Claim No: 1CF91407

Neutral Citation Number: [2014] EWHC 701 (QB)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

CARDIFF DISTRICT REGISTRY

Cardiff Civil Justice Centre
2 Park Street
Cardiff, CF10 1ET

Date: 18 March 2014

Before:

His Honour Judge Keyser QC
sitting as a Judge of the High Court

- -

Between:

NEIL McEVOY

Claimant

- and –

MICHAEL COSTAS MICHAEL

Defendant

- -

David Hughes (instructed by **Glamorgan Law LLP**) for the **Claimant**

Hugh Tomlinson QC (instructed by **Hutton's Solicitors**) for the **Defendant**

Hearing date: 3 March 2014

- -

Judgment

H.H. Judge Keyser Q.C.:

Introduction

1. The claimant, Mr McEvoy, is a member and former Deputy Leader of the Council of the City and County of Cardiff. He represents the Fairwater Ward for Plaid Cymru. Until 2003 he was a member of the Labour Party, for whom he represented the ward of Riverside as a councillor from 1999.

2. The defendant, Mr Michael, is a member of the Labour Party and from December 2009 until March 2012 was the chairman of the Fairwater branch of the Labour Party. He was formerly a councillor for the Fairwater Ward and since 2012 has represented the Trowbridge Ward. He is currently chairman of the council's Planning Committee. For at least the last ten years there has been a history of personal antagonism between the claimant and the defendant.

3. In these proceedings, which were commenced on 17 October 2011, the claimant alleges that he was defamed by the defendant in two issues, Issue 6 and Issue 7, of *Fairwater and Pentrebane Fightback*, a newsletter produced on behalf of the Fairwater branch of the Labour Party and distributed to households in the Fairwater district of Cardiff.

4. On 3 September 2013 I ordered that preliminary issues be tried; these related to the meaning of the words and images complained of, to whether that meaning was factual or by way of comment, to whether the meaning was defamatory of the claimant, and to whether the defendant was the publisher of the words and images complained of.

5. The trial of the preliminary issues took place on 3 March 2014 and this is my judgment on them. I am grateful to Mr Hughes for the claimant and to Mr Tomlinson QC for the defendant for their assistance.

6. In this judgment I shall first set out the larger passages of the newsletters from which the words and image complained of are taken. Then I shall consider the question whether the defendant is to be considered a publisher of the newsletters. Finally I shall consider questions of meaning, comment and defamatory nature in respect of the specific words and image of which the claimant complains.

Issue 6

7. Issue 6 comprised two pages; I assume that they were the front and back of a single sheet, but I have not seen an original of the newsletter. On the front there was a title at the top and, at the bottom, a statement that I shall call for convenience the Promotion Statement, which stated that the newsletter was printed and promoted by the defendant. I shall say more of the Promotion Statement later. The main part of the page contained two boxes: each took up substantially the full length of the page; the left box took up about two-thirds of the width of the page. The text in the left box was as follows:

SNOUTS IN THE TROUGH

Plaid councillors were elected in 2008, following a highly personal and negative campaign against the former Labour councillors based on the very allowances that Cllr McEvoy *voted* for in 2000 and accepted.

Your Plaid councillors have already pocketed more in just over <u>two years</u> than the three previous councillors received in FOUR years.

A MASSIVE £131,645 so far!!!

Leaving aside the jollies abroad to places like Korea and China, Cllr McEvoy has also raked in **THOUSANDS** of **£££££s** more as a landlord renting out at least two properties including one that was leased to the very Council he is Deputy Leader of! He's not the socialist he pretends to be—more of a SOCIAL **LANDLORD** and a **HYPOCRITE**.

Shockingly, Cllr McEvoy has also found room in his wallet for an **<u>EXTRA £2083.08</u>** of child care allowance—or an **<u>EXTRA £40.06 a week</u>** on top of his **HUGE** earnings of **<u>£32,982 a year</u>** as a part-time councillor! Your Labour team is **demanding** an enquiry as the child in question lives with its mother in Aberystwyth! **How many part-time workers can get their employers to fork out for 'child care' like this?**

Your Local Labour Team is writing to the council to demand an end to these shameful payouts. After all, it's YOUR money!

8. Underneath that text there was a photograph that had been altered for comic and political effect. In the background was Cardiff City Hall. In the foreground were two figures: the one in the centre was recognisable in context as Derek (Del Boy) Trotter of the BBC comedy programme *Only Fools and Horses*, but his face was the claimant's face; behind his left shoulder was a character with a face recognisable as that of Mr Rodney Berman, who at the time was a Liberal Democrat councillor and, I believe, the Leader of the Council of the City and County of Cardiff. At the top of the picture in capital letters were the words: "This time next year we'll be millionaires Rodders!" On the right of the picture was a vehicle recognisable as Derek Trotter's van, on which was written:

McEvoy's Independent Trading

New York, Paris, Fairwater

Free Child Care

On top of the van was a box, on which was written:

DIY

INTERNATIONAL BUSINESS PARK KIT

MADE IN XIAMEN CHINA

9. The right box on the first page contained two articles. The lower article was in the following terms:

PLANNING CHAOS

> Your Plaid councillors are busy blaming Labour for the collapse of their Local Development Plan (LDP) because we did not support their bogus 'Green Cardiff' campaign—as usual, it's everybody's fault but **THEIRS**! The LDP collapsed because they were too timid to honestly address the land and housing needs of a growing city. In another superb example of brass-necked hypocrisy, Cllr McEvoy wants to build a Business Park at Junction 33 on those same green fields as well as a school on Rumney Rec and hundreds of student flats on Cantonian School fields to pay for his fantasy football plans.

10. On the second page of the newsletter there were three boxes. Along the bottom was a box containing the Promotion Statement and details of how to support the local Labour Party. Roughly the upper 80% of the page was taken up as to two-thirds by a single article and as to one-third by two articles, of which one concerned the claimant. The passage containing the words of which the claimant complains was the article in the main box.

FAIRWATER FC FURY

> The former Labour councillors worked closely with Fairwater Football Club and helped to set up the Fairwater Sports Trust and obtained about £300,000 to improve Poplar Park, Fairwater Bowling Green, Fairwater Tennis Courts and the surrounding area including £24k for drainage works to improve the football pitch and Wales League standard dressing rooms and community area. The club prospered and were promoted to the South Wales Amateur League and the Cup in 2007/8 ***but then Cllr McEvoy was elected and it all went horribly wrong for them as reported in the Echo*:**
>
> **ECHO 7th October 2010:** Fairwater FC is pursuing a lengthy complaint to the Public Services Ombudsman for Wales accusing the Plaid Cymru councillor of inventing a "poisonous and divisive pipe dream".
>
> Because Mr McEvoy promised the club a new home and advised against developing their own ground, the club stopped pushing to turn their Poplar Park home into a Welsh League facility. They were denied promotion as a result, despite two seasons as South

Wales champions, and have since lost nine top players to better equipped sides and slumped down the leagues.

Simon O'Hare […] said: *"I'm just disappointed with him. He's a local boy who has fallen on his feet and become deputy leader. He's in a great position to help and instead he's just hindered us. As a direct result of what he's done we've gone from league and cup double winners to being in the bottom half of division two and having to start from scratch again."*

"He has been unhelpful, he's been obstructive and he has misled us."

Following another misleading letter from Councillor McEvoy on the 9th October, Fairwater FC has publicly challenged him (Echo 16th October) "to produce a copy of his [Cantonian Football Academy] business plan, and to produce documentation to support his claim that his funding inquiries were at 'an advanced stage' at the next Fairwater PACT meeting (October 27th at Plasmawr Road Day Centre, 7 pm)."

Your Fairwater Labour team hopes that Fairwater FC will recover from the meddling and misleading by Cllr McEvoy. We would like to know what the Cantonian governors were told because residents living near the school are praying that he will abandon his madcap students flats scheme!

In our opinion, his directorship of Complete Football Management Ltd has been a conflict of interest throughout this whole sorry saga.

IS MEDDLING & STUDENT FLATS WHAT YOU VOTED FOR?

Issue 7

11. Issue 7 again comprised two pages. The first page was headed with the title of the newsletter and at the foot of the page was the Promotion Statement. In between, two boxes each ran the length of the page. The left box, which took about two-thirds of the width of the page, looked ahead to the referendum that was shortly to be held in respect of devolved powers. The right box contained an article in which the claimant was criticised, but no complaint is made about that article.

