Neutral Citation Number: [2018] EWCA Civ 2591

Case No: A2/2016/3703

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
The Honourable Mr Justice Warby
HQ15D01507

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2018

Before :

LORD JUSTICE LEWISON
LORD JUSTICE RYDER
and
LADY JUSTICE SHARP

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Between :

ALEXANDER ECONOMOU	**Appellant**
- and -	
DAVID DE FREITAS	**Respondent**

- -
- -

Desmond Browne QC, Jonathan Barnes and Gervase de Wilde (instructed by Public Access) for the **Appellant**
Manuel Barca QC and Ian Helme (instructed by **Hanover Bond Law**) for the **Respondent**

Hearing dates : 17-18 April 2018

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Approved Judgment

LADY JUSTICE SHARP:

Introduction

1. Mr Alexander Economou, the claimant, appeals with the permission of Sir Christopher Clarke, against the Order of Warby J, made after a trial, dismissing his claim for libel, against the defendant, Mr David de Freitas.

2. The claim was made in respect of seven publications in the national media, four of which were published between the 6 to 8 November 2014 and three of which were published between the 6 to 10 December 2014. Five of those publications are now the subject of this appeal.[1]

3. This is a difficult case, which stems from two events: a serious allegation of criminality against the claimant, namely an allegation of rape made to the police in 2013, and a truly dreadful tragedy for the defendant, the suicide of his daughter, Ms Eleanor de Freitas. As the claimant's counsel says, there has been no monopoly of misery in relation to these events or their outcome, which has seen this bitterly contested action, raising strong emotions on both sides.

4. Ms de Freitas killed herself in April 2014, shortly before she was due to be tried for perverting the course of justice. She was 23 years' old. The charge was that she had made a false allegation of rape against the claimant, with intent to pervert the course of justice, contrary to common law. The prosecution had been initiated by the claimant, but in December 2013 it was taken over and continued by the Crown Prosecution Service (the CPS).

5. The five publications with which we are concerned are two articles, one appearing in the Guardian and one in the Daily Telegraph, where the words complained of consisted of verbatim parts of two separate Press Releases issued by or on behalf of the defendant; a further article in the Guardian written by the defendant and published under his name, and words spoken by the defendant during the course of two interviews broadcast by the BBC, one on BBC Radio 4, and one on BBC Television. The claimant complained of selected words from the publications in question, each of which resulted from a media strategy pursued by the defendant following the death of his daughter in relation (in broad terms) to the scope of the inquest to be held into her death and the decision of the CPS to take over her prosecution.

6. The claimant was not named in these publications. His case however, not challenged in this appeal, was that the words complained of referred and were understood to refer to him by reason of a reference innuendo, that is, because there were people who read them who knew certain facts, namely that he was the target of Ms de Freitas' rape allegation and/or the person who had pursued the private prosecution against her.

7. In order of appearance the publications were:

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[1] Except where stated otherwise, all references in the judgment, are to the issues raised in those five publications.

i) An article appearing on the Guardian website on 6 November 2014. It was written by Ms Sandra Laville, a Guardian journalist, and appeared in a materially similar version in the hardcopy edition of the Guardian newspaper for 7 November 2014 (the First Guardian article) [44][2]. The headline of the website article was "Call for prosecutors to answer for trial of alleged rape victim who killed herself" with the sub-headline "Eleanor de Freitas died days before she had to go on trial accused of lying about rape claim, despite lack of evidence". The headline in the hardcopy edition was "Woman who alleged rape killed herself on eve of trial" with two sub-headlines: "CPS decision to pursue case called into question" and "Police said there was no evidence woman had lied." The claimant's complaint related to three paragraphs, which reproduced verbatim, a Press Release drafted and issued by the defendant on the afternoon of 6 November 2014 (the First Press Release);

ii) An interview given by the defendant to John Humphrys, broadcast on 7 November 2014, shortly after 8 a.m. by the BBC on Radio 4 on the Today programme (the Today item). The interview had been recorded a few hours before it was broadcast [49]. The words complained of were (some of) the answers given by the defendant to questions put to him by Mr Humphrys;

iii) An interview given by the claimant, broadcast live on the BBC TV News Channel on 7 November 2014 (the BBC TV interview) a few hours after the broadcast of the Today item. Again, the words complained of were (some of) the answers given by the claimant to questions put to him by the interviewer;

iv) An article appearing online on the Daily Telegraph website from about 6 p.m. on 9 December 2014, under the headline: "Eleanor de Freitas rape case: victim wrote of her "disbelief" at prosecution" (the Telegraph article). As a result of a complaint by the claimant, the headline was altered to substitute the word "complainant" for "victim" in the headline. The words complained of consisted of four paragraphs which repeated verbatim a second Press Release issued on behalf of the defendant on 9 December 2014 (the Second Press Release). The order of the four paragraphs was not the same as that in the Second Press Release, but nothing material turns on this, or the altered headline for present purposes. The Second Press Release was issued in response to a Press Statement issued by the Director of Public Prosecutions (the DPP) on the 9 December 2014 (the DPP's Press Statement), following her investigation into complaints made publicly and to her privately by the defendant about the CPS's decision to take over the prosecution of his daughter;

v) An article written by the defendant, and published on the Guardian website on 10 December 2014, under the defendant's name (the de Freitas article). This appeared under the headline: "My daughter killed herself after being charged over rape claims" and with the sub-headline: "Eleanor de Freitas died on the eve of her trial for perverting the course of justice – but why did the CPS pursue the case?"

[2] Paragraphs from the judgment below are cited in square brackets.

8. I shall refer to the first three of these as the November publications, and the latter two as the December publications. The relevant words from each are set out in an Appendix to this judgment with the words selected for complaint highlighted in bold.

9. The two publications which were dealt with at trial, but which do not form part of this appeal, were articles appearing in the Guardian on 7/8 November 2014 and on 9 December 2014, which were called the Second and Third Guardian articles, respectively, in the judgment below. The judge decided that the words complained of in each were not defamatory of the claimant and did not refer to him and there is no appeal against those findings.

The issues at trial and their resolution below

10. It is helpful to start by setting out a brief overview of the issues raised at trial, and the manner of their resolution by the judge.

11. Apart from his claim that the words complained of referred to him, the claimant's pleaded case was that the words complained of were seriously defamatory of him and that each publication had caused him serious harm, within the meaning of section 1(1) of the Defamation Act 2013 (the 2013 Act). The defamatory meaning the claimant attributed to the publications with some variation of detail was, in essence, that he had prosecuted Ms de Freitas for perverting the course of justice on a false basis, and was guilty of her rape, or there were strong grounds for suspecting that he was.

12. By his defence, the defendant accepted he was responsible for the publication of the words complained of. However he took issue with various aspects of the claimant's case on identification and meaning; he disputed that any of the publications complained of had caused the claimant's reputation serious harm in the statutory sense, and for each publication, relied on the defence of publication in the public interest provided by section 4 of the 2013 Act (the public interest defence). The public interest defence was the only substantive defence relied on: the truth or falsity of the allegations complained of was not therefore in issue at trial.

13. The judge's 'headline' conclusions were these:

    i) The five publications referred to the claimant and bore meanings that were seriously defamatory of him (in the common law sense) albeit in a lesser defamatory meaning than that of which he complained. These meanings are set out at para 14 below;

    ii) The claimant had failed to establish that the November publications had caused him serious harm within the meaning of section 1(1) of the 2013 Act. The claimant's name was not public at the time of those publications, he was not therefore widely identified as the subject of the relevant words and the November publications had not (on the evidence) caused serious harm to his reputation among those who did identify him (see [65] to [77]). Since serious harm to his reputation was not established, it followed that the November publications were not defamatory of the claimant in the statutory sense, and the claim in respect of them failed;

iii) By way of contrast, the December publications had caused the claimant serious harm. By the time they appeared, the claimant had been named in prominent articles appearing in the national media in connection with these matters including one in the Mail on Sunday on 29/30 November 2014 (called the Second Daily Mail article in the judgment below). This consisted of an interview with the claimant giving his side of the story, the gist of which was conveyed by its headline: "The double life of the tragic suicide girl who accused me of rape – tycoon's son says: 'Don't judge me before you know the whole story". This public identification of the claimant significantly increased the number of those who would have understood the December publications to refer to him, and in those circumstances, and where the defamatory imputations they conveyed about him were serious, the judge had no difficulty in inferring that their publication had caused his reputation serious harm.

iv) However, the public interest defence succeeded in respect of each of the publications complained of. It followed that the claim in respect of the December publications failed, as it would have done for the November publications, had they surmounted the statutory threshold of serious harm. Specifically the judge found the publications satisfied the statutory test laid down by section 4 of the 2013 Act because the statements complained of related to a number of topics of undoubted public interest: see section 4(1)(a) of the 2013 Act, [142] to [150]; and the defendant reasonably believed that the November and the December publications were in the public interest: see section 4(1)(b) of the 2013 Act and [249] to [259].

14. Simplifying the judge's wording somewhat to reflect his findings on reference, the judge found the natural and ordinary meaning of the relevant publications to be these:

i) The First Guardian article meant that there were reasonable grounds to suspect that [the claimant] was guilty of Ms de Freitas' rape (see [58] to [61]);

ii) The Today item meant (i) there were reasonable grounds to investigate whether [the claimant] had brought a private prosecution against Ms de Freitas for perverting the course of justice which was based on inadequate evidence, and against the public interest because of her disturbed mental state; and that it was possible that [the claimant] was guilty of raping her (see [78] to [81]);

iii) The BBC TV Interview meant that there were reasonable grounds to investigate whether the private prosecution [the claimant] brought against [Ms de Freitas] for lying was based on inadequate evidence, and against the public interest because of her vulnerable mental state; and in addition, that it was possible that [the claimant] was guilty of raping her (see [86] to [89]);

iv) The Telegraph article meant that it was questionable whether the CPS and the DPP were right to view the evidence of perverting the course of justice (against Ms de Freitas) as strong and it was a real possibility that Ms de Freitas had told the truth, and had indeed been raped by [the claimant] (see [111] to [115]);

v) The de Freitas article meant there were strong grounds to suspect that the decision of the CPS to prosecute Ms de Freitas may have been a mistake, as

there were strong grounds to doubt there was an evidential case against her; with the implication for the claimant, that there were strong grounds to suspect that he was guilty of rape, and had falsely prosecuted Ms de Freitas for perverting the course of justice (see [124] to [128]).

15. As the judge pointed out, it is the law that the words can defame someone even if he or she is not the direct focus of what is said: see for example *Morgan v Odhams Press* [1971] 1 WLR 1239 at 1243 and *Cassidy v Daily Mirror* [1929] 2KB 331 at 338-9. The judge decided this was the position here: each of the publications complained of implied something about the claimant even though the articles/interviews were not "about" him directly, but about Ms de Freitas or the CPS. It was in this sense, that the judge described each of the meanings he found to be "implied".

The Grounds of Appeal

16. The judge's determination of the public interest defence and of the serious harm issue in relation to the November publications, are challenged by the claimant in this appeal. Further, by a Respondent's Notice, the defendant challenges the judge's determination of the meaning of the de Freitas article, arguing that it bore a lesser defamatory meaning than the one it was found to bear by the judge.

Ground 1: section 4 of the 2013 Act

17. The judge found as I have said, and it was common ground at trial, that the statements complained of formed part of a statement on a matter of public interest, and thus that section 4(1)(a) of the 2013 Act was satisfied. The issue raised before us concerns the judge's determination of the issue raised by section 4(1)(b) namely, whether the defendant reasonably believed that publishing the statement complained of was in the public interest.

18. What is challenged, particularly by reference to the de Freitas article, is the judge's conclusion "that when considering what was reasonable in all the circumstances, as a *mere contributor*, rather than a professional journalist, the defendant was entitled to rely on the media organisations he approached to publish his contributions" (i) to put the claimant's side of the story (which it is submitted is the core requirement for responsible mass media publishing and broadcasting); (ii) to verify his claims and (iii) to seek comment from the claimant, rather undertaking these responsibilities himself. Put another way, it is contended that the fact that the claimant was seriously defamed and his reputation seriously harmed, cannot be balanced, by a "journalistic" exercise that was sub-optimal; nor can the exercise be rescued by an assumption made by a particular participant in 'the process' of publication (in this case, the defendant) that some other participant would complete the conditions necessary for the publication to be produced to a standard that serves the public interest, sufficient to justify the protection provided by the section 4 defence.

