Neutral Citation Number: [2014] EWHC 1442 (QB)

Case No: HQ13X02874

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2014

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

AVB	**Claimant**
- and -	
TDD	**Defendant**

- -
- -

William Bennett (instructed by **Stokoe Partnership**) for the **Claimant**
Alastair Wilson QC (instructed by **Richard Slade and Company**) for the **Defendant**

Hearing dates: 2nd, 3rd, 4th and 7th April 2014

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Judgment

Mr Justice Tugendhat :

1. The Claimant ("AVB") asks for an injunction to restrain the misuse of private and confidential information and harassment, and for damages. The information concerns in part the relationship between the parties and in part what the Defendant ("TDD") learnt about AVB's family and acquaintances in the course of that relationship. The relationship was that of a client and a sex worker.

2. AVB is a solicitor in his late 60s. He and his partners built up a well known small London firm from which he retired recently. There are three grown up children of his marriage. Two of them are daughters, one of whom was still at university in 2013 ("AVB's younger daughter"), the other of whom is seven years older ("AVB's elder daughter"). He and his two daughters both went to some of the best known universities in the country. AVB separated from his wife in 2008 and the divorce was finalised in 2010.

3. TDD is a woman in her twenties. She was born in China. She came to England to study at the age of 18. She married a fellow student when she was 20 and divorced three years later. TDD's parents are educated and well to do people. They live in China, and their views on her activities are important to her. They disapproved of her marriage and, for a period, withdrew the financial support they had been giving her. After her divorce she returned to study, attending a prestigious college in London, and choosing law as her subject. She turned to prostitution to make a living. She has kept this a secret from her parents who she says would disapprove. She has also kept it a secret from the college and from some of her friends, but not all of them. She advertised her services under false names through escort agencies.

4. The parties met in late March 2012 when AVB responded to one of the advertisements for her published by an escort agency. The events the subject of this litigation all occurred in the period March 2012 to May 2013. These events fall into three stages: March to September 2012, October 2012 and March to May 2013. AVB issued his claim form on 24 May 2013. On the same day I granted him a privacy injunction for reasons set out in the judgment I handed down on 20 June 2013: **[**2013] EWHC 1705 (QB). At that stage both parties had different firms of solicitors acting for them, and TDD had different counsel.

5. The Particulars of Claim were dated 21 June 2013. At the start of the trial I gave permission to AVB to amend the Particulars of Claim ("APOC") in a number of respects, but I refused permission for an amendment relating to events that occurred in February 2014. I gave my reasons for this decision in an ex tempore judgment on the first day of the trial. Each party blamed the other for the events in February 2014.

6. A Defence and Counterclaim was served on 22 July and a Reply and Defence to Counterclaim on 2 August 2013. In the Counterclaim TDD alleges that AVB harassed her. She claims damages for harassment against him, and an injunction to restrain him from further harassing her or attending at her home, or disclosing information about her sex work.

EVENTS LEADING UP TO THIS ACTION

7. The events that prompted AVB to sue were a telephone call from his younger daughter to him on Saturday 4 May 2013, and his receipt of emails from her. The emails were dated 4 May at 20:38 and on Monday 6 May 2013 just before midnight. He states that his daughter telephoned him distraught on 4 May saying she had received a series of messages from a person using the name "Mary Diaz", who she suspected might be a Brazilian impersonating a young woman who I shall refer to as Ms R, with whom AVB had been in a relationship in Brazil. The email from AVB's younger daughter sent on 4 May reads:

> "I have just received a series of messages from Mary Diaz who I suspect is a fake alibi [Ms R] is using. To what extent the content of the indescribably sickening messages are true or not really doesn't concern me, either way this has all gone too far and I really don't think we are going to be able to have much of a father-daughter relationship from now on."

8. The immediate background to this is in part agreed, and in part disputed. There is no dispute that AVB and TDD had spent the night of 29-30 April together at AVB's flat. They had a serious falling out. He left home for his office, telling her he was going away from 2 to 7 May 2013, in fact to Brazil, although he states that he did not tell her where he was going. In the three day period starting Monday 29 April at 12:53 GMT and ending Thursday 2 May at 17:25 GMT they had exchanged some 360 text messages, about 10 from her for every one from him. The last one from her, at 17:24 GMT, reads: "Last report: This is my last text and hereby I reinforce that please don't contact me". His last at 17:25 GMT reads: "I am responding to your communications for clarity".

9. The relationship between them was not exclusively sexual. She had asked him for help with her legal studies, with her legal career, and, when the need arose, legal advice and representation. He had encouraged her expectations at the start of their relationship. He did in fact introduce her to a relation who is a Queen's Counsel, and to one or two other friends of his. They also got on well together when they were not quarrelling, since they had in common the cultural interests that two highly educated people often do have. He told her some information about his previous sexual affairs, including one affair with a woman at his place of work, and he told her some information about his Brazilian girl friends and the lawsuit he was engaged in with Ms R in Brazil.

10. Many of the messages they each exchanged are abusive, his particularly so. In a text messages sent on 11 August 2012 he explained this:

> "… you are so easy to wind up … I like to arouse your darker side. Its so easy to do. You must learn to control emotions. This is the reputation of the orient. Be inscrutable. Lol."

11. On 30 April and 1 May she was asking him for help in writing to her College to make a complaint about a teacher. She claimed to be entitled to a certificate which was being withheld by the college, but which she needed to get admission to another institution. She said she was being accused of plagiarism. She offered sexual services in exchange for this help. She also asked for money for travel and tuition and for a reference as a paralegal. She told him the deal she was offering to another client of hers, who has been referred to as Mr X. He was an elderly man who came originally from another English speaking country and held a prominent position in life. Apparently she hoped that TDD would accept similar terms. She complained that he had been more generous to Ms R than to herself. To that AVB replied on 30 April at 20:14 GMT "ROT IN HELL HERPES MOUTH CHEAP HOOKER". He sent her a photo of another young Brazilian woman, Ms L, looking flirtatious in a bikini. However, TDD continued to text him asking for his help with her complaint to the college.

12. In the afternoon of 1st May they arranged a sexual encounter over Skype. She then threatened to send, and then said she had sent, emails to his office address, which (as she mistakenly believed) would mean that his secretary would see it. He appears not to have believed her threat, but nevertheless replied at 20:04 GMT:

> "If you do I will sue and get freezing order on your flat. Defamation harassment breach of confidence".

13. Both TDD's emails referred to sexual relationships which she alleged he had had with secretaries, clients and trainees of his firm. They were not in fact read by anyone at that time because she used an obscene email address, and they were diverted to a junk file. Nevertheless he complains of them in his Amended Particulars of Claim ("APOC") paras 22 and 23. The 17:37 email she sent to his office email address was headed "Where!!! ---please don't contact me any more!!!" and started:

> "U can't just fuck hooker and kick them out!!! U dirty old man … Stop contacting me!!! And stop abusing me!! And stop asking for Skype to see my […]!!!"

14. The 17:53 email she sent to his office email address was headed "Abuse ---woman employee" and read:

> "Please stop texting me and bragging about u abusing ur boss power to E and Previous J and previous trainees and made them [a sex act] for a pay check.
>
> & the same time saying they r old saggy and butt ugly & they admire u as u r superior lawyer psychologically.
>
> I don't want to know this
>
> This is disgusting
>
> Please don't contact me. Abusive pervert"

15. At 18:07 GMT he warned her against blackmailing him, but she replied she had already sent the email. At 20:05 GMT he complained that she had been with another man the previous evening and only come to his flat after that, at midnight.

16. There is no mention in these exchanges over Skype of him offering to pay for any of the sexual services she provided at his flat on these days.

17. In three text messages on 1 May which TDD sent at 20:22 GMT, 20:52 GMT and 20:56, and to which she received no response, TDD wrote:

> "U hurt me. U use abuse me.
>
> Never introduce me to family. Never want baby and marriage. We r never serious. u have [Ms L] and still obsessed with r[enata]. U channel all anger/baggage from r to me. U r manipulative. And simply really crazy crazy crazy. [Mr X] caught you cheating on me with [Ms L]. So please don't always abuse others then blame else. U r selfish. And I am tired of u. I tried. Want to move on. Pls don't be a abuser in victim s clothes. Fortune teller said u will block my way to happiness and the right one. So please accept the fact now we r finished and please don't contact me anymore and move on u r v hurtful person who needs help. Bye.

> U r selfish / manipulative / abusive / insecure / paranoid / compulsory liar / not generous / too anxious / violent / user / too stressed / unhappy / lots of baggage / controlling / messed up / aggressive person. Even u r nice one. But I want to move on with life without all this chaos and stress. Above is not worth any ££ in the world to compensate nor justified for what I am suffering. Bye."

18. On 2 May TDD resumed texting. She first wrote at 08:58 GMT:

> " U abuse me for £20 dinner and cheap 2nd hand shoes and give her £1099000 u kick hooker out after u fuck them while she blow ur ££ on other men and kick u out…"

19. AVB replied at 09:17 "I'm not answering. I am relaxing for a few days". At 10:17 GMT she sent to him a still image of Ms R naked in bed in an obscene pose. TDD took this image (by using her iPhone camera) from a video recording she had found on one of a number of USB memory sticks ("the memory sticks") belonging to AVB. AVB responded at 10:31 GMT: "Thank u for giving me PROOF u copied private video and fotos from my computer…" and he again threatened legal proceedings.

20. AVB took the opportunity in both his first and sixth witness statements to explain that Ms R had consented to his taking this video. He does not state that Ms R knew he had retained it, or consented to him retaining it after their affair had degenerated into a lawsuit. His explanation in his sixth witness statement is that he was sure he had deleted it. That seems hard to believe, but since he was not challenged on it I make no finding.

21. TDD replied that he had sent her the image himself (which, as I find, was not true). At 10:38 GMT TDD claimed that she had found a recording of herself having sex with AVB ("the audio tape") and said she was going to the police. At 10:39 GMT he denied he had made a recording of himself with her, and accused her of making it (if there was one). Whether or not there ever was such a recording was hotly disputed in the action. There is no documentary evidence of it. TDD claimed in a text sent at 16:18 GMT that she was deleting it. Her evidence is that she did delete it. His case is that it never existed. The text traffic between them ended shortly after that exchange.

22. In his first witness statement AVB stated that at some time she had also telephoned him to say that she had found a recording of him and her having sex, but he does not give the time of that call. So it is not possible to say when she first made the allegation that she had found the audio tape.

23. The subject line of AVB's younger daughter's email of 6 May contains the words "the messages…" AVB's younger daughter had simply cut and pasted into the body of the email eight messages on Facebook purporting to come from "Mary Diaz". These messages are the subject of APOC paras 29.1 to 29.13. There is no dispute that the messages were posted on AVB's younger daughter's Facebook page by TDD, nor that AVB had been engaged in sexual relationships with Ms R. Nor was there any dispute that he was in 2013 engaged in a relationship with another Brazilian Ms L, who was about the same age as TDD. AVB denied that this relationship was sexual. AVB

admitted that he did not disabuse TDD of her belief that his relationship with Ms L was sexual. TDD believed the relations was sexual, and so do I.

24. On 23 May 2013 AVB made a witness statement in support of his application for an interim injunction. It includes an explanation of how TDD came to obtain the information he seeks to protect as private and confidential. He describes himself as aged 68 (in 2013) and Jewish. He said that he and TDD had met at his flat when she responded to his approach to the escort agency. He said that in the course of that meeting they each told the other information about their personal lives. She told him that she was studying law at the college she named, that she had done a mini-pupillage (presumably in a barristers' chambers) and wanted a career in the law. She told him she liked Woody Allen films and Jewish people who, she said, were like Chinese. He formed the impression that she was very intelligent, extremely well read in English literature and a competent artist and musician. He told her that he wanted to see her again, and to go to the theatre and art galleries with her, but could not introduce her to his children. He said they would never forgive him for having a relationship with a young woman, in particular because he had had a disastrous relationship with a young Brazilian woman [Ms R] that had started in late 2008. She had gone to Brazil and he often visited her there. The relationship had ended acrimoniously in 2011, with each suing the other. He told TDD that he was being helped in Brazil by two women, one of them Ms L, who was aged 25 and studying architecture and history of art. He told her that he had had an affair with a woman at his office. He stated that he had told TDD that he had told his children that he would not have any similar relationships again with younger women.

