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Case No: HQ07X044333

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 July 2008

Before :

RICHARD PARKES QC
Sitting as a Deputy Judge of the High Court

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Between :

(1) APPLAUSE STORE PRODUCTIONS LIMITED
(2) MATTHEW FIRSHT **Claimants**

- and -

GRANT RAPHAEL **Defendant**

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- -

Lorna Skinner (instructed by **Olswang**) for the **Claimants**
Jeremy Pendlebury (instructed by **Bar Pro Bono Unit**) for the **Defendant**

Hearing dates: 30 June – 3 July

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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RICHARD PARKES QC

Richard Parkes QC

INTRODUCTION

1. This is an unfortunate dispute between two former friends. The Claimants are Mathew Firsht, a successful businessman, and his company, Applause Store Productions Ltd ('Applause Store'), which provides audiences for popular television programmes such as Big Brother, The X Factor and Top Gear. The Defendant, Grant Raphael, was a close friend of Mathew Firsht at school in Brighton and for some years afterwards, although they became estranged several years ago. Mr Raphael is a freelance lighting cameraman, so he also spends much of his time working in television.

2. The case concerns the popular social networking site, Facebook, which was started at Harvard several years ago, spread to university networks on both sides of the Atlantic, migrated from the universities as its users graduated, and has now (as appears from the evidence in this case) become popular with older users in the media and television industries. As Mr Firsht's twin brother Simon explained in his evidence, users create 'profiles' for themselves, in which they may include as much personal information as they wish. Facebook enables them to adjust the privacy settings of their profile so that (for example) they may permit general access or restrict access to those whom they accept as 'friends'. The concept of a 'friend' has a special sense in Facebook, for it includes all those who make a request to be accepted as a friend and whose request is accepted by the user. The 'friends' are listed on the user's profile. Profiles will contain a 'wall' on which those permitted access may post messages which can be read by those who have access to the profile, and will contain links to any 'groups' to which the user belongs. 'Groups' are Facebook pages which may be set up by users, notionally, it appears, as a resource which may be visited by any Facebook user interested in the group's subject matter. Simon Firsht himself started using Facebook in December 2006, and neither at that stage nor during the summer of 2007 did he make any attempt to adjust his privacy settings, so that any fellow member of the London network of Facebook could have accessed his profile.

3. A Facebook profile was created in the name of Mathew Firsht during the evening of 19th June 2007. It contained material which was admittedly private information. The following afternoon, a Facebook group was set up, linked to the profile by hyperlink, which was called 'Has Mathew Firsht lied to you?'. It contained material which was admittedly defamatory of Mr Firsht and of Applause Store. Neither the profile nor the group was set up by Mathew Firsht. Both were set up using a computer with Grant Raphael's IP address, that is to say, using a computer at the flat where he then lived. That is all common ground. The main issue which I have to decide is whether Grant Raphael was responsible for putting up the false profile and for creating the group.

THE MATERIAL PUBLISHED ON FACEBOOK

4. The false profile contained information as to Mathew Firsht's sexual orientation, his relationship status (that is to say, whether he was single or in a relationship), his birthday, and his political and religious views. Not all this information was accurate, but all of it is conceded by Mr Jeremy Pendlebury, counsel for the Defendant, to be information in respect of which Mr Firsht had a legitimate expectation of privacy. By contrast, some of the material alleged in the Particulars of Claim to be private information (for example, as to Mr Firsht's employment as managing director of the First Claimant) is no longer contended to be actionable. That leaves four items of information as to the status of which the parties are not or may not be agreed. I deal with those in the confidential annex to this judgment, and conclude that to the extent that two of those items relate to Mr Firsht's supposed sexual preferences, it is indeed private information which gives rise to a cause of action for misuse of private information. By contrast, I was not persuaded that the other two items, containing verbal information about Mr Firsht's whereabouts (to the effect that he was at home at one time and in a public place at another), gave rise to a reasonable expectation of privacy.

5. Ms Lorna Skinner, Counsel for the Claimants, appeared to open her case on the footing that the claim in misuse of private information (by Mr Firsht alone) arose from the false profile, while the claim in defamation (brought by both Mr Firsht and Applause Store) arose from the group page. However, the demarcation may not be quite so clear cut, for the Particulars of Claim allege that the false profile includes some defamatory material. The material complained of in the profile includes Mr Firsht's name, his position as managing director of Applause Store, words alleging that Mr Firsht has been in court 'again', and - under the heading 'Groups' a hypertext link to the false group, with the words 'Has Mathew Firsht lied to you?, and a photograph of Mr Firsht. That case is re-stated in Ms Skinner's skeleton argument for trial.

6. However, the group page contains the bulk of the defamatory material. The material complained of includes the same photograph of Mr Firsht as appears on the false profile, and the following words:

"HAS MATHEW FIRSHT LIED TO YOU?

