IN THE COVENTRY COUNTY COURT **Claim No: AOOCV560**

BETWEEN:

THE LAWRENCE SHERIFF SCHOOL TRUST **Claimant**

- and -

MR AMIT MATALIA **Defendant**

SKELETON ARGUMENT FOR THE DEFENDANT
FOR HEARING OF 7 JANUARY 2015

Introduction and overview

1 This claim is almost entirely misconceived in law. It is also not well-founded on the facts, in that there is nothing in the circumstances which justified making a claim under the Protection from Harassment Act 1997 ("the PHA 1997").

2 In what follows, the relevant legal tests are first stated, by reference in particular to the helpful judgment of Elizabeth Laing J in *Merlin Entertainments plc v Cave* [2014] EWHC 3036 (QB), [2015] EMLR 3 (of which a copy is enclosed with this skeleton argument).

The relevant tests to be applied here; the applicable law

3 A claim of harassment contrary to section 1(1) of the PHA 1997 can be made only by an individual, i.e. and not a corporation: see paragraph 25 of her judgment in *Cave*, where Elizabeth Laing J said this:

> "[Parliament] has not given [corporate claimants] protection against direct harassment. But it has, to a limited extent, conferred protection on them from pressure being exerted on them by a defendant who harasses their employees. Two things are significant. First, except to this extent, Parliament has not

> protected corporate claimants from harassment. Second, there is no claim under section 1(1A) here. I take these factors into account in assessing the claim which is pleaded against Dr Cave."

4 By way of amplification, it can be noted that in the previous paragraph of her judgment in *Cave*, Elizabeth Laing J said this:

> "Section 1(1A) could have been relied on if the corporate Claimants thought that Dr Cave was harassing their officers, employees, and agents in order to put pressure on one or more of the corporate Claimants not to do something it was entitled to do, or to do something it was not obliged to do. This provision gives some protection to corporate claimants (among others) which are subjected to illegitimate pressure by the harassment of their employees. Corporate claimants are entitled to rely on section 1(1A) because section 7(5) does not require the "person" referred to in section 1(1A)(c) to be an individual. The reason for the limited application of the PHA to corporate claimants is, no doubt, the fact that while their employees can experience alarm, anxiety and distress, they cannot."

5 It was for that reason that Elizabeth Laing J said the words set out in paragraph 3 above. She prefaced them with these words:

> "Section 7(5) and section 1(1A) show that Parliament has carefully considered the position of corporate claimants."

6 In paragraph 29 of her judgment in *Cave*, Elizabeth Laing J said this:

> "Section 3(1) provides that an actual or apprehended breach of section 1(1) (but not of section 1(1A)) may be the subject of a claim in civil proceedings by the person who is the victim of the course of conduct in question."

7 Reference to section 3A puts the matter beyond doubt: a corporate claimant cannot make a claim on behalf of its employees. It can make a claim only on its own behalf, and only for an actual or threatened breach of section 1(1A)(c). The application can only be for an injunction, i.e. not damages. This much is explicitly stated in paragraph 31 of the judgment of Elizabeth Laing J in *Cave.*

8 It is noted that in paragraph 5 of the details of the claim (at **7**, i.e. page 7 of the hearing

bundle), this is said:

> "Under the principles of *Smithkline Beecham plc v Avery [2009] EWHC1488* (QB) an employer can bring a claim on behalf of its employees for a protection from harassment injunction."

9 That is simply wrong if and in so far as it asserts that a corporate (or any other) employer can bring a claim under section 1(1) of the PHA 1997 on behalf of its employees. The claim in *Smithkline Beecham plc v Avery* was (see the first sentence of paragraph 1 of the judgment in the case, which is enclosed with this skeleton argument) for precisely the kind of protection which section 1(1A)(c) of the PHA 1997 confers. Paragraphs 40-43 of the judgment of Jack J in that case show that the only point that was decided in that regard was that the claimants (who were all companies, i.e. corporate bodies), and not just natural persons, could make a claim under section 1(1A)(c).