12. The second page contained various articles. I shall set out only the two from which the words of which complaint is made are taken.

> **PACT PANEL PACKED:** Plaid councillors have ensured that (nearly) every member of your local PACT panel is a Plaid Cymru member or supporter. We believe that the panel should be

> completely apolitical as it is supposed to be representative of the community—that's why your local Labour Party will not put forward names of local party activists. Sadly, Plaid's control freakery will reduce PACT meetings to political circuses where any resident with the temerity to criticise their local Plaid councillors can expect a less than welcome reception.
>
> **HOW GREEN DO THEY THINK WE ARE?** Plaid run the council with all the responsibility that leadership entails yet they still 'fight to save our fields' and decry the Local Development Plan as 'not fit for purpose'. The city is growing and eventually all brown field sites will be used up and any honest and responsible leadership would seek to manage that growth for the decades ahead and maximise the return for the city as a whole and for those residents affected by development. You CANNOT say it's okay for green fields in neighbouring authorities and Cardiff East to be concreted over and then pretend in Fairwater to be some kind of green superhero. It's sheer hypocrisy – especially as the Deputy Leader has been globe-trotting to sell the International Business Park at Junction 33 – which will be built on the same green fields he's 'fighting to save'!

Did the defendant publish the newsletters?

Relevant facts

13. Issue 6 was distributed on 20 October 2010, having been printed on or about 17 October 2010. When the claimant learned of the newsletter, he caused representations to be made to senior officials of the Welsh Labour Party, who directed the Fairwater branch to cease distribution of Issue 6 immediately. Issue 7 was distributed on 2 March 2011, when according to the claimant some further copies of Issue 6 were also distributed. Again, when the newsletter was brought to the attention of senior officials of the Welsh Labour party they directed that distribution should cease.

14. The actual printing of the newsletters was done by Mr Paul Mitchell, an active member of the local party and a former and present councillor. Distribution was carried out by members and supporters of the local party; the defendant himself delivered copies of Issue 6 to some houses, though he says only a few.

15. What I have previously referred to as the Promotion Statement is found at the foot of both pages of Issue 6 and the first page of Issue 7 and is in these terms:

> Printed and Promoted by Mr M. C. Michael of *[the defendant's address]* on behalf of the Fairwater Labour Party at *[the defendant's address]*

16. The Promotion Statement reflects the provisions of section 143 of the Political Parties, Elections and Referendums Act 2000, the effect of which is that where "election material" is published in a printed document that document must set out certain details, in particular (a) the name and address of the printer of the document and (b) the name and address of "the promoter" of the material: section 143 (2). For the purposes of the Act: "'the promoter', in relation to any election material, means the person causing the material to be published": section 143(11). Before me, both parties proceeded on the basis that neither of the newsletters comprised or contained election material for the purposes of the Act. I am not altogether sure that this is correct; the evidence suggests that there was a ward by-election in late 2010. However, as the point has not been argued before me, I shall assume that the parties are correct; anyway, the case concerns defamation, not electoral law. The relevance of the Act is that it does appear that the statutory requirements were at least indirectly the reason for the inclusion of the Promotion Statement.

17. The defendant's evidence regarding the production of the newsletters was to the following effect. They were written and printed by Mr Mitchell and were presumably paid for by the local party. The defendant had no input at all into the contents of the newsletters; although he was one of the recipients of emails from Mr Mitchell in the course of and connection with the preparation of the newsletters, he did not read all of those emails and did not make any responses regarding the content of the newsletters. At the time his involvement with the local party was minimal, because he was busy with other matters. As the Fairwater branch was little more than a group of like-minded friends who met once in a while, his role as chairman was little more than as a contact-point. He understood that it was to comply with a statutory requirement for a contact-point to be identified on the newsletters that his name appeared in what I have called the Promotion Statement. (He also said that it was on 20 October 2010, when he was delivering copies of the newsletters to some local houses, that he became aware of the Promotion Statement containing his name. His evidence appeared to mean that it was only then that he became aware that his name was being used at all, rather than simply that he then first learned it was placed on Issue 6.) He knew that Mr Mitchell was an assiduous researcher, who would not include in the newsletter "anything that would be damaging to my name"; therefore he was satisfied that the contents of the newsletters were true.

18. Mr Mitchell's evidence was to similar effect to that of the defendant. As an active and experienced Party member and a person strongly concerned with community matters, he thought it important to respond to what he regarded as misleading and unduly personal propaganda issued by Plaid Cymru and by the claimant in particular; and he had the time and the knowledge to take the lead in the writing of the newsletters. In respect of both Issue 6 and Issue 7, he circulated drafts to branch members, some of whom offered comments; no one proposed amendments of substance to the content, however, and the defendant's preoccupation with other community affairs made attempts to engage him in communication frustrating. The newsletters were also sent to the Local General Secretary before publication and were not circulated before approval had been obtained. The Promotion Statement was included because

it was prudent to forestall arguments that newsletters, even in a non-election period, were election material. There was a convention that the person named as printer and promoter was the chairman of the local party; most party chairmen would know of the convention, and "we certainly assume that they do". However, the Promotion Statement neither stated nor implied that the defendant was the author of the newsletter.

19. Various emails regarding the production of the newsletters were put in evidence. Mr Mitchell very fairly made it clear in the course of his evidence that he could not say whether they were all of the emails in that regard, and I think it very likely that they were not. As they are the main contemporaneous documentation, I shall deal with them at some length.

20. In June 2010 there were some emails regarding Issue 5, which was published shortly afterwards. Although these relate to an earlier newsletter, they seem to me to be of some relevance to the questions that concern me.

21. The emails show that Mr Mitchell intended that Issue 5 be handed out at a ward meeting scheduled for 22 June 2010. On 6 June he sent a draft to Mr Mark Drakeford, the recently elected Assembly Member for Cardiff West; the email was copied to eight other people, one of whom was the defendant. On 8 June Mr Drakeford replied only to Mr Mitchell, attaching a slightly amended draft. Mr Mitchell's reply was again copied to six other persons, including the defendant, and was addressed "Dear All". It attached a further draft, which contained the Promotion Statement on both pages, and in a passage commencing "Sorry, Mike" it responded to and rejected a suggestion for modification of the newsletter. It is likely that "Mike" was the defendant; none of the email addresses of the other recipients suggests the name Mike or Michael, although it is conceivable that the first, which includes the identification "braders", belongs to someone of that name.

22. Later that morning, 8 June, Mr Mitchell sent a further email to Mr Drakeford and to eight other recipients, including the defendant:

> "Following emails from the ward and yet more lead McEvoy stories in the Echo about the schools in Canton I revamped the leaflet but this is the LAST draft. I hate writing leaflets via committee! I am not going to change it. I have things to do today. I think this is now a perfect ward-focused attack leaflet and recommend acceptance and distribution ASAP."

Mr Mitchell had been unduly optimistic about the finality of his earlier draft. On the night of Sunday 20 June he sent an email to seven recipients, including the claimant, stating:

> "Okay guys, this is the sixth and LAST time I'm amending this leaflet. … Hope to print it Tuesday afternoon [22 June] about 3 pm."

Even then, Mr Mitchell managed to send out a final version at 2.17 pm on 22 June, containing last-minute comment on the Chancellor of the Exchequer's first budget, which had been delivered earlier that afternoon.

23. From these emails I note the following points. First, the practice being followed was to pass all drafts for consideration by a number of local members, including the defendant. Second, comment and feedback were being given. Third, it is likely that a suggestion for amendment of the content of Issue 6 was made by the defendant. Fourth, it is certain that email responses were sent to Mr Mitchell, although these have not been produced in evidence. Fifth, it is possible that responses were also given by other means (telephone, face-to-face), though I think it likely that this was a less usual form of response. Sixth, although on behalf of the defendant it was suggested that Mr Mitchell's email of 8 June expressing dislike of drafting by committee shows that Mr Mitchell was asserting and taking responsibility for the contents of the newsletter and that it undermined the allegation that the claimant bore responsibility for it, what it rather shows is that Mr Mitchell, though the principal author of the newsletter, was submitting his efforts for approval and adoption by the local party. Seventh, that was clearly in fact the case: although the primary composition was that of Mr Mitchell, he was preparing his draft, in consultation with others, for the purpose of submitting it for acceptance by the local party at a ward meeting.

