IN THE COURT OF APPEAL, CIVIL DIVISION **Ref: /2015**

ON APPEAL FROM THE COVENTRY COUNTY COURT

BEFORE HIS HONOUR JUDGE GREGORY

BETWEEN:

AMIT MATALIA **Appellant/Defendant**

- and -

LAWRENCE SHERIFF SCHOOL **Respondent/Claimant**

GROUNDS OF APPEAL

Ground 1: erroneous application of the Protection from Harassment Act 1997

1 His Honour Judge Gregory ("the Judge") wrongly concluded that the things said in documents on which the Claimant relied constituted harassment within the meaning of the Protection from Harassment Act 1997 ("PHA 1997"). This is for the following reasons:

1.1 those things were not obviously untrue, as in *Plavelil v Department of Public Prosecutions* [2014] EWHC 736 (Admin), and were therefore ripe for (i.e. most appropriately considered in the context of) a claim of defamation only;

1.2 in fact, in regard to several of the most challenging respects (namely that the Claimant/Respondent had wrongly refused to admit the Defendant/Appellant's younger son to the school and then wrongly refused to permit the Defendant to appeal against that decision) those things were (given the decision of the Local Government Ombudsman stated finally on 19 May 2014) objectively correct; and

1.3 the things themselves were no worse than the things which Elizabeth Laing J said in *Merlin Entertainments plc v Cave* [2014] EWHC 3036 (QB), [2015] EMLR 3 were not even arguably harassment.

Ground 2: material error of fact

2 The Judge made a major error of fact, which either must, or at least may, have affected his judgment, in that he wrongly concluded that the Defendant/Appellant ("the Defendant") had for the first time alleged race discrimination in an email that he (the

Defendant) sent after the decision of the Claimant/Respondent ("the Claimant") to withdraw the offer of a place for the Defendant's younger son had been made, and then the Judge used that wrong conclusion as a justification for his view that the Defendant had deliberately (and by implication in bad faith) alleged (and continued now to allege) that the Claimant had (by withdrawing that offer) committed victimisation (i.e. within the meaning of section 27 of the Equality Act 2010) when he (the Defendant) knew that that allegation was false.

3 That major error of fact arose either from a failure properly to read the Defendant's witness statement and exhibits, or from a failure to pay proper attention to the evidence as a result of having a predetermined view, i.e. the Judge, instead of evaluating the evidence objectively, and coming to a conclusion after hearing it and considering the parties' submissions, arrived at a view early on in the proceedings and then looked for evidence to support that view. In either event, i.e. whichever of those two occurred, the trial was tainted by a procedural irregularity of such a sort that a retrial should be ordered unless (as it is the Defendant's case it should) the Court of Appeal concludes that no court, properly directing itself, could properly have concluded that there was here harassment within the meaning of the PHA 1997 and/or that no injunction should have been made.

Ground 3: apparent bias

4 The proposition that the Judge arrived at a predetermined view is strongly supported by the signs of bias exhibited by the Judge throughout the trial, which are such that the test for apparent bias is satisfied. Those signs are as follows.

4.1 While half a day was allocated for the reading of the documents, i.e. the morning of 30 March 2015, it is clear that the Judge did not read the Defendant's second witness statement properly, or at least that the Judge did not read the documents to which it referred, as it referred to exhibits in the bundle that had had page numbers removed by the Claimant's legal team, and the Judge did not notice that fact. It would have been impossible to read the evidence in the Defendant's second witness statement properly without the documents to which it referred having page numbers. Counsel for the Defendant (Mr Oliver Hyams) pointed out to the Judge that the page numbers were missing and later provided the Judge with numbered pages.

