

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
BETWEEN : -

CHRIS PACKHAM CBE

Claimant

- and -

(1) DOMINIC WIGHTMAN
(2) NIGEL BEAN
(3) PAUL READ

Defendant

THIRD DEFENDANT'S CLOSING SUBMISSIONS

1. The present case potentially raises a number of important issues of principle of general application. This document seeks to address all of them and in sufficient detail should the Court choose to address them in its judgment. The relevant passages from the authorities and Parliamentary debate will be included in the body of this document for ease of reference. Where a submission has been sufficiently addressed in D3's trial SA, there will be a reference to the relevant paragraph.
2. Its length should not detract from the short points that are sufficient to reject the claim: (a) D3's involvement in A1-4 is a chasm away from "effective control" of the "statement" (the minimum requirement of editorial responsibility) (b) the terms "author" and "editor" have no meaning in relation to a retweet and/or (c) there is no proper inferential case of serious harm advanced in relation to the D3 Retweets.

Overview

3. C has confirmed that he is not seeking to rely on any common law responsibility outside the definitions of "author" and "editor" in s.1(2) of the 1996 Act. Accordingly, the position remains as stated in SA[14]: it is not necessary to debate the extent of liability at common law.

4. Similarly, it is not necessary to debate the nature of the jurisdictional bar in s.10 of the 2013 Act and its relationship with CPR 11. Nevertheless, as stated in SA[21], s.1(2) must now be interpreted in the context of s.10 and other provisions in the 2013 Act. This bolsters the case for the exclusion of D3 from the s.1(2) definitions. But it is overwhelming, even if s.1(2) is looked at in isolation. Consideration of s.1(2) in isolation starts at [68] below.
5. Author is defined as: “the originator of the statement”. It is no longer alleged that D3 was author of A1-4. It is alleged that that he was the author of the D3 Retweets.
6. Editor is defined as: “a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it”. In relation to A1-4, C relies on “the content of the statement” and in relation to the Retweets, “the decision to publish”.
7. It is implicit that C accepts that D3 did not have responsibility for the decision to publish A1-4. S.1(2) refers to “content” or “the decision to publish”, but any such distinction would be misconceived in a media article making defamatory imputations. Whether to include any particular imputation is recognised in the *Reynolds* cases – heavily influential in the passage of the 2013 Act – as part of the same editorial judgement as to whether to publish at all.
8. For convenience, a person inside s.1(2) will be described as a “primary participant” and a person outside as a “subordinate”. There is no specific categorisation to this or similar effect in the 1996 Act or in any other statutory provision. *Gatley* and the authorities refer to “primary publisher”. The word publisher will be avoided, as it presumes common law liability. This will be open to dispute in relation to many subordinates and does not need to be resolved in the present case.
9. A subordinate will generally either have involvement with the primary participants in the course of the preparation of the defamatory statement or be responsible for its dissemination to the publishees. This will lead to different issues in the application of s.1(2).
10. However, the underlying public policy concerns are the same. Extending the ambit of primary participants is capable of having a chilling effect on freedom of

expression generally and will constitute an interference with the Article 10 right of a person treated as a primary participant. Restricting its ambit could, in theory, frustrate the exercise of the right to reputation. However, certain participants will always be regarded as primary. The claimant will generally be able to obtain vindication from them.

11. More specifically as regards the present case, there has never been any previous attempt to make someone in D3's position re A1-4 liable as editor, or to make a retweeter liable as a primary participant. English claimants have been able to obtain vindication from authors, editors and publishers of media articles without including any other participant in the claim. The right to sue the tweeter and obtain damage for all retweets has, thus far, proved sufficient. There is nothing in the facts of the present case to suggest any general lack of vindicatory options.
12. The relevant legal principles will be addressed below, insofar as not covered in the SA. This will be followed by consideration of the evidence and the application of the principles to the facts.
13. Finally, serious harm and *Jameel* will be considered in the relation to the Retweets. These raise interesting issues that would be relevant if D3 had been sued as a subordinate and no claim had been reasonably practicable against D1.

Relevant legal principles

Article 8/10 balance

14. Art 10 operates at a corresponding macro and micro level.
15. Every member state is under a positive duty to create an enabling and favourable media environment (see, for example, *Dink v Turkey*, nos. 2668/07 14 September 2010, §137). States must ensure that laws or provisions which may impact on media freedom are compatible with this duty. It is well-established that the most careful scrutiny is called for when sanctions imposed by the national authority are capable of discouraging participation in debates by the media over matters of legitimate public concern (see, for example, *Bladet Tromsø v Norway* (2000) 29 EHRR 125 [64]). It is recognised that this principle now extends beyond the media

to anyone communicating on a matter of public interest (see, for example, *OOO Memo v Russia* [2022] ECHR 229 at [23]).

16. Any such sanction is a restriction and penalty within the meaning of Article 10(2). It is accordingly subject to the requirements of proportionality, including necessity. The only possible justification in a defamation claim relates to the right to reputation of the claimant.
17. On a micro level, a finding of liability on a particular defamation defendant and the consequent sanctions (including costs and damages) are restrictions and penalties that require justification by reference to the claimant.
18. The relatively large damages and even larger recoverable costs inherent in English defamation proceedings (which do not take into account the defendant's means) result in the penalty being severe. The financial consequence of losing (and also often fighting and winning) a defamation claim can be life-changing (see, for example, the application in *Malkiewicz v United Kingdom* referred to at 5694 arising from *Serafin v Malkiewicz* [2020] 1 WLR 2455. In common with D2, the Applicants lost all appetite for journalism as a result of the libel proceedings; they also lost their home).
19. It is well established in domestic law (SA[17]) that the threat or initiation of a defamation claim with the accompanying risk of sanction and accompanying cost and anxiety for a defendant is a serious interference with freedom of expression.
20. The ambit of responsibility as a primary participant engages Art 10 at a macro and micro level. Extending it to persons involved in the course of the preparation of the defamatory statement, other than those writing it and/or having editorial control over it is, at least, capable of discouraging their involvement and thereby capable of negatively impacting on the activities of the media or other entities involved in debating public interest matters.
21. Such persons are particularly at risk of being discouraged from involvement as they do not generally have the same "skin in the game" (financial or otherwise), in the publication of the defamatory statement.

