as head of state in engaging them to act in that public capacity.
>
> 52. The Particulars of Claim are clear and unambiguous. Taking the pleading at face value, the only pleaded case in the Particulars of Claim as to the capacity in which the General acted, alleged that General Sanz Roldán was acting in his capacity as Director of the CNI throughout. Accordingly, he and the CNI operatives with whom he acted, were at all material times acting or purporting to act as servants or agents of the Spanish state. Since the state is liable for acts done under colour of public authority, whether or not they are actually authorised or lawful under domestic or international law, their acts would accordingly be attributable to the Spanish state. On a straightforward application of the SIA, it would follow that the claim to immunity for the appellant, General Sanz Roldán, and the servants or agents of the CNI, in respect of the relevant allegations in the Particulars of Claim, should have succeeded.
>
> …
>
> 54. On the face of the pleadings, and in the absence of any coherent basis for reaching the contrary conclusion, it was only the appellant's position as head of state that enabled him to

procure the head of the state security service to act in the manner alleged, using the CNI, whatever his private motives, and however abusive they might have been. To adopt the words of Blake J in *Al Attiya*:

> "25. …It is difficult to see how the two hats can be severed and how the alleged private motive in inducing the torts can be separated from the public office that gave the defendant the status and the ability to direct others and issue instructions.
>
> 26. The fact that the claimant contends that the dispute with the defendant arose as a purely personal matter in 1997, is irrelevant…"

The same is true here. It is highly unlikely that a private citizen could have procured a General and the CNI to carry out the Monaco and Villars operations on their behalf. It is his public office that inevitably gave the appellant the "status and ability" to influence these actors. Whether the appellant had actual power to direct or influence General Sanz Roldán is irrelevant. The pleading necessarily alleged conduct in the appellant's public capacity.

55. The amendments to the Particulars of Claim do not resolve the issue. First, the deletion of all references to the CNI and state activity in the paragraphs identified above in the Amended Particulars of Claim went beyond the leave granted by the judge at [75] and in his order. These amendments are impermissible on that basis. Secondly, to the extent that they were permitted by the judge, the amendments do no more than aver that General Sanz Roldán was acting in a private capacity (though there is in fact no averment as to the capacity in which the appellant was acting). In doing so, they demonstrate that references to the activity being undertaken by the CNI or its agents is inconsistent with any coherent plea that General Sanz Roldán was acting otherwise than in a public or state capacity. It is wholly implausible that people acting in a private capacity conducted international surveillance, covert raids and infiltrated electronic devices. The deletions make a nonsense of the pleaded references to the respondent seeking to raise concerns through diplomatic channels and/or with the British intelligence services. Indeed, in the course of the hearing before the judge, Mr Lewis came close to conceding that the original Particulars of Claim were not consistent with General Sanz Roldán acting in a private capacity.

56. Accordingly, the judge was wrong to conclude that the pre-abdication conduct alleged was private conduct. First, he wrongly focussed on the domestic law cause of action of harassment, when the proper approach was to consider the individual acts alleged. Secondly, he wrongly treated as

determinative that the alleged acts were acts any private individual could carry out (see [68]). This was a formulation he took from Lord Goff's speech in *Kuwait Airways Corp v Iraqi Airways Co (No.1)* [1995] 1 WLR 1147 at 1160A, which was merely a shorthand summary. If an act is one that no private citizen – and only a government – could carry out, it is necessarily a public or sovereign act. But acts which an individual could carry out may still be done in a public capacity, and if an act is one that both a private citizen and a government could perform, then in the light of *Jones* further enquiry is required. The question is one of the capacity in which the person purports to be acting: in other words, the test that must be applied in this instance is the "colour of authority" test discussed by Lords Bingham at [12] and Hoffmann at [78] in *Jones v Ministry of Interior of Saudi Arabia*. Although this test was referred to in earlier sections of his judgment, there is no reference to the "colour of authority" test in the section of his judgment that addressed the functional immunity claim, and nothing in that section to indicate that the judge applied it.

…

58. But even if the test was whether the alleged acts were acts any private individual could carry out, it seems to me that these were not such acts: private individual could not ordinarily have procured the use of state machinery by the head of the state intelligence and security service. A clearly pleaded evidential basis to support a conclusion or inference that these were acts of a private individual were required, but was not advanced. It is fanciful to suggest, as Mr Lewis did, that the clear facts alleged in the pleading demonstrate that the appellant, when head of state, procured the General to use state machinery simply as his friend. For the reasons already given, that submission is without foundation.

59. The judge was also wrong to regard as significant for the claim to state immunity, whether the acts of surveillance and physical intrusion onto the respondent's property were done by agents of the CNI or other "contractors"; and to conclude that there could not be "any conceivable claim to functional immunity" in respect of contractors: see [70] and [71]. As a matter of international law, where acts of trespass or surveillance are committed by contractors, their conduct as agents of the CNI or as agents of a serving sovereign would be attributable to the state in the same way that the CNI's conduct would be. So much is conceded on the respondent's behalf. Instead, Mr Lewis placed emphasis on the judge's finding that the mission was carried out by contractors "with which the Spanish state had no involvement". But that is not what the pleaded case alleged, and there was nothing ambiguous about it: paragraph 16 expressly

> alleged the involvement of "*a CNI team dispatched from Spain*" and the Director of the CNI itself, General Sanz Roldán, was allegedly central to much if not all the conduct of which the respondent complains.
>
> 60. As I have said, in my judgment the judge was wrong to say that the pleading was ambiguous or unclear; and also to say, to the extent that he did so, that these were matters for evidence, to be addressed in due course, but on which the appellant failed on the burden of proof. The pleading was far from ambiguous or unclear, and the question of immunity had to be addressed on the basis of the respondent's pleaded case, assuming it to be true. Where it applies, state immunity is an absolute preliminary bar that precludes any examination of the merits. As Lord Bingham observed in *Jones v Ministry of Interior of Saudi Arabia*, "*A state is either immune from the jurisdiction of a foreign court or it is not. There is no half-way house and no scope for the exercise of discretion.*" Where there is a dispute as to whether acts, although committed by an official, were purely private in character, then there should be a preliminary issue determining that dispute.
>
> 61. Although he did not formally base his decision on the point, the judge indicated that the respondent would also have succeeded on the basis that the conduct alleged involved criminal acts occurring outside the territory of Spain, and state immunity would not have been available on this basis: see [73]. That too was wrong in my judgment. It is inconsistent with what the majority said in *Pinochet No3*, and the analysis in *Khurts Bat v Germany* [2011] EWHC 2029 (Admin), [2013] QB 349, to which the judge referred as supporting the proposition, itself recognises that the majority in *Pinochet No 3* made clear that for heads of state there can be immunity even for criminal liability, and a fortiori for civil liability, notwithstanding that the events occur abroad. State immunity from the civil jurisdiction of foreign courts applies just as much to the extra-territorial conduct attributable to a state on the international plane, as to the domestic conduct of a state, even where that conduct is unlawful. *Khurts Bat* concerned criminal not civil proceedings in any event, and the analysis in that case was confined to criminal liability for acts of non-heads of state (the head of the Mongolian national security department on a mission to London) exercising official functions.

145. This analysis proceeded on the basis of a focus on the claim *as then pleaded*. But the Court of Appeal also reached the following conclusions on the issue of the Claimant's attempts to re-plead in reliance on the permission she had been given to do so by the High Court. Again, I set out the Court's analysis in full, since the Claimant's further attempts to re-plead are now before me, and I must be guided by the Court of Appeal's reasoning in this matter also.

63. The judge was also wrong to proceed on the basis of a promised but unarticulated amendment to the pleaded case. Unless the particular circumstances make it obviously unnecessary, a formal application to amend is ordinarily required, with a written document setting out the proposed amendments; and, again in general, there is a merits test to overcome in obtaining permission to amend. The pleading must not only be coherent and properly particularised, it must plead allegations which if true would establish a claim that has a real prospect of success. This means that the claim must carry a degree of conviction; and the pleading must be supported by evidence which establishes a factual basis which meets the merits test: see *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [8]; *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 at [41] and [42]; *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18].

64. Here, there was no application to amend, still less a formal application supported by a proposed amended pleading and evidence of the kind just indicated. Instead, the approach adopted was strikingly informal. Despite knowing about the state immunity application issued in June 2021 for many months, it was not until shortly before the hearing that the respondent first highlighted an alleged personal relationship between General Sanz Roldán and the appellant in her skeleton argument for the hearing. No proposed amended pleading was produced in advance of or even during the hearing. On the second day of the hearing, Mr Lewis asserted that General Sanz Roldán was (at all times) on a private mission, but he also indicated a potential need to abandon the pre-abdication conduct and submitted that the respondent could live without those allegations and still maintain her claim.

65. There are cases in which the court can dispense with formalities and treat a defect in a pleading as capable of being cured by amendment where it is obvious that to require an application and evidence would be mere formality. But this was not such a case. Given the stark timing of the suggested amendments, and their stark inconsistency with the existing pleading, it is not, and was not, obvious that the respondent could meet the merits test in this case: there was a real question whether the proposed amendments were simply a device to meet the state immunity arguments. Critically, what was required is an explanation for withdrawing the allegations of CNI involvement, which, even now, has not been provided despite the letter of 26 September 2022 in the Unagreed Bundle. The respondent herself accepts that in considering her amended pleadings the court is required to consider whether the amendments are contrived purely to avoid immunity but fail to

> do so or, as she contends, whether they simply plead a more developed understanding of her case. However, the judge did not consider this question.
>
> 66. Moreover, the respondent's approach, in the face of the immunity application, in seeking to disavow, or characterise as ambiguous, allegations made against the CNI was directly contradicted by her statement of truth on her original pleading and by her sworn affidavit evidence deployed in Spanish proceedings. Her amended case of conduct motivated by personal friendship also stands in marked contrast to claims she made to the Spanish media that General Sanz Roldán was acting on behalf of other elements within government, or within the Spanish Royal household, hostile to the appellant, in a bid to bring about the appellant's abdication or destroy their relationship (as evidenced by a transcript of the respondent's interview with Okdiario on 28 September 2020, exhibited in the witness statement of Guy Martin, dated 17 October 2022, and served in opposition to the Unagreed Bundle). These were all matters that required careful consideration before giving leave to amend in the first instance. Had the judge conducted the necessary analysis, he would either have refused to permit a last-minute amendment that did no more than aver that those involved were acting in a private capacity; or at best, adjourned the state immunity application to enable a formal application to amend to be made.
>
> 67. This was not, as Mr Lewis suggested, a discretionary case management decision. It was a decision bearing directly on the disposition of the state immunity application. To direct the respondent to amend her pleading in the circumstances and in the informal manner which occurred, was wrong.

146. Having found functional immunity established, the Court of Appeal had no hesitation in agreeing with the High Court that the exception in section 5 SIA did not apply. The claim as it stood then did not include a claim for personal injury, and there was no application to amend or to adduce fresh evidence. The Court noted that any such application '*would have had to overcome the obstacle that this evidence could plainly have been obtained with reasonable diligence for the hearing before the judge (see CPR 52.21(2))*'.

(iv) Consequences for the Claimant's pleadings

147. The Claimant's particulars of claim emerged from the Court of Appeal in a form (dated 6th January 2023) which contained substantial deletions to give effect to the Court's conclusions. In particular, the Claimant was not permitted to plead any of the following allegations:

> (a) a continuous course of conduct by the Defendant, amounting to harassment, running consistently '*from 2012 until the present time*';

> (b) details of incidents and events said to form part of a harassing course of conduct by the Defendant, consisting of actions by him or by General Sanz Roldán or by persons unknown on their behalf, occurring between April and June 2012 (including intrusion into her premises in Monaco, a meeting with the General in London at which he threatened her, intrusion into her premises in Switzerland, and other approaches from the General by phone and email);
>
> (c) publications '*from or about March 2013*' and/or the leakage of information to the media by the Defendant, General Sanz Roldán or the CNI, and surveillance of the Claimant by the CNI, including to obtain information disclosed to the media.

148. These deleted particulars all concerned matters relating to the pre-abdication period, and which the Court of Appeal considered to have been *necessarily* pleaded as committed 'under colour of authority' by the Defendant as head of state, and therefore to attract state immunity. The deletions applied to both the pleaded course of conduct itself and to matters pleaded as 'relevant background' to the course of conduct.

(d) The Claimant's application in relation to pre-abdication matters

149. By her application now before me, the Claimant seeks permission to amend her pleadings to (among other things) take a fresh approach to the material removed following the decision of the Court of Appeal, and to include further new material in relation to pre-abdication events. She proposes now to plead in terms that '*The Claimant does not rely on any pre-abdication acts carried out by or on behalf of the Defendant as constituting the said [ie harassing] course or courses of conduct, but only on post-abdication acts carried out by or on behalf of the Defendant.*'. However, she seeks to introduce, or re-introduce, pre-abdication material, in two principal ways.

150. First, she wishes to plead details of what she says were the Defendant's *motives* for the harassing course of conduct alleged, by way of a more developed alleged factual account of the circumstances surrounding his payment to her of €65m in June 2012 ('the June 2012 payment').

151. Second, she wishes to include, under a heading of '*The Background (2004 – June 2014 and the Defendant's abdication)*', a revised factual narrative of events in 2012 (including the intrusions into her premises in Monaco and Switzerland, the meeting with General Sanz Roldán in London and threatening approaches from the Defendant and the General) and in 2013 (including the publication of a number of media articles said to have been derived from information leaked by the Defendant and the General, including material obtained by 'monitoring' of her by them or their agents).

152. Of this material the Claimant wishes to say a number of things in her pleadings. First, she wishes to say they were undertaken by or on behalf of the Defendant '*for his private purposes*', those purposes including the improper motivation of the June 2012 payment (principally tax evasion) and the Defendant's intention to '*hide his conduct from the Spanish State rather than act on its behalf*'. Second, she wishes to say that, although she does not rely on the pre-abdication matters as part of the pleaded course of conduct, '*these matters remain relevant as part of the context and background for the post-abdication course of conduct relied upon*'. Third, she wishes to say that the pre-abdication matters '*are also relied upon as similar fact evidence that supports the*

findings and inferences the Court will be invited to make of the Defendant's post-abdication conduct, as pleaded'.

