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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 6/12/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

2015 No. 58617/01

BETWEEN:

EC

Plaintiff

-and-

SUNDAY NEWSPAPERS LIMITED

Defendant

COLTON J

Introduction

[1] In this action the plaintiff complains about material concerning him published by the defendant in pages 24 and 25 of the Sunday World Newspaper on 14 June 2015. He says that the publication constituted an unlawful invasion of his privacy (alternatively referred to as misuse of private information), defamation, breach of his rights under the Data Protection Act 1998 and breach of copyright.

[2] I am obliged to the assistance provided by counsel in this case for their excellent written and oral submissions. Mr Gavin Millar QC appeared with Mr Peter Girvan for the plaintiff. Mr Brett Lockhart QC appeared with Mr Richard Coghlin for the defendant.

Factual background

[3] On 23 August 1998 the plaintiff, then aged 16, had been out celebrating his GCSE exam results with classmates including Ronan Hampsey who was also aged 16.

[4] The group went back to the plaintiff's home because his parents had been away for the weekend. In the early hours of the morning Ronan Hampsey was

killed when a shotgun owned by the plaintiff's father was discharged causing a fatal wound to the head.

[5] The plaintiff was initially charged with the murder of Ronan Hampsey but the charge was reduced to manslaughter to which the plaintiff pleaded guilty on 25 June 1999.

[6] A contemporaneous newspaper report of the criminal proceedings concerning the plea and sentence of the plaintiff described the circumstances in the following way:

"A Crown lawyer said (the plaintiff's) sister and her 7 month old daughter were also in the house when the group arrived and the accused had been worried the noise of the party might wake them.

At one point he warned the victim he would 'get the shotgun' for him if he did not keep quiet.

He later went to his father's bedroom and got the weapon, loading a single cartridge into the gun.

The lawyer said some witnesses had said he came into the living room carrying the gun and he and Hampsey had started 'laughing and carrying on'.

It appeared Hampsey had seized the weapon's barrel and the gun had gone off, he said.

(The plaintiff) later told police he had believed the gun's safety catch had been on when he brought it in, but the court heard he had no experience of guns."

[7] The sentencing judge Mr Justice Pringle is quoted as saying that he would give the plaintiff full credit for the fact that he had pleaded guilty and spared the victim's family the torture of a trial. He said:

"In getting your father's shotgun and loading it you behaved with extreme foolishness, but it is accepted that the firing of the gun was accidental."

[8] Mr Justice Pringle sentenced the plaintiff to two years custody in a Young Offenders Centre with the sentence suspended for three years.

[9] Newspaper articles in the Belfast Telegraph and Irish News at the time of the sentencing named the plaintiff.

[10] In May 2015 the plaintiff, with the assistance of his family, opened an “airsoft skirmishing” site, “Torrent Warfare”, on land next to the family home where Mr Hampsey was killed. It is also close to the graveyard where Mr Hampsey is buried. Both the plaintiff’s family and the Hampsey family continue to live in the town of Coalisland.

[11] Airsoft skirmishing is a recreational activity in which participants eliminate opponents by hitting each other with spherical non-metallic pellets launched via specially made replica weapons called airsoft guns. It is commonly compared to paintball. Games are overseen by a marshal and participants must wear eye/ facial protection at all times. The sport can be played by children and young people with parental consent.

[12] The site run by the plaintiff has been registered with the Mid-Ulster District Council and was subject to an initial advisory visit on 9 January 2015 and a health and safety inspection on 1 May 2015 prior to the site being fully operative. Torrent Warfare is registered under the United Kingdom Airsoft Retailers Association (UKARA) and is fully insured.

[13] The business has been promoted by the plaintiff via Facebook and social media. A feature of Torrent Warfare is the apparent realism of the simulated combat which takes place. The weapons used are designed to look like real firearms, participants dress in combat style khaki uniform, the business is promoted with military style images.

The publication

[14] It is clear from the evidence heard in the course of the proceedings that the Hampsey family were extremely unhappy about the sentence which was imposed on the plaintiff in 1999 and with other aspects of the criminal proceedings.

[15] The Hampsey family were upset that the plaintiff opened this business at this place and against the background of Ronan’s death. They approached a freelance journalist Mr Ronan McSherry, who was a friend, with a view to highlighting their concerns. Mr McSherry prepared two articles which he provided to a journalist employed by the Sunday World, Mr Steven Moore, together with some cuttings from newspaper articles from 1998/1999 which he had been given by the Hampsey family. He also sent some digital photographs to Mr Moore by e-mail, again provided to him by the Hampseys.

[16] Mr Moore looked at the plaintiff’s Facebook pages and rewrote Mr McSherry’s articles for publication. He did not interview the Hampseys. He did not contact the plaintiff for comment or visit the airsoft skirmishing site when rewriting the two articles.

[17] The two articles appeared in a “two page spread”. The two articles are accompanied by two images of the plaintiff, an image of Ronan Hampsey, a photograph of a logo relating to Torrent Warfare and some replica weapons which appeared on Facebook profile pages. The centre piece contains the prominent headline “Stone Cold Killer”. The article is described as an “exclusive” – “Victim’s Family Wounds Opened Up Again by Callous New Business”.

[18] The central photograph (image 1) shows the plaintiff in military gear holding a replica gun alongside the words “CALLOUS Killer (the plaintiff) opened up a war games centre on the exact spot where he shot his victim”. In the lower part of the page there is a photograph of Ronan Hampsey and the barrel of the replica gun held by the plaintiff rests on top of Mr Hampsey’s head. A further photograph of the plaintiff (image 2) appears showing him in military style uniform above the second article on page 24 with the strapline:

“No shame; (the plaintiff) uses replica rifles on spot where he killed.”

[19] In the top right-hand corner of page 25 there is a reproduction of an image showing a logo for Torrent Warfare which includes a skull with crossing machine guns and the words “GET SOME” (image 3). Finally, in the top right-hand corner there is a photograph of some replica weapons (image 4).

[20] One article appears at page 24 under the heading “Court Lies that made Family Pain go Deeper”. A further article is published on page 25 under the headline “Gun Killer Opens Up a ‘War Games’ Venue on the Exact Death Scene”.

The articles

[21] The first article appears on a single column on the left hand of page 24.

[22] The text is as follows:

“The tragic shooting of Ronan Hampsey rocked the community of Coalisland 17 years ago.

But a series of false claims and slurs – coupled with the fact his killer wouldn’t serve a day in jail – made the trauma for his family much, much worse.

Ronan was tragically gunned down on the night he was out celebrating his GCSE exam results.

The 16-year-old had done well and had gone to a disco at the Glengannon Hotel near his home along with many of his classmates.

Ronan's killer - 16-year-old classmate (the plaintiff) - was also at the disco.

After the disco some of the teenagers went to (the plaintiff's) house because his parents were away for the weekend.

(The plaintiff) was high on a cocktail of Ecstasy and alcohol while forensic tests showed Ronan had only drunk a small amount of alcohol.

Exactly what happened next is disputed. (The plaintiff) claimed in court that Ronan was being noisy and that he had told him he had to be quiet.

Rejected

Eye-witnesses told police they heard (the plaintiff) threaten to shoot Ronan with his father's shotgun.

What isn't in dispute is the fact (the plaintiff) did indeed get his father's shotgun, load it and fired it at Ronan's head, killing him instantly.

(The plaintiff) told police he thought the gun's safety catch was on.

In court his defence team tried to argue that the gun was faulty but two separate ballistic experts rejected those claims.

(The plaintiff) was originally charged with murder but later pleaded guilty to manslaughter.

He was sentenced at Omagh Crown Court in 1999 to two years in a Young Offenders Centre but he suspended it for 3 years.

It meant (the plaintiff) never served a single day in jail for killing Ronan - a fact that devastated the Hampsey family.

Ronan's father stormed out of court as the sentence was read out - unable to believe his son's killer would walk away a free man.

During a bail application for (the plaintiff) it was claimed that Ronan had taken cannabis and Ecstasy as well. This drug slur hurt the family not least because it was completely untrue – as forensic tests later proved.

During the same hearing a solicitor for the Crown told the court that the Hampsey family bore no grudge against the (the plaintiff's) family and they were keen for (the plaintiff) to be allowed out on bail.

This claim was also untrue – the Hampsey family were never consulted about the issue.”

[23] The second article appears in two columns on page 25 of the spread. The text of the article is as follows:

“This is the gun-toting convicted killer who has shocked the family of his teenage victim by opening a ‘war games’ centre on the site where he killed their son.

(The plaintiff) blasted schoolboy Ronan Hampsey to death with a shotgun in 1998 during a party at his home in Coalisland.

Both boys were 16-years-old and had been celebrating their GCSE results at a disco earlier that night.

The Hampsey family were outraged when he was handed a suspended sentence after admitting a charge of manslaughter.

Since their son was so brutally slain Ronan parents Collette and Seamus Hampsey have regularly encountered his killer in Coalisland where he continued to live throughout.

Now the family are said to be traumatised after they discovered (the plaintiff) – who has never apologised for what he did – is ‘playing soldiers’ complete with replica firearms on the same spot where he gunned down his defenceless young victim.

(The plaintiff), who is 33 now, always claimed the shocking killing was a tragic accident but witnesses said he had become aggressive and agitated and had warned Ronan that he was going to 'get his shotgun'.

Pictures of (the plaintiff) dressed in army surplus gear while explaining the component parts of replica guns had been posted on the internet.

Traumatised

And the profile picture on (the plaintiff's) own Facebook page shows his company logo 'Torrent Warfare' which features a skull emblazoned on two machine guns.

A close family friend of the Hampseys told the Sunday World:

'For (the plaintiff) to start up a business like this and to pose for pictures holding replica weapons has traumatised the family all over again. They can't believe he has done it but neither can a lot of people in Coalisland who remember what happened. It's worse than insensitive - in fact it's totally callous. Considering he shot Ronan dead the images on Facebook of him holding rifles at the same property are appalling.

You would have thought he would never want to see another firearm ever again - regardless of whether it is a replica or not.

When he is holding a weapon does it not even cross his mind the horror of what he did that night? Does he not think of Ronan every time he loads one of those rifles?

It's painful enough for the family to deal with meeting (the plaintiff) around the town as they have had to do regularly for the last 17 years.

This is rubbing what happened to Ronan in their face. There are guns in the images on-line that are the same size and shape as the one he used to kill Ronan. It is sickening.'

The Sunday World has learnt (the plaintiff) has hosted various young sports teams and youth groups at Torrent Warfare.

