British Broadcasting Corporation **Broadcast Centre - BC2 A2, 201 Wood Lane, London W12 7TP**

BBC

Programme Legal Advice

Our ref : PLA/BC2 A2
Your ref :

[redacted]

1 November 2021

BY E-MAIL ONLY: Committee.Finance@niassembly.gov.uk
FAO Mr Peter McCallion

Dear Mr McCallion

Thank you for your letter of 17 September 2021 in which the Committee for Finance indicated that it would receive written responses in relation to the Defamation Bill and its call for evidence.

This response is sent on behalf of the British Broadcasting Corporation (the "BBC"). As the major public service broadcaster in Northern Ireland, the BBC has a considerable interest in the proposed Defamation Bill. It has considerable experience in litigating meritorious and unmeritorious claims for defamation in the jurisdiction. Whether measured by the size of population or amount of output, the BBC experiences a disproportionate number of defamation complaints from Northern Ireland compared to England and Wales.

In recent years England and Wales (the Defamation Act 2013), Scotland (the Defamation and Malicious Publication (Scotland) Act 2021, and the Republic of Ireland (the Defamation Act 2009) have modernised and reformed each jurisdiction's laws of defamation, making them fit for purpose in the new media and communications landscape. The Defamation Bill is an important similar step for Northern Ireland, and the BBC supports the Defamation Bill.

The BBC agrees with the view expressed in your letter that the Bill will ensure that a fair balance is struck between the right to freedom of expression and the right to reputation. In summary the BBC's position is that if enacted in its current form, the Defamation Bill will provide an important modernisation of the law of defamation in Northern Ireland. It will promote freedom of expression, public interest journalism, while also leading to speedier and more effective redress in cases where reputation is wrongly traduced.

The purpose of this letter is therefore not to traverse each of the Bill's clauses and their legal merit but to highlight two key themes which have not received significant scrutiny in the debate so far but which the BBC in its experience considers to be of considerable importance.

A. The Abolition of the Right to Trial by Jury.

The effect of Clause 11 of the Defamation Bill will be to abolish the existing presumption and right in favour of the right to trial by jury in defamation cases. While not widely heralded, this is a very significant development which the BBC submits will (i) play an important role in modernising defamation claims in Northern Ireland, (ii) lead to the quicker and more efficient determination of defamation claims for both plaintiffs and publishers, and (iii) significantly reduce the ability of a party to run cases to trial which have little prospect of success but which incur significant costs and therefore have a corresponding chilling effect on both the right to reputation and the right to freedom of expression.

Following the enactment of the Defamation and Malicious Publication (Scotland) Act 2021, Northern Ireland is now the only country within the United Kingdom which has a presumption in favour of a jury trial for defamation claims. Jury trials are expensive and take longer. They lead to greater costs for the parties and less efficient use of court time. There is no reasoned judgment from a jury, which means that an important element of a plaintiff's right of vindication cannot be obtained.

However, in practice, the most significant impact however of the right to the trial by jury is that it delays the ability of the court to make early determination of key issues in a defamation claim. The central issue in almost all defamation claims is the single meaning of the publication of which complaint is made. It is well established that in a defamation claim, the court will ultimately determine a single meaning for the publication complained of, and that meaning may be factual and/or one of opinion or comment. That meaning is central to the entire claim; it will determine whether a publication can be determined as true (or justification in common law) or honest opinion or comment, and if that meaning cannot be defended, the gravity of the meaning will also be central to the assessment of damages which a plaintiff is entitled to be awarded.

Yet at present, pursuant to Order 82 R3A of the Rules of Court of Judicature, at an early stage the Court can only exclude meanings which are perverse, an extremely high standard – see paragraph 20 of the Judgment of Mr Justice Scoffield in *MacAirt and others v JPI Media NI Limited and others*, 21 May 2021. The perversity standard exists because that is the standard which the trial judge can properly remove the matter from a jury. Accordingly, a case can proceed to trial with a plaintiff advancing a meaning which is not the meaning of a publication and a defendant can seek to defend a case as true or comment even though the meaning which it seeks to defend is not the correct single meaning of the publication. Either or both parties may be missing the target of the whole claim.

Since the Defamation Act 2013 abolished the right to trial by jury in England and Wales, this has led to the courts being able to determine the actual single meaning of a publication right at the outset of a claim, before even a defence is served. This determination also can include the thorny issue of whether an allegation is factual, or one of opinion.

An early determination of meaning, including whether an allegation is factual or opinion, is now the standard practice in the overwhelming majority of cases in

England and Wales. The benefits of what is now the standard practice were set out in a judgment of Mr Justice Nicklin (now the High Court Judge in charge of the Media and Communications List, which includes claims for defamation) in *Bokova v Associated Newspapers Ltd* [2018] EWHC 2032 (QB) at [9] and [10]:

> *"To an extent, this represents a culture shift in defamation pleadings, but it is one that has to be embraced in the new era where meaning will regularly be tried as a preliminary issue. Since the abolition of the 'right' to trial by jury in defamation proceedings, by s.11 Defamation Act 2013, libel actions now fall to be determined (and case managed) in the same way as any other civil proceedings in the High Court. One of the principal benefits of the change in mode of trial is that the way is now clear for the Court to determine the actual meaning of a publication as a preliminary issue. Indeed, as the natural and ordinary meaning of a publication is a matter upon which no evidence beyond the words themselves is admissible, in most cases meaning can be determined as soon as it is clear that the issue of meaning is disputed between the parties.*
>
> *The benefits are obvious. Indeed, if there is no factual dispute on the issue of publication (e.g. a dispute over the actual words published, reference or innuendo), I struggle to see circumstances in which the parties would want to proceed through the stages of defamation litigation without having meaning determined. Its determination can lead to the parties resolving the dispute without the need for further litigation. Even if the claim cannot be settled at that stage, there remain significant benefits for the future conduct of the case. A defendant would know, for example, what would be required for any truth defence to have a real prospect of success. Equally, if meaning is determined before a Defence is served, it remains open to a defendant to make an offer of amends under s.2 Defamation Act 1996 (an opportunity that is lost "after serving a defence" (s.2(5)). But most importantly, it avoids the spectre of hugely wasteful litigation (perhaps requiring up to a year's preparation and several weeks of trial) of a meaning that the words are found not actually to bear. Some of the pitfalls of pleading a defence before the determination of meaning became apparent in Morgan -v- Associated Newspapers Ltd [2018] EWHC 1725 (QB)."*

Determination of the single meaning of a publication is a relatively quick and cost-effective hearing. The legal principles are well established and a typical hearing would likely last less than half a day, potentially leading to the prompt resolution of a claim, and in all cases leading to significant savings of costs overall.