(e) Consideration

(i) Introductory

153. The Defendant makes a range of objections to the application in this respect, including that matters of 'motive' and 'background' have no proper place in pleadings in any event. But I have to make a preliminary distinction between objections going to a possible exercise of any *discretion* in favour of the Claimant's application, and the narrower objection the Defendant makes in reliance on state immunity. As the Court of Appeal made clear in this case (at [39]), citing Lord Bingham in *Jones v Minister of the Interior of Saudi Arabia*, '*state immunity is a procedural rule going to the jurisdiction of the national court – where it applies, the national court has no jurisdiction to exercise. It is an absolute preliminary bar, precluding any examination of the merits: "A state is either immune from the jurisdiction of the foreign court or it is not. There is no half-way house and no scope for the exercise of discretion".*'. So I have to deal with the state immunity challenge as a distinct, and preliminary, issue. If it is a bar on the Claimant making the amendments she wishes to make, that is an end of the matter and I have no merits-based discretion to entertain her application to that extent.

154. What the Claimant says she wants to achieve with these amendments, put at its simplest, and from the widest possible perspective, is both the maximum possible conservation of the narrative of her allegations consistent with the Court of Appeal's decision, and a considerably fuller elaboration of that narrative than originally pleaded. The account she wants to give is one in which the pattern and linkages which help explain the (post-abdication) course of conduct pleaded as harassment are to be understood by reference to (pre-abdication) history – starting with the history of the Defendant's June 2012 payment.

155. That payment, she says, was a private transaction between them, which she was given to believe at the time was by way of a gift settlement in recognition of their former intimate relationship and which, by its nature, could not otherwise be formally and openly acknowledged or provided for. She now believes it was designed as a device to place the funds beyond the reach of tax authorities but in a way the Defendant intended nevertheless to remain under his control: he planned to control the fund by controlling her.

156. What the Defendant says, on the other hand, in his challenge on state immunity grounds, is that the Claimant impermissibly (and indeed abusively) seeks to plead pre-abdication conduct in a manner which is not reconcilable with the Court of Appeal's decision in the case, and not consistent with the authorities on state immunity.

157. The Claimant accepts, as she must in light of the Court of Appeal decision, that the Defendant is protected by state immunity from adjudication by the High Court of the question of whether he is legally liable to her in harassment for conduct 'under colour of authority' while he was head of state. That is why she now states expressly that she does not rely on *any* pre-abdication conduct as constituting part of the course of conduct she now pleads. Mr Caplan KC also makes clear that she does not now seek to argue

that *any* pre-abdication conduct relevant to her case was undertaken otherwise than under colour of authority. The Court of Appeal did leave the door ajar in its observation at [58] that '*A clearly pleaded evidential basis to support a conclusion or inference that these were acts of a private individual was required, but was not advanced.*'. Mr Caplan KC clarifies that the Claimant does not now seek to advance any such case.

(ii) The parties' positions

158. The dispute between the parties is about the consequences of the Court of Appeal's decision that the particularised incidents in 2012 and 2013 were allegations of conduct by the Defendant done under colour of authority – and about the consequences of functional immunity itself. In a nutshell, the Claimant says that simply precludes her pleading those incidents as part of a course of conduct giving rise to *liability* in harassment, while the Defendant says it also precludes her pleading them as relevant facts at all.

159. This issue was canvassed briefly before the Court of Appeal (transcript pages 22-23) in an exchange between Popplewell LJ and Counsel for the Defendant. The Court asked whether if the Defendant's appeal were successful (which, in the relevant respects, it was), it would be open to the Claimant to make the same factual allegations as *background* to the post-abdication cause of action rather than as allegations in their own right – the very question now before me. The exchange touched on the possibility of the same allegations being reintroduced as similar fact evidence, or by way of founding inferences about the Defendant's post-abdication conduct. The Court expressed some reservations:

> … the *par in parem* justification for the type of sovereign immunity we are looking at might suggest that this court should simply not investigate and pronounce judgment on alleged acts by a sovereign in the exercise of sovereign authority … and that the immunity attaches to the investigation of the acts themselves rather than to cause of action.

Counsel for the Defendant doubted there could be any rule that a court was precluded in all circumstances from ever adjudicating on the conduct of foreign states – it regularly did so in hearing asylum applications. Popplewell LJ commented, '*I quite understand that, but if it is the foreign state or the sovereign who is impleaded then the par in parem principle cuts in*'. The matter was left there – it was agreed to be '*for another day*'. That day in due course arrived.

160. As I am considering what is in essence a further jurisdictional challenge, I do not start by approaching the question from the angle of considering whether the Claimant's application is *abusive* – a possibility briefly touched on before the Court of Appeal, and put squarely to me. If I find jurisdiction is *not* excluded, then the merits of the application of course fall to be considered at that point. But on the preliminary jurisdictional point, it is a question of applying the law of immunity to the facts of the pleading, and answering the question of whether the latest version of the draft pleadings is consistent with the Court of Appeal's decision that functional immunity attaches to the conduct in question. Does functional immunity mean only that a UK court may not attach legal liability to the Defendant or require remedies from him in relation to that

conduct – that it may not be pleaded as part of a cause of action? Or does it mean that a UK court is further inhibited from making decisions about that conduct – including about whether it happened as alleged or at all? I was told there was no direct authority on the point. But there is certainly an established framework within which that question needs to be approached.

161. It is primarily for the Claimant as applicant to satisfy me that I have the jurisdiction – the legal power – to accept her proposed new pleading of the pre-abdication events. But I begin with the Defendant's position, since it sets out the jurisdictional challenge I am asked to consider.

162. Mr Thompson reminded me I am not starting from first principles in this matter. The Court of Appeal has already required the deletion from the version then before it of pleading pre-abdication conduct (a) to support inferences of fact about the Defendant's responsibility for post-abdication acts (paragraphs 42.4 and 42.5 of the Claimant's particulars) and (b) by way of 'relevant background' to the post-abdication conduct (paragraphs 46.1, 46.2 and 46.3.2) as being inconsistent with functional immunity. I cannot ignore that. At the same time, of course, as already noted, the question now in issue was not fully ventilated before, and not expressly decided by, the Court of Appeal.

163. Mr Thompson took me first to the principle of '*par in parem*', or sovereign equality as among states, as a proposition of international law enunciated by the International Court of Justice in *Germany v Italy (Jurisdictional Immunities of the State) [2012] ICJ Rep 99* at [57]:

> The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.

164. He then took me to the breadth of the leading domestic statement of principle by Lord Wilberforce in *I Congreso del Partido [1983] AC 244* at 262C:

> It is necessary to start from first principle. The basis upon which one state is considered to be immune from the territorial jurisdiction of the courts of another state is that of '*par in parem*' which effectively means that the sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate.

Mr Thompson drew my attention to '*acts*' (as opposed to causes of action) and to '*adjudicate*' (as opposed to determination of liability). And he took me to the opening

statement of principle of Lord Bingham in the *Jones v Saudi Arabia* case (noted by the Court of Appeal to be a case providing '*clear guidance on the correct approach to questions of functional immunity*') at [1]. Discussing the interaction of two principles of international law, his Lordship observed, '*One principle, historically the older of the two, is that one sovereign state will not, save in certain specified instances, assert its judicial authority over another.*' So, said Mr Thompson, as a matter of first principles, functional immunity *means* that a UK court lacks jurisdiction to 'sit in judgment upon' the *acts* of another state, including where those acts are alleged against a former head of state acting under colour of authority.

165. It does not, he says, matter for what purpose a court of one state would be sitting in judgment on another. The problem is more fundamental. It is a problem of a court of one state purporting to exercise sovereign (judicial) authority over another sovereign state in matters – its own actions – in which it is sovereign. Beyond the determination of legal liability, it is the *assertion of judicial authority* which is restrained by functional immunity. That includes purporting to require the immune party to comply with procedural and evidential directions in relation to allegations made against him and, crucially, it includes purporting to conduct fact-finding exercises in relation to the acts in question.

166. That, says Mr Thompson, is precisely what distinguishes a jurisdictional bar from a defence. Functional immunity is not immunity from liability or from the *consequences* of a judicial determination. It is immunity *from* judicial determination, whether or not productive, or capable of being productive, of liability. Those are, after all, the plain words of the SIA. In any event, functional immunity is not a *personal* immunity enjoyed by a head of state; it is, as its name suggests and as the Court of Appeal made clear, an immunity of the state acting – including *ostensibly* acting – through its offices, agents and organs. Mr Thompson reminds me of Lord Bingham's observation at [12] of *Jones v Saudi Arabia* (and Lord Hoffman's similar observations at [74]):

> International law does not require, as a condition of a state's entitlement to claim immunity for the conduct of its servant or agent, that the latter should have been acting in accordance with his instructions or authority. A state may claim immunity for any act for which it is, in international law, responsible.

Functional immunity attaches to *acts*, and where it applies (for example to acts of a head of state done under colour of authority), Mr Thompson says, a court will have no judicial authority in relation to those *acts* – full stop. In other words, the instinct underlying Popplewell LJ's comments in the present case about *par in parem* was entirely correct.

167. For the Claimant, Mr Caplan KC draws rather more encouragement from the brief exchange before the Court of Appeal. But in any event, his interpretation of the decision of the Court of Appeal, and the consequences of the finding of functional immunity, is very different. Mr Caplan KC deduces that the Court of Appeal was saying the UK courts will not, because of functional immunity, proceed to *try* the Defendant for the relevant acts. As the claim was originally framed, the Defendant (and hence the Kingdom of Spain) was *impleaded* in relation to those acts, because he was on the face of the claim made to defend his liability in relation to them. But the Court of Appeal found he *could not be impleaded* in relation to acts to which functional

immunity applied. The pre-abdication acts could not remain as part of a pleaded course of conduct in a claim for harassment for that reason. But that did not mean they could not be relied on for any purpose.

168. Mr Caplan KC put it succinctly in this way. The concept of immunity begins and ends with the state or its representatives being impleaded. The Court of Appeal conclusively prevented the Defendant, and thereby the state of which he was head, being impleaded in relation to the acts in question. That is a decision which is respected in the latest draft pleadings. And that is the end of the immunity.

169. Mr Caplan KC finds support for that proposition from the decision of the Supreme Court in *Belhaj v Straw [2017] AC 964*. Lord Mance concluded in that case (at [11]) that '*the appellants' pleas of state immunity fail because the various foreign states (Malaysia, Thailand, the United States and Libya) are not impleaded; and their legal position is not affected either directly or indirectly by the claims in tort advanced by the respondents solely against the appellants*'. Explaining his decision further at [15], his Lordship continued:

> …the situations in which state immunity applies are commonly described as involving either direct or indirect impleading of the state. A state is (directly) impleaded by legal proceedings taken against it without its consent: *Cia Naviera Vascongada v SS Cristina (The 'Cristina')* [1938] AC 485, 490, per Lord Atkin. Lord Atkin also identified a second situation of immunity in which, even though the state may not be a party, the proceedings relate to state property…

170. Here, says Mr Caplan KC, the foreign state is no longer impleaded (and it is not a case about state property). The Defendant is no longer *proceeded against* in relation to acts committed under colour of state authority. The Defendant is no longer at risk of liability for acts committed while he was head of state. So the issue of immunity has been dealt with and no longer arises.

171. Mr Thompson says that is the wrong logic. The Court of Appeal found the Kingdom of Spain *was* impleaded – necessarily so, because that is what triggered the finding of immunity. The situation we have is of a *prima facie* impleaded state with immunity successfully claimed, and the question is now about the consequences of that. *Belhaj v Straw* is, he says, irrelevant to the present circumstances because there a claim was brought against the UK seeking to establish a form of accessory liability for primary acts committed by other sovereign states who were not themselves being proceeded against in any capacity. The *UK* defendants could not claim derivative immunity by reference to the position of other states. Here, on the other hand, the Defendant has successfully claimed immunity – it is a different situation altogether.

172. Mr Thompson also drew my attention to the very recent first instance decision in *Haswah v Qatar National Bank [2023] 2 WLR 815* which he says is closer to the present situation. There, a claim was brought against various foreign persons said to have been acting for the state of Qatar, and the court held itself jurisdictionally barred by the SIA. The claimants, however, advanced an alternative application in that event, that they should be able to amend their pleadings so as not to claim inconsistently with the finding of immunity. The court disposed of that application as follows ([54]-[55]):

> The alternative claim is set out in paras 71-73 of the ADPC [amended draft particulars of claim]. In summary, it is that:
>
> > "If and to the extent that the inference pleaded at paras 5-6 above is not accepted by the court, the claimants will advance their claims against all defendants save for ... the 'Excluded Defendants'".
>
> This formulation assumes that at trial, the court will hear all evidence and submissions relevant to the primary case that I have held is subject to state immunity but the court in its judgment following completion of the trial would refuse to draw the inferences that the alleged Terrorist Funding Arrangement had occurred but not with "the direct or indirect authority or acquiescence of the Emir of Qatar, or an individual or entity officially or unofficially authorised to give consent on the Emir's behalf". This is consistent with para 7 of the ADPC, where it is pleaded that "should the inference set out at paras 5-6 above not be accepted by the court and/or established at trial, the claimants advance their claims against certain of the defendants on the footing that they participated in the Terrorist Funding Arrangement in their individual private capacities, as pleaded at para 71 below".
>
> The alternative case as pleaded is premised "on the absence of any authorisation, direction or control of the participation in terrorist financing of those defendants by the Excluded Defendants or the Emir". In order to decide whether that is so, there would have to be a full trial and judicial determination of all the issues that constitute the primary claim. As I have explained in the earlier part of this judgment, the court is precluded by section 1(1) of the SIA from hearing or determining the claimants' primary claim. It follows therefore that the current draft brief details and the ADPC assume that what will happen is what in law cannot be permitted to happen. In consequence, the application for permission to amend in its current form must fail.

(iv) Analysis

173. I return to the decision of the Court of Appeal in this case. I remind myself that the Court did not consider it necessary or appropriate to hear full argument on, or to determine, the point now before me. But it did consider it both necessary and appropriate to eliminate from the Claimant's pleading, as it then stood, not only references to the pre-abdication incidents as forming part of an alleged tortious course of conduct, but also references to those incidents as 'context', or as giving rise to inferences, in relation to the pleaded post-abdication course of conduct. I remind myself of the unqualified conclusion to which the Court came: '*the pre-abdication conduct alleged is immune from the jurisdiction of the courts of this country*' ([76]).