Ground 2: section 1(1) of the 2013 Act

19. In this Ground, the claimant contends that the gravity of the imputations in the November publications were such that the judge should have drawn the inference that they had caused his reputation serious harm, regardless of the sufficiency of the evidence of actual harm called by the claimant to prove this aspect of his case. The

Grounds of Appeal, including this one, were settled before the judgment of the Court of Appeal in *Lachaux v. AOL & Ors* [2017] EWCA Civ. 1334; [2018] 2 WLR 387,[3] was handed down. This was an appeal from a decision of Warby J, where appellate guidance was given on the meaning and effect of section 1(1) of the 2013 Act. However Mr Browne QC for the claimant submits the reasoning in *Lachaux* fully supports the core argument for the claimant in this case.

20. I can deal relatively briefly at the outset with the meaning issue raised by the Respondent's Notice, and then with the issue of serious harm raised by Ground 2: these do not require any understanding of the factual background, to which it will be necessary to refer before turning to the substance of Ground 1 of the appeal.

Meaning: the de Freitas article

21. It is common ground that in an appeal against meaning, the court should proceed cautiously, and that an appellate court should only intervene if it is satisfied that the judge is wrong: see *Bukowski v CPS* [2017] EWCA Civ. 1529 at paras 30 and 30. I am not persuaded that the judge was wrong in relation to this issue, which as Mr Barca QC confirmed in argument, is a discrete one with no wider implications for the determination of the appeal as a whole.

22. The defendant does not suggest that the judge, with his immense experience in this field, misdirected himself as to the law. As to that, the judge set out at [13] to [17] the well-established principles by which the court identifies the single natural and ordinary meaning of the relevant words. The criticism is what is said by Mr Barca QC to be a paradox in the judge's approach (presented briefly to us more as a puzzle, than an error) as he submits that the reasons the judge gave at [126] and [127] for rejecting the meaning advanced by the claimant of "actual guilt" applied with equal force to the alternative meaning of "strong grounds to suspect" and no adequate reasons were given for the actual meaning that the judge found. In my view, neither criticism is well-founded.

23. The claimant had pleaded in summary that the article meant that he was guilty of rape, alternatively, that there were strong grounds for suspecting that he was. The judge explained that the various statements made by the defendant when talking or writing about his daughter's case such as "there was nothing to the prosecution for perverting the course of justice" did not mean that the claimant *was* guilty of rape (the judge described this as a "false dichotomy"). He had made a similar point at [60] to [61] in relation to the First Guardian article, where he said that it was illogical to jump from the proposition that there was no case against Ms de Freitas for perverting the course of justice to one that the man she accused was guilty of rape. This was, amongst other reasons, because a conviction requires proof to a criminal standard, and a person can make a false but honest allegation of rape. The judge also said there were various parts of the de Freitas article that offered some balance, and pointed away from guilt.

24. It did not follow from this analysis however, that the de Freitas article read as a whole, did not imply that there *was* a strong suspicion that the claimant was guilty of rape. It is true, as Mr Barca QC points out, that the judge did not give 'chapter and

[3] This decision is currently under appeal to the Supreme Court.

verse' for the meaning he found. The determination of meaning of course, is always a matter of impression, rather than forensic analysis, where overelaboration is to be avoided. In some cases, more ink needs to be spilt on explaining the rejection of a pleaded meaning, than in explaining the actual meaning found. It seems to me, on a fair reading of this part of the judgment, that the judge considered this was one of those cases. In any event, his process of reasoning can, in one sense, be discerned from the meaning he found: if, as he considered the relevant words suggested there were strong grounds to doubt there was an evidential case against Ms de Freitas, and that there were strong grounds to suspect that the decision of the CPS to prosecute Ms de Freitas may have been a mistake, it was not unreasonable to infer that there were strong grounds to suspect the claimant was guilty of her rape, and had therefore falsely prosecuted a case against her.

25. If more needs to be said about this aspect of the case, which I doubt, reference can be made to a collection of matters to be discerned from the de Freitas article itself, including the context not complained of, as identified in writing by the claimant below, which taken as a whole, strongly support the judge's determination. These included that the defendant wished to see his daughter vindicated posthumously with regard to the allegation of rape; that Ms. de Freitas reported the allegation to the police on advice resulting in the claimant's arrest (giving some credence to the allegation); that the reasons given for not charging the claimant (to protect a vulnerable woman and perceived inconsistencies in Ms. de Freitas' account) had nothing to do with the merits; that the reference to Ms. de Freitas wishing to put "it" behind her, would or could reasonably be understood to be a reference to the rape and that the prosecution should not have taken place. All this, whilst not meaning that the claimant was guilty, tended to imply there were strong grounds for believing that Ms de Freitas' allegation was true.

Serious Harm: Section 1(1) of the 2013 Act

26. Section 1(1) of the 2013 Act provides that: "A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant."

27. I have already identified in broad terms what lay behind the different findings on serious harm as between the November and December publications.

28. At the stage at which the trial took place, there had been a number of cases at first instance which had considered the implications of the introduction of the section 1(1) threshold, but none at appellate level. One of those was *Sobrinho v Impress Publishing SA* [2016] EWHC 66, [2016] EMLR 12 a decision of Dingemans J, who summarised at paras 46 to 50, the state of the law in relation to serious harm as it was then understood. The judge set out those propositions, which at [18] he described as uncontroversial. Materially for present purposes, the propositions included the following:

> "46. …. first, a claimant must now establish, in addition to the requirements of the common law relating to defamatory statements, that the statement complained of has in fact caused or is likely to cause serious harm to his reputation…

> 47. Secondly it is open to the claimant to call evidence in support of his case on serious harm and it is open to the defendant to call evidence to demonstrate that no serious harm has occurred or is likely to do so. However, a Court determining the issue of serious harm is, as in all cases, entitled to draw inferences based on the admitted evidence. Mass media publications of very serious defamatory allegations are likely to render the need for evidence of serious harm unnecessary. This does not mean that the issue of serious harm is a "*numbers game*". Reported cases have shown that very serious harm to a reputation can be caused by the publication of a defamatory statement to one person.
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> 48. Thirdly there are obvious difficulties in getting witnesses to say that they read the words and thought badly of the claimant, compare *Ames v The Spamhouse Project* [2015] EWHC 127 (QB) at paragraph 55. This is because the claimant will have an understandable desire not to spread the contents of the article complained of by asking persons if they have read it and what they think of the claimant, and because persons who think badly of the claimant are not likely to co-operate in providing evidence.
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> 49. Fourthly, where there are publications about the same subject matter which are not the subject of complaint (because of limitation issues or because of jurisdictional issues) there can be difficult points of causation which arise: see *Tesla Motors v BBC* [2013] EWCA (Civ) 152 and *Karpov v Browder and others* [2013] EMLR 3071 (QB); [2014] EMLR 8. The decision of the House of Lords in *Associated Newspapers v Dingle* [1964] AC 371 does not prevent these difficulties. That decision was not a decision on causation. The decision in *Dingle* prevents a defendant from relying in mitigation of damages for libel on the fact that the same or similar defamatory material has been published in other newspapers about the same claimant. *Dingle* does not address the issue of whether a publication has caused serious harm.
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> 50. Fifthly, as Bingham LJ stated in *Slipper v BBC* [1991] QB 283 at 300, the law would part company with the realities of life if it held that the damage caused by publication of a libel began and ended with publication to the original publishee. Defamatory statements are objectionable not least because of their propensity "*to percolate through underground channels and contaminate hidden springs*" through what has sometimes been called "*the grapevine effect*". … "

29. There was an obvious link between the claimant's case on identification and his case on serious harm as the judge identified. The claimant had to establish there were, say, readers of the First Guardian article, who knew enough to identify him as the man accused by Ms de Freitas, and who would therefore understand the words to refer to

and defame him: see the judge's explanation at [63] to [65]. Had there been no such readers, the claimant would not have been identified as the person Ms de Freitas had accused of raping her, he would have had no cause of action in libel, and, self-evidently, his reputation would not have been harmed, seriously or otherwise. In a case where the claimant was not named in the words complained of, and there was other publicity about the case, other than in the publications sued on, as the judge said, correctly in my view, the assessment of the issue of serious harm required some care.

30. In approaching this task the judge examined what had emerged from the evidence presented by the claimant on identification. As to that, the claimant made his case as to those who knew him to be the target of the rape allegation and/or to have pursued the private prosecution, by reference to certain individuals who he identified by name, others by description. When considering the First Guardian article, the judge put these individuals into seven categories, which he said were not mutually exclusive or exhaustive, including people to whom Ms de Freitas had made the allegation, and family, friends and acquaintances in whom he confided. The judge then examined the evidence on this topic in detail: see [65] to [77]. In summary, the judge was not persuaded there were large numbers in any of the categories or that collectively they added up to a large number; little of the evidence from friends and acquaintances touched on the First Guardian article at all, and what little there was, was strongly supportive.

31. It is important to note that when considering what this evidence amounted to, the judge expressly took account of the propositions he had identified by reference to *Sobrinho.* He recognised that the fact that the claimant had been unable to adduce evidence from the people in the categories other than those the judge had already mentioned, did not mean the claimant's case on serious harm must fail; that the difficulties of obtaining such evidence are obvious and well-recognised; that in a reference innuendo case it might be obvious or a proper inference that the claimant's reputation suffered serious harm because a substantial number of people who knew the identifying facts read the statement complained of; that serious harm can be caused by a small-scale publication of a serious allegation; and that it may be enough that the publication contributed to serious harm, it does not have to be the exclusive cause: see [68].

32. However, whilst the judge accepted that hostility and caution had been displayed towards the claimant and that he had suffered serious harm to his reputation by late 2014, he was not satisfied this was causally connected to the First Guardian article. His conclusion was this was probably due to information about the rape allegation and the prosecution that had been spread by word of mouth in the claimant's social circles, and/or by publications, some of which named the claimant, but in respect of which he had not sued. The judge drew particular attention in this regard to an article appearing very late on 7 November 2014 on the website of the Daily Mail under the headline "Wealthy financier who Eleanor de Freitas said was a rapist offers sympathy to her family, saying her death was a 'very unfortunate event'". This article (the First Mail article) unlike any of the November publications, identified the claimant by name as the person who "had launched private prosecution against Eleanor de Freitas because she had accused him of rape": see further [55] and [77].

33. A similar analysis, but tailored to the discrete facts arising in each case, led to the conclusion that the claimant had not established that the Today item and the BBC TV News interview had caused him serious harm either: see [85] and [91].

34. Mr Browne QC submits that an allegation of suspicion of rape of whatever shade or level is so serious that it must always be considered seriously damaging to reputation, on the plain and simple wording of section 1(1) of the 2013 Act, and that in this case, an inference of serious harm should have been drawn from the nature of the allegation without more. The judge went wrong he submits, because instead of drawing such an inference, he applied a pre-*Lachaux* approach, that is, he went "searching for consequences" and considered issues such as causation, reader numbers and damage that went to quantum, if anything, but were irrelevant to the establishment of serious harm.

35. It is correct, as Mr Browne QC points out, that in *Lachaux* the Court of Appeal departed from certain aspects of the interpretation given to section 1(1) of the 2013 Act by Warby J in that case. It is also true, that the judge did not have the benefit of the guidance in *Lachaux.* However I am not persuaded that it follows that the judge's approach to the evidence in this case, or his conclusion on its particular facts was wrong.

