Neutral Citation Number: [2020] EWHC 644 (QB)

Case No: QB-2019-003728

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2020

Before :

Mr Justice Nicol

- -

Between :

Matthew Johnson	**Claimant**
- and -	
(1) Alanna McArdle	**Defendants**
(2) XYZ	

- -
- -

Simon Myerson QC (instructed by **Nicholas Collins Ltd**) for the **Claimant**
Jane Phillips (instructed by **Schillings LLP**) for the **1st Defendant**
Patrick Lawrence for the **2nd Defendant**

Hearing date: 10th March 2020

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Approved Judgment

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

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MR JUSTICE NICOL

Mr Justice Nicol :

1. In this claim for libel and malicious falsehood the 1st Defendant has applied to strike out the Claimant's Particulars of Claim. Although Patrick Lawrence was present on behalf of the 2nd Defendant, he took no substantive part in the proceedings.

2. At all material times the Claimant describes himself as a successful recording engineer and musician. He was the lead singer and frontman of an indie band called 'Hookworms'

3. The 1st Defendant is also a musician. She has a blog, the address of which is http://alanna-mcardle.tumblr.com/. And she owned and operated a Twitter account, @alanna-mcardle with the nickname 'Lan'.

4. The 2nd Defendant is alleged to be an academic social scientist. Between September and October 2016 she and the Claimant are alleged to have had a romantic relationship.

5. On 30th October 2018 the 1st Defendant published a blog or an Article entitled: 'TW: sexual, physical, emotional abuse. Concerning Matthew Johnson (MJ from Hookwormss)'. It is alleged that the article was published by the two Defendants jointly. On the same day the 1st Defendant posted a link to the article on her Twitter account ('the 30th October tweet'). There was also a snapshot of the article itself. It is not alleged that the 2nd Defendant was responsible for this publication (i.e. the publication via the 30th October tweet).

6. On the following day, 31st October 2018, the Claimant issued a press release on Twitter at 11.46pm in which he denied the claims against him which were said to have been made in the Article.

7. The Claimant alleges that the Defendants' blog was referred to by 'The Guardian' and 'Pitchfork' magazine on 31st October 2018 and by 'Billboard.com' and the 'The Independent' on 1st November 2018.

8. The 1st Defendant then published on 1st November 2018 three further tweets ('the 1st November tweets').

9. The Claimant's solicitors wrote a letter of claim on 6th March 2019 to which the 1st Defendant's solicitors subsequently replied.

10. The Claim Form was issued on 21st October 2019. Since the primary limitation period for actions based on defamation or malicious falsehood is 1 year (see Limitation Act 1980 s.4A) the claim was brought a few days prior to the expiration of that period. The claim sought damages for libel and malicious falsehood in respect of the blog and the 1st Defendant's 30th October tweet. The Claim Form made no reference to the 1st November tweets.

11. Particulars of Claim were served at the same time as the Claim Form. They had been drafted by Mr Myerson QC and Ms Ayesha Smart. They are dated 20th October 2019, but I am told, they were served with the Claim Form on 21st October 2019. I shall come in due course to Ms Phillips' allegations of the deficiencies in the Particulars of Claim, but, at this stage, I note the following:

i) The blog was said to be defamatory of the Claimant and both Defendants were alleged to be liable for that defamatory publication.

ii) Although it is not entirely clear, it may be that the 30th October tweet was also alleged to be defamatory of the Claimant. The 1st Defendant alone is alleged to have been responsible for that publication.

iii) The 1st November tweets were also said to be defamatory of the Claimant and, although the Claim Form had not referred to them, the Particulars of Claim do rely on them and pleads that they were defamatory of the Claimant.

iv) It is also pleaded that the 'publications' amounted to malicious falsehoods (paragraph 27) and 'Each of the Defendants contributed to and/or made and/or caused and/or permitted the falsities complained of to be published maliciously' (paragraph 28).

v) Paragraph 34 of the Particulars of Claim pleads,

> 'By reason of the publication of the words complained of, the Claimant's reputation has been seriously injured, and he has suffered personal injury, distress and humiliation, together with loss and damage.'

vi) There was attached to the Particulars of Claim a psychiatric report dated 17th September 2019 from Dr R.A. Jarman, a consultant psychiatrist.

vii) There was also attached to the Particulars of Claim a schedule of Special Damages as at 30th October 2019.

12. On 13th November 2019 Schillings, who are the 1st Defendant's solicitors, wrote to Nicholas Collins Ltd, the Claimant's solicitors, alleging that the Particulars of Claim were defective. Schillings letter also set out the meaning which the they alleged that the blog and tweets conveyed (a meaning which was different to what the Claimant had pleaded in the Particulars of Claim) and alleged that in some respects the words were comment. Nicholas Collins Ltd replied on 15th November denying that the Particulars of Claim were defective. They did not agree with the 1st Defendant's meaning and proposed in the alternative a 'better meaning'. They denied that any of the words complained of were comment.

13. The present application notice was issued on 21st November 2019. In brief, the relief which the 1st Defendant seeks is as follows:

i) An order that the libel and malicious falsehood claims in the Claim Form and/or the Particulars of Claim should be struck out because:

a) They fail to disclose reasonable grounds for bringing the claims and/or

b) They fail to comply with paragraph 4.2(3) of Practice Direction 53B.

ii) Alternatively, that there should be a trial of the following preliminary issues:

a) The meaning of the words complained of for the purposes of the libel claim;

b) Whether the meanings pleaded are reasonably available meanings for the purpose of the malicious falsehood claim

c) Whether the meaning were statements of fact or of opinion.