4.2 The Judge began by acceding to the request of the Claimant to read the judgment of the Honourable Mr Justice Newey in *Warwickshire County Council v Matalia* (27 February 2015; 3BM30478). That case was unrelated, although the Defendant was also the defendant in that case. The Judge then made what the Defendant (and, in fact, Mr Hyams) perceived to be aggressive comments relating to the possibility of perjury on the Defendant's part in that case. However, the Judge was (necessarily) unaware of the manner in which that case had proceeded. The judgment of Newey J in that case contained redactions, so the Judge could not see the whole picture. However, there were other factors which could not have been known to the Judge about the manner in which that case was conducted and

which in the reasonable view of the objective observer were relevant, such as that the Defendant had asked in that case that there be expert witness evidence to determine the authenticity of the relevant documents, and the claimant County Council had objected. Then, at the last minute the County Council had claimed that the documents (individual documents in a series of documents which were screen-shots of websites) had been created at a later date than the dates which they bore on their face. The documents were not in fact determinative of the case before Newey J and were of little assistance to the claimant Council as the Council had objected to the entire content of the websites in question. In any event, the judgment of Newey J was simply irrelevant.

4.3 The Judge then was highly critical of Mr Hyams for not recognising immediately (without having had any warning that the Judge might ask him or that the question might arise) that there was the possibility of the crime of perverting the course of justice and for merely referring (when the Judge asked him about the possibility of criminal proceedings) to the possibility of perjury. In fact, the Judge only asked him about the crime which might have been committed because he (apparently) looked puzzled when the Judge asked whether there were criminal proceedings arising out of the judgment of Newey J. The Judge said to him words to this effect: "*You look puzzled, Mr Hyams?*" Mr Hyams then said something like this: "*Your Honour, I had not given any thought to the question of whether or not there might have been a crime. I suppose there is the possibility of perjury.*" The Judge then indicated something like scorn for Mr Hyams' apparent ignorance of the criminal law, saying words to the effect that the crime was obviously perverting the course of justice.

4.4 The Judge made what the Defendant perceived to be aggressive and insulting comments to the Defendant when, during the cross-examination of one of the Claimant's witnesses, Mr Anthony Thomas, the Defendant shook his head in disbelief at some of his responses, which he (the Defendant) perceived to be evasive.

4.5 In stark contrast to the manner in which the Judge interacted with the Defendant, the Judge had friendly conversations with the Claimant's witnesses, including Ms Jackie Harborne. One concrete example is that in one conversation, it may have been with Mr Thomas, the Judge commented in a benign manner that a Governor of the Claimant was the Headteacher of a school which the Judge's son had attended a number of years previously.

4.6 The Judge made a sarcastic and insulting remark by way of a joke when Dr Peter Kent (who was called as a witness on behalf of the Claimant) said in cross-examination that he did not know by whom an application for a place at the Claimant's school had been made when it was in fact made by the Defendant and it later became clear that it was so made. The Judge then said: "*I bet you were happy when you found out the parent was the Defendant.*"

4.7 When Dr Kent was cross-examined by Mr Hyams, the Judge answered on Dr

Kent's behalf in relation to a critical part of the evidence on at least one occasion. That part related to the conduct of the Claimant in refusing to send the Defendant's son a year 7 information pack and refusing to allow him to attend an induction day even though he had been offered a place at the school conducted by the Claimant. The Judge then said to Dr Kent when he was being cross-examined about that refusal: "*You did not allow Mr Matalia's son to attend induction so as not to give him false hopes; perfectly understandable*". At the time of that refusal, however, the Defendant's son's offer of a place at the school had not been withdrawn and the legal position was (an employee of Warwickshire County Council had told the Defendant at the time) that the Defendant's son could not lawfully be denied attendance at the induction day and should have received an information pack. Refusing to send him such a pack amounted to the pre-emption of any decision whether or not to withdraw the offer of a place which had been made on the Claimant's behalf by the County Council. The County Council in fact persistently refused to withdraw the place because the County Council believed that it could not lawfully be withdrawn and it was withdrawn only when the Claimant told the County Council that it was going to make the decision to withdraw that place, and then did withdraw it, on the basis that the Defendant's application for a place had been made fraudulently. There had (as the Defendant had stated in his witness statement evidence) subsequently been an appeal to an independent appeal panel under the applicable legislation, and the appeal panel had (1) found no evidence of fraud, and (2) decided that the place was unlawfully withdrawn. In addition, the Local Government Ombudsman ("LGO") had originally recommended that the Claimant offered the Defendant's son a place at the school.