However, we understand a number of local clubs have indicated they will not be visiting the facility out of respect for the sensitivities to the Hampsey family.

'It is shocking as well that young people are being encouraged to use the place. They are being shown how to load weapons by someone who shot dead an innocent local boy.'

Said the family friend.

'How on earth did this business get insurance with him running it and is he fit to be working in this way with teenagers?

Distressed

Ronan's relatives including his sister, 17-year-old nephew and young nieces, as well as his friends are all aware of the images on Facebook and have been distressed by seeing them.

The family say that (the plaintiff) has never shown them any remorse despite claims at the time by his legal team that he was full of it.'

The friend said:

'At the time of the court case, the police chief Duncan McCausland said (the plaintiff) would have to live with the

killing of Ronan Hampsey for the rest of his life – but that doesn't look like it is the case'."

The issues

[24] The issues before the court for determination at this stage are as follows:

- (a) Is the defendant liable to the plaintiff for invasion of privacy/misuse of private information?
- (b) Is the defendant liable to the plaintiff in respect of breach of the plaintiff's rights under the Data Protection Act 1998?
- (c) Is the defendant liable to the plaintiff for breach of copyright?
- (d) What, if any, defamatory meanings are the words complained of by the plaintiff reasonably capable of bearing?
- (e) Is the defendant entitled to succeed in a defence against any defamatory meanings established on the basis of a Reynolds privilege argument?

In order to provide coherence to the judgment I propose to deal with the issues in sub-paragraphs (d) and (e) first.

Identification of defamatory meanings

[25] The principles to be applied in identifying meanings in a defamation action are well established.

[26] It is for the jury to decide whether the words complained of by a plaintiff are defamatory of him. To do so the jury must determine the meaning of the words, either by reference to their natural and ordinary meanings or, where appropriate, innuendo meanings.

[27] The natural and ordinary meaning of words is the meaning the words would convey to the notional, reasonable reader. Where there is a possible range of meanings, a single or "right" meaning is determined by the jury as the natural and ordinary meaning. This case does not involve any innuendo meanings.

[28] In advance of a trial the court has the power to rule on whether or not words are capable of bearing a particular meaning, whether they are capable of being defamatory of a plaintiff, and whether they are capable of bearing any other meaning defamatory of the plaintiff.

[29] The rules for determining whether words are capable of bearing a particular meaning are well established. It is the judge's function to limit the range of meanings of which the words are capable and to rule out any meanings outside that range. It is for the jury to decide what meaning within that permissible range the words actually bear. In this jurisdiction the Court of Appeal in Neeson v Belfast Telegraph Newspapers and Richardson v Belfast Telegraph Newspapers Limited [1999] NIJB 200 has approved the principles laid out in England and Wales in the cases Gillick v BBC [1996] ENLR 267 and Skuse v Granada Television [1996] ENLR 278.

[30] In deciding whether words are capable of conveying a defamatory meaning the courts should reject those meanings which can only emerge as the produce of some strained or forced or utterly unreasonable interpretation. The principles which emerge can be summarised as follows:

- (1) The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable viewer watching the programme once (or reasonable reader reading the article once).
- (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read an implication more readily than a lawyer and may indulge in a certain amount of loose thinking. But he must be treated as being a person who is not avid for scandal and someone who does not and should not select one bad meaning where other non-defamatory meanings are available.
- (3) While limiting his attention to what the defendant had actually said or written the court should be cautious of an over-elaborate analysis of the material at issue.
- (4) A television audience would not give a programme the analytical attention of a lawyer to the meaning of a document, an auditor to the interpretation of accounts, or an academic to the content of a learned article.
- (5) In deciding what impression the material complained of would have been likely to have on the hypothetical reasonable reader the courts are entitled (if not bound) to have regard to the impression it made on them.
- (6) A court should not be too literal in its approach.
- (7) The words complained of must be read in context and the meaning taken with any surrounding antidote.

[31] Applying these principles to this case it is clear that the prolix assertions in the pleading require to be more precisely defined and simplified.

[32] The plaintiff complains of two charges in the published material:

- (a) One arising from the words relating to the criminal offence committed by the plaintiff in causing the death of Ronan Hampsey on 23 August 1998;
- (b) One arising from the words and photographs relating to his conduct in opening the business in 2015.

[33] In relation to the words relating to the criminal offence committed by the plaintiff, the plaintiff contends that the defamatory meaning is that he was guilty of murdering Ronan Hampsey. The defendant contends that if there is a defamatory meaning in the articles concerning the criminal proceedings (which is denied) they are that the plaintiff was guilty of the manslaughter of Ronan Hampsey and that there were reasonable grounds to suspect that he had threatened Ronan Hampsey before the accidental killing.

[34] Self-evidently the article is defamatory of the plaintiff in that it alleges that he has committed and been convicted of a serious crime. The nature or type of the crime is however crucial in terms of the outcome of the action. For example, if the meaning of the article was limited to an allegation of involuntary manslaughter, the defendant would clearly avail of a justification defence.

[35] In ruling on this matter I have considered a range of potential meanings as follows:

- (1) The words are capable of meaning that the plaintiff murdered Ronan Hampsey.
- (2) The words are capable of meaning that there were reasonable grounds to suspect that the plaintiff murdered Ronan Hampsey.
- (3) The words were capable of meaning that there were grounds to investigate the plaintiff in relation to the murder of Ronan Hampsey.
- (4) The words were capable of meaning that the plaintiff was guilty of the manslaughter of Ronan Hampsey.
- (5) The words were capable of meaning that the plaintiff was guilty of the involuntary manslaughter of Ronan Hampsey.

[36] At its heart the issue between the parties turns on the question of intent. All of these meanings with the exception of involuntary manslaughter involve an

element of intent. Murder involves intention to kill or cause grievous bodily harm, as does voluntary manslaughter. Involuntary manslaughter is unlawful killing without the intent to kill or cause grievous bodily harm, in other words accidental killing.

[37] What then does the article convey, particularly with regard to the issue of intent?

[38] The plaintiff is described as a “stone cold killer”. Throughout the article the plaintiff is referred to as a “killer”.

[39] Turning to the actual account of the killing the article says:

“Exactly what happened next is disputed”

It is not clear from the reading of the article what is “disputed”. The article goes on to say:

“Eye witnesses told police they heard ‘the plaintiff’ threaten to shoot Ronan with his father’s shotgun.

What isn’t in dispute is the fact ‘the plaintiff’ did indeed get his father’s shotgun, load it and fired it at Ronan’s head, killing him instantly.”

[40] On any showing, it seems to me these words are capable of conveying an allegation of murder. There is the threat, followed by the conscious carrying out of the threat.

[41] The article goes on to state:

“(The plaintiff) told police he thought the gun safety catch was on.”

[42] This is dismissed in the following paragraph (which is underlined by the heading “Rejected”) as follows:

“In court his defence team tried to argue that the gun was faulty but two separate ballistic experts rejected those claims.”

[43] The article goes on to state that:

“(The plaintiff) was originally charged with murder but later pleaded guilty to manslaughter.”

[44] In the second article the plaintiff is described as a “gun-toting convicted killer”. He is alleged to have “blasted schoolboy Ronan Hampsey to death”. Of particular relevance in consideration of meanings the article states:

“(The plaintiff) who is 33 now, always claimed the shocking killing was a tragic accident but witnesses said he had been aggressive and agitated and had warned Ronan that he was going to ‘get his shotgun’.”

[45] This is the only reference throughout the publication that the death was an “accident”. But this is described as a “claim” and is countered by what witnesses are alleged to have said.

[46] Other references in the articles set the tone. In relation to the business opened by the plaintiff the article states:

“There are guns in the images on-line that are the same size and shape as the one he used to kill Ronan.”

Mr Hampsey is described as being “brutally slain”. The plaintiff “shot dead an innocent local boy”. All of this is in the context of a prominent photograph of the plaintiff holding a replica rifle (although this is not immediately apparent from the article) whose barrel rests on top of a photograph of Mr Hampsey’s head.

[47] The defendant says that no reasonable reader could find a meaning that the plaintiff was guilty of murdering Ronan Hampsey from the articles. In particular they rely on the use of the adjective “tragic” to describe the killing. The word “tragic” is used on three occasions. The shooting is described as “tragic”. It states that Ronan was “tragically gunned down” and finally the word “tragic” is used in relation to the plaintiff’s claim that the shocking killing was an accident. I do not see how the use of the word “tragic” in these articles would exclude a meaning that the plaintiff had murdered Ronan Hampsey. On two occasions it relates to the actual shooting itself and on the one occasion in which it is used to suggest that the shooting was an accident it is qualified in the context of a “claim” by the plaintiff which is immediately followed by an allegation which clearly undermines the suggestion of an accident.

[48] The defendant further relies on the suggestion that the article reports the fact that the plaintiff’s conviction was for manslaughter. What the article reports is firstly that the plaintiff “later pleaded guilty to manslaughter” and “the Hampsey family were outraged when he was handed a suspended sentence after admitting a charge of manslaughter”.

[49] Whilst a careful and reasonable reader might well come to the conclusion that the plaintiff was in fact convicted of manslaughter and that this was accepted by the court it seems to me to fall well short of a sufficient antidote to exclude a reasonable reader coming to the conclusion that the article was alleging that in fact the plaintiff had committed murder. In this case the glaring omission to any reference to the fact that both the Crown and the sentencing judge accepted that the conviction and plea was to involuntary manslaughter and that the killing was an accident is hugely significant. In this regard it is also important to understand that even a reference to manslaughter leaves open the meaning that there was an intention to kill. The fact that the article includes other allegations in relation to false claims concerning collateral matters and focuses on the plaintiff's subsequent decision to open a business does not undermine what is conveyed in relation to his conduct in 1998.

[50] In my view it cannot seriously be disputed that this publication is capable of conveying to a reasonable reader that the plaintiff murdered Ronan Hampsey. Such a meaning derives from the words used and the entire tone and content of the article.

[51] It follows from this that the words are also capable of meaning that there were reasonable grounds to suspect that the plaintiff murdered Ronan Hampsey – indeed this is implicit in the fact that it is reported that he was originally charged with the murder.