14. It is convenient to take first the strike out application and, within that, to take first the strike out in relation to the libel claim.

Strike out: libel claim

15. At common law, a claimant in defamation had to prove that: (a) the defendant had published words by making them known to at least one other person, apart from the Claimant; (b) that the words were of or concerning the Claimant; and (c) that the words were defamatory of the Claimant. If those elements were proved, it was not necessary for the Claimant to prove loss since damage was assumed. However, if the Defendant could show that the harm was trivial or insubstantial, the claim was vulnerable to being stayed or struck out as an abuse of process and in accordance with the principle in *Jameel (Yousuf) v Wall Street Journal (Europe) Sprl* [2006] UKHL 44; [2007] 1 AC 359 and *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985.

16. The Defamation Act 2013 changed that position by adding a further requirement. Thenceforth, by section 1(1)

> 'A statement is not defamatory unless its publication has caused, or is likely to cause serious harm to the reputation of the Claimant.'

The further refinement in s.1(2) is not material in this case since it only applies to a body that trades for profit and the claimant in this case is an individual.

17. The Supreme Court had to consider the impact of the 2013 Act in *Lachaux v Independent Print Ltd*. [2019] UKSC 27, [2019] 3 WLR 18. In that libel case a trial of a preliminary issue had been directed to consider whether the serious harm requirement had been satisfied. Warby J. found that all but one of the statements did satisfy the 2013 Act test – [2016] QB 402. The Court of Appeal [2018] QB 594 found that the 2013 Act did not affect the common law presumption as to damage in libel cases, but upheld the judge's finding on 'serious harm'. The Defendants appealed to the Supreme Court which dismissed the appeal. The leading judgment was given by Lord Sumption.

18. At [12] he said,

> '[section 1] shows very clearly to my mind, that it not only raises the threshold of seriousness above that envisaged in *Jameel (Yousuf)* and *Thornton*, but requires its application to be determined by reference to the actual facts about its impact and not just to the meaning of the words.'

He rejected an argument advanced by Ms Page QC for the Claimant that the Act had made no significant change to the common law or that it was sufficient for a claimant to show the words complained of had an inherent tendency to cause harm to his reputation. Lord Sumption said at [16],

> 'Suppose that the words amount to a grave allegation against the claimant, but they are published to a small number of people, or to people none of whom believe it,

> or possibly to people among whom the claimant has no reputation to be harmed. The law's traditional answer is that these matters may mitigate damages but do not affect the defamatory character of the words. Yet it is plain that section 1 was intended to make them a part of the test of the defamatory character of the statement.'

Lord Sumption also rejected an argument by the Claimant that section 1, on this basis would postpone the accrual of the cause of action until harm had actually occurred. He said that was not so: the cause of action still crystallised at the time of publication. For s.1 of the 2013 Act to be satisfied either the Claimant's reputation had then been seriously harmed or it was then likely to be seriously harmed and, as evidence of that likelihood, the Claimant could point to later harm which actually occurred.

The Supreme Court endorsed Warby J.'s conclusions. It noted (see [21]) that he had based his findings on

> '(i) the scale of the publications; (ii) the fact that the statements had come to the attention of at least one identifiable person in the UK who knew Mr Lachaux and (iii) that they were likely to come to the attention of others who either knew him or would come to know him in future; and (iv) the gravity of the statements themselves, according to the meanings attributed to them by Sir David Eady.'

19. Following *Lachaux* a new Practice Direction - PD53B - was introduced for Media and Communication claims – with effect for claims issued after 1st October 2019 (which the present claim was). At paragraph 4.2 (3), the Practice Direction says,

> 'The claimant must set out in the particulars of claim...
>
> (3) The facts and matters relied upon in order to satisfy the requirement of section 1 of the Defamation Act 2013 that the publication complained of has caused or is likely to cause serious harm to the reputation of the claimant...'

20. Ms Phillips took me to such parts of the Particulars of Claim as might be relevant for this purpose. They were as follows:

i) Paragraph 3 where it is pleaded that the 1st Defendant's Twitter account had about 2500 followers.

ii) Paragraph 18 pleads,

> 'At all material times the First Defendant's blog and twitter page could be accessed by any user of the World Wide Web and it is to be inferred that a substantial number of users accessed it and read the words complained of , given the widespread interest in the Claimant's career among followers of Hookworms.'

iii) Paragraph 19 which pleads the words complained of in the Article or blog which were alleged to bear the 20 meanings set out in paragraph 20.

iv) At paragraph 22 it is pleaded that 'The article had a wide distribution' and it is said that it was received and referred to in 4 other publications.

v) The words complained of in the 1st November tweets which are alleged to have the meaning in paragraph 25.

vi) Paragraph 26 which says, 'As a result of publication of these words within the Article and subsequent tweets, the Claimant's reputation has been severely damaged as is set out below'.

vii) Paragraph 33 says, 'The actions of the Defendants constitute a serious interference with the Claimant's right to private life so as to engage Article 8 of the European Convention on Human Rights. The publications seriously undermine his personal integrity and reputation. On a proper analysis of the law, that right is not, in this case, offset by the right to freedom of expression set out in Article 10.'

viii) Paragraph 34 which says, 'By reason of the publication of the words complained of, the Claimant's reputation has been seriously injured, and he has suffered personal injury, distress and humiliation, together with loss and damage. There then follows what are described as 'Particulars of Personal Injury, distress and humiliation' in the course of which reference is made to Dr Jarman's report.

ix) After this (and still within paragraph 34) there is another cross heading 'Particulars of Loss' under which it is said,

> 'The Defendants' actions have so stigmatised the Claimant that he will find it difficult to obtain alternative employment or engagement of a like kind. In particular, the Claimant's band broke up, his contract with Next Wave Management was suspended and he had to close his recording studio because he had no work. Accordingly, the Claimant claims for his projected loss of future earnings which are detailed in the schedule attached hereto.'