174. The Claimant's contention is nevertheless made firmly. It is, in effect, that the matter of immunity has been conclusively dealt with by drafting, and can now be consigned to history. The Defendant is sued as a private individual solely in relation to an alleged post-abdication course of conduct, which gives rise to no question of jurisdictional immunity. The Kingdom of Spain is no longer impleaded – it is no longer a party in any meaningful respect – to this claim.

175. Noting the exchange in the Court of Appeal, however, I pursued with Mr Caplan KC at the hearing precisely what implications the position he was advancing would have for the future conduct of this litigation. I reminded him that what Lord Mance had concluded in ***Belhaj*** – the case on which the Claimant particularly relies – was that the foreign states in that case were not impleaded *and their legal position was not affected either directly or indirectly* by the case being brought against the defendants. What, however, the Claimant in this case wishes to do is to bring in the *facts* of the pre-abdication conduct, if not as part of a continuous course of conduct giving rise to liability, then as matters evidentially relevant to the establishment of liability for a post-abdication course of conduct. It is a fine distinction. But I accept it is not a distinction without a statable difference. The question I put to Mr Caplan KC was therefore whether he was asking me to agree that a UK court had the jurisdiction to (a) make findings of fact in relation to pre-abdication conduct committed under colour of authority and (b) give legal consequences to any such conduct by way of enabling it to affect legal liability for post-abdication conduct. His answer to that question was 'yes'.

176. Drilling down further, that proposition inevitably envisages trying the facts of the pre-abdication conduct to the extent they are not conceded. It brings that conduct within the purview of the Defendant's disclosure obligations. It brings it within the scope of cross-examination to which he may be subjected. It contemplates the court making factual adjudication, and evaluating legal liability (of the Defendant, even if not of the foreign state) in the light of that adjudication. It contemplates the court considering the consequences of its factual adjudication for remedies and for costs. And the matters in question relate to the engagement by a serving head of state of its security and intelligence service, acts which are those of another state.

177. The Claimant's case is that I should willingly contemplate all of this because none of it affects the legal position of the Kingdom of Spain, but only that of a private individual who, irrelevantly, was once its head of state. But it is hard to ignore the pull of the same question that occurred to Popplewell LJ – whether the *par in parem* justification for the type of immunity engaged here does not indicate that its effect is to debar judicial investigation of the *acts themselves* by the court of another country. And it is hard to ignore the reluctance of the court in ***Haswah*** to contemplate embarking on a full trial of the facts of conduct subject only to a reservation that liability may not finally be attached to matters subject to state immunity.

178. The contrary view is of course that the exercise the Claimant seeks to embark on is indeed to subject to the jurisdiction of the English courts the pre-abdication conduct alleged, albeit in a modified form – precisely what the Court of Appeal ruled against. To return to the specifics, the Claimant wishes the High Court to be able to rule that the Defendant, while head of state, abused the influence he thereby had over the apparatus of state intelligence to intrude on the Claimant's premises, intercept her communications, and leak information about her to the media, and that he did all of this as part of a campaign to manipulate a fund of money he was seeking to hide from the

national tax authorities. She also wishes the High Court to be able to apply that ruling to help explain and give coherence to a subsequent course of conduct, so enabling it to sound, or to sound in an enhanced manner, in liability, damages and costs.

179. Turning back to the authorities, to sue an individual *in respect of the conduct of the state's business* is, indirectly, to sue the state (Lord Phillips, *Pinochet No3* at 286A). That is not a proposition which is limited on its face by reference to precisely how the individual is sued in respect of the conduct of the state's business, or which easily justifies making a jurisdictional distinction between pleading the state's business *as* a course of harassing conduct and pleading the state's business as *colouring or explaining* a course of conduct and the remedies properly attaching as a result. Again, it is contrary to international law for one state *to adjudicate upon the internal affairs* of another state (ibid.). That is not a proposition limited on its face by reference to precisely how a court is to adjudicate upon those affairs, or which is easily reconcilable with a court doing precisely that in order to make findings of fact (the linkages explaining and connecting the components of a post-abdication course of conduct).

180. A sovereign state has the *exclusive right to determine what is and is not illegal or unconstitutional* under its own domestic law. Where a claim is brought against officials, servants or agents of a foreign state in respect of acts done by them, the foreign state is entitled to claim immunity for its servants or agents as it could if sued itself (Lord Millett, *Pinochet No3* at 270). Again, this is not a proposition limited on its face by reference to precisely how a claim is brought in respect of those acts – whether as a primary source of liability or as an ancillary source contributing to the establishment of a post-abdication 'course of conduct'.

181. I have to look at this matter from the position of the state, and not exclusively from the Defendant's (personal) exposure to liability. Whether this Defendant did, pre-abdication, what the Claimant alleges he did *necessarily* puts in issue whether he in fact abused his (public) position for an improper (private) purpose. Whether or not the High Court is invited to attach liability directly to any such finding, it is hard not to see it as being asked to determine – or at least to lay out the definitive groundwork for inferring – whether or not he did that which he was properly and lawfully entitled to do *in his public capacity*. If the High Court embarked on that exercise and made a suite of findings of fact about what really happened between the Defendant and General Sanz Roldán pre-abdication, and what each of them did to the Claimant and why, then a Spanish court before whom such questions might in future arise would be faced with a choice: either to ignore the English court (a denial of its sovereignty) or to consider itself bound by it (a denial of its own sovereignty); the rules of jurisdiction are designed precisely to avoid that sort of invidious dilemma.

182. The Court of Appeal has already found the Defendant not to have been acting in a private capacity in relation to the pre-abdication conduct, but under colour of authority. The incidents complained of are therefore allegations made against a state – allegations of facts which, if established by a court, have legal consequences, even if not in direct liability. The Claimant wishes to proceed to a full trial of the facts, circumstances and indeed merits of the pre-abdication conduct, subject only to a (final) reservation that no such incidents as are established may themselves be described as components of a tortious course of conduct. The effect this gives to state immunity may be statable, but it is hard to recognise as fully respecting its underlying principles.

183. That may owe something to the nature of the tort of harassment, and the particular factual matrix at issue here. If the pre-abdication conduct is pleaded to be, factually and legally, *relevant* or even *necessary*, to understanding, contextualising, evaluating and perceiving the coherence of the post-abdication incidents as a (wrongful) *course of conduct*, then it is meaningfully and materially pleaded as to the facts of and liability for that course of conduct. Labelling it as wholly distinct and severable 'background' looks in these circumstances like an exercise in artificial formalism, for which I was shown no support in the authorities on harassment.

184. In any event I have to look past the drafting to the substance of what is in contemplation here. I am satisfied that, reading the proposed new pleadings as a whole, their effect would be to place the pre-abdication conduct under the jurisdiction of the UK courts in a manner inconsistent with the functional immunity which attaches to that conduct. I would have been minded to reach that conclusion simply on the basis of the fact-finding exercise inevitably contemplated, the exercise of legal powers of procedural compulsion, and the degree of evaluation of propriety, constitutionality and indeed lawfulness of the pre-abdication conduct invited, whether or not that ultimately sounded in the formal legal liability of another state.

185. On any basis, that seems to subject the conduct of a sovereign state to the adjudication of a foreign court. As the Court of Appeal observed in this case ([39]), state immunity is a *procedural* rule going to the jurisdiction of the court; it is '*an absolute preliminary bar, precluding any examination of the merits*'. An *examination of the merits* (indeed the truth) of her allegations about the pre-abdication conduct is what the Claimant wishes the English court to undertake, whatever reservation may be placed on the outcome of that exercise. A state is either immune from the jurisdiction of the foreign court or it is not; there is no half-way house (Lord Bingham, *Jones v Saudi Arabia* at [33], cited with approval by the Court of Appeal ibid.). A half-way house is in my view precisely what the present Claimant seeks, in trying to have the detail and merits of the pre-abdication conduct adjudicated upon, notwithstanding the preliminary procedural bar established by the Court of Appeal.

186. But even if I am wrong about that, I am satisfied, on this particular set of pleadings, that the *degree* of consequence sought for the pre-abdication conduct does indeed to continue to expose the Kingdom of Spain to at least indirect legal consequence – that the foreign state continues to be, to that extent, at least indirectly impleaded. Again, I have to look at the substance, not the formality, of the drafting. A former head of state is proceeded against in a manner which seeks to rely on his conduct as head of state. That former status is neither factually nor legally irrelevant. The Claimant invites an English court to establish and hold that, pre-abdication, the Defendant engaged in conduct under colour of state authority but which was not properly and lawfully so authorised. That is the only basis on which such conduct could be relevant to her claim, and that is what, necessarily and in substance, she alleges. An English court would be obliged to decide the *substance* of that one way or the other.

187. I cannot see but that the Kingdom of Spain would thereby be exposed to the legal jeopardy of an outcome in which the acts of its *ostensible* agent sounded in liability and damages. To that extent, it continues to be impleaded. In any event, the English court's decision would *in substance* amount to an adjudication on the very issue on which the sole sovereignty of the courts of another country is protected by state immunity – the lawfulness and constitutionality of conduct by its head of state undertaken under colour

of authority. No authority I was shown on functional immunity supports that, or supports an assumption of jurisdiction depending on a distinction between lawfulness and liability. Immunity is a bar on adjudicating the merits of such a claim, not a bar on the enforcement of an adjudication against a state once the merits have been decided.

(iv) Conclusion

188. For these reasons, I conclude that the amendments the Claimant seeks to make to her pleadings introduce matters which an English court is not competent to adjudicate upon, because of the limits on jurisdiction imposed, by way of an absolute preliminary bar, by international law as given domestic effect in the State Immunity Act. Prima facie, therefore, I must have refused the permission she seeks.

B. PERSONAL INJURY

(a) Introductory

189. That, however, is not the end of the matter of state immunity. The Claimant seeks further to amend her pleadings in a manner which potentially engages an *exception* to the state immunity jurisdictional bar. That exception is set out in section 5 of the SIA, by which a state is *not* immune as respects proceedings in respect of death, personal injury, or damage to or loss of tangible property *provided that* it is caused by an act or omission in the UK.

190. The Claimant sought expressly to assert that exception, in relation to her original pleadings, both at first instance and before the Court of Appeal. Her assertion was rejected at each stage without hesitation. The High Court judge put it this way (at [76]):

> Although, based on my decision, the point does not arise, I should deal, finally, with the submission that, had an immunity subsisted, the Claimant's claim could nevertheless continue on the basis of s.5 SIA. I would have rejected that argument. The Claimant's claim is for pure harassment. The loss she claims does not include a claim for any recognised psychiatric injury… As such, I do not accept that the Claimant's claim is, or includes, a claim for personal injury. A claim for distress and anxiety arising from an alleged course of conduct amounting to harassment is not, without more, a personal injury claim. Neither of the authorities relied upon by [Counsel for the Claimant] assists the Claimant. The claimant in *Jones v Ruth* was pursuing a claim for psychiatric injury (ie a claim for personal injury). *Nigeria v Ogbonna* is authority only for the proposition that '*personal injury*', as used in s.5 SIA, should be given its normal meaning in domestic law; ie to include a claim for a recognised psychiatric injury (see [27] *per* Underhill J). The short point is that, in her Particulars of Claim, the Claimant makes no claim that she has been caused a recognised psychiatric injury by the alleged harassment. Her claim is therefore not a claim for

> personal injury within the terms of s.5 SIA; it is a claim for distress caused by alleged harassment.

191. The Court of Appeal, before whom the point *did* arise in light of its conclusions on immunity more generally, agreed ([74]):

> The claim was plainly not pleaded as a personal injury claim nor were damages for personal injury claimed in the prayer. As the judge correctly held, a claim for distress and anxiety arising from an alleged course of conduct amounting to harassment is not, without more, a personal injury claim. The short point, again as the judge observed, is that the respondent made no claim that she has been caused a recognised psychiatric injury by the alleged harassment. Her claim is therefore not a claim for personal injury within the terms of section 5 SIA. It is simply a claim for distress, anxiety and depression (none of which, as pleaded, are recognised psychiatric conditions) caused by the alleged harassment.

192. The Court of Appeal also made some forward-looking observations (at [745]):

> As to the suggestion that the respondent may now wish to rely on new medical evidence or a re-amended pleading, there is no application to amend. Any such application would have to be made to the judge. Moreover, the respondent has made no application to adduce fresh evidence on this appeal, and any such application, if it had been made, would have had to overcome the obstacle that this evidence could plainly have been obtained with reasonable diligence for the hearing before the judge (see CPR 52.21(2)).

193. The Claimant now seeks, by application, to address these very matters. This application of course engages considerations much wider than state immunity. I must first determine it on its own merits in accordance with the applicable legal framework. But I deal with it at this point in the judgment because of its potential jurisdictional significance – jurisdiction being a preliminary and non-discretionary matter – as well as its potential consequences, either way, for the shape of her pleadings as a whole.

(b) The Claimant's application

194. The Claimant applies to amend her pleadings in two significant respects. The first is to introduce a new claim in intentional infliction of injury (the '*Wilkinson v Downton*' tort – *Wilkinson v Downton [1897] 2 QB 57*). She wishes to introduce this as a head of liability additional to harassment, although constituted by the same acts. She wishes to plead that: '*the conduct complained of*' (with the exception of the allegations relating to pre-abdication media articles) amounted to the intentional infliction of injury because there was no justification or reasonable excuse for it; the conduct was intended to cause her '*physical harm and/or mental or emotional distress*', and '*it was so obvious that the Defendant's conduct would or could potentially cause harm and/or mental or emotional distress that he cannot realistically assert that none was intended*'; causing '*harm and/or mental or emotional distress*' was the means by which the Defendant

sought to achieve his objectives of punishing the Claimant and obtaining control over the June 2012 payment; '*the conduct*' caused the Claimant to suffer psychiatric injury; and she claims damages for pecuniary and non-pecuniary loss as a result of the intentional infliction of injury.

195. Then she also wishes to be able to claim that '*the matters complained of*' have '*caused or materially contributed to the Claimant's psychiatric injuries*'. For particulars of those injuries she wishes to refer to expert reports of a consultant forensic psychiatrist, Dr Farnham, dated 12th June 2022 and 18th April 2023. There, the Claimant is identified as suffering from '*mild to moderate depression, a mild to moderate anxiety disorder and mild post-traumatic stress disorder*'. There is a prognosis of some improvement if 'the matters complained of' cease; otherwise, there is said to be a significant risk of the Claimant developing complex PTSD. Accordingly, she seeks injunctive relief, and wishes to add to her claim in damages in relation to harassment '*and/or intentional infliction of injury as well as damages for pain, suffering and loss of amenity*'.