24. The emails regarding Issue 6 begin on 8 September 2010. Mr Mitchell sent an email to two people, one of whom was the defendant. It said, "So far – so good", and attached an early and incomplete draft of the newsletter, containing both the Promotion Statement and the Del Boy picture. On 22 September Mr Mitchell sent an email to eight people, including the defendant. It attached a further draft and said, "As sanctioned by the ward, this is the last but one attack leaflet – any more will be counter-productive in the long-run unless mixed with positive stuff." On Saturday October 16 Mr Mitchell sent a further draft to seven people, including the defendant. It had been developed significantly from the first draft and was close to the final version. The following day he sent to seven people, including the defendant, an email attaching what was apparently intended to be the final version of Issue 6, "to go out Wednesday" (that is, 20 October). But on 18 October Mr Mitchell sent a final version to nine people, including the defendant; the email said simply: "Finally – we're agreed on the attack format!!!"

25. I have no doubt at all that, in connection with Issue 6, there were emails and other communications between 8 September and 18 October 2010 that have not been produced in evidence. Even the initial email of 8 September presupposes some background of communication and discussion, if only regarding strategy. The gaps thereafter are most unlikely to reflect total inaction, as is suggested not only by common sense but by the evidence relating to Issue 5. Even if communications consisted of no more than approval and encouragement, there must have been such communications. The process of revision reflects an attempt to accommodate the views of those to whom the earlier drafts were circulated. The final email dated 18 October is explicit regarding the fact that agreement had been reached. (Reference to

"the attack format" cannot refer to the attack strategy, which had been approved at the outset, as indicated by the email dated 22 September. Nor can it relate to design, which was unexceptional.)

26. There then follow some emails in November 2010. They relate to efforts to redraft Issue 6 after the Party had directed the withdrawal of the version that was distributed on 20 October. On 3 November Selwyn Hughes, a Labour Party activist (I am not sure whether he was a member of the Fairwater branch or was involved because of his wider links in Cardiff) sent an email to Mr Mitchell:

> "In the redrafted edition of your newsletter we were discussing tonight, I think it would be best not to put in Mark's [i.e. Mark Drakeford's] photo and any reference to his campaign. If as Michael Michael said tonight you are intending to attack Neil McEvoy both in this edition and in the next and then reverting to a more positive approach afterwards I would prefer Mark not to be mentioned until those positive editions are produced."

Mr Mitchell responded on the following day, when he attached a revised draft of Issue 6. It was sent to six people, including the defendant. On 5 November Mr Mitchell sent a further draft to six people, including the defendant. The email began, "Latest recommended version—we should be allowed to quote the council's own rules? Chris has copy. Awaiting okay." On 9 November Mr Mitchell sent a further draft to five people, including the defendant, and the local branch's email address. The "subject" of the email was "leaflet massacre", and the first sentence said, "This is all we're left with after the lawyers—suggestions for two POSITIVE stories please". The reference to "Chris" was to Chris Roberts, the General Secretary of the Labour Party in Wales. However, he was replaced in November 2010 by David Hagendyk. On 23 November 2010 Mr Mitchell was informed that the newsletter could not be circulated until it had been approved by Mr Hagendyk. Mr Mitchell forwarded the email giving that information to four people, including the defendant, and to the local branch email address. There are no further emails in evidence, and I do not know whether approval was given for the revision of Issue 6. Nothing turns on the point.

27. The emails regarding Issue 7 commence on 6 February 2011, when Mr Mitchell sent an email to ten people, including the defendant, and to the local party address. It said:

> "I've drawn up the detailed attack leaflet (hopefully HQ won't ban it) to tie down McEvoy during the by-election. He cannot resist replying and will try to rush out a counter-leaflet or explode in the press – either way it will detract from the Plaid effort in Riverside. I would welcome comments by Friday at the latest."

Mr Mitchell received a lengthy suggestion from Mr Drakeford, which on 8 February he forwarded with an update of his draft to nine people, including the defendant, and to the local party address.

28. There are no further emails regarding the drafting, approval and publication of Issue 7, before the claimant's complaint on 3 March 2011 about distribution of it the previous day. As with the case of Issue 6, I consider it strongly probable that there were a significant number of other communications, both by email and otherwise.

29. Some mention might be made of the minutes of the Fairwater Branch Labour Party meetings. The only minutes produced in evidence were those of a meeting on 16 November 2010, which was in the period when approval of the revised version of Issue 6 was awaited from the General Secretary. The minutes of that meeting contain one material entry under the heading "Campaigning":

> "6.1 Report of meeting with Wales Labour General Secretary regarding leafleting etc received. WLP wished to avoid controversy during NAW election period, but FBLP felt active campaigning against [unnamed] rogue Plaid Councillor … was politically essential.
>
> 6.2 Noted: New General Secretary (David Hagendyk) in process of taking over. Agreed: To renew discussion with him in due course."

The other point that appears from the minutes is the occasions when previous meetings had been held. The last previous regular meeting had been on 21 September 2010. (Therefore, whatever was the occasion when the defendant mentioned strategy regarding the newsletters on 3 November 2010, as referred to in Selwyn Hughes' email of that date, it was not a regular meeting of the branch.) There had been what appears to have been a special meeting on 26 October 2010 when, after a prospective candidate for the Assembly elections had spoken, there had been "discussion of campaigning issues"; there was no evidence as to what those issues were or, indeed, of anything that had transpired at branch meetings. The next meeting, the AGM, was to be on 19 January 2011. This suggests that regular meetings took place every two months. I do not know whether the meeting on 22 June 2010 was a regular or a special meeting, however.

30. Finally, it is relevant to note briefly some of the pre-claim correspondence. On 28 September 2011 the claimant's solicitors sent a letter of claim to the defendant. The letter made clear that it was alleged that the defendant had published the newsletters.

31. On 4 November 2011 the defendant's solicitors sent a letter of response. Some features of the letter might be noted. It does not deny that the defendant was a publisher or involved in the publication of the newsletters. Rather, it emphasised that the newsletters were not a personal attack on the claimant by the defendant but were issued "with the full knowledge and support" of the Party; cf. paragraph 4. Specific issue was taken with the allegation that the defendant was responsible for the redistribution of Issue 6 in 2011:

8. The subsequent re-release of this leaflet is therefore not connected to our client in any way …

9. Given the above, our client will say that he cannot be held accountable for a document which has been re-released by persons unknown and outside of his control.

Under the heading "Conclusion", paragraph 28 stated:

28. It is our view that the allegations of defamatory remarks levied solely against our client by your client are unfounded and liability for the same is denied. Our client has acted in accordance with the instructions of the Local Labour Party Branch and has only raised and commented upon issues which are of relevant public interest. At no time has our client done anything which would give your client grounds to bring an action against him on a personal basis. In addition, the comments made in the publications are clearly recognisable as honest comments which are based on facts which are true or believed to be true.

32. On 23 December 2011 the claimant's solicitors responded. Their letter stated that it was irrelevant that publication had been with the knowledge and support of the Party: "The comments were made by your client and hence he is liable under the laws of defamation." Again,

> "[T]he statements made by your client in issues 6 and] 7 … are prima facie defamatory. It is irrelevant that your client has acted in accordance with instructions of the Labour Party. As the author of the comments he is liable under defamation."

33. Having taken instructions, the defendant's solicitors responded, "Our client is not prepared to alter his position and will rely upon the defences set out in our previous correspondence."

Relevant law

34. *Gatley on Libel and Slander* (12th edition), at para 6.10, summarises the general principles of responsibility for publication of defamatory matter as follows (footnotes omitted, here and elsewhere):

> "The person who first spoke or composed the defamatory matter (the originator) is of course liable, provided he intended to publish it or failed to take reasonable care to prevent its publication. However, at common law liability extends to any person who participated in, secured or authorised the publication …"

In respect of "Joint and several liability", *Gatley* says at para 6.11:

> "In accordance with general principle, all persons who procure or participate in the publication of a libel, and who are liable therefor,

> are jointly and severally liable for the whole damage suffered by the claimant. Thus in the case of the publication of a newspaper the journalist, editor and publisher are all joint tortfeasors.
>
> > 'If one repeat, and another write a libel, and a third approve what is wrote they are all makers of it; for all persons who concur, and show their assent or approbation to do an unlawful act, are guilty' [*per curiam* in *R v Paine* (1696) 5 Mod. 163 at 167]."