25. The choice by TDD of the pseudonym "Mary Diaz" gave the impression that the messages TDD sent to AVB's younger daughter came from a Brazilian girlfriend. The messages also contained what purported to be private information about TDD and his relationships with Ms R and Ms L, and what purported to be information which TDD had communicated to the writer about each of TDD's children and their mother. Some of this information is what AVB had told TDD at their first meeting, or subsequently, but much of it clearly came from the memory sticks TDD had found at his flat. The first message sent to AVB's younger daughter states that Ms R was "claiming for spouse settlement which is [a large sum]" and which, said TDD, AVB was proposing to settle for about half that figure. The messages are written in a sarcastic and mockingly friendly style ("He still loves u even if u didn't …"). The text is generally disobliging. The second last message is particularly offensive. It refers to TDD having "fantasies" about "girls around ur age". The message goes on that "he tries not to think about this when having intimacy with them. So don't worry". The last message is short: "Ur dad now is in brazil --- right now with girls".

26. As they appear in AVB's younger daughter's email, the messages are undated, and the first one has no time either. The second third and fourth messages are timed within half an hour of each other 20:17, 20:43 and 20:45. The fifth, six and seventh messages are headed "Thursday" and are timed within four hours of the first four messages, and within seven minutes of each other: 00:38, 00:43 and 00:45". The last message is headed "Saturday" and is timed 13:47 (probably 4th May, that is more than one day later). I infer that the first message was sent on Wednesday 1st May, while AVB and TDD were quarrelling through text messages.

27. On 4 May TDD sent a number of other emails to AVB's professional partners, but these emails did not reach their addressees. AVB did not come to learn of them until TDD disclosed them in this action. One sent at 16:24 contains three pages of allegations against AVB.

28. AVB stated in his first witness statement that, on his return from his trip to Brazil, he found in his flat three of his memory sticks, a camera and a front door key that TDD had pushed through his letter box. He states that the contents of these were confidential. They included copies of essays of Ms L and another person, with which he had been helping, and highly personal information about Ms R, his son and his former wife.

29. In the email of 12 May at 10:20 which TDD sent to AVB's professional colleagues (but which he did not learn of until it was disclosed in this action) TDD set out detailed information about financial matters concerning the firm which she can only have learnt by reading the documents on the memory sticks.

30. On 13 May solicitors instructed by AVB sent to TDD a letter before action complaining that TDD's conduct amounted to harassment of AVB and of AVB's younger daughter, to theft of memory sticks and information obtained by TDD from AVB's computer, and to breach of confidence. The solicitors asked for an apology and undertakings from TDD. They threatened to report her to the police for harassment, which, as they correctly pointed out, is a criminal as well as a civil wrong. The letter enclosed a copy of a Confidentiality Agreement ("the Confidentiality Agreement") signed by TDD and AVB about a year previously, on 17 June 2012.

31. On 14 May 2013 at 00:04 TDD sent a reply disingenuously claiming to think that the solicitors' letter might be a scam, and saying she had herself already reported the matter to the police. She alleged that the Confidentiality Agreement was a forgery. She had in fact been to the police station in Wimbledon on 13 May and complained to them about AVB.

32. On 15 May at 01:23 she wrote a defiant email containing similar allegations to AVB's professional partners. She included a complaint that AVB had made "death threats harassment" to her.

INTERIM PROCEEDINGS IN THIS ACTION

33. On 24 May I granted a non-disclosure order without notice to TDD to last until 5 June. The information not to be disclosed is set out in a Confidential Schedule in two paragraphs. Sub-para (1)(a) covers personal information mainly relating to AVB himself. But it is wide enough to include information about the relationship between AVB and TDD. Sub-para (1)(b) covers information relating to his family. Para (2) covers photographs of AVB engaged in private acts.

34. On 30 May TDD served a witness statement in compliance with my order that she disclose the names of those to whom she had disclosed information about AVB which he claimed to be confidential. The number of publishees was in low single figures for each disclosure, and none of them appear to be journalists.

35. On 4 June TDD made her 2nd witness statement. In it she gave the information about herself set out in para 3 above, and she set out an account of the relationship between them which is now the basis of her Defence and Counterclaim. However, she did admit AVB's claim in respect of the disclosure to AVB's younger daughter as follows (an admission which she repeated in her Defence):

> "I admit that … I sent Facebook messages to [AVB]'s daughter … using the alias Mary Diaz. I accept I should not have involved her in a dispute between myself and [AVB]".

36. She has not made any similar admission in relation to any of the other disclosures she has made of information concerning AVB or third parties who had been in a relationship with him.

37. On 5 June TDD appeared by solicitors and counsel. After a further adjournment, and with the assistance of their legal advisers, the parties reached an interim agreement. The interim injunction I granted was discharged, and they each voluntarily gave undertakings to last until trial.

38. TDD's undertakings were substantially similar to the terms of the injunction I had granted, but preserved her right to make complaints about AVB to the appropriate individuals and bodies dealing with complaints about a solicitor, and to bring proceedings against AVB.

39. AVB's undertakings were, mainly, not to contact named friends of TDD and her parents, and not to disclose information about her, including information about her "work or employment as an escort or prostitute". He gave the undertaking notwithstanding that his evidence is that he had never threatened to tell her parents or her college about her sex work, and her allegation that he did make that threat is untrue.

40. The undertakings were initially limited to a period ending 14 December 2013. In accordance with my normal practice in granting privacy injunctions, I had required that there be that limitation in order to ensure that the prohibitions did not last longer than was necessary for the resolution of the dispute, and did not become permanent by default if AVB did not pursue the action (as has sometimes happened with interim privacy injunctions in the past). On this occasion I also gave directions for the matter to proceed to trial.

41. When the end of that period approached TDD declined to renew her undertakings. On 1 November 2013 Bean J had dismissed TDD's application that the anonymity order that I had granted on 24 May be discharged (his reasons are set out at [2013] EWHC 3842 (QB)). On 6 December 2013, and on AVB's application, the prohibitions were continued until the trial of this action by an injunction granted by Nicola Davies J (her reasons are set out at [2013] EWHC 4160 (QB)). Nicola Davies J awarded indemnity costs against TDD, saying that these hearings had been "an exercise in gamesmanship".

THE ISSUES IN THE ACTION

42. The allegations of harassment go back to the start of the relationship. It is therefore necessary to review that history.

43. In his APOC paras 10 to 35.4 AVB now complains of the following as a course of conduct amounting to harassment under the Protection from Harassment Act 1997 (APOC paras 36 to 41), and on much of the following as misuse of private information breach of contract (APOC paras 42 and 43):

    i) APOC para 11 - 13 June 2012: Three emails to his partners and co-workers, following which the parties each signed the Confidentiality Agreement (the Confidentiality Agreement is the basis of a claim for breach of contract in APOC para 43);

    ii) APOC paras 17 to 21 – 30 April 2013: TDD taking confidential information in the form of seven documents recorded on USB memory sticks on the occasion when she stayed at his flat on the night of 29/30 April 2013;

    iii) APOC paras 22 to 24 – 1 May 2013: Two emails to his co-workers at 17:37 and 17:53;

    iv) APOC paras 25 to 28 – 2 May: a text message to AVB attaching an image of AVB having sex with Ms R;

    v) APOC paras 29 to 30 - 1 to 4 May 2013: TDD's eight Facebook messages to AVB's younger daughter;

    vi) APOC paras 31 to 32 – 4 and 5 May 2013: TDD's emails to his partners at 16:24 on 4 May and on 5 May at 01:35, 01:58 and 02:12;

    vii) APOC paras 33 to 34 on 15 May 2013: TDD's email to AVB's then solicitors Daryl Ingram.

    viii) APOC paras 35 on 1 to 7 May: TDD's emails, and other disclosures to third parties, as admitted by TDD in her first witness statement after AVB had obtained the injunction against her on 24 May.

44. TDD does not dispute that she did send these emails and other messages, and she admits that she was wrong to send the eight Facebook messages to AVB's younger daughter. The issue in respect of the other messages is whether they amount to harassment, or to a breach of confidence, or to misuse of private information.

45. For her part TDD now complains of the following as a course of conduct amounting to harassment (Counterclaim para 14)**:**

    i) Occasions when AVB has threatened to inform her college about her sex work - AVB denies that he did this;

    ii) Occasions when AVB has threatened to inform her parents about her sex work - AVB denies that he did this;

iii) Occasions when AVB has attended at TDD's home uninvited late at night, or threatened to do so, to demand sex – AVB admits that he sometimes attended TDD's home at night, but claims it was at her invitation;

iv) One occasion between about 5 and 13 May when AVB attended TDD's home uninvited and late at night and threatened to kill TDD, about which she complained to the police – AVB admits the complaint, but avers that TDD made a false complaint to the police.

v) Occasions when AVB has stalked TDD by attending at her hairdresser's salon for a haircut and questioning her hairdresser as to TDD's then whereabouts – AVB admits the visits and questions, but denies that it amounted to harassment;

vi) When AVB has sent prank texts to TDD's friends pretending to be an Asian call girl – AVB denies this.

46. She also relies on the allegations set out in her third witness statement paras 26-28. In these paragraphs TDD states that AVB took great pleasure in winding her up and calling her names, and in her being rude to him in return. After such exchanges he demanded sex or sexual photos and occasionally sent sexual photos of himself to her. She states that he deliberately provoked her into arguments because he enjoyed them.

47. Mr Wilson submits that both sides have behaved badly, but that there should be no injunctions or other orders. TDD admits she has behaved unacceptably, as recorded above, but AVB does not admit that he has.

48. Mr Bennett submits that the real issue is whether AVB has harassed TDD. He accepts that the fact that there was a relationship between them is not private or confidential, but submits that the fact that the relationship was with her as a sex worker is private and confidential. TDD states that they went out together in public, and it was always quite obvious that she was an escort.

THE LAW ON HARASSMENT

49. Harassment is a statutory cause of action created by the Protection from Harassment Act 1997. The provisions most relevant to this case are:

> "1 (1) 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 the other…
>
> (2) The 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 amounted to or involved harassment of the other.
>
> (3) Subsection (1) … does not apply to a course of conduct if the person who pursued it shows – … (c) that in the particular

> circumstances the pursuit of the course of conduct was reasonable. …
>
> 2 (1) A person who pursues a course of conduct in breach of section 1 is guilty of an offence…
>
> 3 (1) An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.
>
> (2) On such a claim damages may be awarded for (amongst other things) any anxiety caused by harassment and any financial loss resulting from the harassment.
>
> 7… (2) References to harassing a person include alarming the person or causing the person distress.
>
> (3) A 'course of conduct' must involve – (a) in the case of conduct in relation to a single person conduct on at least two occasions in relation to that person.…
>
> (4) "Conduct" includes speech".

50. Mr Bennett submits that a course of conduct is to be interpreted in accordance with the guidance of Rix LJ in *Iqbal v Dean Manson Solicitors* [2011] EWCA Civ 123. In that case a solicitor advocate brought a claim in harassment against the firm with whom he had previously worked arising out of a series of letters. At paras [35]-[36] Rix LJ cited the following:

> "35 In *Majrowski v. Guy's and St Thomas' NHS* Trust [2006] UKHL 34, [2007] 1 AC 224, the issue was whether an employer could be vicariously liable under the Act for harassment by its employee. The House of Lords held that it could. It was submitted that such an answer would open the floodgates to vicarious liability for all the petty nastiness of employee to employee, and even to unfounded and speculative or unmeritorious claims by disgruntled employees. Lord Nicholls of Birkenhead said this:
>
> > '[30] This is a real and understandable concern. But these difficulties, and the prospect of abuse, are not sufficient reasons for excluding vicarious liability…Courts are well able to separate the wheat from the chaff at an early stage of the proceedings. They should be astute to do so. In most cases courts should have little difficulty in applying the "close connection" test. Where the claim meets that requirement, and the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day 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 gravity of the misconduct must be of an order which would sustain criminal liability under section 2.'
>
> 36 Baroness Hale of Richmond said at [66]:
>
> 'A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour.'"

51. At para [45] Rix LJ said this under the heading "Course of conduct":

> "… the Act is concerned with courses of conduct which amount to harassment, rather than with individual instances of harassment. Of course, it is the individual instances which will make up the course of conduct, but it still remains the position that it is the course of conduct which has to have the quality of amounting to harassment, rather than individual instances of conduct. That is so both as a matter of the language of the statute, and as a matter of common sense. The Act is written in terms of a course of conduct: see sections 1(1), 1(2), 1(3), 2(1), 3(1), 7(3). That course of conduct has to amount to harassment, both objectively and in terms of the required mens rea (see section 1(1)(b)). In the case of a single person victim, there have to be "at least two occasions in relation to that person" (section 7(3)(a)), but it is not said that that those two occasions must individually, ie standing each by itself, amount to harassment. The reason why the statute is drafted in this way is not hard to understand. Take the typical case of stalking, or of malicious phone calls. When a defendant, D, walks past a claimant C's door, or calls C's telephone but puts the phone down without speaking, the single act by itself is neutral, or may be. But if that act is repeated on a number of occasions, the course of conduct may well amount to harassment. That conclusion can only be arrived at by looking at the individual acts complained of as a whole. The course of conduct cannot be reduced to or deconstructed into the individual acts, taken solely one by one. So it is with a course of communications such as letters. A first letter, by itself, may appear innocent and may even cause no alarm, or at most a slight unease. However, in the light of subsequent letters, that first letter may be seen as part of a campaign of harassment."