(c) The legal framework

(i) Amendment of pleadings

196. Amendment of particulars of claim after service requires the permission of the court (Civil Procedure Rule 17.1). The test to be applied on an opposed application to amend is the same as the test applied to an application for summary judgment, namely whether the proposed new claim has a real prospect of success (*SPR North Ltd v Swiss Post International (UK) Ltd [2019] EWHC 2004 (Ch)* at [5]).

197. Nicklin J summarised the state of the authorities on permission to amend as follows (*Amersi v Leslie [2023] EWHC 1368 (KB)* at [140]):

> (1) The threshold test for permission to amend is the same as that applied in summary judgment applications: *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204 [40]-[42] per Asplin LJ ("the merits test").
>
> (2) Amendments sought to be made to a statement of case must contain sufficient detail to enable the other party and the Court to understand the case that is being advanced, and they must disclose reasonable grounds upon which to bring or defend the claim: *Habibsons Bank Ltd v Standard Chartered Bank (HK) Ltd* [2011] QB 943 [12] per Moore-Bick LJ.
>
> (3) The court is entitled to reject a version of the facts which is implausible, self-contradictory, or not supported by the contemporaneous documents. It is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action or defence relied upon: *Elite Property Holdings Ltd* [42] per Asplin LJ.
>
> (4) In addition to being coherent and properly particularised, the pleading must be supported by evidence which establishes a proper factual basis which meets the merits test: *Zu Sayn-Wittgenstein v Borbón y Borbón* [2023] 1 WLR 1162 [65] per Simler LJ.

> (5) In an area of law which is developing, and where its boundaries are drawn incrementally based on decided cases, it is not normally appropriate summarily to dispose of the claim or defence. In such areas, development of the law should proceed on the basis of actual facts found at trial and not on the basis of hypothetical facts assumed to be true on an application to strike out: *Farah v British Airways plc* [1999] EWCA Civ 3052 [42]-[43] per Chadwick LJ.

198. That summary notably references the observations of the Court of Appeal in the present case. In the circumstances, I set out the Court of Appeal's own summary in full ([63]):

> …in general, there is a merits test to overcome in obtaining permission to amend. The pleading must not only be coherent and properly particularised, it must plead allegations which if true would establish a claim that has a real prospect of success. This means that the claim must carry a degree of conviction; and the pleading must be supported by evidence which establishes a factual basis which meets the merits test: see *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [8]; *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 at [41] and [42]; *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18].

199. The 'merits' test for granting summary judgment itself was set out more fully by Lewison J in *Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)* in a passage at [15] subsequently approved at Court of Appeal level and now widely cited:

> i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All E.R. 91;
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];18
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should

> hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 3;
>
> vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.

(ii) Intentional infliction of injury

200. The tort identified in *Wilkinson v Downton* was approved by the Court of Appeal in *Janvier v Sweeney* [1919] 2 KB 316. It is a tort of principal relevance to infliction of injury by non-physical means. The *Janvier v Sweeney* headnote –

> False words and threats calculated to cause, uttered with the knowledge that they are likely to cause, and actually causing physical injury to the person to whom they are uttered, are actionable.

– was approved by Buxton LJ in *Wainwright v Home Office [2002] QB 1334* at [79], as coming as close as possible to a general statement of the tort, adding that a 'recognised psychiatric illness' amounts to physical injury for this purpose.

201. In *Wong v Parkside Health NHS Trust [2003] 3 All ER 932*, Hale LJ (as she then was) stated (at [12]):

> For the tort to be committed, as with any other action on the case, there has to be actual damage. The damage is physical harm or recognised psychiatric illness. The defendant must have intended to violate the claimant's interest in his freedom from such harm. The conduct complained of has to be such that that degree of harm is sufficiently likely to result that the defendant cannot be heard to say that he did not 'mean' it to do so. He is taken to have meant it to do so by

> the combination of the likelihood of such harm being suffered as the result of his behaviour and his deliberately engaging in that behaviour.

202. The tort is distinctively one of *intention*. At House of Lords level in *Wainwright* (*[2004] 2 AC 406*), Lord Hoffmann noted (at [44]):

> ….the policy considerations which limit the heads of recoverable damage in negligence do not apply equally to torts of intention. If someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation. But I think that if you adopt such a principle, you have to be **v**ery careful about what you mean by intend.

203. The history, development and policy of the tort was extensively reviewed by Lady Hale JSC in *Rhodes v OPO [2016] AC 219*. I have read her judgment carefully, and do not attempt to summarise it here. But it is not, I think, controversial to capture the following headline points. In *Wilkinson v Downton* Wright J recognised that wilful infringement of the right to personal safety was a tort. It has three elements: a conduct element, a mental element and a consequence element. The conduct element requires words or conduct directed towards a claimant for which there is no justification or reasonable excuse, and the burden of proof is on the claimant. The consequence required for liability is physical harm or recognised psychiatric illness. The necessary mental element is *intention* to cause physical harm or severe mental or emotional distress; recklessness is not the test.

(d) Consideration

(i) Pleading

204. My first task is to consider whether, on its face, the proposed new particulars of claim clearly and accurately plead all the necessary components of (a) the tort of intentional infliction of injury and (b) the causation of personal injury ('*recognised psychiatric injury*') by harassment. I am applying, in the first place, the test of whether, in these respects, the pleadings are '*coherent and properly particularised*' and in good working order. To be in good working order they must plead the components sufficiently clearly for the Defendant to understand and be able to deal with the case raised against him, and for it to be fair to expect him to defend it on those terms.

205. It is perhaps necessary to say something in the first place about the overall shape of the case the Claimant seeks to make. I consider the pleaded case on liability for harassment, as a whole, below; for present purposes I am concerned with the new personal injury dimension the Claimant seeks to introduce into her case. But the injury tort is desired to be pleaded in the alternative to harassment ('*further or alternatively*'). So a preliminary point does arise about the relationship between the two torts, and precisely what, therefore, the injury tort is said to add.

206. Taking the 'conduct' element first, both torts require conduct directed to a claimant which is unjustified or unwarranted. Harassment, distinctively, requires a 'course of conduct' – two or more connected acts of the necessary quality – whereas the injury tort does not. However, in her latest draft, the Claimant pleads in terms that she relies on the same facts – the pleaded 'course of conduct' – for the purposes of both harassment and intentional infliction of injury. Her case on either basis is that the

course of conduct had a cumulative, and continuing, impact on her mental health. For the injury tort, therefore, the case is one of cumulative causation. I am persuaded, including by the examples cited without criticism in ***Rhodes v OPO***, that that is not impermissible pleading of the tort in itself. It does, however, make the pleading of the conduct element of the two torts coterminous, other than in the theoretical event that only a single relevant act of the Defendant were ultimately established (that possibility is however, perhaps unsurprisingly, not pleaded).

207. It appears also that the conduct is identically pleaded on both bases as regards its unjustifiability (leaving aside its intentionality and effects). It is said to have been oppressive of the Claimant and extortionate in relation to accessing the June 2012 payment. I remind myself that the pleaded course of conduct includes elements of speech and publication, and that considerations of freedom of expression were prominent in the analysis and decision in ***Rhodes v OPO***, as was confirmation that the burden was on a claimant in that respect. This aspect is not, however, itself dealt with in the proposed pleading.

208. The key distinction between the two torts is of course the mental element. For harassment, acts must be such that a defendant knew or ought to have known of their harassing quality – that they were oppressive and likely to be causative of alarm and distress. For the injury tort, the test is much higher: a defendant must be alleged to have acted with the *intention* to cause physical harm or severe mental or emotional distress.

209. That component is not accurately pleaded in the Claimant's latest draft. What is pleaded is that the conduct was intended to cause the Claimant '*physical harm and/or mental or emotional distress*'. That does not establish the injury tort. The absence of the qualifying '*severe*' in relation to distress is not a minor point of detail. The mental element of the injury tort was given careful and meticulous attention in ***Rhodes v OPO***. It goes to the root of the policy justification of the tort. The Supreme Court was clear that neither an intention to cause distress, nor recklessness as to the causation of injury, will suffice. As Lord Hoffmann pointedly observed in ***Wainwright***, it is important in relation to this tort to be *very careful about what you mean by intend*. This is a material defect in the proposed pleading.

210. There is a further problem with the mental element – and indeed the consequences element – of the proposed pleading of the injury tort. The intention is wholly unparticularised beyond the (attempted) recitation of the tort. The Defendant is said to have (intentionally) caused harm as the *means* of securing his financial objective. But as a proposition of intention, that does not speak for itself. An inferential case may be understood as to the deployment of harassment – oppression, threats, distress – in order to secure financial purposes. But the alleged connection between those purposes and a primary intention to *injure* (not just to *threaten injury*) is opaque. Injuring someone by intentionally, as opposed to recklessly, making them mentally ill (including by exposure to severe distress) does not self-evidently advance the objective as pleaded. The 'motive' and the 'intent' are not obviously coterminous. Without further pleaded detail, it is hard to understand what it is the Defendant is being said to have intended to bring about by way of injury (or severe distress). And that element of intention is of the essence of the tort.

211. The consequence is pleaded as 'psychiatric injury', without the qualifier 'recognised' and without particularisation. Instead, under the heading of '*particulars of anxiety and*

personal injury', the Claimant seeks to plead in Dr Farnham's reports, and their diagnoses of '*mild to moderate depression, a mild to moderate anxiety disorder and mild post-traumatic stress disorder*'. These are said to have been '*caused or materially contributed to*' by the Defendant's conduct.

212. Pleading the core components of a tort by the annexation of reports in this manner is not ideal here because (a) it requires an exercise in reading evidence to discern *what* is being alleged and not just *why* it is being alleged and (b) since further medical evidence is foreseen by the Claimant, 'consequence' is thereby pleaded in what might be considered an ambulatory style. Both of these are problematic in terms of providing the Defendant with a clear and succinct statement of the case he is being asked to defend. However, I can see that the Claimant's amendments would at the least specify on the face of the particulars of claim the causation of what may fairly be described as recognised psychiatric illness. On that basis, I consider Dr Farnham's reports further below for the support they are able to offer the Claimant's application as a matter of evidence.

(ii) Merits: evidential basis

213. I am not to conduct a mini trial at this stage. But I must be satisfied that the amendments the Claimant wishes to make would establish a personal injury claim – in harassment or in intentional injury – that carries a degree of conviction, is supported by evidence, and has a *real* prospect of succeeding at a contested trial. I am to look at the evidence before me, and the evidence which can reasonably be expected to be available at trial, but I am not to proceed on the basis of Micawberish hopes of future evidence turning up something else of use to the Claimant.

214. As I have indicated, the problems with the pleading of intention are not limited to a missing word here or there. The bare inference invited – purely from the riskiness of the conduct and the Defendant's alleged motivations – does not in my view speak for itself. Much less is it 'obvious' that conduct which, objectively, '*would or could potentially cause harm and/or mental or emotional distress*' leads to any inevitable (or sound) inference of an intention to inflict severe mental or emotional distress, particularly where it is pleaded as instrumental to a different primary outcome. That is because such conduct is entirely consistent with mere recklessness as to the infliction of harm, and entirely consistent with an intention to cause distress to a degree far short of *severe*. These are the fundamental distinctions on which liability for this tort turns. Not only are they not pleaded correctly, or particularised, the purely inferential case apparently relied on is not coherent and does not carry a real degree of conviction.

215. And there is *no* evidence offered at this stage to support such an inference. The evidence filed to date by the Claimant comprises Dr Farnham's reports – which, unsurprisingly, do not address the state of the Defendant's mind – and five witness statements by the Claimant herself, dated between 19th April and 12th July 2023. The first of these, prepared apparently before the introduction of the injury tort was in contemplation, expressly disavows any view to adding a new head of liability, and is addressed instead to '*losses which all arise out of my existing claim for harassment*' (at [8]). The second and third are not addressed to this issue, and her final statement takes the matter no further. The fourth statement, of 5th July 2023 (two weeks before the hearing) says only this, of the proposed amendments introducing a claim for intentional infliction of injury: '*These amendments do not rely on any further facts, and will be*

addressed by my lawyers in submissions.'. But the new head of liability necessarily raises a further, and crucial, factual issue as to the Defendant's state of mind. In other words, no *evidence* is offered that the alleged course of conduct was undertaken not only deliberately, persistently, oppressively and with a view to a financially advantageous outcome, but with the further *intention* to inflict psychiatric injury or *severe* distress. There is not even any indication that evidence going to this issue is in contemplation, or could be expected to be made available before trial.

216. The tort of intentional infliction of injury entails allegations which are demanding for a claimant to make good. It alleges unlawful behaviour directed to a claimant's entitlement to bodily integrity and of a correspondingly malicious nature. There is ultimately an equivalently demanding evidential burden for a claimant to discharge at trial. It is incumbent on claimants to set out allegations of this sort with sufficient accuracy, coherence and particularity (and, on an amendment application, prima facie evidence), so that there can be no reasonable doubt about the case a defendant faces. Here, the combination of defective pleading and absence of evidence, present or prospective, does not in my judgment establish that these proposed amendments present a claim in the injury tort which, as matters stand, has a real prospect of success. It does not carry the necessary degree of conviction. It does not meet the merits test.

217. Turning to the pleading of the causation of 'recognised psychiatric injury' by harassment – and proceeding for present purposes on the provisional basis of an otherwise soundly pleaded case in harassment – the principal evidence relied on in support of the Claimant's application is contained Dr Farnham's report of 12th June 2022, as supplemented by his further report of 18th April 2023. The former sets out the psychiatric diagnoses relied on. The latter is intended to answer a series of forensic follow-up questions dealing with the following, amongst other things:

    a) when the Claimant's symptoms 'crossed the diagnostic threshold';

    b) the extent to which the alleged acts of harassment subsequently exacerbated her psychiatric condition;

    c) whether the alleged course of conduct of which the Claimant became aware after 18th June 2014 [that is, the date of abdication] caused or materially contributed to her psychiatric injuries and, if the index harassment made a material contribution, whether it was possible to identify a part of the injury that was due to the index harassment or whether the injury was 'indivisible'.

218. Dr Farnham answered these questions with the following opinion evidence. The Claimant's symptoms of anxiety, depression and PTSD '*probably would have crossed the diagnostic threshold by 2016 and may have crossed the threshold as early as 2012 or 2013*'. The subsequent acts of alleged harassment are likely to have aggravated and exacerbated these conditions. The alleged course of conduct after 18th June 2014 would have made a '*material contribution*' to her psychiatric injuries; it is not possible to identify a part of the injury due to the index harassment (an expression which does or may refer to the pre-abdication conduct), and the injury is indivisible.