22. The chilling effect is even greater for small-scale publications where there may be no meaningful indemnity available from the publisher or access to specialist pre-publication legal advice and the participants are often volunteers.
23. One of the ways that media and other publishers distribute an article is by routinely sending a tweet at the time of publication of an article that summarises its contents and contains a link. This will then be retweeted by many others, thereby further disseminating it. Extending the ambit of responsibility to a retweeter is, at least, capable of discouraging the process of retweeting. This will negatively impact on the right of the media publisher, the tweeter and potential retweeter to disseminate the information in the article, and the right of the followers of the retweeter to be informed of it.
24. Further, in the context of responsibility for publication, there is no principled distinction between a retweet relating to a media article and any other social media dissemination of information created by others. Public debate largely takes place through social media. It is an important means of “empowering the citizen so that those in authority are held properly to account” (see [31] below).
25. Litigation (or the threat of it) will be a particularly serious interference with the Art 10 rights of the pre-publication participant or the social media user, particularly as they will often be of limited means.
26. The proportionality balance in relation to the ambit of primary responsibility takes place in the context of the claimant’s right to pursue a claim against others clearly recognised as primary participants. Vindication against such persons will also likely to be more valuable given their greater likely knowledge.
27. Further, in relation to social media, where a user adds content (as opposed to mere dissemination), they will generally be responsible for that content as author.
28. An important element of Art 10 is the protection of public interest journalism. It would be inconsistent with Art 10 for a lesser involved party acting in good faith to be deprived of a public interest defence available to the persons more directly involved.

29. S.3(1) of the Human Rights Act 1998 requires that any provision engaging Art 10 “must be read and given effect in a way which is compatible with” Art 10, so far as is possible. It is a powerful tool with an unusual and far-reaching character.

The 1996 and 2013 Defamation Acts

30. The 1996 and 2013 Acts both refer widely to “the statement”, which is defined in both (S.17(1) and s.15 respectively) as: “words, pictures, visual images, gestures or any other method of signifying meaning”. This reflects the variety of ways in which defamatory material can be communicated. In the traditional media publication case, the “statement” is the article complained of. In the present case the relevant statements are A1-4 in the form published and the wording of the Article Tweets retweeted by D3.

31. The stated purpose of the 2013 Act was to rebalance the law in favour of reputation:

“The right to freedom of speech is a cornerstone of our constitution. It is essential to the health of our democracy that people should be free to debate issues and challenge authority – in all spheres of life, whether political, scientific, academic or any other. But freedom of speech does not mean that people should be able to ride roughshod over the reputations of others, and our defamation laws must therefore strike the right balance – between protection of freedom of speech on the one hand and protection of reputation on the other.

“There has been mounting concern over the past few years that our defamation laws are not striking the right balance, but rather are having a chilling effect on freedom of speech. This is particularly important for the Coalition Government which is committed to empowering the citizen so that those in authority are held properly to account. But, as reflected in the manifestos of all three parties prior to the General Election, the consensus for reform goes much wider than this.”

Ministerial Foreword, Draft Defamation Bill, March 2011

32. The interpretation of s.10 must be approached on the basis of it being part of a coherent package to address the mischief of the 2013 Act referred to above. Since

Parliament chose to adopt the definition in s.1(2) of the 1996 Act for the purposes of s.10(2), this necessarily impacts on the interpretation of s.1(2).

33. The proportionality balance referred to above is evident in the various reforming provisions in the 2013 Act.

34. There is no need for detailed consideration of the Parliamentary debate, even if admissible. The debate in relation to s.10 was limited. The explanatory notes add nothing of relevance.

35. S.10 was not in the original draft Bill. *Gatley* [7-045] fn 412 states:

“Section 10 was added in the light of concerns expressed to the Joint Committee on the Draft Defamation Bill by the Booksellers Association to the effect that s.1 of the Defamation Act 1996 had reduced the protection for secondary publishers (who are not covered by the Electronic Commerce (EC Directive) Regulations 2002). Whether or not this was in fact the case (and it is respectfully submitted that it was not), s.10 was introduced to allay their concerns.”

36. The relevant part of the Joint Committee Report (12/10/11) is set out below:

“Innocent dissemination

60. As a final point in relation to the protection of publishers, we were made aware that what appears to be a change to the so called “innocent dissemination” defence, when it was put on a statutory footing by the Defamation Act 1996, has weakened the position of “secondary publishers”. It means in effect that any secondary publisher such as a bookseller who is not the original author and has no editorial control over the published material becomes liable as soon as being made aware that some of the publication’s content may be defamatory. Prior to 1996 the secondary publisher appears to have had a defence if they reasonably believed (for example, on the basis of reasoned assurances from the author or primary publisher), that the defamatory material was defensible.¹⁰⁹ The reform implemented by the 1996 Act has, in this respect, been unduly harsh on secondary publishers. We recommend that the Government amends the “innocent dissemination” defence in order to provide secondary publishers, such as

booksellers, with the same level of protection that existed before section 1 of the Defamation Act 1996 was introduced.”

37. There is a significant difference between knowledge that a statement is defamatory – generally easy to establish - and knowledge that it is libellous – generally difficult to establish.

38. It is correct that distributors would often seek assurances from publishers that an article or book was not libellous. However, this would not protect them if it was obviously defamatory. The Joint Committee was mistaken to state that the common law defence was available in the latter case. In common with s.1, the issue at common law was whether the statement was defamatory, not libellous. For this reason, as with s.1, it did not provide adequate protection for public interest information, which is often defamatory.

39. The only authority to support the Joint Committee’s understanding of the innocent dissemination defence is the minority judgment of Lord Denning MR in *Goldsmith v Sperrings* [1977] 1 WLR 478:

“Common sense and fairness require that no subordinate distributor – from top to bottom – should be held liable for a libel contained in it unless he knew or ought to have known the newspaper or periodical contained a libel on the plaintiff which could not be justified or excused” 487F

“The freedom of the press depends on the channels of distribution being kept open” 488G.