4.8 The Judge commented on past complaints about his own conduct and referred to how he felt when he received complaints in brown envelopes. The impression given was that the Judge understood how people felt when they received what were later decided to be baseless complaints. In fact, the Defendant's complaints against Dr Kent and the Claimant had been found by independent persons, namely the Department for Education, the statutory independent appeal panel to which reference is made in paragraph 4.7 above and the LGO, to be well-founded. Assuming that the Judge had read the Defendant's witness statements properly, the Judge must have known that.

4.9 When the Defendant said in oral evidence that a document which had purported to be written by Mr Mike Hickling, the Claimant's first witness, was not written in the manner claimed by Mr Hickling, the Judge was (it appeared) extremely irritated and, the Defendant felt, rude towards the Defendant. The Defendant explained why he believed that Mr Hickling had not written that document (as he had said in oral evidence) directly after the meeting which it described, and the Defendant said that Mr Hickling was attempting to pervert the course of justice. The Defendant said that no copy of the document had been revealed by the Claimant in the disclosure process and that page numbers for that document had not been included in the hearing bundle index (indicating that the document was not available at the time of the preparation of that bundle). He said also that the

document had been only provided to Mr Hyams only ten minutes before start of the trial, on the day before. The Judge apparently saw nothing of any concern in those circumstances, and continued to exhibit signs of being extremely irritated by the Defendant. The Judge refused to engage in any detailed analysis of the document.

4.10 However, the Judge had in fact prevented Mr Hyams for cross-examining Mr Hickling about the provenance of that document. Mr Hickling was the Claimant's first witness. Mr Hyams started to cross-examine Mr Hickling about that document and the Judge exhibited extreme irritation with the fact that he was doing so, and in effect shut down his cross-examination on the document. Mr Hyams protested to the Judge that the document had been disclosed only some ten minutes before the hearing had started, and the Judge dismissed his protest. However, a careful analysis of the document which Mr Hickling said he prepared immediately after the meeting which it described would have shown that there was good reason for thinking that the document could not have been written immediately after the meeting and could have been written only after the Defendant had, later that day, sent to Dr Kent a complaint about the manner in which the meeting had been conducted by Mr Hickling. If one adds to this factor the fact that the document which Mr Hickling said in oral evidence he wrote immediately after the meeting was not mentioned by or on behalf of the Claimant for over two years and was produced to the Defendant only 10 minutes before the hearing before the Judge commenced on 30 March 2015, then one can see that failing to permit Mr Hyams to cross-examine Mr Hickling on the document was unfair and exhibited bias on the Judge's part.

4.11 The Judge also said to Mr Hyams that it was "lazy" to ask question of a witness in cross-examination by asking the witness to look at a note of a meeting and asking questions about that note, instead of framing a question without reference to that note. Mr Hyams was then forced to proceed by paraphrasing the note, and after a while the Judge simply permitted him to ask questions by reference to the note, probably because it was by then evident that it was fairest to the witness to ask questions by reference to the document instead of paraphrased parts of the document.

4.12 The Judge was, it seemed to the Defendant, abrupt on a number of occasions. That abruptness was most evident when the Judge ended the hearing on both 30 and 31 March 2015, without asking whether it was a convenient moment for the cross-examination to be adjourned. The Judge did so apparently because of annoyance with, or because he was irritated by, the Defendant and/or his case.

4.13 The Defendant made an application by means of a letter for the recusal by the Judge of himself. That letter, which referred to and enclosed the relevant authorities (including *El-Farargy v El-Farargy & Ors* [2007] EWCA Civ 1149), was dated 6 May 2015 and was sent by email, with the covering email stating specifically that the email was being sent also to the Claimant's solicitors. The Judge refused to read the letter until the case had resumed on 16 June 2015,

