Neutral Citation Number: [2014] EWHC 3036 (QB)

Case No: HQ14X03161

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/09/2014

Before :

THE HONOURABLE MRS JUSTICE ELISABETH LAING

- -

Between :

(1) Merlin Entertainments LPC (on behalf of its officers, employees and agents) & (2) Merlin Attractions Operations Limited (for and on behalf of its officers, employees and agents) & (3) Chessington World Of Adventures Operations Limited (for an on behalf of its officers, employees and agents) & (4) Merlin Entertainments Group Limited (for an on behalf of its officers, employees and agents) & (5) Nicholas Varney (for himself and on behalf of all of the officers and employees of the First, Second, Third and Fourth Claimants pursuant to CPR Part 19.6)	**Claimant**
- and -	
Peter Cave	**Defendant**

- -
- -

Mr Ashworth QC and Ms Ruth den Besten (instructed by **Knights Solicitors LLP**) for the **Claimant**
Mr Strauss QC acting Pro Bono for the **Defendant**

Hearing dates: 26 August and 28 August 2014

- - - - - - - - - - - - - - - - - - - -

Judgment Approved by the court
for handing down
(subject to editorial corrections)

If this Judgment has been emailed to you it is to be treated as 'read-only'.
You should send any suggested amendments as a separate Word document.

Mrs Justice Elisabeth Laing DBE :

Introduction

1. The Claimants are four companies and one individual. The companies are involved in running amusement parks, including Chessington World of Adventures ("the Park"). I will refer to them as "Merlin" (first Claimant), "MAOL" (the second Claimant), "Chessington" (the third Claimant) and "Merlin Limited" (the fourth Claimant). Merlin owns several amusement parks. Merlin also owns Chessington, MAOL and Merlin Limited. The fifth Claimant is the Chief Executive Officer of Merlin Limited and a director and employee of Merlin.

2. This is an application by the Claimants for an interim injunction restraining the Defendant, Dr Cave, from (in short) sending mass emails and setting up websites in which he campaigns on the issue of safety in theme parks, and criticises the Claimants and other individuals (sometimes in intemperate and hurtful terms). As Mr Strauss QC (for Dr Cave) submitted, this case raises an important issue about the lawfulness of campaigns which (if their content is correct), are in the public interest. I accept that the issues which Dr Cave raises are matters of public interest. 1.6 m people visit the Park every year, and many more visit the other theme parks. The fact that the Claimants are private companies does not affect this conclusion.

3. As he submitted, campaigners may, in the course of their activities, annoy, irritate, and upset companies and individuals. To what extent should those activities be restrained by the civil courts, before the question whether they are justified has been decided? To what extent are they criminal offences? Dr Cave's main tool has been the internet: websites and email. These are both very effective ways of getting a message across to many people. He admits that he has used a number of different email addresses, in order to circumvent spam filters. Are the Claimants, who contend that Dr Cave's communications with the public and with their employees are defamatory, and in breach of confidence, entitled to stop him, before any trial, by relying on the statutory tort of harassment, or should they, instead, have to rely on their remedies for defamation and breach of confidence?

4. The Claimants' claim is that Dr Cave is harassing the officers, agents and employees of the first four Claimants, and the fifth Claimant, Mr Varney. The Claimants say that they represent three classes of unnamed individuals: the officers, employees and agents of the corporate Claimants. Mr Nicholas Strauss QC, whom I have already mentioned,

acted pro bono for Dr Cave, and I am very grateful to him for his help. I am also grateful to Mr Ashworth QC and Ms Den Besten for their lucid submissions. They argued the Claimants' case.

5. The Claimants' case is that Dr Cave's concerns about the Park are baseless. They say that his emails and websites are scurrilous and are intended to harass the officers, employees and agents of the corporate Claimants. Dr Cave's case is that, in short, his concerns about safety are justified, and he is doing no more than to exercise the right conferred by article 10 of the European Convention on Human Rights ("the ECHR") to freedom of expression. He also says that any claim to an interim injunction to prevent him from defaming the Claimants must fail, because, he says that his criticisms are justified. They cannot be in any better position because they frame their claim in harassment.

6. Dr Cave, who was not then legally represented, gave undertakings at a hearing before Lewis J on 11 August 2014. The return date was Tuesday 26 August. The hearing did not finish on 26 August. It resumed on the afternoon of 28 August and continued until about 7.30 pm on 28 August 2014. I indicated that I would reserve my judgment at the end of that hearing. Dr Cave, through his counsel, agreed that his undertakings should continue until judgment.

7. Mr Strauss QC made three main submissions.
   (1) He accepts that the Claimants do not have to identify every individual whom they represent. But, he submits, the Claimants do have to show that one or more individuals in one of two classes has a cause of action. Those two classes are the individuals named by Dr Cave in his communications, and the recipients of his mass emails (in particular, the employees of the corporate Claimants). He submits, in relation to both classes, that the conduct of which complaint is made is not harassment.
   (2) He submits that however much distress is caused by conduct which is potentially defamatory, that conduct should not be restrained by interim injunction, if Dr Cave would seek to justify it at trial. That would infringe the rule in *Bonnard v Perryman* [1891] 2 Ch 269. 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.
   (3) In any event the terms of the order sought are unacceptably wide and vague. The parties agreed that I should deal with this issue after judgment.

8. There are two further issues.
   (1) What test should I apply in deciding whether or not to grant interim relief? Is it the test in *American Cyanamid v Ethicon* [1975] AC 396, which usually applies when a claimant asks for an interim injunction, or is it the more stringent test which applies as a result of section 12(3) of the Human Rights Act

1998 ("the HRA")?

(2) Is Dr Cave prevented, by a decision of Sharp J (as she then was), from arguing that the statements he has made in the course of his campaign are justified? I shall refer to this as the estoppel issue.

1. The facts in outline

9. It seems to be common ground that in June 2012 there had been an accident at the Park when a child called Jessica Blake had fallen and been seriously injured. Dr Cave and his company, Peer Egerton Limited ("PEL") were retained in late 2012 to provide a condition survey report of the Park, for a fee of £46,000. This was a considerable piece of work, as Dr Cave explains. Mr Strauss pointed out in his submissions that the Claimants have not explained why the Claimants chose a very small non-specialist company for such an important task. The retainer required PEL to keep any report confidential and to assign the intellectual property in any work done to Merlin Limited. The work was done in November and December 2012. On 24 January 2013, the board of MAOL approved the work, including work required to be done urgently, at a total cost of cost of £4.6 m. On any view, then, as at January 2013, the board of MAOL accepted that a significant amount of remedial work needed to be done at the Park, some of it urgently.

10. The Claimants say that PEL was paid in full for this work, except for a sum of about £3000, which, the Claimants say, was not paid to him because of a computer error. Dr Cave then sent a letter before claim, claiming £158,687.82. The two sides negotiated, and, the Claimants say, Dr Cave indicated that he would accept £14,000 in settlement of his claims. He then issued proceedings claiming £83,565.38. The Claimants' case is that the proceedings were issued for the collateral purpose of campaigning about the safety of the Park.