21. Ms Phillips submits that none of these are a sufficient pleading of what is required by s.1 of Defamation Act 2013, *Lachaux* or the Practice Direction. She emphasises that the 1st Defendant's application takes a pleading point. It is not an application for summary judgment. She submits that, taken individually, or in combination, the pleaded paragraphs are insufficient. She makes the following points:

i) As against the 1st Defendant complaint is made of the following publications: (a) the original Article or blog; (b) the 30th October tweet; (c) the three tweets of 1st November. Although paragraph 22 refers to the articles in other media outlets, Ms Phillips notes that it is not pleaded that the 1st Defendant is responsible for their content (which in any event is not particularised).

ii) For each publication (for which the 1st Defendant is said to be responsible) to be actionable, each publication would also either have to have caused serious harm to the Claimant's reputation or have been likely to do so. Yet, on each occasion that the Particulars of Claim refer to the impact on the Claimant's reputation, it is to the collective effect of 'the publications'- see paragraphs 26, 33 and 34.

iii) Defamation Act 2013 s.1 is concerned with harm to the Claimant's reputation. That is distinct from personal injury. While harm to reputation may in consequence cause distress, upset and even financial loss, it is the immediate

harm to reputation which has to be serious in order to satisfy the statutory test. As Lord Sumption said at [5] of *Lachaux* when speaking of slander which was not actionable *per se* 'Special damage, representing pecuniary loss, rather than injury to reputation must be proved.'

iv) More fundamentally, the Practice Direction requires a Claimant to plead the facts and matters from which the claimant will ask the court to infer that he has suffered serious harm to his reputation and the present Particulars of Claim do not do this.

a) Paragraph 26 simply asserts that the Claimant's reputation has been 'severely damaged' by the publications. (Ms Phillips made clear in the course of her oral submissions that her point was the absence of particulars and not the failure to repeat the statutory language that the Claimant's reputation was 'seriously harmed').

b) Paragraph 26 did say 'as is set out below'. Although a specific cross reference was not given, she assumed that this was a reference to paragraph 34.

c) But paragraph 34 did not provide the necessary particulars. The particulars which paragraph 34 does provide are, as it says, 'Particulars of Personal Injury, Distress and Humiliation' which may be consequent on serious harm to reputation, but which are not facts and matters from which serious harm to reputation can be inferred.

d) Under the heading 'Particulars of Loss' it is said that the Defendants' actions 'have so stigmatised the Claimant that he will find it difficult to obtain alternative employment'. Ms Phillips argues that, although it is then said that the Claimant's band broke up and his studio closed, no causal link is pleaded between those events and the publication of the statements complained of.

e) The Particulars of Claim do not plead the scale of the publication of the statements complained of or their readership.

v) Paragraph 3 of the Particulars of Claim pleads that the 1st Defendant's Twitter account has 'about 2,500 followers', but there is no averment that any of them clicked on, and read, the article.

vi) Paragraph 18 refers to the accessibility of the article to the World Wide Web, but no particulars are given to support the inference that it was read by a sufficient number of people to seriously harm the Claimant's reputation. No specific readers are identified. In any case, Ms Phillips submitted, the Claimant was attempting here to invoke a proposition that had been rejected by Gray J. in *Al Amoudi v Brisard* [2006] EWHC 1062 (QB), [2007] 1 WLR 113 where he said at [37],

> 'I am unable to accept that under English law, a claimant in a libel action on an Internet publication is entitled to rely on a presumption of law that there has been a substantial publication.'

vii) Paragraph 22 pleads that the article had a wide distribution and refers to 4 third party media publications, but, Ms Phillips submits, they are said to follow the Claimant's own press release which is set out at paragraph 23 of the Particulars of Claim. Ms Phillips submitted that the Claimant's press release was a *novus actus interveniens*.

viii) Ms Phillips also submitted that the 1st Defendant had no connection with Hookworms and it was not therefore obvious why someone who was interested in Hookworms would read her blog. There was no pleading, for instance, that a search engine search of say, 'Hookworms' or 'Matthew Johnson' would lead a reader to either the blog or the tweets of the 1st Defendant.

22. Mr Myerson on the Claimant's behalf submitted that Ms Phillips had subjected the Particulars of Claim to an overly close and restricted reading. It could not be said that the Defendants did not understand the case they had to meet. Practice Direction 3A paragraph 1.4 gave examples of pleadings which might be vulnerable to striking out. The present Particulars of Claim was not akin to any of those examples.

23. Mr Myerson asked me to note that the Claimant's press release was (according to paragraph 23) timed at 23.46 on 31st October 2018. The article in 'The Guardian' was published before then, at 22.58 as could be seen from the copy of the article exhibited to the witness statement of Charlotte Watson made on 21st November 2019 in support of the present application. Mr Myerson accepted that 'The Guardian' had quoted the Claimant's refutation of what the 1st Defendant had said in her blog, but this must have been a quote provided to the newspaper in advance of the Claimant posting his reply. Mr Myerson argued that the evidence showed the sequence to have been: (a) the 1st Defendant published her blog; (b) Hookworms announced that it was breaking up 'because of the allegations that came to light yesterday' (c) 'The Guardian' reported the break up of the band including the quote from the Claimant (d) the Claimant issued his press release (e) The Claimant had been badly affected and sought psychiatric help.