40. Bridge LJ followed the traditional approach to the defence:

“The legal background, with which all parties to the settlements must be taken to have been familiar, is that any disseminator of defamatory matter is liable to the party defamed, subject to the defence of innocent dissemination. To establish this it is for him to show that he did not in fact know that the publication contained defamatory matter and that he had no reason to believe that it was likely to contain defamatory matter *Gatley on Libel and Slander*, 7th ed., para.241.” 505B

41. Scarman LJ agreed, noting:

“If, therefore, there be in these proceedings a threat to press freedom, the threat comes, not from Sir James Goldsmith, but from the law itself, in that it provides a cause of action against distributors as well as publishers. That is a matter for Parliament, not the courts. So long as the cause of action exists, it may be invoked unless it can be shown that it is being used to secure a collateral advantage.

If the effect of the law is to diminish freedom of the press, Parliament will have to decide where the balance is to be struck between freedom of the protection of the defamed citizen. Some, no doubt, will argue against any restraint being imposed on distributors of newspapers. Some may even wish to go so far as to call for a legal obligation to be imposed on all newsagents and others engaged in the business of newspaper distribution to provide an outlet for all newspapers and periodicals, whatever they publish. Others, however, will argue that the existing law provides in the action against a secondary distributor a valuable additional remedy for an individual who is defamed by a scurrilous or financially dubious publication. We do not have to consider these questions.” 501B-D.

42. S.1 is set out in full below. Parliament chose to retain the knowledge test by reference to the defamatory nature of the statement alone.

43. In the Bill’s second reading Lord Mackay LC stated:

“Clause 1 is a new statutory defence which will supersede the common law defence of innocent dissemination, which has always been subject to some uncertainty, particularly as to who could rely on the defence. It concentrates on the concept of responsibility for publication. The new defence will not be available to authors, editors or publishers (in the commercial sense) of defamatory material. But it will be available to others whose work may in some way have contributed to the publication of defamatory material which someone else has chosen to publish unless they knowingly took part in producing a defamatory publication, or had reason to believe that they were doing so.” (8 March 1996 HL Vo 570 Col 577)

44. It is to be noted that Lord Mackay specifically referred to “others whose work may in some way have contributed to the publication of defamatory material which someone else has chosen to publish” as not being within the s.1(2) definition of

author, editor or publisher. This is evident from the wording of s.1(5)(a) considered further below.

45. Criticism of the lack of protection for subordinates persisted, notwithstanding s.1 (and in part because of it). In *McVicar v the United Kingdom* Application no. 46311/99 (Admissibility), the applicant author complained, among other matters, that the distributors of the magazine had been sued giving rise to the risk of a claim against him for an indemnity. The article was published in 1995, but the applicant relied on a continuing chilling effect following the coming into force of s.1. This aspect of the application was declared inadmissible on the basis of lack of victim status.

46. It would have been open to Parliament in 2013 to rebalance the law in favour of freedom of expression by amending the s.1 defence to reflect Lord Denning's minority judgment in *Goldsmith*. However, by this stage, the printed word had become less significant and the internet was the most important means of disseminating information, with its particular challenges. Instead, Parliament opted for a hard-edged version of one of Scarman LJ's possibilities – "against any restraint being imposed". The wording of s.10 is repeated below for ease of reference:

"10 Action against a person who was not the author, editor etc

(1) A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.

(2) In this section "author", "editor" and "publisher" have the same meaning as in section 1 of the Defamation Act 1996."

47. The same wording and explanatory notes appeared in the draft Bill introduced to the House of Commons on 10/5/12. [87]-[98] of the explanatory notes address ECHR compatibility and include:

"98. Clause 10 limits the circumstances in which an action for defamation can be brought against a person who is not the primary publisher of an allegedly defamatory statement. It is clear that Article 6 embodies not just procedural

guarantees of fairness but also the right of access to the court itself²⁷. This may, however, be subject to limitation as a right of access “by its very nature calls for regulation by the State ... [which will] enjoy a certain margin of appreciation”²⁸. It is also clear that Article 6 does not affect the democratic power of the state to determine the scope of an individual’s civil rights²⁹. To the extent Article 6 is engaged at all, nothing in the clause impairs the “very essence”³⁰ of a claimant’s right to take action to protect his reputation. The clause applies only to those persons who are not the author, editor or publisher for the purposes of s.1 of the 1996 Act. In any case, the clause leaves discretion to the court to hear a case if it is not reasonably practicable for a defamation action to be taken against the author etc.

27 *Golder v UK* (1975) 1 EHRR 524.

28 *Fayed v UK* (1994) 18 EHRR 393 (at 65).

29 *Matthews v Ministry of Defence* (HL) [2003] 1 All ER 689 (at para 77)

30 *Fayed v UK*.”

48. In addition to s.10, s.5. provides a specific defence to operators of websites, while giving the claimant the opportunity to procure the removal of the defamatory statement.

“5 Operators of websites

(1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.

(2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.

(3) The defence is defeated if the claimant shows that—

(a) it was not possible for the claimant to identify the person who posted the statement,

(b) the claimant gave the operator a notice of complaint in relation to the statement, and

(c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

(4) For the purposes of subsection (3)(a), it is possible for a claimant to “identify” a person only if the claimant has sufficient information to bring proceedings against the person.

(5) Regulations may—

(a) make provision as to the action required to be taken by an operator of a website in response to a notice of complaint (which may in particular include action relating to the identity or contact details of the person who posted the statement and action relating to its removal);

(b) make provision specifying a time limit for the taking of any such action;

(c) make provision conferring on the court a discretion to treat action taken after the expiry of a time limit as having been taken before the expiry;

(d) make any other provision for the purposes of this section.

(6) Subject to any provision made by virtue of subsection (7), a notice of complaint is a notice which—

(a) specifies the complainant’s name,

(b) sets out the statement concerned and explains why it is defamatory of the complainant,

(c) specifies where on the website the statement was posted, and

(d) contains such other information as may be specified in regulations.

(7) Regulations may make provision about the circumstances in which a notice which is not a notice of complaint is to be treated as a notice of complaint for the purposes of this section or any provision made under it.