36. In *Lachaux* the decision on serious harm was made after a two-day trial of a preliminary issue, which involved the receipt of extensive written and oral evidence. The allegations concerned had been made in the Huffington Post, the Independent and the Evening Standard by Afsana Lachaux, about her ex-husband, including that he was a wife-beater, who had falsely accused his ex-wife of kidnapping their son and had then snatched him back. The Court of Appeal decided that an unnecessarily elaborate procedure had been adopted to determine the issue of serious harm at the preliminary stage; nevertheless that on the facts, the judge's conclusion that serious harm had been caused was justified; the gravity of the imputations derived from the published statements was obvious, and a clear inference was to be drawn that serious harm to the reputation of the claimant in that case had been caused: see para 85. The Court of Appeal also held, amongst other things, that it was necessary to distinguish between the harm caused to reputation by the publication of 'falsehoods' from the consequences that may flow therefrom: see para 27.

37. Mr Browne QC relies in particular on what was said in *Lachaux* at para 70, 73 and 82(3). There, Davis LJ, in a judgment with which the other members of the Court agreed, said that serious reputational harm is capable of being proved by a process of inference from the seriousness of the defamatory meaning; and that if the meaning established (at the preliminary stage) conveys a serious defamatory imputation, then an inference of serious reputational harm ordinarily can and should be drawn. Further, this was not an approach confined to imputations of the utmost gravity, as some earlier cases might have suggested. I would add that this latter point obviously modifies the approach described in para 47 of *Sobrinho*.

38. However, as Davis LJ also made clear, there may be cases where it is open to a defendant to challenge such an inference, either at the preliminary stage or at trial, on evidence unrelated to the defamatory meaning of the words complained of. Thus, at para 70 Davis LJ said that

> "70. If.. the meaning so established [as a preliminary issue] conveys a serious defamatory imputation…then an inference of serious reputational harm ordinarily can and should be drawn accordingly. The defendant may seek to rebut or challenge the drawing of such an inference: but that is a different point and may well then, if facts are in issue, be a point suitable for trial…"

39. Davis LJ went on to say:

> "80. Whether in any given case the imputation is of sufficient gravity as of itself to connote serious reputational harm (quite apart from the question of consequential or special damage) should therefore normally be capable – where the question of serious harm is in issue and is not appropriately to be left to trial – of being relatively speedily assessed at the meaning hearing. If it is, nevertheless, desired by a defendant to put in evidence at an interlocutory stage designed to show that there is no viable claim of serious harm the summary judgment procedure under CPR Part 24 is available if the circumstances so justify. There may, for instance, be cases where the evidence shows that no serious reputational harm has been caused or is likely for reasons unrelated to the meaning conveyed by the defamatory statement complained of. One example could, for instance, perhaps be where the defendant considers that he has irrefutable evidence that the number of publishees was very limited, that there has been no grapevine percolation and that there is firm evidence that no-one thought any the less of the claimant by reason of the publication. Whether such evidence is in truth unanswerable and whether such matters are best resolved on a summary judgment application or best left to trial is then for the court to determine. …
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> 82. …I think that an unnecessarily elaborate procedure was adopted in the present case. …I thus consider that where a claimant has advanced a sufficient case on serious reputational harm, by reference to the seriousness of the imputation conveyed by the words used, then ordinarily the case should be left to go to trial: where there can then be finally decided the extent to which there was serious reputational harm and, if it is so established, what the resultant damages – including also recoverable damages for consequential loss (if any) – should be."

40. Returning to this case, it seems to me that the exercise undertaken by the judge in relation to the issue of serious harm was precisely that which was contemplated in *Lachaux.* In a case where the matter is contested, and cannot be disposed of summarily, the issue of serious harm is, in short, best left to trial, where it can be determined as appropriate, on the evidence. At first blush it might seem surprising that such serious allegations, as the judge found them to be, promulgated in the national media, could fail to surmount the serious harm threshold, not least because,

as was also said in *Lachaux*, section 1(1) of the 2013 Act appears to be designed to weed out trivial and undeserving claims. This was the inexorable result however of the judge's careful analysis of the evidence in this case.

41. The key problems for the claimant, as the judge identified, were reference (that is, the limited number of relevant people or publishees who read or saw the relevant words and understood them to refer to the claimant) and causation. The fact that an inference of serious harm can be drawn in an appropriate case does not in my view preclude the sort of causation analysis undertaken by the judge, depending always on the facts. Ultimately, the judge had to be satisfied that it was the particular publication concerned that had caused the claimant serious harm; and for the reasons he gave, when considering the complex facts which were before him, he was not so satisfied here. I would add that I do not think it can be sensibly doubted that the judge had in mind that a serious imputation in an appropriate context, might justify an inference of serious harm without the need for further analysis; he directed himself accordingly, and his application of such an approach was what led in part to his different conclusion on serious harm in relation to the December publications.

42. I turn next to the background.

The background

43. The facts are set out in the long and careful judgment of Warby J, which must be read in full, in order for his conclusions to be properly understood: see [2016] EWHC 1853 (HC). The judge divided his analysis of the facts into two sections. At [21] to [39] the judge set out what he described as the relevant factual background; and at [162] to [236] he concentrated on events that he considered contributed or could have contributed to the defendant's state of mind, and which had a bearing on the reasonableness of the defendant's state of mind: see [161]. The judge's findings of fact are not challenged in this appeal, and what follows is a summary of his account. It is to be noted that with limited and immaterial exceptions, the judge accepted without reservation, the defendant's evidence about his motives for his actions and about what he knew or believed at various times.

44. The claimant had a very brief relationship with Ms de Freitas in late December 2012, which he ended as a result of his discovery of certain information about her online. They had known each socially for some years, had been friends since 2012 and had friends in common. Over a period of weeks they had carried out what the judge described as "flirtatious" correspondence by text and on social media.

45. On 23 December 2012, the claimant and Ms de Freitas met and spent the evening and night together at the claimant's flat where they had sex. This meeting and what occurred during the encounter had it seems, been presaged in the messages passing between them before it occurred. The following day, they went shopping together. This shopping trip included a trip to Harrods and a visit to an Ann Summers sex shop, where they spent some time, with Ms de Freitas choosing and picking out various sex toys which they paid for jointly. CCTV footage apparently showed them laughing and kissing in that shop. After they parted company, the claimant did some Internet searches and as a result of what he discovered, told Ms de Freitas, by telephone that he did not want to see her again. Ms de Freitas, who lived with her parents, and was close to them, suffered from affective bipolar disorder, a disorder that had been

diagnosed in 2008, when she was at university. She was upset by the ending of the relationship, and made this known to others, including by social media and by text. She sent a text to one friend saying the claimant had "fucked her and chucked her". To another mutual friend she sent a text saying: "I don't understand what I have done wrong???"

46. In early January 2013, it came to the claimant's attention that Ms de Freitas was alleging to mutual friends that he had assaulted her, drugged her and would not let her leave his flat; and that she had asked a mutual friend, who was a well known gossip, to spread this information. The claimant became very upset. He contacted the defendant on 4 January 2013 and left a voicemail, saying Ms de Freitas had been making a lot of false allegations about him, some of them were serious, and he was on his way to Chelsea police station to officially complain of her conduct. Ms de Freitas made a complaint of rape at the same police station that same afternoon, alleging to the police that the claimant had raped her, between 23 and 24 December 2012 at his flat.

47. In the light of Ms de Freitas' complaint to the police, when the claimant arrived at Chelsea Police Station, he was arrested on suspicion of rape. He was detained overnight, and interviewed under caution the following day when he denied the allegations. Whilst he was in custody, the claimant's flat was searched and his mobile phone was seized. He was released on police bail. He and his solicitors thereafter gathered evidence, including CCTV footage and various communications, which they considered exonerated the claimant and which they presented to the police. Some six weeks after his arrest, on 20 February 2013, the claimant was told that no charges would be brought against him. This decision was made by a Detective Inspector King, the officer in charge of the investigation. The claimant then made a complaint against Ms de Freitas for perverting the course of justice, which he asked the police to investigate. They refused to do so. The claimant thereafter instructed solicitors (a firm, specialising in private prosecutions) with a view to bringing a private prosecution against Ms de Freitas. He also told the defendant and Ms de Freitas of his intentions in this connection, in messages sent to them on 21 February 2013.

48. This was the first of a number of communications from the claimant to the defendant and Ms de Freitas, and latterly, in consequence of the events surrounding the publications complained of, to the defendant and his solicitors, that were in strong terms, and perceived as harassment. Some, including the service of the summons itself, were reported to the police as such.

49. Between March and August 2013, the claimant and his solicitors gathered more evidence, obtaining a number of witness statements. The police assisted when asked to do so, and were generally helpful. DI King provided the claimant's solicitors with a witness statement dated 13 August 2013, which exhibited a note of what Ms de Freitas said in her interview with the police (on 4 January 2013) and the note of his rationale (the Rationale) for taking no further action in the investigation of the claimant for rape.

50. On 2 August 2013, the claimant began the private prosecution against Ms de Freitas by laying an information before Westminster Magistrates Court. This alleged that she had perverted the course of justice by making a false allegation of rape against the claimant to the Metropolitan Police Service with intent to pervert the course of justice.

On 13 August 2013, the claimant's solicitors served on Ms de Freitas the summons, a schedule of offences, and a Case Summary.

51. The Case Summary set out the rape allegation as noted by the police, and what were said to be the true events of 23 and 24 December 2012 including text messages Ms de Freitas had sent to friends, and references to what the CCTV footage showed of their visit to Ann Summers: see [173] to [174]. It also referred to DI King's Rationale for taking no further action. It "noted that following the commission of the alleged offence before making a complaint to the police [Ms de Freitas] (i) communicated with [the claimant] in a manner inconsistent with a rape having taken place; (ii) went shopping to Ann Summers to buy sex toys with [the claimant] the day after the alleged rape, and (iii) sent a text message to a mutual friend stating that [the claimant] had "fucked her and chucked her" with no mention of the sex being non-consensual".

52. The case presented against Ms de Freitas in outline was that after their date of 23 and 24 December 2012, the claimant told Ms de Freitas he did not wish to see her again; after this she began spreading false and malicious rumours about his behaviour towards her to their mutual friends; when the claimant contacted her by email on 4 January 2013 and threatened to report the matter to the police in order to stop her spreading those rumours, she went to the police herself and made the entirely false allegation that she had been raped. Advance Information in support of the prosecution, consisting of 17 witness statements, and their exhibits, was served on Ms de Freitas' solicitors in September 2013.

53. Ms de Freitas was summonsed to appear in the first instance at Westminster Magistrates' Court on 11 September 2013. On 17 September 2013 she instructed new solicitors. Further hearings took place at Southwark Crown Court in September and November. At the Preliminary Hearing on 25 September 2013 the CPS was asked by Ms de Freitas' defence team to take over the prosecution and to discontinue it. The CPS in the first instance, asked the police to reconsider conducting an investigation into the claimant's allegation. The police refused to do this, and confirmed their original decision to take no action against Ms de Freitas.

54. The case was then reviewed by senior personnel within the CPS: first by Ms Sarah McLaren, Head of Homicide and the Rape and Serious Sexual Offences Unit (RASSO) for the CPS and then Ms Alison Levitt QC, Principal Legal Advisor to the DPP. Amongst the documents reviewed was a lengthy psychiatric report served on behalf of Ms de Freitas by her defence team in support of their contention that the prosecution should be discontinued. Having conducted this review, on 5 December 2013 the CPS resolved to take over the prosecution and continue it. Ms de Freitas subsequently pleaded not guilty on arraignment at Southwark Crown Court at a Plea and Case Management Hearing on 24 January 2014. A trial date of 7 April 2014 was set. On 4 April 2014, three days before her trial was due to begin, Ms de Freitas took her own life.

55. A Coroner's Inquest had to be held into Ms de Freitas' death. This was due to be heard in the first instance on 7 November 2014. The defendant wanted the scope of the Inquest expanded to include the conduct of the CPS in taking over the prosecution, concerning what he said were institutional failings that had led to or played a part in his daughter's death. Between August and November 2014 he enlisted the support of two charities, Victim Support and Inquest, and instructed Ms Harriet

Wistrich of Birnberg Peirce to act on his behalf. The defendant wrote to the Coroner on 19 September 2014, inviting such an expansion, and to the DPP at the same time asking for answers to a number of questions he raised about the decision-making of the CPS. His letter to the Coroner was followed by one from Ms Wistrich making submissions in support of an application to adjourn the inquest, and raising the possibility of an "Article 2 inquest", that is an inquest giving effect to the duty of the State pursuant to Article 2 of the European Convention on Human Rights (the Convention) to conduct an investigation where it appears death may have resulted from State action.