11. PEL, represented by Dr Cave, also sought an injunction to stop the Park re-opening after its winter break. Sharp J described this (judgment of 18 March 2013, paragraph 15) as an application to obtain relief for damage caused to PEL's reputation if MAOL opened the Park on the basis of a survey report which PEL had been co-erced into changing. PEL claimed that damages would not be an adequate remedy as the consequences of opening the Park in an unsafe condition could be loss of life and serious damage to PEL. She described the terms of the order sought in paragraph 16 of her judgment. It included provision for the Park to be closed until inspected by competent external engineers who certified that the issues identified in the PEL report had been addressed and until witness statements from such engineers showed that the Park was safe. PEL also wanted its report to be returned to it and not to be used as a justification for not dealing properly with safety issues as the Park, and any third parties who had been told about the report to be told that the report was unreliable as it had been modified on Chessington's instructions.

12. Sharp J had difficulty understanding why the application was being made. She recorded that Dr Cave regretted signing off the survey report. He had lost faith in the bona fides of the claimant companies and in what they had said they would do about the areas of concern identified in PEL's report (judgment, paragraph 17). She went on to say that the evidence Dr Cave had adduced "does not ground any right to the relief

sought by the injunction". She referred to evidence from the Claimants which showed that the work identified in the report had been approved by the board. Some had been done, and rides which still needed work had been closed until the work was done. She said (judgment, paragraph 18), "There is no evidence that the work is not being carried out. The evidence that has been put before the court by [Chessington] shows that health and safety issues are taken very seriously." The most recent schedule of work supported Chessington's argument "as Dr Cave was bound to accept" that it was doing the work. Dr Cave had produced no reason, or at least none which satisfied Sharp J, that there was any reason to doubt Chessington's evidence in that respect.

13. She went on to say that the contemporaneous correspondence showed that Dr Cave's concerns were taken seriously (judgment, paragraph 20). Chessington offered to let him come and see that the work was being done. She had not seen any evidence which supported PEL's entitlement to any of the sums claimed, or which supported the very serious allegations of misconduct made by PEL (judgment, paragraph 22).

14. She repeated (judgment, paragraph 23) that there was no ground for the relief claimed. In so far as PEL's claim raised "safety concerns as a freestanding matter, neither [PEL] nor Dr Cave have, or could have, any standing to seek the relief sought in the application notice, in particular that in paragraph 1 of the order....". PEL had failed to satisfy her that there was a serious issue to be tried. Dr Cave had not identified any cause of action which could give rise to the relief sought. The claim, on the face of it, was a debt claim. What Chessington chose to do with PEL's report was a matter for it, and if necessary, for the regulator, the Health and Safety Executive ("the HSE"). "It is not a matter which can give rise to claims by [PEL] or Dr Cave in private law proceedings" (judgment, paragraph 24).

15. Sharp J awarded indemnity costs against PEL and Dr Cave because the conduct of PEL was "unreasonable to a high degree". If Dr Cave had been suspicious, he could have visited the Park and seen for himself what was being done. There were offers to compromise the money claim. The application for an injunction was misconceived, and the application for interim relief wholly without merit (judgment, paragraphs 31 and 32). PEL appealed the costs order only. Fulford LJ refused an application for permission to appeal on the papers. Maurice Kay LJ dismissed an oral application for permission to appeal on 11 December 2013.

16. In due course, PEL's claim was struck out because the costs order had not been satisfied. PEL was eventually wound up and Dr Cave was made bankrupt. On 25 October 2013, PEL applied for permission to apply for judicial review against the HSE. The grounds referred to an accident at the Park, and said that the HSE, which investigated the accident, should have acted instantly to close the Park but did not. PEL's November 2012 report was referred to in support. On 9 January 2014, Carr J refused permission on the papers. She held that PEL did not have standing to bring the claim. In any event, the accident had happened on 7 June 2012 and the claim was well out of time. There was no basis for the claim that the HSE should be obliged to produce, or to publish, a report about the incident. In paragraph 5 of her reasons, Carr J noted that the HSE's investigation was still going on and that there was still a potential for a criminal prosecution. The Claimants did not argue that the decision of Carr J gave

rise to any relevant estoppel; such an argument would have failed.

17. Dr Cave then sent a series of emails in September and October 2013, criticising the four companies and its employees. He engaged in mail drops to local residents and businesses. According to the Claimants, he made untrue and defamatory statements on a website about safety, which had links to PEL's condition report. A further email was sent in January 2014 attaching a pdf file about safety. No injunction was sought about the website, as it was taken down. Dr Cave sent more emails in June, July and August 2014. I consider these in more detail below. The Claimants's solicitors wrote at least four letters to Dr Cave asking him to stop. He refused to.

18. Dr Cave's evidence is that all the emails contain a link enabling a recipient to unsubscribe. He says that of a total of some 80,000 emails he has sent, only about 20 have elicited that response. Of those, only 7 are employees of the corporate Claimants. Where an individual has asked not to be sent further emails, he has complied. The Claimants' case is that the emails did not contain a hyperlink, but that (as I understand their case) many of them gave the recipient the option to send an email asking to unsubscribe. That invitation, according to the Claimants, was not included in the emails referred to in Appendices G and H to the Particulars of Claim. One of those emails was addressed to the Claimants' solicitor, and neither was addressed to employees of the corporate Claimants.

2. The estoppel issue

19. I was referred to some authorities on this point, but did not hear full argument on it. Mr Strauss submitted that no issue estoppel could be generated by a decision on an interlocutory application. Mr Ashworth referred to *SCF Finance Company Limited v Masri (No 3)* [1987] QB 1028 at 1047G-1049 and *Khan v Golecha International Limited* [1980] 1 WLR 1482 at 1490F-1491H. The second decision is authority that an admission or concession on which an order dismissing proceedings is based may give rise to an issue estoppel, both at first instance and on appeal, even though the court has heard no argument or evidence about the merits.

20. The issue in *SCF* was whether the second defendant was estopped, in garnishee proceedings, from contending that she owned a dollar account. That account was subject to a freezing order. In earlier proceedings she had made an application to decide who owned the account. That question was to have been decided after the trial of the main action. The second defendant decided for tactical reasons not to pursue that application after the trial. She did not expressly concede that she did not own the account. In the later garnishee proceedings, she wanted to argue that she was the owner of the account. The Court of Appeal upheld the Judge's decision that she was prevented by issue estoppel from arguing in the garnishee proceedings that she owned the dollar account. The Court of Appeal held that the earlier application had been dismissed and that the issue that was determined by that dismissal was the ownership of the dollar account.

21. I do not consider that either decision helps me. As Mr Strauss submitted in his note, both cases concern final decisions. Sharp J refused to grant an interlocutory injunction. Hers was not a final decision. But even if it was, the question would then be what

issues Sharp J decided and whether her decision prevents Dr Cave from contending, in these proceedings, that his statements about safety are justified. I have referred to the decision of Sharp J above. Many of her factual findings are, unsurprisingly, expressed to be conclusions based on the evidence before her. Such findings cannot give rise to an issue estoppel. The narrow basis of her decision was that PEL had no cause of action which would entitle it to the injunction claimed. She did not decide that Dr Cave had no standing to campaign about safety. She also decided that Dr Cave had behaved so unreasonably that PEL should pay indemnity costs. I do not consider that her decision prevents Dr Cave from pursuing his campaign, or raising the issues set out at page 41A of Mr Strauss's speaking note.

