Neutral Citation Number: [2020] EWHC 3545 (QB)

Case No: QB-2020-000824

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 December 2020

**Before** :

**THE HONOURABLE MR JUSTICE NICKLIN**

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**Between :**

| | |
|---|---|
| **Max Mosley** | **Claimant** |
| **- and -** | |
| **Associated Newspapers Limited** | **Defendant** |

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**Paul Mitchell QC and Tom Shepherd** (instructed by **Payne Hicks Beach**)
for the **Claimant**
**Andrew Caldecott QC and Ben Gallop** (instructed by **Reynolds Porter Chamberlain**)
for the **Defendant**

Hearing dates: 15-16 October 2020

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**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date of hand-down is deemed to be as shown above.**

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# Approved Judgment

I direct that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE NICKLIN

**The Honourable Mr Justice Nicklin :**

1. The issue raised in this case is whether the Defendant is liable for the tort of malicious prosecution as a result of sending a "dossier" of evidence to the Crown Prosecution Service, intending that the Claimant be investigated for alleged perjury, even if ultimately no criminal investigation or prosecution ensued. The matter comes before the court, at an early stage in the proceedings, on the Defendant's Application to strike out the claim, pursuant to CPR 3.4(2)(a), on the grounds that the statement of case discloses no reasonable grounds for bringing the claim.

## The Parties

2. The Defendant is the publisher of the *Daily Mail*, *Mail on Sunday* and *MailOnline*. The Claimant is the former president of the Fédération Internationale de l'Automobile, the international federation of the world's major motoring organisations as well as the governing body of international motorsport. Latterly, he has become a prominent campaigner for reform of the print media in the United Kingdom.

## The Claimant's Privacy Action against the *News of the World*

3. On 30 March 2008, the *News of the World*, the former Sunday newspaper published by News Group Newspapers Limited ("NGN"), published an article concerning the Claimant under the headline: "*F1 Boss has sick Nazi orgy with 5 hookers*". The article appeared both in the print and online versions of the newspaper. The Claimant brought a claim against NGN for breach of confidence and misuse of private information. The action was tried before Eady J between 7-14 July 2008. The Claimant was successful. He was awarded £60,000 damages: **[2008] EMLR 20**.

4. NGN had defended its publication as being in the public interest. Rejecting this defence, Eady J said this:

> [122] The principal argument on public interest related to the Nazi theme. I have come to the conclusion (although others might disagree) that if it really were the case, as the newspaper alleged, that the claimant had for entertainment and sexual gratification been "mocking the humiliating way the Jews were treated", or "parodying Holocaust horrors", there could be a public interest in that being revealed at least to those in the FIA to whom he is accountable. He has to deal with many people of all races and religions, and has spoken out against racism in the sport. If he really were behaving in the way I have just described, that would, for many people, call seriously into question his suitability for his FIA role. It would be information which people arguably should have the opportunity to know and evaluate. It is probably right to acknowledge that private fantasies should not in themselves be subjected to legal scrutiny by the courts, but when they are acted out that is not necessarily so.
>
> [123] On the other hand, since I have concluded that there was no such mocking behaviour and not even, on the material I have viewed, any evidence of imitating, adopting or approving Nazi behaviour, I am unable to identify any legitimate public interest to justify either the intrusion of secret filming or the subsequent publication.

5. During the course of the trial, the Claimant was cross-examined about whether he had supported racist politics in the 1960s, in particular acting as the agent for a candidate standing in a by-election in Moss Side in 1961. He was asked the following questions:

> Q. Did you pursue some political ambitions within your father's party by acting as the agent in a Parliamentary by-election in Moss Side in 1961?
>
> A. I absolutely acted as the agent in Moss Side in 1961, but I would not call that pursuing a political ambition. My father offered it to me as a holiday job after leaving Oxford and I did it, it was quite entertaining.
>
> Q. And the candidate was a man called Walter Hesketh, and you were his agent?
>
> A. Correct
>
> Q. Putting out his literature?
>
> A. Correct.
>
> Q. And you had to take responsibility for that literature?
>
> A. He was an ex-policeman, quite a respectable man, who I think represented England in athletics on a number of occasions, a nice enough man.
>
> Q. And were you out on the streets issuing leaflets to voters urging them to vote for Mr Hesketh?
>
> A. I do not think that I did that as the agent. I think I was in the headquarters trying to organise things…
>
> Q. Do you remember Mr Robert J. Taylor?
>
> A. I do not remember the name.
>
> Q. Someone who has said, as you will have seen in the papers here, that he and you were out on the streets putting out leaflets urging voters to send the blacks home?
>
> A. Well, you say that, you have read this somewhere. I have not seen Mr Taylor, I cannot remember him, and I have no recollection of doing any such thing, and I would think with the research that has been done if there was such a leaflet you would be able to produce it. If there were such a leaflet you would produce it.
>
> Q. Did you put out leaflets as agent for Mr Hesketh urging voters to send the blacks home?
>
> A. Not as I recall.
>
> Q. Was it not part of the political agenda of the Union Movement to get the blacks sent home?

A. No. As I said, not as I recall. I think the policy at the time was to offer financial inducements to people to go home – a slightly different thing.

Q. And is there any truth in the suggestion in one of the articles that you will have read that leaflets were put out alleging that coloured immigrants brought leprosy, syphilis and TB?

A. That is absolute nonsense.

6. It appears that a copy of the election leaflet of Mr Hesketh was not available at the trial in 2008.

**The Defendant's Articles and the leaflet**

7. Almost 10 years later, on 28 February 2018, the Defendant published a front-page article in the *Daily Mail* under the headline: "*Did F1 Tycoon lie to Orgy Trial?*" ("the First Article"). The print version of the First Article also occupied pages 2, 3, 10 and 11. It is not necessary to set out the full article for the purposes of this judgment. At the date of judgment, it remains available online at: www.dailymail.co.uk/news/article-5441827/Did-F1-tycoon-Max-Mosley-lie-orgy-trial.html.

8. The First Article was based, principally, upon the discovery of the election leaflet about which the Claimant had been cross-examined at the original trial. The leaflet, a facsimile of which was used to illustrate the Article, promoted Walter Hesketh as the Union Movement candidate for Moss Side at the By-Election on 7 November 1961. At the foot of the page there appeared the following statement: "*Published by Max Mosley, 113 Upper Lloyd Street, Manchester 14…*" One page of the leaflet – published in the Article – was headed: "*Why you should Vote Hesketh… on Tuesday, November 7th, 1961*" and contained the following text:

> "**PROTECT YOUR JOBS**
>
> Coloured immigrants are forming a large pool of unemployed. They will be used to lower your living standards.
>
> **PROTECT YOUR HOMES**
>
> Britain is suffering from an acute housing shortage. Coloured immigrants come into Britain faster than we can build new homes.
>
> **PROTECT YOUR HEALTH**
>
> There is no medical check on immigration. Tuberculosis, V.D. and other terrible diseases like leprosy are on the increase. Coloured immigration threatens your children's health.
>
> **PROTECT YOUR FAMILY**
>
> This man [pictured] is telephoning his wife to say that he would like to 'digest' is (sic) a good British dinner in a good British home. Remember that Mr Taylor, the Conservative candidate, said you would have to 'digest' the coloured

immigrants who are here already, and then 'digest' some more (*Times* 12-10-61), and the other candidates are every bit as bad. To stop coloured immigration **VOTE HESKETH**…"

9. On the reverse of the leaflet, under the heading "*A Personal Message from Walter Hesketh*", the following appeared:

"Dear Friends,

Do you want a change? Or are you perfectly content with the things as they are… Every vote for me is a real protest against what is now happening. My return to Parliament would be for the old parties an earthquake. A heavy vote for me would oblige them to take action and do the things you want done. No government can ignore the will of the people. Every vote for me is an expression of your will. It is a chance to tell the Government: wake up, get on or get out.

What do we want done? Surely we want something done about housing and about coloured immigration. These are the real issues of this election. Do you want to live in the present bad houses for ever? Do you want more and more coloured immigrants coming in? The old parties have been telling you all your lives that they will build you better homes, but they have not done it yet. But how many things have they 'considered', and for how long without anything happening? You know the results as well as I do. You know your only chance to stop the coloured immigrants coming in is to wake up the Government. And you know your only way to do that is to vote for me.

Even now they tell you they will let in any immigrants who show they have jobs to come to, or private means to keep themselves. But don't you know these bits of paper can be produced at any time by the racketeers who bring them in here? And the jobs they will come to are the jobs you will soon be wanting, if depression comes again and the means they bring with them will be the means to buy up the houses you want to live in. Surely by now you know what a racket the whole business of this coloured immigration is. So you will give a vote which will stop it. If enough people vote for me in this election, the Government simply cannot go on with this policy. They will be sending coloured immigrants home, instead of bringing more in. For they must obey the will of the people expressed in this election.