52. Both sides cite on the summary of the law that Simon J set out in *Dowson v Chief Constable of Northumbria Police* [2010] EWHC 2612 (QB) in part derived from the passage in *Majrowski* cited above. He set it out as follows at para [142] what a claimant must prove:

> "(1) There must be conduct which occurs on at least two occasions,
>
> (2) which is targeted at the claimant,
>
> (3) which is calculated in an objective sense to cause alarm or distress, and
>
> (4) which is objectively judged to be oppressive and unacceptable.
>
> (5) What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.
>
> (6) A line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways: 'torment' of the victim, 'of an order which would sustain criminal liability'. "

53. What amounts to a course of conduct is a matter for the court to assess, since it is not always clear whether the acts complained of are to be considered as separate or as linked.

THE LAW ON MISUSE OF PRIVATE OR CONFIDENTIAL INFORMATION

Misuse of private information

54. The statutory framework for the law on misuse of private information derives from the Human Rights Act 1998 and the European Convention on Human Rights, as explained in *Hutcheson v News Group Newspapers Ltd* [2012] EMLR 2 paras [17]-[28]. They provide as follows.

55. Art. 8 provides as follows:

> "Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of … the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

56. Art. 10 is in these terms:

> "Freedom of expression
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and

> impart information and ideas without interference by public authority and regardless of frontiers…..
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, … for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, ..."

57. HRA s.12, so far as here material, provides as follows:

> "Freedom of expression
>
> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression. …..
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression …"

58. The questions which the court must ask itself can, in large measure, be taken from the summary given by the court in *K v News Group Newspapers* [2011] EWCA Civ 439; [2011] 1 WLR 1827 at para [10]:

> "(1) The first stage is to ascertain whether the applicant has a reasonable expectation of privacy so as to engage Article 8 [right to private and family life]; if not, the claim fails.
>
> (2) The question of whether or not there is a reasonable expectation of privacy in relation to the information:
>
> > "… is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher": see *Murray v Express Newspapers* [2009] Ch 481 at [36].
>
> The test established in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 is to ask whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, rather than the recipient, would find the disclosure offensive.

> (3) The protection may be lost if the information is in the public domain. In this regard there is, per *Browne v Associated Newspapers Ltd* [2008] QB 103 at [61],
>
> > "…potentially an important distinction between information which is made available to a person's circle of friends or work colleagues and information which is widely published in a newspaper."
>
> Whether what may start as information which is private has become information known to the public at large is a matter of fact and degree for determination in each case depending on its specific circumstances.
>
> (4) If Article 8 is engaged then the second stage of the inquiry is to conduct "the ultimate balancing test" which has the four features identified by Lord Steyn in *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 A.C. 593 at [17]:
>
> > "First, neither article [8 or 10] has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each." (It should be noted that the emphasis was added by Lord Steyn.)
>
> (5) As *Von Hannover v Germany* (2005) 40 EHRR 1 makes clear at [76]:
>
> > “the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest.”

59. However, in so far as the present case relates to information concerning the parties (as distinct from third parties, including the family or other acquaintances of AVB) there is no involvement of any news media or person other than the two parties to the relationship in question. And it is TDD’s case (which I accept) that, in so far as it was sexual, the relationship was between a professional sex worker and a client. It did not engage the affections of either party, but was a business relationship. A business relationship is nonetheless a business relationship if the parties to it happen to enjoy each other’s company from time to time. Parties to business relationships often do.

60. Passages from *Hutcheson* which Mr Bennett refers to as being of assistance in the present case include the following:

"24. *(3) Art. 8:* In addressing the question of whether Mr. Hutcheson is entitled to assert a claim to privacy in respect of the second family, it is next helpful to highlight various features of Art. 8, beginning with the identification in the authorities of 'private information as something worth protecting as an aspect of human autonomy and dignity': *Campbell v MGN Ltd (supra),* at [50]. The cause of action focuses upon (*ibid,* at [52]):

> ' …the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.'

Picking up on the same theme in the context of a free society, Laws LJ said this in *R (Wood) v Comr of Police of Metropolis* [2009] EWCA Civ 414; [2010] 1 WLR 123:

> '21. The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification… an individual's personal autonomy makes him – should make him – master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image… He is the presumed owner of these aspects of his own self; his control of them can only be loosened, abrogated, if the state shows an objective justification for doing so.
>
> 22. This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's personal autonomy must (if article 8 is to be engaged) attain 'a certain level of seriousness'. Secondly, the touchstone for article 8(1)'s engagement is whether the claimant enjoys on the facts a 'reasonable expectation of privacy' … Absent such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the state pursuant to article 8(2)…'

That, in the event, this judgment of Laws LJ was a dissenting judgment, is neither here nor there on the questions of principle canvassed in the passage cited.

25. It should further be noted that the mere fact that otherwise private information is known – and thus 'public' - but within a limited circle of people, does not, without more, preclude a claim to prevent publication to the world at large.

26. As will be apparent, a complaint of misuse of private information is necessarily fact sensitive. That Art. 8 may be, in principle, applicable (or 'engaged') does not by itself mean that there has been a breach of its provisions: *Harrow LBC v Qazi* [2003] UKHL 43; [2004] 1 AC 983, at [47], *per* Lord Hope. Further, the nature of the information requires careful consideration. There may, for instance, be a difference (both at this stage and when conducting the balancing exercise) between information as to the *bare fact of a relationship* and information as to the contents or detail of that relationship: see, *Browne v Associated Newspapers Ltd* [2007] EWCA Civ 295; [2008] QB 103, at [57] *et seq*. Further still, evidence is required as to the Art. 8 rights of the individuals said to be affected; as Tugendhat J expressed it, in *Terry and Persons Unknown* [2010] EWHC 119; [2010] EMLR 16, at [65]:

> 'Respect for the dignity and autonomy of the individuals concerned requires that, if practicable, they should speak for themselves.'

27. There is no question of Art. 8 furnishing an *absolute* right to privacy. Art. 8.2 qualifies, in terms, the right conferred by Art. 8.1. The claims of privacy must of course also be read with the right to freedom of expression provided by Art. 10 (in this jurisdiction, to be read together with s.12 of the HRA). Moreover and, in my view, with respect, wisely, Laws LJ emphasised in *Wood (supra)*, at [22], that the purpose of the 'safeguards' or 'qualifications' to which he referred was to ensure that the '…core right protected by article 8….should not be read so widely that its claims become unreal and unreasonable'.

28. *(4) Art. 10 and the balancing exercise:* Art. 10 enshrines another vitally important right in a free society, that of freedom of expression. It is unsurprising that the balancing exercise between the competing values of Arts. 8 and 10 may be difficult and necessarily requires an 'intense' focus on the facts of the individual case. As US Appellate Judge and jurist, Richard A. Posner observed (in *How Judges Think*, 2008, at p.246):

> " ….when cases are difficult to decide it is usually because the decision must strike a balance between two legitimate interests, one of which must give way."

29. In the area of sexual conduct, the decision in *Terry (supra)* raises a question which (while it does not have to be resolved in this case) highlights the conflict or tension between these two competing fundamental rights. Against the background of Eady J having upheld, at trial, a claim to privacy in respect of sadomasochistic conduct in *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777; [2008] EMLR 20, counsel in *Terry* (seeking an interim injunction in respect of information about an alleged adulterous relationship) appears to have submitted that the conduct of one person in private must be unlawful before another person should be permitted to criticise it in public. In a powerful passage, Tugendhat J disagreed, emphasising (at [99] *et seq*) the importance of public discussion and the freedom to criticise. Tugendhat J observed (at [101] and [104]):

> "It is not for the judge to express personal views on such matters, still less to impose whatever personal views he might have. That is not the issue. The issue is what the judge should prohibit one person from saying publicly about another…
>
> ... There is no suggestion that the conduct in question in the present case ought to be unlawful, or that any editor would ever suggest that it ought to be. But in a plural society there will be some who would suggest that it ought to be discouraged…. Freedom to live as one chooses is one of the most valuable freedoms. But so is the freedom to criticise (within the limits of the law) the conduct of other members of society as being harmful or wrong… It is as a result of public discussion and debate that public opinion develops….'

See too, the thoughtful discussion in *Tugendhat and Christie, The Law of Privacy and the Media* (2nd ed.), at paras. 12.208 – 12.216, under the heading "plurality of opinion".

61. What Laws LJ said in *Wood* about personal autonomy in the context of Art 8 also applies, of course, in the context of Art 10, and in that context it may apply to a woman who wants to speak about her experiences with a sexual partner.

62. The present case differs from *Hutcheson* in more than one respect. The conduct of AVB included payment for sexual services, and there is a public debate in this jurisdiction (and differing legislative provisions in other states parties to the ECHR), as to whether and to what extent payment for sexual services should be unlawful. This does not apply to TDD's sex work: no one in this jurisdiction suggests that the provider of sexual services for money should be guilty of criminal offence.

63. Mr Bennett submits that in the present case each party objects to the other disclosing to family and friends details of the relationship. That is true so far as it goes. But there are two asymmetries. The first, which I have already noted, is that there is public discussion as to whether to extend the provisions of the criminal law relating to sex work (Sexual Offences Act 2003 ss52-54 (exploitation of prostitution), as amended by the Policing and Crime Act 2009) so as to make buying sexual services illegal.

64. The only qualification to the obligation of confidence or privacy mentioned in *Hutcheson* was public domain (which is not relevant to the present case). But there are of course other qualifications or limitations which were not mentioned in that case because they were not relevant to it. One that is relevant here is the second of the two asymmetries between the parties that I have mentioned. TDD has been complaining that AVB was not paying her what he agreed to pay her, and that it was in seeking to enforce claims which she regarded as warranted that she made the disclosures that she did make.

65. In *Tournier v National Provincial* [1924] 1 KB 461 at pp481 and 486 the court held that there were a number of limits, or qualifications, to an implied contractual duty of confidence. These include where it is reasonably necessary for the protection of the interests of the party to the contract making the disclosure as against the other party to the contract.

66. In *Tournier* the court was considering the duty of confidentiality owed to a customer by a bank, and in particular the qualifications to that duty, but there seems no reason why the following passage should not also apply in a confidential business relationship where some service other than banking is what is provided (so the passages should read substituting the words "service provider" for the word "Bank)". See *Tugendhat and Christie on the Law of Privacy and the Media* 2nd ed, ch 12 written by Mark Warby QC, at para 12.105, where this case is cited in a chapter discussing defences to claims in both confidence and misuse of private information.

67. In *Tournier* at p 486 Scrutton LJ said:

> "…the obligation not to disclose information such as I have mentioned is subject to the qualification that the bank have the right to disclose such information when, and to the extent to which it is reasonably necessary for the protection of the bank's interests, … as against their customer…"

68. Mr Wilson submits that there is a public interest that prostitutes should be free to notify colleagues or relatives of a client who does not pay with a view to persuading him to behave better. He submits that where the prostitute claims that she has been exploited unless she is paid, then it is not a case of blackmail by her. I accept those submissions in principle, subject to there being a limit to what she can say. What she can say, and to whom, must be subject to the rights of the third parties. But it seems to me that this public interest is the foundation of the limiting principle that I have cited from *Tournier*, and that expressing it in terms of public policy does not add anything.

69. Mr Bennett also cites passages from the judgment of Eady J *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); [2008] EMLR 20, in particular:

> "98. … one is usually on safe ground in concluding that anyone indulging in sexual activity is entitled to a degree of privacy – especially if it is on private property and between consenting adults (paid or unpaid)."

70. That reflects the words of Browne-Wilkinson V-C as he then was in *Stephens v Avery* [1988] Ch 449. That was a claim in confidentiality. At p 453-4 he stated:

> "I entirely accept the principle stated in that case [*Glyn v Weston Feature Film Co* [1916] 1 Ch 261], the principle being that a court of equity will not enforce copyright, and presumably also will not enforce a duty of confidence, relating to matters which have a grossly immoral tendency. But at the present day the difficulty is to identify what sexual conduct is to be treated as grossly immoral. In 1915 there was a code of sexual morals accepted by the overwhelming majority of society. A judge could therefore stigmatize certain sexual conduct as offending that moral code. But at the present day no such general code exists. There is no common view that sexual conduct of any kind between consenting adults is grossly immoral…. If it is right that there is now no generally accepted code of sexual morality applying to this case, it would be quite wrong in my judgment for any judge to apply his own personal moral views, however strongly held, in deciding the legal rights of the parties. The court's function is to apply the law, not personal prejudice. Only in a case where there is still a generally accepted moral code can the court refuse to enforce rights in such a way as to offend that generally accepted code."