3. The PHA

22. The Protection from Harassment Act 1997, as amended ("the PHA"), among other things, makes "harassment" a tort, and a crime (sections 1, 3, and 2). The offence is a summary one. The maximum sentence is one of six months' imprisonment and a fine (section 2(2)). A restraining order is available on conviction (section 5(1)), and on acquittal, if the conditions in section 5A(1) are met. These would be equivalent in effect to an injunction granted in civil proceedings (see section 3).

23. Section 1(1) provides that a person must not "pursue a course of conduct (a) which amounts to harassment of another and (b) which he knows or ought to know amounts to harassment of another". Section 1(1A) prohibits a person from pursuing "a course of conduct (a) which involves harassment of two or more persons and (b) which he knows or ought to know amounts to harassment of those persons and (c) by which he intends to persuade any person (whether or not one of those mentioned above) (i) to do something which he is not entitled or required to do, or (ii) to do something which he is not under any obligation to do."

24. The claim pleaded in this case relies on harassment contrary to section 1(1) only. There is no claim based on section 1(1A). 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.

25. Section 7(5) and section 1(1A) show that Parliament has carefully considered the position of corporate claimants. It has not given them 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.

26. By section 1(2), a person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounts to or involves harassment. Section 1(1) and 1(1A) do not apply to a course of conduct if the person who pursued it shows that, among other things, in the particular circumstances, the pursuit of the course of conduct was reasonable.

27. Section 7(2) provides that references to harassing a person "include alarming or causing the person distress". A course of conduct "must involve", in the case of conduct affecting one person (ie conduct which is contrary to section 1(1)), conduct on at least two occasions in relation to that person (section 7(3)(a)). In the case of conduct affecting two or more persons (ie conduct contrary to section 1(1A)) conduct it must involve conduct on at least one occasion in relation to each of those persons (section 7(3)(b)). Conduct includes speech (section 7(4)). References to a person, in the context of the harassment of a person, are references to a person who is an individual (section 7(5)). So direct "harassment" of a company is neither a tort nor a crime.

28. Section 4 creates a separate offence of putting people in fear of violence. This provision suggests that fear of violence is not a necessary element of harassment.

29. 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. Damages may be awarded on such a claim for anxiety caused by the harassment and for any financial loss resulting from it (section 3(2)).

30. Section 3(3)-(9) provide for the consequences of a breach of any injunction which is granted in the course of any such proceedings. In short, a claimant may apply for the issue of a warrant of arrest in the High Court or in the county court. If an injunction is granted and a defendant, without reasonable excuse, does anything which he is forbidden by the injunction to do, he is guilty of an offence (section 3(6)). It is clear from section 3(7) and (8) that such a breach is also a contempt of court, but both subsections make clear that a defendant cannot be pursued both for civil contempt, and for an offence, in respect of the same conduct. The maximum sentence for the offence created by section 3(6) is five years' imprisonment on conviction on indictment and six months' and a fine on summary conviction.

31. Section 3A applies where there is an actual or apprehended breach of section 1(1A) by any person (section 3A(1)). In such a case, anyone who is the victim of the conduct in question, or any person who is or might be a person falling within section 1(1A)(c), may apply to the High Court or to the county court for an injunction restraining a defendant from pursuing the course of conduct which amounts to harassment in relation to any persons mentioned or described in the injunction (section 3A(2)). Section 3(3)-(9) applies to any such injunction (section 3A(3)). The effect of this section and of section 3(1) is that while conduct contrary to section 1(1) creates a cause of action sounding in damages, conduct contrary to section 1(1A) only creates a right to apply for an injunction. In some circumstances, therefore (which are not present here) a corporate claimant could apply for an injunction to stop the harassment of its

employees.

32. What is harassment, then? "Harassment" is an ordinary English word. Before the amendment which inserted section 4A, most people would have regarded stalking as the paradigm case of harassment. Harassment is conduct which, objectively, is harassment, and which a person knows or ought to know is harassment. A person ought to know that conduct is harassment if a reasonable person, on the same information, would think that the course of conduct was, or amounted to, harassment. If the course of conduct is reasonable, it is not harassment (see section 1). But it does not follow that conduct which is unreasonable (or unattractive, or regrettable) is necessarily harassment. Nor necessarily is conduct which causes upset (see per Lord Nicholls, below).

33. Because section 2 creates an offence of harassment, the course of conduct must be serious enough to found criminal liability. But the creation of a fear of violence is not a necessary element of harassment (otherwise section 4 would be redundant). Harassment includes alarming a person or causing him distress. It can also include causing anxiety (see section 3(2)). The cases refer to a dividing line between conduct which is not unlawful, and is part of the ordinary give and take, and stress and strain of everyday human interactions, and conduct which is oppressive and unacceptable.

34. In *Hayes v Willoughby* [2013] UKSC 17; [2013] 1 WLR 935 Lord Sumption JSC referred (judgment, paragraph 1) to the lack of definition of 'harassment' in the PHA. He went on,

> **"It is, however, an ordinary English word with a well understood meaning. Harassment is a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress: see *Thomas v News Group Newspapers Ltd* [2002] EMLR 78 , para 30 (Lord Phillips of Worth Matravers MR). One of the more egregious forms of harassment is the stalking of women. But the Act is capable of applying to any form of harassment. Among the examples to come before the courts in recent years have been repeated offensive publications in a newspaper (as in *Thomas*); victimisation in the workplace (*Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224); and campaigns against the employees of an arms manufacturer by political protesters: *EDO Technology Ltd v Campaign to Smash EDO* [2005] EWHC 2490 (QB)."**

35. Two further examples are relevant. The first is a utility company sending, over a period of five months, many bills and letters to a former customer, claiming sums she did not owe and threatening to cut off her supply and to report her to ratings agencies (*Ferguson v British Gas Trading Limited* [2009] EWCA Civ 46; [2010] 1 WLR 785). The second is *Roberts v Bank of Scotland* [2013] EWCA Civ 882. The defendant telephoned or tried to call the claimant 547 times in just over a year about her overdraft, mostly during a period of 6 months. She made it clear she did not want to be called. The callers were persistent and in some cases unpleasant (see paragraphs 13-15 of the judgment of Jackson LJ).

36. 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".

4. The relationship between the PHA and the Human Rights Act 1998 ("the HRA")

37. The right protected by article 10 of the ECHR (see Schedule 1 to the HRA) includes the right to "hold opinions and to receive and impart information and ideas without interference by a public authority". This right may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for, among other things, "the protection of the reputation or rights of others" and "for preventing the disclosure of information received in confidence". The law of defamation as a whole (substantive and procedural) is such a restriction. So is the law of confidence. I accept Mr Ashworth's submission that the PHA is also, potentially, such a restriction. Article 10 expressly recognises that the rights which it protects may be curtailed by such laws.

38. The PHA makes no express provision about either article 10 or the law of defamation. Both sides relied on this silence. Mr Ashworth submitted that it indicated that the fact that the conduct relied on was or might be an exercise by Dr Cave of his article 10 rights, and that, to the extent that it was potentially defamatory, would be the subject of a defence of justification at trial, could not prevent his clients from obtaining an interim injunction to stop it. I cannot accept that bald submission, but do accept a qualified version of it (see further, below). The cases which Mr Ashworth relied on (*Howlett v Holding* [2009] EWHC 41 (QB) (judgment, paragraph 15) and *ZAM v GCW* [2011] EWHC 476 (QB) (judgment, paragraph 18)) do not support the bald version of this submission. The defendants in those cases either did not seek to, or could not have sought to, justify the defamatory statements on which the claims for harassment were based. What those cases show is that a defendant may, by making (and repeating) defamatory statements in some circumstances, commit two torts: defamation and harassment.