However, as Eady J observed in *Bunt v Tilley* [2007] 1 W.L.R. 1243, at 1249, a person will not be held liable as a publisher without a sufficient degree of intention or awareness:

> "21. In determining responsibility for publication in the context of the law of defamation, it seems to me to be important to focus on what the person did, or failed to do, in the chain of communication. It is clear that the state of a defendant's knowledge can be an important factor. If a person knowingly permits another to communicate information which is defamatory, when there would be an opportunity to prevent the publication, there would seem to be no reason in principle why liability should not accrue. So too, if the true position were that the applicants had been (in the claimant's words) responsible for 'corporate sponsorship and approval of their illegal activities'.
>
> 22. I have little doubt, however, that to impose legal responsibility upon anyone under the common law for the publication of words it is essential to demonstrate a degree of awareness or at least an assumption of general responsibility, such as has long been recognised in the context of editorial responsibility. As Lord Morris commented in *McLeod v St Aubyn* [1899] AC 549, 562: 'A printer and publisher intends to publish, and so intending cannot plead as a justification that he did not know the contents. The appellant in this case never intended to publish.' …
>
> 23. Of course, to be liable for a defamatory publication it is not always necessary to be aware of the defamatory content, still less of its legal significance. Editors and publishers are often fixed with responsibility, notwithstanding such lack of knowledge. On the other hand, for a person to be held responsible there must be knowing involvement in the process of publication of *the relevant words*. It is not enough that a person merely plays a passive instrumental role in the process. …"

35. For the defendant, Mr Tomlinson QC also referred me to the decision of Tugendhat J in *Underhill v Corser and another* [2010] EWHC 1195 (QB). In that case, the claimant sued for libel on the basis of the contents of the editorial in a single issue of the magazine of a charity. There was a preliminary issue whether the first defendant, Mr Corser, was responsible in law for any of the publications complained of. He was the treasurer of the

charity and a member of its management board; all his work for the charity was voluntary and unpaid. He was originally joined as a defendant on the strength of his membership of the management board, but it was accepted at trial that that mere fact was not a sufficient basis for holding him liable. He was also joined on the basis that it should be inferred that the editorial had been discussed by all members of the management board. Mr Corser admitted that he was aware of the contents of the editorial before publication, though he denied having approved the editorial.

36. At [27] to [29] Tugendhat J referred to passages in the 11th edition of *Gatley* and in *Byrne v Deane* [1937] KB 818 and *Bunt v Tilley*. At the beginning of [27] he also said:

> "The principle governing responsibility for publication of a libel is broad. As summarised by the editors of *Duncan & Neil on Defamation* 3rd ed para 8.10: 'Every person who knowingly takes part in the publication of defamatory matter is prima facie liable in respect of that publication.'"

Despite the breadth of the principle, however, Tugendhat J held that Mr Corser was not responsible for the publication of the editorial. The case had to be decided on the basis that Mr Corser knew in advance of the publication but did not address his mind to whether or not the editorial should be published and then did nothing more about the matter. Such inaction was not a ground for inferring consent to the publication. See [109] and [110].

Discussion

37. In my judgment, the defendant has legal responsibility for the publication of Issue 6 and Issue 7 of the newsletter. His responsibility does not rest on authorship of those newsletters; clearly he did not write them himself. It rests rather on the fact that he falls squarely within the principles contained in the two passages set out above from paragraphs 6.10 and 6.11 of *Gatley*.

38. I have set out enough of the facts, including such evidence as has been put before me regarding email communications, to make clear how the newsletters came to be published. I shall draw the strands together. The Fairwater branch of the Labour Party is a small group of persons acting relatively informally but under the auspices of Welsh Labour and the national Party. Campaigning, including the distribution of leaflets, is discussed and decided upon at branch level, though with input from the local Assembly Member (there is no evidence of input directly from the local Member of Parliament) and in consultation with the Party headquarters in Cardiff. The strategy for leaflets would be decided in principle by the branch. Thus in the present case it was decided that there should be two "attack" newsletters (Issues 6 and 7), which focussed not on advancing a constructive political case but on attacking political opponents—mainly, but not quite exclusively, the claimant—followed by a positive newsletter, which would put aside that negative approach and instead concentrate on what the Labour Party was offering to the electorate. The newsletters were drafted by Mr Mitchell. No other reasons for

that fact are required than, first, that it is obviously sensible that one person do the writing rather than that the document be entirely produced by committee and, second, that Mr Mitchell was an astute and experienced politician with a gift for research and writing and the time and energy to do the work. But Mr Mitchell was not a loose cannon, or engaging in a frolic of his own—however one wishes to put it. He was doing the work for and on behalf of the local branch and for the purpose of implementing the strategic decisions regarding the attack newsletters. His efforts were submitted to branch members as they progressed, with a view to receiving approval or suggestions for alteration. I am entirely satisfied that they did receive input and were redrafted to reflect the suggestions, though probably not very drastically. When the draft was finalised, Mr Mitchell submitted it for approval and acceptance. That approval might be formal approval at a branch meeting, as occurred in respect of Issue 5, for which the records are the most complete. It may be that in other cases it was less formal, being constituted by arrival at a text that required no further alteration by those to whom it was circulated. In short, the point made by the defendant's solicitors in paragraphs 4 and 28 of their response to the pre-claim letter (paragraph 31 above) applies above all to Mr Mitchell.

39. As for the defendant, although it is not necessary to the conclusion I have formed, I reject his efforts to distance himself from the process by which the newsletters were produced. His very description of the way in which the branch functioned is itself, in my view, only partially true. As he said in evidence, the branch comprised what were in effect "a group of friends". (Whether the eight or so people who were receiving the emails were the total branch membership, or committee members, or the activists, I do not know. The defendant's evidence suggests the likelihood that they were the entire membership, or at least the entire active membership.) But, as well as informal contact, there were formal, minuted meetings on a regular basis and the branch operated properly as a local branch of the national party. Mr Mitchell's evidence, which I accept, was that the final drafts of both Issue 6 and Issue 7 were submitted to the General Secretary of Welsh Labour for approval.

40. Regarding the defendant's personal involvement: although it is likely that his role as chairman was not one of "leadership" in any formal sense, as he was one of a group of friends, I am sure that he performed the requirements of that role, including chairing the meetings. More importantly, I do not accept the picture of him as someone who had little involvement in the local party—whose involvement was, as he put it in evidence, "at a minimum". Of course, the Fairwater branch was small; its activities were relatively limited and may well not have taken up much of the defendant's time. But I consider it strongly probable that the defendant was fully involved in those activities. First, he was appointed chairman of the branch in December 2009. It is improbable that someone not committed to the activities of the local branch would be appointed chairman or, indeed, that he would remain in that role until March 2012, as he did. Second, he was and remains a committed politician. He was a councillor for the Fairwater ward until May 2008 and has been a councillor for the Trowbridge ward since May 2012. Active involvement in local party politics was central to him. Third, the relevant part of the limited activities of the branch, namely the production of the