I am as much against persecution as any of you. I am just like the rest of you who live here in Moss Side. I want to do things in a fair and decent British way. Let us give the coloured people a fair deal by sending them back to good jobs and good wages at home in Jamaica in the way our policy suggests. But let us give our own people a fair deal first. After all, the father of a family puts his own children first. Why should not our Government put our own people first? And we can do it without hurting other people, in the way described on the opposite page in our constructive policy. It is all part of a great policy which can be for the good of all. You may or may not agree with all of it. That does not matter. What you can say to the Government by voting for me at this election is this: here is a way to do some of the things we want done, either do it, or think of a better way of doing it for yourselves. But we are not sitting here in bad houses which are getting worse,

> while more and more coloured immigrants come in and take our homes today and our jobs tomorrow.
>
> If you vote for me you say to the Government; wake up! And I promise to keep them awake. That is what we in Moss Side want, and that is why I am asking for your votes in this election."

10. An entry on Wikipedia for the 1961 by-election in Moss Side records that the electors did not want Mr Hesketh. He polled 1,212 votes (representing just over 5% of the vote). The Conservative candidate, Frank Taylor, was elected.

11. In the First Article, the Defendant published the following:

> "Under oath at the High Court, Mr Mosley, who had been suing the News of the World for reporting his participation in what the newspaper alleged was a 'Nazi-themed' orgy, categorically denied such a leaflet existed. But the Mail has tracked down the hateful pamphlet in a historical archive. It states: 'Published by Max Mosley'…
>
> Asked about the leaflet at the High Court in 2008, he initially said, 'If there was such a leaflet, you would be able to produce it.'
>
> He said he could not recall the leaflet and then said it was 'absolute nonsense' to suggest that such a pamphlet was put out."

12. The evening before publication of the First Article, the Claimant had been interviewed on Channel Four News and questioned about the leaflet. The First Article described the interview as a "*car crash*" and stated:

> "In a compelling interview on Channel 4 News last night, a blustering Max Mosley admitted the bombshell election pamphlet uncovered by the Amil was racist. He told host Cathy Newman 'Yeah… I think that probably is racist. I'll concede that.' An unflappable Miss Newman, one of TV's most respected interviewers, had put a series of incisive questions to the tycoon. Yet he protested it was 'nonsense' to say he should apologies and 'stupid and offensive' to suggest he hadn't told the truth in his 2008 High Court case. At one point he even suggested the leaflet was a hoax, then conceded it might be genuine, but denied it was racist, before finally admitting it was racist. The Mail shared its Mosley dossier with Channel 4 News and reporter Michael Crick retraced our steps to find the original leaflet in a Salford archive…"

13. The First Article then set out extracts from the Channel Four News interview with the Claimant and also included some extracts from the cross examination of the Claimant from his 2008 trial. It concluded:

> "It is difficult to understand the failure of Mr Mosley, who even his critics say has a brilliant legal mind, to recollect his publishing one of the most racist pieces of parliamentary election literature produced in post-war Britain.
>
> If he did lie, he would have been committing perjury – an offence which is punishable by a prison sentence of up to seven years.

> It is difficult to calculate the affect his memory lapse had on the outcome of his landmark orgy privacy trial in which Mr Justice Eady awarded Mr Mosley £60,000 damages.
>
> If the defence had been able to produce that devastating pamphlet, would it have damaged the credibility of both Mr Mosley's testimony and his integrity?..."

14. As to any further action, the First Article contained only a single sentence stating that "*The Mail will hand its dossier over to the Crown Prosecution Service*".

**The submission of the 'dossier' to the Crown Prosecution Service**

15. At 13.36 on 28 February 2018, Stephen Wright, the Associate News Editor, sent an email to the Crown Prosecution Service ("the Complaint").

> "Further to our brief conversation, could you please forward this email to the appropriate colleague/department at the CPS. I would be grateful if you could confirm you have received the email and attached documents and links.
>
> The Daily Mail has today published a series of articles which question whether Mr Max Mosley lied and therefore committed perjury when giving evidence under oath at his privacy trial against the News of the World in 2008 (Mosley v News Group Newspapers Limited [2008] EWHC 1777 (QB), a question also put to Mr Mosley by Channel 4 news last night…"

The email set out the background to the 2008 trial, summarised the cross-examination and referred to the discovery of the 1961 election leaflet and concluded:

> "We were not a party to the 2008 trial, however we believe that it is appropriate and in the public interest for us to pass these documents and questions to the Crown Prosecution Service for you to consider whether any criminal offences have been committed."

Attached to the email were (1) an extract from the transcript of the cross-examination of the Claimant in the 2008 trial; (2) a certified copy of the election leaflet; (3) questions sent by the Defendant to the Claimant via his solicitors on 25 February 2018; (4) the Claimant's 'on-the-record' response to the questions provided on 26 February 2018; (5) the *Daily Mail* coverage from 28 February 2018; and (6) a link to the Channel Four News interview with the Claimant from 27 February 2018. Leaving aside media inquiries and coverage, the so-called "dossier" consisted of simply the leaflet and an extract from the Claimant's cross-examination.

16. At 14.37 on 28 February 2018, the CPS sent the Complaint to the Metropolitan Police "*to consider whether any investigation is required*". The email included the following:

> "The Mail have already indicated to us that they want a statement on their 'dossier'. I would propose the following as a statement from a CPS spokesperson: 'I can confirm that information was received from the Mail and has been passed to the Metropolitan Police'. If there are any objections to that, please let me know."

**The follow-up Article**

17. The Defendant published a subsequent online article after sending the "dossier" to the CPS under the headline, "*Scotland Yard is called to consider whether Max Mosley committed perjury at the orgy privacy trial, as the tycoon – who still won't apologise – is frozen out by Labour*" ("the Second Article"): www.dailymail.co.uk/news/article-5445899/Prosecutors-ask-Scotland-Yard-look-Max-Mosley-case.html, which included the following:

> "Police are examining whether Max Mosley committed perjury after a Mail investigation exposed his racist past.
>
> A detailed dossier including a bigoted election pamphlet published by the tycoon is being assessed by Scotland Yard.
>
> The leaflet raises the question of whether he lied at his orgy privacy trial. The ex-Formula One chief, who is refusing to apologise for the document, was yesterday dumped as a Labour Party donor…
>
> Yesterday, the Mail handed a dossier to the Crown Prosecution Service. It included a transcript of Mr Mosley's evidence to the High Court in which he denied the existence of the racist leaflet, and a legally certified copy of the leaflet – which Mr Mosley had tried to suggest might be a fake.
>
> The CPS immediately referred the case to the police, and last night Scotland Yard said: 'This afternoon the CPS forwarded information from the Daily Mail to the Met Police. An assessment will be carried out.
>
> Detectives will decide on launching a full-scale investigation into whether offences were committed. Should such a probe be instigated, then it is likely that Mr Mosley would be interviewed by police."

18. The Second Article also included sections headed: "*How justice caught up with two infamous perjurers*" – which recounted the cases of Jeffrey Archer and Jonathan Aiken – and "*Perjury law in the United Kingdom*". The Claimant complains that this latter section seriously misstated the law. s.1 Perjury Act 1911 provides, so far as material:

> "(1) If any person lawfully sworn as a witness… in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury, and shall, on conviction thereof on indictment, be liable to penal servitude for a term not exceeding seven years, or to imprisonment… for a term not exceeding two years, or to a fine or to both such penal servitude or imprisonment and fine.
>
> (2) The expression "judicial proceeding" includes a proceeding before any court, tribunal, or person having by law power to hear, receive, and examine evidence on oath…
>
> (6) The question whether a statement on which perjury is assigned was material is a question of law to be determined by the court of trial."

The Claimant submits that the Defendant must have known that there was no prospect of the Claimant having committed the crime of perjury because it could not have failed to have appreciated that the issue of the leaflet was "*completely irrelevant to the outcome of the trial.*" In consequence, the Claimant alleges that the Defendant sent the Complaint "*without reasonable and probable cause to believe the substance of the complaint made within it, the Defendant did so maliciously*".

## The police assessment of the Complaint

19. On 16 March 2018, Commander Stuart Cundy sent an email to Mr Wright confirming receipt of the Complaint, which the police had assessed, and asking whether the Defendant had any additional information that it believed should be considered. Mr Wright replied, by email, on 20 March 2018, stating:

> "I can confirm it is our intention to send to the MPS more material illustrating Mr Mosley's considerable involvement in the Union Movement and his far-right activities. We will endeavour to do this in the next few days, giving your officers important context in which to consider matters."

20. On 2 July 2018, the Metropolitan Police sent a letter to Mr Wright confirming that the police would not be commencing a criminal investigation into the allegation of perjury and no further action would be taken by the police:

> "When considering allegations of perjury, the alleged false statement must be 'material to the proceedings'. To prove an offence of perjury it must also be shown that the specific statement was made knowing it to be false or not believing it to be true. Our assessment included a review of the evidence provided during the 2008 court proceedings and liaison with the Crown Prosecution Service. The CPS Charging Standard guidance explains that to bring proceedings for perjury, the evidence is expected to be 'exceptionally strong'. Early investigative advice obtained from the CPS is that these standards are not met here."

21. The letter mentions that there had been a meeting between unidentified representatives of the Defendant and the Metropolitan Police on 17 April 2018 at which "*further documentation*" had been provided by the Defendant. Whatever was provided by the Defendant at this meeting has not been identified in the evidence for this hearing, but it clearly did not persuade the Metropolitan Police that it should launch a criminal investigation into any allegation of perjury against the Claimant.