10 If there is a valid claim made by an individual under section 1(1), then (see paragraphs 39-41 of the judgment in *Cave*) if the only claim is in reality of defamation, the rule in *Bonnard v Perryman* [1891] 2 Ch 269 will apply. That rule is that, in general, the court will not restrain by interim injunction the publication of statements which are said to be defamatory, but which a defendant will seek to justify at trial. Thus, where there is a claim for an interim injunction to prevent claimed harassment because of a statement which is alleged to be defamatory, the first question for the court when deciding whether or not the injunction should be granted is whether "the conduct complained of has extra elements of oppression, persistence and unpleasantness and therefore crosses the line referred to in the cases": see the opening sentence of paragraph 41 of *Cave*.

11 Section 12(3) of the Human Rights Act 1998 applies here, in the manner in which it was interpreted by the House of Lords in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253: see paragraphs 43-48 of the judgment in *Cave*.

12 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. The position in relation to a public limited company was stated by Elizabeth Laing J in *Cave* in this way in paragraph 56 of her judgment:

> "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."

13 When deciding whether there has been harassment in any particular case, it is necessary to apply the decision of the House of Lords in *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224. As Elizabeth Laing J put it in paragraph 36 of her judgment in *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".'

14 It is useful to draw by analogy on the manner in which in paragraphs 63-64 of her judgment in *Cave* Elizabeth Laing J approached the claim in relation to the 'initial public offering' ("IPO") document relating to *Merlin Entertainments plc*. In fact, the manner in which she approached the allegations to which she referred in paragraphs 66, 68-72, 80-82 and 84-86 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.

What is the claim about here? What is the Defendant's response to the individual complaints?

15 There is, with one exception (which is considered below) no possible claim here of a breach by the Defendant of section 1(1A) of the PHA 1997, in that there is no claim that he is doing anything which is intended by him to persuade the Claimant from doing anything that it is entitled to do, or to do something that it is not entitled to do. As for the claim which does fall within section 1(1A), it is (for the reasons stated below) hopeless. Thus all elements bar one of this claim should be struck out on the basis that they are not even arguable. The other element is hopeless, for the reasons stated below. That which is said below is without prejudice to this general contention.

16 The witness statement of Dr Kent (at **23-48**) in large part merely proves (and quotes from) documents the existence and provenance of which is admitted by the Defendant. The complaints made by Dr Kent are in fact claims of defamation, and, moreover, defamation of a sort which is far less serious than the defamatory statements which were in issue in *Cave*. The complaints and the Defendant's responses to them (the complaints are underlined; the responses are not), are as follows:

16.1 That the Defendant sent the email at **50-51**. The email alleges abuse by other pupils of the Defendant's son and that the school was not handling the situation at all. The suggestion that the mother of one other pupil should be contacted and informed that the matter was to become a police matter was not harassment. The allegations made to the school of a failure to handle the situation are not harassment, nor are they remotely actionable in any other way.

16.2 That the Defendant sent the email at **53-55**. It was a complaint email. A parent is entitled to complain. A publicly funded school has to accept that a parent has a right to complain, in critical terms if he or she so wishes. A threat to contact the press was not harassment. The law of defamation protects the school and its

employees quite sufficiently here.

16.3 That the Defendant sent the email at **61**. It is innocuous for present purposes.

16.4 That the Defendant did what he is alleged in paragraphs 19-21 on page **28** to have done. That which is said in those paragraphs is denied. The Defendant's response is in box 5 of the Scott Schedule at **377-378**. In fact, that which is described in paragraphs 19-21 is no more than that which can be expected by a state school from a vociferously unhappy parent. The Claimant can simply refuse to meet with the Defendant if it so wishes: it is not bound to afford him meetings if it perceives him to be harassing. That is a matter of the internal management of the Claimant's school (i.e. the school, Lawrence Sheriff School, for which the Claimant is, as its proprietor within the meaning of section 579(1) of the Education Act 1996, responsible). It is not the subject of a proper claim here.

16.5 That the Defendant sent the email at **63-64**. In fact, no sensible person would object to the recording of a meeting of the sort in question. While there is a sensitivity on the part of some people to being recorded, in a position of public responsibility, which is the case in a state school, what occurs is of importance, so anything which helps to record that which actually occurred is to be welcomed rather than shunned. On any view, and in any event, the email at **63-64** is clearly not the proper subject of a claim under the PHA 1997. That which is said in paragraph 23 of Dr Kent's witness statement, at **29**, just does not bear scrutiny. If staff members told untruths, then the revealing of a recording would cause them to tell the truth. If they told the truth, and are sure of it, then they need not be concerned. In any event, recollections of events vary, and the assertion of a different perception of an event together with an assertion that the event may have been recorded cannot possibly be said to be unfair on the members of the Claimant's staff. In fact, as stated in paragraph 5 of the Defendant's witness statement, at **209**, the Defendant inadvertently recorded the meeting, in the manner he describes there. That was not harassment.