stating on 13 May 2015 through his clerk even that it was "wholly inappropriate" for the Defendant to "seek to communicate directly with the Judge when [he, the Defendant, was] only part way through [his] evidence and, if it be the case, without reference to the Claimant's Solicitors". The Defendant then made a formal application, by filing an N244 Application Notice, for the determination of his application for the Judge's recusal. That application was not determined by the Judge, or anyone else, at any time. The Judge, rather, despite being referred to the applicable case law in an email, and the rationale for the request for his recusal at that point, criticised not only the Defendant but also Mr Hyams heavily for having communicated with the Defendant in relation to the Defendant's recusal application, on the basis that because the Defendant's cross-examination was part-heard, Mr Hyams should not have communicated with the Defendant at all. Only when the case resumed on 16 June 2015 did the Judge (apparently) read the letter dated 6 May 2015 and its enclosures. He took 10 minutes to do so and gave an immediate judgment stating that he was satisfied that he was not obliged to recuse himself. He then, in his judgment of 24 September 2015, described the Defendant's application for recusal as being typical of the conduct of which the Claimant complained.

4.14 Having at first made much of the judgment of Newey J in *Warwickshire County Council v Matalia*, including by suggesting that it was relevant, the Judge, in his judgment of 24 September 2015, said that he had not taken it into account. If he knew that he should not take it into account, then he should have refused to read it in the first place. The fact that he read it supports strongly the proposition that he had already formed a strong view of the merits before he started to hear oral evidence.

4.15 The Judge, for no apparently good reason, has refused to protect the anonymity of the Defendant's sons by redacting the transcript of his judgment to do so.

Ground 4: wrongful grant of an injunction

5 There was no justification for granting the application for an injunction: the only ongoing matter, or "live" concern, was the websites about which the Claimant complained, and in the circumstances they were appropriately to be considered only in a claim of defamation. In addition, there was no objectively credible evidence that the Defendant was, by maintaining those websites, intending to procure either of the results stated in section 1(1A)(c) of the PHA 1997. Thus, the grant of the injunction was wrong, and the claim should have been dismissed.

OLIVER HYAMS

12 October 2015

IN THE COURT OF APPEAL, CIVIL DIVISION **Ref: /2015**
ON APPEAL FROM THE COVENTRY COUNTY COURT
BEFORE HIS HONOUR JUDGE GREGORY

BETWEEN:

AMIT MATALIA

Appellant/Defendant

- and -

LAWRENCE SHERIFF SCHOOL

Respondent/Claimant

SKELETON ARGUMENT IN SUPPORT OF GROUNDS OF APPEAL

Ground 1

That which was said by the Defendant in the documents on which the Claimant relied was not harassment within the meaning of sections 1 and 7 of the Protection from Harassment Act 1997 ("PHA 1997")

1 While there is now a body of authority in the High Court and the Divisional Court concerning the question whether words (whether written or spoken) can constitute harassment within the meaning of the PHA 1997, there is no decision of the Court of Appeal concerning directly the extent to which such words can properly be taken to do so.

2 The most comparable case in the High Court to this one is *Merlin Entertainments plc v Cave* [2014] EWHC 3036 (QB), [2015] EMLR 3. *Plavelil v Department of Public Prosecutions* [2014] EWHC 736 (Admin), on which the Judge relied in support of his conclusion that there was here harassment, concerned statements which were obviously untrue, and which were highly damaging to the victim. Here, the statements which the Defendant made, and which were (please see below) the only "live" matter which could

in the circumstances have justified the making of an injunction, constituted allegations made on websites maintained by or on behalf of the Defendant of

2.1 illegality on the part of the Claimant's relevant employees or officers in relation to

2.1.1 the withdrawal of an offer of a place at the school conducted by the Claimant ("the School");

2.1.2 a failure to follow the Claimant's own complaints process; and

2.1.3 the subsequent determination not to consider the Defendant's further application for such a place in the light of that withdrawal;

and

2.2 victimisation and race discrimination on the part of those employees and/or officers.

3 Copies of the relevant website pages in their most recent form at the time of the trial are at **[123-132]** i.e. pages 123-132 of the permission bundle pages.

