Neutral Citation Number: [2023] EWHC 3166 (KB)

Case No: KA-2022-000255

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 11 December 2023

Before :

MR JUSTICE JOHNSON

- -

Between :

JOSEPHINE MARY HAYES **App**

- and -

(1) THE LIBERAL DEMOCRATS

(2) STEPHEN PAUL DUDHILL **Respon**

- -

- -

The Appellant appeared in person

Tim James-Matthews (instructed by Druces LLP) for the First Respondent

The Second Respondent appeared in person

Hearing date: 28 November 2023

- -

Approved Judgment

This judgment was handed down by release to The National Archives on 11 December 2023 at 10.30am.

Mr Justice Johnson:

1.
The appellant is a practising barrister and was a member of the Liberal Democrats. She wishes to know the identities of people who made anonymous complaints about her to the Liberal Democrats, and who have said things on Twitter to which she takes exception. She has issued a claim against those people (without identifying them by name) but has not yet served that claim. She sought an order against the Liberal Democrats and Mr Dudhill for disclosure of the identities of these people. Master McCloud dismissed her application. She appeals against Master McCloud's order.

The background

2.

The account set out below is taken from the appellant's witness statements and the exhibits to those statements. It appears that at least some of the account is likely to be contested. I do not make any finding as to its veracity, but for the purposes of this appeal I proceed on the basis that it is true. I have greatly condensed the appellant's account, and omitted much of the detail which is not necessary to determine this appeal.

Sequence of events

3.
The appellant is a founder member of the Liberal Democrats. She is concerned about the manipulation of political debate and public opinion by deceitful means, including by the use of online social media platforms.

4.
In early 2019, Jason Hunter was beginning to gain prominence as a campaigner against Brexit. He became the subject of a campaign of harassment. His bank statements were published online. Criminal prosecutions were brought. One person was convicted of an offence under the Data Protection Act 2018; a restraining order was made against another person.

5.
In January 2020, the appellant was elected to the Federal Board of the Liberal Democrats and was chair of the East of England regional party. In December 2020, she was a candidate for the position of regional candidates' chair. Mr Hunter resided in the appellant's region. She contacted him and learned about the extent of the harassment that he (and also someone who had supported him) had faced. She became concerned about what appeared to be the co-ordinated nature of the complaints that had been made against Mr Hunter's supporter. One such complaint had been made by a person using the name "Monica Andersson" on social media. That person was, ostensibly, campaigning against Brexit. The appellant suspects that person is "fake", in the sense that their true name is not Monica Andersson. She suspects that this person engaged in "unlawful political data harvesting" during what she describes as "the period of uncertainty" between the Brexit referendum in June 2016 and the departure of the United Kingdom from the European Union.

6.
The appellant has undertaken research to seek to establish her thesis. On 5 December 2020, she published a blog in which she explained her suspicions about Monica Andersson and the campaign against Mr Hunter. On 13 December 2020, the appellant received an email from "Monica Andersson" which said that her publication of 5 December 2020 was "bullying, harassment and potential defamation." The email asked her to "cease and desist", and to remove her blog from all social media. Thereafter, the appellant says that she has been the target of a co-ordinated campaign of harassment. This has mainly taken two forms.

7.
First, on 14 December 2020, a complaint was made to the Bar Standards Board by "Monica Andersson". The complaint was that the appellant had "published [a] blog where she suggested I'm a fake Twitter and Facebook account. The blog is harassment and libellous… I have sent her a C&D which she has ignored." The complaint was dismissed without requiring any response from the appellant. She found out about it later. Complaints were also made to the Liberal Democrats:

(1)

A complaint was made by Lyndsey Knox (“case 718”) that the appellant was “making false claims without cause”. The complainant said that they did not wish the complaint to be anonymous.

(2)
An anonymous complaint (“case 719”) was made that the appellant had “made many false and libellous claims in particular about Monica Anderson.”

(3)
An anonymous complaint (“case 720”) was made that the appellant “bullies and harasses and potentially defames Monica Andersson by making false and unsubstantiated allegations.”

(4)
A complaint was made by “Monica Anderson” (“case 721”) that the publication of 5 December 2020 was “libellous and defamatory” and that the appellant was “lying about me”.

(5)
A complaint was made by Fiona Cameron (“case 766”) that the publication contained “a very personal attack on my friend, Monica Andersson.”

In complaints 718, 719 and 720 it was also said that the appellant’s contention that Mr Hunter’s bank statements had been published online was untrue.

8.
Second, messages have been published on the social media platform Twitter (as it was known at the time) by Stephen Dudhill, and by the authors of accounts heeney77, xlandphoto, kicki_1485 and namestoolon. These messages accuse the appellant of telling lies, being part of a hate campaign, and infiltrating the Liberal Democrats. The appellant is not now able to view these messages from her own Twitter account, because she has been blocked by the authors of the accounts that are sending the messages, but she has obtained or retained copies of the messages. Examples of the messages are:

From heeney77:

(1)
“I am flattered that you think that is me, but it is just another lie told to you by Sheller. But feel free to waste time and money and your reputation.”

(2)
“Jo, you should do more research before making a public fool of yourself. Below is a photo of the author (google is your friend). Now run along and ask Bloke is that me?”