16.6 That the Defendant sent the letter at **70-71**. The gist of the complaint appears to be that the Defendant sent the letter at **70-71** to the governor in question in person rather than via the clerk to the governing body of the school. There can be no sensible criticism of this, bearing in mind that the governor can be expected to have dealt with the letter in the way in which any other governor who is written to individually would do so; namely, by dealing with it as a governor would in the normal course of events. The Defendant was seeking a meeting of the governing body to consider his allegations. That was not harassment.

16.7 That the Defendant sent the email at **84**. It is at least arguable that an attempt by the head teacher of a state school to stop a parent from writing to the governing body of the school directly, by saying that the parent should write to the head teacher first (which is what was sought by Dr Kent in the email at **82**), is seriously improper. In any event, the email at **84** was written to Dr Kent's Personal Assistant, and not the Chair of governors himself. The letter states in terms that if "*the governor concerned is not happy with direct communication, he needs to contact me directly requesting I do not contact him directly again. I will file such a request with my data and respect that individual governor's request.*" It cannot possibly be said to have constituted harassment to write the email at **84**.

16.8 That the Defendant sent the email at **89-91 (a clean copy is at 246-248)**. The email copied as those pages in no way constitutes harassment. A concerned parent, who is concerned not only about his own son but also about the manner in which a state school is dealing with bullying is entitled, if not morally obliged, to take the matter up in strong terms with the governing body of the school. Even if the terms used in the email are stronger than the recipients would have liked, that does not entitle them to come to court and seek an injunction, preventing the parent from writing in critical terms to the school (which the injunction sought would certainly do). The injunction sought would in reality constitute a monstrous invasion of the rights of a pupil at a state school. The State requires the

attendance of children aged 5-16 at school, unless they can be seen (by the State, acting through a local authority) to be effectively educated at home (see sections 437, 443 and 444 of the Education Act 1996). The State surely cannot properly gag those children's parents when they are critical of the manner in which the school is (at public expense) conducted. Paragraph 56 of the judgment of Elizabeth Laing J in *Cave* should be borne in mind here.

16.9 That the Defendant sent the email at **94-96**. The email contains nothing which can remotely be said to be harassing in nature. Dr Kent has to expect complaints. The email is fair in its statement of the Defendant's complaints.

16.10 That the Defendant sent the email at **98-99**. The email is innocuous for present purposes. It is not harassment.

16.11 That the Defendant sent the email at **101-102**. By now, the Defendant was becoming a little exasperated, as can be seen from the terms of the email at **101-102**. The recipient was a solicitor. Solicitors can be expected to be robust and deal with strongly-worded criticisms of them and their clients. That which Elizabeth Laing J said in paragraph 67 of her judgment in *Cave* is applicable by analogy. She there said this about the allegations which were the subject of paragraph 66 of that judgment:

> "I do not consider that it is arguable that the receipt by a solicitor instructed by companies in the circumstances of this case of such a document can conceivably amount to harassment of him, either on its own or taken together with the September 2013 email. Nor do I consider that the content crosses the *Majrowski* line, as respects anyone else, for example, the members of the Merlin board, or Mr Varney." [Mr Varney was the only individual claimant and therefore the only person who could in that case make a valid claim, but it is clear that Elizabeth Laing J considered the matter from all possible angles for the sake of completeness.]

Reliance by the Claimant on the email at **101-102** is therefore totally mistaken.

16.12 That the Defendant sent the email at **104**. There can be no sensible complaint about the email at **104**.

16.13 That the Defendant sent the email at **108-109**. Interestingly, the Secretary of State concluded that the Claimant had not complied with its own complaints procedure (see **338-339**). In any event, it cannot sensibly be said that the email at **108-109** constituted harassment.