[52] The defendant wishes to contend for contrary lower meanings to the ones relied on by the plaintiff to the effect that the article means merely that the plaintiff was guilty of manslaughter, but that there were reasonable grounds to suspect that he had threatened Ronan Hampsey before the accidental killing. In this regard the defendant relies on the fact that the articles state on two separate occasions that the plaintiff pleaded to a charge of manslaughter. This was reported as a factual statement. The article is silent on the basis of that plea and omits to report that the plea was accepted by both the prosecution and the sentencing judge. I confess I have considerable difficulty with this point. Whilst the article accurately reports the fact of the plaintiff's plea, the surrounding content and context points to a deliberate killing and a clear rejection of the plaintiff's version of events. I am very conscious of the high threshold to be met for exclusion of meanings and that the meaning of words in libel proceedings is the preserve of a jury properly directed. In the words of Simon Brown LJ in Jameel v Wall Street Journal [2003] EWCA Civ 1694:

“The judge's function is no more and no less than to pre-empt perversity. That being clearly the position with regard to whether or not words are capable of being understood as defamatory or, as the case may be, non-defamatory, I see no basis on which it could sensibly be otherwise with regard to differing levels of defamatory meaning.”

[53] The difficulty that arises is obviously that words are capable of bearing an infinite variety of meanings and implications to different persons. I could not rule out that a reasonable person reading these articles could come to the view that the article meant that in fact the plaintiff was guilty of manslaughter and so it would be wrong for me to exclude this as a potential meaning.

[54] A further difficulty arises in this case in relation to the category of manslaughter. The average reasonable reader is unlikely to be aware of the nuances between manslaughter and involuntary manslaughter. The key distinction is whether or not there was an intention to kill or cause grievous bodily harm. I have already concluded that the article is capable of meaning that the plaintiff did intend to kill Mr Ronan Hampsey which would encompass a murder meaning and a meaning of reasonable suspicion that the plaintiff had committed murder. The issue remains as to whether or not the article is capable of meaning that the death was accidental i.e. that the plaintiff was guilty of involuntary manslaughter. With some reservation I can come to the conclusion that this is a capable meaning and that in fairness to the parties the defendants should be allowed to plead this to ensure that the jury has an opportunity to come to a conclusion on the issues between the parties.

[55] In relation to the second issue concerning the plaintiff's business, the plaintiff contends for the following meaning:

“The plaintiff's conduct in opening the business in the way he did was callous and confirmed that he had no remorse in relation to the killing of Ronan Hampsey.”

[56] There is little doubt that the article alleges that the plaintiff was callous and indeed this is a key feature of the article. The plaintiff is expressly described as callous. The opening of the business is described as “worse than insensitive – in fact it is totally callous”. In my view this is capable of being defamatory of the plaintiff and the words are capable of bearing that meaning. Equally I take the view that the article does convey the sting that the plaintiff had no remorse in relation to the killing of Ronan Hampsey. The article on two occasions makes the case that the plaintiff had never apologised to the Hampsey family nor had he ever shown any remorse to them. This was a matter of contention at the trial with conflicting evidence from the plaintiff and Mr and Mrs Hampsey in this regard. For the purposes of my consideration of meanings it is not necessary to resolve this dispute. It will be a factor for any jury tasked with determining the issue of defamatory meanings.

Finding on meanings

[57] What are the court's conclusions in relation to the meanings to be pleaded? For the reasons set out above I give the plaintiff leave to amend his pleadings to plead the following defamatory meanings:

- (1) The plaintiff was guilty of murdering Ronan Hampsey on 23 August 1998.
- (2) The plaintiff's conduct in opening the business in the way he did was callous and confirmed that he had no remorse in relation to the killing of Ronan Hampsey.

[58] From the arguments in the case it is clear that the defendants deny that the words bear these meanings but that will ultimately be a matter for the jury. In my view these meanings come within the permissible range of meanings.

[59] In its amended defence the defendant seeks to justify a series of meanings, in effect what are known as Lucas-Box meanings.

[60] In light of my findings and discussion on the issue of defamatory meanings I give leave to the defendant to amend paragraph 11 of the defence.

[61] In this regard I repeat what I have set out in paragraphs [51] and [52]. What the words complained of in this action actually mean is the preserve of the jury. The purpose of the pleadings is to identify the issues between the parties in advance of trial. In this action the plaintiff has pinned his colours to the mast and has made clear what he says is the sting of this article. The defendant is of course entitled to refute the plaintiff's meanings. As part of its defence I accept that it is entitled to assert that the words have a meaning different from that contended for by the plaintiff. However for the purposes of Lucas-Box meanings in such circumstances the defendant must firstly set out defamatory meanings and then the basis upon which it will seek to justify those defamatory meanings. When I turn to the pleadings in paragraph 11 of the defence it seems to me they do not meet the Lucas-Box requirements. For example, the meaning pleaded at 11(i) is not a defamatory meaning. To say "that the plaintiff killed Ronan Hampsey" does not in any way go to the dispute in this case.

[62] 11(ii) of the defence pleads that "the plaintiff threatened to shoot Ronan Hampsey with his father's shotgun shortly in advance of his death or, in the alternative, that there were reasonable grounds to investigate or reasonable grounds to believe that the plaintiff threatened to shoot Ronan Hampsey." In my view this is not a defamatory meaning per se. It might be a fact which could be used to justify a defamatory meaning.

[63] Again 11(iii) -

"That the plaintiff fired his father's shotgun at Ronan Hampsey's head;"

is a potential fact upon which the defendants might seek to justify a defamatory meaning.

[64] The meanings pleaded by the defendant are simply too vague and seek to evade the central issue in the defamation battle in this case. The issue turns on what the article says about the plaintiff's degree of criminality in relation to his conduct in 1998. For the purposes of setting the ground rules at a trial I accept that there is a potential range of meanings in relation to that conduct which are arguable. I have accepted the plaintiff's submission that the words are capable of bearing the serious meanings contended for by him. In fairness to the defendant I have indicated that I would permit it to plead the lesser meanings to which I have referred. They should now commit to what meanings they say the articles bear to which they are prepared to assert the truth of by way of justification, or if appropriate fair comment.

[65] The plaintiff's case is that the defendants should not be permitted to plead by way of a Lucas-Box meaning any meaning lower than the second meaning that I have set out in paragraph [35] above, that is that the words are capable of meaning there were reasonable grounds to suspect that the plaintiff murdered Ronan Hampsey.

[66] As I have set out in paragraph [53] above I consider that the lower meanings at sub-paragraphs (4) and (5) of paragraph [35] above are permissible meanings.

[67] What I propose to do is to permit the defendant to reflect upon this judgment and to allow it to consider what defamatory meanings within the range set out at paragraph [35] of this judgment, if any, it wishes to plead by way of Lucas-Box meanings and to set out the facts upon which it seeks to justify any such meanings. From this it should be clear that I do not consider paragraph 11(i) to (iii) are proper Lucas-Box meanings.

[68] At the hearing I had considered whether it would be better to split the second alleged meaning in two, to the effect that the meanings were that the plaintiff had been callous and that he had had no remorse in relation to the killing of Ronan Hampsey. However, on reflection it seems to the court, that the issue of callousness and lack of remorse are intrinsically linked. The sting of the article is that it was callous of the plaintiff to open up this new business having regard to the nature of the business and his previous conduct in 1998. The article does assert that the plaintiff "has never apologised for what he did" and also that the family say that "(the plaintiff) has never shown them any remorse despite claims at the time by his legal team that he was full of it". What the article is in effect saying is that the opening of this new business in the circumstances described demonstrate what the family say about the plaintiff, namely that he never apologised or showed any remorse for his actions.

[69] As to the way in which this has been dealt with in the defence I take the view that the defendant is entitled to plead either justification or fair comment in relation

to this allegation. However I do not see that this type of meaning is capable of Chase level 2 or 3 meanings. The sting against the plaintiff in this regard is unequivocal. I would therefore give the defendant leave to amend his defence in light of this ruling and should any issues arise about that amended defence the court can look at the matter afresh.

The Reynolds defence

[70] The starting point for a defence of qualified privilege, commonly referred to as a Reynolds defence is whether the subject matter of the publication was a matter of public interest. Whilst public interest will normally relate to matters concerning the public life of the community and is more obviously established in activities concerning the actions of persons in public life the defence of course is not confined to political discussion and as per Lord Cooke in his judgment in the Reynolds case at [1999] 4 All ER page 640:

“Matters other than those pertaining to Government and politics may be just as important in the community; and they may have as strong a claim to be free of restraints on freedom of speech.”

[71] I will discuss the question of “public interest” in relation to the issue of breach of privacy/misuse of private information and similar considerations apply in relation to whether or not the defendant enjoys a Reynolds defence.

[72] If the public interest test is met then the court must consider whether the inclusion of a defamatory statement was justifiable. As Lord Hoffmann said in Jameel’s case [2007] 1 AC:

“[53] If the publication, including the defamatory statement, passes the public interest test, the inquiry then shifts to whether the steps taken to gather and publish the information were responsible and fair.”

[73] In considering whether the allegations made in the press attract qualified privilege Reynolds indicates that matters taken into account include: the seriousness of the allegation; the source of the information; the steps taken to verify the information; the status of the information; the urgency of the matter; whether comments had been sought from the plaintiff; whether the article contained the gist of the plaintiff’s side of the story; the tone of the article and the circumstances of the publication, including the timing. The weight to be given to these and any other relevant factors will vary from case to case.

[74] As I will set out in my discussion on the breach of privacy issue, I take the view that there was a potential public interest story to be written here. The problem for the defendant is that in publishing this story their reporting of the 1998 incident

and the plaintiff's subsequent conviction is misleading and inaccurate. It constitutes a serious attack on the reputation of the plaintiff. I must look at the article that has been written and not the one that could have been written. Even if I accept that the defendant gets over the public interest test I am not satisfied that the defendant comes close to meeting the requirements of the second stage of the court's consideration. In returning to the factors I have set out above this was a serious allegation, the source of the information was clearly someone who wished to convey the Hampsey family's views, to the detriment of the plaintiff. No comment was sought from the plaintiff. It did not fairly represent the criminal proceedings and the fact that the court accepted the killing of Ronan Hampsey was accidental. It made no attempt to set out the reasons from the plaintiff's perspective as to why he set up the business. I have come to the conclusion that the defence of Reynolds privilege is not made out on the facts of this case.

Misuse of private information/invasion of privacy

[75] The law in relation to privacy has developed significantly from the tort of breach of confidence to the now well established tort of misuse of private information.

[76] The enactment of the Human Rights Act 1998 has embedded the protections afforded by Article 8 of the Convention in our domestic law and is reflected in both domestic and European jurisprudence.

[77] The same can be said of freedom of expression protected by Article 10 of the Convention which also has developed significantly since the Reynolds decision in relation to qualified privilege in libel actions.