22. For this hearing, a further note, dated 3 July 2018, from a reviewing officer of the Metropolitan Police has been provided. It states:

> "Having read through the updates and consider the initial Early Investigative Advice again I am satisfied that no further information has been provided to change the rationale for closing this matter, i.e.
>
> 1. The evidence regarding the pamphlet was not material to the defamation proceedings (sic)

> 2. Due to the length of time passed between the issue of the pamphlet and the proceedings (47 years) it is not possible to show that Mr Mosley made a false statement knowingly…
>
> Due to these evidential difficulties which are laid out at length… a criminal investigation is not met and this assessment can now be closed."

23. On 13 July 2020, the Defendant published a small article in the *Daily Mail* confirming that "*Scotland Yard has ruled out launching a criminal investigation into evidence given by ex-Formula One boss Max Mosley at a high-profile privacy trial.*"

**The Claimant's claim for malicious prosecution**

24. The Claimant did not commence proceedings for libel against the Defendant for publication of the First and/or Second Articles and, under s.4A Limitation Act 1980, the 1-year limitation period for a libel claim expired in 2019. Instead, on 3 February 2020, the Claimant sent a letter of claim to the Defendant alleging that the submission of the Complaint to the Crown Prosecution Service amounted to malicious prosecution. In summary, the Claimant's solicitors complained:

> "Your newspaper maintained a constant refrain that our client was under suspicion of having perjured himself. You repeatedly published insinuations to the effect that the criminal law had been set in motion against him as the result of evidence he had given during his successful claim against the News of the World; and you obviously did this with a view to doing him and his reputation as much harm as you could via the pages of a newspaper; and put as much pressure as you could on the CPS and MPS to treat your dossier seriously."

25. The Defendant rejected the Claimant's claim for malicious prosecution in a letter of response dated 14 February 2020 and so, on 27 February 2020, the Claimant issued a Claim Form together with Particulars of Claim. The Particulars of Claim set out the background to the 2008 trial ("the Privacy Action"); the subsequent emergence, in 2018, of the leaflet; the Channel Four News interview with the Claimant on 27 February 2018; the publication of the First and Second Articles and the submission of the Complaint – with the "dossier" – to the Crown Prosecution Service.

26. The Particulars of Claim include the following paragraphs:

> "38. It is averred that the Defendant's editors took legal advice regarding whether the Claimant could be accused of having committed the crime of perjury; and that after taking such advice, the Defendant chose language used in the MailOnline and the Daily Mail's article [the First Article] with a view to avoiding libelling the Claimant.
>
> …
>
> 45. In the premises:
>
> (1) The Defendant sent its 'dossier' to the CPS with a view to being able to report in its publication that the CPS/the MPS were investigating the Claimant;

(2) In its publications, the Defendant linked the Claimant with infamous perjurers; and

(3) In its publications, the Defendant gave an explanation of the law of perjury which was materially misleading and gave the impression that the crime of perjury could be committed merely by deliberately making a false statement in court, regardless of the relevance of the statement to the decision-maker's deliberations.

…

52. In sending to the CPS its email dated 28 February 2018 inviting the CPS to consider whether the Claimant had committed 'any criminal offences'… the Defendant intended to and did set the processes of law in motion:

(1) As was intended by the Defendant, the CPS followed its procedures for considering whether the Claimant might be guilty of perjury;

(2) The CPS then caused the MPS to devote resources to considering whether there might be evidence to justify sending a file back to the CPS to consider whether a prosecution should be brought against the Claimant;

(3) The MPS considered the evidence, all of which had been provided by the Defendant; and

(4) The Defendant acted as aforesaid in order to smear the Claimant and cause harm to him.

53. Further and alternatively, the Defendant's aim in sending the said email to the CPS was to be able to report in its various publications that the processes of the law had been set in motion against the Claimant and that he was now the subject of a potential prosecution for perjury.

Determination in the Claimant's favour

54. On or around 2 July 2018, the MPS informed the Defendant that it would take no further action in respect of the Defendant's allegations against the Claimant.

55. Accordingly, the legal process the Defendant had set in motion was determined in the Claimant's favour: the MPS very quickly appreciated that the complaint made disclosed absolutely no offence that could reasonably be charged against the Claimant.

Absence of reasonable and probable cause

56. The Defendant's editorial team was at all material times supported by lawyers (both in-house and external) retained to advise on, among other things, whether articles which the Defendant intended to publish might expose it to defamation actions.

57. No competent lawyer advising the Defendant in advance of the publication of the [First Article] would have been unaware of the constituent elements of the crime of perjury, namely a person will be guilty of that crime only if:

    (1) He was lawfully sworn as a witness in judicial proceedings; and

    (2) He wilfully made a statement in those proceedings which he knew to be false or did not believe to be true; and

    (3) That the statement was material to the proceedings.

58. No competent lawyer could have concluded that it was even arguable that any statement made by the Claimant regarding the leaflet was material to the Privacy Action.

59. Further and alternatively, no competent lawyer could have concluded that there was any prospect of a court ever accepting that any statement made by the Claimant about the leaflet during the trial of the Privacy Action was one which he knew to be false or did not believe to be true.

60. The Claimant will say at trial that it is to be inferred from the wording of the [First Article] that the Defendant was advised that there was no reasonable basis for alleging that the Claimant had perjured himself and that the only non-defamatory statement that could be made regarding the leaflet was that it 'raised the question' whether the crime of perjury had been committed; the answer to which questions need not be articulated by the Defendant even though it knew that the elements of the crime of perjury were not present.

61. Accordingly, when the Defendant submitted the dossier to the CPS it knew that there was no possible ground on which the Claimant would ever be charged, let alone convicted.

62. In the premises, the Defendant did not have reasonable and probable cause for submitting its allegations to the CPS: it knew that no crime had been committed.

[The Claimant's case on malice was set out in paragraphs 63-65]

Loss and Damage

66. As a result of the Defendant's wrongful actions as aforesaid, the Claimant has suffered loss and damage:

PARTICULARS

(1) Serious and significant reputational damage.

    (a) The judgment in the Claimant's favour following the trial of the Privacy Action constituted an important vindication of the Claimant's rights and reputation. The referral of the 'dossier' to the CPS and subsequent reporting tainted the value of that

judgment by the implication that it had been procured by perjured evidence by the Claimant;

(b) The Defendant's reporting of its actions in setting the law in motion created the unjust impression that there were reasonable grounds to suspect that the Claimant was guilty of criminal wrongdoing.

(2) Serious and significant distress and anxiety. The Claimant has sought for years to have a private life that is private to him. The Defendant's campaigns seeking to humiliate him by constant taunting cause him distress; the allegation that even his total vindication in the Privacy Action might be treated as the product of his committing the crime of perjury caused further distress.

67. The Claimant seeks exemplary damages on the basis that:

(1) The Defendant deliberately and knowingly set the law in motion against the Claimant without reasonable and probable cause and maliciously;

(2) The Defendant sought thereby to obtain its goal of damaging the Claimant's reputation and harming him without libelling him, buy the simple method of passing a dossier containing no evidence of any crime to the CPS and then reporting that the CPS were investigating whether a crime had been committed."

27. In his skeleton argument, Mr Mitchell QC submitted on the Claimant's behalf that: "*the widespread reporting that he was officially suspected of having committed perjury, with the consequent undermining of the vindication of his reputation obtained at the News of the World trial, damaged his reputation and caused him serious and significant distress and anxiety.*"

**The Defendant's Application to strike out the Claim**

28. The Application Notice seeking to strike out the Claimant's claim was issued on 26 March 2020. The basis on which the Defendant seeks the striking out of the claim is, pursuant to CPR 3.4(2)(a) that "*that the statement of case discloses no reasonable grounds for bringing ... the claim*". It is supported, formally, by a short witness statement of Geraldine Elliott, the Defendant's solicitor. However, this witness statement principally exhibits the key underlying documents, from which I have quoted in setting out the background above. Save for uncertainty as to what, precisely, was provided to the Metropolitan Police at the meeting on 17 April 2018 (see [21] above), there is no material dispute of fact about this history of events. The Defendant accepts that, for the purposes of this application, the Court should assume the facts relied upon by the Claimant will be established at trial. Nevertheless, even making this assumption, the Defendant contends that, as a matter of law, the Claimant's claim for malicious prosecution is bound to fail and should be dismissed now. The short point, in the Defendant's submission, is that there was no prosecution of the Claimant and so his claim is bound to fail for want of demonstrating this key element of the tort.

29. Mr Mitchell QC, on behalf of the Claimant, did make a preliminary submission that the Court ought to refuse the Defendant's application on the grounds that this is an area of developing jurisprudence and that novel points of law should be based on actual findings of fact made at trial and not on assumed facts: ***Farah -v- British Airways plc,*** *The Times* 26 January 2000 [42] *per* Chadwick LJ; ***Hughes -v- Colin Richards & Co*** **[2004] EWCA Civ 266** [30] *per* Peter Gibson LJ.