24. In his skeleton argument, Mr Myerson argued that *Lachaux* did not assist the 1st Defendant since it concerned what the Claimant had to prove at trial and these were matters of fact.

25. The Practice Direction did not require a Claimant to adopt particular words or form.

26. Mr Myerson took me to Dr Jarman's report which was attached to the Particulars of Claim. Dr Jarman quotes from the record of a specialist mental health service whom the Claimant had consulted on 31st October 2018. Dr Jarman's report says,

> 'The entry notes the ramifications of the statement being made public on Twitter, The Guardian released a story and music magazine. Consequentially, all of Matthew's upcoming working including gigs and record making have been cancelled. Matthew states that there had been a vast amount of negative claims and character assassinations and people siding with [the Defendants]. Matthew is the lead singer for the band Hookworms and is clearly apprehensive about what this will mean for the band. The entry notes the situation has left Matthew without any income and future gigs. His name in the music industry he feels is currently tarnished beyond repair and the subject of online abuse from others who have been reading the claims from [the defendants].'

27. In my judgment, Ms Phillips is right and the Particulars of Claim do not comply with the Practice Direction 53B paragraph 4.2(3) and the Particulars of Claim do not presently plead reasonable grounds for bringing the claim in defamation. I reach this conclusion for the following reasons:

i) Mr Myerson is right that neither the statute nor the Practice Direction requires a Claimant to adopt a particular form of words. Ms Phillips was, for instance, sensible not to rely on the phrase in paragraph 26 that 'the Claimant's reputation has been severely damaged' rather than the expression used in s.1 of Defamation Act 2013 that the publication caused 'serious harm to the Claimant's reputation'. If the two phrases mean the same thing, it is a distinction without a difference.

ii) Mr Myerson is also right that *Lachaux* was concerned with the evidence which had been led at trial. However, an important function of pleadings is to circumscribe what evidence at trial will be relevant. Plainly the Practice Direction *is* about the content of pleadings. By CPR r.16.4(1), Particulars of Claim must include,

> 'such other matters as may be set out in a practice direction'.

Thus, compliance with PD53B is mandatory.

In any event, even in the absence of the Practice Direction, it is axiomatic that a Claimant would be obliged to plead the facts necessary for a court to find that the cause of action is made out. After the 2013 Act those necessary facts include serious harm to the Claimant's reputation.

iii) I do not accept that gaps in the Particulars of Claim can be made good by reference to a medical report attached to the Particulars of Claim. There are several reasons which lead to that conclusion:

a) PD53B paragraph 4.2 itself starts 'The Claimant must set out *in the particulars of claim'* [my emphasis] and so not in some other document even another document attached to the Particulars of Claim.

b) The Practice Direction to Part 16 of the CPR is what requires a medical report to be attached to the Particulars of Claim (if the Claimant is relying on the evidence of a medical practitioner) – see 16PD paragraph 4.3. But this same Practice Direction is careful to distinguish what must be contained in the particulars of claim itself (e.g. claimant's date of birth and brief details of the claimant's injuries – see paragraph 4.1 and additional particulars where provisional damages are being sought – see paragraph 4.4) and what must be attached to the particulars of claim in a personal injury claim (a schedule of loss – paragraph 4.2 and any medical report on which the Claimant relies – see paragraph 4.3).

c) A defendant must respond in the defence to each allegation in the particulars of claim – see CPR r.16.5. It is right that in personal injury actions, the defendant should also state whether he agrees, disputes or has no knowledge of the matters contained in the medical report – see PD16 paragraph 12.1 and set out his case on any schedule of loss - *ibid*

> paragraph 12.2. Nonetheless, the style of pleadings differs markedly from the style of medical reports, so that in a medical report it may be far less easy to identify individual allegations which require a response.

In any event, the notes of the psychiatric assessment to which Dr Jarman refers do not themselves provide the particulars which the Practice Direction requires.

iv) As Ms Phillips submitted, some publications (such as national newspapers or broadcasters) have such a broad reach that if they include grave allegations, it will be relatively straightforward for a Claimant to plead those facts as the basis for an inference that his or her reputation has been seriously harmed. However, no such facts are pleaded here. Further, as Ms Phillips also submitted, in *Al Amoudi v Brissard,* Gray J. rejected the proposition that, where there had been an internet publication there was a presumption of law that there had been substantial publication.

v) Damage to reputation is not exclusively about the numbers of people who read the publication in question. The impact on some readers may be more important than that on others. Ms Watson's exhibit also includes a message, apparently from a member of the Hookworms band which said,

> 'We were deeply shocked by the allegations that came to light yesterday [since the message was apparently written on 31st October, this would suggest that the writer was speaking of events on 30th October] regarding MJ, and take them very seriously. As a result we have cancelled all upcoming Hookworms shows and can no longer continue as a band.'