newsletters, is not something that would have been inconsistent with the defendant's other activities. Some of the issues, including strategy, would have been discussed in meetings, at which the defendant would have been present. Other matters were dealt with by emails, which are capable of being dealt with around other activities; I shall say more of them presently. Fourth, the picture painted by the defendant and Mr Mitchell is at odds with, if not logically and as a matter of strict necessity inconsistent with, the fact that the defendant went out distributing copies of Issue 6 to local households, albeit only to one street on his evidence. Fifth, the email dated 3 November 2010 from Selwyn Hughes shows that the defendant was discussing campaign strategy regarding the leaflets with Mr Hughes on an occasion which was outside the regular branch meetings (although the terms of the email suggest the probability that it was at some specifically political gathering, however formal or informal). Sixth, the defendant would be keenly interested in the campaigning strategy. Indeed, he does not suggest otherwise. But it is right to say plainly that in my view the strategy of directing explicit attacks against the claimant (I say nothing as to the merits or demerits of that as a strategy) reflects his own judgement as to what is appropriate, though that judgement is no doubt shared by others of the "group of like-minded friends" that is the Fairwater branch of the Labour Party. Since at least 2002/2003 the claimant and the defendant have been at loggerheads, after the claimant complained of alleged irregularities in a transaction between the defendant and the council. When the defendant lost his seat as councillor for the Fairwater ward in May 2008, the claimant was elected as a councillor for that ward; cf. the "Snouts in the Trough" article in Issue 6 for some pertinent reference to this. I say nothing of malice, animus or the rights and wrongs of disagreements. But the strategy evident in the newsletters and, as a matter of probability, in the minutes of the branch meeting on 16 November 2010 (paragraph 29 above) is one to which he was privy and to which, I am entirely satisfied, he gave whole-hearted support and active encouragement. Seventh, having listened to the evidence of the defendant and Mr Mitchell and considered it in the context of the documents, I am afraid that I simply do not believe that the defendant did not respond in any way regarding the drafts. Mr Mitchell was not submitting them on the chance that his friends might be interested in what he was doing. He was submitting them for approval, because he was working solely to implement the decision of the branch as to this aspect of campaigning. As I have made clear, there were clearly communications that have not been put in evidence, including email communications. The process of communications resulted in agreement of Issue 6 and I am satisfied that it will have done so in respect of Issue 7 also. It is highly probable that the defendant actively communicated his agreement; this is both a matter of inherent likelihood from the circumstances and because I regard it as almost inconceivable that this defendant, having the attitude he does towards this claimant, would have been able to refrain from comment. (The distinct question, whether the defendant made positive contributions to the text, in the sense of suggesting omissions or alterations or additions that were reflected in the final text, is not in my judgment relevant.) Even if I were wrong about active communications by the defendant, the entire exercise whereby Mr Mitchell was working towards an agreed draft, not merely a personal effort sent to others for their interest, would indicate that the email correspondents

were working on the basis that silence indicated satisfaction with the draft. Eighth, the nature of the responses by the defendant's solicitors to the letter of claim tends to suggest, what seems otherwise likely, that the defendant's current efforts to distance himself from active involvement in the production of the newsletters is a tactical device adopted after the expiration of the limitation period, when it no longer risks passing blame to others but would, if successful, ensure the failure of the claim.

41. As for the Promotion Statement, I find that the defendant knew about it at all relevant times. He is an experienced local politician. Mr Mitchell's evidence shows that it is inherently likely that the defendant knew that his name and address would appear on the newsletters. The Promotion Statement appeared on all of the drafts of Issue 6. It also appeared on Issue 5, as already mentioned. It also appeared on Issue 4, which internal evidence shows was produced after 22 February 2010. A corresponding statement, showing a different name and address, also appeared on Issues 1, 2 and 3, all of which were produced before the defendant became chairman of the local branch but while he was a member of the branch. I reject the defendant's evidence that he did not know of the Promotion Statement until he was distributing Issue 6 on 20 October 2010. That evidence is incredible and is an example of the defendant's attempts to distance himself from the newsletters.

42. Mr Tomlinson submitted that the Promotion Statement had no legal effect in and of itself and that, as a statement of fact, it had to be judged by its correspondence with the actual facts: despite what it said, the defendant was not the printer of the newsletters; the fact that it said he was the promoter did not make him such. That submission seems to me, with respect, to miss the point that the Promotion Statement was an expression of the fact that the branch, represented for these purposes by the chairman, was responsible for publishing the newsletters. Mr Mitchell accepted that he knew the Electoral Commission's guidance for candidates in respect of the requirements under section 143 of the 2000 Act ("the imprint requirements"):

> "4.33 The intention of imprint requirements is to enable anyone to trace the person responsible for the material, for example in case of any complaint or query about its content. …
>
> 4.35 The promoter is the person who causes the material to be published. …
>
> 4.36 The printer is the person or company that physically prints the material. …"

The defendant was less sure that he knew the guidance itself, but he knew both the requirements and the purpose of the requirements. He also accepted that the information given pursuant to the imprint requirements had to be true; he accepted this "with hindsight", but I do not think that he or anyone else requires hindsight on this point.

43. The reason why the defendant was named in the Promotion Statement was simply that the newsletter was produced by the branch, which was a small

unincorporated association of which he was the chairman. Mr Mitchell was doing no more than implementing the decision of the branch—of which, of course, he was a member. It is likely that he ought to have been named as the printer, but the reason he was not so named is doubtless that he was simply the agent by whom the branch printed its own leaflet.

44. I should, if necessary, be prepared to hold that the Promotion Statement was itself a sufficient assumption of responsibility to bring this case, in the particular circumstances, within the principles enunciated in *Bunt v Tilley* and in the passages cited above in *Gatley*. However, the case goes far beyond that. The leaflets were written to implement a branch decision to publish attack newsletters focusing on the claimant. Mr Mitchell gave effect to that decision by producing drafts to the members, including the defendant as chairman, so that it might be approved. Only when the process of approval had been completed (which includes, it should be remembered, submission to and approval by the General Secretary) were the newsletters released. The question whether any parts of the newsletters were themselves suggested by the defendant is immaterial. He was part of the approval process. I am satisfied that he played an active part in that process by confirming approval. Even if I were wrong on the point, the process was such that his approval would be inferred by silence. The foregoing discussion of the facts and basis of decision in *Underhill v Corser* is sufficient to show that this is a very different case: the defendant was not simply a member of the management committee who, having no responsibility for or involvement in the production of the newsletter, happened to see it in draft but thought no more about it and assumed no responsibility for it. In short, even if the Promotion Statement were not as I think itself an assumption of responsibility, it correctly states the defendant's actual responsibility on the facts of this case.

Meaning, Comment and Defamation

45. The remaining preliminary issues relate to the particular parts of the newsletters of which the claimant complains and ask as to their meaning (whether their ordinary and natural meaning or their meaning by way of innuendo), as to whether they constitute factual assertions or are comment, and as to whether they are defamatory. In accordance with the helpful approach adopted by counsel in their submissions, I shall order the discussion by reference to the particular parts of the newsletters in turn, rather than by reference to the preliminary issues themselves. In considering the particular parts of the newsletters, I bear in mind the context in which those parts appear within those newsletters, the context both of the entirety of the articles in which they appear and of the other articles that are contained in the newsletters but are not set out above. I also bear in mind the wider context, namely that these are campaigning leaflets that will have been understood as advancing a partisan view of the claimant.

46. First, however, I shall set out as briefly as possible the relevant law, noting that the matters complained of predate the Defamation Act 2013, which has modified the law in certain respects.

The relevant law

47. The first question is: What do the words mean? Only when the meaning is known can the further question be asked: Is that meaning defamatory? The law proceeds on the basis that the words have a single meaning. This is "a fiction adopted by the law for practical reasons": *per* Laws LJ in *Lait v Evening Standard Ltd* [2011] 1 W.L.R. 2973, 2983.

48. As to the ascertainment of the meaning of words, in *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 Sir Anthony Clarke MR, with whom Tuckey and Jacob LJJ agreed, said this at [14]:

> "The legal principles relevant to meaning have been summarised many times and are not in dispute. … They may be summarised in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any 'bane and antidote' taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation…' (see Eady J in *Gillick v Brook Advisory Centres*, approved by this court [2001] EWCA Civ 1263 at paragraph 7 and *Gatley on Libel and Slander* (10th edition), paragraph 30.6). (8) It follows that 'it is not enough to say that by some person or another the words might be understood in a defamatory sense': *Neville v Fine Arts Company* [1897] AC 68 per Lord Halsbury LC at 73."

49. Two kinds of meaning are relevant for the purposes of the law of defamation: first, the natural and ordinary meaning; second, a meaning by innuendo.

50. The natural and ordinary meaning of words was explained by Lord Morris of Borth-y-Gest in *Jones v Skelton* [1963] 1 W.L.R. 1362, 1370-1:

> "The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words."

51. A meaning by innuendo: that is "a meaning alleged to be conveyed to some person by reason of knowing facts extraneous to the words complained of": CPR PD 53, para 2.3(1)(b). A claimant who relies on a meaning by innuendo is required to identify the relevant extrinsic facts.