71. Those passages must, like all citations, be viewed in the context of the cases in which they were written. In neither *Stephens* nor *Mosley* did the judge have to consider what was meant by consent. In the case of *Stephens* the court was concerned with an adulterous consensual lesbian relationship between the plaintiff and T. But the disclosure in question was not by either of the parties to the relationship, but by the defendant in whom the plaintiff had confided. And the disclosure was to the media. The judge was unimpressed by the submission for the newspaper defendant, a major national Sunday newspaper. Having published the information for profit, it was arguing that the actions of the plaintiff were so grossly immoral as to produce a tendency towards immoral conduct and thereby to be without the law.

72. Notwithstanding the apparent breadth of these dicta there remain cases, as Browne-Wilkinson V-C recognised, where there is a generally accepted moral code. And in those cases the court refuses to enforce rights in such a way as to offend that generally accepted code.

73. Today there is a generally accepted view that certain conduct relating to sex is grossly immoral, whether or not it is also illegal. If that were not so, then, given the definition of what is defamatory (words that tend to lower the claimant in the estimation of right-thinking members of society generally), it could not be defamatory of a person to allege that that person had engaged in any sexual conduct which was lawful and which occurred with another consenting adult in private. But that is not the case: for

example, if the statement about sexual conduct also involves some further imputation, such as hypocrisy or exploitation, the statement may well be held to be defamatory. See Gatley on *Libel and Slander* 12th ed paras 2.1, 2.19-20 and 2.29 and *Random House Australia Pty Ltd v Abbott* [1999] FCA 1538; 167 AIR 224 (allegation that the plaintiff so lacked personal integrity that, in return for sexual favours, he was willing to change his political allegiance held to be defamatory).

74. The fact that the state of public opinion changes as to what is right or wrong in certain contexts is discussed in Gatley at paras 2.25 and 2.29. The editors express the uncontroversial view that an allegation would not now be held to be defamatory if it amounted to no more than that a couple were in a sexual relationship which was lesbian or gay, or which was outside marriage. But those changes in the opinion of the public do not mean that there is no common standard or morality at all in regard to any sexual conduct between consenting adults. There are some types of sexual activity in respect of which public opinion has become less permissive over recent years.

75. Some exploitative sexual conduct became criminal for the first time under the Sexual Offences Act 2003, or amendments to that Act, and sentences for others have been increased, whether by statute or by the Guidelines on sentencing. On the other hand, some exploitative sexual conduct remains outside the scope of the criminal law.

76. Examples of exploitative conduct that has been made criminal since 2003 are where the consent is impaired, whether by abuse of trust (ss. 16-24) or by the incapacity of one party (ss.30-33).

77. Although the criminal law has been extended in these cases to reflect public opinion on these matters, it has not been extended to criminalise all exploitative sexual conduct, in particular where deception is used to procure sexual activity with a person who enjoys full capacity. An example of alleged deception which is not said to be criminal is in *AJA v Commissioner of Police for the Metropolis* [2013] EWCA Civ 1342; [2014] 1 WLR 285. The claimants claim that they would not have consented to sex with an undercover police officer if he had not deceived them as to his employment as a police officer. Whether or not those claims for damages for deceit are good in law is an issue which remains to be decided. Whatever may the rights and wrongs of that case (as to which I express no view) there can be little doubt that right thinking members of society generally would regard as grossly immoral some forms of deception to procure sexual conduct in addition to the limited deceptions identified in s.76 (under which it is to be conclusively presumed that the complainant did not consent where there has been deception as to the nature or purposes of the act, or impersonation of a person known personally to the complainant). Whether or not reneging on an agreement to pay a sex worker, or making fraudulent promises to a sex worker, would be considered immoral by right thinking members of society generally may depend on the circumstances.

78. Another example of an allegation of sexual activities between consenting adults in private which has been conceded to be defamatory (other than exploitation or hypocrisy) is where there is harm to, or humiliation of, third parties. In *Contostavlos v News Group Newspapers Ltd* [2014] EWHC 1339 (QB) very experienced counsel for the defendant newspaper accepted (paras [8] and [13]) that it would be defamatory of a man (a prominent footballer) to allege that, by having an affair with another woman,

he had been unfaithful to and had thereby humiliated his domestic partner (and see the statement in open court in *Brand v News Group Newspapers* 8th May 2014 reported in *The Guardian* of that date, in which the Defendant settled a libel action apologising for an allegation that a well known comedian had cheated on his no less famous girl friend).

Breach of confidence

79. Three requirements have to be satisfied before a court will protect information as being legally confidential. They were laid down by the Court of Appeal in *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203, and were summarised by Megarry J, in *Coco v. A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41, 47, in this way:

> "In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene M.R. in the *Saltman* case on p. 215, must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it. ..."

80. An important difference between a claim in breach of confidence and a claim for misuse of private information is that a claimant suing for breach of confidence may sue in respect of information relating to third parties. The three elements of the cause of action do not include a requirement that the information relate to the claimant, and in many cases it does not. For example an employer can sue to restrain the publication of information relating to employees or customers, whether or not that information also relates to the employer. Claimants suing for misuse of private information sue in respect of information relating to themselves.

81. There are qualifications, or limits, or defences to a claim in breach of confidence, as referred to above.

82. In a claim for breach of confidence, in particular where an injunction is sought, a claimant is required to specify precisely what information is alleged to be confidential, and the nature of the breach of the duty of confidence. Any injunction must be capable of being framed with sufficient precision so as to enable a person injuncted to know what it is he is to be prevented from doing: see eg *Thomas & Co. v. Mould* [1968] 2 QB 913; *Lawrence David v Ashton* [1989] ICR 123, 132 and *CEF Holdings Ltd v Mundey* [2012] EWHC 1524 (QB); [2012] IRLR 912 paras [43]-[44].

83. For example, where parties are in a relationship, whether commercial or personal, there is a distinction to be drawn between information which may not be confidential at all (which often, although not always, includes the fact that they are in that relationship) and information which is confidential (which will generally have to be information which is specific, or of a specific kind). And where confidential information is disclosed to a third party that will not always be a breach of confidence. It will not be a breach of confidence if the persons to whom the information was disclosed are amongst those to whom any duty of confidence is

owed. Nor will it be a breach of confidence if they are persons to whom allegations of impropriety based on the information in question ought properly to be made, if such allegations are to be made at all. No analysis of that kind has been conducted in this case.

84. There is a principle of law that contracts may be unenforceable on certain grounds of public policy. The law is set out in the current (21st) edition of Chitty on Contract in chapter 16. The public policy relating to prostitution is set out in para 16-070 and *Coral Leisure Group Ltd v Barnet* [1981] ICR 503, which was cited by Mr Wilson. Mr Wilson cited a passage from the judgment of Browne-Wilkinson J, as he then was, in which he said at para [8]:

> "… there is no real dispute that if the contracts of employment had been entered into for the sole purpose of procuring and paying prostitutes, that would have been a contract for an immoral purpose, which would accordingly have been illegal and unenforceable".

85. Unlike the editors of Gatley, the editors of Chitty have not qualified their statement of the law to reflect changes in public opinion relating to gay and lesbian sex, and sex outside marriage. I take what they write to represent the law, albeit that the circumstances in which that principle may be applied may be different in some respects from what they have been in the past.

86. Prostitution is consensual sexual conduct between adults in private which is not itself illegal, but which is recognised by Parliament to be immoral. That is why Parliament has legislated to impose criminal sanctions not applicable to other forms of consensual sexual conduct. One reason for this recognition (notwithstanding that prostitution involves acts which are consensual for the purposes of the criminal law) is, as Mr Wilson submits, that prostitutes commonly are individuals who are acting under degrees of compulsion or exploitation from pimps and people traffickers, or who are under other influences, such as illegal drugs.

87. Any of these factors may impair their ability to give the genuinely free and informed consent, which, in almost all other areas of the law, is the only form of consent that is legally effective. See the analysis of Mark Warby in *Tugendhat and Christie on the Law of Privacy and the Media* 2nd ed, ch 12 at paras 12.12-12.18.

88. ECHR Art 8 (right to respect for private life) sets out the principle why the courts should not interfere when adults are engaged in consensual sexual activities. Nevertheless, in Art 8(2) provides an exception when such interference is "necessary in a democratic society … for the protection of health or morals, or for the protection of the rights and freedoms of others". As noted by Mr Warby at para 12.188 this provision justifies giving a broad ambit to the exercise of freedom of expression in a context such as the present (where the prostitute is a complainant).

89. It does not, of course, follow from the fact that an allegation of sexual conduct may be defamatory that it would by that fact alone count as sufficiently serious to justify what would otherwise be an interference with the rights of a party to respect for private life under ECHR Art 8. Whether it would or not will depend upon the outcome of the process of reasoning set out in the cases cited above.

THE EARLIER EVENTS IN 2012 AND 2013

90. As already indicated, I have disbelieved evidence given by both parties about the events that have occurred. I shall therefore review the history of their relationship primarily from the contemporaneous documents. However, the contemporaneous documents are in many respects not just unreliable, but also untruthful. This is in part because they reflect the fantasies that both parties claimed to entertain about each other, and in part because the parties were deceiving and abusing each other. He was deceiving her with false assurances about the help she could expect from him with her studies and her career, in order to get her sexual services for less money. She was deceiving him with false assurances of her affection with a view to getting his help with her studies and her career, and more money.

91. The parties first met on or about 26 March. The emails and texts exchanged between the parties dated 9 April to 15 June 2012 are printed out on some 150 pages, 120 of them for the five days 11 to 15 June.

92. The first email is dated 9 April 2012 from TDD to AVB. In it she thanked AVB for what she said was a lovely day, and said she had forgotten some ear rings which she asked him to keep for her. I do not know whether what they did that day was sexual. If it included an outing to the theatre or a museum, then what TDD said about her feelings might be true. If it was a sexual encounter, as seems likely from the reference to her earrings, than I do not believe it was truthful. It was encouragement to a client. He replied "I loved it too". That probably was true.

93. On 10 April she sent him an email headed "Reminder". As is common ground, he had given her money in envelope which was less than the sum agreed for the services she had provided. He explained that he just happened not to have enough money in his wallet. I did not believe him. She wrote:

> "1: the price is 350 not 300 Wud u mind count before hand and put into sealed envelope to make life easier for us, please? 2. I just did my blood test Awaiting for result If u have no intention to do blood test too? Wud u mind from now on --- condom? Blood test or condom ---u pick… [I] won't count every minute with u on the meter --- as I do enjoy spending time with u. Above 2 applies that if u c me again".

94. On 12 April TDD wrote asking AVB to kindly post her earrings, or to drop them into her building. At the time she lived in a flat in central London not far from his office. At 10:17 he replied:

> "Hi. Haven't had a chance 2 reply earlier email. Will accept terms but hope it is not just a business relationship. I really like your company. X"

95. I am sure he did like her company. TDD replied promptly:

> "Sure
> Friendship is welcome
> And is free of charge

> I d love that
> Xxx
> If I'm not studying or working or dating and free…
> I feel terribly terribly guilty already to this guy I'm dating --- so I think friendship for us on top or our business deal will be healthy for now to save both of us emotional turmoil which we can't afford".

96. On 15 April AVB helped TDD with an essay. On 17 April she sent him two brief emails about an encounter with a client which she had found unpleasant, saying she was going to work in an office. He replied "I can give you a reference. If you are serious…" She replied:

> "Ahhhhhh I had enough of this industry!!! That was so scaring!!! My agency blacklisted him just now!!! Well I tried v hard for the past 6 months to get a legal job even for 10 quid a hr but no one wanted me. "

97. AVB asked for her full name and CV. She replied:

> "Conflict of interest huh? How about ur cousin QC need any girl worker? Who u mentioned last week apparently heard of me already. Will look good on my cv. Cv will follow within a hour"

98. TDD replied that he would ask his cousin. Then things started to get difficult between them.

99. On 22 April she apologised for sending mixed signals and said it would be best to keep things strictly professional. He replied at 16:23 that he understood her terms: "You want your envelope". He added disingenuously: "Its your mind that attracts me most of all".

100. On 6 June she asked him whether he would be willing to help her with a property she was proposing to buy. On the same day she wrote to him about a particular flat she liked. She also thanked him, presumably for help he had given her with the flat. She added at the end of the email: "FYI Agency £350 Me: £310".