One claim where such an early determination of meaning was possible and effective was a claim brought against the BBC by Petro Poroshenko, the then President of the Ukraine *(Poroshenko v BBC* [2019] EWHC 213 (QB). In that case there was a substantive dispute on meaning between the parties. When Mr Poroshenko's meaning prevailed at the preliminary issue trial, the case subsequently settled promptly with the BBC apologizing and agreeing to pay damages. The Plaintiff therefore achieved prompt vindication of his rights and court time was used efficiently and effectively to determine the dispute.

The proposed abolition of the right to trial by jury in Clause 11 of the Defamation Bill therefore is of immense practical importance. It will allow justified a meritorious plaintiff to achieve prompt vindication, while also preventing plaintiffs advancing hyperbolic and unsustainable meanings to trial, forcing publishers to incur considerable costs in defending claims which have no merit and having a corresponding and detrimental chilling effect on freedom of expression. It will allow defamation cases to be determined proportionately, speedily and in keeping with the overriding objective.

B. Consistency of Approach to Freedom of Expression and Protection of Reputation

Freedom of expression, the right to protect reputation and the scope and extent of publication in the internet age are not limited by jurisdictional boundaries. At present however Northern Ireland is the only jurisdiction withiin the United Kingdom which has not recently reformed the law of defamation. Therefore, while there is a consistency of approach with regards to the law of misuse of private information, harassment and data protection legislation between England and Wales and Northern Ireland, this is not the same for defamation law, where Northern Ireland is an outlier in not modernising its law to protection reputation for the current information age.

This position is historically atypical; Northern Ireland has always broadly kept lockstep with the law of defamation in England and Wales. The Defamation Act 1952 for England and Wales was largely replicated by the Defamation Act (Northern Ireland) 1955. Similarly, many of the provisions of the Defamation Act 1996 applied equally to both jurisdictions, albeit with some in Northern Ireland being introduced a few years later (such as the offer of amends regime).

This has a number of important consequences which undermine freedom of expression and the efficient conduct and resolution of disputes:

1. First, it means that a plaintiff can engage in forum shopping, seeking the most favourable jurisdiction to determine their claim.

2. Second, the unpredictability of a jury trial means that many cases never reach trial and even those that do often do not include a reasoned judgment developing the common law. There are very few defamation judgments handed down by the courts in Northern Ireland. This leads to stasis in the law, and lack of development. While the Northern Ireland courts have historically had careful regard to the development of the common law in England and Wales, they are now on separate and distinct tracks with different statutory provisions for key defences. There will be a corresponding reduced impact of the ability of the courts in Northern Ireland to draw from decisions in England and Wales and to develop the common law bringing clarity and certainty for all parties.

3. Third, the common law in Northern Ireland is an outlier from the law in both England and Wales and Scotland in respect of two of the key substantive defences available to the media and publishers generally to protect freedom of expression. These are the defences of (i) honest opinion (which has evolved from the common law's defence of fair comment) and (ii) publication on a matter of public interest (which has evolved from the common law's defence of *Reynolds* responsible journalism). In

> *Serafin v Malkiewicz* [2020] UKSC 23, the Supreme Court recognised that the statutory test now found in s.4 of the Defamation Act 2013 for England and Wales and reproduced in s.6 of the Defamation and Malicious Publication (Scotland) Act 2021 is quite different and distinct from the common law's evolution of the *Reynolds* defence. The difference in defences is important and risks chilling freedom of expression in important ways, undermining important public interest journalism and discussion.

The introduction of the Defamation Act 2013 in England and Wales has not ended the ability of claimants to bring meritorious complaints against publishers. It has however brought an important modernisation and adaptation of the common law's principles many of which derive from Victorian common law cases. For the reasons given above in addition to those proposed by the Bill's sponsor, the enactment of the Defamation Bill in Northern Ireland would bring much needed consistency and enhance Northern Ireland's reputation as a jurisdiction which protects both the right to reputation and the right to freedom of expression.

Yours sincerely

David Attfield
Legal Director, BBC Programme Legal Advice

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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **21/05/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

(1) CIARAN MacAIRT;
(2) NIALL O'MURCHU;
(3) JOANNE KINNEAR;
(4) ROSIE KINNEAR;
(5) STUART MAGEE; and
(6) LESLEY VERONICA

Plaintiffs

-and-

(1) JPI MEDIA NI LIMITED;
(2) JPI MEDIA PUBLISHING LIMITED; and
(3) ADAM KULA

Defendants

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Gerald Simpson QC and Jonathan Scherbal-Ball (instructed by Cleaver Fulton Rankin, Solicitors) for the Defendants/Applicants
Ronan Lavery QC and Peter Hopkins (instructed by Carson McDowell, Solicitors) for the Plaintiffs/Respondents

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SCOFFIELD J

Introduction

[1] This is an application on the part of the Defendants to strike out the Plaintiffs' claims in defamation, misuse of private information, harassment and data protection law on a variety of grounds, pursuant to RCJ Order 18, rule 19 or, alternatively, pursuant to the inherent jurisdiction of the Court. The first order of business is a determination of the meanings capable of being borne by the words of which the Plaintiffs complain in the Defendants' articles which give rise to the claim.

[2] Mr Simpson QC appeared for the Defendants with Mr Scherbal-Ball, of counsel; and Mr Lavery QC appeared for the Plaintiffs with Mr Hopkins, of counsel. I am grateful to all counsel for their helpful written and oral submissions.

The Defendants' Articles

[3] The Plaintiffs' claim arises from the publication of an article in the *Belfast Newsletter* ('the newspaper'), and on the newspaper's website, on 15 July 2019 ('the articles'). The First Defendant is the publisher of the newspaper; the Second Defendant is the host and operator of the newspaper's website; and the Third Defendant is a journalist employed by the newspaper who was the author of the articles.