(8) Regulations under this section—

(a) may make different provision for different circumstances;

(b) are to be made by statutory instrument.

(9) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(10) In this section “regulations” means regulations made by the Secretary of State.

(11) The defence under this section is defeated if the claimant shows that the operator of the website has acted with malice in relation to the posting of the statement concerned.

(12) The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.”

49. The consequences of s.5 and s.10 are as follows. The s.5 defence protects a website operator where the “not reasonably practical” exception to s.10 is engaged and there is therefore jurisdiction to proceed with a claim. In such a case, other subordinates can deny publication at common law or invoke s.1 (both of which may be difficult). Otherwise, they would need to rely on a generally available substantive defence. The application of the s.10 exception is outside the control of the defendant and unrelated to the merits of the claim.

50. An important element of the rebalancing related to the protection of information on matters of public interest in any context, not merely media publications. A criticism of the *Reynolds* defence was that it was overly influenced by hindsight bias and, in practice, limited to media publications. As previously noted, the 2013 Act was intended to “empower[ing] the citizen so that those in authority are held properly to account”.

51. With this in mind, s.4 created a new public interest defence to replace the common law *Reynolds* defence. It was intended to be of general application and give greater respect to the decisions made at the time of publication. It provides:

“4 Publication on matter of public interest

(1) It is a defence to an action for defamation for the defendant to show that—

(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and

(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.”

52. In contrast to the *Reynolds* defence, the defendant has to prove the existence of a belief. If the defendant did not form such a belief, it does not help that it would have been a reasonable belief.

53. If the belief is proved, the remainder of the section addressed the issue of reasonableness and the abolition of *Reynolds*. It reflects the perceived defects of *Reynolds* identified above.

“(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.

(3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.

(4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

(6) The common law defence known as the Reynolds defence is abolished.”

54. In relation to s.4(4), the explanatory notes referred to the most recent Supreme Court decision in *Flood v Times Newspapers Ltd* [2012] 2 AC 273, delivered in the course of the Parliamentary debate. It also featured heavily in the Parliamentary debate:

“33. Subsection (4) requires the court, in considering whether the defendant’s belief was reasonable, to make such allowance for editorial judgement as it considers appropriate. This expressly recognises the discretion given to editors in judgments such as that of *Flood*, but is not limited to editors in the media context.”

55. The headnote in *Flood* includes:

“Per Lord Mance and Lord Dyson JJSC. Within the boundaries set by the courts of what can properly be regarded as acceptable journalism, the judgment of responsible journalists and editors as to the **nature and content** of an article merits respect and is entitled to weight in determining whether publishing the detail of allegations is in the public interest (post, paras 137, 170, 180, 199).” [bold added]

56. The most relevant passage is the judgment of Lord Mance at [137]:

“137 The courts therefore give weight to the judgment of journalists and editors not merely as to the nature and degree of the steps to be taken before publishing material, but also as to **the content** of the material to be published in the public interest. The courts must have the last word in setting the boundaries of what can properly be regarded as acceptable journalism, but within those boundaries the judgment of responsible journalists and editors merits respect. This is, in my view, of importance in the present case.” [bold added]

57. *Flood* concerned a public interest story about a police investigation where the issue was the inclusion of the officer’s name and the details of the investigation.

58. The preceding Supreme Court Reynolds case was *Jameel v Wall Street Journal Europe* Sprl [2007] AC 359, also widely referred to in the Parliamentary debate. This also related to the inclusion of a defamatory statement within a public interest story. Lord Hoffman stated:

“(b) Inclusion of the defamatory statement

51. If the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article. But whereas the question of whether the story as a whole was a matter of public interest must be decided by the judge without regard to what the editor's view may have been, the question of whether the defamatory statement should have been included is often a matter of how the story should have been presented. And on that question, allowance must be made for editorial judgment. If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, ex hypothesi, in the public interest, too risky and would discourage investigative reporting.”

59. It necessarily follows from the structure of s.4 in the light of the existing common law that, where the statement complained of is an article, the reference to editorial judgement in s.4(4) must be to the decision to publish the article and what to include in it by the person(s) who believed that it was in the public interest and who had the responsibility and information to make such judgments.
60. The relevant public interests were identified by Lord Nicholls in *Reynolds* as: the public interest in communicating information on matters of public interest balanced against the public interest in avoiding falsehood and unjustified injury to reputation (see *Economou v De Freitas* [2019] EMLR 7 at [79] 1/19/507). These are engaged in the application of editorial judgement.
61. The s.4 defence is evidently not directed to those persons involved in the process of publication who do not have the responsibility to make such decisions and the related need and/or information to form a public interest belief in relation to them. If their involvement ends prior to the final decision-making as to what to include in the article and/or what steps should be taken to verify it, it will be even more unlikely that they will be able to establish a reasonable belief in relation to the “statement” i.e. the article as published.
62. It follows that if such persons are responsible for publication, they will not be able to rely on a s.4 defence available to the those responsible for making such decisions. Most defamatory claims involve defamatory statements of fact, where the only available defence, other than s.4, will be truth. This will be directed to the meaning found by the court by operation of the principles for determining meaning. It is a notoriously difficult and expensive defence to advance. These difficulties were the overt justification for the *Reynolds* defence.
63. Requiring a subordinate to prove truth where a public interest defence is available to the primary participants is “outrageous” (see SA[22]). No creative interpretation of s.4 can get round the requirement to hold a public interest belief.
64. This makes it all the more important that subordinates have the s.10 protection.
65. S.10 entitles a claimant to seek vindication from the author, editor or publisher, thereby respecting the right to reputation. It further respects it by permitting a claim

against a person who was not the author, editor or publisher, where it is not reasonably practicable to pursue a claim against the author, editor or publisher.

66. In all the above circumstances, where it is reasonably practicable to bring a claim against the person who had the responsibility to decide on whether an article should be published and what should be included within it, there is no Article 10 justification to allow such a claim to be brought against a person with a role in relation to content who did not have such responsibility. It follows that, insofar as is necessary, s.3(1) HRA is available to require s.1(2) of the 1996 Act to be interpreted in a manner to exclude such persons from the definition of editor.