56. On 30 October 2014, the Coroner refused the application to adjourn. In his letter of reply to the defendant's solicitors (which he said could be read as his ruling) the Coroner said he considered the witnesses and statements that had been provided would be sufficient to enable him to answer the four questions he was required by statute to answer; he was not persuaded that the inquest engaged Article 2 of the Convention, but that Ms Wistrich was "welcome to make further oral submissions on scope prior to the commencement of the hearing on 7 November 2014."

57. Thereafter the defendant went public as the judge put it, at the suggestion and with the support of Ms Wistrich in particular, who contacted selected media organisations, namely the *Guardian* and the BBC on his behalf to interest them in the story; [4] this was then followed by the provision to the *Guardian* of the First Press Statement drafted by the defendant, and by the defendant's two interviews with the BBC.

58. This media campaign generated a considerable amount of publicity, in addition to the November publications themselves.

59. In between the date of the November and the December publications, the defendant received further information from three sources: the claimant, DI King and the DPP. The claimant sent the defendant a series of emails (from late on 6 November 2014 to 8 December 2014) in which he variously threatened to bring defamation proceedings against the defendant and set out the detail of the case against Ms de Freitas: see [226] to [229], [232] and [235]. I should add the claimant's communications to the defendant throughout the material period, that is from February 2013, came under a scrutiny at the trial, and it is fair to say their content and tone did not find favour with the judge (see for example, [134] and [260]). Certainly, the judge accepted that they were perceived as harassment by the defendant and his daughter; and viewed similarly after her death, by the defendant, who considered the claimant was out to hurt him and his family, and by Ms Wistrich. In the event, the claimant received harassment warnings, was prosecuted for harassment, and in June 2015, was acquitted.

60. Returning to the narrative, DI King said in emails to the defendant after Ms de Freitas' death (including one sent after the defendant's meeting with the DPP on 20 November, see below) that he maintained the view that she should not have been prosecuted. In an email of 25 November 2014 he said: "In this case there are no clear facts that she had falsified her claim of rape. The fact that I authorised no further

[4] So for example, on 5 November 2014, Ms Wistrich contacted Ms Laville of the Guardian, asking her whether she might be interested in writing "a story re state involvement that may have led to the suicide of a rape victim."

action against [the claimant] does not imply the victim had lied about her allegation. We have never doubted as to whether Eleanor's complaint of rape was genuine or not." (see [231]).

61. The DPP investigated the concerns raised by the defendant. The result of the investigation was published in the DPP Press Statement issued on 9 December 2014. The DPP made it clear she considered that the decision to take over and continue the prosecution of Ms de Freitas was correct. Both limbs of the prosecutors' test (the evidential test, and the public interest test) were satisfied. The Press Statement said in part:

> "… Having considered the detail and the issues raised by the family, I am satisfied that the decision making in this case was correct and that it was made in accordance with our policies and guidance. I have separately met with Ms de Freitas' father, David de Freitas, to explain in more detail our decision and the evidence informing it …
>
> … the evidence in this case was strong and having considered it in light of all of our knowledge and guidance on prosecuting sexual offences and allegedly false rape claims, it is clear there was sufficient evidence for a realistic prospect of conviction for perverting the course of justice. This was evidence including text messages and CCTV footage that directly contradicted the account Ms de Freitas gave to the police. This was not assumption based on her behaviour or actions which fall into myths and stereotypes about how alleged rape victims should behave. It was on this basis that we concluded that there was a realistic prospect of proving that the rape allegation made by Ms de Freitas was false, and there was also a strong public interest in prosecuting due to the seriousness of the alleged offence which was maintained by the defendant for some time and which led to the arrest of an individual.
>
> …
>
> I am satisfied that prosecutors had taken the necessary steps in assuring themselves that Ms de Freitas' mental health had been properly considered. This was in the form of a very detailed report by a consultant forensic psychiatrist instructed by Ms de Freitas' legal team, who also took into account the views of Ms de Freitas' consultant psychiatrist. That medical assessment was clear. The doctor instructed by Ms de Freitas' legal representative recommended that she was aware of the implications of making a false allegation, as she was alleged to have done, and was fit to stand trial. We do not take on these kinds of prosecutions lightly, but the medical evidence provided to us could not justify dropping such a serious case. No further representations were made to us as to Ms de Freitas' health, which would of course have been carefully considered.

> There has been speculation that the police did not agree with the prosecution for various reasons. However, the police never undertook an investigation into the alleged perverting the course of justice nor did they consider all the material provided to us by the private prosecution. They were therefore not in a position to form a view on whether there was sufficient evidence to prosecute. …"

62. As mentioned, the information in the DPP Press Statement was fleshed out with more detail (not made public for reasons of sensitivity) at a face-to-face meeting between the DPP and the defendant and his solicitors, held on 20 November 2014, of which there is a detailed note, and in private correspondence from the DPP to the defendant and his solicitors sent before the issue of the DPP's Press Statement. In that correspondence specific answers were provided to a series of questions the defendant and his solicitors had asked before and after the meeting. Mr Browne QC specifically drew our attention to these underlying documents during the course of the argument on Ground 1.

63. The defendant's response to the DPP's Press Statement was the Second Press Release, issued on his behalf on the same day. The de Freitas article appeared the day after that. The Second Press Release, parts of which appeared in the Telegraph article, said:

> "While we appreciate that the DPP has made clear that Eleanor was not found guilty of perverting the course of justice, and that the evidence in the case was never tested, we are disappointed that she seeks to justify the original decision, despite the subsequent tragedy.
>
> We cannot comment on the detail of the DPP's analysis of the evidence as we still haven't seen it. However, whilst it seems clear from that analysis that Eleanor behaved in a way that was confusing and inconsistent with the behaviour of the classic victim, this is a far cry from evidence that she positively lied. Anyone who has worked with rape and domestic abuse victims knows that many victims behave in ways both before and after attacks that may, at first blush, suggest that they must have consented at the time. Thus they may positively seek and encourage the sexual encounter beforehand and they may maintain what appears to be positive contact afterwards. This does not prove they consented at the time and it is deeply disappointing that despite the extensive research and training now available in relation to this, the DPP precludes it as a possibility in Eleanor's case. Whilst such inconsistent behaviour may make the prosecution of a rape very difficult, this is a far cry from the need to prosecute the complainant – particularly where she suffers from a serious mental illness.
>
> The CPS decision and subsequent review was based only on documentary material provided by the private prosecutor. It is notable that the police, who met the people involved, felt that while the rape allegation could not be pursued, neither should

> the allegation for perverting the course of justice. We feel this may be significant in the very different approaches taken by them.
>
> The DPP says that they took into account the fact that Eleanor had bi-polar effective disorder. However it appears to us that they did not. Research has shown that people with this disorder are 17 times more likely to attempt/commit suicide than those without.
>
> David decided to make his daughter's case public, despite the emotional difficulties. He was aware that his daughter's mental health issues and her sexual history would be subject to public scrutiny, but felt compelled to raise the issue for lessons to be learned so that other vulnerable women and their families do not have to suffer what his family has and lessons can be learned.
>
> When Eleanor received the news from her lawyer that the CPS had taken over the prosecution, she emailed him in despair. "I am in utter disbelief about the decision of the CPS… I will regret reporting this to the Sapphire "team" for the rest of my life. I did that as my duty to this country, and to women…Can we get reporting restrictions? This is of extreme importance to me."
>
> The DPP's justification of their decision in the light of the subsequent tragedy is deeply disappointing and will send a message out to anyone who is thinking of reporting rape that it would be better if they didn't unless they have behaved as a stereotypical victim."

What the defendant knew or believed

64. When considering the events that were or may have been material to the defendant's state of mind, for the purpose of ascertaining the reasonableness of his belief at the time of each publication, the judge said his review needed to start well before the key events, in order to assess his state of mind in its proper context. This was obviously not an easy task for the judge amongst the welter of detail, nor is there a particularly easy path through that detail to his findings. Picking out the main strands however, the position seems in summary, to have been this.

65. With few exceptions, it appears (i) from what the defendant said, and the judge accepted, that Ms de Freitas was the main source of the defendant's information up until her death, and that he had only limited knowledge of the primary documents on which the prosecution of her was based; and (ii) what further information the defendant had after her death came from the claimant, DI King, and the DPP. The individuals from Inquest and Victim Support who helped the defendant, were, on the judge's findings, largely reliant on the defendant for their understanding of the facts.

66. Starting at the beginning, the defendant first learned of Ms de Freitas' allegation of rape at the time she made it to the police. At that stage, she told him she could not be sure what happened, but it was obvious they had unprotected sex, something she would never have consented to; she also told him she believed the claimant had drugged her and 'water-boarded' her. The defendant did not press his daughter for details of her encounter with the claimant, or for the progress of the police investigation into her allegations about it, as he did not want to add to her stress. In relation to the decision of the police not to proceed with the charge of rape against the claimant, he was told by his daughter that the police had explained they did not want to put her through a great deal of stress that would have amounted to her effectively being put on trial, particularly because of her bipolar condition. The defendant's view was that his daughter was disappointed, but accepted this and decided to get on with her life.

67. As for the private prosecution, the defendant did see the Case Summary, but his evidence was that, apart from a brief look at the claimant's statements, he did not see any of the Advance Information, and was not party to its analysis by Ms de Freitas' legal team in consultation with her. He did not see therefore the statement from DI King, exhibiting the Rationale for not prosecuting the claimant for rape, or the other witness statements served or a complete print out of the exchanges (Facebook messages and texts) passing between Ms de Freitas and the claimant, before their sexual encounter, or messages passing between them, and to some of their mutual friends afterwards. He saw only some extracts of these exchanges that were shown to him by his daughter, and by her legal advisors thereafter.

68. The defendant did however accompany Ms de Freitas to some hearings in September 2013. By the 19 September, his daughter had conveyed to him the gist of the advice she had been given by her new legal team, which was that the prosecution would not pass the tests set out for Crown Prosecutors. Further, the defendant knew of her defence team's application to the CPS to take over the case and discontinue it, which he strongly supported. He also saw the correspondence from the CPS (Ms McLaren) sent to the Resident Judge at Southwark Crown Court, before its decision to take over the prosecution was made: this set out what the CPS were doing, and that their review encompassed the psychiatric report on Ms de Freitas submitted on behalf of the defence.

69. The case presented by the claimant, initially at any rate, was that the defendant was malicious and dishonestly selective in relation to the facts. By the end of the trial however, the claimant's position was that the defendant ignored everything that tended to contradict his view, did not think about how what he said might harm the claimant's reputation and did not care: see [152]. Further, it was an important part of the claimant's case that the defendant's media strategy was inherently improper in that it was designed to put pressure on the Coroner to make a decision in favour of the defendant, for fear of public criticism if he did not. The judge rejected these and many other criticisms of the defendant at each stage of his analysis. The case that the media strategy was improper, failed on the facts. The judge said at [219]:

> "Mr de Freitas' purpose was not to intimidate. I do not believe that he would have seen that as an achievable, let alone proper objective. I accept that what he had in mind was to show the Coroner that the issues he wished to have investigated, and

> which he (rightly) believed to be matters of public interest were recognised as such by others. I do not consider that to be improper, or illogical."

70. The judge accepted that the defendant believed: (i) that the police had investigated the allegation of perverting the course of justice against his daughter (because this would have been part of what was considered when they investigated the allegation she had made of rape): see [186]; (ii) that had the CPS complied with their disclosure duties in a timely fashion (in relation to his daughter's Achieving Best Evidence interview) his daughter's death could perhaps have been avoided (as her solicitors intended to use the interview as her evidence, but she killed herself before the meeting at which they intended to tell her of this, see [191]; and (iii) that the defence's psychiatric report (on the defendant's interpretation) indicated a continuing prosecution of Ms de Freitas involved a real risk of completed suicide: see [193].