4 The allegations were all objectively sustainable. The evidence showing that they were objectively sustainable was, for present purposes, to be found in the following documents:

4.1 correspondence consisting of an email of 6 July 2013 and subsequent correspondence between the parties up to and including 9 August 2013 **[155-162]**; this shows that the allegation of victimisation was on its face capable of being good and it also shows the factual background to the allegations of illegality in the application of school admissions law;

4.2 a letter from the Department for Education of 12 September 2013, concluding that the Claimant had not followed its own complaints procedure properly **[185-186]**;

4.3 a decision of the Local Government Ombudsman ("LGO") of 19 May 2014 about the admissions issues and a subsequent email and letter written on behalf of the LGO, making it clear that the LGO had found that there had been serious failings on the part of the Claimant's employees and officers in regard to the application of school admissions law **[187-196]**; and

4.4 the decision of an independent appeal panel, established under the School Standards and Framework Act 1998 to determine the Defendant's appeal against the refusal of admission of his younger son to the School, of 24 November 2014 **[197-201]**.

5 *Merlin v Cave* points towards the most coherent and sensible interpretation of the PHA 1997. For example, bearing in mind the fact that a person who is an employee or a member of the corporate body which is responsible for the conduct of a state-funded school must expect and be expected to face criticism from time to time, that which Elisabeth Laing J said in paragraph 56 of her judgment in *Merlin v Cave* is of particular assistance. There, she said this in relation to a public limited company:

> "An almost inevitable consequence of occupying a position of responsibility in a plc, the business of which affects many members of the public, is that, at times, a person will be exposed to robust, and occasionally upsetting, criticism. Its officers should, of course, be protected from real harassment. But they are not immune from criticism, even if that is misguided and intemperate. If such criticism is defamatory, the remedy is a claim in defamation. If such a claim succeeds, the level of damages will reflect the distress caused by the defamation." (Emphasis added.)

6 When deciding whether there has been harassment in any particular case, it is necessary to apply the (much-cited) decision of the House of Lords in *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224. As Elisabeth Laing J put it in paragraph 36 of her judgment in *Merlin v Cave*:

> 'The issue in *Majrowski* was not whether harassment had occurred, but whether

> an employer could be vicariously liable for harassment by his employee of another employee. The approach of Lord Nicholls and of Baroness Hale is, nevertheless, helpful. Lord Nicholls said (speech, paragraph 30), that "courts will have in mind that irritations, annoyances, and even a measure of upset, arise at times in everybody's dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable, the misconduct must be of an order which would sustain criminal liability under section 2." Baroness Hale said, at paragraph 66, "All sorts of conduct may amount to harassment. It includes alarming a person or causing her distress: section 7(2) . But conduct might be harassment even if no alarm or distress were in fact caused. A great deal is left to the wisdom of the courts to draw sensible lines between the banter and badinage of life and genuinely offensive and unacceptable behaviour".' (Emphasis added.)

7 The manner in which in paragraphs 63-64 of her judgment in *Merlin v Cave* Elisabeth Laing J approached the claim in relation to the 'initial public offering' document relating to *Merlin Entertainments plc* is also very helpful. The manner in which she approached the allegations to which she referred in paragraphs 66, 68-72, 80-82 and 84-86 of her judgment is instructive also: see paragraphs 67, 73, 83 and 87 respectively. So is the manner in which she dealt with the question whether there was a course of conduct which amounted to harassment of anyone: see paragraphs 95-101.

8 Articles 8 and 10 of the European Convention on Human Rights are very much in play in this context. This is most clear from the recent decision of the Court of Appeal in *Levi v Bates* [2015] EWCA Civ 206 where, in paragraph 16, Briggs LJ said this:

> "Before turning to the authorities, Articles 8 and 10 of the ECHR have an obvious bearing upon the interpretation and application of the Act, in particular where the conduct complained of consists of, or includes, speech or published material. As frequently happens, Articles 8 and 10 are likely to pull in opposite directions. The conduct complained of may well impact upon the victim's private life, but a broad interpretation of harassment, in relation to speech or published material, may plainly engage Article 10, if the court is minded to prohibit it, or visit damages upon the defendant."