[4] As appears further below, the articles concerned a charitable organisation called 'Paper Trail', of which each of the Plaintiffs is a trustee. It is described in the Plaintiffs' Statement of Claim as:

> "*a charity registered in Northern Ireland that offers specialised and targeted legacy archive research to the legal profession and offers free advocacy and training to victims and survivors of the conflict in the North of Ireland.*"

[5] There are modest editorial differences between the print and online editions of the article. The print version appeared under the headline (on page 1 of the newspaper), "*McKee book to fund ex-bomber's group*", with a further headline (on page 8), "*Ex-IRA bomber's group to get cash*"; whereas the online version bore the headline, "*Ex-IRA bomber's group to get cash from Lyra McKee's book.*" The online version also contained a number of sub-headings within the text, which the Plaintiffs contend added flavour to the text. In my view, however, little, if anything, turns on the differences between the two versions.

[6] The central subject matter of the articles is that Paper Trail is to receive funding as a result of the posthumous publication of a book by Lyra McKee, the journalist tragically killed by 'the New IRA' in Derry/Londonderry on 18 April 2019; and that one of the directors of Paper Trail, Robert McClenaghan, has admitted planting bombs, of which he is unrepentant. The newspaper has indicated that it was drawing attention to the irony of funding being provided from Ms McKee's book to a group of which Mr McClenaghan was a director.

The Plaintiffs' claim in defamation

[7] The Plaintiffs have pleaded that they each enjoy "*a professional and personal reputation within this jurisdiction.*" Details of their positions and occupations are included within the Statement of Claim and are not repeated here at any length. In summary, however, Mr McAirt is employed by Paper Trail as an advocate for victims and survivors; Mr O'Murchu was formerly a school teacher and is now a

solicitor, as well as being a member of the Northern Ireland Victims Forum; Ms Joanne Kinnear is a management consultant and the manager of a cross-community charity; Ms Rosie Kinnear is a solicitor with her own practice and a local councillor; Mr Magee is a barrister; and Ms Veronica is a lecturer at Belfast Metropolitan College.

[8] All of the Plaintiffs have an involvement with Paper Trail. The Defendants' articles name and refer to each of the Plaintiffs. Mr MacAirt is stated to be the company secretary of Paper Trail; and the remaining Plaintiffs are all identified as directors of Paper Trail.

[9] The words complained of by the Plaintiffs, and alleged by them to be defamatory, are set out in paragraphs 12 and 14 of their Statement of Claim. They consist of the headline in the print version of the article ("*McKee book to fund ex-bomber's group*"); the statement that, "*The posthumous book by paramilitary murder victim Lyra McKee is helping to fund a group directed by a former IRA bomber, the News Letter can reveal*"; the headline on the inside page ("*Ex-IRA bomber's group to get cash from Lyra Book*"); the reference to Paper Trail that "*its address is the Ashton Centre in the Republican-dominated New Lodge Estate in North Belfast*"; and the identification of the Plaintiffs' involvement with Paper Trail, along with their occupations. In respect of the online version of the article, the Plaintiffs make the same case in relation to the text repeated in the body of the article, as well as the headline in the online version ("*Ex-IRA bomber's group to get cash from Lyra McKee's book*").

[10] The articles describe Mr McClenaghan – also a director and charitable trustee of Paper Trail – as someone who has "*admitted to planting bombs across Belfast on a daily basis*"; and notes that "*he has told the paper he does not regret his past paramilitarism, stating the IRA had no choice but to use violence to 'destroy the Orange state.'*" They later note that, when asked if he regretted or felt sorry for having joined the IRA and having planted bombs, Mr McClenaghan said:

> "*No. But that was when I was a child. That was when I was a teenager. That was when I was growing up in the middle of the conflict. Now I'm trying to go in a different direction by promoting peace, reconciliation and trying to bring together people. That's what Paper Trail does.*"

When asked if a way to promote peace and reconciliation may be to say that his past actions were wrong, he is quoted as having said:

> "*But I don't believe I was wrong.*"

[11] Paragraph 16 of the Plaintiffs' Statement of Claim, which sets out the defamatory meanings relied upon, is in the following terms:

"In their natural and ordinary meaning, the words complained of meant and were understood to mean as follows in respect of each of the Plaintiffs:

a. That he/she is a member of a group of ex-IRA bombers;

b. That he/she is a member of a group founded, directed and/or controlled by an ex IRA bomber;

c. That he/she is a member of a group whose purpose is to promote the interests of ex IRA bombers;

d. That he/she is a member of a group which is closely affiliated to violent Irish nationalism/republicanism;

e. That he/she was previously a bomber;

f. That he/she was previously a member of the IRA;

g. That he/she has supported and/or condoned IRA violence;

h. That he/she has supported and/or condoned bombing;

i. That he /she is affiliated to the interests of terrorists namely violent Irish nationalism/republicanism;

j. That he/she is actively involved in the promotion of the interests of violent Irish nationalism/republicanism or the interests of persons previously involved in acts of terrorism;

k. That he/she is using the paramilitary murder of Lyra McKee to raise cash for those associated with her murderers;

l. That he / she is using the paramilitary murder of Lyra McKee to raise funds for ex IRA bombers; and

m. That he / she is using paramilitary murder victim Lyra McKee's book to get cash for an ex IRA bombers group."

Ruling on meanings

[12] The Defendants contend that the words complained of by the Plaintiffs are not capable of bearing any of the meanings set out at paragraph [11] above. The meanings are strained and wholly contrived, on the Defendants' case. A secondary

submission was that, insofar as some of the meanings may be capable of being borne by the relevant words, such meanings (amounting to no more than mere association with Mr McClenaghan through Paper Trail) are not defamatory.

[13] Mr Simpson understandably also drew my attention to, and placed significant reliance on, the sentence appearing in the articles immediately after the identification of the Plaintiffs and their occupations, which is in these terms: "*There is no suggestion Mr MacAirt or any of the other directors are connected to violence or criminality*".

[14] The Defendants also point to a number of other features of the articles, including that they indicate that Ms McKee herself wished the proceeds of her book to be donated to Paper Trail; and that Paper Trail is a charity, which has been funded by the EU's Peace IV programme. There was also a further article published immediately below the article complained of in the print version of the newspaper, which emphasised the First Plaintiff's friendship and connection to Ms McKee, and her connection to Paper Trail, which is a cross-community charity which helps survivors of the conflict regardless of religion, political belief or other affiliations, including victims and survivors of republican violence.