101. They referred to his car being repaired by a friend of hers, and she offered to lend him her car while he was waiting for his own. The next day there were further emails about the car and the flat, she saying that her mother's money would arrive in the last ten days of June. (Her relationship with her parents must have improved by that time). He wrote to her an email from his firm's address offering to have her conveyancing done by a member of his firm. He said his partner would charge £900 and added "I will pay you and you pay him". What AVB would be paying to TDD was obviously for sexual services to fund the legal fees of his firm.

102. On 13 June 2012 TDD sent three emails of which AVB complains in APOC para 11.1 to 11.3. They are timed 15:10, 15:51 and 16:33. They are part of a series of emails as follows.

103. On 13 June they exchanged a large number of emails. At 09:02 and 09:07 TDD wrote to AVB suggesting that he should ask her to give up her sex work. She said she had just given up a job that would pay £1,000 because she could not do it "emotionally while thinking of seeing you". She said she could be an exclusive girlfriend or a whore, and he had to choose.

104. In evidence TDD explained that one of the services she advertised, and which was commonly advertised by escorts, was what she called "the girl friend experience", or "gfe". She was not offering to be a real girl friend. AVB maintained at trial that she was a real girl friend. The nature of the relationship is best considered in the light of the contemporary emails. Mr Bennett drew my attention to a selection in which he included those in which TDD did not ask for money. But there are others in which she clearly did ask for payment for her services.

105. In the email exchanges TDD prevaricated. At 09:16 he said he had a lot going on, that his ex wife's mother was dying, he had problems on a house sale and at the office. She asked if these were real problems or excuses. At 09:42 she wrote that he could see her as a hooker, but then she did not want to listen to his problems: "… if u can't handle seeing me as hooker nor do u want to pay responsibility to me as boyfriend. Then maybe u should not see me anymore…"

106. At 09:49 she wrote that if he wanted exclusivity he had to make a plan and deliver on it. Or if he wanted her as hooker he still owed her an essay, but after that he should call the agency. She was happy to pay their commission. He could not have his cake and eat it.

107. At 10:42 TDD wrote to an estate agent under the subject line "My lawyer's information". She gave AVB's name and professional address and other details.

108. At 11:14 she wrote to TDD that she had been wrong to ask him for a loan, but thanked him for offering. She went on:

> "I think I m deeply utterly earnestly unhappy wit the way how u treat me with no respect
>
> Ex ex ex ex ex ex ex shit
>
> Un decisive / UN manly / irresponsible / unfair about us.
>
> So please:
>
> 1: put all my things together plus my car key and register paper.
>
> 2: my final essay due on Monday (I will do the mooting myself --- if I don't get into law school by myself then I will never get out law school by myself)
>
> 3: do this nw3 property with mr **[…]** to close deal ASAP
>
> Many thanks again for your help".

109. He replied at 12:20 that he wanted to see her but she was overreacting: "I really like u and I don't want to see anyone else. But we have our separate lives". She said at 12:42: "Why can't u be business like paying punter fee but to save 350 every time for

a fuck?" He had offered her a loan, which she thanked him for, but said she did not need.

110. At 13:01 she explained that he owed her money, from which he could deduct the £900 fee for work to be done by his partner, but he still owed her an essay. At 13:47 she wrote:

> "1. u r Jewish. I'm not
>
> 2: ur my client. It is a disaster wrong start. I will only resent u more n mor for how much punter fee u owe me every time in accumulating manner n think u r cheap mr freebie […]
>
> I think I'm entitled to hate u for breaking our client-whore boundary in BUSINESS MANNER
>
> In the name of "bf / relationship" etc blabla meaningless words and titled which I am really too young for it.
>
> And which words u think women love to hear and buy
>
> 3: U want baby, I can never have baby […]
>
> 4: Society will kill us
>
> 5: my mum will kill me […]
>
> Time now we stop bullshitting ourselves and others"

111. At 14:53 on 13 June the relationship broke down. She wrote at 14:53: "Why u don't pay hooker hourly fee? This is really low and cheap" he replied at 14:57 "Now I am getting pissed. I don't want a hooker in my bed all nite…"

112. At 15:10 she sent the first of the emails AVB complains of. It is addressed to AVB's partners under the subject line "Invoices". It came from an e-mail address which did not identify her, and purporting to be signed on behalf of Elite Girls Ltd asking for payment of "outstanding balance … £1500 to Miss Tiffany over the last few weeks as girl friend experience".

113. At 15:31 she forwarded the emails of 14:53 and 14:57 to 7 people including his partners at their professional addresses under the subject line: "Escort invoices".

114. At 15:51 TDD sent an email from an address which included her name to AVB and his secretary. It set out arrangements for the collection of a number of items of clothing, books and other personal items which she said she had left at AVB's flat, and for the return of her car which (as is common ground) she had lent him while his was being repaired. The email ended: "U also owe £2500 punter fees in cash which u refused to pay".

115. AVB emailed TDD at 16:18 that he owed nothing: "… For your memoirs I wanted to be with you. You wanted to be with me. End of. Will miss you but not interested in being a client…" At 16:33 TDD sent an email to his secretary at their office address with copies to partners and others in the firm under the subject line "owing escort punter fees ---debt collection". The email purports to come from a third party

"Emmy" and the email address does not identify TDD. The email started with AVB's first name and continued:

> "Miss tiffany wants to say: she doesn't want your:
>
> Marks Spencer flower pot
>
> John Lewis earring
>
> Dinner and theatre
>
> Introducing to cousin and colleagues and relatives
>
> But simply want the hard earning £350/hour fee
>
> I am afraid we have to put you on punter black list if you continue acting like above with no respect and boundary towards our sex workers
>
> And also she told me you are forcefully suggesting to her not to use condom
>
> This is unprofessional
>
> Also she forwards me your correspondence as below (stating you are harassing her outside her work)
>
> [there then follows the text of the emails sent by AVB to TDD on 12 April at 10:17 and 22 April at 16:23]
>
> Also she has told me a few disturbing things you have done to women in the past:
>
> 1: had an affair with your office receptionist for 3 years
>
> And fired her recently […]
>
> I am sorry to inform you that our agency will not accept such behaviours and type of client […] "

116. At 16:38 TDD wrote to AVB:

> "I am sorry… Once a client Forever a client. U pay for girlfriend experience. I am not your girlfriend. And u r not a man of your words: Envelope? Law essay and Property? Your have no dignity at all when come to money… And where is reference?"

117. He still refused to pay saying at 16:52:

> "If u r saying u only stayed with me coz it was gfe and I was getting credit I don't believe you. You are not that good an actress".

118. Both parties stated in their witness statements that TDD apologised and they made up. However, at the trial she was not apologetic. Criticised for sending these message, she said she had tried asking him for payment directly. She then added rhetorically:

> "Can you suggest a morally correct method for a prostitute to ask a client who does not pay?"

119. On 14 June at 08:05 AVB replied as a lawyer. He wrote that she had agreed to apologise for sending confidential mail to strangers. He threatened her with proceedings for harassment. He wrote:

> "If I take you to court for breach of confidence and defamation I will be awarded damages. I will get my damages from the money your mother sent you or you will be forced to sell the flat you buy…. Stop your threats which are criminal … demanding money with menaces…"

120. The suggestion that he could have sued her for defamation and been awarded substantial damages has not been explained by him or on his behalf. There can be no reasonable explanation of it.

121. She replied that she had agreed to nothing and did not harass anyone. She accused him of blackmailing her "with my mum and my mum's money". In his 6th witness statement he states that this allegation of hers is false and absurd. It seems to me to be close to what he had in fact threatened at 08:05. His threat of a claim for damages for defamation was unwarranted.

122. He asked her to sign a Confidentiality Agreement. She agreed, but said he should sign the same one "So both our mouths shut N zipped". By that time, as he states, he had discussed with her the possibility of him acting for her, but no formal retainer had been agreed.

123. On 15 June at 08:41 she set out the true nature of their relationship in ironical terms under the subject line "3-3.5k / month depends on how much u love me":

> "3k-3.5k per month. Up to u what amount in this range u think I deserve (hopefully more than your secretary)
>
> >As I audio type faster than her!!!! I do dry clean, laundry, cooking, DIY furniture, social butterflying. Hosting dinner party… change lightbulb… teaching u Chinese…also your body guard with martial arts…Have driving license too!!!
>
> >plus [she names a sexual act]
>
> >and human reproduction
>
> >so only changing tyres and gardening left
>
> Therefore I think 3.5k is fair if ur secretary earns 3k.
>
> (I know a 34 yrs old lawyer gives his wife this allowance and she is fat an useless)
>
> (plus money won't be wasted---all goes to property and tuition fees---u know me---as tight/sensible as u!!!)
>
> Also in the summer I will get a day volunteer job (full time/part time) for fun !!!! Besides evening law school.

> So I will leave u alone in peace…to ur football tennis balls n boys time"

124. At 09:11 she wrote to AVB:

> "[…] I will never do these kind of stupid crazy things (email to people etc) again to fight with u. I will just simply quietly vanish from ur life […]".

125. Something must have happened during that day or the next, because on 16 June 2012 at 17:20 she sent another ironical email. Incredibly, AVB referred to this email a number of times in his evidence, claiming to have believed that she meant what she wrote (there is no record of her writing about converting to Judaism on any other occasions). It was under the subject line "Baby daisy !!!!!!":

> "U: start to take zinc and vitamin c
>
> I will find u zinc tablet from boots
>
> Stop smoking drinking (u don't do anyway)
>
> And cut down stress
>
> Don't let your son make u angry please … I don't wan see you upset.
>
> And eat well!!!! :)
>
> ---
>
> Me: take folic acid supplement
>
> I want baby to be Jewish!!!!!!
>
> Can we try find a rabbi to convert me?
>
> Or fly to tel aviv to sort this out?
>
> I will look into self education books and DVDs and baby room planning etc"

126. On the same day she sent an email printed out on two full pages under the subject line "Behaviour contract". In evidence she said it was her joke confidentiality agreement. It certainly seems to me to be satirical. Written in mock legal language, it starts: "In order to reach mutual agreement upon confidentiality contract Mr … must declare and full fill following". There follow paragraphs of details of the behaviour she supposedly required of him, including fines for late payment of her fees, and the legal services and help he is to provide to her, and the minimum duration of cuddles.

127. The Confidentiality Agreement is dated 17 June 2012. It identifies the parties formally, and gives their addresses. In AVB's case he gives his professional address. There is a recital, which TDD refused to accept, and which is crossed out. It purported to contain an admission by her that she "broke… [his] right to privacy and confidentiality when she sent copies of his emails to her to third parties including his work colleagues…" By a clause 3, added in manuscript by him, it is provided that the agreement itself is confidential.

128. The other clauses read:

> "1. The parties will treat all written communications (hard copies, emails, texts) passing between them as confidential and will also treat all oral communications concerning their lives as confidential unless the following applies:
>
> a. both parties agree in writing that any such written or oral communication is not confidential;
>
> b. the written communication contains material which is in the public domain and in that event only this material is not confidential.
>
> 2. The parties undertake to each other that they will respect this confidentiality and acknowledge that if copies of any such confidential written communications or the contents of confidential oral or written communications are disclosed to any third party this will be a serious breach of confidentiality ~~entitled the injured party to an award of damages~~ and the party in breach will not oppose the injured party obtaining an injunction without notice to prevent any further infringement."

129. TDD insisted on the crossing out of the words in clause 2. She also signed the document with only part of her normal signature (she omitted the Chinese characters she usually used). She states she did this to mark that she did not believe the document had any legal effect. She had received no legal advice herself, she was not signing willingly, she was alone in his flat with him, he was a lawyer, and he was very angry.

130. Over the next few days the parties exchanged friendly emails. AVB told TDD that he had to go to Brazil on personal business. On 21 June 2012 TDD signed the standard eight page "Terms of Business" for clients of AVB's firm. This time she added the Chinese characters to her signature. On 25 June, after she had said the property she was interested in had been taken off the market, AVB wrote to her that she should use another lawyer. His colleagues did not want AVB to do conveyancing because he had not done any for a long time.

131. On 9 July he emailed her that he was back from Brazil. The next day, late in the evening, they exchanged about 17 friendly text messages. But they were quarrelling again by text on 13 July. She called him a thief for not returning her property. But on 27 July they were again exchanging numerous texts about meeting, and she erroneously sent to him an email about her arrangements with Mr X which was intended for Mr X.