39. Section 3(1) of the HRA provides that "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". It is possible to read the PHA so as to be compatible with article 10. There is no express indication in the PHA that Parliament intended the provisions of the PHA to abrogate the rights conferred by article 10, or to change the law of defamation, which is, by necessary implication, involved in any

consideration of the scope of the legitimate restrictions which may be placed by a contracting state on the rights conferred by article 10. Nothing in the PHA indicates that Parliament intended to encroach on the rule in *Bonnard v Perryman*. This common law rule operates so as to safeguard freedom of speech and I consider that its relevance to the issues in this case is supported, if not reinforced, by section 3 of the HRA. In *Greene v Associated Newspapers Limited* [2005] 1 QB 972, the Court of Appeal decided that this rule was "not weakened in any way" by section 12 of the HRA. It does not follow, of course, that the PHA does not, or cannot, restrict the rights protected by article 10, but that is a different issue.

40. Harassment can take different forms. Where the harassment which is alleged involves statements which a defendant will seek to justify at trial, there may be cases where an interim injunction will be appropriate. These are cases where such statements are part of the harassment which is relied on, but where that harassment has additional elements of oppression, persistence or unpleasantness, which are distinct from the content of the statements. An example might be a defendant who pursues an admitted adulterer through the streets for a lengthy period, shouting "You are an adulterer" through a megaphone. The fact that the statement is true, and could and would be justified at trial, would not necessarily prevent the conduct from being harassment, or prevent a court from restraining it at an interlocutory stage. The same point would apply to *Howlett*, if the banners flown from aircraft for several years over the claimant's house, instead of conveying abuse, had set out truthful allegations. I therefore reject Mr Strauss's submission that the rule in *Bonnard v Perryman* is in and of itself complete answer to an application for an interim injunction in a harassment case, where the harassment consists of repeated statements which the defendant will seek to justify at trial. This conclusion appears to be consistent with the recent decision of Carr J in *Brand v Berkie* [2014] EWHC 2979 (QB), to which the parties referred me after the hearing.

41. This means that the real question is whether the conduct complained of has extra elements of oppression, persistence and unpleasantness and therefore crosses the line referred to in the cases. There may be a further question, which is whether the content of the statements can be distinguished from their mode of delivery. The nature of the relief sought shows that what really concerns the Claimants is references in Dr Cave's various communications to named individuals. But the fact that conduct consists of, or includes, the making and repetition of statements which a defendant will seek to justify at trial means that a court must scrutinise very carefully claims that that line has been crossed in any particular case, and ensure that any relief sought, while restraining objectionable conduct, goes no further than is absolutely necessary in interfering with article 10 rights. I reject Mr Ashworth's submission that whether or not Dr Cave has genuine safety concerns is irrelevant to the claim under the PHA. I also reject the Claimants' invitation to decide, at this stage, that his concerns are baseless.

42. The order sought against Dr Cave on this application sought to restrain him from "pursuing a course of conduct which amounts to harassment" and in particular, from making any "abusive or threatening communication to or about any officer employee or agent of" the first to fourth Claimants, "which shall include, for the avoidance of doubt, any repetitive emails, letters or telephone calls to or about such persons" or

"[a]ny communication whatsoever to or about any officer, employee or agent of" the first to fourth Claimants. I had several concerns about this relief. First, I have seen no evidence of any threatening communications. Second, "abusive", in this context, is a troublingly vague word. Dr Cave's emails do not contain words which are, in the common use of the term, abusive; rather, they contain, at times, strong criticism, which is quite a different thing. Third, I can see no basis for a blanket prohibition on any communication with, or about, the first to fourth Claimants' officers, employees or agents. An order in these terms would interfere with Dr Cave's article 10 rights, and those of the employees, in circumstances where he argues that his statements are justified. Paragraph 48 of Mr Ashworth's speaking note says that Dr Cave is free "within the confines of the law to make disparaging comments about the corporate claimants themselves". But this does not deal with the concerns I have just expressed. Interestingly, without any intervention by the Court, the terms of the undertaking given by Dr Cave between the end of the August hearing and judgment do, to some extent, accommodate these concerns, by permitting Dr Cave to criticise the safety of the corporate Claimants' theme parks, provided that he does not criticise named individuals.

5. The test for granting an interim injunction

43. Mr Strauss submitted that section 12(3) of the HRA applies to this application. Section 12 applies where a court is considering whether to grant relief which might affect a person's article 10 rights (section 12(1)). Section 12 (3) provides that "No such relief is to be granted to restrain publication before trial unless the court is satisfied that the application is likely to establish that publication should not be allowed". I agree that section 12(3) applies in this case, even to the extent that (if it has) the conduct complained of has the extra elements which are necessary to constitute harassment independently of the content of any statements which Dr Cave will seek to justify and which are relied on as constituting harassment.

44. Mr Strauss relies on paragraphs 22-23 of the speech of Lord Nicholls in *Cream Holdings Limited v Banerjee* [2004] UKSC 44; [2005] 1 AC 253. Lord Nicholls referred in paragraph 15 to the background to section 12, which was Parliament's anxiety that if the test in *American Cyanamid Co v Ethicon Limited* were applied at the interim stage in defamation cases, it would have an adverse effect on freedom of the press in those cases where claimants relied on their article 8 rights. That test is whether the claimant has shown that his claim is "not frivolous or vexatious; in other words, that there is a serious question to be tried".

45. The principal purpose of section 12(3) "was to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a higher threshold for the grant of interlocutory injunctions against the media" than a serious question to be tried, or a real prospect of success at trial. Lord Nicholls referred in his speech both to the media and to the press. But article 10 is not confined to the media and the press; nor is section 12(3). These considerations must also therefore apply to individuals who publish material which is potentially defamatory but which they will seek to justify at trial. That means that they apply in this case.

46. Lord Nicholls said in paragraph 12 of his speech that "likely" has several shades of

meaning, depending on context, and that even read in context its meaning is not precise. The issue was whether, in section 12(3), it meant "more likely than not" or "probable". He said that Parliament was painting with a broad brush, and that it could not mean this in every case.

47. He gave two examples of cases where Parliament could not have intended the test to apply. First is the case in which "it is plain that injunctive relief should be granted as a temporary measure". A judge might need time to read the papers, and since once lost, confidence is lost for ever, it might be necessary for interim relief to be given for a short period, in order to enable him to "form a view on whether on the balance of probability the claim would succeed at trial". Similar reasoning would apply to the short period necessary to hear an interlocutory appeal (speech, paragraphs 16-18). The second example is a case where the consequences of publication would be extremely serious, perhaps because of a risk of personal injury (speech, paragraph 19).

48. He concluded that "likely" was not intended to mean "more likely than not" in all situations. Parliament's intention was that a higher standard than the *American Cyanamid* test should usually apply, but that that standard could be dispensed with where circumstances made that necessary (speech, paragraph 20). The general approach must be that courts should be "exceedingly slow" to grant an interim injunction to restrain publication where the applicant has not satisfied the court that "he will probably ("more likely than not") succeed at the trial" (speech, paragraph 22). In my judgment there are no special or particular grounds for departing from that general approach in this case.