30. These authorities deal with a situation where the facts in a particular case are, in material respects, disputed and that the practical expedient of assuming proved certain facts for the purpose of a striking out application is no substitute for full and proper fact-finding after a trial. However, it does not appear to me that there are any material facts beyond those that are agreed. The facts relevant to the Defendant's application are of narrow compass. Certainly, Mr Mitchell QC was not able to identify any further facts that were likely to be resolved only at a trial that would have a potential bearing on the legal issues I am asked to determine now. He faintly suggested that the Court does not know what further documents were provided by the Defendant to the Metropolitan Police at the meeting on 17 April 2018. I accept that, but it is clear that, whatever was submitted, it had no bearing on the decision of the police not to commence a criminal investigation. On this application, I will proceed on the basis that the Defendant tried its level best to interest the CPS and/or Metropolitan Police in initiating a criminal investigation into whether the Claimant was guilty of perjury in his evidence in the Privacy Action. Its efforts failed.

**Malicious Prosecution: the ingredients of the tort**

31. The elements of the tort of malicious prosecution are common ground between the parties, taken from *Clerk & Lindsell on Torts* (§15-13 (with footnotes omitted), Thomson Reuters, 23rd edition, 2020) (and as approved by the House of Lords in ***Martin -v- Watson*** **[1996] AC 74, 80C** *per* Lord Keith and see also ***Gregory -v- Portsmouth City Council*** **[2000] 1 AC 419, 426G** *per* Lord Steyn):

> "In an action for malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him by the defendant on a criminal charge or, now, via civil proceedings; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; and fourthly, that it was malicious. The onus of proving every one of these is on the claimant."

32. Each of the elements of the tort must be established separately. Evidence of malice, of whatever degree, cannot dispense with or diminish the need to establish separately each of the first three elements of the tort: ***Martin -v- Watson*** **[1994] QB 425, 451B-C** *per* Hobhouse LJ.

33. The battle-ground between the parties is the first element. For the purposes of this application, I assume that the Claimant will be successful in demonstrating the other three elements.

**Acts amounting to "prosecution"**

34. Mr Caldecott QC submits:

i) A "prosecution" for the purposes of the tort of malicious prosecution requires the commencement of proceedings before a judicial officer: ***Harris -v- Warre*** **(1879) CPD 125**.

ii) As the tort is concerned with the malicious abuse of the processes of the court, those processes – whether in the civil or criminal context – must be invoked in order to found liability (Sir Timothy Lloyd provided an overview of those cases in which liability has been recognised in ***Crawford -v- Jenkins*** **[2016] QB 231** [50]).

iii) This reflects an underlying policy: it is necessary for the law to provide for an action against a person who abuses court procedures, because there is no remedy against the *court*: ***Crawford -v- Jenkins*** [54]-[55].

iv) Preparatory steps taken by a defendant are insufficient unless proceedings in fact result. The question is a simple one of fact: whether proceedings actually came about: ***AH -v- AB*** **[2009] EWCA Civ 1092** [69] *per* Sedley LJ.

v) Following ***Crawford Adjusters (Cayman) Ltd -v- Sagicor*** **[2014] AC 366** and ***Willers -v- Joyce*** **[2018] AC 843** the tort can now be founded on any form of legal proceedings, not just a criminal prosecution. However, a mere complaint or request to investigate directed to a prosecuting authority is insufficient. The House of Lords declined to extend the tort to disciplinary proceedings in ***Gregory -v- Portsmouth City Council***. Lord Steyn observed (at 431C): "*Given that the tort has never in England been held to extend beyond legal proceedings the proposed development would be a radical reform*."

vi) The correctness of this approach (and its continued application) is demonstrated by three first-instance judgments: ***Barkhuysen -v- Hamilton*** **[2018] QB 1015**; ***CFC 26 -v- Brown Shipley*** **[2016] EWHC 3048 (Ch)**; and ***CXZ -v- ZXC*** **[2020] EWHC 1684 (QB)**.

35. Mr Mitchell QC submits that Mr Caldecott QC's submissions represent the conventional orthodoxy. He argues, however, that insufficient attention has been paid in the authorities to what amounts to "*setting the law in motion*". He contends that, on a proper appreciation of the authorities and a purposive approach to the tort, the actions of the Defendant are sufficient to amount to a "prosecution" of the Claimant. He submits that where a defendant has, maliciously and without reasonable and probable cause, misused the practices and procedures of the civil or criminal legal system to cause harm to the claimant, and the legal process initiated against him has determined in the claimant's favour, the tort has been committed. In essence, he argues, the tort arises when the machinery of justice had been used to cause damage.

36. Mr Mitchell QC relies upon Lord Toulson's analysis in ***Willers -v- Joyce*** of the early recognition of the tort and the "*broad principle underlying the cause of action*" [26]:

> [27] In ***De Medina -v- Grove*** **10 QB 172, 176** the judgment of Wilde CJ (with whom Maule J, Cresswell J, Williams J, Parke B and Rolfe B agreed) began:

> "The law allows every person to employ its process for the purpose of trying his rights, without subjecting him to any liability, unless he acts maliciously and without probable cause."

[28] In ***Churchill -v- Siggers* 3 E & B 929, 937** the judgment of the court (Lord Campbell CJ, Erle J and Crompton J) began:

> "To put into force the process of the law maliciously and without any reasonable or probable cause is wrongful; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case."

And his conclusion that the case law on malicious prosecution had "*fashioned the tort to do justice in various situations in which a person has suffered injury in consequence of the malicious use of legal process without any reasonable basis*": [42].

37. Mr Mitchell QC contends that ***Quartz Hill Consolidated Gold Mining Company -v- Eyre* (1883) 11 QBD 674** is important in demonstrating that "*setting the law in motion*" does not require any judicial act (contrary to Mr Caldecott QC's submission – see [34(i)] above). In that case, the malicious presentation of a winding up petition was sufficient for the purposes of the tort of malicious prosecution. Bowen LJ explained (at p.691):

> "… there are legal proceedings which do necessarily and naturally involve that damage; and when proceedings of that kind have been taken falsely and maliciously, and without reasonable or probable cause, then, inasmuch as an injury has been done, the law gives a remedy. Such proceedings are indictments – I do not say every indictment, but I mean all indictments involving either scandal to reputation or the possible loss of liberty to the person, that is, all ordinary indictments for ordinary offences. In its very nature the presentation or the prosecution of an indictment involves damage, which cannot be afterwards repaired by the failure of the proceedings, to the fair fame of the person assailed, and for that reason, as it seems to me, the law considers that to present and prosecute an indictment falsely and without reasonable or probable cause, is a foundation for a subsequent action for a malicious prosecution."

38. The second case upon which Mr Mitchell QC places significant reliance is the Privy Council case of ***Amin -v- Bannerjee* [1947] AC 322**. The defendant had filed a petition of complaint against the claimant in the Magistrates' Court in Calcutta seeking to summon the claimant to answer a charge of cheating under section 420 of the Indian Penal Code. The relevant sections of the Code of Criminal Procedure provided as follows:

> "200. A Magistrate taking congnizance of an offence on complaint shall at once examine the complaint upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate."
>
> 202. (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance, or which has been transferred to him

> under s.192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police-officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint:
>
> Provided that, save where the complaint has been made by a court, no such direction shall be made unless the complainant has been examined on oath under the provisions of s.200.
>
> (2A) Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath."
>
> 203. The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the result of the investigation or inquiry (if any) under s.202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing."

39. The Magistrate duly held an inquiry into the matter in open court, at which the claimant attended and was represented by counsel. The Magistrate made an order to the effect that no case of cheating had been made out, and he dismissed the complaint. Mr Mitchell QC submits that no charge actually ensued and there were no "proceedings" against the claimant. This was held to be a sufficient "prosecution" for the tort of malicious prosecution. Sir John Beaumont, giving the judgment of the Privy Council, held (at pp.330-331):

> "The action for damages for malicious prosecution is part of the common law of England, administered by the High Court at Calcutta under its letters patent. The foundation of the action lies in abuse of the process of the court by wrongfully setting the law in motion, and it is designed to discourage the perversion of the machinery of justice for an improper purpose. The plaintiff must prove that the proceedings instituted against him were malicious, without reasonable and probable cause, that they terminated in his favour (if that be possible), and that he has suffered damage. As long ago as 1698 it was held by Holt CJ in ***Savile -v- Roberts*** **(1698) 1 Ld. Raym 374** that damages might be claimed in an action under three heads, (1) damage to the person, (2) damage to property, and (3) damage to reputation, and that rule has prevailed ever since. That the word 'prosecution' in the title of the action is not used in the technical sense which it bears in criminal law is shown by the fact that the action lies for the malicious prosecution of certain classes of civil proceedings, for instance, falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company ***(Quartz Hill Consolidated Gold Mining Co. -v- Eyre***)…
>
> From this consideration of the nature of an action for damages for malicious prosecution emerges the answer to the problem before the Board. To found an action for damages for malicious prosecution based on criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they

> may be correctly described as a prosecution; the test is whether such proceedings have reached a stage at which damage to the plaintiff results. Their Lordships are not prepared to go as far as some of the courts in India in saying that the mere presentation of a false complaint which first seeks to set the criminal law in motion will *per se* found an action for damages for malicious prosecution. If the magistrate dismisses the complaint as disclosing no offence with which he can deal, it may well be that there has been nothing but an unsuccessful attempt to set the criminal law in motion, and no damage to the plaintiff results. But in this case the magistrate took cognizance of the complaint, examined the complainant on oath, held an inquiry in open court under s. 202 which the plaintiff attended, and at which, as the learned judge has found, he incurred costs in defending himself. The plaint alleged the institution of criminal proceedings of a character necessarily involving damage to reputation and gave particulars of special damage alleged to have been suffered by the plaintiff. Their Lordships think that the action was well founded, and on the findings at the trial the plaintiff is entitled to judgment."