132. On 28 July at 5:26 pm he sent her his proposal for an arrangement between the two of them:

> "Contract. 1 one month trial. 2 3k upfront. 3 Sex next Saturday and for one month following and staying over like before. 4. [A particular type of sexual act] included. 5. Faithful… no other partners… neither side allowed to [another kind of sexual act is

> identified] starting NOW. Agreed? You will need good excuse for [another man] or dump him. You can add terms for me to consider".

133. She texted back that she was happy with that adding "But [the sexual act he had named in his clause 4] + exclusivity costs extra 2k + blood test result. Then unlimited sex anytime".

134. He sent another email to her at 7:58 pm under the subject line "Compromise":

> "Forget [the sexual act he had named in his clause 4]… keep it for wedding nite…with whoever is luck man! Blood test for what…STD? And u will take pill. Hate condom. And no sex til we start…and both faithful while we see how it works out? Xx"

135. In evidence AVB said he had never been interested in the kind of sexual act he had named in his clause 4, and only included it in his terms because he did not want less than what TDD was willing to give to another client. This is another denial of his which I do not believe.

136. On 31 July he texted her, but said he could not see her because he was in mourning. On 3 August they exchanged about 40 texts. She texted that if there was no money in the bank by 3pm the deal was off. He texted back questions to her. She texted back that he should stop harassing her: "We had a clear deal". The exchange of texts continued, deteriorating in tone into intermittent mutual insults. On 5 August there were 16 exchanged, on 6 August 13, on 7 August 13, on 10 August there were over 25, mostly sent by her, on 11 August 35, 13 August 4, 14 August 40, 15 August 40 and two each on 16 and 17 August. Although they were exchanging these messages, the parties did not meet again until September.

137. Mr Wilson asked AVB about a message he sent on 25 August about his Brazilian girlfriend. He described her as "24 only 3 previous lovers. Clever girl too". AVB replied that he was trying to make TDD jealous. Mr Wilson asked why. AVB replied "It is standard in the rules of love to make people jealous". He was agreeing that his conduct was manipulative.

138. In his Particulars of Claim and his 6th witness statement (made on 20 January 2014) AVB stated that he did not agree to any girl friend experience. He stated that the parties were both emotionally involved. He stated that he saw TDD, and paid her, on a commercial basis for the first four weeks, but that he then stopped paying her after each sexual encounter, and she did not ask him to do so. He bought her clothes and other presents and sometimes gave her money.

139. His evidence that they were emotionally involved is incredible. It is inconsistent with the contemporaneous documents, some of which I have cited. In my judgment he cannot have ever believed it to be true. It is a lie to seek to explain why he was not paying her at the rate she set, as she repeatedly demanded that he should do.

140. He stated that TDD was concerned about Ms L and other girls in Brazil out of jealousy. She stated that her concern was for her own sexual health. I find that TDD was concerned for her own sexual health. She was also concerned at there being a

rival for AVB's willingness to pay for sexual services. Her jealousy was commercial, not emotional.

141. As to her essays, AVB states that he had agreed to help her, but not to write them for her.

142. In his 6th witness statements he stated the following about the effect upon him of TDD's disclosures in June 2012:

> "I was deeply embarrassed and humiliated. They were clearly designed to cause huge distress. … I became extremely embarrassed and humiliated at work although my fellow partners were actually very decent about the whole incident".

143. I accept that AVB was embarrassed. I also accept that at first, at least, he was alarmed at what she might do in the future. That is why he sought to bind her by a Confidentiality Agreement. But I do not accept that he was distressed to any significant extent. If he had been, he would have ended his relationship with TDD once and for all. That would have been very easy for him to do.

144. I find that although the formal engagement by TDD of AVB as her solicitor was not signed until 21 June (para 130 above), he had given her to understand no later than 13 June that he or his firm would act as her solicitor in a conveyancing transaction (paras 107 to 108 above). So at the time she signed the Confidentiality Agreement she did understand him to be her solicitor, and her understanding was a reasonable one.

The second stage of the relationship between the parties

145. On 13 September 2012 marks the start the second stage of the relation relationship between the parties. On that day solicitors acting for Mr X had written to TDD threatening legal proceedings against her. They alleged that she had been harassing Mr X. TDD responded complaining that she had been anally raped by Mr X. She copied her responses to AVB. The events of this period are not complained of by AVB. TDD complains that they were part AVB's harassment of her.

146. On 13 September TDD texted AVB ten times and he replied twice. On 16 September the parties exchanged 17 texts, some about sex between them, others including requests by her for a reference. He offered to give her a reference, while at the same time writing about sex. He emailed to her the draft of a reference. He stated in evidence that by this time he had refused to give her a job as a paralegal, but that she had looked up some cases for him on one of his matters, and she had attended court with him. The reference he wrote for her appears in the bundle dated 10 June on the headed paper of AVB's firm, and signed by him. Even if true, it does not demonstrate the candour that a lawyer reading it would have been entitled to expect. It reads:

> "The above named young lady has done legal research for me and accompanied me to court. … I can recommend her as a paralegal…"

147. The parties exchanged 43 texts on 18 September and 8 on 19 September. She again complained of having been anally raped by another man. On 21 September they

exchanged 12 texts, she complaining that he and his firm were not representing her as she required them to do in her dispute with the man she accused of raping her. On 22 September they exchanged 7 texts about sex. She complained that she had been giving it to him for free because he promised to do the conveyancing on her flat, and asking him for £500 for her to forgive and forget that. He said he was willing to do that.

148. On 24 September they exchanged 10 texts. He gave her legal advice to reply to the letter from the solicitors for Mr X and set out the legal options available to her as to her complaint of rape. On 27 September there were 36 texts, mostly from her. On 30 September there were 15 texts, most of them sexually provocative ones from her.

149. On 2 October they had a quarrel. There is no dispute that he bought her a necklace from Selfridges costing about £1,000. He wanted to go straight back to his flat. She did not want to do that. There was an incident. When he opened the boot of his car she saw some pencils which he had bought for Ms L, but not sent to her. This was in the evening. She ran away and he chased her, accusing her of stealing the pencils. She screamed calling the police. A passing driver took her into his car and drove her home. At 21:24 GMT AVB texted her complaining. At 22:42 he texted her saying he was still waiting outside her flat. At 06:24 the next morning, 3 October, he texted her reciting what had happened and complaining that she had not returned to her flat.

150. In his 6th witness statement AVB stated that he did call her 46 times between 7pm and the early hours, because he was angry at her behaviour. He states that this is the only occasion on which his conduct towards her could be described as harassment.

151. On 5 October they exchanged 15 texts, and 6 October over 90. Much of it is quarrelling. She complained of him calling her and coming to her flat uninvited. She stated that she has blocked phone calls from him and he been harassing her. He wrote that he had bought jewellery for her as a girlfriend, but that:

> "I must have right to check [that she was not having sex with anyone else] and your flat key".

152. On 6 October at 01:11 GMT she complained that when he had pushed her around in the street she had lost a button and suffered scratch marks on her arms. He replied: "U stole my possessions and I have legal right to run after you to get them back. You refused, I certainly was not violent…" She replied "What possessions? What u talking about???"

153. On 7 October the quarrelling escalated. At 1:40 pm AVB set out his allegations in legal language in an email:

> "You committed a criminal offence under the Data Protection Act as well as a breach of confidence. You refused to tell me the new passwords you changed on my facebook. U locked me out of my own flat. You prevented me from opening my own door. You deleted all texts to you and emails from phone. Luckily I back up regularly. I deactivated my facebook on Tuesday but reopened it Thursday. This was what happened on Wednesday when you stole the pencils I bought months ago for [Ms L] but never sent and ran off and I chase you down the

> street shouting and you refused to hand them over. Then a passer by drove by and he must have thought I was trying to get take something from you and you got in his car and he drove you home. You have since told me he was an Iraqi and you made up a story. I was trying to get my property back. So then I reactivated facebook. Then you called and we spend a lovely day together yesterday. [Ms L] lives 3000 miles away. I have not seen her for months. Are you a 21st century Hedda Gabbler? Maybe last nights performance influenced you too much. She destroyed the book from spite and control mania and jealousy. You hacked into my facebook and phone did the same sort of thing".

154. It is common ground that, on 7 October 2012 AVB went to her flat. After some waiting she came down with a smartphone. She took a selfie in the street of him kissing her on the lips, while she looked sideways into the camera. She then went back up to her flat.

155. On 7 October Facebook sent a number of automatic messages. One message at 11:38 asked AVB to confirm his new e-mail. One at 15:42 advised him (with his first name misspelt) that he had created a new account. Some automatic messages were sent to AVB advising him to reset his password.

156. One of the automatic messages went to AVB's younger daughter at 1600. It starts with AVB's name (with his first name misspelt) and goes on "wants to be friends with you on Facebook", and records that at that time he had two friends. At 16:07 AVB's elder daughter forward this to AVB saying: "Is this actually you or just another crazy women pretending to be you?" At 16:32 AVB replied to his daughter that it was not him and that he was closing his facebook. At 17:55 AVB's daughter replied: "Dad, this is now becoming a bit of a joke. How many other people has this person approached? It's beyond embarrassing". He replied at 18:01 that he had closed his Facebook down and pointed out the misspelling of his name. At 18:55 Facebook sent another automated message to AVB's daughter, similar to the one timed 1600, but this time with AVB's name misspelt in a different way, and recording that he had 13 friends. At 18:59 AVB's daughter asked: "So who did it then?" And at 18:59 AVB's daughter wrote to AVB that Facebook were saying that he had 13 friends already.

157. Another automatic Facebook message at 19:30 informed him that AVB's elder daughter had confirmed that she was a friend of his (with his first name misspelt). Similar messages referred to a number of other people with women's names in Portuguese.

158. During the course of these exchanges with AVB's daughter, AVB was texting TDD. At 16:44 GMT he wrote that he was sorry she had hurt her hand and said she must have done it "when u lost your temper and started to smash my door down". She texted back at 16:49 and 16:50:

> "U opened door inviting me in then jump on me then grab me then push me extremely violently backwards out of ur door I fell v hard hurt my backbone disc and left hand scratched when I trying to keep balance Then u followed me home ring my

> door bell then waited for me coming out then trying to break in I stopped u while all [passers by] witnessed you put a foot in stopping me close my own door".

159. At 17:31 GMT he wrote to TDD: "And [MsR] tried the same trick. She opened a false facebook in my name to cause trouble and like her that's a crime and I am suing her for damages for this. And you spelt my first name wrongly". And at 18:00 he texted: "I am now reporting you. U opened another one". After she said she was sorry and did not think she had done anything wrong, he texted her at 20:31 GMT:

> "I am going home to bed. If I had told them [ie his daughters] first it would be very different. It is obviously a shock to c the foto. And what can they think of a woman who pretends to be me and says we r having a child? And I am so upset how u tricked me to get the foto and then shut the door on me. They now think what sort of person am I with to do such a think and show my children this foto b4 I spoke to them".

160. TDD responded at 20:54 GMT telling him not to come to her flat, and, amongst other things, complaining that he was abusing her for sexual purposes and threatening to drop the case on which he was advising her if she did not give him sex. She accused him of being an immoral and unethical lawyer. She went on at 20:58 GMT:

> "After I instructed u pressure me into fucking with out condom then say u will go public with me introduce me to familys and marry me if I am pregnant then if I leave u u will drop my case--- u demand key to my flat also – while in truth u calling whores behind me a and talk to Brazilians on daily basis pretending u r single on facebook and let ur daughters attacking me and threatening me".

161. 7 October ended with AVB texting TDD that he did not want to hear from her any more.

162. What had happened during those days at the start of October is not fully documented. It appears that the disclosure by TDD, which was continuing into the trial, is likely to have been incomplete at least on the events of around 7 October.

163. In his evidence he states that she had stayed overnight at his home after they had been to see *Hedda Gabbler* together at the theatre. She had locked him out for nearly an hour, and he had to climb back in. He had left his mobile phone and laptop in his flat. They had a big argument. He states that his account of these events in the text messages is correct and, where they differ, hers is not.

164. He also states that she tricked him into posing for the selfie photograph. In her second witness statement TDD states that she thought that AVB was willing that the selfie of him kissing her should be used as the profile photo for the new accounts she opened in his name. She also states that when he found out what she was doing he forcibly pushed her from the flat.

165. I do not believe that TDD ever thought that AVB would be pleased at her creating new Facebook pages and posting that photo on them. I find, that TDD had opened the two Facebook accounts in the misspelt names, and had posted on to them the selfie which she had tricked AVB into posing for in the street, and had announced that they were a couple. She was motivated by revenge. I make no findings as to whether TDD took the pencils from AVB's car. Even if she did it was not theft, but a ploy to provoke him in their dysfunctional relationship.