But Ms Phillips is entitled to observe that it is not pleaded that a band member in question read the 1st Defendant's blog or her 30th October tweet or any other publication for which she was responsible. Nor is it pleaded that it was a reasonably foreseeable consequence of the publications for which she was responsible that her publications would come to the attention of the band with seriously adverse consequences for the Claimant's reputation.

vi) I also agree with Ms Phillips that *Lachaux* distinguishes damage to reputation from other types of loss (such as personal injury). The Particulars of Loss which are pleaded in paragraph 34 do not meet the obligations of the Practice Direction. These are items of special damage which, as Lord Sumption said in *Lachaux* at [15] 'represents pecuniary loss to interests other than reputation.'.

vii) I also share Ms Phillips concern that a pleading as to the effect of the publications collectively on the Claimant's reputation is not sufficient. In libel each publication is a separate tort. Each publication must therefore meet the requirements of the common law and the statute. Each publication must therefore have either caused or have been likely to cause serious harm to the Claimant's reputation.

viii) In her oral submissions, Ms Phillips emphasised that this was a strike out application, not an application for summary judgment. With that in mind, I am not sure of the relevance or importance of the evidence either of Ms Watson, on the 1st Defendant's behalf or of Mr Collins on behalf of the Claimant. After all,

> if the argument is that the pleading is deficient, that is to be judged on the face of the pleading alone. But, so far as it is proper for me to look at the evidence, it seems clear from the article in 'The Guardian' that, even if that article was published before the Claimant's press release, it had been published (a) after news of Hookworms' breakup and (b) after some comment had been made to the press by the Claimant or on his behalf. I agree with Ms Phillips that those events may have been the reason for, or, at least, a contributory factor in the 'wide distribution' which paragraph 22 attributes to the 1st Defendant's article.

Strike out: the claim in malicious falsehood

28. The cause of action in malicious falsehood has some affinities with libel, but there are also important differences. Notably, for malicious falsehood the Claimant must plead and prove that the words published were false and that they were published maliciously. Ms Phillips argued that the present Particulars of Claim were deficient in both their plea of falsity and their plea of malice. Another difference from defamation is that the 'single meaning rule' does not apply to malicious falsehood. Instead, the Court's task is to consider the meanings which a substantial number of readers might reasonably attribute to the publication in question.

Falsity: the 1st Defendant's submissions

29. Ms Phillips first argues that taking the Particulars of Claim as a whole, it is unclear which statements are alleged to be false.

    i) Paragraph 27 appears to be the pleading of the claim in malicious falsehood and it includes cross headings, 'Particulars of Falsity' and 'Particulars of Malice.'

    ii) The difficulty is that paragraph 19 had pleaded that 'The Article [i.e. the blog] contained words which were *false* and defamatory of the claimant' [my emphasis]. Paragraph 20 then pleaded twenty meanings which, apparently were both defamatory and false. Paragraph 25 of Ms Phillips' skeleton argument then contrasts the 9 statements said in paragraph 27 to be false with the 20 meanings in paragraph 20 said to be false and defamatory.

30. Next, Ms Phillips submits that the Particulars of Claim are not coherent because what is said to be false in one part of the pleading is admitted to be true elsewhere.

    i) In paragraph 27(e) The Claimant pleads, as one of the particulars of falsity, 'The Claimant did not abuse the 2nd Defendant.' But at paragraph 28(v) the Claimant admits sending the 2nd Defendant a text in which he said,

    > 'I didn't realise I was being abusive and that was no excuse but now I realise I was. So yes. Sorry. That should just be – "yes"'.

    ii) While paragraph 27(a) pleads that 'The Claimant did not sexually abuse the 2nd Defendant', paragraph 27(e) says,

    > 'Whilst the Claimant did once spit at the 2nd Defendant, that was in the course of mutually satisfactory and consenting rough sex, in which the parties engaged during the course of their relationship. On that one occasion, the 2nd

> Defendant indicated that she did not like what had happened, and the Claimant never repeated the act.'

iii) Paragraph 27(e) also contrasts with what is said in Paragraph 10,

> 'On or around the 2nd Defendant sent text messages to the Claimant... They included, quite out of the blue, serious and *untrue*, allegations against him, particularly that he...(b) spat in the 2nd Defendant's face during sex.' [my emphasis]

iv) One of the meanings which the 1st Defendant's 'false and defamatory' blog is said to bear is that,

> 'c. The Claimant had joked about the 2nd Defendant's previous physical and sexual abuse, of which he was aware.'

Yet in paragraph 31 it is pleaded,

> 'In 2013 the 2nd Defendant alleged that she had been raped whilst a student in Canada in 2010, "by a trusted friend". The 2nd Defendant had told the Claimant that she had been the victim of a rape and that the person against whom she made the allegation had been acquitted. The Claimant is currently seeking reliable information about that incident.'

31. Next, Ms Phillips submits that some of the alleged false statements are not statements in the blog at all.

i) At paragraph 27(d) it is pleaded,

> 'The Claimant did not punch the 2nd Defendant.'

Ms Phillips submits that the blog did not allege that the Claimant had punched the 2nd Defendant. The closest reference was where the blog said,

> 'L is a survivor of sexual and physical abuse, something she made Matt aware of. Over the course of numerous interactions, he made jokes about the specific details of L's past experience, joking about raping her, mutilating her body and punching her in the face.'

Thus, Ms Phillips said, the blog was saying that the Claimant had joked about punching the 2nd Defendant in the face, not that he had punched her in the face.

ii) I have already quoted paragraph 27(e) which refers to the Claimant spitting in the face of the 2nd Defendant during sex. Ms Phillips submits that the blog does not mention him spitting in the 2nd Defendant's face.

iii) Paragraph 27(f) pleads that,

> 'The Claimant was supportive of the 2nd Defendant following their breakup.'