[78] As the domestic and European Courts' interpretation of the rights protected by Article 8 has developed to restrict intrusion by the media into a person's private life it has increasingly brought those rights into conflict with the right of freedom of expression under Article 10.

[79] This conflict is at the heart of this case.

[80] The plaintiff contends that the relevant publication constitutes the tort of misuse of private information and is in breach of his Article 8 rights.

[81] Article 8 provides that:

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as

is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

[82] The determination of whether the plaintiff has established the tort of misuse of private information involves a two stage process.

[83] Firstly, the court must consider whether there is a “reasonable expectation of privacy” in the relevant information. It is only when this test is satisfied that Article 8 of the ECHR is engaged.

[84] Secondly, if there is a reasonable expectation of privacy in the relevant information then the court must proceed to balance any competing ECHR rights, in this case Article 10, and the justification for interfering with each right.

Does the publication engage the plaintiff’s Article 8 rights?

[85] The question of whether there is a reasonable expectation of privacy:

“Is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.” (See Murray v Express Group Newspapers [2009] Ch 481 at [36].”

[86] Thus it is necessary for the court to carry out a close assessment of all the material published. The engagement of the right is a multi-faceted question.

[87] What is the information in respect of which the plaintiff claims he had a reasonable expectation of privacy?

[88] In paragraph [7] of the Statement of Claim the plaintiff alleges that “the commission of the offence of manslaughter by the plaintiff and the Crown Court proceedings against the plaintiff, their disposal and the sentence imposed upon the plaintiff are matters in respect of which he had a reasonable expectation of privacy”. In paragraph [9] he pleads:

“In relation to image one and image two being digital images which depicted the plaintiff, the plaintiff had a reasonable expectation of privacy.”

[89] Before scrutinising the circumstances of this case it is important to understand two important concepts.

[90] Firstly, reputation is an aspect of a person’s private life protected by Article 8 (see Chauvy v France [2005] 41 E.H.R.R. 29 at [69] and [70]).

[91] The English Court of Appeal in Greene v Associated Newspapers [2004] EWCA Civ 1462 at [68] was content to assume, relying on Chauvy that a right to reputation was among the rights guaranteed by Article 8.

[92] In Pfeifer v Austria [2009] 48 E.H.R.R. 8 at [25] the court determined that an applicant’s right to reputation outweighed the countervailing interest in freedom of speech. The court asserted that a person’s reputation forms part of their personal identity and psychological integrity and therefore falls within the scope of a person’s private life.

[93] As Lord Hope put it in the case of In Re BBC [2010] 1 AC 145 when dealing with the publication of the fact that a person’s retained DNA had been used to link him to the commission of a crime:

“His reputation, his personality, the umbrella that protects his personal space from intrusion, will just as inevitably be damaged by it. The conclusion that broadcasting this information will engage his right to respect for his private life seems to me to be inescapable.”

[94] Secondly, it is important to understand that the plaintiff’s claim is based on intrusion. As was recognised by the Court of Appeal in CG v Facebook Ireland Limited and Joseph McCloskey [2016] NICA 54:

“The tort protects both confidentiality and intrusion.”
(My underlining)

In its judgment the Court of Appeal went on to say that:

“[42] The determination of whether the repetition or disclosure of private information achieves the level of intrusion protected by Article 8 of the Convention is inevitably fact sensitive.”

[95] Applying the principles set out in Murray, what are the relevant circumstances of the case which should determine whether the plaintiff's Article 8 rights are engaged?

[96] In relation to the plaintiff's criminal conviction Mr Lockhart says that the plaintiff does not have a reasonable expectation of privacy in respect of this information. In particular he relies on the case of In Re JR38 in which the Supreme Court ruled that the publication of the photograph of a person who was 14 years old participating in criminal activity did not engage that individual's rights under Article 8 ECHR. The reasoning of the majority of the court was that the criminal nature of his activities were not aspects of his life which he was entitled to keep private.

[97] He relies on the principle of "open justice". Criminal convictions take place in open court and are a matter of public record. He relies on a number of cases based on breach of confidence. He points to the important public policy reason behind the concept of open justice. His argument is that if all references to criminal convictions automatically engage Article 8, the press and the public would be left in a permanent state of flux and uncertainty as to whether they could refer to an individual's criminal antecedents in any publication, even those referred to in open court. If this be the law there would have to be an overriding justification for such references on each and every occasion which would lead to a severe and unwarranted "chilling effect" on the important rights protected by Article 10 ECHR. He says that in the circumstances of this case there is no reasonable expectation that the commission of the offence of manslaughter by the plaintiff, the Crown Court proceedings against the plaintiff and their disposal including the sentence imposed upon the plaintiff would remain private and that his claim for misuse of private information should fall at the first hurdle.

[98] There can be no doubt that the principle of "open justice" is of great importance in assessing this matter. Nonetheless it is clear that the courts do envisage circumstances in which a person's previous criminal conviction will engage his Article 8 rights.

[99] Thus in the first instance decision in CG v Facebook Ireland Limited and Joseph McCloskey [2015] NIQB 11 Stephens J (as he then was) says at paragraph [84]:

"There are obvious competing interests as to disclosure of despicable criminal conduct. The balance quite clearly comes down in favour of disclosure at the time of conviction. However, years after an individual has been convicted of criminal offences there could be a different outcome to the balancing exercise so that disclosure is not appropriate. For instance disclosure of spent criminal

convictions would only be appropriate in very limited circumstances. The balance in each case depends on a detailed analysis.”

Clearly he envisaged that a disclosure of a criminal conviction could engage an Article 8 right subject of course to the balancing exercise.

[100] The Court of Appeal in CG dealt with the matter in this way at paragraph [44]:

“We agree that with the passage of time the protection of an offender by prohibiting the disclosure of previous convictions may be such as to outweigh the interests of open justice. In principle, however, the public has a right to know about such convictions. Information about what has happened in open court can be freely communicated by members of the public unless there is some compelling reason to prevent it. The open justice principle is fundamental to securing public confidence in the administration of justice and is particularly important in the criminal context where the public is concerned with the punishment and rehabilitation of the offender and the extent of the risk of harm he may present. This is, therefore, a factor of very significant weight which can only be outweighed by the interest of the individual in freedom from intrusion in the most compelling circumstances.”

[101] In the case of R(T) v Chief Constable of Greater Manchester Police [2015] AC 49 the Supreme Court was considering the disclosure of cautions and whether they represented an aspect of the recipient’s private life. In his judgment Lord Wilson states (Lord Neuberger, Baroness Hale and Lord Clarke agreeing) as follows:

“[17] Building on the comments in those two main judgments in the L case, the Court of Appeal in the present cases held that, in that a caution takes place in private, the receipt of a caution was part of a person’s private life from the outset. The proposition calls for careful thought but in the end I find myself in agreement with it. My receipt of a caution, whenever received, is a sensitive, certainly embarrassing and probably shameful, part of my history, which may have profound detrimental effects on my aspirations for a career; and the unchallengeable fact that I did commit the offence for which I was cautioned makes

it no less sensitive but, on the contrary, more sensitive.

[18] These appeals do not relate to the disclosure of a spent conviction which will have been imposed in public. But it might be helpful to refer to Lord Hope's comment in the L case at para 27, quoted at para 16 above, that "as it recedes into the past it becomes a part of the person's private life...". Liberty, an intervener in these appeals, suggests that the point at which a conviction recedes into the past and becomes part of a person's private life will usually be the point at which it becomes spent under the 1974 Act. It is a neat and logical suggestion which this court should adopt."

[102] Whilst this was *obiter* to the decision it is strong support for the proposition that a conviction in the past which has been spent under the relevant legislation concerning rehabilitation of offenders becomes part of a person's private life.

[103] Turning to the circumstances of this case the plaintiff was convicted on 25 June 1999 in respect of an offence which was committed on 16 August 1998 when he was aged 16. The conviction has been "spent" under the Rehabilitation of Offenders (Northern Ireland) Order 1978 for more than 10 years before these articles were published (special provisions relate to juvenile offenders). I note that the plaintiff's conviction is not a "protected conviction" within the meaning of the Rehabilitation of Offenders (Exceptions) (Amendment) Order (Northern Ireland) 2014 but this does not affect the principle that the conviction has been "spent". Apart from these articles there have been no publication or press reports in relation to the criminal proceedings since the contemporaneous reports in 1999.

[104] The plaintiff gave evidence of his life since the commission of the offence. He has done his best to rehabilitate, he has been in employment and is now married with a child. He has not been convicted of any criminal offences in the interim. He initially struggled. He said "he was nobody, had no presence, did not speak to anybody, I didn't leave the house, I didn't do anything". Later in his evidence he said:

"I suppose a better way of putting it ... I existed, I didn't live. I just done what I was told to do. Get up, it's time to go to work, it's time to go to school. My family carried me for years."

[105] He explained how when he first encountered Airsoft skirmishing, after encouragement from his mother, initially he found the activity very distressing. In due course he came to enjoy it. He explained how the opportunity came to open up

a site at the family home and how beneficial it has been for him. His evidence was that "I love it for what it has done for me, I love it for the community and the way it brings people together". He added:

"I have spent the last which is now going on 19 years, trying to live the best life I can. I have 19 years trying to not bring any more harm to anybody or anything, I just tried to find a way in life. When something like this happens from my side, I know that it is hard on both. But on my side, you're completely lost. You have no place. And like I have explained, is Airsoft helped me find my place."

[106] He explained how he went about opening the business, how he had sought advice from the PSNI, obtained a licence from the council and insurance from the UKARA.

[107] In terms of the effect of the publicity engendered by the article he said that:

"It was hard ... I can't explain ... it was likely somebody had torn my heart from my chest."

He said:

"It feels like after 19 years, at the time it was 16 years, of trying to find a balance and trying to find a way that I had just been attacked. I feel attacked and the story written by people that are uninformed. Everything that I had ever done do not cause trouble or do anybody any harm it is like harm found me. So no matter how much I try to be positive and get on with it everybody just seems to want to attack me."

Later he says:

"The attack is in the story. When you take the sections of the story and read it, it reads right. If you take this part and read it out it is fine. But when you take that story as a whole it makes me out to be an absolute mad man, that I just don't care, that I'd never cared that I am doing this on badness. ... I felt attacked and I felt like I had nowhere to go ..."

[108] His evidence was that the article was a cause of anxiety symptoms which required attendance with his GP.