[15] RCJ Order 82, rule 3A provides as follows:

> *"(1) At any time after the service of the statement of claim either party may apply to a judge in chambers for an order determining whether or not the words complained of are capable of bearing a particular meaning or meanings attributed to them in the pleadings.*
>
> *(2) If it appears to the judge on the hearing of an application under paragraph (1) than none of the words complained of are capable of bearing the meaning or meanings attributed to them in the pleadings, he may dismiss the claim or make such other order or give such judgment in the proceedings as may be just."*

[16] The approach of the Court on a meanings application is now well-settled. It is described in cases in this jurisdiction such as *Neeson v Belfast Telegraph* [1999] NIJB 200; and *Winters, Mackin and KRW Law LLP v Times Newspapers Ltd* [2016] NIQB 12; with the relevant principles also having been helpfully, recently summarised by Nicklin J in *Koutsogiannis v Random House Group Limited* [2020] 4 WLR 25, at paragraph [11]. I do not propose to rehearse in any great detail the exposition of the law contained in those cases or the other relevant authorities which were opened to me on this application. I consider the following principles, however, to be especially germane to the Court's task in the circumstances of this case:

(a) The governing principle is reasonableness and the Court must view the articles as would a hypothetical reasonable reader, who is neither naïve nor

unduly suspicious, and who may indulge in a certain amount of loose thinking but is not avid for scandal.

(b) Over-elaborate analysis is best avoided. In addition, the article must be read in context and as a whole (with any 'bane and antidote' taken together).

(c) Any meaning that emerges from some strained or forced interpretation should be rejected, so that it follows that it is not enough to say that some person or another might have understood the words in a defamatory sense.

(d) The intention of the publisher is irrelevant. In addition, no evidence beyond the publication complained of is admissible in determining the ordinary and natural meaning.

(e) However, on a meanings application at this stage of the proceedings, the question is whether the words complained of are capable of the meaning or meanings pleaded (that is to say, whether, applying the principles above, it would be perverse to conclude that the words bear the alleged meaning or meanings).

[17] After receipt of the Statement of Claim, in *inter partes* correspondence the Defendants' solicitors wrote to the Plaintiffs' solicitors making the case that the Statement of Claim proceeded on a fundamental misconception, namely that the words complained of meant that the Plaintiffs were bombers, were members of the IRA, and/or condoned or supported violence. Any such meaning was clearly disavowed and it was suggested that the words complained of simply did not bear that meaning. The Plaintiffs were asked to discontinue the claim but did not do so.

[18] I accept the submission on the part of the Defendants' that, in assessing meanings from the perspective of the hypothetical reasonable reader, some knowledge of the basic rules of grammar – such as the correct use and placement of an apostrophe – must be assumed. In my view this follows from the principles that the words should be given their ordinary and natural meaning; that the reasonable reader must be treated as someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available; and, relatedly, from the principle that the Court should rule out a meaning which can only emerge as the product of a strained or forced interpretation. The words complained of are *not*, therefore, to be read as referring to an "*ex-bombers' group*", as opposed to (the words actually used in the articles) an "*ex-bomber's group*." There was only one bomber referred to, rather than more than one. This is evident from the placement of the apostrophe. Punctuation matters. Otherwise, claims could be founded (as here) on meanings which are demonstrably not the ordinary and natural (including the objectively grammatically correct) meaning of the words used.

[19] In any event, it is clear from the rest of the text of the articles that they refer only to one ex-bomber, Mr McClenaghan; and they make clear how it is that the

Plaintiffs are connected to or associated with him, namely through their shared interest in the work of Paper Trail, which is a charity whose work is summarised. The 'irony' (if it be such) which the Defendants were highlighting was the involvement of Mr McClenaghan – with his unrepentant views about his past actions – in the organisation to which the proceeds of Ms McKee's book were to be donated in accordance with her wishes. That was the connection which was being highlighted. As to the other directors of Paper Trail, I cannot accept that the hypothetical reasonable reader would tar them with the same brush when the articles are read reasonably and as a whole. Their connection with Mr McClenaghan was through the charitable organisation, of which they were all mere co-directors; and there was an express statement that there was no suggestion that any of them was "*connected to violence or criminality*."

[20] Applying the principles summarised above, I rule on the meanings as follows. The words complained of:

(a) Are <u>not</u> capable of meaning that each Plaintiff "*is a member of a group of ex-IRA bombers*";

(b) <u>Are</u> capable of meaning that each Plaintiff "*is a member of a group directed by an ex IRA bomber*" in the sense described below; but are <u>not</u> capable of meaning that each Plaintiff "*is a member of a group founded and/or controlled by an ex IRA bomber*";

(c) Are <u>not</u> capable of meaning that each Plaintiff "*is a member of a group whose purpose is to promote the interests of ex IRA bombers*";

(d) Are <u>not</u> capable of meaning that each Plaintiff "*is a member of a group which is closely affiliated to violent Irish nationalism/republicanism*";

(e) Are <u>not</u> capable of meaning that each Plaintiff "*was previously a bomber*";

(f) Are <u>not</u> capable of meaning that each Plaintiff "*was previously a member of the IRA*";

(g) Are <u>not</u> capable of meaning that each Plaintiff "*has supported and/or condoned IRA violence*";

(h) Are <u>not</u> capable of meaning that each Plaintiff "*has supported and/or condoned bombing*";

(i) Are <u>not</u> capable of meaning that each Plaintiff "*is affiliated to the interests of terrorists namely violent Irish nationalism/republicanism*";

(j) Are <u>not</u> capable of meaning that each Plaintiff "*is actively involved in the promotion of the interests of violent Irish nationalism/republicanism or the interests of*

persons previously involved in acts of terrorism", save to the limited extent discussed below;

(k) Are not capable of meaning that each Plaintiff "*is using the paramilitary murder of Lyra McKee to raise cash for those associated with her murderers*"; and

(l) Are not capable of meaning that each Plaintiff "*is using the paramilitary murder of Lyra McKee to raise funds for ex IRA bombers*".