Ms Phillips submits that the blog does not say that he was unsupportive at that time.

iv) To some extent the blog was comment and the publication of comment cannot found a claim in malicious falsehood – see *Euromoney Institutional Investor plc v Aviation News Ltd.* [2013] EWHC (QB) Tugendhat J. at [102].

Malice: the 1st Defendant's submissions

32. Ms Phillips began with some general submissions concerning this aspect of the malicious falsehood claim.

33. First, the law in this regard was the same as in defamation where malice was relied upon by a claimant to defeat a plea of qualified privilege – see *Spring v Guardian Assurance plc* [1983] 2 All E R 273 CA. The Court of Appeal's decision was reversed in the House of Lords, but on a different point – see [1995] 2 AC 296.

34. In defamation law (and therefore also in malicious falsehood), the leading authority on malice was *Horrocks v Lowe* [1975] AC 135 and particularly the speech of Lord Diplock at pp.149-151. He commented:

i) The person said to be malicious must have the dominant motive to injure the other, knowledge that it will have this effect is not enough (p.149).

ii) It is generally sufficient to prove that the person concerned did not believe that what he published was true (p.149).

iii) It is also sufficient to prove malice to show that the person concerned published the matter recklessly, not caring whether it was true or not (p.150).

iv) But recklessness in this sense is to be distinguished from carelessness, impulsiveness or irrationality in arriving at a positive belief that what has been published is true (p.150).

v) While there may be malice in the form of personal spite or ill will being the dominant motive, judges and juries should be very slow to draw the inference that the person concerned was so far actuated by an improper motive as to deprive him of protection unless satisfied that he did not believe what he said or wrote was true or that he was indifferent to its truth or falsity (p.150-1).

35. A plea of malice is equivalent to a plea of dishonesty and, accordingly, must be pleaded with a high degree of particularity. The particulars of malice must be more consistent with the presence of malice than its absence – see *Thompson v James* [2013] EWHC 585 (QB) Tugendhat J. at [16] citing *Telnikoff v Matusevitch* [1991] QB 102 CA (a decision subsequently reversed by the House of Lords on a different point) and see also *Yeo v Times Newspapers Ltd (No.2)* [2015] EWHC 209 (QB), [2015] 1 WLR 3031 at [30]-[37].

36. The plea of malice is in paragraph 28 of the Particulars of Claim. It is subdivided and Ms Phillips necessarily considered each of them. Her submissions were as follows:

i) Subparagraph (a) distinguishes between the two defendants. It pleads that the 2nd Defendant knew that the statements were untrue. It is not entirely clear what the case is against the 1st Defendant although it is said that what she published were 'deliberate lies'.

ii) Sub-paragraph (b) says,

> 'The 1st Defendant lied and/or was reckless in asserting that she had seen evidence of the Claimant texting the 2nd Defendant and admitting to sexually and emotionally abusive actions, because there were no texts that could be properly construed as such an admission.'

This is then followed by 8 sub-sub-paragraphs each of which Ms Phillips also addressed, but she commented that the reference in the opening words to what could 'properly' be construed from the Claimant's texts showed that the pleader had ignored the distinction drawn by Lord Diplock in *Horrocks v Lowe* between malice on the one hand and carelessness, impulsiveness or irrationality on the other.

iii) Paragraph 28(b)(i) pleads that if the 1st Defendant had seen the text messages passing between the Claimant and the 2nd Defendant she would have known that the 2nd Defendant had contacted the Claimant because the Claimant could assist the 2nd Defendant to make progress in her therapy by admitting that he had never cared for her and had abused her. As to this Ms Phillips submits it makes no allegation against the 1st Defendant and is not more consistent with the presence of the 1st Defendant's malice than its absence.

iv) Paragraph 28(b)(ii) alleges that the 2nd Defendant had made untrue allegations against the Claimant. It is not alleged that the 1st Defendant knew that they were untrue. This sub-sub-paragraph makes no allegation against the 1st Defendant.

v) Paragraph 28(b)(iii) says that, if the 1st Defendant had troubled to contact the Claimant before posting her blog, he would have provided the response that he did subsequently, namely that he was trying to help the 2nd Defendant. Ms Phillips submits that this is not an allegation more consistent with the presence of malice than its absence. At its highest, it is a criticism of the 1st Defendant for not contacting the Claimant before publishing her blog, but that is not malice.

vi) Paragraph 28(b)(iv) pleads that it was clear from the Claimant's messages to the 2nd Defendant that he himself was receiving treatment for his mental health and he was concerned that the 2nd Defendant would publish false allegations causing him personal injury and damage. Ms Phillips submits that this makes no allegation against the 1st Defendant. It is not more consistent with the presence of malice than its absence.

vii) I have already quoted Paragraph 28(b)(v) which quotes the Claimant's text apparently admitting spitting at the 2nd Defendant during sex on one occasion. Ms Phillips submits that this positively supports the 1st Defendant's honest belief in the truth of the words complained of.

viii) Paragraph 28(b)(vi) pleads,

> '[the text quoted in paragraph 28(b)(v)] could not objectively or fairly be construed as a voluntary admission of specific conduct. As the Claimant said in his response to the Article – and as he would have made clear to the 1st Defendant had she troubled to contact him before publishing the Article – the

> texts were sent as a result of the pressure placed on him by the 2nd Defendant at a time when the Claimant was vulnerable.'