9 In that case, a claim of defamation in relation to some of the written statements about which complaint was made under the PHA 1997 had been made by the time of the

hearing of the claim of harassment, and the claim of defamation had been successful. At no time was the point taken that the statements were merely defamatory, because (see for example paragraph 14 of the judgment of Briggs LJ) they included invitations to go to the home of the claimants, which was identified in the statements, and because (see paragraph 7(e) of the first instance judge, set out in paragraph 7 of the judgment of Briggs LJ) the claimants' home telephone number was identified, with an implicit invitation to the reader to call that number and make harassing telephone calls.

10 It is submitted on behalf of the Defendant here that where statements are merely potentially defamatory (without wishing in any way to suggest that the making of a defamatory statement is anything other than a serious matter), the PHA 1997 should be regarded as not being applicable unless all of the protections of the common law, statute and Article 10 are applied. But even then there is room for confusion. It is accordingly submitted that unless the claim is stated as including a claim of defamation, the PHA 1997 should be regarded as being engaged in relation to the written or spoken word only in limited circumstances.

11 It is submitted that it is only if

11.1 a potentially defamatory statement is found (after a hearing at which the question of the truth or otherwise of that statement is expressly in issue, or admitted) by the court to be untrue, or

11.2 there is something going beyond "simple" defamation (as occurred in *Levi v Bates*) in the statement

that a statement for which there is a remedy in the law of defamation should be capable of being the subject of a successful claim under the PHA 1997.

12 Here, the accuracy of the website statements on which the Claimant relied (i.e. whether or not the Defendant was correctly asserting wrongdoing on the part of the Claimant) was

not expressly considered by the Judge, with the glaring exception that in one respect (please see below in relation to ground 2) he, plainly erroneously, found that a complaint of the Claimant of inaccuracy in a document produced by the Defendant was well-founded.

13 Thus, the Judge should have considered whether there was in the website statements on which the Claimant relied something more than "mere" defamation. He did not do so. Instead, he assumed, wrongly in the only objectively verifiable respect, that they were true.

14 In any event, the website statements on which the Claimant relied were all capable, if they were defamatory, of being the subject of a claim of defamation, and none of them, viewed objectively, went beyond "mere" defamation. In addition, the most objectionable of them were at least possibly, if not actually, true.

15 As for the other statements on which the Claimant relied, the Judge failed to distinguish between statements which showed what the Claimant's intention was (i.e. for example to, as the Judge found, procure the resignation of, for example, the head teacher, Dr Peter Kent), and other statements of views held by the Defendant. Those other statements were in themselves merely strong expressions of the views of the Defendant and should accordingly not have been found to be conduct of which the Claimant could make a legitimate complaint under the PHA 1997.

Ground 2

Material error of fact

16 The Judge decided as a matter of fact (in what is at least arguably the only finding of fact which he did make about the basis of the allegations in the statements made by the Defendant on which the Claimant relied) that the Defendant had deliberately misstated the position in regard to victimisation within the meaning of section 27 of the Equality Act 2010. The Judge apparently did so by accepting, uncritically, the following paragraph

(paragraph 38) of the witness statement of Dr Kent **[77]**:

> 'During this time the Defendant also sent an email to Warwickshire County Council (who administer the school's admissions process on its behalf) (PK20), which stated that "The withdrawal of [my son]'s place was unlawful and only happened after I made a formal complaint of discrimination and assaults in relation to my elder son to the Head of LSS. The withdrawal after 4.5 months was a deliberately vindictive and discriminatory act orchestrated to cause maximum damage to my younger son." The Defendant is fully aware that the email he sent in relation to those allegations (which did not specifically refer to racial discrimination) was sent at 22.31 on 16th July 2013 (PK21) whilst the decision to withdraw the place had been made by a panel of governors on the morning of the 16th July 2013, however, he continues to repeat these allegations in various publications and correspondence.'

17 In fact, as the Defendant expressly stated in paragraph 22 of his second witness statement **[116]**, he had sent an email on 6 July 2013 alleging the possibility of discrimination because of race on the part of "staff at the school". That email **[155-156]** was evidently put before the Claimant's relevant employees and officers, because the Claimant's then solicitor responded on the Claimant's behalf to it in a letter dated 8 July 2013 **[157]**.