[21] I have dealt above with each of the meanings pleaded in paragraph 16 of the Statement of Claim save for that at sub-paragraph (m) which asserts the meaning that each Plaintiff "*is using paramilitary murder victim Lyra McKee's book to get cash for an ex IRA bombers group*." Leaving aside the fact that the article recounts that it was Ms McKee's *own* wish that the proceeds of her book be donated to Paper Trail, since there is no apostrophe used in this pleaded meaning, it is unclear whether it relates to raising money for an ex-IRA bomber's group (Mr McClenaghan's group) *or* whether it relates to raising money for an ex-IRA bombers' group (a group containing several ex-bombers). I therefore strike out this meaning on the basis that it is unintelligible and/or ambiguous, and thus may embarrass a fair trial (see Valentine, *Civil Proceedings: The Supreme Court* (SLS Legal Publications (NI)), at section 11.180). I would exercise my discretion against allowing the ambiguity to be cured by way of amendment since the second possible meaning is not capable of being borne by the words complained of and the first meaning is not in my view defamatory for the reasons discussed further below.

[22] The only pleaded meanings left standing, or partially standing, as a result of my ruling above are those paragraphs 16(b) and (j) of the Statement of Claim. As to paragraph 16(b), the words complained of are capable of meaning that each Plaintiff "*is a member of a group directed by an ex IRA bomber*." What is meant by "*directed by*", in the context of the articles as a whole, is discussed below. In addition, with appropriate amendment, a meaning contained within the pleading at paragraph 16(j) of the Statement of Claim is capable of being borne by the words complained of, namely that each Plaintiff "*is actively involved in the promotion of the interests… of [a person] previously involved in acts of terrorism*", namely the interests of Mr McClenaghan. But what do these assertions really amount to?

[23] It is clear from the articles that the Plaintiffs associate with, or are associated with, Mr McClenaghan, who was previously involved in violent terrorist activity and appears to be unrepentant about that. However, read fairly and as a whole, the articles convey that Mr McClenaghan – whilst seeking to justify his criminal past – is no longer involved in terrorism and is now focused on peaceful work which has been accepted as having a charitable purpose. The Plaintiffs' association with him is through Paper Trail, whose activities and charitable status are explained, along with the fact that Lyra McKee supported its work.

[24] Mr McClenaghan is a director of Paper Trail. To that extent, it can be said that the group is 'directed' by him, in the sense in which directors exercise some control over the affairs of a company in law. But the articles also make clear that the Plaintiffs, all professional persons, are directors as well. There is no proper basis for suggesting that the words complained of, read in context, mean that each Plaintiff has placed themselves personally under the direction and control of Mr McClenaghan; or that Mr McClenaghan is the controller of the whole organisation.

[25] It is clear that the Plaintiffs share an interest with Mr McClenaghan in terms of the work of Paper Trail and, to that extent, are promoting one of his interests (although not his *personal* interests in the sense in which that term is usually understood of personal financial gain or advancement). But where does that take the Plaintiffs? Mr Simpson submitted that it is not of itself defamatory to state or suggest that a person in modern-day Northern Ireland works alongside or has a professional shared interest with a person with a past history of terrorist offending. If that were so, he submits, many people – including those who work in politics, in community relations, or in peace and reconciliation work – would be able to mount a claim merely on the basis of the reporting of a shared interest with a current colleague who had a history of terrorist offending in the past.

[26] Broadly, I accept that submission. There may be some circumstances where a publication recounting such an association may convey a connection to, or sympathy towards, the use of violence for political ends which would be defamatory. The likelihood of a defamatory meaning also increases where the previous offender seeks to justify past violent actions. However, in the present case, when the Defendants' articles are read as a whole, particularly with the express clarification that there was no suggestion that the Plaintiffs were "*connected to violence or criminality*", I do not consider that the highlighting of their involvement in the work of Paper Trail (along with Mr McClenaghan) can be said to be defamatory.

[27] In summary, therefore, the vast majority of the Plaintiffs' pleaded meanings are not in my view capable of being borne by the words complained of. In respect of those meanings, I strike them out pursuant to the Court's powers under Order 82, rule 3A(2).

[28] The limited remaining meanings which can be borne by the words complained of are not defamatory. I propose to deal with them under section 8 of the Defamation Act 1996. This provision came into force in Northern Ireland on 6 January 2010 (see the Defamation Act 1996 (Commencement No 4) Order 2009, SI 2009/2858) and provides, insofar as material, as follows:

> "*(1) In defamation proceedings the court may dispose summarily of the plaintiff's claim in accordance with the following provisions.*

> *(2) The court may dismiss the plaintiff's claim if it appears to the court that it has no realistic prospect of success and there is no reason why it should be tried."*

[29] RCJ Order 82, rule 9(2) makes provision for the exercise of this power in a defamation claim in Northern Ireland. It provides that:

> *"The Court may, at any stage of the proceedings –*
>
> *(a) treat any application, pleading or other step in the proceedings as an application for summary disposal; or*
>
> *(b) make an order for summary disposal without any such application."*

[30] In dealing with the present application under the Rules of the Court of Judicature, I am required to seek to give effect to the overriding objective: see RCJ Order 1, rule 1A(3). The overriding objective is to deal with the case justly, including so far as practicable saving expense, ensuring that it is dealt with expeditiously (as well as fairly), and allotting to it an appropriate share of the Court's resources while taking into account the need to allot resources to other cases. These various factors appear to me to favour grasping the nettle where, as here, the Court has reached a view that the defamation claim rests on an unsustainable foundation.

[31] As to the limited meanings which have not been struck out, for the reasons given at paragraphs [22]-[26] I conclude that the Plaintiffs have no realistic prospect of succeeding in their claim in defamation based on them and that there is no reason why it should be tried. I treat the Defendants' application which is under consideration as a claim for summary disposal in respect of those remaining meanings and dismiss the Plaintiff's remaining claim accordingly.