4. The incidents on which the Claimants rely

49. I now consider each part of the Defendant's conduct. I bear in mind Mr Ashworth's submission that I should consider the cumulative effect of any course of conduct, and that a course of conduct can consist of elements which, by themselves, might not amount to harassment (*Iqbal v Dean Mansons Solicitors* [2011] EWCA Civ 123). I will therefore also consider, in the next section of this judgment, whether, in relation to each class of individual, Dr Cave has engaged in a course of conduct which amounts to harassment.

50. I also bear in mind that what I am considering is claims that individuals have been the subject of harassment. What is relevant, therefore, as respects each individual, is the course of conduct which affects him, not any conduct which affects, or is directed to, a different individual. This is important, because there is a risk, otherwise, of an approach which is too impressionistic. The corporate Claimants cannot aggregate examples of conduct against a disparate range of individuals and claim that all those individuals have been subject to harassment in reliance on all that conduct. Some might think that that might be 'harassment' of the corporate Claimants, but except to the extent that section 1(1A) of the PHA applies in any case (and it does not apply here), Parliament has not given corporate claimants any remedy against 'harassment'.

51. The pleaded claim relies on eleven elements. I consider them in turn (although I have run together some elements where this is convenient). I make five points before I do that.

52. First, the mass emails were sent to many employees at their work email addresses. I think I can take judicial notice of the fact that, however sophisticated a spam filter may be, many employees these days are all too familiar with receiving spam emails sent to their work email addresses. The mere fact of sending mass emails is not, in my judgment, harassment. For the tort (or crime) of harassment to be committed it is necessary for there to be some extra element, either in the content of the emails, or in their frequency.

53. I also note that Parliament has specifically considered the extent to which the sending of mass emails should be a crime or a tort. In some circumstances, the sending of mass emails could be an offence under section 127 of the Communications Act 2003. The conduct is either sending messages which are grossly offensive, indecent or menacing, or, for the purpose of causing annoyance, inconvenience or needless anxiety to another person, either sending messages which are known to be false, or persistently using a public electronic communications network. Section 127 creates offences, but does not expressly create a cause of action in tort. The existence of section 127 does not, of course, mean that the sending of mass emails could not also amount to the tort of harassment. But its existence means that I should consider carefully whether Parliament (which has amended the PHA at least twice since its enactment) can be taken to have intended that mass emails which are not caught by section 127 should, nonetheless, give rise to criminal or tortious liability under the PHA.

54. Second, Mr Ashworth relied on the fact that Dr Cave had been told more than once by the Claimants' solicitors that any further communications from him to employees would be regarded as harassment (the dates of the letters are pleaded in paragraph 5 of the particulars of claim). In my judgment, that is part of the picture, but the mere fact that a solicitor indicates that particular conduct, if repeated, will be seen as harassment, cannot, as a matter of law, convert otherwise innocuous conduct into harassment. In the context of this case, that fact is, in any event, outweighed by the next point which I consider.

55. Third, Mr Strauss submitted, in relation to the mass emails to employees, that the recipients were given an option, if they did not wish to receive any further such emails, to send an email to a link provided in the email, and to say so. I have described the dispute about this in paragraph 18, above. Mr Ashworth submitted, in any event, that any such invitation was irrelevant. I disagree. In the absence of any other evidence about it, I cannot hold that it is arguable that a person who has received a spam email, and having the means to stop its repetition, has not done so, has been alarmed or distressed by that email, or has experienced anything similar to alarm or distress. Nor could I hold that such an argument is more likely than not to succeed. I appreciate that harassment may occur even if the victim does not experience alarm or distress, but the absence of significant evidence of such a reaction (which I consider further below) is highly relevant to my assessment. The option to stop future emails means, in my judgment, that a reasonable person would not see these emails as harassment.

56. Fourth, as I have already said, there is a public interest in ensuring that theme parks are safe. Merlin is now a plc. Its officers (whether its board or its "management") are the

means by which it carries out its operations. 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.

57. Fifth, as regards the first class of possible victims of harassment, that is, the employees and others whom the Claimants seek to represent, there is limited evidence of distress, alarm, or anxiety. There is a general assertion in paragraph 55 of Mr Armstrong's first witness statement. In paragraphs 7-10 of his second witness statement he says that many email recipients from across the world have contacted him and "expressed concern to me as to why they are receiving these emails" and why they continue to receive them despite the fact that Dr Cave has been asked to stop sending them. Some staff have expressed "more direct concerns" because they think they are being criticised. Some have expressed concern that Dr Cave's acts and statements are "so bizarre that they feel worried about receiving such emails from him" particularly since he ignores solicitors' letters and takes steps to avoid Merlin's email block. He goes on to say that some employees are aware that Dr Cave tried to contact them at their home addresses and "are particularly alarmed by continued contact from Dr Cave". He says that it is "quite draining and time-consuming dealing with employees' questions". It can be hard to explain to them why they are getting the emails, and that causes uncertainty. The anxiety caused by this is multiplied by the knowledge that Dr Cave is sending these emails to thousands of others.

58. Mr Harrison Jones says that he has been approached "on many occasions" by employees who have received unsolicited emails from Dr Cave. "In general, individuals have been quite distressed and concerned by emails." He names Mr Cunningham and Mr Barmby in particular, whose names have been mentioned by Dr Cave. "They have advised me that this has caused them anxiety and distress as they perceived they are being held out as having done something wrong. I have had to reassure both individuals that they have done nothing wrong." I deal with the position of these two named employees below.

59. Mr Harrison Jones then mentions Ms Clatworthy, a commercial director. She has received a number of emails from Dr Cave which she has found "disturbing". That reaction to the emails generally is not further explained. A recent email addressed to "Hi Nic" is exhibited. Mr Harrison Jones reports that she found this email disturbing because she is only called "Nic" by close family and friends.

60. Neither witness suggests that any employee has continued to receive emails despite asking to unsubscribe. This evidence does not persuade me that there is a serious question to be tried about the effect on employees generally, or that a claim that employees generally have been caused alarm, distress, or anxiety sufficient to found criminal liability is more likely than not to succeed. The evidence consists mostly of general assertions, and, to the extent that it does not, no reasonable person in

possession of this information would think that the course of conduct at issue here amounted to harassment.

September 2013

61. In September 2013, the Defendant sent, to about 500 employees of the Merlin Group, his response to a notice given to him by Mr Beech, the solicitor to the third Claimant, of its intention to seek an injunction to prevent PEL from applying to wind up Merlin on the basis of a debt which Dr Cave claimed was owed to PEL. Dr Cave said, "I think the Judge will laugh you out of court if you apply for an injunction." If Dr Cave's application for a winding up order had no merit, the Judge would say so. That meant that the application for an injunction was an abuse of process. Dr Cave thought it would fail. He said that Mr Bainbridge had been disingenuous. He went on to say that there was a basis for settling the dispute. He referred to a failed mediation. He would withdraw the threat of a winding up petition "When your client starts behaving as though it is looking seriously for a solution".