40. Mr Caldecott QC submitted that the underlined passage demonstrates that, whatever support it can provide for Mr Mitchell QC's argument, it cannot stand as authority for the proposition that merely submitting a complaint to the police is sufficient to amount to a prosecution under the tort of malicious prosecution. The basis of the decision appears to be that because, under the applicable criminal procedure, the filing of the criminal complaint, notwithstanding that it was dismissed and so the claimant was never 'charged', had nevertheless led to a hearing in open court and this had exposed the claimant to reputational harm. Mr Mitchell QC responded that, by analogy, the Defendant's submission of the Complaint to the CPS had exposed the Claimant to reputational harm arising from the Defendant's reports of the submission of the "dossier" and the suggestion that he might face a criminal investigation for alleged perjury. In the same way, the legal system had been misused by the Defendant and damage had been caused to the Claimant.

41. The final authority upon which Mr Mitchell QC placed significant reliance is the decision of the Supreme Court of Canada in ***Casey -v- Automobiles Renault Canada* (1963) 46 DLR (2d) 607**. On 19 November 1960, the defendant had laid an information before Magistrates alleging a charge of theft against the clamant. However, nothing was done, and the information lay unprocessed before being eventually withdrawn following a request by the defendant on 13 December 1960. At first instance, the Court had held that merely laying an information could not amount to a "prosecution" for the tort because the defendant had not successfully set the law in motion. Allowing the appeal, the Supreme Court of Canada held that the element of "prosecution" was established because the defendant had "*done all he could do to launch criminal proceedings against the accused*" *per* Martland J (at 621 and 623). The judge followed the Privy Council decision in ***Amin -v- Bannerjee***, and held (pp.619-620):

> "In ***Amin*** the complaint was dismissed by the magistrate, and no prosecution followed the making of the complaint. It is true that the magistrate made an inquiry under s.202 of the Code of Criminal Procedure, but the result of that was the dismissal of the complaint. No process was ever issued to bring the accused before the magistrate.

> I think it is important to read the passage from the Privy Council, just quoted, together with the sentence which immediately follows it:
>
> > 'If the magistrate dismisses the complaint *as disclosing no offence with which he can deal,* it may well be that there has been nothing but an unsuccessful attempt to set the criminal law in motion and no damage to the plaintiff results.' (The italics are mine)
>
> Read together, they would appear to mean that the mere presentation of a false complaint will not necessarily be a basis for suit for malicious prosecution, but that, if a complaint is made disclosing an offence with which the magistrate has jurisdiction to deal and he takes cognizance of it, that is sufficient foundation for the action."

42. It appears from the report (p.613) that there was evidence that following the laying of the information, and despite the fact that it had apparently lain dormant in an office in the Magistrates' Court, news of the charge became widely known among people in the automobile business in Nova Scotia. Three witnesses had testified that they had been advised that the claimant had been charged with theft by persons employed by the defendant.

43. Mr Caldecott QC argues that ***Casey*** is nevertheless still an example of the Court's processes being engaged.

44. As to the three recent first instance decisions relied upon by Mr Caldecott QC (see [34(vi)] above), Mr Mitchell QC argues that the point now at issue was not fully considered. The courts, he contends, have proceeded on the basis that a prosecution for the purposes of the tort must involve the actual execution of the processes of a court under its rules of procedure. He submits this is the "conventional view", also advanced by the authors of *Clerk & Lindsell*, but, properly analysed, it is not correct, and it is not consistent with, particularly, ***Amin -v- Bannerjee*** and ***Casey***.

45. Mr Caldecott QC submits that by maintaining that the "prosecution" element of the tort must involve malicious abuse of the Court's process the tort of malicious prosecution is kept within its proper bounds. It means that the law retains overall coherence, having regard, particularly, to the principle of immunity from suit. Immunity from suit is an extension of the protection afforded to witnesses in court proceedings which prevents them from being sued for what they say in court. Immunity from suit also prevents a person from being sued in respect of statements before the proceedings which can fairly be said to be part of the process of investigating a crime or a possible crime with a view to prosecution: ***Taylor -v- Director of the Serious Fraud Office*** **[1999] 2 AC 177, 215** Lord Hoffmann approving the decision of Drake J in ***Evans -v- London Hospital Medical College (University of London)*** **[1981] 1 WLR 184**, **192**. It applies from the time of the initial complaint to the police in respect of a matter which might lead to a prosecution: see ***Westcott v Westcott*** **[2009] QB 407**.

46. Mr Caldecott QC relies upon the analysis of the Court of Appeal in ***Crawford -v- Jenkins*** **[2016] QB 231** as supporting his argument that the tort of malicious prosecution, which is the single exception to the immunity from suit principle (see Lord Hoffmann in ***Taylor -v- SFO*** at p.215D), is the safeguard for malicious abuse of court

proceedings. Sir Timothy Lloyd (with whom Sharp and Beatson LJJ agreed) gave the following analysis:

> [50] In each case where liability has been recognised, the processes of the court have been invoked, either by (or, as in ***Roy -v- Prior*** **[1971] AC 470** by an application in the course of) a criminal prosecution or by civil proceedings. Leaving aside the newly recognised tort of maliciously bringing civil proceedings, the instances in the cases have involved obtaining court orders for the arrest of the plaintiff, for example under a writ of *capias ad satisfaciendum* for non-payment of a debt (***Gilding -v- Eyre*** **(1861) 10 CBNS 592**), or for the arrest of a ship (***The Walter D Wallet*** **[1893] P 202**) or of other assets of the plaintiff (***Clissold -v- Cratchley*** **[1910] 2 KB 244**, and ***Congentra AG -v- Sixteen Thirteen Marine SA (The Nicholas M)*** **[2009] 1 All ER (Comm) 479**) or a search warrant: ***Gibbs -v- Rea*** **[1998] AC 786**. In all of these cases, and also in ***Johnson -v- Emerson*** **(1871) LR 6 Ex 329**, where the allegation was of maliciously initiating bankruptcy proceedings and procuring the adjudication of the plaintiff as bankrupt, action on the part of the court was involved, for which, evidently, the court could not be made liable. In ***Quartz Hill Consolidated Gold Mining Co -v- Eyre*** **(1883) 11 QBD 674** the wrongful act alleged was maliciously presenting a winding up petition. That was held to be sufficient, in that the effect of presentation of such a petition was immediately damaging to the company which was the subject of the petition. In that case, therefore, the court was not involved other than in receiving and processing the petition when presented for issue. In none of these cases could there be a claim against the court for compensation for loss suffered.
>
> [51] In the present case, no court process was involved at any stage. The defendant's complaint to the police is within the scope of the immunity rule because it was the first step in a process that might have involved the criminal justice system, just as was the complaint in ***Westcott -v- Westcott*** **[2009] QB 407**. It is clear that no action in defamation would lie against the defendant in respect of her complaint to the police. But Mr Wilson's argument, for the claimant, is that the same is not true of the claim analogous (he says) to ***Roy -v- Prior*** **[1971] AC 470** of malicious procurement of arrest.
>
> [52] For the defendant Mr Speker submitted that the absence of any court process at any stage makes all the difference. His contention was that this group of torts, to which the witness immunity does not apply, as held in ***Roy -v- Prior***, are all concerned with the malicious use or manipulation of the process of the court, whether criminal or civil. The essence of them is abuse of the process of the court. He therefore argued that, if no court process is involved at any stage, then the case does not fall within this category and there is no reason for it to fall outside the scope of the witness immunity rule.
>
> [53] To the contrary, Mr Wilson argued that the essence is abuse of the processes of the law, and that there should be no good reason to distinguish between the case of a defendant who maliciously procures the police to arrest the claimant where no prosecution follows, and a case where a prosecution has already been brought or is later commenced. It might be said to be

anomalous to allow the witness immunity rule to apply where the complaint leads to an arrest but no prosecution follows, and not to allow it to apply if a prosecution does follow, with or without an arrest.

[54] As it seems to me, there is a significant difference between a case where what happens is that the claimant is arrested by the police on the basis of information provided by the defendant, but no prosecution follows, and a case where criminal or civil proceedings are brought, in the case of criminal proceedings being based on information provided by the defendant and, in the case of civil proceedings, being brought by the defendant. If the interference with the claimant's liberty or his assets is the result of a court order of some kind (arrest under a bench warrant or some form of execution) or is the effect of the issue of proceedings (as in the case of an insolvency petition), there can be no remedy by way of compensation to the claimant by recourse to the court which made the order. The order may be set aside, but that will not undo loss already caused. Accordingly, it is right that there should be a distinct remedy, if the necessary elements can be proved, against the person who invoked the court procedure.

[55] By contrast, if the defendant is said to have procured the arrest of the claimant by the police without any prosecution following, then in principle the police, being responsible for the arrest, may themselves be liable to the claimant for the fact and consequences of the arrest. Moreover, now that the decision whether or not to prosecute is not for the police but for the CPS, there will be an independent consideration of the circumstances before any decision to prosecute is taken. (I disregard cases of private prosecution, but they are not likely to have been preceded by an arrest.)