(3)
“Jo, you have tagged the wrong person again. Monica is @kicki_1485. Take the matter up with your colleague… he has a record of misleading you all. Better still, cross-check with the Standards Officer …”

From xlandphoto:

(4)
“… the Lib Dems have been infiltrated by an equally corrupt& nasty element without its leadership caring. It’s the perfect scenario for the crime of Brexit.”

(5)

“Are you now or have you ever been aware of an orchestrated and coordinated plot to infiltrate the Liberal Democrat party? … Maybe you should start reading the room!”

(6)
“Those that infiltrated the Conservatives are currently involved in the same ploy with the Lib Dems… Enough people are shouting it thru the complaints procedure but strangely being side stepped by those already in place…”

9.
The appellant’s research indicates that Mr Dudhill and the author of heeney77 know each other (she has photographs which, she says, show them together in conversation). The account kicki_1485 was operated by a person using the name “Monica Andersson”. It has been dormant since mid-January 2022 when a woman, whose name was Monica Andersson, died. The appellant maintains that the author of kicki_1485 was not the Monica Andersson who died in January 2022, and explains her reasoning in detail (largely based on apparent differences between biographical details concerning Monica Andersson and the author of kicki_1485).

10.
On 21 December 2020, the appellant published a further blog entitled “Monica Andersson is no longer my friend.” She referred to the reaction to her earlier blog and “questioned why the bullying gang… bothered and cared.”

11.
On 28 January 2021, Mr Dudhill emailed the appellant’s clerk and expressed an intention to make a complaint to her chambers about her blog. In the event, he did not pursue a complaint to her chambers but said that he would complain to her professional regulator.

12.
In March 2021, the appellant was acting as the agent for the Liberal Democrat candidates in two local election campaigns. She appointed a campaign manager. Disparaging comments were made online about the campaign manager. A complaint was made to the police that one of the candidates had broken rules relating to the Covid pandemic. On the day before the election, a complaint was made to the Liberal Democrats about the appellant’s appointment of the campaign manager. The complaint included details of his membership status which were confidential. The complaint was subsequently dismissed. The appellant says “[s]omeone with inside knowledge, was monitoring [the campaign manager], my candidate and me and acting in this disturbing and disruptive fashion.”

13.
In June 2021, “Monica Andersson” emailed the appellant’s clerk and said that she wished to make a complaint about the appellant and her “social media Presence.” In the event, the matter did not proceed.

14.
On 5 July 2021, Mr Dudhill emailed the appellant’s clerk and offered to provide the member of chambers that was responsible for dealing with complaints evidence as to the identity of Monica Andersson and others who had written about the appellant, so that member of chambers could then convince the appellant that they were who they said they were. The proposal was not taken up.

15.

The appellant has identified some of those who have suggested that Monica Andersson was “real.” She asked them to provide proof. She has not received a substantive response, although this correspondence precipitated a further complaint against her.

16.
The appellant lodged a claim form with the court in December 2021. The defendants to the claim include Mr Dudhill, Ms Knox and three other named defendants. The claim form provided the address for each of these defendants. The remaining defendants are the authors of complaints 719 and 720, the author of the complaint to the Bar Standards Board, and the authors of Twitter accounts heeney77, xlandphoto, kicki_1485 and namestoolon. The claim form does not provide the address for any of those defendants. The claim form was issued on 8 December 2021, but the sealed claim form was not, at that stage, provided by the court to the appellant.

17.
The brief details of claim set out on the claim form state:

“1 . The Twitter account @kicki_1485 and the administrator or moderator of several pro-EU or pro-Remain groups purports to be authored by one Monica Andersson or Anderson.

2.
The Claimant is a political activist in the Remain, and now Rejoin, cause. The Claimant expressed her honest belief that the said online persona was fictitious. The Defendants engaged in a course of conduct of co-ordinated harassment online and in the case of some Defendants also by other means. Despite the Claimant’s requests to such of the Defendants as she has been able to locate to produce evidence verifying that the online persona is genuine, none has done so.

3.
The Claimant seeks declaratory relief to resolve the question whether the said online persona is genuinely authored by the person it purports to be, or a fake or stolen identity as it appears to be, and if fake or stolen, for what purposes it has been used. The Claimant contends that the First Defendant in concert with others currently unknown to her has used it for infiltrating, monitoring, manipulating and sowing discord among pro-EU campaigners, harassing individual campaigners and acquiring personal data and confidential information for political uses, in breach of data protection laws and confidence.

4.
Consequent on the declaration described above being granted, the Claimant claims damages for malicious falsehood against (1) the First, Second, Third and Fourth Defendants in respect of Complaints 718, 719, 720 and 721 to the Liberal Democrats between 5th and 10th December 2020;… (4) the Fifth Defendant in respect of his her or their emails to the Clerk to Gough Square Chambers and to Mr Fred Philpott on 14th and 15th June and 4th July 2021;… All these falsehoods were written and calculated to cause damage to the Claimant in respect of offices she held and/or the profession she carried on at the times of their publication.

5.
The Claimant claims damages from the Defendants for conspiracy to injure the Claimant by means including but not limited to a course of unlawful conduct involving organised concerted harassment online on Twitter; co-ordinated false vexatious complaints to the Liberal Democrats, to the chambers to which the Claimant belongs, to the Bar Standards Board and to the police; interference by harassment of the Claimant's political adviser and campaign manager in the Claimant's performance

of her role as Agent in two local government election campaigns; prying on the Claimant's home life by means of private investigators; breach of an undertaking to the court; and groundlessly accusing the Claimant of collusion in a criminal act.