[109] When he was taken to the detail of the description of the reporting of the criminal conviction he says:

“There is a lot of, there is actually very damaging which actually brings, for me, when read, it makes it very personal and it was very hard. Actually, for the family it is all about how it is worded. There is a lot of allegations in there and no truth.”

In relation to the article he goes on to say:

“... that is not how that article reads. That article makes me out to be an absolute monster.”

[110] The audited circulation of Sunday World in Northern Ireland for the week of publication was 47,508.

[111] The information about the events of 1998/1999 came into the hands of the publisher from a close friend of the Hampsey family, a Mr McSherry, who was a journalist working for local newspapers. Mr McSherry agreed that the purpose of providing the material to Mr Moore who wrote the article for the Sunday World was to ensure a wider circulation. In particular Mr McSherry was motivated by a desire to have the Hampsey’s account of the events put in the public domain. He spoke to the Hampseys, provided two draft articles which formed the basis of the articles which were subsequently published and also some newspaper cuttings from the time in question. Mr Moore’s evidence was that he was able to obtain two further articles of a similar nature from a Lexis search. The only way in which a journalist could obtain further information of coverage of the said court proceedings would be to search through archived print editions from the time of the court hearings.

[112] The plaintiff did not know about the article, nor did he consent to it.

[113] In considering the degree of intrusion and engagement of the Article 8 right in this case it is essential to assess the actual material that was published.

[114] The fact that the conviction had been in the public domain in 1999 may well mean that the material was not confidential but this is a case which involves alleged intrusion. In this regard the plaintiff relies heavily on the decision in PJS v News Group Newspapers Ltd [2016] AC 1081. In that case the plaintiff obtained injunctive relief against national newspapers in respect of material which was already widely in the public domain via social media and newspapers in other jurisdictions.

[115] In granting injunctive relief in PJS the Supreme Court took the view that the Court of Appeal focused:

“Too narrowly on the disclosures already made on the internet and did not give due weight to the qualitative difference in intrusiveness and distress likely to be involved in what is now proposed by way of unrestricted publication by the English media in hard copy as well as on their own internet sites.” - Lord Mance at paragraph [35].

[116] While obviously PJS is important in focusing on the question of intrusion as the basis for engagement of Article 8 it is important to recognise that that case involved publication of purely private sexual encounters which were unarguably private matters. This publication deals with matters of an entirely different kind. The court should therefore be cautious in relying on PJS in this action.

[117] In this context I recognise that the plaintiff does not make the case that any publication of the fact of his conviction and the repetition of the reporting at the time necessarily will engage Article 8. Whilst this is also relevant in terms of the balancing exercise, what has in fact been published in relation to the conviction is partial and highly prejudicial to the plaintiff. It presents the circumstances of the offence and the court proceedings in the worst possible light in respect of the plaintiff. This may not be surprising in view of the fact that part of the motivation for the publication of the article was to put the Hampsey family’s views in the public domain. In so far as those views relate to the circumstances of Ronan’s death and the subsequent conviction of the plaintiff it is clear that they did not accept the suggestion that this was an accident. It is clear from my discussion of defamatory meanings earlier in the judgment that I do not consider the article was “fair and accurate” in relation to its treatment of the conviction and court proceedings in 1999.

[118] I have come to the conclusion that the articles constitute a serious attack on the plaintiff’s reputation and that the degree of intrusion arising from the articles is high. For these reasons I am satisfied that, in the circumstances of this case, the plaintiff’s Article 8 right is engaged.

[119] That being so it is necessary for the court to engage in a balancing exercise between the intrusion into the plaintiff’s private life by the published material and the defendant’s rights to freedom of expression by reference to the principles established under Article 10.

[120] The methodology to be adopted in balancing conflicting Article 8 and Article 10 rights was explained by Lord Steyn in the case of Re S in the following way:

“The interplay between Articles 8 and 10 has been illuminated by the opinions in the House of Lords in Campbell v MGN [2004] 2 AC 457. For present purposes the decision of the House on the facts of Campbell and the differences between the majority

and minority are not material. What does, however emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual cases is necessary. Thirdly the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test ...”

[121] In respect of the Article 8 rights I consider that there is a strong Article 8 right in play. As I have set out above in analysing whether Article 8 is engaged the degree of intrusion was high, it brought into the public domain events which occurred in 1998/99 when the applicant was a juvenile and presented them in a highly damaging way. The articles, in particular in relation to the criminal matters constituted a serious attack on the reputation of the plaintiff.

[122] Cases such as Von Hannover (No. 1) [2004] EMLR 21 and Axel Springer v Germany [2012] EMLR 15 set out criteria relevant to the balancing exercise between Article 8 and Article 10 rights.

[123] An essential pre-requisite for protection of Article 10 rights is that the article in dispute contributes to a debate of general interest.

[124] What is the debate of general interest to which the article complained of contributes?

[125] In his evidence Mr Moore who wrote the article when asked about the public interest in his story said as follows:

“Well I think, it has been discussed already the public interest was a man with a conviction for killing somebody am had a, a site where replica weapons were not only being used pictures were being published on on, in social media, glamorising guns, glorifying guns, glorifying warfare ... and there was, I think there was a moral and debate to be had by the, for the public to discuss whether they think it is right that somebody with that kind of conviction could operate such a business but also that the public may want to discuss that it’s ... that somebody with that kind of conviction can lawfully open such a

business where guys in balaclavas can run around playing paramilitary games.”

[126] Mr Moore also placed emphasis on the views of the Hampsey family. In his evidence he said:

“I, I think from, from writing the article I was very very clear I, Ronan (McSherry) made me aware just how upset the Hampsey family were and it was clear from reading the newspaper cuttings that they were not satisfied with the justice they received at the time and they perhaps had not accepted that it was am, as tragic accident as maybe it was portrayed in court at the time.”

[127] When asked by Mr Lockhart what part the Hampsey family had in the article he replied:

“Well I think the Hampsey family had a, did have a large part in the article because we were trying to tell the Hampseys side that they had felt they had no voice they had been re-traumatised, this was an intrusion into their grief and I think they were entitled to comment on that and the plaintiff didn’t consult with the Hampsey family before opening his business this business and I think they were entitled, so he had his say, he posted this stuff, he opened his business that’s fine but I think they are entitled to their comment on, on it as well.”

[128] This theme was echoed by Mr Sullivan, who is the editor of the Sunday World newspaper, in his evidence when he said in response to Mr Lockhart:

“It’s actually we have a story I think at the centre of it is a family who have suffered a terrible tragedy, an awful thing. It think they have lived with a great frustration that their views were never heard, I think they have had to live with that, they have had little choice I think in conversation they have said they had no objection to [EC] trying to rebuild his life and moving on but I think when [EC] opened the Torrent Warfare business I think that was to use a term a kick in the teeth for them and that it reawakened something very traumatic for them which they, which I think they have been forced to live with and I think the frustration of not having a voice in all those years

surfaced and I, it was entirely understandable that they felt aggrieved and slighted and hurt by what had happened.”

[129] When asked by Mr Lockhart what he saw as the public interest in the story he replied:

“I think well here we have an individual who was convicted of a violent crime involving firearms albeit tragically and accidental and we accept that but I then down the years [EC] then opened a business which involved the use of replica weapons and on the face of it glorifies warfare/violent action. I think people, the general public who spend their money they make choices about who they associate with, what businesses they go to, what activities they are involved in, I think they have a right to have information that enables them to make a moral ethical judgment on where they go, how they spend their money and who they are dealing with.”

[130] In his able submissions Mr Lockhart argued that reasonable people would be entitled to question and criticise the actions of the plaintiff and the material he posted on his Facebook pages to advertise his business in view of the location of the business, the proximity of the victim’s family to the business and the method by which the plaintiff chose to advertise his business having regard to his conviction for manslaughter. He argued the fact that the plaintiff, who was someone convicted of a serious crime which caused the death of a person, had chosen to engage in an activity/business which involved the use of replica firearms, together with the way in which he had promoted that business, inevitably caused additional trauma and upset to the family of Mr Hampsey, was a matter of legitimate criticism. His present public behaviour in opening the business and marketing it in the way he did meant there was a public interest in referring to the circumstances of his conviction when he was a juvenile. Mr Lockhart persuasively argues that the “facts underpinning” his conviction are clearly legitimate matters to be put in the public domain in the context of this debate.

[131] Whilst there are countervailing arguments on balance I accept in principle Mr Lockhart’s submission that the subject matter of the articles in question had the potential to meet the test of contribution to a debate of general interest. In my view there was a “public interest” story to be written in the context of this case. Such a story could have legitimately criticised the plaintiff for opening the business and promoting it in the way he did having regard to his previous conviction. What the court must consider is the article that was actually published. The right to publish information in the public interest carries with it duties and responsibilities. Foremost amongst such duties and responsibilities is the obligation to provide

reliable and accurate information. I agree with Mr Lockhart's submission that an article contributing to the debate of general interest he envisages would make no sense without reporting on the plaintiff's conviction and on the facts underpinning that conviction. In doing so there is an obligation to ensure that that conviction and the facts underpinning it are presented fairly and accurately. It is the court's conclusion that in fact the conviction and the circumstances giving rise to it have been presented in a misleading, selective and inaccurate way so as to cause the maximum damage to the reputation of the plaintiff. In my view the article clearly conveys the impression that the killing in question was intentional.

[132] The court's concern is focused on the way in which the conviction was reported. Notwithstanding the fact that Mr Sullivan accepted in his evidence that the killing was indeed accidental the wording of the article itself suggests otherwise. It is difficult to avoid the conclusion that the genuinely held view of the Hampsey family that the killing was not in fact an accident, as accepted by the court in 1999, has found its way into the content of the article. It would have been open to the defendant if they were so minded to publish an article making that case if they felt it could be justified. That is not what the article does. I accept, as Mr Lockhart compelled both the plaintiff and his father to accept in cross-examination, that his conduct in opening the business could be the subject matter of legitimate criticism. That freedom to criticise that conduct would be something capable of protection under Article 10. As indicated the freedom to express that criticism carried with it an obligation to report the important element of the story namely the plaintiff's previous conviction in a fair and balanced way. The failure by the defendant to do so weighs heavily in favour of the plaintiff's Article 8 rights and against the defendant's Article 10 rights.