219. I can see from this that the proposed amendment to advance a case for damages for personal injury, caused by a harassing course of conduct, pleads the infliction of a

recognised psychiatric injury for which there is evidence by way of a supporting medical diagnosis. That, on the face of it, is at least capable of adding up to a proposition which I could properly find, by following the approach indicated by the authorities, to have a real prospect of success.

220. The Defendant, however, raises a number of objections to this case. They include the following. As currently pleaded, the Claimant expressly disavows reliance on pre-abdication incidents as themselves constituting part of the harassing 'course of conduct'. She can only properly plead the causation of personal injury by the course of conduct she pleads. But Dr Farnham's (albeit provisional) evidence is that the Claimant may have crossed the diagnostic threshold – that her psychiatric injuries arose – *before* the date of abdication. In that event, the pleaded course of conduct cannot have *caused* the psychiatric injuries. At most they could have made them worse (made a '*material contribution*'). But Dr Farnham's evidence is that the injury is '*indivisible*'. And the High Court (*Thorley v Sandwell & West Birmingham Hospitals NHS Trust [2021] EWHC 2604 (QB)* and *Davies v Frimley Health NHS Foundation Trust [2021] EWHC 169 (QB)*) has consistently held itself bound by Court of Appeal authority that the '*test for material contribution has no application to a case where (as here) there is an indivisible injury and one tortfeasor*'. So this case is bad in law.

221. In any event, says the Defendant, it runs up against limitation problems, since the Claimant cannot plead *new* matters relating to *harassment* arising more than 6 years before she issued her claim – that is to say, before 16th October 2014. A court does have discretion under CPR 17.4(2) to consider permitting an amendment otherwise statute-barred *if* its effect would be to add a *new claim*:

> The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.

That *could* have applied to the amendments dealing with the addition of a claim in the intentional infliction of injury, allowing for an extension of the relevant (three year) causational period. But a court has no such discretion where it is considering an amendment to pleading under CPR 17.1 – that is, relating to an already-pleaded basis of liability.

222. What the Claimant says about this, in effect, is that these matters of causation and limitation take me into mini-trial territory, and can and should be left until a substantive trial. The Claimant can be said to have raised a prima facie, and evidenced, case of the infliction of psychiatric injury by harassment. On any basis, the exacerbation of harm by conduct *within* the limitation period must survive. And the *Thorley* problem ought not to be dealt with at an interlocutory stage on something short of a full-facts basis.

223. I have some sympathy with those submissions. It is plain that the High Court has struggled to some extent with the indivisibility/material contribution point in the past. The facts of the present case are unusual: the only reason the Defendant is being said to have contributed to, rather than caused, personal injury by harassment is because the 'index harassment' – the primarily causative 'course of conduct' pre-abdication – has been eliminated from the Defendant's claimed legal responsibility in light of the Court

of Appeal's decision on functional immunity. That is on the face of it a set of circumstances which might conceivably found a fact-sensitive case to the effect that the Court is not after all bound to find a 'material contribution' argument inevitably inconsistent with authority.

224. But the problems of causation and limitation more generally have deeper roots. They arise from the fact that pleading and evidence in support of the proposed case for causing personal injury by harassment do not fully match up. Liability is pleaded by reference to a course of conduct beginning no earlier than 18th June 2014 (abdication) or perhaps 16th October 2014 (limitation) both of which curtail the matters for which the Defendant can, as things stand, be held legally liable in harassment. But the causation of psychiatric harm is not addressed to *that* course of conduct. The evidence is that the 'diagnostic threshold' may have been crossed before then. And *material* contribution made exclusively by the post-abdication conduct, even if arguably relevant, is neither pleaded nor evidenced with any degree of specificity. The harm may be 'indivisible'. But the course of conduct has been divided. And the nature and indeed *materiality* of the contribution said to have been made by the latter is neither identified nor specified, whether in pleading or evidence. All Dr Farnham gives by way of explanation is that the post-abdication conduct '*indicates a continuing pattern of harassment and threat*', '*likely to have led to a perpetuation of her condition*'.

225. For these reasons, I cannot perceive here a pleaded and evidenced case for the causation of (or *material* contribution to) personal injury by the pleaded course of conduct in harassment which I can be satisfied has a real prospect of success. But here we begin to approach the nub of the problem of how the Claimant wishes to put her case on personal injury – and it is a problem of incoherence. To some extent the problem may have to do with the Claimant's attempt to plead the pre-abdication conduct as 'relevant context' for liability – and by extension perhaps causation. I have explained why in my judgment that attempt must fail on its own terms. But it may have rather more to do with the multiple targets the Claimant may be trying to hit at once with these amendments, and the degree of opacity that has resulted. It is to this aspect I turn next.

(iii) Merits: the overriding objective

226. Whether a proposed case as amended has a reasonable prospect of success does not exhaust the merits test. I am required also to consider the overriding objective *of enabling the court to deal with cases justly and at proportionate cost*. I am, as one of the authorities puts it, required to balance the potential injustice of refusing to permit a claimant to put, and develop, her case exactly as she chooses, against the potential injustice to a defendant of making him address a moving, and/or indistinct, target in order to avoid liability. That exercise requires a clear answer to the question of what would be added to the Claimant's overall case, to the Defendant's overall burden, and to the commitment of scarce public resource to court proceedings – by these proposed amendments.

227. The Claimant impresses on me that she is fairly entitled to have her allegations considered coherently, contextually and as a whole. And she says there is no material prejudice to the Defendant – who, to date, has tendered neither defence nor evidence – in being asked to address that case from here on in. Taken purely at face value, however, the addition of a new claim for the intentional infliction of injury, and/or the expansion of her claim for harassment to include the causation of (recognised

psychiatric) injury, add a degree of potential complexity and expense to her case not obviously in proportion to the enhancement of her claim in harassment alone. The intentionality element introduced by the new claim sets a bar for liability – and therefore for evidence required to support it – considerably higher than that required for harassment. The extension of the damages claim to include personal injury – in addition to damages for anxiety, distress, etc – also raises the bar, and engages the prospect of contested expert medical evidence leading to considerable further expense, delay and consumption of court resource. The Claimant's case for amendment was put to me on the basis that, although she had already included claims for debility, distress and medical expenses in her harassment claim, she was now looking to claim general damages for pain, suffering, loss of amenity and loss of earning power. That does account for some of the increase in the total quantum she now seeks, but it is a *relatively* limited proportion of that.

228. What an approved pleaded case of recognised psychiatric injury does add, however, is the prospect of making out an exception to the functional immunity jurisdictional bar in reliance on section 5 SIA. And what a *new* head of liability adds is the prospect of making a case for the discretionary extension of the limitation period. Taken together, these hold out the prospect of enabling the Claimant effectively to revert to the previous position she had secured in the High Court judgment, before that was overturned on appeal – and indeed to enhance that position. She would in principle be able to try to plead back in the pre-abdication conduct on a direct rather than obliquely 'contextual' basis – or at the very least on a full-fact basis – because of the exception to functional immunity (and that could be the effect of the change to the harassment pleading alone). And, through the new cause of action, she could potentially be able to sue on the pre-abdication ('index') conduct even without the assistance of the post-abdication incidents.

229. That is not how she puts her application, of course. She would be in plain difficulty in combining an *express* restriction of her case in harassment to a post-abdication course of conduct (her primary answer to the Court of Appeal's ruling) with a clear and *express* case on the causation of injury by the *whole* of the conduct complained of, both pre- and post-abdication (the logic of the section 5 route). But I cannot ignore the litigation history of this matter. It may be that she has tried to have the best of both worlds, acknowledging the strict logic of the Court of Appeal's decision but seeking to reintroduce the pre-abdication material, and laying the groundwork for pursuing the logic of her previous section 5 SIA arguments, none the less. The wording of section 5 is absolute: jurisdictionally, a state *is not immune* as respects proceedings in respect of personal injury (albeit caused by an act or omission in the United Kingdom – a matter of some potential evidential substance and complexity in its own right, as we have seen). And it may be that the attempt to have the best of both jurisdictional arguments has undermined her ability to succeed on either.

230. As I have said, the potential accrual of jurisdictional benefits is not a reason in and of itself to do anything other than consider the personal injury application on its merits in the first place. I have explained why I do not consider either limb of this part of the application to have a real prospect of success. That is largely because of an incoherence in the pleading and evidence, but that in turn may be because of what the Claimant at some level is collaterally trying to achieve here. Permission to plead personal injury would potentially unlock the functional immunity exception. The functional immunity

exception could in principle enable the Claimant to plead in the pre-abdication conduct fully. But she needs to colour the personal injury case with the pre-abdication conduct to enhance its prospects of obtaining permission, and to reflect the case she continues to wish to make. That is the conundrum, and may well be at the root of the problems of coherence in her pleadings and evidence.

231. To say, however, that there is no prejudice to the Defendant in her application is not accurate. It is prejudicial to his continuing ability to rely as of right on functional immunity in relation to the (facts of the) pre-abdication conduct without litigating the 'act or omission in the UK' point. The question is whether it is *fairly* prejudicial. Had the Claimant from the outset properly pleaded a case in personal injury, and pre-empted any claim for functional immunity on that basis in the first place, then that would have been one thing. But that is not what happened.

232. The Claimant issued her claim in harassment (minus any pleading of personal injury as the Court of Appeal in due course found) on 16th October 2020. The Defendant raised his functional immunity jurisdictional challenge by application notice filed on 18th June 2021. The Claimant resisted that application both on its merits *and* on the alternative basis that, relevantly to s.5 SIA, *she had made a personal injury claim*. The High Court judgment of 24th March 2022 rejected that alternative application (obiter): it considered on a proper interpretation she had not made any such claim.

233. The Claimant then obtained Dr Farnham's (original) report, with its psychiatric diagnosis, on 12th June 2022. The hearing before the Court of Appeal took place on 8th November 2022. The judgment of 6th December records (at [10]-[12]) that there was, before it, an 'unagreed bundle' dated 6th October 2022, comprising documents not before the High Court on which the Claimant sought to rely. It included a draft revised version of the particulars of claim containing '*an express plea of personal injury based on a medical report dated 12 June from Dr Frank Farnham, said to document the [Claimant's] depression of mild to moderate severity, an anxiety disorder of mild to moderate severity, and symptoms suggestive of post-traumatic stress disorder*'.

234. The Defendant had not consented to that amendment, the Claimant had not made any application to amend, and Counsel for the Claimant accepted that that application should have been made. '*He made clear that he did not rely on documents contained in the Unagreed Bundle, or on the re-amended pleading as evidence of the truth of its contents. Rather, he submitted that the new material simply supports the case he wishes to run at trial.*' On that basis the Unagreed Bundle – containing the draft personal injury plea but not, it would appear, Dr Farnham's report itself – '*was admitted de bene esse without determining the admissibility of each document. The [Defendant] did not oppose that approach*'.

235. The Court of Appeal's conclusion on functional immunity made it *necessary* for it to address and determine the section 5 SIA point. It records the Claimant's position before it in this way:

> [72] [Counsel for the Claimant] accepted that the original pleading did not specifically use the phrase 'personal injury' or adduce a medical expert report as to any asserted psychiatric injury suffered by [the Claimant], as is required for a personal injury claim by CPR 16 PD 4. However, the Particulars of Claim

> pleaded a claim at paragraph 7.1 for damages caused by anxiety and damage to [the Claimant's] health caused by harassment. Moreover, he relied on the clearly pleaded claim at paragraphs 56.1 and 56.3 for damages for anxiety, distress and depression. Although in writing he submitted this sufficiently pleaded a recognised psychiatric injury, he accepted in the course of the hearing, that it did not, and that personal injury was not in fact pleaded in the original Particulars of Claim.
>
> [73] However, he maintained that these passages made clear that [the Claimant] intended to claim damages for injury to her health, and it was open to her to provide further particulars documenting the extent of her injuries (which she has now done in the draft Re-Amended Particulars of Claim, including by reference to an expert medical report). Certainly, by the time of the hearing before the judge and having raised reliance on section 5 SIA, it was clear that she regarded her claim as a claim for personal injury, and the amended pleading demonstrates that this is the case she intends to run. The amendment would cure any defect and she should have been given the opportunity to cure any defect in her pleading, if there is one.

236. In other words, before both the High Court and the Court of Appeal, the Claimant's position was that she had been strenuously trying all along to assert a personal injury claim, that she had, at each successive stage, successfully done so, and that, if there was anything amiss in that, it could easily be cured by drafting.

237. As has been noted, the Court of Appeal rejected these submissions. Indeed, they look rather like another attempted 'halfway house' on immunity – asserting the benefit of the exception without the necessary pleading and evidence. The Court upheld the High Court decision that personal injury had not in fact been pleaded or evidenced. There had been no application to amend or to adduce fresh evidence. And any application to rely on fresh evidence (on appeal) '*would have to overcome the obstacle that this evidence could plainly have been obtained with reasonable diligence for the hearing before the judge*'. By 'this evidence' the Court was presumably referring to Dr Farnham's report, obtained in the months between the two hearings. Opposing the Defendant's jurisdictional challenge by reference to s.5 SIA could, and should, in other words have been based on effective pleadings (or a formal application to amend) before the High Court or a formal application before the Court of Appeal to admit fresh evidence. None of that was done. The Claimant had been declaring a personal injury case, and asserting the benefit of s.5, but had failed to do so effectively.

238. That raises the question of why not. An opportunity to do so in an orderly manner in response to the Defendant's jurisdiction challenge had apparently presented itself and the Claimant had failed to take it. Indeed, on the Claimant's own case, the opportunity to do so had existed from the time the claim was filed. All of these opportunities, it appears, were recognised, since the Claimant was arguing that she had successfully taken them. But she was found to have failed to do so. So the question of functional immunity had to be litigated in full (and again before me, in relation to the proposed 'pre-abdication' amendments).

239. I am now given an explanation for this failure in the form of two pieces of evidence. In his addendum report of 18th April 2023, Dr Farnham records being asked this question:

> whether, on the basis that the Claimant proposed to give evidence that she had not included a claim for personal injury earlier because she had not felt mentally strong enough to do so, there may have been 'psychiatric reasons' for not making the claim earlier.