6.
The Claimant seeks exemplary damages against the First Defendant and such others of the Defendants as shall be just, to mark the gravity of their conduct.

7.
The Claimant seeks an injunction to restrain the Defendants from further harassment in the future.

8.
The Claimant joins the Twelfth Defendant because she has persistently maintained both in Complaint 766 made to the Liberal Democrats… and on Twitter that Monica Andersson is her personal friend, but failed or refused to substantiate that claim when requested to do so."

18.
In her witness statement in support of the application, the appellant adds: "I seek relief from harassment in any event, having been targeted in a concerted way which I believe crossed the line into illegality even if my expressed views on Online Monica were in error; but if I was correct that Online Monica was not authentic, then various of the Defendants set out to damage my professional and political standing and induce me to retract my expressed views in order to sustain a lie."

19.
On 9 February 2022, the appellant asked Mr Dudhill to agree to provide the names (and other identifying details) of the authors of Twitter accounts heeney77, xlandphoto, kicki_1485 and namestoolon. He declined to do so. He suggested that the request should be made of Twitter rather than him.

20.
On 31 March 2022, the appellant made an application for a Norwich Pharmacal order against the Bar Standards Board, Mr Dudhill and the Liberal Democrats. As against the Liberal Democrats, she seeks disclosure of information identifying the authors of complaints 719, 720 and 721 and the member of the party who was admitted to membership in the name "Monica Andersson." As against Mr Dudhill she seeks disclosure of information identifying the authors of Twitter accounts heeney77, xlandphoto, kicki_1485 and namestoolon.

Liberal Democrats complaints policy

21.
The Liberal Democrats maintain a published complaints policy. A complaint is defined as "an allegation by any Complainant about the behaviour of a member of the Party." The policy (as in force at the relevant time) permitted the making of an anonymous complaint:

"Sometimes Complainants and witnesses will want to remain anonymous – by this we mean they want personal or identifying information about them not to be shared with other parties to the Complaint. People will always be required to give their name and contact details to the Party or the Complaint cannot be accepted by the Standards Office.

…

If a person asks to be kept anonymous, the Senior Adjudicators' team will consider the request and will allow it only where the person making the request has shown good cause (this may include but is not limited to, if a person is concerned about their personal safety, their privacy or their job and employment prospects).

…"

The judgment of Master McCloud

22.
The Bar Standards Board did not contest the application. The judge granted the application so far as it concerned the Bar Standards Board. The Bar Standards Board complied with the order. The resulting disclosure has not enabled the appellant to identify the person who made the complaint against her, save that various of the defendants say that she is Monica Andersson who died in January 2022.

23.
In respect of the application for disclosure against Mr Dudhill, the judge was not satisfied that it had been established that he was "mixed up" in any wrongdoing: "I just have not seen more than a bit of possible tweeting between each other, and I am not even quite satisfied that I have really seen any or much of that." Further, the judge considered that the application should have been made against Twitter who would be able to provide the IP address which could then be used to identify the subscriber address. The judge pointed out that "another option" was to allow the claim to proceed and to pursue an application for specific disclosure. She therefore dismissed the application, saying "[the claimant] can go to make an application against Twitter or wait until we get to disclosure and then ask for disclosure in the ordinary way, if it is thought there are co-tortfeasors and there is material that points in that direction."

24.
In relation to the application against the Liberal Democrats, the judge was satisfied that they were "mixed up" in the alleged tortious conduct. However, she did not consider that the alleged conduct reached the threshold required for the making of a Norwich Pharmacal order. Further, she did not consider that the overall justice of the case required the making of an order. The appellant was able to pursue a claim against Mr Dudhill (and other identified defendants). She could seek disclosure from them in the course of the proceedings. The application for a Norwich Pharmacal order was therefore "either bad or premature": Burford Capital Limited v London Stock Exchange Group PLC [2020] EWHC 1183 (Comm) per Andrew Baker J at [161]. For the same reason, it was not proportionate to make an order. Further, the order made in respect of the Bar Standards Board would mean that "Monica Andersson" would be identified so that "the claim is now afoot [and] can now be got on with." Further, the judge only had "a claim form… and an exceedingly complicated factual position with a certain amount of belief and speculation involved." It would be much easier to assess what disclosure order to make once the claim had been sufficiently particularised. The judge made an order for costs against the appellant in favour of Mr Dudhill and the Liberal Democrats. She made an order for a payment on account in the sum of £3,808. There has been no stay of that order, but the appellant has not made the payment on account.

25.
The appellant had, separately, sought an extension of time to serve the claim form. The judge made a separate order on 24 November 2022 in respect of that application. She adjourned the application and

directed an investigation by court staff as to the reason why the clamant had not been provided with the issued claim form.

Grounds of appeal

26.
The appellant advances the following grounds of appeal:

(1)
It was incumbent on the respondents to communicate with the unidentified defendants and to pass on to the court any worthwhile reasons why they should not be identified: Totalise PLC v The Motley Fool Limited [2001] EWCA Civ 1897; [2002] 1 WLR 1223 per Aldous LJ at [26].