[133] In coming to my conclusion about the article that was actually written in this case I bear in mind that the court is not a newspaper editor. I fully recognise that "it is not for the court, or for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. Article 10 protects not only the substance of the ideas and information but also the form in which they are conveyed." (See News Verlags GmvH and Co. KG v Austria [2000] 31 EHRR 246 at [39], cited with approval in In Re Guardian News and Media Limited and Others [2010] UKSC 1 at 35). The courts should not unduly restrict the discretion vested in editors as to how they present their stories. Much of the case law in this area refers to judgments of journalists in terms of identifying individuals in the context of public interest stories. This issue was dealt with in the Supreme Court judgment in Flood v Times Newspapers [2012] UKSC 11.

[134] As Lord Brown put it at paragraph [137] of the judgment:

"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.”

[135] The court considers that the Article 10 rights of the defendant permitted it to criticise the way in which the plaintiff promoted the Torrent Warfare business. In evidence the plaintiff and his father accepted that this was so. In particular the plaintiff accepted that he had adjusted the advertising policy to take into account the sensitivities arising from the opening of his business. Whilst I accept that the two images of the plaintiff in respect of which he claims a legitimate expectation of privacy have been “cropped” from the original, I do not consider that they unfairly represent or distort the way in which the plaintiff is depicted in the originals. Applying the principles referred to by Lord Brown in Flood v Times Newspaper case I would not condemn the defendant for breach of privacy or misuse of private information in respect of the two photographs. It comes within the “relevant boundaries”. However the defendant’s coverage of the commission of the offence of manslaughter by the plaintiff and the Crown Court proceedings against the plaintiff do not.

[136] In completing the balancing exercise I have had regard to a number of other important factors.

[137] The plaintiff is a private person and not one involved in public life. The convictions occurred in the distant past and have not been the subject matter of public comment or debate in the interim. The plaintiff himself is not someone who has sought public attention in the interim. The defendant did not engage in any intrusive surveillance in obtaining the material for the publication.

[138] Finally I refer to the failure by the defendant to contact the plaintiff prior to publication. Mr McSherry, the original source of the article, conceded to Mr Millar in cross-examination that he felt “there would be a need to talk to both sides”. When Mr Moore and Mr Sullivan were pressed about this Mr Moore put forward two reasons for a failure to seek the plaintiff’s views. He suggested that there was nothing the plaintiff could add since the material in relation to the business had been taken from its Facebook entries. He also indicated that there was a concern that the plaintiff might seek an injunction. This was the primary basis put forward by Mr Sullivan for failure to speak to the plaintiff prior to publication. In my view in the circumstances of this case the failure to seek the plaintiff’s views before publication weighs against the protection of the defendant’s Article 10 rights. It was clear from the plaintiff’s evidence and indeed from the conduct of this case that there was much he could have said about the proposed article. I do not consider that a concern about a potential injunction was sufficient to absolve the defendant from a fairly

fundamental tenet of responsible journalism. No injunction could have been obtained without a legal basis. This was not a story which required immediate publication so as to expose a public wrong or prevent imminent wrongdoing. It was not “a breaking story”. The court’s view is that the defendant could and should have sought a comment from the plaintiff prior to publication.

[139] Having weighed all these factors, applying the ultimate balance test of proportionality, I have come to the conclusion the balance falls in favour of protecting the plaintiff’s Article 8 rights in this case. In particular the articles went beyond a proportionate public interest discussion on criticisms that might have been made in respect of the plaintiff opening his business because of the way in which the defendant dealt with the plaintiff’s prior conviction.

[140] There remains a further matter in relation to this issue which causes me concern. It is clear from my consideration of the issues that a primary factor leading to my conclusion is the damage the article has caused to the plaintiff’s reputation, on the basis of the reportage concerning his 1999 conviction. As I have concluded earlier in this judgment this is a matter which gives rise to a cause of action in defamation. I have given careful and serious consideration as to whether the plaintiff’s remedies should be confined to a claim based on defamation which would of course be a matter for a jury. There is no doubt that the development of the law of privacy has had ramifications for the court’s approach to the law of defamation. This question has been the subject matter of academic debate. In highlighting what Mr Lockhart described as the dangers of an extension of privacy claims he referred me to an extract from the current edition of Tugendhat and Christie at paragraph 245 as follows:

“... One disposed to alarm might express the greatest concern over where privacy is going. The question may still be raised, and apparently is still unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interests of freedoms of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may circumvented in so casual and cavalier a fashion?”

[141] This issue was also the subject matter of an interesting article by Alastair Mullis entitled “The Swing of the Pendulum; Reputation, Expression and the Re-centring of English Libel Law” published in NILQ 36(1); 27-58.

[142] In somewhat more measured terms the current edition of Gatley on Libel comments at paragraph 1.14:

“The Strasbourg and domestic courts have, since 2004, become progressively more pronounced in recognising that reputation falls to be protected under the Article 8 right to respect for private life. They have recognised a Convention right to the protection of reputation. Yet, while this jurisprudential innovation is now embedded at both the European and domestic levels, it is not clear that a coherent intellectual underpinning has been articulated by the courts. Notwithstanding the increasingly consistent message deriving from the case law on the coverage of reputation by Article 8, a fundamental question is obviously begged. Reputation, by dint of being determined by aggregating the appraisals made of an individual by other people, is quintessentially public in nature. Different views have been expressed as to why protection is afforded reputation under Article 8, relying variously on the public-private divide, the concept of human dignity, the contribution of reputation to psychological integrity and the impact of libel on personal relationships. A second level question is whether Article 8 is invoked by every instance of harm to reputation.”

[143] In considering this matter it is important to recognise that the Article 8 right asserted in this case is not based solely on “inaccurate” reporting. In coming to my conclusion I have had regard to the impact on the publication on the plaintiff, together with the effect it had on him and the degree of intrusion represented by the article. I do not consider that this was some trivial matter.

[144] In any event I cannot see that the defendant can “compel” the plaintiff to pursue a claim in defamation if in law he can establish a breach of his Article 8 rights after the court has properly carried out a balancing exercise between the asserted rights of the defendant under Article 10. It is this balancing exercise which is the equivalent of the “numerous restrictions and limitation which have hedged defamation for many years in the interests of freedom of the press and the discouragement of trivial and extortionate claims”. Arguably it is an approach much better suited to the assessment of competing rights that are at the heart of such disputes. I am satisfied that the plaintiff has established a breach of his Article 8 rights. The protection against any injustice to the defendant in terms of a potential defamation claim is to ensure that there is no double recovery of damages in respect of the two torts arising out of the same publication if they are proven.

Data Protection

[145] The Data Protection Act 1998 implements EU Directive 95/46. The purpose of the Act is to provide a measure of personal privacy by regulating the use of an individual's personal information. It provides an individual with protection against excessive use or misuse of his/her personal information. It places obligations on data controllers in respect of the processing of personal data.

[146] The standard of processing required by the Act is defined through the "Data Protection Principles", which set the normative standard against which the data controller's use of personal data is measured. In the context of this action the Act clearly recognises the importance of balancing the interests of the individual in respect of personal privacy and the interests of protecting freedom of expression.

[147] Thus the directives and recitals make express reference to Article 10 of the ECHR (Recital 10) and (Recital 37):

"Whereas the processing of personal data for purposes of journalism or for purposes of literary or artistic expression ... should qualify for exemption from the requirements of certain provisions of this directive insofar as it is necessary to reconcile the fundamental rights of individuals with freedom of information and notably the right to receive and impart information, as guaranteed in particular in Article 10 of the ECHR ..."

[148] The Act seeks to reconcile the inherent tensions between the rights at play in this action. In addition the Charter of Fundamental Rights of the European Union assists in the proper interpretation of the Act, notably Article 8 in relation to protection of personal data, Article 11 in respect of freedom of expression and information and Article 47 in relation to the right to an effective remedy.

[149] The Act therefore provides an individual with a right to compensation for a data controller's contravention of any of his/her rights under the Act if he/she can prove a breach of the Data Protection Principles.

[150] Reflecting Article 10 considerations the principles are qualified by various exemptions and of relevance in this action by the "journalism" exemption provided in section 32 of the Act.

[151] In this action the personal data identified by the plaintiff is:

- (a) The information in the articles about the plaintiff's involvement in the events of 23 August 1998 and the subsequent criminal proceedings.

(b) Images 1 and 2.

[152] The data referred to in (a) is clearly sensitive personal data – section 2 of the Act.

[153] The defendant is a data controller under the Act and has processed the data by the publication of the articles – See section 1 of the Act.

[154] Section 4(4) therefore compels the defendant to comply with the Data Protection Principles which are listed in Part 1 of Schedule 1.

[155] Schedule 1 Part 1 provides that it:

“Shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) At least one of the conditions in Schedule 2 is met, and

(b) In the case of sensitive personal data at least one of the conditions in Schedule 3 is also met.”

[156] The plaintiff argues that neither of the conditions in Schedule 2 or Schedule 3 are met and this was not really strongly contested in closing submissions with Mr Lockhart focusing on the exemption in section 3(2) to which I will return later.

[157] In relation to Schedule 2 it seems to me the defendant might rely on paragraph 6(1) which states as follows:

“The processing is necessary for the purpose of legitimate interests pursued by the Data Controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and feelings of legitimate interests of the data subject.”

[158] It seems to me that this is an attempt to give expression to the competing ECHR rights at issue in this action.

[159] In relation to Schedule 3 which relates solely to the sensitive data it seems to me that Schedule 1 to the Data Protection (Processing of Sensitive Data) Order 2000, SI 2000/417 is also relevant. Sub-paragraph (3) provides for disclosure of personal data which:

- (a) Is in the substantial public interest;
- (b) Is in connection with -
 - (i) The commission by any person of any unlawful act ...
- (c) Is for the special purposes as defined in section 3 of the Act;
- (d) Is made with a view to the publication of those data by any person and the data controller reasonably believes that such publication would be in the public interest.

[160] Section 3 of the Act provides that journalism is a special purpose.

[161] Finally, in this context the defendants relied on the exemption provided in section 32(1) which provides:

“Personal data which are processed only for the special purposes are exempt from any provision to which this sub-section relates if -

- (a) The processing is undertaken with a view to the publication by any person of any journalist, literary or artistic material,
- (b) The data controller reasonably believes that, having regard in particular to the special importance of the public interest and freedom of expression, publication would be in the public interest, and
- (c) The data controller reasonably believes that in all the circumstances, compliance with that provision is incompatible with the special purposes.”

[162] Taken together it seems to me that the court must consider the questions as to whether or not the material has been processed fairly and lawfully and ultimately whether the defendant reasonably believes that the publication was in the public interest.