His answer was that typical psychological reactions to stalking and harassment, and typical unwillingness of individuals to discuss their mental health difficulties in detail for fear of making them worse, added up to psychiatric and psychological symptoms and difficulties that are '*likely to help explain reasons why the Claimant did not claim personal injury damages earlier*'.

240. And in her first witness statement, of the same date, the Claimant sets out the alleged impact of the Defendant's behaviour '*over the past decade or so*' on her wellbeing, asking the court to bear this in mind when considering the drafting of the original particulars of claim in December 2020. Of that, she says she '*did not feel mentally strong enough to subject myself to the intensive examination by a forensic medical expert and my lawyers which would have been necessary to include specific details of the psychiatric harm that the harassment has inflicted upon me*'. She says she feared intensive discussion of her '*emotions about the harassment*' would, at a time when she had other stressful matters to cope with, tip her over the edge and stop her functioning properly. But she pointed out that her original particulars did include the costs of medical treatment. It was only when other circumstances changed and she felt able to be examined by Dr Farnham that she asked for permission to amend her claim to include a personal injury element.

241. Unlike evidence going to the question of 'real prospect of success' – where I can and should proceed on the basis of taking apparently plausible evidence largely at face value at an interlocutory stage – this is evidence I need to examine critically for the weight I am able to place on it. I am addressing not the prospects of success at trial but the *fairness* of what the Claimant wants to do.

242. In the first place, I note that this account of not feeling mentally strong enough in effect to provide adequate instructions and evidence to plead personal injury before the spring of 2022 appears nowhere previously in any material or submissions prepared for the purposes of this litigation. It would have been simple enough, and obviously advantageous, to have done so. On the contrary, however, the instructions she apparently did give were precisely to assert a personal injury element in her claim from the outset and to assert that twice in court with some vigour. Privilege has not been waived in this respect, so I proceed on the basis that the reasons she gave to the Court of Appeal through Counsel, as set out above, for her position accurately stated it. Although the Court was told that further applications and evidence were in prospect there is no sign of any suggestion that she had been *unable* to provide them any earlier.

243. The Claimant's witness statement does not in any event explain the failure to make an application to amend pleadings and adduce Dr Farnham's report to the Court of Appeal, if that indeed had been her first practical opportunity to do so. The Court was clearly given no reason to understand that it was the first opportunity, since it considered it

plain that the report could with reasonable diligence have been prepared in time for the High Court hearing. The evidence does not explain why Dr Farnham's report could not after all have been prepared in advance of the High Court hearing, and yet why it was able to be put in hand so soon after.

244. Dr Farnham's supplementary opinion throws little further light on the matter. I note that his original report annexed a list of (very) brief excerpts from the Claimant's UK GP reports over the relevant period which, so far as anything can be made of them in view of their decontextualised brevity, appear to suggest that she was after all discussing her mental state and its relationship to the underlying allegations with her medical advisers throughout the relevant period. A '*strong mental approach*' is noted on 7th December 2020; symptoms of stress were discussed in the context of being an '*ongoing target of nefarious state activity*' on 4th May 2021; and on 16th May 2022 there is a reference to being '*positive*' about the progress of the case since the medical report had been commissioned. There is a limit to the significance I am able to attach to this sort of material, but it is contemporaneous documentary evidence, and I note that Dr Farnham does not deal with these records in answering the question put to him. And they contain no sign of a mental condition too fragile to instruct on and evidence personal injury in support of the Claimant's section 5 submissions.

245. I do at this point have to ask myself some of the questions which troubled the Court of Appeal faced with the (informally) proposed amendments intended to address the primary functional immunity case (at [64]-[65]). These include whether the '*stark timing*' of these proposed amendments and this evidence – responsive as they are to the Court of Appeal decision on functional immunity and the rejection of the unsupported s.5 submissions – and their '*stark inconsistency*' with the position formally taken on personal injury before now (or, at the very least, the complete absence of this account of a long period of effective mental disability to advance her litigation fully at any time previously, including when being directly challenged in court to give an explanatory account) – raise a real issue about whether they are '*simply a device to meet the state immunity arguments*'. The Court of Appeal answered its own questions adversely to the Claimant. She has not put me in a position to give her a more favourable answer now. The Claimant has again sought to have the best of both worlds – assertively advancing a section 5 case on jurisdiction previously, without complying with the relevant rules of pleading and procedure, and now seeking to explain that on the basis that, contrary to her previous position, she had been *unable* to advance any such case. That is inconsistent, unpersuasive and unfair.

246. In the circumstances, the evidence now put forward to explain the procedural and substantive failure to plead personal injury from the outset has both insufficient explanatory power and insufficient weight-bearing strength. In the result, I conclude that granting this application would materially advantage the Claimant, *not* (only) in relation to a full and fair statement of her claim, but in the prospects it opens up for avoiding the full consequences of the Court of Appeal's decision on functional immunity, and indeed of the conclusions I have further come to on immunity, and to the same extent would be unfairly prejudicial to the Defendant. The Defendant has faced the prospect of an asserted section 5 case already at first instance and on appeal. I have been given no sufficient basis, and see no argument of fairness, for exposing him to the possibility of having to do so again, nor for the considerable complexity, expense and delay inevitably entailed, not least by way of the commitment of scarce court time

and resource. The Court of Appeal left the door only somewhat ajar on this matter. The Claimant has not sufficiently grappled with the clearly signalled, and demanding, requirements for passing through. The personal injury claims she wishes to advance add little of apparent substance to her case, are defectively pleaded, raise real and (at this interlocutory stage) unanswered problems of coherence, have no real prospect of success on their merits as a result, and in any event permitting them would be contrary to the overriding objective.

247. On their merits, I would have refused the Claimant' application to amend her pleadings in relation to personal injury. The consequence of that is that the conclusions I reached on the application of the SIA in the previous section of this judgment would have stood unaffected.

C. THE PARTIES' REMAINING APPLICATIONS

(a) Overview of the applications

248. The Claimant's application is to amend her particulars of claim. She requires permission to do that, and I have set out above the merits test I am required to apply. The Defendant opposes her application and applies for a terminating ruling: summary judgment, or strike-out in the alternative. I have set out the test I am required to apply on a summary judgment application; it is the same as that for permission to amend. I am looking for a '*real prospect of success*', based on the pleading, and on the evidence – what is before me now, and what may reasonably be looked for by the time of any trial.

249. The power of a court to strike out a claim and particulars of claim, in whole or in part, is set out in CPR 3.4(2):

> The court may strike out a statement of case if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order.

250. The Claimant had served the first version of her particulars of claim in December 2020. The draft version now before me is said to be the thirteenth iteration. It constitutes a considerable development of her case from the version she served on 6th January 2023 in response to the Order of the Court of Appeal to serve a version showing the sections struck through in accordance with the Court's decision.

251. Her case for amendment was originally made – in the application of 19th April 2023 itself, and before me – on the basis that '*the proposed amendments have a real prospect of success, will not place an excessive burden on the Defendant, and an order permitting amendment will ensure that the real dispute between the parties can be adjudicated upon*'. The argument consistently relies on there being no procedural detriment to the Defendant in the development of the Claimant's case at a stage when he has not yet been called upon to enter a defence.

252. The development of the articulation of the 'real dispute' the Claimant wishes to make has been part responsive and part expansionary. In her witness statement supporting the original application (CSW1, 19th April 2023), the Claimant addressed three matters which I have considered on their merits: (a) personal injury caused by harassment, (b) reintroducing the pre-abdication conduct as context, background or similar fact explanation for the post-abdication course of conduct relied on and (c) her connection to England. As already explained, all three of these are in my view essentially responsive; the first two to the Court of Appeal's decision on state immunity and the third to the identification of the BRR challenge (see also the Claimant's second witness statement at [76]). For the reasons already given, I would have refused permission to amend in the first two cases. I would also have refused permission on the third, for the reasons discussed above. This latter category of amendments was evidently introduced in response to the identification of the BRR challenge, particularly with a view to establishing that the 'harmful event' occurred in the UK, and I have explained why I do not consider them adequate for that purpose. It is not clear how, otherwise, they are said to be necessary to or to advance the claim, and in any event they are, as I have explained, problematic from the perspective of clarity and coherence.

253. The Claimant's first witness statement also addressed, at some length, the proposed expansion of her claim to include loss of business income, and the expenses of Swiss and US investigatory proceedings. And her fifth witness statement deals with the proposal to add new incidents of harassment by speech. Her witness statements have otherwise sought to respond to what has been a sustained and wholesale attack by the Defendant on the coherence and sustainability of her claim, whether or not as amended, and on its congruence with the requirements of the law of harassment.

254. The Defendant's principal and essential submission in these proceedings, as put to me on his behalf by Mr Wolanski KC, is that – notwithstanding the length of time since this claim was issued, all the potentially complex and interesting legal topics canvassed, a repeatedly revised draft particulars of claim now running to 59 pages, and the Claimant's re-valuation of losses in excess of £126m – I cannot discern any viable case under the Protection from Harassment Act which a court should countenance or a defendant be asked to defend. Mr Wolanski KC spent a considerable amount of the hearing taking me in detail through the pleadings to explain his submissions. But his cornerstone submission is that the claim is on any basis confused, incoherent and incongruent with the tort.

255. He also relies, more broadly, on the litigation history, and the way the claim is now put, to argue that the 'real dispute' between the parties has always been something other, and more, than a graspable harassment claim. The Claimant, he suggests, is aggrieved with the Defendant for a whole range of interrelated reasons. First, there was the public outcry over the Botswana trip, from which her profile and reputation never quite recovered. Then there was the context of a relationship breakdown and its differential

consequences for each party. Social and business losses followed, as mutual friends and business contacts took sides or drifted away, and both parties were caught up in financial misconduct rumours and investigations. The Claimant now says the 'real dispute' between the parties is something to do with the June 2012 payment and the rights and wrongs of any historical or subsequent claims over it. And the pre-abdication matters, she says, cast a long shadow. Her wellbeing is not what it was. But, says Mr Wolanski KC, the attempt to cram all of this into the mould of a harassment claim – in England – was hopeless from the start, and the more the Claimant tries to explain, contextualise or expand her claim, the more clearly that appears. Litigating the 'real dispute' cannot survive the excision of the pre-abdication episodes from the pleaded course of conduct: what remains does not even arguably constitute a coherent and oppressive course of conduct of anything approaching the necessary gravity.

256. But the Claimant says this root and branch attack is nothing but further illustration of the Defendant's oppression of her. His behaviour has been calculated and relentless. He has destroyed her peace of mind and damaged her life and livelihood. As the vulnerable victim of a powerful man, she is entitled to the protection of the court and its power to restrain him and hold him to account.

257. Polarised positions and counter-allegations about the misuse of litigation are not uncommon in cases where harassment is alleged in the wake of relationship breakdown. I start by looking at how the Claimant wishes to plead her claim, subject to the elimination of the matters I have already dealt with.

(b) The draft amended particulars of claim

258. The Claimant's draft amended particulars of claim begin with a short introductory Section A, setting out briefly the parties' personal relationship. There follows a lengthy Section B headed 'summary of the harassment claim'. It refers to a course (the Claimant wishes to add 'or courses') of conduct by the Defendant – himself or by his servants or agents – targeted at the Claimant. It states clearly that '*the Claimant does not rely on any pre-abdication acts carried out by or on behalf of the Defendant as constituting the said course or courses of conduct*'. That appears to eliminate from the pleaded course of conduct any act occurring before 18th June 2014 – whether or not carried out 'under colour of authority'.

259. The 'summary' itself is at a high level of generality. It says the Defendant (a) intimidated and pressured the Claimant over the use of the June 2012 payment, (b) threatened and intimidated her more generally, (c) made allegations of stealing, untrustworthiness and disloyalty with a view to disrupting her relations with friends and family, (d) made similar defamatory statements to her clients and business associates, (e) supplied false information to the media, with a view to publication, relating to her financial probity and alleging she was a threat to the Spanish national interest and/or was trying to blackmail the royal family, and (f) placed her and her advisers under surveillance, trespassed onto and damaged her Shropshire property and intercepted or monitored the mobile and internet accounts of herself and her advisors.

260. This summary is followed by a lengthy new passage to do with the June 2012 payment, by way of what the Claimant says she understands or infers to have been the Defendant's motives for this. The Claimant then sets out what she says was the result of the Defendant's conduct.

261. There follows a further lengthy Section C headed 'the background' which ranges across the parties' relationship in the period 2004-2014, including the June 2012 payment. It is predominantly here that the Claimant had wished to reinsert the matters eliminated from her pleading by the Court of Appeal.