62. The Claimants plead that this email was "baseless", and that it impugned both Mr Bainbridge and Merlin. One of the addressees of this mass email sent it to the Claimants' solicitors with the message, "Presume sent to me in error". It is clear that Dr Cave was seeking to put pressure on the third Claimant to settle his claim. But I do not consider that the sending of this email to many of the Claimants' employees could possibly amount to harassment of those employees. To the limited extent that there is any evidence of its effect on employees, it is simply that one recipient was puzzled to have received it. There is no evidence of alarm or distress, or of anything like it, and I do not consider that any person of reasonable firmness could possibly be alarmed or distressed, or be caused any similar emotion, by the receipt, at his work email address, of such a communication. Nor do I consider that it could amount to harassment of Mr Beech, the solicitor. It is not conduct which crosses the line referred to in *Majrowski*.

The IPO document

63. In October 2013, Dr Cave prepared a document in relation to the initial public offering ("IPO") of Merlin. He sent it to brokers on the London Stock Exchange and to potential shareholders. He also sent it to the Claimants' solicitors. He was critical of the IPO, and of Mr Baratta, of Blackstone, an investment banker, who, Dr Cave said, had been responsible for the "Southern Cross Homecare fiasco". He referred to Mr Varney under the heading "Expert in PR - obviously not safety". He said that Merlin was managed by Mr Varney whose background was in PR, and that "He may not be very hot on safety but he does know how to make something look like it isn't". Dr Cave went on to describe the structures of theme parks. He said that theme parks are "just fairgrounds which are made to look more substantial than they are" and that "Many of the structures are temporary and appear to be built and maintained with no engineering design knowledge". The document asked, "Would you let your children ride on attractions that are not safe....or would you invest in a company which did not do everything possible to ensure that its attractions are safe to visitors?". It then listed incidents at Merlin sites between 2000 and 2013. It gave an email address for those who wished to receive a copy of the Chessington World of Adventures Condition Report.

64. This document was not initially sent to the Claimants' employees or to Mr Varney. Mr Varney relies on Dr Cave's description of him as an example of "untrue and shocking" and "distressing and outrageous statements" made by Dr Cave about him. I have no doubt that Mr Varney's reaction to this document is genuine. But I do not consider, either, that the document is shocking, or outrageous, or that reasonable person would think so. I do not consider that it is arguable that, of itself, it constitutes harassment of them, or of him, or of Mr Baratta. A fortiori, a claim that this is harassment by itself is not more likely than not to succeed. The tone and content may be misguided, but they do not constitute harassment. They do not cross the *Majrowski* line.

The December 2013 correspondence

65. On 16 December 2013, Dr Cave sent an email to Mark Beech, of the Claimants' solicitors. It attached an email chain and other documents, in which Dr Cave explained that he was resigning from his local parish council. He said that he would continue to strive to bring the Merlin board to account "because it deliberately used my company in a cynical ruse to delay much needed maintenance in the certain knowledge that the consequences could be fatal". He also said that Mr Varney "seems to think he can sway me from my purpose of ensuring that he exercises a proper duty of care to visitors, staff and contractors. He and the HSE undoubtedly have guilty knowledge and will be brought to account in due course". His resignation letter referred to his unsuccessful application for an injunction. He referred to other litigation (his money claim and the application for judicial review) and said that the Claimants were taking pre-emptive action to bankrupt him.

66. A document dated 8 January 2014, addressed to "Dear Surrey Resident" refers to a petition about the safety of theme parks. Dr Cave says that the owners of the Park had decided to spend substantially less than his report recommended, and that, although he no longer has access to the Park, he believes that it is unsafe. Rides still break down and there was a substantial fire in December 2013. Going to a Merlin theme park was potentially more hazardous than visiting a building site. The industry is self-regulated and this is wrong. The "balance of probabilities approach" of current management needed to be replaced by one of zero tolerance. The recipient was invited to sign an e-petition.

67. The Claimants do not plead that any of the Claimants (other than Mr Beech, who for this purpose is an agent of the corporate Claimants) received these documents. It is pleaded that they were "sent out". They could, nonetheless, be relevant to those claims if it was likely that, for example, their recipients would communicate them to any individual named in the documents who would thus find out about them. Nonetheless, I do not consider that in the circumstances, they are relevant to the claims of harassment. 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.

The January 2014 website

68. Dr Cave created a website in January 2014 registered in the name of PEL. It included

confidential information about the Park and what the Claimants describe in the particulars of claim as "a great number of highly scurrilous allegations". The Claimants rely on the allegation that Mr Varney had "guilty knowledge". Dr Cave, it is said, distributed links to the website to "numerous employees of Merlin". On 31 January 2014, Dr Cave also sent an email attaching a pdf containing screenshots of four different websites critical of safety in theme parks to people whom Dr Cave considers have responsibility for children. It was also sent to Chessington employees. It does not seem that those websites have ever been live. I have not found it easy to disentangle the material which is said to have been distributed in this way from the material in the January 2014 website.

69. The January website criticises the way that safety is regulated. It suggests that regulation is ineffective. There are many 'case studies', which show, with supporting text, photographs of apparently dangerous and corroded parts of the Park. It has not, I think, been suggested that the photographs are inaccurate, although the Claimants point out that they were historic when published. One case study, about escape routes, shows eight photographs of decay. The text below says, ".....Where such decay exists, you cannot call a child falling through a barrier an accident". One of the themes of the text is that for the Park to have fallen into the state of disrepair evident in November 2014 (this must be a mistake for November 2013, a date referred to elsewhere in the text) "takes a lot of collusion (or turning a blind eye) by a number of bodies". A further theme is that while the companies have done some of the work that was recommended in the report, they have not, so far as Dr Cave is aware, done it all.

70. One page is headed "Guilty knowledge". This is "when you know that something is wrong but you don't do anything about it". Dr Cave says he (not any of the Claimants) was given guilty knowledge by Chessington management using his company to delay rectifying defects at the Park. He took proceedings and as a result, two rides were demolished. I should make clear, here, that the Claimants' case is that the theming, but not the rides, were demolished, and not as a result of Dr Cave's claim for an injunction. The page goes on to say that Dr Cave believes that there are still safety issues at the Park and at other Merlin parks. His objective is to change the way parks are regulated. The page adds that Dr Cave has given guilty knowledge to the people listed below (with their email addresses deliberately corrupted to prevent email harvesting). Those include a long list of Merlin employees. Anyone who has seen the website cannot deny guilty knowledge.

71. Under the heading "Culpability", the website suggests that Chessington management were fully aware why Jessica Blake fell through the balustrade of the Tomb Blaster queue line. It is submitted that the fence panel was completely decayed and the fixings pulled through the rotten wood. A photograph is said to show secondary restraints have been bolted through similar panels on another ride, and that "There is no doubt Chessington management knew why Jessica fell through a gap in the barrier." That was in June 2012. In November 2012, the PEL report found over 2000 defects. "There is no doubt that Chessington (and Merlin) management were aware that these defects existed, many of which rendered the park unfit for purpose (unsafe) and yet [the Park] remained open for the whole of the remainder of 2012. The management were also intending to open the [Park] again in 2013 with most of the defects outstanding until

[PEL] sought injunctive relief in the the High Court. In 2013, Nick Varney launched his long yearned for £3bn IPO....Nick Varney, Joseph Baratta, Kevin Bainbridge, David Smith, Ian Cunningham, Sam Thompson, Peter Barmby and Bob Nicholls, how do you sleep at night?"