(2)
The judge failed to take account of the appellant's right under article 6(2) of the European Convention of Human Rights to a fair and public hearing within a reasonable time by an independent and impartial tribunal enshrined by law. She should have concluded that it was not conducive to a fair hearing to keep the identities of the unidentified defendants concealed.

(3)
The judge erred in concluding that the appellant's underlying claims did not reach the threshold required for making a Norwich Pharmacal order.

(4)
It was illogical to make an order against the Bar Standards Board, but not the respondents.

(5)
The judge was wrong to conclude that the appellant should find out the identities of the unidentified defendants by other means.

(6)
The judge was wrong to conclude that Mr Dudhill was not mixed up in the wrongdoing of the unidentified defendants.

(7)
The judge was wrong to make an order for costs in favour of the Liberal Democrats because the respondents had changed their positions from neutrality to opposition at a late stage, thereby increasing the costs.

(8)
The judge was wrong to make a costs order in favour of Mr Dudhill because the judge failed to consider he was a defendant to the claim, "not an innocent person who got mixed up in the wrongdoing of others." The judge should have reserved the costs to the trial judge.

The legal framework

Claim form where no address provided for a defendant

27.
Paragraph 2.3 of Civil Procedure Rules Practice Direction 16 requires that the claimant should (if she is able to do so) include in the claim form an address at which the defendant resides or carries on business. Paragraph 2.5 states:

“If the claim form does not show a full address, including postcode, at which the… defendant(s) reside or carry on business, the claim form will be issued but will be retained by the court and will not be served until the claimant has supplied a full address, including postcode, or the court has dispensed with the requirement to do so. The court will notify the claimant.”

28.
Where the claim form is served within the jurisdiction, the step that effects service must be taken within 4 months: CPR 7.5(1). It follows that the time for service of the claim form expired in April 2022. The appellant has an outstanding application for an extension of time for the service of the claim form. As explained above, that application has been adjourned while an investigation is carried out as to the reason why the appellant was not provided with a copy of the claim form. It may be that paragraph 2.5 of Practice Direction 16 provides the explanation.

Right to freedom of expression

29.
Everyone has the right to freedom of expression. That right includes the freedom to impart information without interference by a public authority: article 10(1) of the European Convention on Human Rights (“ECHR”). The exercise of the right to freedom of expression may be subject to restrictions where that is prescribed by law and is necessary in a democratic society for the protection of the rights of others: article 10(2) ECHR.

30.
The court is a public authority and must not make an order that is incompatible with article 10: section 6(1) and (3)(a) of the Human Rights Act 1998. The court is required to have particular regard to the importance of freedom of expression: section 12(4) of the Human Rights Act 1998.

31.
Twitter permits users to post messages anonymously. The Liberal Democrats complaints process allows complainants to seek anonymity (and the complainants in cases 719 and 720 sought and were granted anonymity). An order for disclosure of the identities of those who have made anonymous complaints, or communications on Twitter, amounts to an interference with the right of freedom of (anonymous) expression, and, potentially, privacy interests protected by Article 8 ECHR: Standard Verlagsgesellschaft mbh v Austria No 3) (2021) 53 BHRC 319 at [75] – [80], Davidoff v Google LLC [2023] EWHC 1958 (KB) per Nicklin J at [29] – [32]. The appellant must therefore show that such disclosure is necessary and proportionate for the protection of her rights. When balancing the article 8/10 rights of the unidentified defendants, with the article 6 right of the appellant to a fair trial, the required approach is that explained by Lord Steyn In re S (a child) [2004] UKHL 47; [2005] 1 AC 593 at [17]:

“… First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test…”

Malicious falsehood

32.

At common law, the tort of malicious falsehood is the malicious publication of a falsehood thereby intentionally occasioning damage: Ratcliffe v Evans [1892] 2 QB 524 at 532. It is necessary to prove special damage except where the falsehood is published in writing or in other permanent form and is calculated to cause special damage, or where the words are calculated to cause pecuniary damage to the claimant in respect of any office, profession, calling, trade or business held or carried on by her at the time of publication: section 3 of the Defamation Act 1952.

Conspiracy

33.
The tort of conspiracy (whether by lawful or unlawful means) is an agreement to injure the claimant, thereby occasioning her damage: JSC BTA Bank v Ablyazov (No 14) [2018] UKSC 19; [2020] AC 727 per Lord Sumption and Lord Lloyd-Jones at [9].

Harassment

34.
Section 1(1) of the Protection from Harassment Act 1997 states that a person must not pursue a course of conduct which he knows, or ought to know, amounts to harassment of another. That prohibition does not apply if the pursuit of the course of conduct was reasonable: section 1(3)(c). Harassment includes causing alarm or distress: section 7(2). A minimum threshold of seriousness must be met before conduct amounts to harassment within the meaning of the Act: Hayes v Willoughby [2013] UKSC 17; [2013] 1 WLR 935 per Lord Sumption JSC at [1], [12], Hayden v Dickenson [2020] EWHC 3291 (QB) per Nicklin J at [44], Davies v Carter [2021] EWHC 3021 (QB) per Saini J at [69]-[76].