[56] That seems to me to make a difference which is significant in the present context. If proceedings are commenced, and if the events complained of either lead to those proceedings or occur in the course of the proceedings, so that the court process is abused, then it is appropriate for the tort of malicious prosecution, or a related tort based on malicious abuse of the process of the court, to be available so as to afford the claimant a remedy, and it is justifiable that such a claim should not be defeated or precluded by the witness immunity rule. If, however, there are no court proceedings, the claimant's arrest not being preceded or followed by any proceedings, whether criminal or civil, then there is no question of an abuse of the process of the court, no reason why (if the relevant facts can be proved) the person responsible for the arrest should not be answerable for the imprisonment, and correspondingly no reason to treat a claim for compensation for the arrest as one to which the otherwise general witness immunity rule does not apply.

[57] I bear well in mind the comments of judges, some of which I have already quoted, that the scope of the immunity rule must be limited to that which is necessary in the interests of the administration of justice. I also bear in mind Lewison LJ's comment that it is dangerous to generalise in this area. However, it does seem to me that, in this particular contested zone, part of Lord Hoffmann's disputed ground, both principle and policy support the distinction that I have drawn, between, on the one hand, a case where what

> is complained of is or involves the invocation of the process of the court, where a claim for, or akin to, malicious prosecution may be brought against the person who invoked the court process, and where the witness immunity rule does not prevent the claim being brought even though it may rely in part on statements which would be immune from a claim in defamation, and, on the other hand, a claim in circumstances where no court proceedings have taken place, so that no issue arises of a claim based on the malicious abuse of the process of the court. In such a case I see no reason to make an exception from the normal scope of the witness immunity rule. It would preclude a claim in defamation; it should also, in my judgment, preclude a claim of the kind brought by the claimant in the present case. The policy behind the witness immunity rule is the same in relation to the present claim as it would be as regards a defamation claim, and the case does not have the feature of abuse of the process of the court which, because no claim can be made against the court, justifies the possibility of a separate claim for the malicious abuse of the court's process, which should be possible despite the witness immunity rule.

47. Mr Mitchell QC submits that, insofar as ***Crawford -v- Jenkins*** is authority for the proposition that the tort of malicious prosecution can only be maintained if the defendant "*crossed the threshold of the court*", it was wrongly decided. In any event, he submits it can be distinguished because the defendant in ***Crawford*** was an actual witness whose evidence would have been an essential part of any prosecution case, whereas the Defendant here has simply passed documents to the CPS. This was, he argues, an abuse of the legal system which the court should hold is sufficient for the first element of the tort of malicious prosecution.

48. Mr Caldecott QC's final case is ***AH -v- AB*** **[2009] EWCA Civ 1092**. Although the central issue in this case was whether the defendant, the original criminal complainant, could be said to be the prosecutor, Mr Caldecott submits the judgment of Sedley LJ is authority for the proposition that preparatory steps to proceedings are insufficient to found an action for malicious prosecution unless proceedings in fact result:

> [68] In ***Martin -v- Watson*** Lord Keith, having approved the statement of principle in *Clerk & Lindsell* to which I have referred, identified at page 80E of the report the question at issue as being "*whether or not the defendant is properly to be regarded, in all the circumstances, as having set the law in motion against the plaintiff.*" …
>
> [69] I think it is clear from Lord Keith's speech and from the authorities to which he referred that the concept of "*setting the law in motion*" requires something more than merely making a complaint or report which suggests that an offence has been committed; it also involves active steps of some kind to ensure that a prosecution ensues (what Richardson J. in ***Commercial Union Assurance Co. of New Zealand Ltd -v- Lamont*** **[1989] 3 NZLR 187, 199** described as "*procuring the use of the power of the state*"). Invoking the power of the state against the claimant is central to the tort of malicious prosecution and requires a positive desire and intention to procure a prosecution. In effect, it must be the defendant's purpose to bring about a prosecution and that purpose

> must be translated into actions which are effective in bringing about proceedings…"

49. Mr Mitchell QC submits that the Defendant's submissions would produce what he calls a "*remedy gap*"; the Claimant has been caused serious reputational harm as a result of the submission of the 'dossier' by the Defendant, but he would be without remedy. He argues that, were the Court to uphold the restricted view of "prosecution" urged by the Defendant, the Court would be failing to provide redress for a clear wrong; a result that would be contrary to the public policy "*that wrongs should be remedied*": *per* Sir Thomas Bingham MR in ***X (minors) -v- Bedfordshire County Council*** **[1995] 2 AC 633, 663**.

50. Mr Caldecott QC rejects the submission that the Claimant would be left without remedy. The complaint of reputational harm arises not from the submission of the Complaint, but the publicity given to it by the First and Second Articles. If the publication of those Articles caused actionable damage to the Claimant's reputation, then there was absolutely no impediment to his suing for libel. The Articles are not protected by immunity from suit (or absolute privilege). Mr Caldecott QC submits that the only substantive defences available to defend the publication would be truth, honest opinion or public interest under ss.2-4 Defamation Act 2013. If the Claimant were to establish malice, that would effectively dispose of the honest opinion and public interest defences leaving only truth to whatever meaning the Articles were found objectively to bear. Although the Claimant's contention as to the meaning of the Articles has not been consistent, Mr Caldecott QC submits that it would not be an allegation of guilt of perjury, but a *Chase* level 2 or 3 meaning of grounds to suspect/grounds to investigate (which, at least in one paragraph of the Particulars of Claim, the Claimant appeared to accept – see 66(1)(b) – set out in [26] above). In short, on the facts of this case there was no "remedy gap". The Claimant could have sued for libel. He did not do so and, by the time he sent his letter of complaint, an action for libel was time-barred (see [24] above).

51. Mr Caldecott QC argued that upholding the submissions of the Claimant would lead to several anomalous and unwarranted consequences:

    i) First, it would represent a significant erosion for complainants of the protection of immunity from suit;

    ii) Second, it would render practically otiose the consideration of who was regarded as a "prosecutor" in the law of malicious prosecution; and

    iii) Third, it would practically remove the distinction between remedies for false imprisonment and malicious prosecution which, at present, depends on whether the process of the court had been engaged.

**Discussion and decision**

52. The elements of the tort are accurately summarised in the passage from *Clerk & Lindsell* set out in [31] above. There is no dispute that, following ***Sagicor*** and ***Willers -v- Joyce***, a claim for malicious prosecution can now be based upon the malicious prosecution of civil proceedings.

53. The authorities identified by Counsel also demonstrate that a "prosecution" for the purposes of the tort can also include maliciously initiating bankruptcy proceedings (***Johnson -v- Emerson*** **(1871) LR 6 Ex 329**) or maliciously presenting a winding-up petition (***Quartz Hill Consolidated Gold Mining Co -v- Eyre*** **(1883) 11 QBD 674**). The word "prosecution" in the eponymous tort is perhaps apt to mislead; it extends beyond "prosecution" as that word is usually understood. More accurately, perhaps, it is the malicious abuse of the process of the court.

54. The damage caused by this wrongdoing includes harm to reputation: "*damage … to the fair fame of the person assailed*" *per* Bowen LJ in ***Quartz Hill*** (see [37] above). Without recourse to the tort of malicious prosecution, any reputational damage cannot be redressed. This is for two reasons. First, no action can be brought against the court, or any of the participants in the proceedings: ***Munster -v- Lamb*** **(1883) 11 QBD 588, 607** *per* Fry LJ; ***Marrinan -v- Vibart*** **[1963] 1 QB 528, 535** *per* Sellers LJ. Second, and perhaps more importantly in the context of reputational harm, reports of court proceedings will be protected by reporting privilege: see ss.14-15 Defamation Act 1996 and Schedule 1, Paragraph 2. The effect of this is that a person whose reputation is damaged by reports of court proceedings will have no remedy in defamation against the publisher of those reports.

55. This analysis is consistent with the recognition that the act of malicious presentation of a winding up petition is sufficient for the tort of malicious prosecution. The procedure that applied at the time of ***Quartz Hill*** meant that the presentation of the petition was required to be advertised in the *London Gazette*. The company had no recourse for the publication of details of the petition in the *London Gazette* because the publication was privileged. Brett MR explained:

> "… the very touchstone of this point is that the petition to wind up is by force of law made public before the company can defend itself against the imputations made against it; for the petitioner is bound to publicly advertise the petition seven days before it is to be heard and adjudicated upon… under the Companies Act 1862…"

***Quartz Hill*** is therefore another example of the ambit of the malicious prosecution tort being closely aligned to, and justified by, the potential reputational damage that arises from reporting privilege.

56. I consider that, for the reasons explained by Sir Timothy Lloyd in ***Crawford -v- Jenkins*** [53]-[57], there is an important jurisprudential boundary between other malicious acts that cause damage, e.g. false arrest, wrongful imprisonment, where no process of the Court has been invoked, and malicious prosecution which must involve some abuse of the Court's process. In the present case, the Complaint did not get even to the stage of a criminal investigation. There was no arrest, no charge and no laying of an information (or modern equivalent) to commence a prosecution against the Claimant.