72. If the website also contained the material which Dr Cave produced at the time of the IPO and to which I have already referred (although the Claimants suggest that it did not), a line at the end of the second page of that material invited Mr Baratta or Mr Varney to correct any errors in the website by sending an email. A page about legal proceedings said that it was in the interests of Mr Varney to "muddy the waters" about those proceedings.

73. 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.

The letters before claim

74. On 14 April 2014, Dr Cave wrote a letter before action to two individuals at their home addresses: to Mr Smith and to Mr Bainbridge. This, on his evidence, which is not specifically contradicted, is the only time he sent a communication to an employee at his home address. Mr Smith had been Chessington's managing director. Mr Smith is an employee of MAOL. Mr Bainbridge had been Chessington's head of safety and technical services. He is no longer employed by any of the claimant companies so I am not concerned with any effects on him. According to the Claimants' evidence this was the only occasion on which Mr Smith was contacted (apart from when he received a mass email).

75. Dr Cave wrote this letter, he now says, because he was depressed, and he attributed that state of mind to his experiences with the Park. He thought that Messrs Smith and Bainbridge were personally to blame for it. In his second witness statement (paragraphs 6-10) he explains how dangerous two of the structures were when he first inspected them. His legs fell through a stairway on the Runaway Mine Train, and a piece of scaffolding came "scything" past him on the Dragon Falls Twin Faces. This evidence, while served very late, has not been contradicted by the Claimants.

76. In the letter, he said that he now knew that the survey was "an elaborate ruse to stave off much-needed expenditure". He had been told it might also have been "some form

of personal vendetta". In effect, he said, he had been "the victim of a practical joke (in law it is called "intentionally inflicted emotional shock) visited on me by you and [Bainbridge/Smith]". He went on to say that they had a duty of care towards him and that they failed in that duty by causing him damage intentionally. There was a clear causal link between their actions and his present state of health. The evidence showed that his company had been chosen not because of its professionalism but because of his stupidity. This had left him very depressed. That depression was made worse by the fact that they were well aware of the dangers of two of the rides, and were prepared to put at risk his life, the lives of his staff, and of visiting children, to "achieve either a commercial or selfish personal objective". He asked for all his medical expenses and any further damages which arose from the "practical joke" to be paid by a deadline, failing which he would issue proceedings without further notice.

77. Chessington's solicitors replied to this letter on 17 April 2014. They said that neither individual was employed by Chessington any more, and that any claim against the two individuals would be "wholly malicious and vexatious". While denying that any claim would have merit, the solicitors said that any such claim should be brought against the company, not the individuals. If any such claim were issued, Chessington would apply to have it struck out. Chessington had asked the individuals not to reply to any communication from him, and Dr Cave was to address any communication in relation to Chessington or to any of its current or former employees to the solicitors. Any further communication with individuals in relation to "these matters" would be seen as harassment.

78. Mr Smith emailed the Claimants's solicitors on 21 April 2014, asking for reassurance on a couple of points about any potential litigation. He appears to have been advised that the claim had no merit. He ended the email by saying that his response might seem a little excessive and recognised the efforts which the solicitor and the companies would put in to dismiss any claim. He wanted to be sure, given that Dr Cave appeared to be targeting him personally for some reason, that he understood the position. This email does not suggest that Mr Smith was in any way alarmed or distressed by the letter before claim.

79. 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.

The 27 June 2004 email

80. On 27 June 2014 Dr Cave sent an email entitled "Only people without imagination take children to theme parks". Its primary addressee was Mr Scoggins of the HSE, but it was also sent to at least 19,600 recipients. One of those seems to have forwarded it to a Mr Tony Nicholls, who appears to be connected with the Claimant group of companies.

81. The email referred to the risk that children can be stranded for hours on a broken-down ride, and said that fires are not an abnormal occurrence. Dr Cave referred to the condition report and to the fact that it revealed that a park had not been fit for purpose. Two rides had since been demolished, and about £4.2m spent to bring the park up to scratch. That was a "good result", despite the fact that his company had been bankrupted.

82. He did have "residual concerns", though. He wanted to change regulatory arrangements and to "sound a strident warning to respondent adults". The HSE is criticised on the grounds that it is easier to prosecute small companies than to "try and prove wilful negligence on the part of the CEO of a theme park company (who incidentally) deliberately allows rides to operate when they are not fit for purpose".

83. I do not consider that there is anything objectionable about the tone or content of this email, other than the unnecessary reference to the CEO. Mr Varney is not named, but it is clear that he is being referred to. It is a further example of the personalised nature of Dr Cave's attacks on Mr Varney, and the wide circulation of this email exacerbates its impact. However, I do not consider, in the circumstances, that it arguably crosses the *Majrowski* line, or that a claim that it does is more likely than not to succeed.

The 3/4 July 2014 email

84. Dr Cave sent an email on or about 3 July 2014 to Mr Beech of the Claimants' solicitors. This was a reply to an email sent by Mr Beech to Dr Cave on 2 July, which he attached. In that email, the Claimants' solicitors referred to emails sent by Dr Cave which were said to be defamatory and to contain highly confidential information. They said this was unlawful, asked him to stop, and to remove the companies' employees' email addresses from his list. His actions were harassment and any further correspondence with employees or directors of the companies would also constitute harassment, and would be reported to the police. I asked whether the Claimants had in fact reported Dr Cave to the police and they have not. Dr Cave was also asked to stop sending defamatory and malicious emails to other people, which were sent to damage the Claimants' business and reputation.

85. In his email of 3 July, Dr Cave said he did respect the law, but respected children's safety more. "Your client knowingly operated a theme park which was not fit for purpose". He denied defamation, as what he was saying was true. People had a right to know that in 2013 (at least) the Park was not fit for purpose. Unless the industry were properly regulated, "the same thing will happen again as interest rates rise and footfall falls (and Varney spends money on headline grabbers not maintenance)". If the police were called he would deal with them properly and politely. He referred to Jessica Blake's accident and said that Chessington might have paid "compensation proportionate to an unforeseen accident, but it was not an unforeseen accident if your client knew that the park was not being properly maintained."

86. Dr Cave sent this email chain on 4 July to many employees of the companies, on 11 July to many solicitors and on 18 July 2014 to some 7000 members of the Bar. He used a variety of different email addresses. A Mr Hamblin (a barrister) objected to this email. Dr Cave sent him an email apologising for disturbing him, in which, among

other things, he said that Merlin was able to gag the press, and he believed that the public should know that senior management were prepared to operate a theme park knowing that it was not fit for purpose. Because the HSE was not doing its job properly, he was going to make sure that management take visitors' safety much more seriously in the future.

87. The Claimants take exception both to the mass emails and to the email to Mr Hamblin. Again, I assume that Dr Cave will seek to justify the allegations at trial. Neither the mass emails, nor the reply to Mr Hamblin, arguably cross the line from lawful conduct into harassment. Such a claim is not more likely than not to succeed. On the assumption that Dr Cave would seek to justify these allegations at trial, I do not consider that they are capable of amounting to harassment of an individual. In general, Dr Cave was repeating his views in an unobjectionable tone, and was not unreasonably singling out or targeting any individual. He did refer to Mr Varney, but that reference does not cross the *Majrowski* line.