[163] There is no doubt from the evidence of both Mr Moore and Mr Sullivan that they believe that the publication of the material was in the public interest. My impression of their evidence was that they did not give any express consideration to the requirements of the Data Protection Act.

[164] In considering the issue the court takes the view that the test of belief is not a subjective but an objective one. The belief must be reasonable. Also in considering whether or not publication is in the public interest public interest should be considered in the legal sense.

[165] In assessing the reasonableness of the belief the court is entitled to have regard to compliance with a relevant Code of Practice – see section 32(3)(a) of the Act. The IPSO Editors’ Code provides at Clause 1(i):

“(i) The Press must take care not to publish inaccurate, misleading or distorted information, including pictures.”

[166] I have already extensively discussed the issues of whether the publication was lawful or fair and whether or not it was in the public interest. In relation to the events of August 1998 and the plaintiff’s subsequent conviction I have concluded that the information published was unfair, misleading and inaccurate sufficient to give right to a cause of action for breach of privacy and defamation.

[167] In relation to the images which were published, whilst it is correct to say they were altered, I am not persuaded that those alterations were unfair or led to a misleading or distorted impression. Image 1 is both cropped and enlarged. The image was taken from a photograph of the plaintiff and two of his work colleagues taken at his place of business. Each of the men appear to be in military clothes and are posing together holding replica rifles. In front of them is what appears to be further military style equipment and clothing. The defendant has cropped the photograph to simply use the image of the plaintiff and have enlarged it so that it appears prominently in the articles. Image 2 is a “cropped” version of the plaintiff in military gear apparently demonstrating the use of a replica rifle to another person whose back is to the camera and who is also dressed in military gear. The photograph simply uses the head and shoulders of the plaintiff in military dress. It seems to me that these photographs illustrate the case made by the defendant to the effect that the plaintiff was dressed in military gear where he was using realistic replica weapons in the course of his business. Had they been published in the context of an article which did not mislead or was unfair in relation to the earlier events I consider that the defendants would be in a position to justify the publication under the Data Protection Act.

[168] In relation to the sensitive personal data I have come to the firm conclusion that the defendants have not met any of the conditions in Schedule 2, Schedule 3 nor have they established that they are exempt under section 32 of the Act.

[169] I find therefore that in this regard there has been a breach of the plaintiff's rights under the Data Protection Act.

[170] By reason of section 13(2) an individual "who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that distress if:

"... the contravention relates to the processing of personal data for the special purposes."

[171] In these circumstances I conclude that the plaintiff is entitled to damages for a breach by the defendant of the Data Protection Act 1998 in respect of the information in the articles about the plaintiff's involvement in the events of 23 August 1998 and the subsequent criminal proceedings.

[172] However, since the distress in respect of which he is entitled to compensation is identical to that for which I have concluded he is entitled to damages for breach of privacy, I determine that the plaintiff is not entitled to any additional damages for this breach. To make such an award would amount to double compensation and whilst the plaintiff has established the breach it would not add to any compensation to which he was entitled in light of my findings in relation to breach of privacy.

Breach of Copyright

[173] The plaintiff maintains that the defendant breached his copyright in respect of each of images 1, 2, 3 and 4 and is liable to the plaintiff in respect of each such breach.

[174] The claim in copyright is governed by the Copyright, Designs and Patents Act 1988 ("CDPA").

[175] The CDPA provides property rights for certain types of work. Under Article 4(1)(a) each of the images in this action, being photographs, are artistic works. In order to enjoy the protection of those rights the plaintiff must first establish that he is the "owner" of each of the artistic works. Under the Act the "author" in relation to a work means the person who creates it - section 9. Under section 11 the "author" of the work is the first "owner" of any copyright in it.

[176] Who then is the author/owner of each of the images?

Image 1

[177] Image 1 was reproduced from a photograph showing the plaintiff and two others posing in military style gear holding replica weapons. The defendant only

published that part of the photograph showing the plaintiff and enlarged it on the left hand page of the articles.

[178] In relation to this photograph, in his evidence the plaintiff said as follows:

“This was taken in what we call our armoury, which is where we store all our equipment, from the BB guns to the safety equipment, which is on the picture below.”

[179] When asked why it was taken and by whom he replied:

“It was taken by someone, I can’t remember actually who took the picture exactly, but it was taken for the man in the centre, and he was using it. There was a friend of his that was from Co Louth.”

[180] He went on to say that the friend, who is in the middle of the photograph, (PC) was trying to start a media business. Whoever took the photograph used PC’s phone. When asked if PC was an employee the plaintiff replied;

“No, PC was helping me with doing the advertising and like I said, at the time, PC was trying to open a media company on Facebook ... and he had approached me about educating me on how to use Facebook, newspaper and other media outlets to advertise the business itself.

This picture going back to why it was taken was taken, like I said, for a friend of PC’s who had come into a large amount of land and he did not know what to do with it; he had no idea and he was thinking of doing an outdoor activity centre, so PC was advertising, I was sending it to him like a promotion for Air Soft for his business to be.”

[181] The plaintiff went on to explain that PC put the photograph on his own Facebook and that he “tagged” the plaintiff. He indicated that as a result this picture came up on the plaintiff’s newsfeed. It was then stored on his own Facebook page, he thinks his personal page rather than his business page. Because it was on his personal Facebook page he thought that only friends and friends of friends could see it. He thought he had maybe 200-300 friends at the relevant time.

[182] In light of the plaintiff’s evidence I do not see that he has a viable claim in copyright. He did not “create” the photograph. It seems to me it was created by his friend PC who had a particular interest or motive for taking the photograph. The photograph was taken from PC’s camera and was subsequently used by him in his

Facebook which in turn resulted in it being published on the plaintiff's Facebook site. Nor can the plaintiff avail of section 11(2) of the CDPA which provides that:

“(a) where a ... artistic work ... is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary.”

[183] PC, or the person who took the photograph, was not an employee of the plaintiff at the relevant time and the plaintiff cannot therefore claim ownership of copyright on the basis of being an employer in relation to Image 1.

Image 2

[184] This is a photograph of the plaintiff in military style uniform. It was reproduced from a photograph which shows the plaintiff holding the top of a weapon with the back of a person watching the plaintiff while he does so.

[185] In his evidence the plaintiff indicated that this photograph was taken by a photographer from a company known as MK Photography. It was taken on a digital camera. His evidence was:

“There was a mutual agreement between myself and MK Photography. He wanted to take Air Soft photographs for his portfolio, to show people when they came to see him. The agreement was that we could use these pictures to help promote our site on our opening day, so these were used on the Facebook page the day after we had done our first opening day on 10 May.”

[186] He was asked:

“So, he let you use some of his photos?”

To which he replied:

“Yes, I had to ask him for permission.”

[187] The photograph was published on his business Facebook page. When asked “Who can look at it” he replied:

“Oh, most everybody. It is a very public page.”

[188] In my view the author of this image is clearly MK Photography who retain copyright. The plaintiff is entitled to use the photographs with the permission of the copyright owner, namely MK photography.

[189] The plaintiff is not an “exclusive” licensee under the CDPA. A non-exclusive licensee can bring an action for certain infringements under the CDPA but in order to do so under section 101A of the Act only if the licence:

- “(i) is in writing and is signed by or on behalf of the copyright owner; and
- (ii) expressly grants the non-exclusive licensee a right of action under this section.”

[190] These conditions are not satisfied and so the plaintiff cannot rely on his status as a licensee to sustain a claim under the CDPA.

[191] On the evidence the plaintiff cannot sustain an action for breach of copyright in relation to Image 2.

Image 3

[192] Image 3 is a reproduction of an image showing a logo for Torrent Warfare which includes a skull with crossing machine guns and the words “get some”.

[193] His evidence on the creation of this logo was as follows:

“At that time P has contacted someone that was a friend of his that is very computer savvy and is very good at making logos for badges, T-shirts, hats this sort of thing ...

Yes. The person that made this logo sent me about 8 or 9 separate logos. That was just one of 8 or 9 things that were to be made as a side patch.”

[194] He was then asked “Did you ask for it to be made?” to which he replied:

“I asked for patches for pictures to be made that could be turned into a site patch. Site patches, in Air Soft, are used for advertising. Whenever an Air Soft travels to another site, they are also used for giveaways. People take a lot of pride in their sites, so I had asked that they be images made for site patches, which none I had seen until they were actually sent to me.”

[195] The plaintiff went on to say that the last time he had seen it was when it was sent to him as a possible logo. The plaintiff never used it as a logo.

[196] It was sent to him via Facebook, similar to Image 1 and ended up on his own personal page with access to 200 or 300 friends and presumably to any other person to whom the logo was “tagged”. The plaintiff argues that this logo was created by PC who was employed to create a number of such patches and other promotional content on behalf of the plaintiff for his business and that as a result and arising from section 11(2) of the CDPA the plaintiff was the first owner of the copyright as his employer.

[197] Under section 178 of the CDPA an “employer” refers to “employment under a contract of service or of apprenticeship”.

[198] I do not see how on the facts it could be said that PC was under a “contract of service”. At its height it was a contract for service. Clearly PC was the author of the logo and I do not consider that he could be fairly described as an employee so as to create a copyright for the plaintiff.

[199] In summary I do not consider that the plaintiff on the evidence establishes that he has copyright in either Images 1, 2 or 3.

Image 4

[200] Image 4 shows 4 replica rifles laid out on what appears to be a rug or carpet. It was taken in the plaintiff’s family home and showed some of the rental equipment that had been purchased which was to be used on the skirmishing site. He took the photograph himself on his mobile phone and published it on the Facebook business page for Torrent Warfare.

[201] Clearly the plaintiff is the author and owner of the copyright in this photograph.

[202] By publishing this photograph the defendant has infringed the plaintiff’s copyright by copying the images and thereafter issuing copies of the images to the public. The photograph was altered slightly in that it was reduced in size and some of the surrounding content was removed. However, in my view this falls well short of “derogatory treatment” of the work under section 80 of the CDPA. It did not distort or change the image in any meaningful way.

[203] In its defence the defendant pleads the “fair dealing” provisions set out in section 30 of the CDPA.

[204] Section 30(1) provides that:

“Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement ... and provided that the work has been made available to the public.”

[205] In the circumstances of this case, and having regard to the article that was written, I do not see that the defendant can argue that the photographs were published “for the purpose of criticism or review, of that or another work”. This was not a critique or criticism of the photographs as envisaged by the Act in my view.

[206] The defendant also sought to rely on section 30(2) which provides:

“Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that ... it is accompanied by a sufficient acknowledgement.”