16.14 That the Defendant contacted a governor at her home address on 2 April 2013. The Defendant's response to this is in box 15 of the Scott Schedule, on page **381**. The documents to which he refers in that box are at **267-268**. There is no hint of harassment there. There is no suggestion made by the Claimant that the governor in question said that the Defendant should not have contacted her, or should not contact her again.

16.15 That the Defendant sent the email at **112-113**. That email concerned the withdrawal of place for the Defendant's younger son. No complaint could conceivably be made of that email, let alone a complaint of harassment. The withdrawal was at least arguably unlawful, and in any event what occurred after that withdrawal, which was the subject of complaint in that email, was subsequently found by the Local Government Ombudsman to have involved a failure to offer the Defendant "a right to which he [was] entitled by law", which failure was "serious" and "[went] to the heart of the school admissions process" (see **359-360**).

16.16 That the Defendant sent the email at **116-118**. That email is again innocuous in the context in which it was sent.

16.17 That the Defendant sent the email at **120-126**. That email is again innocuous in the context in which it was sent.

16.18 That the Defendant published the website a print-out of which is at **128-129**. Again, reference should be made to the passage of the judgment of Elizabeth Laing J in *Cave*, at e.g. paragraphs 63-64.

16.19 That the Defendant published the websites, print-outs of which are at **132-133, 152-164, 205 and 207**. These are well outside the scope of the PHA 1997. If the Claimant wishes to take action about them, then it can seek a remedy in the law of defamation (although it is the Defendant's case that the law of defamation has not been breached by him in this, or any other, regard). Certainly at this stage, but in any event, the right to freedom of speech must prevail, given that there is nothing remotely harassing in those website pages. Pages **161-164** are in any event in the public domain elsewhere. The Defendant's complaint to the Ombudsman was successful and the Ombudsman came to the conclusion that the failures of the Claimant were serious (see above). What complaint could there possibly be about putting that finding on a website, when it is already on the Ombudsman's website? Furthermore, the factual allegation stated in paragraph 64 of Dr Kent's witness statement, at the top of page **47**, is shown by paragraph 21 of the Defendant's witness statement, at **212**, to be true. There can be no harassment therefore in stating that which is the subject of complaint in paragraph 64 on page **47**.

16.20 That the Defendant wrote and submitted the document at **136-144**. It is difficult to see on what basis the Claimant could credibly argue that submitting that document as part of a consultation process is harassment. A reasonable person would not (as Dr Kent says, in paragraph 43 of his witness statement, at **38**) have been made to fear for his safety or the safety of his wife and family by reason of the content of the document at **136-144**. The same is true of the matters dealt with in paragraph 49 of Dr Kent's witness statement, at **40**. If Dr Kent wants to stifle criticism of him as a head teacher, then he should seek to do so in the law of defamation, which is apt for that to which he objects in the document at **136-144**, and not the law of harassment. (He himself, of course, has not sought a remedy

here.) The words of Elizabeth Laing J in paragraph 73 of her judgment in *Cave* in relation to the criticisms described in paragraphs 68-72 of that judgment are apt here:

> 'Mr Varney describes these allegations as "highly alarming and distressing and disgraceful". I consider that Mr Varney's description of some of the allegations suggests a degree of oversensitivity. Nonetheless, I have considered carefully whether the comments, even if they are wholly or partly true (as to which I express no view) cross the *Majrowski* line from robust comment to oppressive and unnecessarily and unacceptably personal attacks. I take into account that they have been widely circulated both inside, and outside, the Claimant companies. It is one thing to criticise a company's record and the public system of regulation. It might be quite another to attack an individual repeatedly and publicly in a way which is very likely to cause him embarrassment and hurt, and to cause those attacks to circulate and re-circulate. This might not be a reasonable way to conduct a campaign, even if that campaign would otherwise be justified and in the public interest (as to which I again express no view). Nonetheless, I do not consider either, that this arguably crosses the *Majrowski* line, or that a claim that it does so is more likely than not to succeed.'