52. The question what constitutes comment rather than an imputation of fact is relevant not to questions of meaning but to the availability of the defence of honest comment. At paragraph 12.8, *Gatley on Libel and Slander* states:

> "The ultimate determinant of whether the words are comment or fact is how they would strike the ordinary, reasonable reader. … The matter is not simple. There may be significant practical difficulty in distinguishing comment and fact. The first step is to determine the meaning of what the defendant has said in its context. For this purpose, the law adheres to the normal rule that words are treated as having a single meaning. It is possible to distinguish three general situations:
>
> (1) A statement may be a 'pure' statement of evaluative opinion which represents the writer's view on something which cannot be meaningfully verified: for example, 'I do not think Jones is attractive'.
>
> (2) A statement which is potentially one of fact or one of evaluative opinion according to the context: for example, 'Jones is a disgrace'.
>
> (3) A statement which is only capable of being regarded as one of fact and is in no sense one of opinion, but which may be an inference drawn by the writer from other facts: for example, 'Jones took a bribe'.
>
> Honest comment clearly applies to the first situation. It also obviously applies to the second situation if the statement is best read as an evaluative opinion in the context of the publication as a whole (for example, because the writer has just described some controversial act of Jones). … [T]he defence can also apply to the third situation above if the statement of fact can be understood as an inference from supporting facts."

53. A "bare comment" is a statement that, though perhaps intended as a comment, does not include any indication of the underlying facts and as a result cannot be understood as an inference: for example, the statement, "Jones is a thief", or even, "On the basis of what I know, Jones is a thief", is likely to be treated as an imputation of fact, not a comment, because it does not state sufficient background facts to enable it to be understood as an inference from such facts. See *Gatley* at paragraph 12.9.

54. In *Joseph v Spiller* [2010] UKSC 53, [2011] 1 AC 852, Lord Phillips of Worth Matravers PSC, with whom the other Justices agreed, approved with one modification the statement of the law relating to the defence of fair comment

(now called honest comment) made by Lord Nicholls of Birkenhead in the Court of Final Appeal of Hong Kong in *Tse Wai Chun v Cheng* [2001] EMLOR 777. As I am not considering the application of the defence in the present case, I shall refer only to the second proposition and to the fourth proposition as restated by Lord Phillips:

> "Second, the comment must be recognisable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege. Much learning has grown up around the distinction between fact and comment. For present purposes it is sufficient to note that a statement may be one or the other, depending on the context. [For example]: 'To say that a man's conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment.'"
>
> "[Fourth], the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based."

55. As to whether a publication is defamatory, I refer to *Thompson v James and Carmarthenshire County Council* [2013] EWHC 515 (QB), where Tugendhat J said this:

> "266. The definition of defamatory commonly used is that given by Sir Thomas Bingham MR in *Skuse v Granada Television Limited* [1996] EMLR 278 at 286 where he said:
>
> > 'A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally.'
>
> 267. But in some cases it may be necessary to consider whether the words complained of satisfy a requirement of seriousness. For this purpose I would repeat the definition I preferred in *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985; [2010] EWHC 1414 (QB):
>
> > 'the publication of which he complains may be defamatory of him because it [*substantially*] affects in an adverse manner the attitude of other people towards him, *or has a tendency so to do*.'"

In the *Thornton* case, a few paragraphs before the passage cited in the judgment in the *Thompson* case, Tugendhat J also said:

> "90. … [W]hatever definition of 'defamatory' is adopted, it must include a qualification or threshold of seriousness, so as to exclude trivial claims."

56. In the light of the law that I have summarised, I now turn to consider the particular passages complained of, which I shall identify by the corresponding paragraph numbers in the amended particulars of claim.

Paragraph 4.1

57. The relevant passage from Issue 6 is as follows:

> **SNOUTS IN THE TROUGH**
>
> Plaid councillors were elected in 2008, following a highly personal and negative campaign against the former Labour councillors based on the very allowances that Cllr McEvoy *voted* for in 2000 and accepted.
>
> Your Plaid councillors have already pocketed more in just over <u>two years</u> than the three previous councillors received in FOUR years.

58. The claimant alleges that the natural and ordinary meaning of these words is that the claimant has taken advantage of the expenses regime for councillors for personal enrichment rather than to reimburse expenses incurred and/or has been hypocritical in his take-up of expenses. It is submitted that the words "snouts in the trough" is an imputation of fact, implying conduct motivated by a desire for personal enrichment.

59. In my judgment, the natural and ordinary meaning of the words is an imputation of hypocrisy for taking full advantage of an expenses regime after criticising others for taking rather less advantage of it. I do not consider that there is any imputation of fact to the effect that the claimant (he is clearly one of the Plaid councillors mentioned) has taken moneys to which he is not legally entitled; the criticism is that, having criticised Labour councillors for taking moneys under an expenses regime, he is not only doing the same but actually receiving more money in expenses than they did. It is obvious that the receipt of expenses is to one's own advantage. But in my judgment the passage does not mean that the claimant is taking moneys unlawfully or in contravention of the expenses regime; it just means that he is a hypocrite for taking as much as he can, in view of his previous criticisms of Labour councillors.

60. The defendant now admits that an accusation of hypocrisy in this passage is defamatory. I agree. The claimant accepts that such an accusation is comment. The defence of honest comment is raised; it does not fall within the scope of the preliminary issues that are before me.

Paragraph 4.2

61. The next passage relied on is what follows immediately after the first passage:

> **A MASSIVE £131,645 so far!!!**
>
> Leaving aside the jollies abroad to places like Korea and China, Cllr McEvoy has also raked in **THOUSANDS** of **££££s** more as a landlord renting out at least two properties including one that was leased to the very Council he is Deputy Leader of! He's not the socialist he pretends to be—more of a SOCIAL **LANDLORD** and a **HYPOCRITE**.

(In fact, although the amended particulars of claim quote the first, partially capitalised line, they do not thereafter rely on it as being defamatory.)

62. The claimant contends that the natural and ordinary meaning of these words is (1) that the claimant had organised or taken part in trips to Korea and China for the purposes of personal gratification rather than in good-faith endeavours to further the interests of the people of Cardiff and (2) that the claimant was hypocritical in letting out two properties.

63. In my judgment, the natural and ordinary meaning of the words is (1) an imputation of fact that the claimant has enjoyed trips to Korea and China at public expense, (2) an imputation of fact that he has received large amounts of money from letting properties and (3) an accusation by way of comment that he is hypocritical in both those respects. I do not regard the use of the word "jollies" as an allegation that the trips were not undertaken in good faith and for a legitimate purpose. Rather I consider it to be a pejorative expression, performing a function similar to that of the words "raked in" in the same sentence, which is intended to underline the accusation of hypocrisy but not to allege any other form of wrongdoing.

Paragraph 4.3

64. The next passage relied on by the claimant follows immediately in the same article:

> **Shockingly**, Cllr McEvoy has also found room in his wallet for an **EXTRA £2083.08** of child care allowance—or an **EXTRA £40.06 a week** on top of his **HUGE** earnings of **£32,982 a year** as a part-time councillor!

65. The claimant contends that the natural and ordinary meaning of these words is (1) that the claimant was to be criticised for taking the child care allowance to which he was entitled, (2) that he accepted earnings out of proportion to the time that he devoted to his duties as a councillor, and (3) that in accepting the allowance and the earnings the claimant was hypocritical.

66. The passage certainly expresses disapprobation of the claimant for receiving the child care allowance; this is indicated not only by the language but by the use of bold script, capital letters and underlining. The passage therefore implies that he is to be criticised for receiving that allowance. It does not, however, suggest that he is not entitled to receive the allowance. (The

sentence that follows in the passage, which is set out in paragraph 7 above, touches on that latter question, but the claimant has not relied on that sentence.) To express criticism of someone is not in itself defamatory; at least, I do not regard it as so in this context.

67. The passage also refers to the claimant's "huge" earnings. I do not read that as implying either that the post of part-time councillor is overpaid or that the claimant received remuneration out of proportion to the time that he devoted to his duties as councillor. There is no suggestion that the claimant received payments that were greater than he was entitled to. There is no suggestion that he had not done the work that would justify the payments. There is no suggestion that the post of councillor is overpaid; even if there were, that would not constitute defamation of the claimant. In my judgment the reference to the "huge" earnings is a context in which to criticise the claimant for accepting child allowance.

68. Mr Tomlinson QC observed in the course of his submissions that the entire article is an extended allegation of hypocrisy. I agree, and I think that it is important, when considering the individual selections on which the claimant relies, to have regard to the whole tenor of the article. The meaning of the passage complained of in paragraph 4.3 of the amended particulars of claim, when that passage is read contextually, may be paraphrased as follows: "This man claims to be a socialist. But, not content with his huge earnings as a councillor, he also sees fit to accept a substantial amount by way of child allowance. What a hypocrite!"