262. Section D is headed 'the course(s) of conduct'. It occupies by far the largest section of the particulars, and is subdivided by headings which reference historical periods and subject-matters (but these turn out in the event to be indicative and somewhat permeable classifications). These subheaded sections contain allegations as follows:

i) Meetings with the Defendant in late 2014: This section starts with some paragraphs about the parties' personal relations between May and September of 2014. It gives an account of a meeting in London on 16th September 2014 between the parties to which the Claimant brought along her Swiss lawyer. The Defendant asked for the June 2012 payment to be made informally available to him. The Claimant refused and the lawyer asked the Defendant not to pressurise the Claimant to comply. He agreed. But he later called the Claimant and told her the consequences would not be good if she failed to comply. He continued to pressure her over the money. He spread false accusations to the effect that she had stolen his money. She asked him to stop, at a meeting they had on 16th October in London. He refused, and they argued. In early November the Defendant arranged that mutual friends would invite both of them, as a couple, to dinner parties. The Claimant refused these invitations. The parties met on 4th November in London; the Claimant brought along a mutual friend. They had an angry argument about money. They did not meet after that for nearly four and a half years.

ii) Targeting the Claimant's family, friends and business associates 2014/15: This subsection begins by stating that the Defendant '*conducted a course of conduct designed to undermine the Claimant's personal and commercial relationships and/or to state falsely that she had stolen from him*' and goes on to particularise that allegation over several pages. The Defendant met a business associate of the Claimant in London in October 2014 and made allegations of dishonesty and disloyalty about her. The associate repeated these to her, but then broke off relations. In November 2014, the Defendant had lunch in London with a business client of the Claimant. The client terminated the relationship and became financially involved with the Defendant. The Claimant infers that the Defendant induced the termination of the business relationship. In the same month, the Defendant's 'head of security' tried to get her driver to drive the Defendant in London without telling her. The driver refused. Years later, in February 2017 and March 2018, the Defendant made friendly overtures to her personal assistant. The Claimant infers that the Defendant was trying secure these employees as sources of information about her. The Defendant falsely told a mutual friend in November 2014 that the parties shared a 'partnership account'. In the same month he invited two of the Claimant's business associates to lunch; as a result one of them ceased communicating with her, and in relation to the other the Defendant demanded a security deposit in connection with a property venture. The Claimant refused to pay. In late November, the Defendant was in Abu Dhabi and told members of the ruling family the Claimant had stolen his money and was untrustworthy; she inferred that these defamatory

statements were calculated to damage her reputation and business prospects in the region. The family broke off relations with her. In December the Defendant invited the Claimant's first former husband and daughter to join him in Los Angeles and Tahiti; he told her first ex-husband she had stolen from him and he repeated that in a family WhatsApp chat; he told the Claimant rumours were spreading. In April 2015 he travelled to Austria to visit the family of her second ex-husband and told them she had stolen from him.

iii) Spreading further defamatory statements about the Claimant: In early 2015, the Defendant texted an individual in London to say the Claimant had stolen silver items from a royal residence in Spain. On 28th January 2015, the Defendant called the Claimant in London on her birthday to say he was in Riyadh with members of the Saudi royal family and they were talking about her. She inferred the Defendant intended her to understand that he had told them she had stolen his money and was untrustworthy. She inferred these statements were intended to cause damage to her reputation and business interests. She put the matter of what he had said to the Saudi royal family, when she met the Defendant more than three years later; he did not deny her accusations. In April 2015 the Defendant was in the Bahamas as a guest of mutual friends. He told them and other guests the Claimant had stolen his money and was disloyal and untrustworthy. By the end of 2015, the Claimant had lost contact with 'many important business associates and friends'; she infers that this was because of the Defendant's repeated defamatory statements about her over the previous year.

iv) Harassment of the Claimant by publication in 2014-2015: This is a new and lengthy section. In it the Claimant complains of three articles in the Spanish press, published respectively in December 2014, February 2015 and April 2015. She starts by saying they contained information calculated to threaten her and damage her reputation. She infers the Defendant was responsible for supplying the press with material which was, variously, private, confidential, false and/or threatening. She either read or re-read these articles and/or articles which repeated their content in England. Other than by reference to pre-abdication matters, including the involvement of the CNI, in respect of which I consider the Defendant to have the benefit of state immunity for the reasons already given, the Claimant seeks to support her inference that the Defendant was responsible with a long, and difficult to follow, account of the relationship between the three articles of which she complains, and a number of pre-abdication articles in the mainstream Spanish or international press. She says in terms she does not rely on these earlier articles as forming part of the course of conduct of which she complains. Of the three later articles, she says the contents, which touch on her financial affairs and her relationship with the Defendant, are inaccurate or untrue, reflect his perspective and that of his earlier defamatory statements, and amounted to threats and harassment. There was substantial onward publication.

v) Surveillance, trespass and unlawful interception of mobile phones and internet accounts: In this section, the Claimant seeks to plead in, by way of 'background', an amount of pre-abdication material in relation to which I consider the Defendant to be able to claim state immunity. She also makes a

number of allegations about actions taken by the General Sanz Roldán and/or the CNI, post-abdication, which she infers should be attributed to the Defendant. She further particularises anonymous conduct which she infers to be the Defendant's responsibility. These include three incidents experienced by her public relations adviser: on 11th September 2018 the adviser disturbed some Spanish-looking and Spanish-speaking men apparently trying to interfere with her car who then ran away; on 4th June 2019, and on three or four occasions thereafter, the adviser was accompanied, while taking an Uber taxi, by a car with the registration SPA 1N; on 11th November 2020 a Mediterranean-looking man accosted her in the street saying '*hi, hola, you must stop*'. The Claimant says she herself had the following experiences: on 28th June 2015, she was followed about by two men of Mediterranean appearance while at a racing car event; a week or so later she was followed by two Mediterranean-looking men in a supermarket; a few weeks after that, a man followed her into a shop and hailed her by name. She particularises a series of incidents at her home in Shropshire: a hole drilled in her bedroom window in June 2017; the shooting out of her front gate camera in April 2020 by someone too far away to feature on the CCTV; a number of attempts to interfere with the CCTV which resulted in access in May 2020 and the deletion of recordings; a drone above the estate on 7th May 2020. She also mentions incidents in September/October 2018 when she says she, and her adviser, experienced security issues with their mobile and internet accounts. She says a conversation she had with a Spanish police officer in October 2016 was covertly recorded and leaked to the press in July 2018, which then led to the Swiss financial investigation into the Claimant's affairs.

vi) Other acts that were part of the course(s) of conduct: Here the particulars lists some further incidents, but without clarifying whether they are said to be part of a course or courses of conduct, or are mentioned by way of context only (these are suggested in the alternative). They include: in February 2016 being told by cabin crew on a flight to New York that the Defendant was arranging for a driver to collect her, when she had not told him of her travel plans; a meeting on 16th March 2019 in London between the parties, described as '*hostile*' and '*not conciliatory*'; the publication in the Spanish press on 25th March 2020 of 'private and confidential information' relating to her financial affairs and her disposal of the June 2012 payment. This information was known to very few; she infers the Defendant or his agents leaked it to the press. The publication in turn was a 'significant cause' of the US financial investigation into her affairs; in February 2022 a German film crew filming at the Claimant's home spotted someone watching and filming *them* and a video later appeared in the Spanish press, together with commentary by her first husband which made false allegations about her financial affairs.

(c) Consideration

(i) CPR Practice Direction 53B

263. CPR PD 53B makes specific provision, in addition to the general provision made in Part 16 of the CPR, for the pleading of statements of case in media and communications cases. It includes this:

> **2.1** Statements of case should be confined to the information necessary to inform the other party of the nature of the case they have to meet. Such information should be set out concisely and in a manner proportionate to the subject matter of the claim.

264. Paragraph 10 of the Practice Direction makes further provision in relation to claims for harassment arising from publication or threatened publication via the media, online, or in speech. It includes this:

> **10.3** The claimant must specify in the particulars of claim (in a schedule if necessary) the acts of the defendant alleged to constitute a course of conduct which amount to (and which were known or ought to have been known by the defendant to amount to) harassment, including specific details of any actual or threatened communications.

265. Concerns on this score were expressed by the Judge when this case first came before the High Court in December 2021. He described the original particulars of claim as '*extremely diffuse*' and as failing to make any clear distinction between background, commentary and core allegation. All of that, the judge said, was '*before you get on to whether you comply with CPR Practice Direction 53B*'.

266. I cannot see that, in the year and a half since, any effort has been made to address those clearly articulated concerns. On the contrary, the latest draft is twice as long as it was then, and bears all the hallmarks of an accretion of ad hoc additions – many of them reactive to specific points raised in inter partes correspondence – without regard to the rules of procedure on drafting, or indeed to basic editorial principles. The rules of procedure on drafting exist to ensure *fairness* between the parties; it is a fundamental principle that a sued defendant is entitled to know *exactly and precisely* what is alleged against him, so that he has a proper chance to deal with it. And they exist to enable a trial court to see without any difficulty exactly what the question before it is, and what the proposed answers are, so that it can deal with a case expeditiously and at proportionate time and cost.

267. That principle applies with more, and not less, force, to a complex tort such as harassment, and with even further force where, as here, harassment by speech is alleged. A claim must *specify* the acts of the defendant said to constitute an unlawful course of conduct, and, in the case of any actual or threatened communications, give *specific details*. It must identify the unlawfulness – what the alleged linkage between the acts is so as to compose them into a course of conduct, its targeting of the claimant, and why it crosses the threshold of persistence, quasi-criminal gravity and oppression so as to constitute the actus reus of the tort.

268. The Claimant's latest draft particulars of claim are exceptionally difficult to follow. They are long, narrative in style and discursive. The narrative ranges back and forth in time, has a substantial cast-list of third parties, and, crucially, makes no very clear distinction between background, commentary and core allegation. The summary I have endeavoured to set out above – itself at considerable length – registers some particular difficulties in this respect (and if criticism may be made of it *qua* precis, that largely serves to illustrate the point), but the problem is entirely pervasive.

269. Mr Wolanski KC took me painstakingly through the draft to make a line-by-line critique of its opacity, and its defectiveness as a functional pleading of the *actus reus* of harassment – a process occupying a considerable proportion of the hearing. Mr Caplan KC provided me with substantial chronological guide to the incidents alleged; its consistency with the pleadings was challenged, but the proffering of that assistance itself perhaps speaks volumes. In fairness to the Claimant, however, I am going to undertake the exercise of considering her pleadings, thematically, against at least some of the core components of the tort, to see whether, after all, they *do* disclose reasonable grounds for bringing the claim, and it *does* have a real prospect of success on its own terms.

(ii) Course or courses of conduct?

270. The Claimant seeks permission to add 'or courses' to her pleaded course of conduct. There are one or two instances where a subset of the behaviour alleged against the Defendant is referred to as 'a course' of conduct; it is not made clear, however, whether the intention is to plead a *separate* course in these respects. But otherwise the formula is repeated without specificity.

271. Mr Caplan KC told me that the Claimant's '*primary case*' was that a single course of conduct – a campaign – was alleged: a campaign '*with one objective*'. It was neither necessary nor desirable to divide acts into different courses of conduct '*artificially*'. He did also suggest that it was not necessary to make a '*pre-election*' about a course or courses. In fairness, he may have been making the uncontroversial point that a claimant may be able to succeed in establishing a harassing course of conduct without necessarily establishing every single pleaded component. But if he was suggesting that it did not matter what was pleaded in this respect, I disagree, for all the reasons already canvassed.

272. It *matters* into what groupings a set of pleaded acts are corralled, because the crucial elements of linkage between them and overall gravity may turn on that. That does not introduce artificiality, and does not necessarily prevent alternative pleading. On the contrary, it is part of the essential process in pleading harassment of identifying what is said to be unlawful about specified groups of acts taken, in each case, as a whole. I would not in these circumstances have given permission for the Claimant's particulars to be amended to plead 'course or courses of conduct' in a wholly unspecific way, nor to refer to subset clusters of events as a 'course of conduct' without clarifying whether they were being said to be a separate head of liability. I therefore proceed on the basis of the Claimant's intention to plead a single course of conduct.

(iii) 'acts of the defendant'

273. The Claimant's pleaded course of conduct, is, broadly speaking, bookended by two face-to-face interactions directly between the parties, separated by an interval of four and a half years: the meetings in the autumn of 2014, and the meeting of 16th March 2019. On each occasion, an unfriendly, perhaps heated, exchange about money is said to have taken place. The complaint is about the Defendant's words (said to be threatening) and his tone and temper. The Claimant, having been present, is able to give direct evidence of these events; she says named third parties were present in each case, and they could be expected to give further evidence.

274. There is no other *complete and specific* 'act of the Defendant' alleged in the pleaded course of conduct of which the Claimant could give any *direct* evidence herself. All of the other acts fall into one of three categories: (a) acts of the defendant – almost entirely oral speech – in the presence of third parties (largely mutual acquaintances), which she learned about from those third parties, or from others, or (once or twice) from the Defendant; (b) acts of third parties which she experienced directly, and which she infers were undertaken at the instigation of the Defendant and (c) other events (including media publications) which she infers were reliant on acts of others than those immediately responsible (that is, for example, of publishers) and where she further infers that those acts were acts of the Defendant.

275. Of these categories, as I say the first is largely constituted by acts of speech. The Defendant is alleged to have said things about the Claimant to other people, named individuals. The Practice Direction requires the pleading of '*specific details of any actual or threatened communications*'. This is a demanding requirement, because establishing harassment by speech requires a clear distinction to be drawn, and to be clearly alleged in the first place, between protected free speech and unlawful oppression. The allegations in this category are not, or not consistently, pleaded in accordance with that requirement.

276. On the Claimant's own case, the subject matter, the 'linkage' or the 'purpose' of the Defendant's alleged course of conduct has its origins in the parties' intertwined personal and financial history, with particular reference to the June 2012 payment. The parties almost certainly have different perspectives on these matters, which they are undoubtedly free to express – to each other and to third parties – unless constrained by the law. Where that constraint is alleged by reference to harassment by speech, then precision is required about what a defendant is alleged to have said and how they behaved in order to lend it that quality of unlawfulness. The pleading here alludes in general terms to *defamatory* qualities in the acts of speech referred to (and I consider that further below) but does not specify the communications with sufficient particularity to establish whether they were *capable* of amounting – *considered objectively and cumulatively* – to something beyond the bounds of protected free speech.

277. No evidence from any third party alleged to have experienced these communications has been provided or promised. No contemporary records are said to exist.

278. The second of these categories of 'acts of the Defendant' is constituted by experiences of the Claimant herself, of which she is able to give evidence (and some other experiences of third parties close to her), which she *infers* were acts of the Defendant. This is a disparate category. It includes some experiences of being watched or followed about, in public places, in the summer of 2015; otherwise unexplained acts of trespass and damage to her property in mid-2017 and in the spring of 2020; and suspicious IT problems she says are consistent with hacking in the autumn of 2018.

279. It is not suggested that any evidence could possibly connect these events directly with the Defendant. The direct perpetrators are unidentified and unidentifiable. Inference is, instead, invited. A particular basis for inference is sometimes suggested. More often, the inference is invited from the rest of the course of conduct pleaded.

280. I have already noted that it is not necessarily inconsistent with the proper pleading of a harassment case to allege (a) conduct of an unsettling or disorienting nature and/or (b)

anonymous conduct of an inherently deniable nature. But I have also noted that the problem of attribution ultimately has to be gripped. The Claimant gives no indication of how she can accomplish that. These events do not begin to speak for themselves, even in the context of the remainder of the pleading. The Claimant's suggested logic is in danger of being a false syllogism: these are acts of an enemy, the Defendant is her enemy, therefore they are his acts. But she is on her own account a person with an international media and public profile of her own (in which she takes an active managerial interest), connected with powerful, wealthy, competitive and high-profile business and social associates, and someone who has apparently polarised opinion. A case which ultimately relies on establishing that there is no other more probable explanation than that this Defendant is the author of all her unfortunate experiences cannot be said to disclose reasonable grounds for bringing it.