As to this, Ms Phillips submits that it is an 'after the fact' attempt at exculpation. It is not an allegation more consistent with the presence of malice than its absence.

ix) Paragraph 28(b)(vii) quotes the 2nd Defendant's text in reply to what the Claimant had written as quoted in paragraph 28(b)(v). The 2nd Defendant wrote 'I don't believe in public shaming and I am not going to do that.' Ms Phillips comments that this part of the pleading makes no allegation against the 1st Defendant and is not more consistent with the presence of malice on her part than its absence.

x) Paragraph 28(b)(viii) says

> 'If the 1st Defendant had not seen all the messages, then her assertion was plainly based on incomplete information and she cannot reasonably have believed what she said.'

Ms Phillips comments that this is no more than an allegation that the 1st Defendant based her blog on incomplete information and could not 'reasonably' have believed it. She submits that is not malice.

xi) Paragraph 28(c) pleads that, although the 1st Defendant was in regular contact with the 2nd Defendant she took no steps to verify what the 2nd Defendant was telling her. Instead she published all of the allegations and urged her readership to share them widely. The 1st Defendant's behaviour is said to have been incompatible with a genuine effort to discover the truth. Ms Phillips submits that this is redundant in light of the admission by the Claimant in the text quoted at paragraph 28(b)(v). In any event, it is not an allegation that is more consistent with the presence of malice than its absence.

xii) Paragraph 28(d) pleads that the 1st Defendant's true motive was spite and jealousy. Reference is made to what the article said, that the 1st Defendant 'wished to enact some type of accountability for Matt' because of 'the social stature that Matt has in the UK music scene.' It pleads that the 1st Defendant was upset by the Claimant's success 'in the promotion of his band and their last record' It is also noted that the 1st Defendant asked her readers to share her blog widely.

Ms Phillips observes that spite and jealousy is not alleged to have been the 1st Defendant's dominant motive and, she submits, the quoted words were supportive of her having an honest belief in the truth of what she had written as were her wish for her views to be shared more widely.

xiii) Paragraph 28(e) is concerned with the 2nd Defendant. Ms Phillips comments that it makes no allegation against the 1st Defendant.

xiv) Paragraph 28(f) says,

> 'Neither Defendant can reasonably have expected publication to achieve the aim they ostensibly sought, namely to prevent the Claimant abusing women again. Unless the article was read by every person the Claimant was likely to meet, it could not achieve that aim. The purpose of the article was that which it was most likely to achieve and in fact achieved, namely to upset and humiliate the Claimant, severely exacerbate his mental health issues and ensure that his musical career was destroyed.'

Ms Phillips comments that that this is not an allegation more consistent with the existence of malice than its absence. At its highest it alleges that the 1st Defendant's aims could not be achieved. Ms Phillips submits that that is not malice.

xv) Paragraph 28(g) says

> 'The Defendants wrote the words actuated by malice, spite, ill-will and vindictiveness against the Claimant.'

Ms Phillips comments that this is a bare assertion.

Strike out: Malicious falsehood the Claimant's response

37. Mr Myerson responded that the Particulars of Claim did adequately plead the necessary ingredients of malicious falsehood. It was not right to contrast the allegations of falsity for the purpose of the defamation action with those pleaded for the claim in malicious falsehood. The latter was necessarily more limited because, to maintain the action in malicious falsehood the Claimant had to plead that the publication of false facts had caused him loss. The 1st Defendant's approach to malice was also wrong. To judge whether there was a sufficient pleading of malice, the particulars should be considered as a whole, not, as Ms Phillips had done, one by one. Mr Myerson accepted that the Claimant's case on malice against the two defendants was different. It was not alleged that the 1st Defendant knew that the substantive allegations against him were untrue, but she had lied or was reckless when she said that she had seen evidence to substantiate 2nd Defendant's claims.

Strike out: Malicious falsehood: my conclusions

38. In my view Ms Phillips is right that the Particulars of Claim do not disclose reasonable grounds for bringing the claim in malicious falsehood.

39. I consider that, taken individually, her criticisms of the particulars of malice are well-founded.

40. While I understand why Ms Phillips considered it necessary to address each of the particulars (and sub-particulars) of malice separately, I accept that there is some force in Mr Myerson's response that focussing on individual trees can lose sight of the wood as a whole. In other words, I accept that I should also stand back from the detail and consider whether, taken as a whole, the pleading of malice discloses a reasonably arguable case. After all, the division between particulars may be for convenience or style and it would not be right to strike out a pleading because, divided in this way, individual particulars do not pass muster.

41. Nonetheless, whether considered individually or in combination, I accept the points made by Ms Phillips. The pleaded case against the 2nd Defendant is that she knew that what was said in the blog was untrue. That is not the case against the 1st Defendant. So far as she was concerned the Claimant's case is that she lied or was reckless about seeing *evidence* of the Claimant admitting abusive behaviour. So far as it is said that the 1st Defendant *lied* about seeing such evidence, the Particulars of Claim are incoherent, since it is admitted that the Claimant had texted the 2nd Defendant in the terms set out at paragraph 28(b)(v).

42. So far as it is alleged that the 1st Defendant was reckless in the sense that she was indifferent to the truth of what she had published, I consider that Ms Phillips is right that insufficient attention has been given to the distinction drawn by Lord Diplock in *Horrocks v Lowe* between malice on the one hand and carelessness, impulsiveness or irrationality on the other. She is right to say that the particulars of malice do not plead a situation more consistent with the existence of malice rather than its absence.