69. In conclusion, I consider:

    1) That the criticism of the claimant for receiving child allowance amounts to an accusation, by way of comment, of hypocrisy;

    2) That the accusation of hypocrisy is comment and is defamatory;

    3) That the passage does not mean that the claimant accepted earnings out of proportion to the time that he devoted to his duties as a councillor.

Paragraph 4.4

70. The next complaint concerns a different article on the front page of Issue 6: the article headed, "PLANNING CHAOS", set out in paragraph 9 above. The particular passage complained of is:

> In another superb example of brass-necked hypocrisy, Cllr McEvoy wants to build a Business Park at Junction 33 on those same green fields … to pay for his fantasy football plans.

71. The claimant contends that the natural and ordinary meaning of these words is (1) that the claimant had proposed or sought to propose or support the building of a business park on a greenfield site at junction 33 of the M4, (2) that in doing so he was guilty of hypocrisy, and (3) that his proposal or support had

been brought about or influenced by a desire to further his outside interests rather than by a belief held in good faith that the proposal would be to the benefit of the people of Cardiff.

72. The defendant accepts that the words bore meanings (1) and (2). It is accepted that the words "brass-necked hypocrisy" are defamatory comment.

73. In my judgment, the words complained of do not bear meaning (3) contended for by the claimant. It is to be remembered that the claimant relies on the natural and ordinary meaning of the words; he does not allege that they bore the meaning by way of innuendo. The difficulty arises in connection with the words "his fantasy football plans". What do they refer to? The claimant says that they refer to his outside interests. But no such interests are referred to in the article. In theory, the words could be referring to a variety of things: at one end of the spectrum, they could be a reference to some personal business plan of the claimant, which had nothing to do with the well-being of the city and everything to do with his own personal enrichment; at the other, they could refer to an altruistic, and sadly fantastical, dream that the claimant had for turning the city into a centre of footballing excellence. In my view, without reference to extraneous knowledge on the part of the hypothetical reader, the words convey no more than that, hypocritically, the claimant wants to build a business park on the fields in question and that his motivation is thereby to procure funding for some fantasy of his in respect of football. That says nothing about whether the fantasy relates to "outside interests" rather than benefit to the people of Cardiff.

74. I should add that, in reading the article "PLANNING CHAOS", I have had regard not only to its full text but to the picture that is next to it and to the "FAIRWATER FC FURY" article that is on the reverse of the newsletter. I deal with those parts of the newsletter below. The latter article does refer to the claimant's outside interests and alleges a conflict of interest between them and an aspect of his work as a councillor. But the claimant does not rely on the matters mentioned in that article; he complains of the ordinary and natural meaning of the words in the "PLANNING CHAOS" article. In fact, I think that the two articles are making different points. Insofar as the "PLANNING CHAOS" article goes beyond an allegation of hypocrisy, which is its main point, it criticises the claimant for being, in respect of his football plans at least, a fantasist. That meaning is not complained of in respect of this article, but I pick it up in connection with the next head of complaint.

Paragraph 4.5

75. The complaint under this paragraph relates to the picture that I have described but not reproduced. The meaning of the picture and the words it contains is said to be that: (1) the claimant is not to be trusted; (2) the claimant is a roguish character; (3) the claimant is given to unrealistic fantasies; (4) the claimant did not act in good faith in making a trip to China; (5) the claimant's support for a business park—which, say the amended particulars of claim, was not at the greenfield site at junction 33 of the M4—was either (a) an unrealistic fantasy or (b) motivated by a desire for personal enrichment or

gratification rather than by a belief held in good faith that the business park would be to the benefit of the people of Cardiff.

76. The claimant contends that these are the natural and ordinary meanings of the picture and the words it contains.

77. However, the claimant also contends that picture and words bore these meanings by way of innuendo, on the following basis. Del Trotter is widely known, and would be known to recipients of the newsletter, as a "'loveable-rogue-type' character, who is a trader of dubious honesty given to outlandish fantasies and who is an habitual liar". But the tenor of the newsletter negatives any implication that the claimant is loveable. What is left is a dishonest rogue, liar and fantasist.

78. I begin by accepting the first premiss of the claimant's contention. Almost everybody in Fairwater who will have received the newsletter will have known who Del Trotter was; I say "almost" out of an abundance of caution. (Mr Tomlinson's lack of knowledge of the character before he was instructed in these proceedings does him credit but is unusual. The character is at least as well-known in England and Wales as "Gazza" once was.)

79. I also broadly accept the claimant's description of Derek Trotter. But the "loveable" quality of the character is not too quickly to be passed over. The audience laughs at him and does not admire his faults, but it likes him not only because of his comic ineptitude but also because there is more to him than his faults; he has genuine virtues of humanity, though they are heavily overlain by other features.

80. I do not mean to say that the newsletter is to be read as saying of the claimant, "He is to be criticised in such-and-such ways. But his heart is in the right place." The tone of Issue 6 is unremittingly hostile and personal, to an extent that many might find surprising and distasteful. The point, however, is that in considering the meaning of the picture and the words it contains, in the context in which it appears, it is necessary to consider what features of Derek Trotter are being used for comparison with the claimant.

81. For the claimant, Mr Hughes referred to the words of the theme tune to *Only Fools and Horses:* "No income tax, no VAT". He submitted that the clear implication of likening the claimant to Derek Trotter was that the claimant is a rogue, a crook. I see as little justification for that interpretation as for inferring that the claimant is loveable. The fact that a good quality has to be eliminated does not mean that all the bad qualities are meant to be applied to the claimant.

82. As I have laboriously explained, the picture appears at the foot of the left box on the front page of Issue 6. But it apparently belongs there for reasons of design rather than meaning. From the article above it in the same box, the "SNOUTS IN THE TROUGH" article, it picks up the themes of "free child care" and of the claimant as an entrepreneur who likes money and wants more of it, as well as the reference to China. From the article to its right, the "PLANNING CHAOS" article, it picks up the reference to a business park (whatever the location) and, probably, the idea of "fantasy". It is arguable

that, from the article on the reverse, "FAIRWATER FC FURY", it picks up the theme of being misleading; I think that unlikely, however.

83. In my judgment, the meaning of the picture, including its words, when read in context, is as follows.

1) The claimant is a money-loving and money-seeking entrepreneur. In itself that may or may not be a criticism, but it is not defamatory.

2) The claimant has received "free child care" by reason of his acceptance of child care allowance. This is an imputation of fact, albeit loosely phrased, which arises out of the conjunction of the picture with the article immediately above it. In itself it is not defamatory.

3) By virtue of context, the first and second meanings carry with them an accusation of hypocrisy. That is a defamatory comment. However, the implicit accusation of hypocrisy arises only from the other, explicit accusations of hypocrisy on the same page. It is not a separate accusation.

4) The claimant is prone to unrealistic fantasies and improbable business ideas, in particular a business park. This is suggested by Derek Trotter's known character and by the caption, "This time next year we'll be millionaires Rodders!", which gains such humour as it has by the substitution of Rodney Berman for Rodney Trotter. It is also suggested by the use of Derek Trotter's familiar yellow, three-wheeled van, on which, in addition to the words "Free child care", two alterations have been made—the substitution of "McEvoy's" for "Trotters"; and the substitution of "Cardiff" for "Peckham" after "New York, Paris"—and by the box on top of the van.

84. This last meaning is undoubtedly a criticism. I do not think it is defamatory. To say that a politician's ideas or policies are fantasies, or wholly lacking in realism, is to offer a strong indictment of the policies and of the politician, but I do not think that it is to defame the politician. It alleges lack of realism and lack of judgment, but those seem to me to be the stuff of political disagreement, albeit they are commonly expressed in different ways. If I am wrong about that, the criticism is by way of comment rather than by imputation of fact.

85. In my judgment, the picture and words do not bear the meaning that the claimant is not to be trusted, in any sense other than that he is prone to unrealistic fantasies and that therefore reliance cannot be placed on the outcome of his political goals. In that limited sense, it falls within the fourth meaning that I have accepted; but it is not defamatory, though it is critical and uncomplimentary. (As generally with the fourth meaning, if contrary to my view the meaning is defamatory, it is so by way of comment rather than by imputation of fact.) I do not think that the picture and words are properly taken to mean that the claimant is dishonest, which is different from the limited sense I have mentioned.