281. The third category – principally relating to media publications – relies on double inference: that published stories must have relied on improper leaks, and that the Defendant must have been responsible for those leaks. The Claimant is able to evidence the possible sources of the relevant information of which she herself is aware, and the steps she has herself taken to protect that information. But she gives no indication of how she might be able to evidence any connection with the Defendant. We are in the world of mainstream journalism here. Editors decide what they consider it lawful to publish. The public domain is full of information about the Claimant and the Defendant, their finances and what they have had to say about them and about each other over the years (and her latest draft pleadings do show some signs of retreat in acknowledgment of that). Journalists have their ways and means of obtaining further information, and journalists' sources enjoy a high level of legal protection, not least in relation to the production of evidence.

282. The pleading of 'acts of the defendant' is of the essence of a harassment claim. In all of these circumstances, I am not satisfied that the draft before me adequately pleads acts of this Defendant. Exactly what he is said to have done is obscure in the first place. So far as the factual basis is concerned, the requirements of disclosing 'reasonable grounds' are properly modest at the stage of considering an application for a terminating ruling, but *some* graspable basis for understanding how events may be capable of being established as 'acts of the Defendant' is necessary. The *direct* evidence the Claimant is able to give of acts of the Defendant as alleged, and has given, is minimal. No other evidence is before me. I have been given no basis for understanding what further evidence of acts of the Defendant will be, or could possibly be, available at trial, and considerable obstacles to obtaining such evidence present themselves without being addressed or even acknowledged.

283. To the extent that 'inference' is relied on, the reasoning leading to inference must itself be clearly articulated, and the factual groundwork for the inference visibly laid. Inference is something more than suspicion and speculation. A claimant is not entitled to compel a defendant to answer in court to suspicion and speculation. I am unpersuaded that the Claimant's case advances, even for this interlocutory stage, sufficiently beyond the speculative.

(iv) Extraterritoriality

284. As pleaded, a significant number of 'acts of the Defendant' are alleged to have taken place in other countries; and in some cases no geographical location is suggested at all.

The question of the geographical scope of the Protection from Harassment Act has been signalled as an issue from the outset of these proceedings, and the distinctively international nature of the course of conduct noted, including by the High Court.

285. Mr Caplan KC put to me that there is no clear authority, and certainly no binding decision of a superior court, as to whether a course of conduct can constitute the tort of harassment if some or all of its pleaded constituent acts take place overseas. From first principles, he says, the extraterritorial application of a statute is a matter of statutory construction. It is not controversial that there is a *general* presumption against statutes having extraterritorial scope, but it is always a matter of looking at the individual statute, and it is a highly context-specific exercise. He argues that in the case of the tort of harassment (as opposed to prosecution of the criminal offence of harassment also created by the 1997 Act) he would have a real prospect of convincing a trial court that a tortious course of conduct can include overseas acts, or at the very least that extraterritoriality should not be regarded as fatal to a case in which 'a significant proportion of the acts' were committed here – which, he says, is the present case.

286. The question of extraterritoriality was looked at briefly by the High Court in *Shakil-Ur-Rahman v ARY Network Ltd [2016] EWHC 3110 (QB)*. This was a case in which both defamation and harassment by speech were pleaded, and the decision is principally preoccupied with the former. But Sir David Eady expressed the view (at [119]) that, *at any rate where harassment by speech is concerned*, the tort is premised on and directed at acts of a defendant within the jurisdiction – so that acts of a defendant in England and Wales are *necessary*. He did not, however, say that acts of a defendant outside the jurisdiction were necessarily *irrelevant* or excluded, nor did he say that a defendant's *course of conduct* must comprise solely acts within the jurisdiction. But he did say that a claimant must *be harassed* within the jurisdiction; I have considered aspects of that question above.

287. There are some harassment cases in which extraterritorial acts have been taken into account in the granting of interim injunctions to restrain harassment. But of course the extraterritorial acts in those circumstances may go to the issue of the propensity for a defendant to commit *future* harassment and the corresponding case for restraining *future* conduct (within the jurisdiction).

288. We also pondered at the hearing the implications of the amendment of the Act to include a new section 4B(1). That provides that:

> If –
>
> > (a) a person's course of conduct consists of or includes conduct in a country outside the United Kingdom,
> >
> > (b) the course of conduct would constitute an offence under section 4 or 4A if it occurred in England and Wales, and
> >
> > (c) the person is a United Kingdom national or is habitually resident in England and Wales,
>
> the person is guilty in England and Wales of that offence.

289. The Act creates both civil and criminal liability for harassment; and this provision deals exclusively with criminal liability for the offences of putting people in fear of violence and 'aggravated' stalking (and was apparently introduced to comply with a specific requirement of international law in that respect). The Defendant says that (not least bearing in mind what the authorities on harassment say about the gravity required for the tort being at a quasi-criminal level) the absence of an equivalent provision dealing with criminal or civil liability for harassment establishes that a '*course of conduct*' which '*consists of or includes conduct in a country outside the United Kingdom*' therefore *cannot* found such liability since the evidently necessary provision has (deliberately) not been made. The Claimant says on the contrary this new provision addressed a particular issue about criminal liability and no such provision was *needed*, since no such problem existed, in the case of civil liability.

290. I accept that it may yet be possible in an appropriate case for a claim of harassment to proceed to full trial in England on the basis of an argument about the inclusion of extraterritorial 'acts of a defendant' in the pleaded course of conduct. But I do not agree that the present case has a good claim to be that candidate case, for the following reasons.

291. The issue is likely to be significantly fact-sensitive. It is one thing to say that regard may arguably be had to an extraterritorial 'act of a defendant' in an otherwise securely pleaded and evidenced 'course of conduct' within the jurisdiction. It may also be right that ultimately, as Mr Caplan KC suggests, some sort of test of preponderance or 'significant proportion' might conceivably evolve to meet the facts of a particular case. But there is no authority at present which comes close to giving any basis for concluding that fully 'international harassment' is comprehended within the geographical scope of the Act and I was given no contextual basis for inferring a Parliamentary intention to achieve that as a matter of public policy. Moreover I rather think that, whatever the intentions of the drafter, by introducing section 4B into the Act, Parliament may have created an inhibition (on ordinary statutory construction principles) to the easy inference of equivalent extraterritorial scope for the tort, a matter which only Parliament may be able satisfactorily to resolve.

292. And in any event the present case is *not* one, for the reasons just given, in which it is possible to be satisfied that a securely pleaded and evidenced (or even potentially evidenced) set of constituent 'acts of a defendant' within the jurisdiction has been established – whether because incidents have not been sufficiently attributed to the Defendant in the first place, or because their geographical location is insufficiently indicated.

(v) Defamation

293. Defamation and harassment by speech are not mutually exclusive heads of liability on any given set of facts. It is entirely possible to plead acts of defamatory publication as constituent components of a harassing course of conduct, and the Claimant seeks to do so here. But although both torts abridge freedom of speech, they are very different in nature. None of the constituent elements of tortious harassment by speech is a necessary element for defamation, and vice versa, except perhaps gravity.

294. To pick out some of the broad differences between the torts, relevant for present purposes: defamation requires publication to third parties while harassment requires

conduct directed to a claimant; the 'harm' of defamation is the damage done to a claimant's reputation in the minds of publishees while the 'harm' of harassment is the claimant's own experience of being harassed; specific defences of factual truth and the expression of honest opinion are available to defamation defendants, while harassment defendants must simply defend on the basis of showing that the speech complained of does not constitute or form part of a harassing course of conduct (or falls within one of the statutory defences in section 1(3)); the remedies for defamation are principally vindicatory while those for harassment are principally protective. These are broad generalisations, not an attempted statement of the law, of course.

295. One specific and important legal and practical difference between the torts is the six-year limitation period for bringing harassment claims and the one-year limitation period for defamation: harassment has a distinctive quality of cumulation, while defamation demands rapid assertion of vindication. Another specific difference relates to the relevant compensatable losses. A harassment claimant can seek compensation for the anxiety, distress, etc of themselves being an intended publishee of defamatory material while a defamation claimant cannot. A harassment claimant, by contrast, seeking compensation for the consequences of reputational harm caused by publication of defamatory content to third parties will be in difficulty in establishing that it was the quality of *harassment of them* rather than the quality of *defamation to another* which caused those losses. (See *Royal Brompton & Harefield NHS Trust v Shaikh [2014] EWHC 2857 QB* at [10]-[12]; *Siddiqui v Aidiniantz [2019] EWHC 1321 (QB)* per Warby J at [78] and [103].)

296. The Claimant in this case wishes to amend her claim to bring the total of the damages she claims to a sum in excess of £126m. Leaving aside the matter of personal injury, a substantial proportion of these claimed losses relate to (a) the costs and expenses of defending legal and investigative proceedings in Switzerland and the US, which she attributes in turn to the contribution she infers the Defendant made to the publication of media reports about her financial affairs; (b) loss of business and income, which she attributes to the alienation of clients and colleagues by the Defendant making defamatory remarks about her to them and to wider reputational damage she says he has caused by defamation; and (c) '*vilification in the press and on the internet, public shaming, humiliation and moral stigma*' by what she says have been literally thousands of media articles – and which she attributes to the Defendant's supply of false or confidential information to the media.

297. I have already considered the problem of the extent to which these can be regarded as properly pleaded and evidenced 'acts of the Defendant' in the first place. Then there are obvious questions arising about business losses in a case in which no companies are joined to the proceedings and no information appears as to their potential locus to do so (there is no clear indication they are incorporated in the UK, for example). But more fundamentally than that, there is the immediate problem that these losses are not said to be attributable to the (whole) *course of conduct* complained of, nor to be consequential on the Claimant's own experience of *being harassed* by that course of conduct. They are attributed to individual acts of alleged defamatory publication by the Defendant to third parties *and* by individual acts of publication to third parties by persons *other than* the Defendant.

298. The Claimant does not sue in defamation. She does not sue the publishers of the media items of which she complains. She is entitled to include defamatory acts of the

Defendant in a properly pleaded course of conduct in harassment, and to seek compensation for *harassment of herself by him* accordingly. But it is entirely opaque on what basis she claims damages in a harassment action against the Defendant for *reputational harm* caused by *individual acts* of slanderous publication by him (allusively pleaded) – and by media stories published by *other people*. Whether leaks 'cause' publications or investigations in a legally relevant way is highly fact-sensitive in any event; the autonomous decisions of publishers and investigators do intervene, and some explanation is to be looked for in pleading liability. The grouping of a series of defamation claims into an alleged course of conduct does not enable a claimant simply to sidestep all the requirements and limits of defamation law but claim general and special damages for reputational harm caused by publication anyway. No attempt is made to explain this. In the absence of any such attempt, I would have refused permission for the claim to be amended in these respects.

(vi) Conclusions

299. The Claimant's draft amended particulars of claim do not comply with the rules and Practice Direction for pleading a harassment claim. In all the circumstances set out above, they do not disclose reasonable grounds for bringing this claim in the form proposed. They are not sufficiently evidence-based, even to the modest threshold level of sufficiency required at this interlocutory stage. No sufficient basis is provided for understanding the evidence that might be expected at trial to provide a real prospect of the Claimant succeeding on this claim.

300. This is a late stage in the history of the Claimant's development of her pleadings. She has said that she did not plead many of the matters she now seeks to introduce because her original plan had been to bring a limited and 'streamlined' claim which could have been swiftly disposed of but now, in view of the protracted period of time already entailed by the Defendant's interlocutory challenges, she aims to claim for her losses in full. I do not consider that an adequate account of the litigation history of this claim nor of the delayed and evolutionary nature of her own pleadings.

301. The Claimant has sought to place before the court a general narrative history of her relationship with the Defendant, both emotional and financial, and its impact on their mutual acquaintance and on her personal wellbeing and reputation more generally. It is a narrative of an attempt by the Defendant to reclaim money he had given her by destroying her peace of mind over many years. That was on its own terms an elusive project, which proceeded at a leisurely pace over long intervals, in which the Defendant's hand was largely hidden from her sight, and which relied on impacting her in some distinctly bizarre and exquisite ways, from the banal (an unwanted dinner invitation, being hailed in a shop by a stranger) to the frankly illegal (drilling a hole in her window). In the four and a half years between the face-to-face meetings the parties had, there is no clear indication that the Defendant asked (much less *persisted* in asking) for access to money. It was, moreover, on the Claimant's own account, entirely and repeatedly unsuccessful in accessing the money. I reach no view about it all, of course, at this stage. I have no doubt that the parties have their own versions of this narrative history, and that they may well have shared it with others. I have no doubt that other people, and the public at large, have their own theories and opinions, which may or may not be well-informed, about this history and its principal protagonists.

302. The Claimant has not, however, succeeded in converting her narrative history into a claim in harassment which it is fair to ask the Defendant to defend, or a court to try. I do not speculate on whether she might have done so. That is not the question before me. But for the reasons set out in this part of the judgment, I would have refused her application to amend her pleadings. And I would have struck out her claim.

Summary of conclusions

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303. My principal conclusion is that the High Court of England and Wales lacks jurisdiction to try this claim. That is because it has not been brought against the Defendant in his country of domicile, as is his default entitlement; and the Claimant has not satisfied me she has a good arguable case that her claim falls within an exception to that default rule. That in turn is because she has not sufficiently established that the 'harmful event' of which she complains – harassment by the Defendant – happened in England.

304. I am not satisfied either that the Defendant has, or should be deemed to have, submitted to the jurisdiction of the High Court by his own conduct of this litigation so far.

305. In the alternative, if I had been able to conclude that the High Court did have jurisdiction over this claim, I would have refused the Claimant's application to amend her claim. This application was multifaceted; she wished to amend her claim in a number of respects and my reasons for refusing vary correspondingly. They include the inconsistency of her proposals with the decision of the Court of Appeal on the extent of the Defendant's state immunity from suit; problems with the clarity, accuracy and consistency of the way she wanted to change her case; and the lack of good enough explanations for the timing of the changes she wanted to make. My conclusion in all the circumstances was that the changes did not introduce and express matters on which she would have a real prospect of succeeding at trial.

306. I would also have granted the Defendant's application to strike out her claim. The claim did not comply with the rules of court applicable to the drafting of a harassment claim. As pleaded, I could not be satisfied that her statement of case disclosed reasonable grounds for bringing her claim as she did.

307. The Claimant has an account she wishes to give of her personal and financial history with the Defendant, and about the harm he has caused her peace of mind and personal wellbeing, and her business, social and family life. I take no view about that account as such. The only question for me has been whether the Claimant can compel the Defendant to give *his* side of the story to the High Court. My conclusion, as things stand, is that she cannot.