Norwich Pharmacal order

35.
A Norwich Pharmacal order is an order that requires a person who has become “mixed up” in the tortious acts of another so as to facilitate their wrongdoing to disclose information, including as to the identity of the wrongdoer: Norwich Pharmacal Co v Commissioner of Customs and Excise [1974] AC 133 per Lord Reid at 175B. An order may be made where four conditions are satisfied: Collier v Bennett [2020] EWHC 1884 (QB); [2020] 4 WLR 116 per Saini J at [31]-[41]. The conditions are:

(1)
The applicant has a good arguable claim for wrongdoing by a third party.

(2)
The respondent was mixed up in the wrongdoing so as to have facilitated the wrongdoing.

(3)
The respondent is likely to be able to provide information to enable the applicant to pursue a claim against the wrongdoer.

(4)
It is just and proportionate to make an order.

36.
The exercise of the court’s powers to make a Norwich Pharmacal order was considered by the Supreme Court in The Rugby Football Union v Consolidated Information Services Ltd [2012] UKSC

55; [2012] 1 WLR 3333. At [15] - [17], Lord Kerr identified the principles that should guide the exercise of the court's power:

(1)
There is a need for flexibility and discretion in considering whether the remedy should be granted.

(2)
The need to order disclosure will arise only if it is a “necessary and proportionate response” in all the circumstances.

(3)
The test of necessity does not require the remedy to be one of last resort.

(4)
The essential purpose of the remedy is to do justice.

(5)
The court must undertake a careful and fair weighing of all relevant factors.

37.
The factors that are relevant include:

(1)
The strength of the possible cause of action contemplated by the applicant for the order.

(2)
The strong public interest in allowing an applicant to vindicate his legal rights.

(3)
Whether the making of the order will deter similar wrongdoing in the future.

(4)
Whether the information could be obtained from another source.

(5)
Whether the respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing.

(6)
Whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer any harm.

(7)
The degree of confidentiality of the information that is sought.

(8)
The privacy rights of the individuals whose identities are sought, including their rights under Article 8 ECHR and section 6 of the 1998 Act.

(9)
The rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclosed.

(10)

The impact of the making of an order on rights to freedom of expression, including such rights under Article 10 ECHR and section 6 of the 1998 Act.

Submissions

38.
The appellant made wide-ranging submissions in support of her central contention that the judge was wrong to dismiss her application. She relied on her right to a fair trial and the open justice principle (which, she said, mandated the disclosure of the names of anonymous complainants and Twitter users). She said she had a good arguable case for different causes of action: malicious falsehood, conspiracy, harassment, breach of section 127 of the Communications Act 2003, breach of section 1 of the Malicious Communications Act 1988, breach of the General Data Protection Regulation and wasting police time. The judge had acted inconsistently and illogically by granting the application against the Bar Standards Board but refusing it against the Liberal Democrats. The appellant would not be able to get disclosure of the names of the complainants in the course of the substantive proceedings because the Liberal Democrats are not a party to those proceedings. The judge failed to recognise that it was preferable to serve the proceedings directly on identified defendants, rather than by way of substituted service on anonymous defendants. Further, disclosure of the identities sought would avoid the risks of misidentification and substituted service, including that the wrong person is served and is caused unnecessary stress and cost.

39.
Mr James-Matthews, on behalf of the Liberal Democrats, submitted that the judge was right to refuse to order disclosure of information concerning the anonymous complainants. That was because the appellant had failed to demonstrate a good arguable case that a legally recognised wrong had been committed against her; and in any event, disclosure was not required by the overall justice of the case. The judge was required to have regard to the fact that compelling the Liberal Democrats to reveal to the appellant the identities of anonymous complaints would be prejudicial to the public interest in the effective operation of the internal complaints processes of a political party.

40.
Mr Dudhill attended the hearing but did not make any submissions.

Discussion

41.
It is convenient first to address grounds 3 and 5, because it is those grounds that most directly engage with the judge’s critical reasoning for dismissing the application.

Ground 3: Threshold for making an order not met

42.
The appellant has established an arguable case on the evidence that neither the person who made a complaint against her in the name of Monica Andersson, nor the person who operated the Twitter account kicki_1485, was Monica Andersson. That is not sufficient to show that an order should be made. The appellant must show both that she has a good arguable claim in law against the defendants whose identities she seeks.

43.
The causes of action relied on by the appellant in her claim form are malicious falsehood and conspiracy.

44.
Each of these two torts requires the appellant to establish that she sustained damage (save for the exception provided by section 3 of the 1952 Act in the case of malicious falsehood).

45.
A claim for malicious falsehood must set out the nature of the damage that was likely to be sustained, the grounds for saying that it was more likely than not to be sustained, and the mechanism by which it was likely to be sustained: Tesla Motors v BBC [2011] EWHC 2760 (QB) per Tugendhat J at [66], [2013] EWCA Civ 152 per Moore-Bick LJ at [37].

46.
The claim form states that the appellant claims damages, and that the value of the claim is £10,000, and that the amount claimed is £10,000. There is a claim for exemplary damages. However, the claim form does not contain a plea that the appellant has sustained any damage.

47.
The appellant says, correctly, that Norwich Pharmacal relief is often sought before the issue of proceedings. Also, she points out that she is representing herself (albeit she is a practising barrister). For both those reasons she says she should not be held to the limits of her pleaded case. Even if that is so, it is still necessary for the appellant to establish that she has a good arguable case. Quite apart from the absence of a pleaded case on loss, there is no evidence that the appellant has in fact sustained any damage. At various points in her lengthy witness statements, she says that the defendants intended to damage her reputation and to cause her distress and worry. She also says that if it turns out that a person was able to join the Liberal Democrats pseudonymously, then the ramifications of that would “alarm” her. None of this is sufficient to establish that she has suffered damage.