67. With all of the above in mind, detailed consideration is now given to s.1 below.

Section 1 of the 1996 Act

“1 Responsibility for publication.

(1) In defamation proceedings a person has a defence if he shows that—

- (a) he was not the author, editor or publisher of the statement complained of,
- (b) he took reasonable care in relation to its publication, and
- (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

(2) For this purpose “author”, “editor” and “publisher” have the following meanings, which are further explained in subsection (3)—

“author” means the originator of the statement, but does not include a person who did not intend that his statement be published at all;

“editor” means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and

“publisher” means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.

(3) A person shall not be considered the author, editor or publisher of a statement if he is only involved—

- (a) in printing, producing, distributing or selling printed material containing the statement;

(b) in processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part I of the M1 Copyright, Designs and Patents Act 1988) containing the statement;

(c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;

(d) as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the maker of the statement;

(e) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

(4) Employees or agents of an author, editor or publisher are in the same position as their employer or principal to the extent that they are responsible for the content of the statement or the decision to publish it.

(5) In determining for the purposes of this section whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard shall be had to—

(a) the extent of his responsibility for the content of the statement or the decision to publish it,

(b) the nature or circumstances of the publication, and

(c) the previous conduct or character of the author, editor or publisher.

(6) This section does not apply to any cause of action which arose before the section came into force.”

68. Both s.1(1)(a) and s.1(5) refer “to responsibility for the content of the statement or the decision to publish it”. Since (5) only applies if s.1(a) is satisfied, it follows that a person is not an editor merely because they have responsibility for the content of the statement or the decision to publish it (see also *Gatley* [7-032]). They are only to be treated as an editor if they have “editorial or equivalent” responsibility (the additional words in s.1(a)).

69. “Editorial responsibility” is not defined. However, s.1(3)(d) and (e) refer to an absence of “effective control” as being a necessary element of the exclusion from s.1(2).

70. Article 1 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 (as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018) contains the following definitions in the context of the provision of audiovisual media services:

“(bb) ‘editorial decision’ means a decision which is taken on a regular basis for the purpose of exercising editorial responsibility and linked to the day-to-day operation of the audiovisual media service;

“(c) ‘editorial responsibility’ means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;

71. In the circumstances, it is submitted that “effective control” is the minimum requirement of editorial responsibility.

72. In the present case, given D3’s limited role, it is not necessary to debate the precise ambit of effective control and/or the extent to which direct involvement is either an additional requirement of editorial responsibility or implicit in effective control.

73. In the context of a media article, “effective control” must include the power to decide on the content of the article as published. D3 was very far away from having such control in relation to A1-4.

74. S.1(2) specifically refers to “the decision” to publish. For all the reasons previously stated, the reference to “content” in the context of editorial responsibility must inevitably refer to the decision as to what content to include. If the statute had merely said “responsibility for the content of the statement or its publication” it would be potentially confusing, given the various meanings of publication (see

s.17(1)). Hence, the need to specify “the decision to publish”. Editorial responsibility necessarily involves making decisions.

75. As previously stated, C’s case appears to draw a distinction between “content” and the “decision to publish”. It remains to be seen how it may be suggested that editorial responsibility can arise for content without any power of decision-making over the content of the article as published.

76. Further, the references to “content” must be interpreted as relating to “defamatory” content, not matters of style or use of language.

77. If the interpretation of editor in s.1(2) is not directed to decision-making on defamatory content, it will be out of kilter with s.4. It will result in persons being treated as editors who will be unable to rely on s.4 because they do not have the need and/or information to form a belief on the competing public interests inherent in the editorial judgement in s.4(4).

78. D3’s primary submission is that it is not necessary to resort to s.3(1) HRA to achieve such a result. Alternatively, it is a “possible” interpretation with the meaning of s.3(1).

79. S.1(2) refers to “editorial or equivalent” responsibility. The “or equivalent” simply addresses the variety of ways in which a defamatory statement may be published. In a media article, it has no additional relevance.

80. Leigh Day have suggested in correspondence (5954 [16]) that D3 was expected to give legal advice and/or tone down A1 for legal reasons. This was not pursued in cross-examination. In any event, pre-publication legal advice does not amount to editorial responsibility or decision-making, even if expressed in robust terms. In *Christie v Wilson* [1998] 1 WLR 1694 a solicitor provided a letter to a publisher to be shown to distributors which stated that “there is no significant risk that you will be successfully sued”. The Court of Appeal held that this did not make the adviser “responsible for deciding on a course of action”.

81. S.1(3) gives 5 examples falling outside the definitions in s1.(2). They do not purport to limit the generality of s1(2). They are to be understood as specific situations that Parliament considered to be of particular relevance.

The evidence in respect of editorial responsibility for content

82. The primary facts set out in RAD[8] were unchallenged and there was no suggestion that any material documents are missing from the chronology in the Pre-publication bundle. The obvious reasons why D3 did not have editorial control over A1-4 as published (the “statements” for the purpose of s.1(2)) are set out below:

82.1. D3 had no control over copy once returned to D2 where it was subject to further amendment by D1 and/or D2.

82.2. All the numerous discussions about content/decision to publish were between D1 and D2 without any involvement of D3. There were no communications between D1 and D3.

82.3. D3’s only involvement was at an early stage of the publication process, given D1’s need to substantially rewrite D2’s copy even after it had been proofed by D3.

82.4. Re A1, the amendments post D3’s returned copy were substantial and material to the defamatory element of the article. Insofar as is relevant, which is denied, they were made by D1 not D2.

82.5. A2 was completely rewritten.

82.6. Re A3, D3’s changes were either not returned or not considered. It was substantially rewritten from the draft provided to D3.

82.7. A4 was presented to D3 as a draft submission to the regulator which was almost entirely rewritten by D1 and/or D2 to be published as an article.

82.8. D1’s evidence was that the decision as to whether to publish an article in CSM and what to include within it, was solely his responsibility. It is

submitted that this is a primary, not evaluative fact. In any event, it needed to be challenged and/or explored given C's case.