71. The police as I have already said, did not investigate Ms de Freitas for perverting the course of justice in February 2013, and declined the CPS's later request that they reconsider that refusal: see paras 46 and 51 above. The judge however decided enquiries made by the defendant of DI King in August 2014 were genuine attempts to find out what the facts were in relation to this issue. The judge also found that as a result of what DI King told him, the defendant genuinely believed the police had considered whether to investigate Ms de Freitas for perverting the course of justice, had reached a decision not to do so on the basis of all the evidence, and this decision remained unaltered after the intervention of the CPS, by which stage no further evidence had emerged from the claimant: see [209] to [214].

72. A chronology prepared by the defendant and supplied to his helpers, was described by the judge as open to criticism as an unbalanced and tendentious account. It painted the claimant's conduct as one of "appalling criminality" on the basis of partial excerpts from the messages passing between his daughter and the claimant. The judge found however this was not as a result of 'wilful selectivity'. It occurred because the defendant had not seen the full print out of those messages in the Advance Information, or the account of them in the claimant's witness statements: see [205] to [208]. Further, the judge found that the defendant did not wilfully misled those assisting him from Victim Support or Inquest, or "seriously misrepresented" what he knew; and their belief that the facts gave rise to issues of public interest, provided some support for the defendant's case: see [195], [198], [200] to [203].

73. In the event, the judge's conclusion was that the defendant's beliefs about the various matters germane to the public interest defence were genuinely held.

The public interest defence: section 4 of the 2013 Act

74. Section 4 of the 2013 Act provides that:

> "**4 Publication on matter of public interest**
>
> (1) It is a defence to an action for defamation for the defendant to show that—
>
> (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and

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

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

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

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

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

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

75. The area of controversy summarised in Ground 1 of Appeal, raises difficult issues: in particular, the extent to which contributors to media publications or 'citizen journalists' are subject to the same standard of 'responsible conduct' that might be required of professional journalists, and the organs in which they publish, if they are to take advantage of the public interest defence. These issues fall to be considered against the statutory language used in section 4 of the 2013 Act, the common law roots of that provision and the unusual and tragic facts of this case.

76. Section 4 of the 2013 Act as it says at subsection (6), abolished and replaced the common law defence identified by the House of Lords in *Reynolds v Times Newspapers and ors* [2001] 2AC 127. However, the judge and the parties proceeded on the footing that the common law principles identified in *Reynolds* as interpreted or applied in subsequent cases, such as *Bonnick v Morris* [2002] UKPC 31 [2003], 1 AC 300, *Jameel (Mohammed) and anor v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359 and *Flood v Times Newspapers Ltd* [2012] UKSC 11, [2012] 2 AC 273, were of relevance to the interpretation of section 4. Though the point was uncontroversial before us, in my view, this is the correct approach.

77. As the judge noted, the Explanatory Notes to section 4 of the 2013 Act state that the intention is to create "a new defence … of publication on a matter of public interest … based on the existing common law defence established in *Reynolds* ...and … is intended to reflect the principles in that case and subsequent case law… [it] is intended essentially to codify the common law defence …[while] the current case law would constitute a helpful (albeit not binding) guide to interpreting how the new statutory defence should be applied." See paras 29 and 35. The Explanatory Notes also say at para 29: "*Subsection (1)* provides for the defence to be available in

circumstances where the defendant can show that the statement complained of was, or formed part of, a statement on a matter of public interest and that he reasonably believed that publishing the statement complained of was in the public interest. The intention is to reflect the existing common law as most recently set out in *Flood*…It reflects the fact that the common law test contained both a subjective element – what the defendant believed was in the public interest at the time of publication – and an objective element – whether the belief was a reasonable one for the defendant to hold in all the circumstances."

78. The *Reynolds* defence, as it became known, was developed from the traditional form of privilege by a generalisation that in matters of public interest there can be said to be a professional duty on the part of journalists to impart information and an interest in the public in receiving it: per Lord Hoffmann at p.50 in *Jameel*. Lord Nicholls summarised what *Reynolds* privilege was concerned with in *Bonnick* at para 23, where he said:

> "Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege."

See further, the detailed analysis of the *Reynolds* jurisprudence in *Flood*.

79. As Lord Nicholls had identified in *Reynolds*, at p.201D in a speech with which Lord Cooke of Thorndon and Lord Hobhouse of Woodborough agreed, reputation is important both to the individual concerned and to society more generally.

> "Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many important decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good."

80. Although Lord Nicholls spoke in the context of journalism, as Lord Hoffmann said in *Jameel* at para 54, the defence was available to anyone who published material of public interest in any medium. The question in each case was whether the defendant behaved fairly and responsibly in gathering and publishing the information. Nonetheless, the focus of the *Reynolds* jurisprudence and what the rights engaged

might require, was on the media, because the defence tended to be raised by the media, who (as newspaper publishers and journalists) published to the world at large.

81. Lord Nicholls identified in *Reynolds* the famous non-exhaustive checklist of factors that would, depending on the circumstances, be relevant to whether a publisher had acted responsibly; but he emphasised the weight to be given to these and any other relevant factors would vary from case to case. It is important to look at the introductory words used to introduce that 'checklist' as well as at the factors themselves. At p.204 to 205C Lord Nicholls said:

> "The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. The elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject-matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axe to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may already have been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information which others do not possess or have not disclosed. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing."

82. Lord Nicholls went on to say in the same paragraph:

> "…it should always be remembered that journalists act without the benefit of the clear light of hindsight. Matters that are obvious in retrospect may have been far from clear in heat of the moment. Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication."

83. Lord Hoffmann identified what was, in essence, a two-stage test for determining whether the *Reynolds* defence applied in a given case. The first stage related to the

public interest of the material: the question was whether the subject matter of the article was a matter of public interest. In answering that question, Lord Hoffmann said it was necessary to consider the article as a whole, and not isolate the defamatory statement: see paras 48 and 49. If the article as a whole concerned a matter of public interest, the next and separate question was whether the inclusion of the defamatory statement was justifiable. As to that, Lord Hoffmann said at para 51:

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

84. If the publication, including the defamatory statement, passed the public interest test, the inquiry then shifted to whether the steps taken to gather and publish the information were responsible and fair. Lord Hoffmann rejected the notion that these concepts were too vague. This was an objective standard; greater certainty could be attained as to its application by reference to the body of illustrative case law it was anticipated would be built up; and from the guidance provided by the Press Code of Practice as to the standard of responsible journalism: see para 55. He went on to say that the non-exhaustive list of ten matters to be taken into account in suitable cases, were not, individually, tests or hurdles which the publication must pass; as Lord Nicholls had said in *Bonnick* at p.309 the standard of conduct required of the newspaper must be applied in a practical and flexible manner, and must have regard to practical realities: see para 56.

85. In *Bonnick* the Privy Council decided that whether a publisher had acted responsibly, for the purposes of a *Reynolds* defence, could depend on the meanings the publisher intended or believed his words would convey. If for example, a journalist genuinely did not appreciate that his words meant 'A', he could hardly be criticised for not taking steps to verify 'A' before publishing them. In giving the advice of the Judicial Committee of the Privy Council on an appeal from Jamaica, Lord Nicholls explained this principle at para 24 and an important caveat to it, at para 25:

> "24. To be meaningful this standard of conduct must be applied in a practical and flexible manner. The court must have regard to practical realities. Their Lordships consider it would be to

> introduce unnecessary and undesirable legalism and rigidity if this objective standard, of responsible journalism, had to be applied in all cases exclusively by reference to the "single meaning" of the words. Rather, a journalist should not be penalised for making a wrong decision on a question of meaning on which different people might reasonably take different views… If the words are ambiguous to such an extent that they may readily convey a different meaning to an ordinary reasonable reader, a court may properly take this other meaning into account when considering whether Reynolds privilege is available as a defence. In doing so the court will attribute to this feature of the case whatever weight it considers appropriate in all the circumstances.
>
> 25. This should not be pressed too far. Where questions of defamation may arise ambiguity is best avoided as much as possible. It should not be a screen behind which a journalist is "willing to wound, and yet afraid to strike". In the normal course a responsible journalist can be expected to perceive the meaning an ordinary, reasonable reader is likely to give to his article. Moreover, even if the words are highly susceptible of another meaning, a responsible journalist will not disregard a defamatory meaning which is obviously one possible meaning of the article in question. Questions of degree arise here. The more obvious the defamatory meaning, and the more serious the defamation, the less weight will a court attach to other possible meanings when considering the conduct to be expected of a responsible journalist in the circumstances.*"*

86. The statutory formulation in section 4(1) obviously directs attention to the publisher's belief that publishing the statement complained of is in the public interest, whereas the *Reynolds* defence focussed on the responsibility of the publisher's conduct. Nonetheless, it seems to me it could not sensibly be suggested that the rationale for the *Reynolds* defence and for the public interest defence are materially different, or that the principles that underpinned the *Reynolds* defence, which sought to hold a fair balance between freedom of expression on matters of public interest and the reputation of individuals, are not also relevant when interpreting the public interest defence. *Reynolds* was decided when the Human Rights Act 1998 had been enacted but not yet brought into force. However, the decision was clearly informed by the right to freedom of expression and to the protection of reputation, protected under the Convention; and the observations about the importance of those respective rights and how to mediate between them, in *Reynolds* and the subsequent cases, including most recently, in *Flood*, are as true now as they were when those cases were decided.

The judge's analysis

87. There were three questions that had to be addressed in relation to each of the publications complained of. Was the statement complained of, or did it form part of, a statement on a matter of public interest? If so, did the defendant believe that publishing the statement complained of was in the public interest? If so, was that belief reasonable?

88. We are principally concerned with the third question. As I have said, it was accepted below that the statements complained of were or formed part of a statement on a matter of public interest, and no issue is taken in this appeal with the judge's conclusion that the defendant believed that publishing the statement complained of, was in the public interest. In that latter connection, the defendant's evidence, which the judge accepted, was that the focus of his concerns was on why the CPS had taken the decision they had, and it was not on the claimant: see [158].

89. Before considering the third question, it is important to draw attention to the strength of the public interest considerations, carefully outlined by the judge at [142] to [150] of which there were a number of interrelated strands; and to a question of statutory interpretation that has arisen.

90. The principal matter of public interest was whether the CPS, a public authority, may have gone wrong in making a decision to prosecute because it had been mistaken in its assessment of the strength of the evidential basis for the prosecution and/or the public interest in pursuing a prosecution, This was in a context that was especially sensitive, because the person prosecuted was a rape complainant, she was a mentally disordered person and she had killed herself on the eve of her trial. The judge highlighted the enhanced public interest in considering whether to prosecute a person suffering from mental illness in these circumstances, and the possibility of a causal link between their death and the prosecution. An additional matter was the role of an inquest in examining such cases, and whether in this particular case, there were lessons to be learned, something to which the publications complained of directly related.

91. There was, more generally, a strong public interest in ensuring that victims of rape came forward and an obvious risk that they may be deterred from doing so by the risk of prosecution for perverting the course of justice. As the judge noted, it does not follow from the fact that an accused person is not prosecuted or charged, that an allegation made against them is false, still less that it is made with knowledge that it is false; and how decisions are made as to whether or not to prosecute those who complain of rape or other sexual crimes, for perverting the course of justice is a matter of considerable public importance. He referred in this context amongst other things, to a Joint Report authored by Ms Levitt QC in her role as Principal Legal Advisor to the DPP, and the CPS Equality and Diversity Unit of March 2013, published by the CPS on "Charging perverting the course of justice and wasting police time in cases allegedly false rape and domestic violence allegations." In the Foreword to that Report, the DPP acknowledged the need for a national debate about the proper approach to such cases. The publications complained of took place therefore, said the judge, at a time when the topics to which they related were, and were authoritatively recognised to be, important matters deserving of informed public debate.