48.
The claim form asserts that the “falsehoods were written and calculated to cause damage to the appellant in respect of offices she held and/or the profession she carried on”. This reflects the language of section 3 of the 1952 Act, which provides an exception to the need to show actionable damage for the purposes of the tort of malicious falsehood. So far as the complaint to the Bar Standards Board is concerned, it may well be that section 3 applies. If the complaint had resulted in the complainant being disbarred or suspended from practice, then it is likely to have resulted in pecuniary loss.

49.
So far as the complaints to the Liberal Democrats are concerned, however, there is nothing in the appellant’s pleaded case or evidence to suggest that the complaints were likely to result in her sustaining actionable damage. It is not, for example, said that she was in a paid post and that expulsion from the party would have resulted in a loss of earnings. In the course of argument, the appellant said that her positions within the party were voluntary, which I took to mean unpaid. The appellant said that the complaints were liable to damage her reputation, but that does not amount to actionable damage for the tort of malicious falsehood or conspiracy: Niche Products Ltd v MacDermid Offshore Solutions LLC [2013] EWHC 3540 (IPEC); [2014] EMLR 9 per Birss J at [39], Lonrho plc v Fayed (No 5) [1993] 1 WLR 1498 per Dillon LJ at 1493.

50.

It follows that the appellant has not established a good arguable claim that she has sustained actionable loss. She has not therefore established a good arguable claim in either malicious falsehood or conspiracy.

51.
Further, for the reasons that follow, the appellant has not established a good arguable claim of malice so as to found a claim in malicious falsehood, or a good arguable claim of an intention to injure her so as to found a claim in conspiracy.

52.
Leaving aside the claim against the operator of Twitter account kicki_1485, the logic of her case against the remaining unidentified defendants is that once it is established that Monica Andersson was pseudonymous, the defendants (who maintained that she was not) must have been acting maliciously with an intent to injure the appellant. That does not follow. It assumes that the defendants knew that Monica Andersson was pseudonymous. There is no evidence to support that proposition. The appellant relies on the fact that the author of complaint 719 said that they knew "Monica Anderson", but (leaving aside the slight difference in spelling) that does not necessarily mean that they knew her other than through social media interactions. Far less does it mean that they knew that her true identity was not Monica Andersson.

53.
Of course, if the appellant does establish that "Monica Andersson" was pseudonymous then it will follow that the operator of the Twitter account kicki_1485 was lying when they purported to be Monica Andersson. That does not mean that they acted with an intention to injure the appellant. It is equally consistent with an attempt to maintain their pseudonymity. The appellant has not identified any particular communication by kicki_1485 that was intended to cause her injury.

54.
Aside from the torts of malicious falsehood and conspiracy, the appellant also said she relied on the statutory prohibition of harassment. This is mentioned in the claim form, but as an ingredient of an alleged conspiracy rather than a freestanding tort. The appellant pointed out, correctly, that making complaints to a complainant's employer and professional regulator can amount to harassment if they cause distress: R v Musharraf [2022] EWCA Crim 1482; [2023] 4 WLR 4. The appellant suggested that she had established a good arguable claim in harassment merely by pointing to the complaints that had been made against her. I disagree. In order to meet the requisite minimum level of seriousness it would, in practice, be necessary to establish malice and some form of tangible harm. For the reasons already explained, the appellant has not established a good arguable case in respect of either malice or harm.

55.
The appellant also mentioned malicious prosecution, wasting police time, section 1 of the Malicious Communications Act 1988, section 127 of the Communications Act 2003, and breach of the General Data Protection Regulation. There was no sufficient attempt, either in the evidence or in the oral argument, to explain how it was that the appellant had a good arguable case under any of the headings she identified. It is not sufficient simply to mention a tort or crime or legal wrong in order to establish a good arguable claim.

56.
It follows that I agree with Master McCloud that the appellant has not established a good arguable claim so as to justify the possible grant of Norwich Pharmacal relief.

57.
I therefore dismiss the appeal on ground 3. It is necessary for the appellant to succeed on ground 3 in order to succeed overall on the appeal. Accordingly, the appeal is dismissed.

58.
For completeness, and in case I am wrong in respect of ground 3, I address the remaining grounds of appeal.

Ground 5: Wrong to conclude that the appellant should use other means

59.
Norwich Pharmacal relief may only be granted where that is just and proportionate. Moreover, the relief that the appellant seeks amounts to an interference with the defendants' rights to freedom of expression. The appellant must therefore establish that an order for disclosure is a necessary and proportionate interference with free expression rights to achieve the legitimate aim of protecting the appellant's rights.

60.
The judge considered that the appellant was likely to discover the identity of "Monica Andersson" as a result of the order made against the Bar Standards Board. That has turned out not to be the case, but the judge was entitled to consider that it was appropriate to wait to see what that order produced, and that it was premature to grant contested applications for disclosure where the information might become available by another route.