82.9. From RAD[8.2]: "The Third Defendant has never had a contractual relationship with CSM and/or the other Defendants. He has not received any remuneration for any contribution to CSM and has no financial interest in CSM and/or the publication of material by them. He has never had access to CSM's content management system. So far as he is aware, CSM does not have any office structure. He has never attended any premises and, until the commencement of this claim, had never met the First Defendant. The Third Defendant has never had a contractual relationship with CSM and/or the other Defendants."

82.10. Further, there was no expectation that D3 would make himself available to work on any article if he was busy.

82.11. D3 was understood by D1 and D2 and himself to be a proofreader.

82.12. It was put to D2 that D3 was given "free rein". D2 did not accept that this went beyond the proofreading role and that if D3 had included anything that D2 did not like he would reject it. In any event, the relevant relationship was between D1 and D3, not D1 and D2, as D1 was the editor.

82.13. D3 had no knowledge of the story prior to A1. Thereafter, any additional knowledge only came from the further drafts/material published by CSM. D3 did not carry out any research for any of A1-4. His involvement started when he received D2's copy and ended when he returned it.

82.14. D3's amendments to A1-4 were all of a proofreading nature. He was only cross-examined on one amendment in A1, which can be justified as proofreading – D3 said that "nasty little charity" was rude.

82.15. Further, whatever the characterisation, none of the proposed amendments had any impact on defamatory meaning. If D3 had added any text that impacted on defamatory meaning (that made it through subsequent edits), he could have been sued as author in respect the relevant words.

82.16. In any event, the issue is now solely editorial responsibility for content. If D3 had such responsibility it does not matter if he did not make any changes. It may not even matter if he had seen any copy before publication. The fact that his changes were not of substance simply supports the obvious fact, evident from all of the above, that he did not have any editorial responsibility for content of the article as published.

82.17. C's case proceeds on the flawed basis that if D3's actions did or had the potential to impact on content in any way he therefore had editorial control over the content of the article as published. This would make anyone who had a role in relation to content an editor within the meaning of s.1(2).

83. Submissions on the credits given to D3:

83.1. The issue is whether C had effective editorial control over content, not whether such a representation was made to readers. Without prejudice to this:

83.2. The credit in A2-4 was "by Nigel Bean and Paul Read". This is an authorial credit. C no longer alleges that D3 was author.

83.3. The credit on A1 was "edited by Paul Read". That does not amount to a representation of editorial control, especially given that D1 is held out as editor of CSM. The phrase is equally consistent with a sub-editing role, which does not equate to editorial responsibility within the meaning of s.1(2). The likely reason why he was given this credit on A1 – not explored in cross-examination - is that the article is written in the first person, unlike A2-4.

83.4. The cross-examination was on the basis that the credits were apt to mislead; not that they truly reflected D3's role.

84. The length of the relationship between D2 and D3 and the number of articles published in CSM with their joint bylines is irrelevant. Newspaper sub-editors will work on numerous articles in the course their employment and have responsibilities going beyond D3's, but that does not mean that they have editorial control.

85. There was reference in cross-examination re A1 to D1 informing D2 that C would sue and D2 informing D3 of this. The unchallenged evidence of D1 and D3 was

that D3 was not responsible for any legal advice or edits. In any event, it would not amount to editorial responsibility for reasons previously stated.

Responsibility for Publication – retweets – additional legal principles

86. The “statement” for the purpose of a retweet must be the wording of the tweet. RRAPOC proceeds on this conventional basis. C has not advanced any alternative interpretation of “statement”.

87. It follows that the words “author” and “editor” have no meaning in relation to a tweet, particularly as they are used in s1(2). A retweet is the forwarding of a tweet to the followers of the retweeter. It does not involve any creation of text or amendment of text from within the tweet.

88. Since C relies solely on author and/or editor within the meaning of s1(2), the analysis of any potential basis of responsibility below is not strictly necessary.

89. The word “publisher” has meaning in relation to a retweet. However, the definition of publisher in s.1(2) excludes their usage for tweets made by someone in D3’s position.

90. C accepted in cross-examination that he decided to retweet to inform others of the tweet. This is universal and does not assist in assessing the legal basis of responsibility, if any.

91. It is important that in considering the potential basis of responsibility or any issues relating to serious harm, nothing is relied on that exceeds judicial knowledge. There is no expert evidence.

92. There has been no previous debate as to the basis of any responsibility for a retweet. There has been a debate as to hyperlinks. There is no reason, in principle, for being more willing to impose liability for a retweet or any other method of disseminating information online without creating any new text. A hyperlink involves the same decision by a person to inform others of the information. Depending on the circumstances, it can be understood as an endorsement. It is likely to have greater permanent visibility than a retweet. In contrast to a tweet, involves the creation of text i.e. the link and the ability to delete it.

93. In *Crookes v Newton* 2011 SCC 47; [2011] 3 S.C.R. 269 the Canadian Supreme Court upheld a trial finding that there had been no publication by the hyperlinking defendant. The debated issue as recorded in *Gatley* [7-013] is whether a person making a hyperlink can be responsible for another person accessing the defamatory statement via the hyperlink. There has never been any suggestion that the person making the hyperlink, if responsible, should be treated as a primary participant.

94. *Gatley* [7-013] opines:

“First, even if an English court were to conclude by analogy to the cases on publication by reference that there was no fresh publication,¹²³ it is not entirely clear why the person who creates the hyperlink should not at least be liable as a subordinate publisher.¹²⁴ Such a person intentionally participates in the dissemination of the material complained of and, in the absence of proof that he or she did not know and had no reason to know that the page linked to contained defamatory material, should be liable for its further dissemination.¹²⁵”

95. In other words, a person who creates a hyperlink will be responsible at common law but will not be author, editor or publisher within the meaning of s.1(2). Whether *Gatley* is correct on the former is irrelevant in the present case, if it is correct on the latter.