18 This error on the part of the Judge was highly material: it must have affected his judgment in a major way. It was (at least arguably, if not actually) the only matter of fact of those which were relevant to the website and other statements made by the Defendant about the Claimant on which the Judge came to a conclusion.

19 That major error of fact can have arisen only from a failure properly to read the Defendant's witness statement and exhibits, or from a failure to pay proper attention to the evidence as a result of having a predetermined view, i.e. the Judge, instead of evaluating the evidence objectively by coming to a conclusion after considering the evidence and considering the parties' submissions, arrived at a view on the ultimate issue early on in the proceedings and then looked for evidence to support that view. In either event, i.e. whichever of those two occurred, the trial was tainted by a procedural irregularity of such a sort that a retrial should be ordered unless (as it is the Defendant's case it should) the Court of Appeal concludes that no court, properly directing itself,

could have concluded that there was here harassment within the meaning of the PHA 1997.

Ground 3; apparent bias

20 The factual matters on which the Defendant relies in support of his claim that the Judge exhibited apparent bias are stated in full in the Grounds of Appeal, and they are therefore not repeated here. The evidential basis for those factual matters is to be found in

20.1 the transcript of the proceedings of which the Defendant is currently seeking a copy,

20.2 the letter of 6 May 2015 which the Defendant sent to the Judge, inviting the Judge to recuse himself **[202-207]**,

20.3 the emails associated with that letter **[208-214]**, and

20.4 the emails concerning the anonymity of the Defendant's sons in the transcript of the Judge's judgment **[238-240]**.

21 The Defendant relies here on *Porter v Magill* [2002] 2 AC 357. The question is whether a fair minded and informed observer would conclude that there was a real possibility that the Judge was biased. It is submitted that, unusually, there is such evidence here. The Judge went beyond mere irritability with the Defendant and his case (and, in some cases, his advocate) and exhibited such signs of bias that his judgment should be set aside.

Ground 4: wrongful grant of an injunction

22 Section 3A of the PHA 1997 (of which the analysis of Elizabeth Laing J in *Merlin v Cave* at paragraphs 24 and 25 is helpful here) shows that the Claimant was here able to seek an injunction only in order to prevent the Defendant from harassing employees or

governors of the Claimant with the intention of persuading "any person" to do something which he/she was not obliged to do, or not to do something which he/she was entitled to do.

23 It was not in dispute at the hearing before the Judge that the Defendant had steered well clear of the Claimant's premises since his meetings of October 2012. He had not telephoned any member of the Claimant's staff or governors since July 2013, and the telephone call of 6 July 2013 about which complaint was made by the Claimant was in fact found by the Judge to be in no way harassment of its recipient (Mrs Jackie Harborne). Thus, the only "live" things about which complaint was made by the Claimant were documents. The only documents which were being amended in any way, or maintained, were the Defendant's website pages **[123-132]**.

24 In the circumstances, namely that

24.1 there was a remedy in the law of defamation for those website pages, subject to its checks and balances and in a forum in which the truth or otherwise of the factual allegations could be determined;

24.2 the factual basis for the statements made in those website pages was not expressly in issue in the hearing before the Judge;

24.3 there was no threat of any other action on the part of the Defendant in relation to the School which could conceivably be said to constitute part of a course of conduct consisting of harassment within the meaning of the PHA 1997; and

24.4 the only thing which the Defendant was now saying which could on any view be regarded as putting pressure on the Claimant was that in his view "Peter Kent and the Governing Body" should resign **[123]**,

it was plainly wrong to grant the injunction sought. In fact, of course, a call for the

resignation of a particular person is always seen merely as a graphic way of stating a criticism of that person. Nobody would normally suggest (and therefore no reasonable person would think) that such a call amounts to putting pressure for the purposes of section 3A of the PHA 1997 on someone to do something which he/she would otherwise be entitled not to do.

OLIVER HYAMS

Devereux Chambers
Queen Elizabeth Building
Temple
London
EC4Y 9BS

hyams@devchambers.co.uk

14 October 2015