The misuse of private information claim

[32] At paragraph 17 of their Statement of Claim the Plaintiffs allege that, in publishing the words complained of, the Defendants have "*infringed or misused each of the Plaintiff's private information.*" The particulars of this claim are set out as follows:

> "*Each of the Plaintiffs had a reasonable expectation of privacy as to the conjunction of the information published about him/her in respect of his name, career/occupation and involvement in Paper Trail, together with the false imputation that each Plaintiff was involved in an 'ex-bomber's group.'*"

[33] The nub of the Defendants' objection to the Plaintiffs' claim of tortious misuse of information is that the information (the publication of which founds the claim)

was and is information which is not private and is readily available in the public domain, as well as the contention that it is not open to the Plaintiffs to put this together with a "*false imputation*" which the articles do not support in order to found a claim.

[34] I accept the Defendants' submission that the Plaintiffs cannot sustain their claim that their role as directors of Paper Trail (or, in the First Plaintiff's case, his role as company secretary) represents private information; and nor does information about their professions or employment. It is freely available and, indeed, has been put in the public domain by the Plaintiffs themselves. The Defendants have provided detailed evidence in their affidavit grounding their summons that this information was readily available and in the public domain. For instance:

(a) Paper Trail's website identifies the First Plaintiff as the manager and founder of Paper Trail, as well as identifying him as the relevant contact for Paper Trail. The Companies House website also identifies the First Plaintiff as the company secretary of Paper Trail. In addition, his own Twitter page and website have links to, or make reference to, his work at Paper Trail; and his positions within Paper Trail are evidenced through media coverage of his professional activities.

(b) The Companies House website further identifies the Second to Sixth Defendants as directors of Paper Trail and gives their occupations.

(c) The Second to Sixth Plaintiffs are also identified as trustees of Paper Trail on the website of the Charity Commission for Northern Ireland.

(d) Each of the Plaintiffs, to a greater or lesser degree, has a public profile which discloses their occupation publicly and online, either via Twitter or LinkedIn profiles, promotional websites and/or previous media coverage.

[35] The Defendants' assertions in this regard have been substantiated by the provision of information exhibited to Mr Bushe's affidavit which have been downloaded from the internet. It establishes to my satisfaction that each Plaintiff's name, occupation or employment and involvement with Paper Trail is a matter of uncontroversial public record.

[36] I cannot take account of this evidence in respect of the Defendants' reliance on Order 18, rule 19(1)(a), namely that the pleading discloses no reasonable cause of action, since no evidence is admissible on an application to stay or dismiss on that basis: see Order 18, rule 19(2). However, this evidence may be relied upon by the Defendants in relation to the other bases on which they seek to bring an end to the Plaintiffs' case.

[37] In light of my findings above, there is no basis to suppose that the Plaintiffs' employment and professions are private information. Indeed, they are relied upon

by the Plaintiffs (at paragraph 2 of their Statement of Claim) as part of each Plaintiff's "*professional and personal reputation within this jurisdiction*."

[38] The legal principles applicable in a claim for misuse of private information were summarised by Stephens J in *Cushnahan v BBC & Adams* [2017] NIQB 30 at paragraphs [102]-[104]. A plaintiff has to establish a reasonable expectation of privacy in relation to the subject matter of his complaint. This is an objective question and a question of fact. It is a broad one, which takes account of all of the circumstances of the case. If that hurdle is overcome, there follows a weighing of the competing Convention rights in the case with an intense focus upon the individual facts. At the first stage, however, there is no reasonable expectation of privacy in respect of an enduring reputation as a man of good character, honour and integrity. As Stephens J observed (at paragraph [104]):

> "*In the tort of misuse of private information it is not sufficient to just identify what is protected in the tort of defamation. In the absence of an occasion of privacy that part of the claim is not sustainable and is an abuse of court's process, see Ewing v Times Newspapers Limited [2013] NICA 74 at paragraph [31].*"

[39] The reference to the *Ewing* case is to a decision of the Court of Appeal in this jurisdiction in which Morgan LCJ referred to authority to the effect that, where the nub of the case (there, in breach of confidence) was a complaint about the falsity of allegations and the claim was brought to avoid the rules of the tort of defamation, then the issue of abuse of process arose. (That is consistent with a more recent decision of Warby J in the English High Court on the importance of distinguishing between the separate and distinct torts of defamation and misuse of private information and the rights they protect: see *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB), particularly at paragraphs [152]-[166]). In the event, the Court of Appeal in *Ewing* found that there was no reasonable expectation of privacy and that, in the absence of such an occasion of privacy, the claim "*was clearly an abuse of the court's process.*"

[40] The Plaintiffs have tried to circumvent the Defendants' objections by asserting that the Defendants' wrongful behaviour lies in the "*conjunction*" or "*juxtaposition*" in the articles of various pieces of information which are in the public domain: see paragraph 17 of the Statement of Claim and paragraph 17 of the First Plaintiff's affidavit in opposition to the Defendants' application. I cannot accept this for two reasons. Firstly, it is in the essence of the tort of misuse of private information that there must be a reasonable expectation of privacy, which has not been established in this case. I do not consider that (at least in the circumstances of these proceedings) such an expectation can arise from the putting together of various pieces of information which are already in the public domain, including the Plaintiff's public details of their occupations and involvement with Paper Trail and the public details of Mr McClenaghan's history. In the authority relied upon by the Plaintiffs in this

regard – *CG v Facebook Ireland* [2016] NICA 54 – the conjunction of private information with non-private information was relevant context for the determination of whether the disclosure of the private information achieved the level of intrusion required for Article 8 protection; but there still had to be disclosure of information in respect of which there was a reasonable expectation of privacy for the claim to get off the ground (see paragraphs [41]-[42]). Second, the conjunction of which the Plaintiffs complain is one that gives rise to a defamatory meaning relating to them. Otherwise, they would have no complaint. However, I have already held above that the defamatory meanings with which they take issue are not meanings which the words complained of are capable of bearing when the correct legal test is applied.

[41] I conclude that the Plaintiffs' pleaded case on misuse of private information clearly does not involve information in respect of which the Plaintiffs had a reasonable expectation of privacy. On the contrary, the relevant information was publicly available. In addition, since the real focus of this aspect of the Plaintiffs' claim is that their positions within Paper Trail have been published in conjunction with the damaging information about Mr McClenaghan's past actions, I do not consider it adds anything material to their claims in defamation. It is not addressed to a loss of privacy but, rather, alleged reputational damage. As the Defendants submitted, it improperly conflates the separate and distinct torts of defamation and misuse of private information and, in so doing, involves the use of a cause of action for an inappropriate purpose and in a way that obstructs the court's ability to do justice. On these bases, I strike out paragraphs 17-18 of the Plaintiffs' Statement of Claim as an abuse of the process of the Court.