57. Had it not been for the Defendant's independent decision to publicise the sending of the "dossier" to the CPS (and its delivery onwards to the Metropolitan Police) in the First and Second Articles, the Claimant (and in all probability the world) would have remained completely unaware of the submission of the Complaint. In my judgment, that is the legal process working as it should. In the ordinary course, neither the police

nor a prosecuting authority will identify suspects in criminal investigations prior to charge, save where justified by clear and exceptional circumstances: ***ZXC -v- Bloomberg LP*** **[2020] 3 WLR 838** [78]-[79] *per* Simon LJ. "*Those who have simply come under suspicion by an organ of the state have, in general, a reasonable and objectively founded expectation of privacy in relation to that fact and an expressed basis for that suspicion*": [82].

58. The law in this area has therefore achieved a measure of coherence. In general, the fact that someone has been under criminal investigation or suspicion by the police or prosecuting authority will only become public at the point of charge; i.e. the point at which the process of the court has been engaged. Before that stage is reached, in most cases, the decision to institute proceedings will have been made by the independent Crown Prosecution Service which must be satisfied as to the sufficiency of the evidence to provide a realistic prospect of conviction and that it is in the public interest to prosecute. As Lord Wilson noted in ***Sagicor*** [68]:

> "… the paradox is that nowadays, at any rate in England & Wales, there is much less chance of being a victim of a criminal prosecution brought maliciously and without reasonable cause than of a civil action so brought…"

59. It is only after charge, when the Court is seized of the criminal proceedings, and they have become public and liable to be reported under privilege, that reputational harm of any significance is likely to be caused. If the subject can demonstrate the other elements of the tort of malicious prosecution, s/he will then have a remedy for any reputational damage. Up to the point of charge, the immunity from suit protects the publication of the allegation made by the complainant to the police, but the capacity for that publication to cause harm to the subject of the complaint is limited because, in the ordinary course, it will not have received any wider publicity. If the investigation concludes without any charges being brought, unless falling into the exceptional category where publicity of the investigation into the claimant is justified, there will have been no publicity given to the investigation by the police of prosecuting authority and there is, therefore, unlikely to be the cause of any significant or lasting reputational harm.

60. As this case demonstrates, a third party may decide to publicise either the complaint to the police or prosecuting authority or the allegation itself, but the law provides a remedy for such publications (e.g. defamation and/or misuse of private information). The immunity rule protects the publication of the allegation from the complainant to the police/prosecuting authority, but it does not protect wider publication either by the complainant or a third party such as a newspaper publisher. Mr Caldecott QC is right when he submitted that the Claimant in this case was not deprived of remedy. If he wished to complain of reputational harm arising from the First and/or Second Article, then it was to the law of defamation that he could have turned. With no shelter in immunity from suit, or any other reporting privilege, to defend a claim for libel it would have had to advance another defence. For the reasons explained by Mr Caldecott QC, the most likely candidate was a defence of truth. The issues would then have been the single meaning of the publication(s) and whether the Defendant could demonstrate, in that meaning, it was substantially true.

61. In parts of his argument, Mr Mitchell QC appeared to submit that, such was the skill of the Defendant's in-house lawyers, they were able to word the First and Second Articles in a way that made them "libel-proof" (see e.g. paragraphs 38, 60 and 67(2) of the Particulars of Claim – [26]). There may be many skilled lawyers who give the Defendant pre-publication advice, but none could 'lawyer' (to adopt the verb commonly used in this area) these Articles in a way that completely removed a meaning that was defamatory of the Claimant. For the purposes of the objective meaning of the Articles, and substantially so in relation to the First Article, the submission of the "dossier" to the CPS was something of a side-show. It merited a single sentence in coverage of the First Article that extended over 5 pages of the newspaper. Of course, the Second Article made more of the submission of the dossier, and whether a criminal investigation into the Claimant might ensue, but in terms of reputational damage, the real sting of the Articles was the suggestion that the Claimant might have lied in his evidence in the Privacy Action.

62. Mr Mitchell QC urged me to take an expansive view of what acts should amount to a "prosecution" under the tort because, otherwise, there would be a "remedy gap". It was not the submission of the "dossier" to the CPS that caused the reputational damage of which the Claimant complains; it was publication of the Articles. Leaving aside the single sentence referring to the Defendant's intention to "*hand its dossier over to the Crown Prosecution Service*", the reputational damage caused by the publication of the First Article is entirely divorced from the actual submission of the dossier. The Second Article contains more about the submission of the Complaint to the CPS, but the real sting comes, not from reporting that fact, but the repetition of the basis for the alleged perjury. It is clear from the way that the Claimant has pleaded and advanced his claim that his real complaint is about the reputational harm caused by publication of the Articles (see [27] above and, in the Particulars of Claim, paragraph 45(1) "... *linked the Claimant with infamous perjurers*"; and paragraph 66(1)(b): "*The Defendant's reporting of its actions… created the unjust impression that there were reasonable grounds to suspect that the Claimant was guilty of criminal wrongdoing*"). In terms of contribution to the overall defamatory meaning, the submission of the "dossier" to the CPS, in that coverage, is little more than a footnote.

63. On the facts of this case, and for the reasons I have explained, the Claimant was not left without remedy for any reputational harm caused by publication of the Articles. He could have sued in libel. He did not do so. Even had I considered there was scope to do so, there is no compelling reason or justification, on the facts of this case, to attempt to fashion the law of malicious prosecution in a way that would provide a remedy when the law provided the Claimant with a perfectly adequate and readily available avenue of redress through the law of defamation.

64. Mr Mitchell QC's submission, in summary, is that the tort arises when, maliciously and without reasonable and probable cause, "*the machinery of justice has been used to cause damage*". He contends that the Crown Prosecution Service should be regarded as part of the machinery of justice and that a complaint designed and intended to stimulate it into action is sufficient. Leaving aside important constitutional separation between the prosecution/police and the Court which militates against this submission, there is no support for it in the authorities.

65. There are many statements in the authorities of the activity that amounts to "prosecution" for the purposes of the tort, including:

    i) "*setting the law in motion against the plaintiff*": ***Martin -v- Watson*** *per* Lord Keith at p.80E-F;

    ii) "*employing*" the process of the law: ***De Medina -v- Grove*** (see [36] above);

    iii) "*put[ting] into force the process of the law*": ***Churchill -v- Siggers*** ([36] above) approved by Lord Clarke in ***Willers -v- Joyce*** [64];

    iv) the "*malicious use of legal process*": ***Willers -v- Joyce*** ([36] above); and

    v) "*invocation of the process of the court*": ***Crawford -v- Jenkins*** [57] (quoted in [46] above).

66. The coherence of this area of the law is, perhaps, impaired by the fact that there are distinct torts of malicious prosecution and abuse of process, albeit that they "*sprang from the same tree*": ***Sagicor*** [62] *per* Lord Wilson. Baroness Hale suggested that they might, ultimately, be combined "*in a single coherent tort of misusing legal proceedings*": ***Sagicor*** [83]. Nevertheless, the coherence that Baroness Hale envisaged would be achieved by focusing the tort on "*intentionally abusing the legal system*" [89]. It did not extend to malicious and baseless complaints to the police and/or prosecuting authorities.

67. In ***Amin -v- Bannerjee***, the test was stated by the Privy Council to be "*whether [the] proceedings have reached a stage at which damage to the plaintiff results*" ([39] above). It is understandable why this phrase was used in the context of that case. There, although no criminal charge had in fact been brought against the claimant, the laying of the (maliciously false) information had, by reason of the particular requirements of the criminal procedure, led to a hearing in open court at which the 'charge' against the claimant had been identified and had, therefore, exposed the claimant to reputational harm. Seen in that context, it is an example of the malicious abuse of the court's process. Mr Mitchell QC argues that the same could not be said about the facts in ***Casey***.

68. ***Casey*** appears to me to be, in some respects, anomalous. Even on the assumption that there had been an initial attempt to set the law in motion against Mr Casey, it was clearly ineffective: no judicial action or court process resulted before the information was withdrawn some 4 weeks later. Whatever gossip there had been about a charge having been laid against Mr Casey in the local area, it was not caused by anything done by the Court. In that respect, any reputational harm to Mr Casey was caused, not by the Court process, but by the release of information about the laying of the information by someone else. The case does not analyse it in this way, but that, in my judgment, meant that there was a potential remedy available for this reputational harm just as much as one would have been available if a spokesperson of Automobiles Renault Canada had stood on the steps of the Amherst Magistrates' Court and publicly announced that the company had just laid before the Stipendiary Magistrate an information alleging that Mr Casey was guilty of theft.