43. Ms Phillips is also entitled to observe that there is some incoherence in the Particulars of Claim as to which of the statements in the publications complained of were false. Mr Myerson suggested that the different approach in the Particulars of Claim to libel on the one hand and malicious falsehood on the other could be explained by the need to show special damage in malicious falsehood. The difficulty with this argument is that the claim for damage is dealt with compendiously for both causes of action in paragraph 34 of the Particulars of Claim which, I note, does not seek to rely on Defamation Act 1952 s.3 and which dispenses with the need to prove special damage in certain malicious falsehood claims.

44. There is an additional point. As I have just noted, in paragraph 28(b) it is pleaded that the 1st Defendant lied about seeing evidence of the Claimant. Yet paragraph 27 does not plead this as one of the particulars of falsity.

45. In my judgment the other points which Ms Phillips made about the inadequacy of the pleading regarding falsity are also well founded, save that is not necessary for me to reach a view as to whether any part of the publications was comment so as to be incapable of amounting to malicious falsehood.

Consequences of my conclusions

46. The draft order attached to the 1st Defendant's application notice says in paragraph 1,

> 'The libel and/or malicious falsehood claims in the Claim Form and/or Particulars of Claim herein be struck out and the claim dismissed pursuant to CPR 3.4(2) and/or the inherent jurisdiction of the court on the grounds that they
>
> (a) Disclose no reasonable grounds for bringing the claim; and/or
>
> (b) Fail to comply with a practice direction, namely paragraph 4.2(3) of Practice Direction 53B.'

47. I have agreed that the Particulars of Claim did not comply with the Practice Direction (so far as the claim in libel is concerned). I have agreed that the Particulars of Claim

disclose no reasonable grounds for bringing the claim in libel or malicious falsehood against the 1st Defendant. Three matters remain.

i) Whether the relief which I grant should be confined to the claims against the 1st Defendant?

ii) Whether the relief which I grant should be to strike out the claims against the 1st Defendant or whether the Claimant should be given the opportunity to amend the present Particulars of Claim?

iii) What relief (if any) should be granted in respect of the Claim Form?

48. These are matters on which the parties should have the opportunity to comment after considering a draft of this judgment, but it may assist them if I give my provisional views.

49. The application notice was issued by only the 1st Defendant. As I have noted, the 2nd Defendant was represented at the hearing, but her solicitor took no active part in it. My preliminary view is that any relief I grant should be confined to the claims against the 1st Defendant.

50. As to the choice between striking out and allowing the Claimant an opportunity to amend the Particulars of Claim, Ms Phillips referred me to *Yeo v Times Newspapers* (see above) where Warby J. said,

> '[43] Mr Browne invited me, if I concluded that the pleading was lacking in the necessary clarity and precision, to refrain from striking it out but to allow a chance to reformulate. I have however concluded that the better approach is to strike out paragraph 14 as it stands, without prejudice to add a plea of malice if one can be properly formulated. That is for three reasons. The first is that given what has happened so far the onus should in my judgment be firmly on the claimant to persuade the court to allow in a plea of malice.
>
> [44] Secondly, I see a real risk that an attempt to reformulate which starts with the present form of paragraph 14 would produce something unsatisfactory; it would be better to start with a clean sheet. Thirdly, this approach seems to me to be likely to make it easier to test whether the plea of malice meets the requirement that it should state facts which are more consistent with the malice than the absence of malice, and to evaluate whether TNL's second complaint about the malice plea is sound.'

51. Although Warby J's third ground appeared to be particular to the facts of the case before him, his first and second grounds seem to be applicable more generally. My provisional view is that I should likewise strike out the claim for malicious falsehood (though without prejudice to the possibility of an application to allow a properly formulated claim for malicious falsehood back in).

52. What then of the libel claim as against the 1st Defendant? Ms Phillips argued that I should adopt the same course. She submitted that 'serious harm to reputation' was now a threshold requirement for a claim in defamation and striking out was also the appropriate remedy if that requirement was not properly pleaded.

53. I agree that 'the serious harm to reputation' requirement is now a necessary ingredient of the cause of action in defamation but the reason that I take the provisional view that the libel claim should be struck out from the Particulars of Claim as well is rather different. It seems to me that the two causes of action are so closely intertwined in the present Particulars of Claim that it makes no sense to take a different approach to each of them. My provisional view is therefore that, so far as the 1st Defendant is concerned, the Particulars of Claim should be stuck out in their entirety.

54. Following distribution of the draft judgment, the parties agreed that it would be more sensible for the Particulars of Claim to be struck out against both Defendants. It would be more convenient for there to be just one Particulars of Claim setting out the Claimant's case against both Defendants. However, the Claimant and the 2nd Defendant are also agreed that the costs of the 2nd Defendant in consequence should be costs in the case.

55. Regarding the Claim Form, my provisional view is that there is no good reason to strike it out. The deficiencies which I have found are in the Particulars of Claim. As part of her submissions in relation to striking out the Particulars of Claim, Ms Phillips submitted that it would be open to the Claimant, if he wished and could properly plead particulars of claim to apply to serve amended Particulars of Claim. My provisional view is that the Claimant should not be shut out from that possibility. Whether such an application would succeed is another matter, but that would have to be considered when and if such an application was made.

56. As a case management matter, it seems to me desirable to set a deadline within which any application to amend the Particulars of Claim must be made. I have (provisionally) 28 days in mind from the handing down of this judgment.

57. Since I have struck out the Particulars of Claim as regards the 1st Defendant, the alternative relief sought in the application notice is moot.