96. *Gatley* [7-032] refers to the Law Commission report, *Defamation and the Internet, A Preliminary Investigation* (2002), para.2.24. This opined that a hyperlink would amount to “secondary publication”:

“Internet providers outside the scope of the Directive

2.24 The E-Commerce Directive is far from comprehensive. Many services would appear to fall outside its provisions. The Internet Service Providers Association (ISPA) expressed concern, for example, about the status of providers of hyperlinks and location tools. David Price has drawn attention to the nineteenth century case of *Hird v Wood*,²¹ in which a defamatory placard was placed at the side of the road. Although no evidence was available about who had erected the placard, the defendant sat by it all day, smoking his pipe and attracting the attention of passers-by by pointing at it. The Court of Appeal found that this was

evidence of publication. By analogy, it could be argued that a hyperlink which “points” to a defamatory statement would amount to secondary publication. The person responsible for placing the link may be able to take advantage of the section 1 defence, but is not granted any additional immunities under the Directive or subsequent Regulations.

²¹ (1894) 38 SJ 234. See also D Price, *Defamation: Law Procedure and Practice* (2nd ed 2001), p 372.”

[For the avoidance of doubt I did not contribute to the report]

97. Re the Art 8/10 balance:

97.1. The “not reasonably practicable” exemption in s.10 is of sufficiently flexible application to protect any Art 8 right of a defamed person.

97.2. In contrast, the designation of all retweeters – there is nothing factually distinctive in the case against D3 - as primary participants with all that this would necessarily entail would be a very serious Art 10 infringement on a macro and micro level.

Serious Harm and Jameel

Fundamental defects in C’s case

98. The relevant legal principles are addressed in detail in SA[29]-[46]. [52]-[62] and [66]-[74] contain a detailed analysis of the RRAPOC to demonstrate that it fails to advance a proper inferential case of serious harm.

99. It appears that C now intends to rely on the averments in RRAPOC[3] as to the number of followers of PRGB and STGB as a basis for the inferential case, notwithstanding the absence of reference to them in [15] or [16]. C should not be permitted to do so. The defect in the RAPOC was highlighted at the PTR and C had the opportunity to remedy it. If an amendment had been made, D3 might have chosen to adduce further evidence.

100. The approach to serious harm on the D3 Retweets is a paradigm of the tail wagging the dog approach to the litigation, resulting in a failure proper to engage with the essential elements of liability against D3 and the prioritising of other issues that may be perceived to have more value for C.

101. More fundamentally, the number of D3's followers does not provide any reliable basis for inferring serious harm. The relevant issue is not the number of followers but the impact of the retweet. As regards the Article Tweets, [15.4] relies on the interactions and there is a detailed analysis in WS WG1 as to impact based on the significant amount of analytical information. A retweet does not contain any analytical information. Alternatively, if the previous sentence goes beyond the ambit of judicial knowledge, the fact is that there is no analytical information before the Court.

102. There is simply no proper basis (or certainly none relying solely on judicial knowledge) to infer the extent of any impact of any of the D3 Retweets.

103. Further, D3's evidence – negating any inference of serious impact - as to the nature of his feed, followers, overlap with CSM and tweeting activities on the relevant days was not challenged in cross-examination.

Inferential case not made out irrespective of any deficiencies

104. All the facts alleged in RAD[15] in denial of serious harm have been made good. Any evidence from Ds in relation to them was not challenged.

105. The only evidence of harm relied on by C was:

16.4. If necessary, the Claimant will in addition rely upon the considerable degree of animosity towards him demonstrated by social media users in reaction to the publication of the Articles, the Video, the Article Tweets and the Video Tweet.

106. While highly regrettable, it is questionable whether this amounts to evidence of serious harm consequential on any of the publications complained of (see RAD [15.5]). More fundamentally, there is no averment of anything consequential on the D3 Retweets and no social media posts have been provided despite a request under CPR 31.14 (DP 23/3 6035 final paragraphs, LD 3/4 6056 top paragraph).

107. There is no comparable case where serious harm has been inferred. Each of the D3 Retweets have had at most a “miniscule” impact, even taking into account any *Dingle* limitations (see further below). It is evident from RAD[15] and the figures at 8/5428/33¹ that the D3 Retweets are a small fraction of the entire circulation of each Article Tweet. The apparently large circulation of the Articles through Facebook (3302) and other social media should also be added to the composite circulation to which the D3 Retweets should be compared.

Jameel

108. D3 only relies on *Jameel* re the D3 Retweets if (a) C succeeds on the claim against D1 & 2 (b) the claim re A1-4 fails (c) D3 is held responsible for the Retweets as a primary participant and (d) serious harm succeeds, due to *Dingle* evidential restrictions.

109. At this point, there Court would be bound to make two proportionality balances, both of which would prevent judgment being entered against D3. First, there would be no Art 8 justification for the serious interference with D3’s Art 10 rights by virtue of imposition of liability for defamation. Second, there would be no tangible vindicatory benefit for C in the future costs and court resources involved in the likely continued litigation on appeal of the issues of legal principle involved.

Additional analysis of *Dingle*

110. It is appropriate to amplify on the SA in light of C’s intention to rely on *Dingle*.

111. The submissions below will focus on what *Dingle* does not prevent D3 from relying on in the present case.

112. However, there is a fundamental flaw in *Dingle* that cannot be addressed at first instance. It pays lip service to the “but for” principle of causation generally applicable in tort by requiring the court to “isolate” the harm caused by the

¹ 5428 - Sheet 1 (Combined tweets) - An examination of the combined tweets extracted from the report of W Guyatt. This shows the authors of the most retweeted original tweets containing the URL of the CSM articles, their Twitter handles and the number of followers each author had at the time.

5429/33 - Sheet 2 (CSM retweets): A breakdown listing those who retweeted each of the Country Squire Magazine tweets only, and showing the followers of each retweeter as of mid-April 2023. The info is extracted from Twitter itself. D3 is not included in the list.

statement complained of. However, it is impossible to isolate the harm caused by the publication complained of without taking into account the harm that has already been caused.

113. This conceptual confusion is evident in the propositions set out in *Sobrinho v Impress Publishing SA* [2016] EMLR 12, described as “uncontroversial” by Warby J in a judgment approved by the Court of Appeal in *Economou v De Freitas* [2019] EMLR 7. These included:

“49. Fourthly, where there are publications about the same subject matter which are not the subject of complaint (because of limitation issues or because of jurisdictional issues) there can be difficult points of causation which arise: see *Tesla Motors v BBC* [2013] EWCA Civ 152 and *Karpov v Browder and others* [2013] EWHC 3071 (QB); [2014] EMLR 8. The decision of the House of Lords in *Associated Newspapers v Dingle* [1964] AC 371 does not prevent these difficulties. That decision was not a decision on causation. The decision in *Dingle* prevents a defendant from relying in mitigation of damages for libel on the fact that the same or similar defamatory material has been published in other newspapers about the same claimant. *Dingle* does not address the issue of whether a publication has caused serious harm.”