The 20 July 2014 email

88. On 20 July 2014, Dr Cave sent an email entitled "A case of the tail forgetting to wag the dog" to members of Serle Court Chambers (the Chambers of which the Claimants' counsel are members). This referred to Jessica Blake's accident in 2012. It criticised the HSE's response to this and then stated that the HSE's defence to the application for judicial review about its investigation of the accident "was obviously written in collusion" with Merlin's solicitors. It is clear from paragraph 49 of the first witness statement of Mr Armstrong, Merlin's group legal director, dated 4 August 2014, that he understood Dr Cave to be referring to collusion between Knights (and not him personally) and the HSE to prepare the defence to the judicial review.

89. Dr Cave attached to the email the order for costs made in the Administrative Court. A Deputy Judge had made no order as to costs, because the HSE had applied for them too late. Dr Cave said, "It seems to me that this is a clear case of the tail (Merlin Entertainments' solicitor) forgetting to wag the dog (HSE solicitor)". He went on to say that although the costs would have been awarded against him, he was a little upset that Merlin Entertainments has sufficient influence as to make a government department waste public funds - quite apart from not reporting on an open and shut case.

90. Mr Armstrong describes this email in his first witness statement as "offensive and inappropriate". He says that neither he nor the Claimants' external solicitors have ever colluded with the HSE "in any improper way, and indeed took no participation in the judicial review proceedings". The failure to seek costs promptly was TSol's not that of the HSE, as appears from the face of the court's order.

91. Is the content of this email, or the way in which it was distributed, arguably capable of being unlawful harassment? Is such claim more likely than not to succeed? Mr Armstrong does not suggest that he felt harassed by the email in his first witness statement. In his third, made on 21 August 2014, under the heading, "Harassment of me [and of others]" he refers to paragraphs 25-55 of his first witness statement for a summary of "systematic harassment of me [and others]". In paragraph 11 of the third

statement, he states that in the 20 July 2014 email, Dr Cave directly impugned his professional integrity "in his assertion of improper collusion" with the HSE. This offensive and untrue allegation, he says, was repeated many times to many barristers and was sent to Mr Armstrong's business colleagues. Mr Armstrong was "shocked that Dr Cave had made such an appalling allegation and sent it so many times to such a large number of people, many of whom knew me personally or professionally".

92. There is nothing potentially offensive in the email other than the word "collusion" (which might imply impropriety). But Mr Armstrong's use of the phrase "colluded improperly" suggests that he is not sure that, on its own, "colluded" necessarily connoted impropriety. There is nothing necessarily improper in a defendant and an interested party co-operating in producing a defence in a judicial review in which they are both joined. In the circumstances, I do not consider that, in context, the suggestion of 'collusion' is either offensive, shocking, or appalling. I do not consider that this email arguably crosses the the *Majrowski* line. That is not changed by the fact that the email has been sent, on separate occasions, to many recipients.

The email of 2 August 2014

93. On 2 August 2014, Dr Cave sent an email entitled "Safety" about the safety of theme parks to many employees, and officers of the four companies, including Mr Smith. The email says "Please find attached presentation which is intended to raise awareness of the hazards that can occur at visitor attractions. My intention is not to spoil people's fun but simply to keep them safe". He attached a pdf file which was a general presentation about the safety of theme parks. This referred to accidents which have happened in theme parks around the world. It also made suggestions for things to look out for in inspections.

94. The Claimants plead that in context, this constitutes further harassment of the companies, Chessington's employees, and of Mr Varney. I do not agree. The tone of the presentation is moderate, and it has not been suggested that any part of its contents is untrue.

5. Is there a course of conduct?

(a) the employees

95. I do not consider, in the circumstances of this case, that, in the light of all the factors I have mentioned, the series of mass emails to employees of the corporate Claimants is a course of conduct which amounts to harassment of those employees. Although this is not decisive, evidence of adverse effects on employees is very limited. They could all unsubscribe if they wished to. The emails were sent to their work email addresses. This might be annoying conduct, and it might well be irritating. But this is not conduct which is grave enough to be a crime. Such a claim is not arguable, still less is it more likely than not to succeed.

(b) the named individuals

96. There were several individuals of whom Dr Cave asked, rhetorically "How do you sleep at night?" They were Mr Varney, Joseph Baratta, Kevin Bainbridge, David Smith, Ian Cunningham, Sam Thompson, Peter Barmby and Bob Nicholls. These people are referred to in the website at the foot of the page entitled "Culpability". They

are, apart from Mr Baratta and Mr Bainbridge, employees of the corporate Claimants and so will have received the mass emails as well. Joseph Baratta, Mr Varney and David Smith have been the subject of other conduct, so I will consider the position of the remaining 5 employees first.

97. The point being made on this page is that the named individuals (who, I assume, apart from Messrs Baratta and Bainbridge, must be members of the Chessington "management") were fully aware why Jessica Blake's accident happened, because the fence panel she fell through was completely decayed. Despite this, they kept the Park open in 2012.

98. I do not consider that, in relation to five individuals, this text, coupled with the sending of the mass emails, is arguably harassment, or that a claim that it was harassment is more likely than not to succeed. It is harsh, personalised criticism, and may not be reasonable. I have referred to its effect on Messrs Cunningham and Barmby above. But if the factual assertions on this page are right, it does not, in my judgment, cross the *Majrowski* line. For if the fence was in such a state of decay, the reason for the accident would have been self-evident. Moreover, while the managers concerned might not be expected to have known after the accident that every one of the 2000 defects said to have been found by PEL's report existed, the accident, and its alleged cause, might have been expected to have alerted them to the likelihood that there were other defects. The condition report, and MAOL's response to it, suggest that there were other defects: after all, MAOL approved expenditure of more than £4m to put them right.

99. Mr Barrata, in addition, was the subject of criticism in the IPO document. I do not consider that this, coupled with the website reference, is a course of conduct which arguably amounts to harassment or that such a claim is more likely than not to succeed. Mr Barrata has been subjected to robust criticism, but it does not cross the *Majrowski* line.

100. Mr Smith was sent the letter before claim, was named in the website, and received the mass emails. I do not consider that the letter before claim, taken with the website reference and the mass emails, is arguably a course of conduct which is harassment or that such a claim is more likely than not to succeed. The *Majrowski* line is not crossed.

101. Mr Varney has been named in several different communications, as I describe above, and has received the mass emails. He has been singled out more than any other individual. In part, no doubt, that is because, as CEO of Merlin Limited and a director and employee of Merlin, he is the group's public, human face. I do not doubt that he has been upset by this personalised criticism. But it does not arguably cross the line into criminal conduct. A claim that it does so is not more likely than not to succeed.

Conclusions

102. For these reasons, this application fails. The Claimants have not persuaded me that there is a serious question to be tried, still less that they are more likely than not to succeed. This conclusion means I do not need to consider the balance of convenience in accordance with *American Cynamid Co v Ethicon Ltd* [1975] AC 396C. So I say no more about that, other than to make two points. First, while I accept that damages

might well not be an adequate remedy for Claimants (in part at least because Dr Cave would not be able to pay them), that is not the end of the inquiry on adequacy of damages (see pages 406 E-F and 408 B-E, per Lord Diplock). There is a real issue, on Dr Cave's side of the argument, about whether damages would be an adequate remedy to compensate for an infringement of his right to speak his mind. Second, the "balance of convenience" (as that term is used by Lord Diplock at page 408G) might well indicate that the court should take steps to preserve the status quo. In this case, that could mean permitting Dr Cave to continue his campaign.