92. The judge did not consider the meaning of the phrase "the statements complained of" for the purposes of section 4(1)(a). He did however consider what it meant for the purposes of section 4(1)(b): see [153] to [156] and [159]. There is no indication in the judgment that the point was controversial before him, nor indeed did it appear to be controversial for the purposes of this appeal, either in the claimant's Grounds of Appeal or in the skeleton argument prepared by his counsel. Mr Browne QC appears however to take issue with the judge's view that for the purposes of section 4(1)(b), the phrase "the statement complained of" means the words complained of rather than

the (single) defamatory imputation they convey. Building on that, by reference to Lord Hoffmann's two stage test in *Jameel*, Mr Browne QC submits that the judge should have addressed the question whether it was in the public interest or reasonable for the defendant to believe that it was, to include the allegation that the claimant was to be suspected of rape.

93. In my view, the judge's interpretation is the correct one. It is certainly consistent with other parts of the 2013 Act as the judge pointed out, which use the word "imputation" to refer to the meaning of a statement; see for example, section 4(3) of the 2013 Act. More fundamentally perhaps, it is consistent with the principle recognised in *Bonnick*[5] and with the practical and flexible approach it advocates, which in my judgment, should find reflection to the fullest extent in the interpretation of section 4.

94. As Lord Nicholls explained at paras 21 to 23 of *Bonnick* (a case, like this one where the defamatory imputation arose by implication) the attribution of a single meaning to the particular words for the purposes of deciding whether a statement is defamatory, might appear to be an artificial construct; however given the ambiguity of language:

> "…the rule does represent a fair and workable method of for deciding whether the words under consideration should be treated as defamatory. To determine liability by reference to the meaning an ordinary reasonable reader would give the words is unexceptionable.
>
> 22. At first sight it might seem appropriate to apply the same principle when considering whether Reynolds privilege affords a defence. This might appear to have the merit of consistency. But that would be to apply the "single meaning" principle for a purpose for which it was not designed and for which it is not suitable. It is one matter to apply this principle when deciding whether an article should be regarded as defamatory. Then the question being considered is one of meaning. It would be an altogether different matter to apply the principle when deciding whether a journalist or newspaper acted responsibly. Then the question being considered is one of conduct."

95. It follows the judge was right to approach the assessment of reasonableness, as he did, on the footing that a defendant's intended meaning may be relevant to his subjective belief (a point Mr Browne QC would concede) and to whether his belief was objectively reasonable. As the judge said, a reasonable belief that it is in the public interest to make statement 'A' could be the basis for the public interest defence, even if the words unintentionally conveyed meaning 'B'. But this approach cannot be pressed too far, as the judge recognised: thus, in assessing whether a defendant's belief *is* reasonable, there are limits to the latitude to be allowed for unintended or ambiguous meanings: see [159].

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[5] See also, by analogy, the common law approach to honest comment identified by Laws LJ in *Lait v Evening Standard Ltd* [2011] EWCA 859, [2011] 1 WLR 2973 at para 44.

96. Against that background, I turn to the third question: was the defendant's belief that publishing the statement complained of was in the public interest, reasonable?

97. The judge decided that it was. The judge's reasons for doing so are nuanced and 'bespoke', and I consider he reached the correct result in relation to the publications complained of, on the particular and hard facts of this case.

98. If my Lords agree with the proposed disposition of Ground 2, Ground 1 only concerns the December publications. However, it is necessary to look at what the judge said about reasonableness for all the publications in order to understand his approach:

> "249. **The November articles.** I can deal quite shortly with these. In my judgment Mr de Freitas' belief that the relevant publications were in the public interest was reasonable because (1) he reasonably regarded the issues raised as matters of considerable public importance; (2) he was in a unique position to raise the issues, with reference to the tragic circumstances of an individual case, which was likely to catch public attention; (3) he had some inherently reliable information, having observed some of the history first hand; (4) he had made what, for a person in his position, were reasonable and responsible investigations into the merits of the case against his daughter; he was not bound to accept that the CPS had made a correct decision, and he had sufficient material on which to challenge that view; (5) in each case what he said was "about" the CPS and his daughter; it was targeted at the public authority concerned, not Mr Economou; (6) he deliberately avoided naming or referring to Mr Economou; (7) he had, in all the circumstances prevailing at the time of these publications, no reason to suppose that Mr Economou would be widely identified by readers, listeners, or viewers, as the man involved; (8) there was a degree of urgency about raising these matters, given the stage that had been reached with the inquest proceedings; (9) it was reasonable for him to leave it to the media organisations concerned to conduct such further investigations, and to solicit such comment (if any) as the public interest required; (10) similarly, as regards Mr Economou's "side of the story", though since the story was about the CPS that was very much a secondary issue; (11) the tone of what he wrote and said was responsible and measured; (12) it is hard to see how Mr de Freitas could have expressed his sincere doubts about the conduct of the CPS without the risk of implicit defamation of Mr Economou. I have already rejected Mr Economou's case, that there was an improper purpose to Mr de Freitas' contributions.
>
> 250. Standing back from these individual points, my conclusions are that Mr de Freitas could and did properly consider the publication to be in the public interest; and that a judgment in favour of Mr Economou would represent an interference with Mr de Freitas' free speech rights out of any

reasonable proportion to the need to protect and vindicate Mr Economou's reputation.

251. I have no doubt at all that Mr Economou was deeply upset by these earlier publications, and angered by them. His own contemporary statements demonstrate the fury that he felt. I have no doubt, either, that he believed then and up to trial that his reputation had been seriously harmed by the allegations. I have rejected his case to that effect. But even if I had accepted it, I would have concluded that the public interest defence succeeded. The issues at stake were of real political importance and Mr de Freitas' publications made a reasonable contribution to a proper debate…

253. **The December articles.** My conclusions as to these are on not dissimilar lines. By the time these publications took place, of course, the context had changed. The publication of the Second Mail Article made it unavoidable that large numbers would identify Mr Economou as the man involved in the story about which Mr de Freitas was writing and talking publicly even if he continued, as he did, to avoid naming him. The information available to Mr de Freitas had also evolved. In particular, the DPP's evaluation of the CPS decision-making represented a significant evolution in the evidential context. Nonetheless, in my judgment, Mr de Freitas published in good faith, for proper purposes, taking aim at the CPS not Mr Economou; and he had a sufficient factual basis for writing what he did. Of the factors listed above the majority remained the case. This was true of factors (1)-(3), (5)-(6), (8), (11) and (12).

254. Factor (7) no longer applied. The fact that Mr Economou was now publicly known as the man accused of rape is a relevant factor when assessing what if any further publication on these issues could reasonably be considered to serve the public interest. But it was Mr Economou who had brought about his public identification as such. And however his identity had become public it was reasonable, given factor (12), not to regard this as in itself a bar to further publication, if it was otherwise legitimate to question the conduct of the CPS. The critical issue is factor (4): whether the belief that Mr de Freitas held was a reasonable one, in the light of the altered evidential picture. Put another way, does the additional information received change the outcome of the reckoning on that front? In my judgment it does not.

255. Clearly, the DPP's considered and detailed analysis of the CPS decision-making represented an investigation demanding appropriate respect. But that is not the same thing as saying that it was beyond reasonable questioning, or criticism. The words from the Birnberg Peirce Press Release that appeared in the

Telegraph Article were forceful. But the thrust of those words was that the DPP, in endorsing the CPS decision, had given too much weight to "rape myths". This is a highly debatable proposition, and not one with which I would necessarily agree; but it was not in my judgment an untenable one, on the basis of the information then before Mr de Freitas. Whether it was *reasonable* to believe that the publication of this proposition was in the public interest is of course a different question. But it is here that "editorial judgment" has a role to play, I believe.

256. There are five particular factors that influence me. First, the words contain what is in substance an expression of opinion, albeit one that is accompanied by some factual propositions and implies others. Secondly, it is to be noted that the words complained of acknowledged that Ms de Freitas had behaved in ways that were confusing and inconsistent with the behaviour of the "classic victim". That affords a degree of balance, and provides the context for the criticism. Thirdly, the criticism is that the DPP has "precluded as a possibility" that Ms de Freitas did not consent. This is not an unequivocal assertion that she told the truth when making her accusation of rape. Fourthly, Mr de Freitas was in this context placing reliance on a solicitor who was expert in the field. Fifthly, in my judgment Mr de Freitas was entitled to place some weight on what DI King had said, repeatedly, about his own view of the merits of a PCJ prosecution. DI King was of course a much more lowly state official than the DPP, who had the benefit of expert advice from Alison Levitt QC. But he had the advantage of direct personal dealings with the individuals involved. And his view merited some consideration. Overall, bearing in mind the need to take a strict approach to interference with political speech, I am persuaded that Mr de Freitas' belief was a reasonable one.

257. The same applies, with additional force, to the few words complained of in the Third Guardian Article. It also applies, with some modification, to the de Freitas Article. In that instance, it is relevant to note that Mr de Freitas made a particular point of the fact that he had not seen the evidence gathered, as he had no right to do so. (Para [6] of the Article).

258. In my judgment, these points are sufficient to justify the conclusion that the public interest defence succeeds in the case of each of the December publications. A failure to put Mr Economou's "side of the story" would not defeat the defence. In context, this would have made little sense; at any rate, it was not necessary. But I am inclined to think that factors (9) and (10) applied in respect of the December publications as well. The words complained of in the Telegraph Article were taken

> from the Birnberg Peirce Press Release. If Mr de Freitas had been sued on the publication of the Press Release to the public at large, any public interest defence might well have turned solely on whether he and/or Birnberg Peirce had made reasonable enquiries, and made a reasonable judgment about whether publication required an opportunity for comment from Mr Economou or an account of his side of the story. As it is, he was entitled to place some reliance on the media publishers in those respects. Similarly, as regards the words complained of in the Third Guardian Article which came from Mr de Freitas as a contributor or source. The de Freitas Article was his own work, unedited – so it appears. But again, this was a submission to a national newspaper by a contributor who was in my view entitled to place some reliance on the publisher to undertake appropriate checks and provide appropriate balance."

99. A number of things are to be noted.

100. First, the claimant does not take issue with the judge's general approach to deciding the reasonableness question as a matter of law: indeed as Mr Barca QC points out, the judge largely accepted the claimant's analysis, about which in the judge's view "there was much to be said". The claimant for example, submitted, and the judge appeared to accept, that what Lord Brown said in *Flood* at para 113 was a succinct expression of the correct general approach, namely "…could whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?" (see [237] to [239).

101. Further, in passages from the judgment with which the claimant does not appear to take issue either, the judge said, that it would be hard to describe a belief as reasonable if it has been arrived at without care, without any examination of the relevant factors or without engaging in appropriate enquiries. He also said that a belief for the purposes of section 4(1)(b) would be reasonable, only if it is arrived at after conducting such enquiries and checks as it is reasonable to expect of the particular defendant in all the circumstances of the case. See [239] and [240]. The circumstances included: "the subject matter, the particular words used, the range of meanings the defendant ought reasonably to have considered they might convey and the particular role of the defendant in question": see [241].

102. Secondly, the judge accepted in terms (as did Mr Barca QC for the defendant) that factors that were crucial to the *Reynolds* defence could be relevant and important to the issue raised by section 4. What the judge did not accept however, rightly in my view, was the core of the claimant's case as advanced at trial, namely that the *Reynolds* factors were key to the determination of reasonableness in this case.

103. The case put for the claimant was that the defendant's conduct fell short of the standard of responsibility comprised by the *Reynolds* factors. It followed therefore, as night follows day, that his conduct was not reasonable, and the public interest defence should fail. Specifically, there was no credible source of any evidence to support the defendant's condemnation of the evidential case against his daughter; no steps were

taken by the defendant to verify the truth of the allegations before he made them; the defendant had no adequate reasons for taking issue with investigations that commanded respect (namely, the CPS's decision to continue the prosecution and the DPP's confirmation of the correctness of the decision); the defendant sought no comment from the claimant and ignored what the claimant had repeatedly told him; the defendant failed to include even the gist of the claimant's side of the story, and his purpose in going public was improper. See [238].