The harassment claim

[42] The Plaintiffs next allege that the Defendants, or one or more of them, have been guilty of harassment of each of the Plaintiffs contrary to the Protection of Harassment (Northern Ireland) Order 1997 ('the 1997 Order'). The pleaded particulars of this claim are at paragraph 18 of the Statement of Claim, in the following terms:

> "*In writing and publishing the Print Article and the Online Article, together with the other articles published about Paper Trail, the Defendants, and each of them, proceeded in a course of conduct which they knew or ought to have known amounted to harassment of each of the Plaintiffs contrary to Articles 3 and 5 of the 1997 Order.*"

[43] Article 5 of the 1997 Order does not impose any legal obligation but, rather, sets out that an actual or apprehended breach of article 3 may be the subject of civil proceedings and makes provision for civil remedies. Article 3 contains the relevant prohibition which it is alleged the Defendants have breached. Article 3(1) is in the following terms:

> "*A person shall 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.*"

[44] Article 2(2) provides that references to harassing a person include alarming them or causing them distress. By virtue of article 3(2), the person whose course of conduct is in question "*ought to know that it amounts to a harassment if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.*" Article 3(3) provides a number of defences or exemptions (in respect of which the burden lies on the defendant), including that paragraph (1) does not apply if the person who pursued the course of conduct in question shows that, in the particular circumstances, the pursuit of the course of conduct was reasonable.

[45] In *McAuley v Sunday Newspapers Ltd* [2015] NIQB 74, at paragraphs [40]-[41], Stephens J helpfully set out a summary of relevant principles where a harassment claim is raised in the context of media publications. First, he adopted Simon J's general summary of what requires to be established to found a claim in harassment (from *Dowson v Chief Constable or Northumbria Police* [2010] EWHC 2621) including that the conduct is targeted at the plaintiff; that it is "*calculated in an objective sense to cause alarm or distress*"; and that it is objectively judged to be oppressive and unacceptable (depending on the context). "*A line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways e.g. "torment" of the victim, or "of an order which would sustain criminal liability." Article 10 of the Convention is clearly a live issue in such matters.*" Drawing on comments from Lord Phillips in *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, Stephens J also observed:

> "*… that press criticism, even if robust, did not constitute unreasonable conduct and did not fall within the natural meaning of harassment. Before press publications are capable of constituting harassment they must be attended by some exceptional circumstances which justify sanctions and the restriction on the freedom of expression that those sanctions involve. Such circumstances will be rare.*"

[46] In the more recent case of *Sube v News Group Newspapers Ltd & Express Newspapers (No 3)* [2020] EWHC 1125 (QB), Warby J held (at paragraph [68]) that "*nothing short of a conscious or negligent abuse of media freedom will justify a finding of harassment.*"

[47] The Defendants contend that the Plaintiffs' case in respect of the 1997 Order falls into precisely the vice identified in *Thomas* (*supra*) at paragraph [34], namely that it is a pleading "*which does no more than allege that the defendant newspaper has*

published a series of articles that have foreseeably caused distress to an individual." In *Thomas*, it was said that this would be "*susceptible to a strike-out on the ground that it discloses no arguable case of harassment.*" The Defendants further submit that the articles which they published could plainly not sustain a finding of criminal liability against them, nor the exceptionally high threshold which the authorities make clear is necessary to bring a claim for harassment against the media.

[48] In terms of the establishment by the Plaintiffs of a "*course of conduct*", it is unclear from their pleadings precisely which actions they rely upon as establishing the two or more instances of harassment on which they rely. I assume that they rely on publication in the newspaper's print edition and on its website as separate publications constituting a course of conduct. In addition, it is common case that, although the online version of the article was removed from the newspaper's website (and that of the *Londonderry Sentinel*) on 5 August 2019 after the Plaintiffs had raised an objection through their solicitors, although on a 'without prejudice' basis say the Defendants, it was later re-published in error on both websites as a result of content from them being migrated from one digital platform to another. This resulted in the article being re-published for a period of around five months and the Defendants accept that during this period it was viewed by a variety of visitors to the websites. Although the Defendants assert that this re-publication was through no human intervention, taking the Plaintiffs' case at its height, I am prepared to accept that there was a course of conduct involved, in one or other of the manners mentioned above, in the publication of the articles.

[49] I have very grave doubt as to whether the publications with which these proceedings are concerned even arguably reach the threshold for establishing unlawful harassment contrary to the 1997 Order. However, there is no equivalent in the Rules of the Court of Judicature (Northern Ireland) 1980, as amended, of the procedure for summary judgment on the merits as there is in Part 24 of the Civil Procedure Rules (CPR) in England and Wales (the basis on which the defendant can secure summary judgment on the whole claim or a particular issue if the claimant has no real prospect of succeeding and there is no other compelling reason why the case or issue should be disposed of at a trial). The Court's power in this jurisdiction to strike out a pleading on the basis that it discloses no reasonable cause of action is more restricted; and, indeed, is not to be exercised simply on the basis that the claim is weak or not likely to succeed at trial (see *Rush v PSNI* [2011] NIQB 28, at paragraph [10]). Although a claim can be struck out on the basis that it is entirely hopeless – often on the basis that it is therefore frivolous or vexatious – I am not persuaded that the frailty of the Plaintiffs' case in harassment is such that it should be condemned in those terms at this stage of the proceedings. There is some support for a contention that the articles were targeted at the Plaintiffs, since they were named in them with (arguably) no real purpose other than to embarrass them, even accepting that the content of the articles is not defamatory.

[50] On the other hand, I find it difficult to see how the content of the articles reaches the elevated threshold required in a media publication case, given the

context of the Defendants' rights under Article 10 ECHR. In any event, I accept Mr Lavery's submission, on this aspect of the case at least, that the Plaintiffs' application is one which is an attempt to invoke a jurisdiction similar to the summary judgment jurisdiction available under the CPR when the hurdle for a defendant in this jurisdiction to have a case disposed of at this stage is higher. Not without some misgivings, I decline to grant the Defendants any relief in relation to this aspect of the Plaintiffs' claim.