[207] The obvious difficulty in relation to this defence is that it expressly excludes photographs. Whilst this has been the subject matter of academic criticism – see in particular Copinger & Skone James on Copyright, 17th Edition, it cannot provide a defence in this case.

[208] The defendant is therefore compelled to rely on section 171(3) of the CDPA which permits a defence based on the public interest in freedom of expression enshrined in Article 10 of the ECHR which is of course now part of our domestic law.

[209] Section 171(3) provides:

“Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise.”

[210] The availability of a public interest defence to a claim for infringement of copyright has been the subject of consideration in Ashdown v Telegraph Group Ltd [2002] Ch 147.

[211] The particular difficulty that arises for the defendant in this case is the blanket exclusion of photographs under the fair dealing provisions in section 30(2). Clearly the policy consideration behind this exclusion is to prevent publishers such as the defendant using photographs created by third parties, often “commercial rivals”, for its own commercial purposes.

[212] Ashdown is authority for the proposition that, where there is a clear public interest in giving effect to the right of freedom of expression where such right overrides the rights conferred under the CDPA, section 171(3) of that Act does permit the defence of public interest to be raised.

[213] In paragraph 43 of his judgment onwards this issue is discussed by Lord Phillips in the Ashdown case as follows:

“43. *Fressoz and Roire* was not a copyright case, but it illustrates a general principle. Freedom of expression protects the right both to publish information and to receive it. There will be occasions when it is in the public interest not merely that information should be published, but that the public should be told the very words used by a person, notwithstanding that the author enjoys copyright in them. On occasions, indeed, it is the form and not the content of a document which is of interest.

44. Where the subject matter of the information is a current event, s.30(2) of the 1988 Act may permit publication of the words used. But it is possible to conceive of information of the greatest public interest relating not to a current event, but to a document produced in the past. We are not aware of any provision of the 1988 Act which would permit publication in such circumstances, unless the mere fact of publication, and any controversy created by the disclosure, is sufficient to make them 'current events'. This will often be a 'bootstraps' argument of little merit, but on other occasions (such as disclosure by the Public Record Office under the 30-year rule) it may have a more solid basis.”

Of course in this case the exception in relation to Image 4 does not relate to whether it is “current” but to the fact that it is a photograph which prevents the defendant relying on section 30(2).

The judgment goes on:

“45. For these reasons, we have reached the conclusion that rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the 1988 Act, notwithstanding the express exceptions to be found in the Act. In these circumstances, we consider that the

court is bound, insofar as it is able, to apply the Act in a manner that accommodates the right of freedom of expression. This will make it necessary for the Court to look closely at the facts of individual cases (as indeed it must whenever a 'fair dealing' defence is raised). We do not foresee this leading to a flood of litigation.

46. The first way in which it may be possible to do this is by declining the discretionary relief of an injunction. Usually, so it seems to us, such a step will be likely to be sufficient. If a newspaper considers it necessary to copy the exact words created by another, we can see no reason in principle why the newspaper should not indemnify the author for any loss caused to him, or alternatively account to him for any profit made as a result of copying his work. Freedom of expression should not normally carry with it the right to make free use of another's work.

Public Interest

47. In the rare case where it is in the public interest that the words in respect of which another has copyright should be published without any sanction, we have been concerned to consider why this should not be permitted under the 'public interest' exception, the possibility of which is recognised by s.171(3)."

[214] The judgment then goes on to consider the judgment of Aldous LJ in the case of Hyde Park Residents Ltd v Yelland [2001] Ch 143 and concluded as follows:

"58. In the light of these judgments, we do not consider that Aldous LJ was justified in circumscribing the public interest defence to breach of copyright as tightly as he did. We prefer the conclusion of Mance LJ that the circumstances in which public interest may override copyright are not capable of precise categorisation or definition. Now that the Human Rights Act 1998 is in force, there is the clearest public interest in giving effect to the right of freedom of expression in those rare cases where this right trumps the rights conferred by the 1988 Act. In such circumstances, we consider that s.171(3) of the Act permits the defence of public interest to be raised.

59. We do not consider that this conclusion will lead to a flood of cases where freedom of expression is invoked as a defence to a claim for breach of copyright. It will be very rare for the public interest to justify the copying of the form of a work to which copyright attaches. We would add that the implications of the Human Rights Act 1998 must always be considered where the discretionary relief of an injunction is sought, and this is true in the field of copyright quite apart from the ambit of the public interest defence under s.171(3)."

[215] Whilst the defendant cannot rely on the express fair dealing defence in the Act nonetheless the principles underlying the fair dealing defence are relevant in consideration of a potential public interest defence. These were well summarised in paragraph 70 of the Ashdown judgment when Lord Phillips quoted with approval from paragraph 20.16 of Laddie, Prescott and Vitoria, The Modern Law of Copyright and Designs, 3rd Edition (2000) as follows:

"It is impossible to lay down any hard-and-fast definition of what is fair dealing, for it is a matter of fact, degree and impression. However, by far the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor's exploitation of the copyright work, a substitute for the probable purchase of authorised copies, and the like. If it is, the fair dealing defence will almost certainly fail. If it is not and there is a moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant's additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on. The second most important factor is whether the work has already been published or otherwise exposed to the public. If it has not, and especially if the material has been obtained by a breach of confidence or other mean or underhand dealing, the courts will be reluctant to say this is fair. However, this is by no means conclusive, for sometimes it is necessary for the purposes of legitimate public controversy to make use of 'leaked' information. The third most important factor is the amount and importance of the work that has been taken. For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances

the taking of an excessive amount, or the taking of even a small amount if on a regular basis, would negative fair dealing.”

[216] I have come to the conclusion that the defendant is entitled to rely on section 171(3) of the CDPA as a defence to the breach of copyright in respect of Image 4. Firstly, this is not a case where the defendant is commercially competing with the plaintiff’s exploitation of the copyright work or where it is using the photograph as a substitute for the purchase of authorised copies of the photograph and the like. The photograph is in the public domain. It is used by the plaintiff to promote and advertise his business. In his own words, “It is a very public page”. I have already concluded that it was in the public interest that the defendant be entitled to publish an article critical of the way in which the business was advertised having regard to his previous conviction. As part of that criticism I consider that the defendant was entitled to publish photographs which show the precise manner in which the business was advertised. This includes Image 4. In this context in my view the public was entitled to see the images being used by the plaintiff rather than, say, a description of the images. In this context the public interest was properly advanced by the use of the photographs as these were the means by which he was promoting the business. In order to understand what the defendant says was wrong with what the plaintiff did it is necessary to see the images in question.

[217] In evidence the plaintiff and his father accepted that they could be validly criticised for the manner in which the business was publicised. The plaintiff accepted that he had adjusted his advertising policy to take into account the sensitivities arising from the opening of his business.

[218] Having considered all these matters I have come to the conclusion that in the particular circumstances of this case the defendant enjoys a defence under section 171(3) in relation to the breach of copyright concerning Image 4 and that this photograph can be published without any sanction against the defendant.

[219] Whilst I have found that the plaintiff does not enjoy copyright in Images 1-3, if I am wrong in this I would take a similar view and conclude that the defendant enjoyed a defence in respect of those images under section 171 as well. In coming to this conclusion I do take into account that neither Mr Moore or Mr Sullivan expressly applied their minds to the question of breach of copyright or Facebook’s terms and conditions.

[220] Finally, the plaintiff argues that in respect of both Facebook accounts (his personal account and his business account) he enjoyed copyright in the content of the page/profile by virtue of the same constituting both a literary work and a database (a database being a form of literary work by virtue of the original selection and arrangement of the content) – see section 3A CDPA.

[221] In addition the plaintiff relies on Articles 1(2) and 2(1) of European Directive No: 96/9/EC which was implemented in this jurisdiction into domestic law by the Copyright and Rights in Databases Regulations 1997.

[222] Section 3A provides as follows:

“3A Databases

(1) In this Part “database” means a collection of independent works, data or other materials which—

- (a) are arranged in a systematic or methodical way, and
- (b) are individually accessible by electronic or other means.

(2) For the purposes of this Part a literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author’s own intellectual creation.”

The personal and business Facebooks each constitute a “database”.

[223] Can the plaintiff avail of section 3A? There was very little evidence before the court as to how plaintiff’s personal Facebook page and his business page were created. Images 1 and 3 appeared on his personal page by reason of them being “tagged” in the manner I have described above. I certainly do not think this would be sufficient to meet the test of a selection or arrangement as a result of the plaintiff’s own intellectual creation.

[224] Images 2 and 4 are on the business page of the plaintiff’s business and one would certainly expect that the plaintiff would have selected or arranged the contents. Indeed, it could be argued that this is implicit in the very criticism that the defendant makes of the plaintiff. By reason of Regulation 13 a database right subsists in a database “if there has been a substantial investment in obtaining, verifying or presenting the contents of the database”. Again, it seems to me that this could only apply in relation to the business page and Images 2 and 4 although there is very little evidence on this point before the court.

[225] Regulation 16 provides that:

“Acts infringing database right

16-(1) Subject to the provisions of this part, a person infringes database right in a database if, without the consent of the owner of the right, he extracts or re-utilises all or a substantial part of the contents of the database.

(2) For the purpose of this part, the repeated and systematic extraction or re-utilisation of insubstantial parts of the contents of the database may amount to the extraction or re-utilisation of a substantial part of those contents.”

[226] Thus to infringe a database right a person must extract or re-utilise a “substantial part of the contents of the database”.

[227] In this case the defendant has published two photographs from the business page and I am not persuaded that this would be sufficient to meet the test of a “substantial part of the contents of the database”.

[228] Overall, in relation to this cause of action there is an insufficiency of evidence to establish a breach.

[229] Even if there was such a breach I consider the defendant would also enjoy a defence under section 171 of the Act, for the reasons set out above.

Conclusions

[230] As to the questions the court was asked to consider set out in paragraph [24] above the answers are as follows:

(a) Is the defendant liable to the plaintiff for invasion of privacy/misuse of private information?

Yes.

(b) Is the defendant liable to the plaintiff in respect of breach of the plaintiff’s rights under the Data Protection Act?

Yes.

(c) Is the defendant liable to the plaintiff for breach of copyright?

No.

(d) What, if any, defamatory meanings of the words complained of by the plaintiff reasonably capable of bearing?

(See paragraphs [57] to [69] above).

- (e) Is the defendant entitled to succeed in a defence against any defamatory meanings established on the basis of a Reynolds privilege argument?

No.