61.
The appellant was able to issue her claim without securing any disclosure. She knows the identities and addresses of five of the defendants and so (leaving aside the need now to secure an extension of time) she is able to serve her claim on them. She could seek orders for substituted service in respect of the authors of the two complaints and the four Twitter accounts. The appellant was concerned that "it may not be correct to join a defendant by description." She made reference to the decision of the Supreme Court in Cameron v Liverpool Victoria Insurance Co Ltd [2019] UKSC 6; [2019] 1 WLR 1471. That decision in fact made it clear that a claim can be issued and served on an identifiable (but anonymous) defendant – see per Lord Sumption at [12] – [15]. The recent decision of the Supreme Court in Wolverhampton City Council v London Gypsies and Travellers [2023] UKSC 47 does not change that.

62.
Accordingly, the appellant can (if an extension of time and permission to use substituted service is granted) serve the claim form. She can draft and file and serve Particulars of Claim. There will then be an obligation on the defendants to respond. Following exchange of statements of case, the court will be better placed to determine what appropriate orders for disclosure should be made. The judge's case management decision that it was better to wait and see, rather than making an order now which would necessarily interfere with free expression rights, reflects the approach of Andrew Baker J in Burford Capital at [161]: "this Norwich Pharmacal claim…. is either bad or premature."

63.
The appellant says that she might be able to avoid the need for substituted service if she were granted the orders she seeks, but that does not make it just or proportionate to grant Norwich Pharmacal relief. The appellant also points out that the Liberal Democrats are not a party to the claim and asserts the existing named defendants may not know the identities of those who made complaints to

the Liberal Democrats. That assertion does not sit comfortably with the appellant's case that the defendants engaged in a conspiracy to injure her by way of an organised and concerted campaign of harassment. Even it if turns out to be correct, it does not impugn the judge's assessment that it is better to wait for disclosure between the parties to take its course before deciding whether a third party disclosure order (or an order against Mr Dudhill) is necessary.

64.
Accordingly, the judge was entitled to conclude (in what was, effectively, a discretionary case management decision) that it was not just and proportionate to make the orders sought at this stage, and that the appellant should first seek to progress her claim further. This is a separate and sufficient basis to dismiss the appeal.

Ground 1: Judge should have inferred that no good reason for anonymity

65.
In Totalise [2001] EWCA Civ 1897; [2002] 1 WLR 1223 the respondent resisted a Norwich Pharmacal application on the basis that a generic promise had been given to protect the private personal data of those who posted messages on its online forum. At [26] Aldous LJ observed that it can sometimes be difficult for a court to conduct the article 10 proportionality assessment in cases of anonymous internet communications where the website operator "would like to get out of the cross-fire as rapidly and as cheaply as possible." He said that such a website operator could, where appropriate, tell the user what was going on and offer to pass on in writing to the court any worthwhile reason why the user might want to remain anonymous.

66.
The Liberal Democrats did not take that course here. The appellant says that it can be inferred that the anonymous complainants have no good reason to remain anonymous. I disagree. There might be something in the argument if the anonymous complainants had declined an opportunity to explain why they had made their complaints anonymously, but they have not been given that opportunity. There was no obligation on the Liberal Democrats to give them such an opportunity. Aldous LJ was offering a practical suggestion to assist website operators who found themselves in the crossfire of a Norwich Pharmacal application. He was not laying down a mandatory requirement as to the procedure that should be adopted.

67.
It is not possible to know precisely why the complainants sought anonymity. All that is known is that the Liberal Democrats complaints policy permitted complainants to seek anonymity, that that is what the complainants did, and that the person considering their requests granted them anonymity. There was no basis on which the judge could have concluded that there was no good reason for anonymity, let alone that it was just and proportionate to order disclosure of their names.

Ground 2: Right to a fair hearing

68.
The appellant complains that the judge did not take account of her right under article 6(2) ECHR to a fair and public hearing within a reasonable time by an independent and impartial tribunal enshrined by law. She says that the judge should have concluded that it was not conducive to a fair hearing to keep the identities of the unidentified defendants concealed. I disagree. The judge's conclusion had the effect of holding the ring and preserving the position for all parties, including the unidentified defendants, until further steps were taken. It is possible that those further steps will result in the

revelation of the identifies of all defendants. If not, the issue can be revisited at a later stage. There is nothing remotely unfair in the judge's approach.

Ground 4: Illogical to make order against Bar Standards Board but not respondents

69.
For the reasons I have given, the judge was entitled to conclude that the underlying allegations in respect of twitter communications, and complaints to the Liberal Democrats, do not reach the necessary threshold to justify the granting of Norwich Pharmacal relief.

70.
The position in respect of the Bar Standards Board is different. For the reasons give above, section 3 of the 1952 Act removes the requirement to show actual damage. Further, the judge was entitled to take account of the fact that the Bar Standards Board consented to the application, but the Liberal Democrats did not. That difference in stance is relevant to the interests of justice test.

71.
There is thus no necessary inconsistency or illogicality between the grant of Norwich Pharmacal relief against the Bar Standards Board, but not against the Liberal Democrats.

72.
Even if there were an inconsistency, it would not necessarily follow that the judge was wrong to refuse to make an order against the Liberal Democrats – it might equally be said that she was wrong to make an order against the Bar Standards Board. For the reasons given in respect of grounds 3 and 5, the judge was entitled to refuse to make an order against the Liberal Democrats, irrespective of her conclusion in respect of the Bar Standards Board.