The GDPR claim

[51] Finally, the Plaintiffs allege that, at all material times, the Defendants (and each of them) were data controllers in respect of the personal data of each Plaintiff for the purposes of the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA); and that the Defendants have unlawfully processed the personal data of each of the Plaintiffs in breach of the GDPR and DPA, since there was no lawful basis for processing their personal data in accordance with Article 6 of the GDPR.

[52] The paragraph above sets out the sum of the particulars provided in the Statement of Claim in respect of this cause of action. The Defendants contend that, contrary to the requirement in *Sube* (*supra*), at paragraphs [102]-[104], that a data protection claim requires adequate particularisation (especially in light of the breadth of the data protection principles), no particulars are provided of why the publication was not lawful. It is a bare pleading. I would not on that account strike out the Plaintiff's case in data protection. Although the pleading is scant, I am able to discern from it, read in the context of the rest of the Statement of Claim, the substance of the case being made by the Plaintiffs. My concern, rather, is the strength – or, indeed, weakness – of that case in substance.

[53] The relevant personal data which is said to have been wrongly processed consists of the name of each Plaintiff, the employment or occupation of each Plaintiff, and the involvement of each Plaintiff with Paper Trail. The Plaintiffs' claim in data protection is not that the personal data is inaccurate (which is the subject of a separate data protection principle, the fourth, from the lawfulness principle, the first). Indeed, the Statement of Claim confirms the accuracy of the data which it is alleged has been unlawfully processed. Rather, the data protection claim is largely duplicative of the defamation claim and the misuse of private information claim.

[54] In light of the contention that the data protection claim does not add anything in substance to the defamation claim, and that it is entirely unrealistic to anticipate that the Court would ever award damages or an injunction prohibiting the Defendant from identifying the Plaintiffs as directors of Paper Trail, or their jobs or their names, the Defendants submit that it is abusive to allow this claim to continue, particularly in light of it being a disproportionate interference with the Defendants' rights under Article 10 ECHR.

[55] Alternatively, the Defendants submit that a claim in data protection must surmount a threshold of seriousness (see *Lloyd v Google LLC* [2020] QB 747 at paragraphs [43] and [55]), which this claim does not; and that it may also be stayed or struck out as an abuse of process on the basis of the *Jameel* jurisdiction, that is to say where no real or substantial wrong has been committed and litigating the claim will yield no tangible or legitimate benefit to the plaintiff proportionate to the likely costs and use of court procedures (in other words, "*the game is not worth the candle*"). The *Jameel* jurisdiction was applied in *Ewing* to a defamation claim, although in circumstances where this was entirely unsurprising given the extremely limited publication which had occurred in this jurisdiction and the plaintiff's absence of connection with Northern Ireland. As the Defendants point out, however, it extends equally to claims in data protection: see *Higinbotham v Teekhungam & Another* [2018] EWHC 1880 (QB), at paragraphs [34] and [45].

[56] I again have misgivings about the strength of the Plaintiffs' case and its prospects of surviving a defence at trial based on the special purposes exemption for journalism set out in Article 85 of the GDPR and paragraph 26 of Schedule 2 to the DPA (or, alternatively, the lawful basis for processing personal information set out in Article 6(f) of the GDPR). However, to succeed in this aspect of their claim, the Plaintiffs need not show that the relevant personal data were inaccurate, nor that they consisted of private information. The public nature of the information which forms the basis of this claim might well impact on liability, or on the issue of remedy; but, on balance, I again conclude that any real or perceived frailties in the Plaintiffs' case are not sufficient to debar them from running these points at trial if they so wish. It has not been established to my satisfaction that, if the Plaintiffs were to succeed on their GDPR claim, this would provide no benefit to them proportionate to the likely costs and use of court procedures; and, plainly, a decision to pursue this claim will be taken at their own risk of litigation costs. Again, therefore, I decline to grant the Defendants any relief in relation to this aspect of the Plaintiffs' claim.

Conclusion

[57] In the affidavit of Mr Bushe, the Editor of the newspaper, which grounded the Defendants' application, he explains the distinction which was drawn between the Plaintiffs and Mr McClenaghan. He further avers as follows:

> "*As the Defendants have stated in correspondence with the Plaintiffs through the parties' respective solicitors, and as I reiterate now, the News Letter would not for one moment state or suggest that the Plaintiffs were involved in violence or were members of the IRA. That was set out in unequivocal and express terms in the Articles.*"

[58] The Plaintiffs may take some comfort from this unequivocal (and, through this judgment, public) disavowal of what they contend to be the defamatory

meanings of the words complained of in the Defendants' articles. That does not detract from my finding, however, that the words complained of are not capable of bearing the meanings ascribed to them by the Plaintiffs when applying the correct approach in law. Their claim in defamation was an attack on a straw man. Their claim in misuse of private information is also clearly unsustainable in my view and in the category of cases which can be struck out as abusive. The remaining pleaded causes of action cannot be dealt with as decisively as the Defendants might hope since they can at least arguably be maintained even if the information published about the Plaintiffs was accurate and not private in nature.

[59] For the detailed reasons given above, I will make an order to the following effect:

(a) The meanings pleaded at paragraphs 16(a) to (l) of the Plaintiffs' Statement of Claim are struck out, since they are not capable of being borne by the words complained of, save to the extent addressed at paragraph (c) below: see paragraphs [18]-[20] above.

(b) The meaning pleaded at paragraph 16(m) of the Plaintiffs' Statement of Claim is struck out for ambiguity: see paragraph [21] above.

(c) The remaining claim based on the partial meanings at paragraphs 16 of the Plaintiffs' Statement of Claim which are not struck out (see paragraph [22] above) is dismissed on the basis that it has no realistic prospect of success and there is no reason why it should be tried: see paragraphs [23]-[31] above.

(d) The Plaintiffs' claim in misuse of private information is struck out as an abuse of the process of the Court under RCJ Order 18, rule 19(1)(d) and/or the inherent jurisdiction of the Court on the basis that there is clearly no reasonable expectation of privacy in the information they allege to be private and, in any event, this claim is an improper attempt to circumvent the legal restrictions applicable to their claim in defamation: see paragraphs [37]-[41] above.

[60] I will hear counsel on the issue of costs.