69. In my judgment, if ***Casey*** is an example of setting the law in motion against an individual at all, it must be regarded as wholly technical and, importantly, did not cause the claimant any damage. With respect, I cannot accept that Martland J's statement that a person will be liable for a 'prosecution' where "*he has done all he can do to launch the criminal proceedings*" is an accurate definition of the acts that will amount to a 'prosecution' for the tort under English law. When compared with the authorities I have identified, such a test would be too wide and would produce significant anomalies, including those identified by Mr Caldecott QC (see [51] above). In respectful disagreement, Martland J (in the passage set out in [41]) did not correctly identify the material difference between ***Amin -v- Bannerjee*** and ***Casey***. In the former, the laying of the information had been successful in setting the law in the motion against the claimant, to the extent that there were open court proceedings at which the Magistrate had examined the complaint before refusing to issue the summons. In ***Casey***, the attempt to lay the information had led to no judicial action being taken against Mr Casey, and no harm was caused to him by the failed attempt to set the process of the law in motion. Further, and in any event, ***Casey*** should be distinguished on the grounds that it is an example of the process of the *court* being engaged (however technically and briefly). It is not authority for Mr Mitchell QC's argument that lodging a complaint or seeking to persuade the police or prosecuting authority to investigate/prosecute a suspect is an act sufficient to amount to 'prosecution' under the tort.

70. In my judgment, Mr Mitchell QC has failed to identify any authority which suggests, still less, resolves that the making of a complaint to a prosecuting authority, such as the CPS, could, without more, constitute a "prosecution" under the tort of malicious prosecution, even if it could be shown that the complainant hoped and intended that a criminal investigation and prosecution would follow. On the contrary, there are clear statements of principle in the authorities which show that a mere complaint to the police/prosecuting authorities would be insufficient for the element of "prosecution" under the tort.

71. In ***Crawford -v- Jenkins***, the Court of Appeal refused to allow a claim for malicious prosecution because "*no court process was involved at any stage*": [50]. In ***Barkhuysen -v- Hamilton*** **[2018] QB 1015** a malicious complaint made by the defendant led to the arrest of the claimant, his detention, seizure of his property, the taking of intimate samples, and a criminal investigation by the police lasting several months. Nevertheless, at the end of the investigation, the claimant was not prosecuted. The Judge found that the defendant had directly procured the arrest and desired and intended it; and there was "*in reality no room for the police to exercise any independent judgment before they arrested the claimant*": [144]. Warby J nevertheless held:

> [145] All of that shows that there was a false arrest and false imprisonment thereafter, which were maliciously procured by the defendant. But in my judgment that is not enough to bring home the claim for damages for malicious prosecution. I accept Mr Samson's argument that there was no "prosecution" for the purposes of this tort. Ms Marzec submits that the underlying principle of the law of malicious prosecution is that an abuse of the process of the law that causes another injury is actionable; the key feature in considering whether there has been a "prosecution" is whether the actions

> taken against the claimant were such as to cause him injury. She refers me to ***Churchill -v- Siggers*** **(1854) 3 E & B 929**, ***Amin -v- Bannerjee*** **[1947] AC 322, 331**, ***Roy -v- Prior*** **[1971] AC 470, 477–478** and the recent decision of the Supreme Court in ***Willers -v- Joyce*** **[2018] AC 779**. But in none of those cases was a mere arrest held to be actionable in the tort of malicious prosecution. Nor, in my judgment, does any of them stand as authority for any principle that would make a mere arrest so actionable. It is important not to treat passages in judgments, however high their authority, as tantamount to statutory wording.
>
> [146] The pleaded case for the defendant is that a prosecution begins when a person is charged. Mr Samson submits that this is too generous an approach. He argues that the authorities point to the conclusion that the malicious institution of proceedings before a judicial body is actionable in this tort, but not anything short of that. I agree, and add that the established rationale of the tort appears to be that compensation should be available for injury caused by a malicious abuse of the judicial power of the state. All of the cases cited above can be explained on this basis. See also the analysis of Sir Timothy Lloyd in ***Crawford -v- Jenkins*** **[2016] QB 231** [48]-[50].

72. Two weeks after Warby J delivered his judgment in ***Barkhuysen***, Newey J reached a similar conclusion as to the requirements of the 'prosecution' element of the tort in ***CFC 26 Limited -v- Brown Shipley & Co Ltd*** **[2016] EWHC 2048 (Ch)**. The case concerned the service of an enforcement notice for the removal of hoardings outside some premises. The Judge did not refer to the decision in ***Barkhuysen***, but nevertheless held:

> [68] … While it is now clear that the tort of malicious prosecution can apply without a criminal prosecution, there remains a requirement that the law has been "set in motion by an appeal to some person clothed with judicial authority" and service of an enforcement notice cannot, as it seems to me, suffice for this purpose. I do not see ***Churchill -v- Siggers*** as providing authority to the contrary.

73. Finally, in ***CXZ -v- ZXC*** **[2020] EWHC 1684 (QB)**, the Court dismissed a claim for malicious prosecution arising from allegations made by the defendant to the police that the claimant had been guilty of sexual abuse of their children. In response to the allegations, the police began an investigation into the claimant which lasted for just short of 3 months. The claimant was not arrested, but he was interviewed under caution. No charges were brought. The defendant applied to strike out the claim on the ground that the claimant had not been "prosecuted" and so the claim for malicious prosecution was bound to fail. Steyn J struck out the claim and held:

> [37] The Claimant must show that he was prosecuted, in other words, that the law was set in motion against him. In my judgment, the clear effect of ***Martin -v- Watson***, ***AH -v- AB***, ***Barkhuysen*** and ***CFC 26*** is that the requirement to show that the claimant was prosecuted involves showing that the law was set in motion by an appeal to some person clothed with judicial authority. The tort of malicious prosecution is a form of wrongful use of process: see, for example, the heading to the section of *Halsbury's Laws of*

> *England*, Tort, vol.97 (2015), in which the malicious prosecution is addressed…
>
> [39] In this case, the Claimant's pleaded case makes clear that he was not arrested. I readily accept that he felt he had no real choice but to attend the police station voluntarily, to be interviewed under caution. He took the sensible course of cooperating with the police investigation. Nevertheless, there is a clear conceptual difference between an arrest, which has the effect that a person is deprived of his liberty, and voluntarily agreeing to be interviewed by the police, which does not involve being detained. Indeed, the fact that the police offered the Claimant a way to attend an interview without being arrested, and that this accords with modern police practice, underlines the significant distinction between being arrested and voluntarily attending an interview.
>
> [40] It is also clear on the Claimant's pleaded case that he was never charged. No step was taken which involved bringing any criminal charge against him before any judicial authority.
>
> [41] The effect of ***Willers -v- Joyce*** is that the tort extends to civil proceedings. That is a significant development, but it confirms that the essence of the tort is the malicious institution of proceedings. ***Willers -v- Joyce*** does not provide any assistance for the Claimant's argument that the tort extends, or should be extended, to circumstances where no form of process has been instituted. I also note that ***Barkhuysen*** and ***CFC 26*** were determined after ***Willers -v- Joyce*** and both judgments are firmly contrary to the Claimant's case.

74. The clearest appellate statement of the law is contained in Sedley LJ's judgment in ***AH -v- AB*** (see [48] above) that "*setting the law in motion*":

> "… requires something more than merely making a complaint or report which suggests that an offence has been committed… Invoking the power of the state against the claimant is central to the tort of malicious prosecution and requires a positive desire and intention to procure a prosecution. In effect, it must be the defendant's purpose to bring about a prosecution and <u>that purpose must be translated into actions which are effective in bringing about proceedings…</u>"

75. Mr Mitchell QC's submissions emphasised, from this passage, the "*desire and intention to procure a prosecution*" – perhaps echoed in the decision of the Supreme Court of Canada in ***Casey*** that the person need only have "*done all he can do to launch the criminal proceedings*" – as supporting his contention that submission of the Complaint to the CPS was sufficient to found the tort of malicious prosecution in this case. I reject that argument. It is clear, from the underlined part of Sedley LJ's judgment, that the desire and any actions to try and bring about a prosecution on their own are insufficient. They must be "*effective in bringing about proceedings*". As noted by the Privy Council in ***Amin -v- Bannerjee***, if a criminal complaint is dismissed, even at the stage where a Magistrate refuses to issue a summons, "*it may well be that there has been nothing but an unsuccessful attempt to set the criminal law in motion and no damage to the plaintiff results*" (see quotation in [39] above). That is the position here. The CPS and the police discharged their responsibility exactly as they could be expected to have done.

They carried out a review and decided that no criminal charge (or even an investigation) should be pursued. There was no prosecution. Any damage to the Claimant's reputation was not caused by submission of the dossier to the CPS, but by reports of its submission, and more importantly its contents, in the Articles.

76. The decisions of ***Barkhuysen***, ***CXZ -v- ZXC*** and ***AH -v- AB*** contain clear statements of principle that, for the tort of malicious prosecution, there must have been institution of proceedings. I do not consider that there is any tenable ground on which these cases can or should be distinguished. In this case, the Defendant's efforts palpably were not "*effective in bringing about proceedings*". They were not successful even in interesting the CPS and the Metropolitan Police in launching a criminal investigation into the Claimant. This case stands in stark contrast, in terms of the effect on the Claimant, to the cases of ***Barkhuysen*** and ***CXZ***, where the complaints to the police had real impact on the respective claimants. Here, neither the police nor the CPS even contacted the Claimant. His real complaint as to damage is, as I have explained, the publication of the two Articles.

77. For these reasons, the Claimant's pleaded claim discloses no reasonable grounds for bringing his claim for malicious prosecution. The Claimant is bound to fail to establish the necessary element of "prosecution" in the tort. I grant the Defendant's application and the Claimant's claim will be struck out.