166. On 8 October the parties were exchanging emails and letters. AVB wrote both a formal letter stating that, and why, he could no longer act as her solicitor, and, at 18:15, a personal email. In the personal email he thanked TDD for apologising. Her reply at 18:33 was less friendly, setting out allegations some of which she had made before. She said she did not want him coming to her flat, putting pressure on her for sex, booking her through the agency and then cancelling the booking, and saying he would marry her. He replied a few minutes later. He wrote that it was she pressing him for sex, so long as he remained her lawyer, and that she was threatening him with a report to the Law Society if he ceased to act for her. She replied that he was threatening again to drop her case.

167. At 7.06pm on 8 October she emailed him with further serious allegations of misconduct by him as a solicitor, one of which was pursued at the trial and only dropped after cross-examination. The allegation ought never to have been made by her.

168. TDD stated in her second witness statement that on 11 October she had made an email complaint against AVB to the Solicitors Regulation Authority, and that they had sent her forms to fill in, but that she did not feel able to make the complaint because she felt threatened by him. She has not produced any of these documents. I do not believe her evidence on this point.

The third stage of the relationship between the parties

169. The third stage started on 1 March 2013 when TDD sent to AVB an email consisting of a quotation from Shakespeare. At about this time TDD had moved into a flat in Wimbledon which she had bought. There then follow communications between them, mostly by text messages, which have been printed out on over 100 pages in the files, of which 80 pages cover the period 18 March to 28 April 2013. The period on and after 29 April is related in paras 7 to 90 above.

170. Most of the texts in this period are explicitly erotic. They include a photo of himself sent by AVB on 5 April and one sent by her on 10 April, and references to Skype calls with the implication that they were sexual. He asked her to send him a sexually explicit photo every night. There are numerous references to other women with whom AVB had had sexual relations. On 13 April she threatened to post on YouTube a private picture of him. He responded once again threatening to sue her and recover £20,000 damages which he would enforce against her flat. He ended the message: "I know how to sue and win against ex girl friends". Before and after this time many of his texts included demands for sex. The parties also made a lot of complaints about each other in crude language. In his case some of the complaints relate to money he said he had been paying her. On 25 April he texted that he had probably paid her

£20,000 by this time. During the trial he confirmed that he had paid sums of that order, either directly to TDD, or for her benefit.

171. On 27 April at 23:45 AVB texted TDD: "I am outside your flat. Your bell is broken. Let me in". He was complaining about some photographs he said she had taken. The tone was frequently crude and insulting. When she did not agree to the money he was offering her for sex he replied: "Go die in a hole street walker".

The independent witnesses and the audio tape

172. The contemporaneous documents relating to the audio tape are set out at paras 21 and following above.

173. In her second witness statement TDD stated that she had discovered the audio tape "over the weekend" when she had called AVB and discovered he had gone to Brazil. The weekend when AVB was in Brazil was 4 and 5 May 2013. She stated that it was during the week of 5 to 13 May that he came to her flat and threatened to kill her. She stated that it was the next day that she went to the police. A police receipt records that she did go to a police station on 13 May. She stated that she alleged harassment against AVB. It was following her visit to the police station that she returned to AVB the memory sticks she had removed.

174. She stated in her third witness statement that she accidentally packed AVB's memory sticks in her belongings when she was about to return home from his flat on 1 May. I do not believe that. I find that she took them deliberately. She also stated in that witness statement that he had not in fact sent to her the still image from the video of him with Ms R. He had discussed that video with her in 2012.

175. Her evidence as to the timing of her finding of the audio tape she claims she found is unclear. In her second witness statement she gave no date. In her third she stated that it was after she got home on 1 May 2013, and that she immediately texted AVB to complain, and that she went to the police later that day, which she stated was 2 May. She then deleted it because he was alleging that she had made the audio tape herself. She then alleged to the police on a second occasion that AVB had been harassing her. That was on 13 May.

176. However, in her email to AVB's partners at 16:24 (para 27 above) TDD referred to pictures of herself which she alleged AVB had taken without her consent, and to "recorded intimate conversation and noise without my consent" and said that she had all such material as she could find.

177. Mr Bennett notes that in none of the emails sent to AVB's colleagues at this time did TDD allege that he had threatened to kill her. The nearest she comes to that is in the email of 12 May at 10:20 where she stated that AVB "always threatened to hurt me but I don't care now. I can't stand his abuse any more".

Ms A's evidence

178. TDD stated that when AVB came to her house in early October 2012, the occasion when he put his foot in her door (she does not give a date in her third witness statement), she had a witness, a Ms A.

179. Ms A gave evidence. She said that she was a sex worker and had visited TDD's flat on 7 October 2012. She stated that she saw TDD's hand was bleeding, and that her doorbell started ringing. She identified the person she saw on the video phone as "an elderly man". She described TDD going downstairs, and the elderly man putting his foot in the door. She described them both shouting, he aggressively and she trying to close the door. She stated that TDD told her the man's first name, which is in fact AVB's first name. She stated that she left the flat shortly afterwards and that as she did so the man shouted at her things such as "Did you know that she is a prostitute?"

180. In her demeanour while giving oral evidence Ms A gave an excellent impression as a witness. She appeared entirely credible. But Mr Bennett submits that her account of is not consistent with that of TDD. TDD did not mention the presence of Ms A in her contemporaneous texts, but did refer to a man, a Mr W, being in her flat, and to passers by. The alleged presence of Ms A was first made known to AVB when her witness statement was exchanged on 20 January 2014.

181. There is no dispute that on 2 and 3 October an unpleasant incident did occur when AVB attended outside TDD's flat (paras 149 and 150 above). The issue is whether he told Ms A that TDD was a prostitute. I have disbelieved TDD on a number of points, and this is one occasion when TDD may well have chosen to lie at the time as a device to try to control the situation. I have also disbelieved AVB on a number of points.

182. Given the state in which he admits that he was, and given the language he used in his text messages to TDD, it is not unlikely that AVB did use the language which Ms A describes. The inconsistencies Mr Bennett points to can be resolved by my believing Ms A, and disbelieving TDD where their evidence differs. On balance I find that Ms A's evidence is probably true.

Mr P's evidence

183. TDD stated that in March 2013 AVB used her laptop to make a Skype call to a friend of hers in Ireland, Mr P. She gave no further evidence about that, although Mr P did.

184. Mr P is a senior civil servant in the Irish Republic. There is no suggestion that he was a client of TDD. He met her some years ago through a mutual Chinese acquaintance when he was visiting London to try to learn Mandarin. They have remained friends since then. She told him of her background and what she did for a living. In talking to him she sometimes referred to her clients by descriptions, but not by name.

185. His evidence was that in about February or March 2013 he was at home one evening when he got a video call from what he understood to be TDD's laptop, mobile phone or other device. When he answered the call he was surprised to see, not TDD, but an older man. He recognised the room in which the man was as TDD's room. He was alarmed. He did not have his own camera switched on. The man asked Mr P questions. His speech was slurred. Mr P got the impression that the man had confused him with another man with same first name who, he said, knew TDD from teaching her in her law course. He asked Mr P whether he knew that TDD worked as a prostitute, and other personal questions about her.

186. Mr P knew that TDD had a regular client who fitted the description of the man who was making the call. He guessed it must be this man. The man's questions became intrusive and nasty. The man implied that he was looking at a sex video involving him and TDD, and Mr P heard sounds that were consistent with that impression. The man asked repeatedly about TDD's parents, and how rich they were and if he (Mr P) was in contact with them. At this point Mr P ended the call. He immediately called TDD, fearing she might be in trouble. He could not get through at first, but when he did get through she told him not to worry, she had just had an argument with her "boyfriend the lawyer" and that he had called people randomly on her Skype list.

187. Mr Bennett cross-examined Mr P on the basis that this evidence was false. He also made the point that Mr P could not positively identify AVB as the man who made the call. Mr Bennett submits that, as with Ms A, there had been no mention by TDD of this witness before the exchange of witness statements. He submits that if she believed that AVB had done what Mr P describes, then TDD would have raised it with AVB in one of her many messages to him.

188. I found Mr P to be an impressive witness. The present case is not one in which third parties might be expected to be eager to give evidence. But Mr P has taken the trouble to come from Ireland to explain in public his friendship with TDD. It is hard to see why he should have done that if he were not telling the truth. I bear in mind Mr Bennett's points, but I accept Mr P's evidence was truthful. It could be truthful, but mistaken in so far as the identity of AVB is concerned. But I also think it probable, and I find, that the call came from AVB. I have disbelieved AVB's evidence on a number of points, and find him ready to deny matters which are adverse to him. The evidence appears to me to be consistent with the behaviour which AVB demonstrated in the text messages: his use of Skype, his threatening and manipulative behaviour, and the fact that he had made a recording of himself and Ms R having sex.

The audio tape

189. TDD gave detailed evidence about her visit to the police station. But while there is no doubt that she did visit the police station near her home on 13 May, her evidence is complicated and in parts unconvincing. When a police officer contacted her some days after her complaint with a view to taking her allegations further, she chose to let the matter drop. It could be that she thought that there was an audio tape of herself when she found the recording of AVB with Ms R. In my judgment if she had found an audio tape recording herself having sex with AVB it is not likely that she would have deleted it, or that she would have done so in a manner which left no trace.

190. In relation to the audio tape she has not satisfied the burden of proving that she found it.

Other alleged forms of harassment by AVB

191. The evidence that TDD gives about AVB's approaches to her hairdresser is vague and all in the form of hearsay evidence given by TDD herself. There is no dispute that AVB did go to a hairdresser, who did know TDD, and that he asked about her. But TDD was not distressed about that. I can make no clear findings of fact, and it adds nothing to the case.

192. Mr Bennett submits that the first reference to any death threats by AVB was in TDD's email of 15 May at 01:23. I find that AVB did not make a serious threat to TDD that he would kill her. His use of language makes it quite plausible that he may have used some words expressing a threat to kill, but it was not a threat which she took seriously.

BREACH OF CONTRACT

193. The information which AVB alleges was disclosed by TDD in breach of contract is identified by him in APOC paras 29.7, 29.11 and 43. This is information in the Facebook messages addressed to AVB's younger daughter in May 2013 and times at 20.17 ("he still loves you even…") and 29.11 (all of the contents of that message, which relates to AVB's three children)

194. The Confidentiality Agreement purports to be a formal legal agreement between the parties. AVB made a number of references to confidentiality and related legal concepts in his communications with TDD, threatening her with legal proceedings and claims for damages. But the claim for breach of contract received relatively little prominence in Mr Bennett's submission. Mr Wilson described the Agreement as ridiculous. Both were right in my view.

195. In the Defence and Counterclaim TDD pleads that the Confidentiality Agreement is void on a number different grounds including: that it was induced by undue influence, that the information to which it purported to relate was not confidential, and that it was unenforceable for reasons of public policy. But little by way of submission was addressed to these matters. No submissions on public policy were addressed to me until after the hearing, and then only because I had asked how I was to address this issue which was raised on the pleadings.

196. There are certain features of this case which must be noted. First, the relationship between the parties cannot simply be described as one between consenting adults conducted in private. It was not conducted entirely in private: the parties went out together to the theatre and other events, and AVB introduced TDD to a number of friends and relations, and gave her a professional reference.

197. But more importantly, it was not entirely consensual. The terms of the relationship between the parties were bitterly disputed between the parties for the most of each of the three periods during which they were seeing one another.

198. By saying the relationship between the parties was not entirely consensual I do not mean that any particular sexual act by AVB was performed without TDD's consent, as that term is used in the criminal law of sexual offences. I mean that TDD gave her consent induced by his agreement to make payments and confer other benefits on her, to which AVB did not adhere, or intend to adhere. AVB manipulated and deceived TDD into giving consent by other promises and assurance of payment or of help in her career, and in her disputes with others. He also induced her submission by threatening TDD with litigation when she sought to press her claims. Some of AVB's threats were entirely unwarranted, in particular his threats to sue for defamation, which he has not done, and in my judgment never had any good reason to believe he could have done. I accept her evidence that he was a manipulator and a bully. I accept

that TDD's claims to be entitled to the payments she demanded were sincere and were warranted, notwithstanding that they were not legally enforceable.

199. Can a man who refuses to pay a prostitute who has consented to sex in exchange for money or money's worth, but who the prostitute claims to be in breach of that promise, seek to prevent the prostitute from making any complaint at all to any third parties, either by a Confidentiality Agreement, or by the general law of confidentiality or privacy? Not in my judgment. The principle in *Tournier* cited in para 66 above applies in this case.

200. I leave on one side the disclosures to AVB's daughters, because they are admitted to be wrongful, and raise different considerations. The main complaints in question are disclosures to AVB's co-workers, including his professional partners.