104. The judge gave very careful consideration to this aspect of the claimant's argument insofar as it was still a live one on the facts. He acknowledged that the case that the defendant's conduct had fallen far short of what the *Reynolds* approach required, would have had obvious force if the defendant had acted as a journalist, composing and publishing what purported to be investigative journalism. The critical point made by the judge however, was that it would not be appropriate to hold the defendant to the standard that might be required of a journalist because he was not one: his role was closer to that of a source or contributor. See [242].

105. The judge had correctly identified a number of considerations that were important when considering the outcome of a public interest defence, some of which were to be derived from the *Reynolds* defence itself, viz. flexibility in the requirement to have regard to the circumstances of the particular case in section 4(2); the requirement to make allowance for editorial judgment in section 4(4) and the fact that there is little scope under article 10(2) of the Convention for restrictions on freedom of expression in relation to questions of public interest.

106. Building on his analysis of the case of *Hays Plc v Hartley* [2010] EWHC 1068 (QB) a decision of Tugendhat J, the judge then said this:

> "246. It seems to me wrong in principle to require an individual who contributes material for inclusion or use in an article or broadcast in the media to undertake all the enquiries which would be expected of the journalist, if they are to rely on a defence of public interest. The enquiries and checks that can reasonably be expected must be bespoke, depending on the precise role that the individual plays. It is hard to see how an individual could rely on the public interest defence to escape liability for a false factual statement about events within their own knowledge (see *Starr v Ward*). But I see no reason why the defence should not avail an individual source or contributor who passes to a journalist for publication information the truth or falsity of which is not within the knowledge of the contributor. The contributor may well be entitled to rely on the journalist to carry out at least some of the necessary investigation and to incorporate such additional material as is required, in order to ensure appropriate protection for the reputation of others.
>
> 247. Mr de Freitas accepted in his evidence that in contributing to, causing, authorising, and making the offending publications he did not focus on the impact these might have on Mr Economou's reputation. I am sure that is right. Mr de Freitas

> was at all times concentrating his thoughts on what to say about the CPS, and its decision-making. But I do not consider this to be as reprehensible as Mr Barnes contends. The defamatory meanings that I have found were conveyed by the publications complained of are all implied meanings. They are secondary to the principal messages of the articles and broadcasts, all of which are squarely aimed at the CPS. They are not only implied but, to a large extent, necessarily implied.
>
> 248. I raised with Mr Barnes the question of how Mr de Freitas could have expressed himself without unlawfully harming Mr Economou's reputation, by implication. His answer was that he could and should have refrained from attacking the CPS as he did. If it is not strictly true, it is not far from the truth to say that the options were stark: to say nothing adverse to the CPS, or to do so and impliedly defame Mr Economou. What Mr de Freitas did was to criticise or at least raise questions about the conduct of the CPS, but without naming Mr Economou or, for the most part, expressly referring to him in any other way. This limited room for manoeuvre seems to me a further factor to take into account when assessing the reasonableness of Mr de Freitas' belief."

107. Mr Browne QC submits this part of the judge's analysis was flawed for a number of reasons, principally, in his approach to the defendant's role, which he argues amounts to the creation of "contributor immunity". It left out of account, or failed to give sufficient weight to the seriousness of the allegations, it failed to take account of the fact that the defendant was closest to knowing the truth, or that there was no evidence that he had relied on the media to fill the gap left by his own inadequate compliance with the *Reynolds* factors. The judge also erred in giving any weight to the defendant's intentions with regard to meaning (since intention is irrelevant in determining meaning) and/or in having regard to his intention or not to refer to claimant, in circumstances where the test for identification is an objective binary one, which does not depend on what a defendant knows or intends will happen. But principally, the judge was at fault in excusing the defendant's failure to include the gist of the claimant's case (which had been forcibly presented to him by the claimant over the material period) on the footing that it was someone else's (i.e. the media's) "job" and/or that it was difficult for him to do so. On the latter point, he submits it is not difficult to see how the claimant could have incorporated distancing wording, which, if not removing, would have substantially lessened the sting of the defamatory words.

108. The result of all this he submits is that someone who was setting the agenda, and pursuing a media strategy on inadequate and misleading information, is absolved from the consequences, and that the claimant has been defamed on the basis of information which was untrue, partial or misleading and never subject to the sort of responsibility filter, or journalistic inquiry or consideration that is required if a proper balance is to be struck between freedom of expression on matters of public interest, and reputation. In this connection he also draws attention to the wording of section 4(3) of the 2013 Act, which, in summary, requires the court to disregard a defendant's omission to

verify the truth of the imputation when determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest, in relation to the (now) statutory defence of 'reportage'. The removal of verification in section 4(3), necessarily implies, Mr Browne QC submits, its presence as a component of what is required if a belief can be found to be reasonable for the purposes of section 4(2).

109. Looking at the matter generally, it seems to me the issue raises difficulties on both sides of the equation, free speech on one side, and reputation on the other, that must be acknowledged. And I readily accept that mediating between the rights engaged here is not an easy task. I have already referred to what Lord Nicholls said about the importance of reputation to the individual and to society more generally. The implications of the publication of false information are, if anything, more serious now than they were when *Reynolds* was decided. The fact that information is present on the Internet, gives it permanence and reach, which may have profound implications for the life and future prospects of the person defamed. A successful public interest defence leaves a claimant whose reputation is damaged without vindication, damages or the ability to obtain injunctive relief. We were not addressed on how these matters are affected by section 8 of the 2013 Act, which abrogates the single publication rule, and provides, in summary, that a cause of action is treated as having accrued on the date of first publication. On one view however, a limitation defence might prevent the removal of information from the Internet, even if the public interest justification for it, which might have formed the basis of a successful public interest defence when it was first published, no longer exists. It might also be said, that in an era of distrust and 'fake news', it is more important than ever that the public should, so far as possible, be put in the picture as to where the truth, or some approximation of it, lies: see for example, the observations of Lord Phillips in *Flood* at para 48.

110. Looking at the matter from the other perspective however, it is not necessary to expatiate on the importance of freedom of expression to a functioning democracy, and to the individuals within it, which concerns the freedom to receive information as well as to impart it, in particular, as the judge noted, on matters of public concern. The importance of the right in this arena is what led to the recognition of the *Reynolds* defence, and to the subsequent enactment of the public interest defence in section 4 of the 2013 Act. This defence is not confined to the media, which has resources and other support structures others do not have. Section 4 requires the court to have regard to all the circumstances of the case when determining the all-important question arising under section 4(1)(b): it says the court must have regard to all the circumstances of the case in determining whether the defendant has shown that he or she reasonably believed that publishing the statement complained of was in the public interest. In my judgment, all the circumstances of the case must include the sort of factors carefully identified by the judge, including, importantly, the particular role of the defendant in question. The statute could have made reference to the *Reynolds* factors in this connection, but it did not do so. That is not to say however, that the matters identified in the non-exhaustive checklist may not be relevant to the outcome of a public interest defence, or that, on the facts of the individual case, the failure to comply with one or some of the factors, may not tell decisively against a defendant. However, even under the *Reynolds* regime, as Lord Nicholls made clear, the weight to be given to those factors, and any other relevant factors, would vary from case to case.

As with *Reynolds* therefore, with its emphasis on practicality and flexibility, all will depend on the facts.

111. I quite accept that an appropriate balance between the rights engaged would not be struck if the bar of 'reasonable belief' was set too low, or if all those who took part in a particular publication were able to look to the other participants to fulfil what they would otherwise reasonably be expected to do, given their particular role in the process. But the principles applied by the judge do not lead to that result. I also accept that difficult choices have to be made in deciding who should be sued in a case such as this one (where a defendant has played an active role in bringing the publication about, there are a number of media publications and a claimant wishes to obtain injunctive relief) and where the facts that are material to the viability of the public interest defence may not be as clear at the beginning of the litigation process, as they are at the end. I would not criticise, as Mr Barca QC does, the decision taken by the claimant to sue the defendant for the particular parts of the publications complained of which could be traced directly to him, and for which, on conventional legal principles applying to publication, he was directly responsible as a matter of law. Nonetheless, as the judge identified, this decision had consequences for the framing of the issues at trial, and for their resolution.

112. The individual criticisms of the factors taken or not taken into account by the judge, which largely focus on the December publications, are to my mind, unpersuasive. It cannot sensibly be suggested that, in reaching his conclusions on this aspect of the case, the judge was not perfectly alive to the seriousness of the allegations complained of, or their implications for the claimant. These were matters that had been the subject of extensive consideration by the judge in the course of his long judgment. Further, as Mr Barca QC points out, the analysis at [249] is directed to identifying the reasons why the judge concluded that the balance fell in favour of the defendant; and the judge expressly averted to the balance between the rights engaged at [250] to [251]. It was not erroneous to have regard to the defendant's intentions on the issues of meaning and identification, issues which were closely bound together on the facts of this case. As for verification, the position on the judge's findings was not that the defendant left it all to the media, but that (as the judge found at points (3) and (4)) the defendant had some inherently reliable information and had made what, for a person in his position were reasonable and responsible investigations into the merits of the case against his daughter. On the unusual facts of this case, the judge was entitled to conclude, and made no error of principle in concluding, first, that incorporating the "claimant's side of the story" would have made little sense where the defamatory meanings were implied meanings, and secondary to the principal messages of the articles, squarely aimed at the CPS; and secondly, that the defendant had limited room for manoeuvre. It is true that the defendant could have added distancing words, as Mr Browne QC submits, but in my judgment it did not follow from this that the statutory criteria for the public interest defence were not satisfied.

113. Finally, we were addressed very briefly by the parties on the standard of appellate review that should be applied to the public interest defence, and to what was said in the postscript to the judgment of Lord Phillips at paras 3 to 7 of *Flood.* In view of my conclusions, it has not been necessary to consider that issue. For the reasons given, I would dismiss this appeal.

LORD JUSTICE RYDER

114. I agree.

LORD JUSTICE LEWISON

115. I also agree.

Appendix

1. The First Guardian Article

"[1] A young woman who said she had been raped went on to kill herself after the Crown Prosecution Service put her on trial for making up the allegation in a case originally instigated by her alleged attacker.

[2] The woman's father is calling on the CPS to explain why they pursued a charge of perverting the course of justice against Eleanor de Freitas, 23, despite being told by police there was no evidence that she had lied, and in the knowledge that she was suffering from a psychiatric illness.

…

[5] David de Freitas, her father, said: **"Eleanor was a vulnerable young woman, diagnosed with bipolar, who made a complaint of rape as a result of which she herself became the subject of legal proceedings. This was despite the fact the police did not believe there to be a case against her.**

[6] **"There are very serious implications for the reporting of rape cases if victims fear that they may themselves end up the subject of a prosecution if their evidence is in any way inconsistent. It is therefore of the utmost importance that the CPS consider very carefully whether such cases are in the public interest."**

[7] He added: **"I feel that the system of fairness in this country has let me down terribly, and something needs to be done so that this can never happen again**."

[8] The CPS had pursued De Freitas for allegedly making up the rape allegation after the man at the centre of the claims spent £200,000 on a private prosecution, documents submitted to the inquest say.

[9] Lawyers for the CPS were told by the detective who investigated the rape allegation that there was no evidence that she had lied, they would not be investigating her for perverting the course of justice, and the crime had been recorded as rape…

….

[11] Victim support and Justice for women have both written to the director of public prosecutions Alison Saunders expressing their concerns at the wider implications of the De Freitas case for rape complainants coming forward in future if alleged rapists are able to use the law to intimidate them.

[12] In a statement, Saunders said she was concerned about the case and was investigating it personally. "I have asked the team which dealt with this case for a full explanation which addresses all of the De Freitas family's concerns. I appreciate the family's unease which is why I am looking at this personally in order to satisfy myself of the detail surrounding all the stages of the case"

[13] She added that she would welcome the opportunity then to meet her family and said the circumstances regarding the case were "rare", extremely difficult and always complex and sensitive. This case was one of the most difficult I have seen."