86. In my judgment, the picture and words do not mean that the claimant is a "roguish character". Once the prefix "loveable" has been removed, "roguish character" seems to mean "rogue" or "crook". That seems to me to go beyond anything contained in or implied by the picture and words, even in context, and to rest on an over-literal application of edited characteristics of Derek Trotter's persona in construing the picture.

87. I do not accept that the picture and words mean that the claimant did not act in good faith in making the trip to China. They actually say nothing about a trip to China, though they allude to Chinese investment in the business park. So far as concerns a trip to China and the good faith in which it was made, the picture does not add anything to the "SNOUTS IN THE TROUGH" article beyond pictorial emphasis. I have already discussed the meaning of that article.

88. For similar reasons, I do not accept that the picture can properly be construed as meaning that the claimant's support for a business park is motivated by a desire for personal enrichment or gratification rather than by a concern for the well-being of the city. The only things in the picture that could suggest personal advantage from the business park are the comparison with Derek Trotter and the caption. But this is going too far in the search for meanings. The picture does not say anything about a personal interest of the claimant in the business park, and no particular knowledge in that regard is relied on to support a plea of innuendo. Although Derek Trotter is known for always being on the look-out for money and opportunities to make it—and, in the context of the main article on the page I accept that this implication is directed at the claimant; see the first meaning I allude to above—it does not follow that the reference to the business park is to an attempt at personal enrichment. Indeed, the caption and the inclusion of Mr Berman's face tend to suggest that the enrichment that is hoped for, whether realistically or not, is that of the city rather than of individuals.

Paragraph 4.6

89. Under this paragraph the claimant complains of a passage in the "FAIRWATER FC FURY" article on the reverse of Issue 6:

> **"He has been unhelpful, he's been obstructive and he has misled us."**
>
> **… his directorship of Complete Football Management Ltd has been a conflict of interest throughout this whole sorry saga.**

90. The claimant contends that the natural and ordinary meaning of these words was that in his dealings with Fairwater Football Club the claimant (1) had been dishonest and/or influenced by his alleged directorship of Complete Football Management Ltd and (2) had sought to obstruct the interests of the Club. For the claimant, Mr Hughes submits that only over-elaborate analysis could fail to discern an imputation of dishonesty, and that the words are not comment but bare assertions.

91. The defendant denies that the selected words have the meaning urged by the claimant and says that they must be read in the context of the article as a whole. He contends that, in context, the words mean that the claimant had let the Club down by indicating that it would and should move to a new home, advising it against developing its own ground, thereby contributing to the Club's failure to secure promotion, and thereafter failing to produce a business plan to support his claims that funding enquiries were at an advanced stage. The defendant also contends that, if the words were defamatory, they were honest comment. Mr Tomlinson QC points out that the first selection is a quote from someone at the Club and that the second selection follows immediately after the words, "In our opinion".

92. In my judgment:

1) The words do not mean that the claimant had sought to obstruct the Club. Taken purely by itself, the word "obstructive" in the quotation from Simon O'Hare might suggest that. But in the context the meaning of the words is simply that the claimant's conduct has had the effect of obstructing the Club in its attempt to develop. As appears from the context, and as is discussed more fully below, the alleged obstruction did take the form of discouraging development in certain ways; in that limited sense there could be said to be deliberate obstruction. But the nature of the complaint is not that the claimant has wilfully harmed or sought to harm the club but rather that what he has done has had that effect. That is not the meaning relied on by the claimant, and it is not a meaning that I regard as defamatory, albeit that it is critical of the claimant.

2) However, although no express allegation of dishonesty is made, such an allegation is implicit. That may very well not have been the original intention of Mr O'Hare; I incline to the view that, as he meant only that the claimant had in fact obstructed the Club, so he was speaking only of the fact of being misled. But that is not the meaning that is suggested by the way the quotation is used, having regard both to what precedes it and in particular to what follows. (The entire passage is set out in paragraph 10 above.) In my view, what the passage conveys to the hypothetical reasonable reader, when read in context, is that the claimant misled the Club by falsely leading them to believe that his "pipe dream" of a new home for the Club had a genuine financial basis; and, as that basis related to matters and inquiries in which, as the article indicates, he was directly involved, the implication was that his assurances to the Club lacked truthfulness. This is suggested also by the reference to conflict of interest, which I consider below. The way that the implication of dishonesty works in the context of the article as a whole may be shown by a paraphrase as follows: "The claimant, who had a commercial interest in the outcome, was eager to ensure that the football club did not develop its existing ground but rather went to a new ground. In order to ensure that the club did not take a course of action inconsistent with his plans, he gave them false reassurances about the financial basis of his proposals."

3) I regard the imputation of dishonesty as a comment. In one sense, dishonesty is a question of fact. But, although "the state of a man's mind is as much a fact as the state of his digestion" (Bowen LJ), "who knows a person's thoughts except their own spirit within them?" (St Paul); dishonesty is a matter of inference from other facts.

4) The words also mean by implication that the claimant's dealings with the Club had been influenced by his directorship of Complete Football Management Limited, which was a conflict of interest. The statement that the claimant was a director of that company is an imputation of fact but is not defamatory. The statements (a) that his directorship was a conflict of interest and (b) (by implication) that he was influenced by his directorship are also in my view comment. In the present context, the reference to a conflict of interest is most naturally to be taken as an expression of judgement rather than invocation of some objective legal standard. The implication that the claimant's conduct was influenced by his own commercial interests is a matter of comment, for reasons already explained in the context of dishonesty.

Paragraph 5.1

93. The passage complained of under this paragraph is part of the article on page 2 of Issue 7, next to the words "How green do they think we are?" (paragraph 12 above):

> It's sheer <u>hypocrisy</u> – especially as the Deputy Leader has been globe-trotting to sell the International Business Park at Junction 33 – <u>which will be built on the same green fields he's 'fighting to save'</u>!

94. It is common ground that this is an accusation of hypocrisy, that it is comment and that it is defamatory.

Paragraph 5.3

95. The passage complained of under this paragraph is part of the article on page 2 of Issue 7, next to the words "PACT panel packed":

> Plaid councillors have ensured that (nearly) every member of your local PACT panel is a Plaid Cymru member or supporter.

96. The claimant contends that this passage would be understood to refer to the claimant among others. The amended defence denies that it would be so understood. However, in my opinion the reference to the claimant among others is clear. Issue 7 repeatedly refers to the claimant in terms which make sense only if (as was the case) he was a local Plaid Cymru councillor.

97. The claimant contends further that the passage means that the claimant, whether alone or with others, had manipulated the process of appointments to the PACT panel for partisan ends.

98. For the defendant, Mr Tomlinson QC accepts that the passage is an imputation of fact. However, he submits that the words are not defamatory, because they contain no allegation of manipulation or any other improper conduct. "In the absence of extraneous facts (for example, some legal requirement that members of the PACT [panel] should [not] be political appointees) the allegation that Plaid councillors have ensured that the PACT [panel] contains a majority of their members or supporters is not defamatory."

99. I agree with Mr Tomlinson's submission. The passage relates to the PACT panel. I am told that PACT stands for Police and Communities Together. When read as a whole, the passage is highly critical of Plaid Cymru's alleged attempts to fill the panel with its own members or supporters; use of the word "packed" in the heading of the piece is a fair indication of the tenor of the piece. But the article does not even explain what PACT is (I did not know until I was told). And it does not suggest that what is happening is improper in the sense of being contrary to some requirement of law or procedure. The article makes clear that the local Labour Party disapproves of the conduct it complains of, but in my view neither the article itself nor any special knowledge (none being pleaded) takes this matter beyond the bounds of robust political criticism. The article is not defamatory.

100. There is no need for the parties to attend on the handing down of this judgment. If the parties are able to agree both the proper form of the order in respect of the preliminary issues and all outstanding matters, including costs, ahead of the hand down hearing, then a draft agreed order should be submitted for approval. If not, the outstanding issues will be dealt with either at a later hearing (if possible over the telephone) or in writing, as the parties consider best. I will extend the time for applying for permission to appeal so that period of time for making an application to the Court of Appeal for permission to appeal should not begin to run until I have dealt with any application made to me for permission to appeal at a further hearing or on paper.