201. It follows in my view that in so far as the Confidentiality Agreement purports to bind the parties to "treat all oral communications concerning their lives as confidential" it cannot be construed as applying to communications about the terms on which they were agreeing or negotiating the provision of sexual services by her to him at a time after a dispute had arisen between them. The fact that a prostitute cannot sue for remuneration for her sexual services does not mean that she cannot make any complaint to any third parties.

202. In my judgment TDD acted in breach of her duty of confidentiality to AVB when she disclosed information relating to third parties which AVB had disclosed to her, or which she had learnt on reading AVB's memory sticks. This is subject to an exception, namely that disclosure of such information to those who, as the subjects of the information, already knew it could not be a breach of confidence.

203. TDD disclosed some information about AVB more widely than she should have done, that is to partners or employees of his firm who had no role in complaints about him. But in so far as she disclosed to those colleagues and family members who were in a position to influence AVB's behaviour that AVB had not paid her what she claimed he had agreed to pay her (in money or money's worth), then that cannot, in my judgment, be a breach of confidence or of contract.

204. Turning to undue influence, I have found that the Confidentiality Agreement was entered into at a time when TDD had sought to obtain payment of money for sexual services given in the course of prostitution. AVB's purpose was to prevent TDD seeking to enforce her demands for payment in the future. It was also entered into at a time when AVB had agreed to act as her solicitor. The circumstances seem to me to raise strong arguments that the agreement was entered into under the actual, or at least the presumed, undue influence of AVB over TDD. However, I received no detailed submissions on this point. I do not need to make any final decision on it.

205. I turn next to the issue of public interest. I hold that the Confidentiality Agreement is unenforceable on grounds of public policy. It is an agreement between a client and a prostitute which the client required the prostitute to sign, and by which the prostitute purported to give up her right to complain of what she claimed was his exploitation of her. It provided him with an apparent legal basis for threatening her (as he subsequently did) with legal proceedings for damages to be enforced against her home

in the event that she did complain of his exploitative treatment. But this conclusion adds nothing to the one reached in para 201 above.

206. I hold that TDD acted in breach of her duty of confidentiality by disclosing information relating to his children identified in para 193, but I do so not on the basis of breach of the Confidentiality Agreement, but on the basis that TDD was in breach of the equitable duty of confidence.

BREACH OF CONFIDENCE AND MISUSE OF PRIVATE INFORMATION

207. The information which AVB alleges was private and which TDD misused is identified by him in APOC paras 21 to 21.7, 11.1 to 11.3, 22 to 23, 29.1 to 29.13, 35.1 to 35.4 and 42.

208. The considerations which have led me to reject the claim for breach of contract apply also lead me to reject AVB's claims in breach of confidence and misuse of private information in so far as they relate to, first, the fact of the relationship between himself and TDD (which is not in dispute), and, second, her claims that he was not paying her and keeping his other promises to her.

209. Other information which TDD has disclosed is information in which either he had a reasonable expectation of privacy, or which was disclosed to her by him in confidence. This is information about his wife and children, and about other women with whom he has been in relationships.

210. APOC paras 21.1 to 21.7 relate to (1) the video of Ms R; (2) a letter from AVB to a professional partner concerning problems with another partner; (3) a draft email from AVB to his son; (4) bank statements; (5) a page from a document relating to AVB's agreement with his professional partners; (6) a statement by AVB to his lawyer in Brazil including medical information about a third party in Brazil; (7) a statement by AVB to his lawyer in Brazil relating to another third party in Brazil.

211. In my judgment all of this information was obtained by TDD in breach of her equitable duty of confidentiality.

212. APOC paras 11.1 to 11.3 relate to the emails of 13 June 2012 at (1) 15:10; (2) at 15:51 and 16:33 summarised in paras 112 to 114 above.

213. The email timed 15:10 and 15:51 (para 114 above) contain neither any confidential nor information in respect of which AVB had a reasonable expectation of privacy.

214. The e-mail timed 16:33 (para 115 above) contains information relating to third parties which was confidential and which TDD did not have the right to disclose, namely information relating to the office receptionist, a Brazilian, and AVB's wife. AVB disclosed this information to her, and is entitled to seek an order restraining TDD from disclosing it to third parties. But he is not entitled to any damages in respect of past disclosures. He suffered no significant distress himself, the persons whose rights were primarily engaged were the three individuals concerned, none of whom are claimants in this action. AVB is not entitled to complain in respect of any of the remainder of the information.

215. APOC paras 22 and 23 relate to the emails of 1 May 2013 at 17:37 and 17:53 (paras 13 and 14 above). They contain neither any confidential nor information in respect of which AVB had a reasonable expectation of privacy.

216. APOC paras 29.1 to 29.13 relate to the information which TDD disclosed in her eight messages to AVB's younger daughter in May 2013 (para 23 above and following). This information was confidential in so far as it was information obtained by TDD in breach of confidence by her looking into his memory sticks and it relates to third parties. The second last message (referred to in para 25 above) does contain information in respect of which AVB had a reasonable expectation of privacy. But nothing turns on this because TDD has admitted that she should not have sent these messages to AVB's daughter, and does not pose a risk that she might do it again.

217. APOC paras 35.1 to 35.4 relate to disclosures TDD made on 1 to 7 May 2013 which were not known to AVB before TDD disclosed the facts pursuant to the order that I made on 24 May 2013. The subject of paras 35.1 and 35.2 are the images of the same private acts involving AVB and Ms R as already mentioned, and in respect of which AVB does have a reasonable expectation of privacy. The disclosures were to respectively 6 and 5 individuals. The subject of paras 35.3 and 35.4 are disclosures AVB's sexual habits to one individual and his use of prostitutes to five individuals. The precise nature of the information complained of is not specified, and I have been unable to make further findings.

218. I find that AVB suffered embarrassment from learning of these disclosures complained of in APOC para 35, but no, or no significant, distress.

219. TDD has shown herself to be erratic and unpredictable, and ready to disclose private and confidential information when provoked by AVB's conduct. So the question arises as to whether there remains today a real risk that she will disclose in the future any of the information which I hold is information in respect of which AVB has a reasonable expectation of privacy, or in respect of which she owes to him a duty of confidentiality.

220. In my judgment, and subject to para 216 above, there is such a risk, albeit not a high one. I bear in mind the stance she adopted in the hearings before Bean J and Nicola Davies J described in para 41 above.

221. As to those publications which I have found are in breach of AVB's right to privacy, the question arises as to whether I should make an award of damages. I decline to do so. I find that he has suffered no real distress. He has suffered some embarrassment, but that is different. There were only the slightest references to distress in AVB's evidence. And I have also found that AVB took pleasure in provoking TDD's anger and other emotions, and it would not be just that he should receive damages for those occasions when his provocations resulted in the excessive reactions which I have found.

HARASSMENT – AVB'S CLAIM

222. Mr Wilson submits that both sides in this case have behaved badly (and in her case she has admitted that in relation to her involving AVB's daughter). But he submits

that neither engaged in harassment within the meaning of the Act, alternatively that both did.

223. I put out of my mind the question whether TDD's conduct amounted to harassment of the recipients of any of the messages complained of, namely AVB's younger daughter or AVB's colleagues. None of them is a claimant. The question is whether what TDD did amounted to harassment of AVB.

224. The first question is whether there was a course of conduct. There is no doubt that there was more than one act by TDD. But the facts in this case raise difficulties. There was a long interval between the acts complained of: the first occurred on 13 June 2012 (APOC paras 11 to 13) and the remainder on dates on or about 30 April to 13 May (APOC paras 17 to 35). The emails sent to AVB's then solicitors cannot be included. AVB does not include as part of the course of conduct alleged against TDD the events of October 2013.

225. In my judgment the events of 13 June 2012 were separate from and from the events in April and May 2013. They do not amount to a course of conduct. Each of the two time periods involved acts by TDD in response to particular events. They demonstrate her tendency to respond in a similar fashion when angered. But they are not part of a single course of conduct within the meaning of the Act.

226. The next question is whether the events of 30 April to 7 May are a course of conduct by TDD within the meaning of the Act, or whether any part of them are a course of conduct.

227. So far as concerns the messages sent to AVB's younger daughter, in themselves they were not in my judgment a course of conduct, at least in relation to AVB. They were a series of messages. But they were all close together in time, and they all came to the knowledge (and would be expected to come to the knowledge) of AVB at one and the same time.

228. So far as concerns the communications addressed to AVB's colleagues and to others on 1 to 13 May, these did amount to a course of conduct, both in themselves, and together with the messages sent to AVB's younger daughter. There was a sufficient connection in time and circumstances. It was a matter of chance that they did not come to the attention of AVB at different times shortly after TDD's acts were performed.

229. All of the communications complained of in May 2013 were clearly targeted at AVB.

230. The next question is whether they were objectively likely to cause distress. As already indicated above, I find evidence of actual distress on the part of AVB to be lacking (as opposed to embarrassment). But the test is an objective one. Certainly in respect of most people who might be targeted by such behaviour, the conduct would be likely to cause distress. But it is impossible to apply the objective test of what was likely without also taking into account the actual circumstances in which the conduct occurred.

231. It cannot be ignored that TDD had behaved as she did behave in June and October 2012, and in each case AVB revived his association with her and continued to

provoke her by his manipulative and exploitative behaviour. If he had been distressed by what she had done, either he would have kept well away from her, or he would have treated her less provocatively, so as not to risk another outburst of bad behaviour on her part. In those circumstances it cannot be said that the conduct complained of in May 2013 was objectively likely to cause distress to AVB.

232. Was the conduct oppressive and unacceptable? Certainly in almost any other context TDD's behaviour would be regarded as both oppressive and unacceptable, and to an extent she has admitted that it was unacceptable. But I have to have regard to the context in which the conduct occurred. Apart from the conduct involving AVB's younger daughter, in my judgment it would make no sense to find that TDD had acted oppressively towards AVB. Her behaviour was entirely a reaction to his abuse of herself.

233. She too could have walked away from him at any stage, as she threatened to do on a number of occasions. There is nothing to indicate that he had any hold over her. But the oppression was by him of her. The situation calls to mind the ironical French adage**:** "Cet animal est très méchant. Quand on l'attaque il se defend" (This animal is vicious. When it is attacked it defends itself).

234. There is no question of TDD having a defence under s.1(3) of the Act. If, contrary to my view, TDD's conduct did amount to harassment, then it cannot be said that it was reasonable.

235. Accordingly, in my judgment AVB's claim in harassment fails. In any event if it had succeeded I would have awarded either no damages or nominal damages, given the extent of his provocations and the absence of any real evidence of distress.

HARASSMENT – TDD'S COUNTERCLAIM

236. I turn to TDD's counterclaim for harassment. I think it unlikely that this counterclaim would ever have been advanced save in response to AVB's claim.

237. There can be no doubt in my view that a prostitute can in principle claim in harassment against a client. She would not need to rely on the fact of her being a prostitute to support her claim. And the client could not rely on the mere fact of her being a prostitute as removing any likelihood of her being distressed, or as making conduct which would otherwise be oppressive and unacceptable into the opposite.

238. I have accepted the evidence of Ms A and Mr P. And AVB does not seek to justify his behaviour outside TDD's flat in October 2012. I also think it likely, and so find, that AVB did on at least one occasion threaten to kill TDD. But that threat was not meant seriously, and she did not understand it as being meant seriously.

239. Overall I accept that AVB's exploitative and manipulative behaviour towards TDD did amount to a course of conduct which was harassment within the meaning of the 1997 Act. The criteria set out in para 52 above. She was alarmed by his threats to disclose to her parents and others that she was a sex worker. She did also suffer some distress, and it was in response to that distress that she behaved as badly as she did in June and October 2012 and again in May 2013 by making disclosures about third parties which she ought not to have made.

240. However, I decline to award any damages to TDD. She chose to continue to seek to retain AVB as a client knowing how he behaved. If her distress had been more than passing she could and would have ceased to have anything to do with AVB.

CONCLUSION

241. For these reasons:

i) AVB is entitled to an order restraining TDD from further disclosing any of the confidential or private information already disclosed by her which relates to AVB's wife and his children, or to the sexual or financial information relating to individuals with whom he has had a sexual or a personal or professional relationship, but he is not entitled to an order restraining publication of any of the other information on which she based her complaints against himself about his conduct towards her;

ii) AVB is not entitled to an award of damages;

iii) The claim of AVB against TDD in harassment are dismissed;

iv) The counterclaim of TDD against AVB in harassment is upheld, but

v) TDD is not entitled to any damages, nor is there any such risk of AVB repeating his conduct as to justify the grant of an injunction against him.

vi) The parties are invited to agree a form of order, or to make further submissions on a form of order to the extent that it is not agreed.