16.21 <u>That the Defendant wrote and sent the emails at **146-150**</u>. Any mature and sensible governing body that considered that a parent had written submissions in the name of other persons would simply take that belief into account in deciding what to do about the matter which was the subject of the consultation. If the points are good, they are good. If they are bad, they are bad. The words of Elizabeth Laing J in paragraph 79 of her judgment in *Cave* concerning a letter before action written to an employee of one of the claimant companies are of value here by analogy. She said this:

> "I do not consider that the mere writing of a letter before claim in these circumstances, even if sent to Mr Smith's home address, was arguably harassment of Mr Smith, or that such a claim would probably succeed. Dr Cave had not been made the subject of a civil restraint order. He was entitled to bring any claim before the court. It is nothing to the point if this claim appears, objectively, unlikely to succeed. It might be otherwise if there were evidence that Dr Cave did not believe at the time he wrote the letter, that he had a claim, and intended to bring it. There is no such evidence."

16.22 That the Defendant "has no intention of working with the school to resolve these matters and move on": paragraph 54 of Dr Kent's witness statement, at **41**. This is not a proper complaint. It is difficult to know why it is in Dr Kent's witness statement. There is no legal obligation to sign a "school-parent agreement".

16.23 Dr Kent complains in paragraphs 56 and 58 of his witness statement (**42**) about the words set out in paragraphs 55 and 57 of his witness statement, which are taken from the document at **191-199**. The words of Elizabeth Laing J, set out in paragraph 16.20 above, apply here too. The complaints of Dr Kent in paragraphs 56 and 58 of his witness statement are misplaced.

16.24 Dr Kent complains in paragraphs 60-61 of his witness statement, at **44-45**, about the words set out in paragraph 60, which were taken from the document at **173-189**. The complaint stated in paragraph 61 of the witness statement, at **45**, does not bear scrutiny, given that the Defendant has merely stated in the passage set out at the end of paragraph 60, at the top of page **45**, an invitation to pay to transport to his current school the son whose place at Lawrence Sheriff School was withdrawn and then not re-offered. In addition, if (as is, indeed, almost certainly the case) the Claimant was not entitled in law to withdraw the offer of a place for that son, and was then (as the Ombudsman found) not entitled in law to refuse to offer him a place without processing his new application for a place, and was (as the Ombudsman found) not entitled to refuse to allow the Defendant to appeal against that refusal, then section 1(1A)(c) cannot possibly have been breached.

16.25 That the Defendant sought, under the Freedom of Information Act 2000, the names of governors who were involved in each stage of the decision-making process which led to the withdrawal of the offer of a place at the school for the Defendant's younger son: see paragraph 59 at page **43**. This is another misplaced complaint. The proper and sensible remedy (if one was needed) was to refuse the

application, and that is what occurred.

16.26 That the Defendant has "made numerous demands that the governors resign, and ... [has] stated that he will initiate legal action for misfeasance in public office against the governors (PK33) [i.e. **203**]": paragraph 62, at **45-46**. This is well outside the scope of the law of harassment: the words of Elizabeth Laing J set out in paragraph 16.21 above are apt here, taken together with that which she said in paragraph 101 of her judgment in *Cave*.

16.27 It is assumed that paragraph 65 of Dr Kent's witness statement, at **47**, is not intended to be the subject of complaint in these proceedings. For the avoidance of doubt, it cannot be.

16.28 That the Defendant states "the professions of some of the other governors but more disturbingly now includes the year of birth of various staff members and governors, including [Dr Kent]": page **47**. This is surely innocuous in the context: the website page is a comment, which is outside the scope of the law of harassment.

Submissions on behalf of the Defendant

17 The only thing which gets anywhere near a valid claim by the Claimant, bearing in mind that the Claimant can make a claim only under section 1(1A)(c) of the PHA 1997, is that which is said in paragraph 61 of Dr Kent's witness statement, at page **45**. Yet the content of that paragraph is plainly ill-founded on the facts, in particular (but not only), given that the Claimant was adjudged by the Local Government Ombudsman to have failed to offer the Defendant "a right to which he [was] entitled by law", which failure was "serious" and "[went] to the heart of the school admissions process". Thus, if by saying what he has been saying, the Defendant has been seeking to get the Claimant to give his son a place at the school, then he has simply been seeking to get the school to honour its legal obligations, and section 1(1A)(c) has not on any view been breached.

18 As for the allegations of actual harassment, they are flimsy indeed, for the reasons stated above.

19 On any view, the application for an interim injunction should be dismissed, with costs. In fact, the whole of the claim is misconceived.

OLIVER HYAMS

Devereux Chambers
Queen Elizabeth Building
Temple
London
EC4Y 9BS

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