[14] De Freitas reported to police on 4th January 2013 that she had been allegedly drugged and raped by a male associate shortly before Christmas in 2012. The police investigated the case, interviewed De Freitas and arrested the alleged perpetrator. But the police eventually told De Freitas they could not proceed further as there was not a realistic chance of a successful conviction, partly due to the fact she had reported the alleged rape some time after the event and as such no forensic evidence had been collected to support her claims. The alleged perpetrator was told there would be no further action and the case was closed.

[15] De Freitas's father said his daughter had accepted the police's decision and tried to get on with her life. But the man at the centre of the rape claim began a private prosecution against her saying she had lied about the rape. Some months later lawyers for the CPS announced they were taking over the case against De Freitas. Her trial for perverting the course of justice was due to open on 7 April. On 4 April she took her own life…
…

[17] Deborah Coles, co-director of the charity Inquest said:" This case raises serious issues of concern regarding the prosecution of rape complainants. In addition Eleanor had severe mental health issues which do not appear to have been taken into account by the Crown Prosecution Service. There must be robust scrutiny at the inquest to explore how these issues of public interest impacted on her life."

2. The *Today* Item

> "JH. Eleanor de Freitas was a disturbed young woman. In her first year at University she had a mental breakdown and she was diagnosed with bipolar disorder. Four years later she told the police that a man had tried to rape her. The police decided to take no action but the man she had accused himself brought a private prosecution, claiming that she had perverted the course of justice by making a false allegation. The police decided not to proceed with the case, but the Crown Prosecution Service took it over. Shortly before she was due to appear in court, Eleanor killed herself. She was 23. Now the Director of Public Prosecutions has said she will personally investigate why that decision to go ahead with the case was taken by her staff. I have been talking to Eleanor's father, David…
>
> "JH: And what state was she in when she first told you that she had been raped?
>
> **DdF: Well, Eleanor was diagnosed as being in what's called a mixed state, so she experienced highs and lows very frequently. And when I eventually found out about this and I went with her to the police station where she wanted to report the alleged**

incident, she was in a high state and a low state. She was wanting to get this off her chest, and then also at the same time she was very fearful, so if you like that's sort of two ends of the spectrum.

JH: It's a very difficult question for you to answer, but did you believe her?

DdF: Oh, very much so. I have absolutely no doubt about that.

JH: And why do you think that the police did not believe her?

DdF: Oh, the police did believe her. The police had no issues with what they saw presented to them. The police decided not to prosecute because there was evidence which was, how can I put it, inconsistent with her evidence, and what the police didn't want to have happen is for Eleanor to face a trial where she would be put in the position of being on trial herself. Um, and for that reason they decided not to continue with the prosecution.

JH: And when the man who she alleged had raped her himself decided to take out a prosecution against her for a wrongful accusation, how did she react to that, and how did you react?

DdF: Well, her reaction was one of shock, dismay, it completely disorientated her. …

…

JH: How did she react when the police told her that they were not intending to prosecute her for perverting the course of justice?

DdF: Well, she accepted that that's the way it should be because she wasn't perverting the course of justice as far as she was concerned.

JH: But then the Crown Prosecution Service said that they would support the private prosecution. How did she take that?

DdF: With incredulity. I mean, it just didn't make any sense. We could not see that there were grounds on either the evidential stage, or the public interest stage. And there are meant to be two stages before a decision like this is made. We could not understand it, nor could her legal team. In fact we actually invited the CPS to look at this matter, because they also have the power to take over the prosecution and stop it, and that is what we felt they should do, so we were utterly amazed and flabbergasted that they actually decided to continue with the prosecution.

....

JH: And now the Director of Public Prosecutions has said that she will personally conduct an investigation into what happened. What's your reaction to that?

DdF: Well, I am grateful for it, obviously, but it very much falls into the category of too little, too late. …"

"JH: Well, Mr de Freitas now wants a full inquest into Eleanor's death. In a statement, the Director of Public Prosecutions, Alison Saunders, we did ask her for an interview but she didn't want to do it, but she has told us "I am very saddened by the tragic death of Eleanor de Freitas. I have asked the team which dealt with his case for the full explanation which addresses all of the de Freitas family's concerns. I appreciate the family's unease, which is why I am looking into this case personally in order to satisfy myself of the detail surrounding all the stages of this case. I would welcome the opportunity then to meet with Eleanor's family to discuss the case and the law surrounding it. Prosecuting cases of perverting the course of justice in connection with an alleged false rape allegation is rare, extremely difficult and always complex and sensitive. This case was one of the most difficult I have seen. To say any more at this stage would be inappropriate until I can answer the de Freitas family's concerns fully and directly."

3. The BBC TV Interview

"Interviewer: In 2013, she made a complaint of rape to the police. What happened at that point?

DdF: It was relating to a matter that had happened just before Christmas, the previous year. And I think she had battled with herself as to whether she should report it or whether she shouldn't, and sadly that wastage of time worked against her. But she felt both high and low, I mean she suffers from bi-polar order, a mixed state, so she feels both high and low states very frequently and she felt I think relieved at reporting it but also very low and very concerned about having to do so in the first place.

Interviewer: What did the police say about the case, they were concerned about her vulnerability weren't they?

DdF: Completely, I can't praise the police highly enough, they handled Eleanor very well, and I think the decision that they made was a reasonable and a responsible decision.

Interviewer: The decision being that a prosecution would not be in her best interests?

DdF: Correct.

Interviewer: But then the individual who the rape allegation was brought against decided to make a private prosecution, and the CPS then got involved in that prosecution, didn't they?

DdF: They did. We actually asked the CPS to get involved because the CPS have the power to take over the prosecution and stop it. And that is what we wanted them to do. What in fact they did in the end was they took over the prosecution and bizarrely continued with it.

…

Interviewer: The police you say had taken account of her vulnerability, do you think the CPS ignored that.

DdF: I can't see how they took account of that, in fact I have difficulty understanding how they took account of the evidential stage.

…

Interviewer: How do you feel that the Director of Public Prosecutions now is saying she is going to personally investigate and look into your daughter's case?

DdF: **It's an appropriate response, but it falls into the category of being too little, too late.** Um, I think that the proper way of dealing with this is to have a full article 2 inquest where all matters surrounding Eleanor' death are brought out in the open and examined so that there are lessons learned and that other vulnerable young ladies don't go through what Eleanor went through, and that other families don't have to suffer what we have had to go through.

Interviewer: So you want the Inquest to really get to the heart of all the issue here, the question of vulnerable people involved in court cases and especially in cases like this which involve allegations of rape which are hugely sensitive?

DdF: Correct, completely.

Interviewer: Are you hopeful that the Inquest will get to that?

DdF: I am hopeful but we'll have to wait and see."

4. The Telegraph Article

"[1] Eleanor de Freitas, who killed herself after being charged with making a false rape claim, expressed her "utter disbelief" at prosecutors' decision to take her to court, her family has revealed.

[2] In a heart-rending extract from an email to her father David, the 23-year-old said she regretted reporting the alleged crime to police and that she had done so "as my duty to this country and to women".

[3] Miss De Freitas, who had bipolar disorder, was found dead in an apparent suicide shortly after the Crown Prosecution Service (CPS) decided to take over a private prosecution which had been launched by her alleged rapist.

[4] The emotional email, which disclosed Miss De Freitas' deep torment at the CPS' decision, was released by her parents after the Director of Public Prosecution (DPP) defended a decision to take over the court case for perverting the course of justice.

[5] "I am in utter disbelief about the decision of the CPS," Miss De Freitas, an A* student who was studying for a diploma in financial planning, wrote to her father…
…

[9] The De Freitas family piled further pressure on Alison Saunders, the DPP, by describing the conclusions of a CPS inquiry into the case as "deeply disappointing" …
…

[12] Miss Saunders looked into the circumstances of the case following criticism of the CPS' role in prosecuting the "vulnerable" young woman…

[13] Miss Saunders said: "The evidence in this case was strong and having considered it in light of all of our knowledge and guidance on prosecuting sexual offences and alleged false rape claims, it is clear there was sufficient evidence for a realistic prospect of conviction for perverting the course of justice."

[14] "This was evidence including text messages and CCTV footage that directly contradicted the account Ms De Freitas gave to the police.

[15] The DPP added: "Having considered the detail and the issues raised by the family, I am satisfied that the decision making in this case was correct and that it was made in accordance with our policies and guidance."

[16] Ms de Freitas made the original complaint in January 2013.

[17] Her alleged attacker was arrested and questioned by police, but the case was later dropped because the police thought there were inconsistencies in her evidence.
…

[21] Given the test was met in this case, had the CPS not taken over proceedings, a private prosecution would have continued …

[28] The DPP's justification of their decision in the light of the subsequent tragedy is deeply disappointing and will send a message out to anyone who is thinking of reporting rape that it would be better if they didn't unless they have behaved as a stereotypical victim.

[29] Whilst it seems clear from that analysis that Eleanor behaved in a way that was confusing and inconsistent with the behaviour of the classic victim, this is a far cry from evidence that she positively lied.

[30] Anyone who has worked with rape and domestic abuse victims knows that many victims behave in ways both before and after attacks that may, at first blush, suggest that they must have consented at the time.

[31] Thus they may positively seek and encourage the sexual encounter beforehand and they may maintain what appears to be positive contact afterwards.

[32] This does not prove they consented at the time and it is deeply disappointing that despite the extensive research and training now available in relation to this, the DPP precludes it as a possibility in Eleanor's case.

[33] They also questioned the DPP's insistence that Miss de Freitas' mental condition was taken into account by prosecutors.

[34] An inquest into the death of Miss de Freitas … was postponed last month following her family's request for it to be heard by a jury."

5. The de Freitas Article

"[1] **My only daughter, Eleanor, killed herself earlier this year on the eve of a trial where she was to be prosecuted for perverting the course of justice. Eleanor had reported an allegation of rape to the police the previous year on advice from a community support officer. It resulted in the man she accused being arrested and spending a night in custody. Six weeks later, after investigating the allegation, the police decided not to charge him. Eleanor, who suffered from bipolar affective disorder, accepted this decision. She had behaved in a way that might be viewed as inconsistent by a jury and the police were concerned that with her mental illness she might be too vulnerable to withstand a trial, even as a complainant. She decided to try to put it behind her and get on with her life, and that summer she found some happiness in a new relationship and commenced studies for a new career**.

[2] However, all that changed in August 2013, when she was served with a summons for a private prosecution by the man she had accused. She instructed defence solicitors who thought there was nothing to it and they invited the CPS to take over the prosecution and stop it. However, the CPS felt differently and in December 2013, they told the court they would take over the prosecution.
…

[5] When I embarked on the course of getting justice for Eleanor, I was advised that an Article 2 compliant inquest could examine the circumstances surrounding Eleanor's death and in particular the role of the CPS in pursuing the prosecution.

[6] I am still astonished that the CPS decided to prosecute a very vulnerable young woman in circumstances in which the police had thought it should not take place. To date I have not seen all the evidence gathered as I am not entitled to access it. It is partly for that reason that I feel the inquest needs to look into this: it is my only hope of knowing what really went on.

[7] Despite the CPS's press release, it is obvious that there is much more to be heard. We want to know what our daughter went through and why. I still wonder whether, had the CPS made a different decision, our beloved daughter would be alive.

[8] The coroner was resistant to looking at this and I decided with great trepidation that if I wanted a proper examination of what took place I had to go public.

[9] The CPS told me they did not take into account the details provided by the man my daughter had accused. They said they paid no attention to the rape myths on which much of the prosecutorial information was based. However at that meeting, and afterwards, despite providing further information that was not known to them at the time, and despite what happened to Eleanor, they stand by their decision and fail even to say that they might have made a mistake.

[10] When I decided to go public, my focus was on the CPS and it remains on them. Their press release continues to defend their position, with no concession to the idea that they might not have known everything and their decision might have been wrong. I cannot even comment on the reasoning of the CPS as I have not been provided with access to the evidence. So I continue to ask, what public interest is served by the DPP's decision to prosecute and maintain the correctness of their decision?"