114. Rather than considering this conceptual difficulty any further, it is appropriate simply to record that well-established limitations exist on the application of *Dingle*.

115. It only applies to publications by other persons:

“22. It was submitted on behalf of the defendant newspapers that there were errors of principle in the judge’s treatment of the facts. It was said that the injury to Mr Lachaux’s reputation was at least in part the result of artificial legal rules, notably the “repetition rule” which treats as defamatory the reporting, even without endorsement, of another person’s statement; and the *Dingle* rule (see *Associated Newspapers Ltd v Dingle* [1964] AC 371) that a defendant cannot rely in mitigation of damages on the fact that similar defamatory statements have been published about the same claimant by other persons. The argument was that while these rules of law are well established, they do not affect the factual inquiry required by section 1, namely whether the harm caused by a particular publication

was serious. It was also said that the judge should not have taken account of the damage that Mr Lachaux's reputation might suffer in the eyes of people who might get to know him in future. Warby J must have rejected all of these submissions, and the Court of Appeal agreed with him. So do I." *Lachaux v Independent Print Ltd* [2020] AC 612 Lord Sumption at [22].

116. Applying this principle to the present can claim, there is nothing to prevent a retweeter of a CSM tweet from relying on harm caused by previous CSM articles and tweets relating to them.

117. *Dingle* cannot prevent an unrestricted and realistic assessment of the significance of any damage for *Jameel* purposes. *Jameel* is a necessary element in domestic law's compatibility with Art 10 (see *Tamiz v United Kingdom* [2018] EMLR 6 at [80] and [87]).

118. *Dingle* does not prevent evidence as to a claimant's reputation among the publishees to negative serious harm. There is no requirement to demonstrate that the reputation is justified, merely that it exists. D3 is therefore entitled to rely on RAD[15.2] to [15.5] which are proved on the evidence at trial. C's reputation is directly related to the imputations complained of c.f. *Monroe v Hopkins* [2017] 4 WLR 68 and *Banks v Cadwalladr* [2023] EWCA Civ 219.

119. *Dingle* does not prevent consideration of the extent to which the publication complained of is a small fraction of the entire publication complained of. In *Banks v Cadwalladr* [2022] 1 WLR 5236 Steyn J rejected the serious harm case in respect of tweet, in part, by comparing the extent of publication with the related TED Talk. Relevant extracts below:

"67. The claimant's evidence regarding the scale of publication of the Tweet is that by 24 June 2019 the Tweet had appeared in the 'timeline' of Ms Cadwalladr's 311,000 followers, been re-tweeted 8,915 times (consequently appearing in the timelines of any followers of those 8,915 accounts) and been 'liked' 20,261 times. Mr Banks states that by 17 November 2021 the Tweet had been re-tweeted 8,019 times, quote tweeted 484 times and liked 18,600 times.

91. In relation to the Tweet, most of the matters I have referred to above are the same. The gravity of the imputation is the same given that the single meaning of the Tweet is the same as the TED Talk. The lack of direct evidence that the claimant has been shunned or lost business opportunities is the same. However, there are two crucial differences.

92. First, although it is reasonable to infer that most of Ms Cadwalladr's 311,000 followers on Twitter, and most of the followers of those who re-tweeted the Tweet, were within this jurisdiction, nonetheless, the number of people within the jurisdiction to whom the Tweet was published is likely to be only a fraction of the number who viewed the TED Talk. The normal inference, in the absence of a reason to think otherwise, would be that access to a Tweet will peak at or shortly after the time of first publication. The numbers given in paragraph 67 above show there is no reason to think otherwise in this case. The Tweet is likely to be a long way down the defendant's timeline. There is no probability of future harm flowing from the Tweet: the question is whether it *has* caused serious harm."

120. The Court of Appeal rejected the appeal in relation to the Tweet. Relevant extracts from the judgment of Warby LJ below:

"52. It is common ground that a relevant and potentially significant factor when deciding whether publication has caused serious harm to reputation is the scale of publication or, putting it another way, the total number of publications. The judge noted this in her statement of the relevant legal principles. It was one of the points on which the parties focused their arguments on the issue of serious harm. The claimant's first criticism of the judge's analysis of the matter is that she went astray: instead of making an assessment of the absolute numbers of relevant publishees or the overall scale of the relevant publication she based her conclusions instead on assessments of relative scale. The first "crucial difference" which the judge identified between the initial publication of the TED Talk and the publication of the Tweet was that the latter was "likely to be only a fraction" of the former. A comparison of this kind tells one nothing of importance, submits Mr Williams. A similar error is apparent, he argues, in the judge's approach to the Phase two publication of the TED Talk which she said was "close to a tenth" of the figure from 15 April 2019

53. In my judgment this criticism is misplaced. The judge concluded that the initial publication of the TED Talk was probably on a scale "at least equivalent to a high circulation domestic newspaper". That would imply a number in the order of 1 million. The judge later found that "the *number* of people within the jurisdiction to whom the Tweet was published" was likely to be only a fraction of this [my emphasis]. In other words, the judge was making a finding about the absolute scale of publication, using a fraction as a method of calculation or estimation. Although she did not specify the fraction she had in mind it is clear from the context that it was a small one. As everyone in this case accepts, precision in these matters is impossible. Likewise, when assessing the scale of Phase Two publication of the TED Talk the judge began with her earlier finding about the initial publication of that talk and used a fraction – in this instance a tenth – only as a way of arriving at an estimate of the absolute scale of later publication. She then applied the same "small" fraction she had mentioned earlier to arrive at an estimate of the scale of publication in this jurisdiction. I am satisfied that the broad conclusions at which the judge arrived on these issues were open to her on the evidence."

David Price KC
For the Third Defendant
10 May 2023