Ground 6:The judge was wrong to conclude that Mr Dudhill was not mixed up in the wrongdoing of the unidentified defendants

73.
On the appellant's case, Mr Dudhill is a co-conspirator with the unidentified defendants. This is qualitatively different from simply being mixed up (in the Norwich Pharmacal sense)in the wrongdoing of the unidentified defendants. It is not necessary for the appellant to resort to the Norwich Pharmacal jurisdiction as against Mr Dudhill because he is a party to the proceedings and, once they have been served, she can seek disclosure against Mr Dudhill under part 31 of the Civil Procedure Rules. It is at least partly for this reason that the judge considered that it would not be in the interests of justice to make an order against Mr Dudhill and that, instead, it was appropriate to await disclosure within the proceedings. The appellant has not identified any error in that conclusion.

Ground 7: Wrong to make costs order in favour of the Liberal Democrats

74.
The Liberal Democrats had successfully resisted the application. The general rule (leaving aside the particular nature of the Norwich Pharmacal jurisdiction) is that the unsuccessful party is ordered to pay the costs of the successful party: CPR 44.2(2)(a). The judge's order was in line with the general rule. Further, in the particular context of the Norwich Pharmacal jurisdiction, the respondent is ordinarily entitled to its costs even if a disclosure order is made: Norwich Pharmacal per Lord Reid at 176 and Lord Cross at 199, Totalise per Aldous LJ at [29].

75.

The appellant says that the respondent changed its position on the application from neutrality to opposition shortly before the hearing. The appellant was entitled to take that stance and was successful. It does not provide any basis for impugning the judge's decision.

Ground 8: Wrong to make a costs order in favour of Mr Dudhill

76.
Mr Dudhill is a party to the proceedings. That puts him in a materially different position from a third-party respondent to an application for disclosure, or a respondent to an application for pre-action disclosure. In such cases the general rule is that the court will award the person against whom the order is sought that person's costs of the application and of complying with any order made on the application: CPR 46.1(2). Mr Dudhill was not entitled to the benefit of that rule, but the judge did not award him his costs on that basis. She awarded him his costs because the appellant's application had been dismissed. That reflects the general rule that the unsuccessful party will be ordered to pay the costs of the successful party: CPR 44.2(1). The appellant has not identified any good reason why the judge should have departed from that general rule. It follows that the appeal on this ground is also dismissed.

Appellant's "10 best points"

77.
Paragraph 2.22 of the 2023 King's Bench Guide enjoins self-represented litigants to identify in advance of any hearing those points which they consider to be their strongest points, and to put those points first in their oral and any written submissions. The appellant took this to heart. She filed a document shortly before the hearing which identified her "10 best points". Some, but not all, reflect her existing grounds of appeal. For completeness, I address each in turn.

(1)
the open justice principle: The open justice principle means that a party to court proceedings is not entitled to an order protecting their anonymity unless that is necessary to secure the proper administration of justice and to protect their interests: CPR 39.2(4). It does not mean that there is an absolute right to disclosure of the identity of a person against whom a claim has been brought. Otherwise, the Norwich Pharmacal test would be redundant.

(2)
there is nothing to outweigh the appellant's right to a fair hearing: The appellant's right to a fair hearing does not give rise to an absolute right to disclosure of the identity of a person against whom a claim has been brought. Again, that would nullify the Norwich Pharmacal test.

(3)
factors point in favour of early disclosure from Mr Dudhill, rather than Twitter: I have not considered it necessary to address the judge's view that the application would have been more appropriately directed to Twitter. Irrespective of that point, for the reasons given under ground 3, she was entitled to conclude that it was in the interests of justice to wait and see what happened in the substantive proceedings rather than making an order for disclosure before the claim form had even been served.

(4)
Good arguable case for harassment: This is dealt with under ground 5.

(5)
Telecommunications offences: This is dealt with under ground 5.

(6)
Complainants were unlawfully sharing confidential information: This is dealt with under ground 5.

(7)
Public interest element: The appellant says “Brexit was the most important national event of my lifetime” and that she believes “the Defendants participated in a gang or ring that deployed unlawful harassment and/or data harvesting, assisting their ringleader in disrupting the Remain campaign, and even after Brexit took place attempting to harm people such as myself who questioned their activities.” She says that it is in the public interest that this be established before the court. This argument does not, however, engage with the judge’s reasons for refusing disclosure. Those reasons do not prevent the appellant from pursuing her claim in order (on her case) to vindicate the public interest. They simply mean that the Liberal Democrats and Mr Dudhill are not, at this early stage, required to give the disclosure that she seeks.

(8)
Order against Bar Standards Board not enough: This is dealt with under ground 4.

(9)
Liberal Democrats should have filed evidence as to the reason for anonymity: This is dealt with under ground 1.

(10)
This is not a whistleblowing case: This argument was advanced in order to distinguish the decision in Cockburn v Rogers [2022] EWHC 1971 (QB), on which Mr James-Matthews strongly relied. I have not, however, found it necessary to refer to Cockburn. It is not therefore necessary to consider whether it can be distinguished.

Outcome

78.
The judge was entitled to conclude that the threshold for making a Norwich Pharmacal order against the respondents was not met, and that it was not in the interests of justice to make an order. The appeal is therefore dismissed.