Information
Group info
Name: HAS MATHEW FIRSHT LIED TO YOU? ...
Description: MATHEW FIRSHT THE MANAGING DIRECTOR OF APPLAUSE STORE OWES US A LOT OF MONEY AND HAS CONSTANTLY LIED ABOUT WHEN HE WILL PAY US.

WE ARE SICK OF HIS PATHETIC EXCUSES...

HAS HE LIED TO YOU? DOES HE OWE YOU MONEY?

LET US HEAR FROM YOU AND JOIN THE GROUP. BE GREAT TO HEAR FROM YOU.

Contact info
Website: WWW.APPLAUSESTORE.COM
Country: England."

7. As I say, there is no dispute that the material complained of as being defamatory of the Claimants is indeed defamatory of them. Or rather, there is no dispute that the material complained of from the words 'Has Mathew Firsht lied to you?' to 'Has he lied to you?' is defamatory of the Claimants. I assume that this concession, made by Mr Pendlebury in his skeleton argument, embraces the first use of the phrase 'Has Mathew Firsht lied to you?' in the false profile, as well as the second use on the group page.

8. There is a very slight issue on meaning, namely whether the material bore the meaning that (as the Claimants plead) Mr Firsht owes substantial sums of money which he has repeatedly avoided paying by lying about when he will pay and making implausible excuses for not paying, and that as a result the Claimants are not to be trusted in the financial conduct of their business and represent a serious credit risk, or whether (as the Defendant maintains) it bears that meaning, but with the epithet 'substantial' removed. In those circumstances, there is no point in my setting out at length the well known principles which apply to the determination of meaning in defamation. It is sufficient to say that those principles are set out in the decisions of the Court of Appeal in *Skuse v Granada Television Ltd* [1996] EMLR 278 and *Gillick v Brook Advisory Centres* [2001] EWCA Civ 1263. The court is required to give the words the natural and ordinary meaning which they would have conveyed to the ordinary reasonable reader reading them once, a person who is neither naïve nor unduly suspicious, capable of reading between the lines and engaging in some loose thinking, but not avid for scandal; and over-elaborate analysis is to be avoided. It is hardly necessary to repeat that rubric to conclude that, given the statement that Mr Firsht 'owes ... a lot of money', the Claimants' meaning is wholly justifiable and, in my judgment, the correct meaning of the words complained of in so far as they were published to readers of both the false profile and the group page (such a reader being assumed to click on the hyperlink on the false profile and then to read the group page) or to readers of the group page alone. Plainly, that is not the meaning of the false profile alone, but as I understand it the Claimants do not rely on publication of the false profile alone for the claim in defamation.

9. There is no substantive defence, whether to the defamation or to the privacy claim. The only major issue on liability is whether the Defendant was responsible for creating the false profile and the group page and thereby for publishing them to those who visited either Facebook address.

DISCOVERY OF THE FALSE PROFILE AND GROUP

10. It was on 4th July 2007 that Mr Firsht, who was with his twin brother Simon and his brother's girlfriend at the time, discovered the false profile and group page. His first reaction was: why would anyone do this and who could it be? The Defendant's name was one that came up, but only to be dismissed, since Mr Firsht saw no reason why Grant Raphael would hold a grudge against him, even though they had fallen out some years before. Facebook took down the offending material on Mr Firsht's request on 6th July 2007, and on 1st August 2007 his solicitors, Olswang, obtained a *Norwich Pharmacal* order against Facebook Inc for disclosure of the registration data provided by the user responsible for creating the false material, including e-mail addresses, and the IP addresses of all computers used to access Facebook by the owner of those email addresses. Facebook Inc provided Olswang with evidence, which is not contested, showing that the profile was created on a computer using an IP address which is accepted to have been the Defendant's, on the evening of 19th June 2007, and that the group was created on a computer using that same IP address on the afternoon of 20th June 2007. All the relevant activity was conducted from that IP address using three Facebook user identity numbers, one of which was the Defendant's, one of which was that of his girlfriend, Asa Hallonqvist, and the third of which was in the name of Mathew Firsht. There is no dispute that there were only two computers which could have used that IP address: they were the Defendant's desktop computer, which was kept in the study of his flat, and the laptop computer belonging to his girlfriend Asa Hallonqvist, which the Defendant often used. Both computers used a wireless router to connect to the internet, and the router employed the IP address which Facebook disclosed.

THE FACEBOOK ACTIVITY LOG

11. A composite activity log for the Defendant's IP address was compiled by Olswang from the material disclosed by Facebook, which was not so immediately accessible to the layman and used Pacific time (Facebook being based in California). Its contents are not disputed by the Defendant, except that Mr Pendlebury could not admit the final column, which represented Olswang's view of which activity was being carried on at different times. The log is agreed to show activity on the Defendant's IP address between 0820 hours BST on 19th June and 2102 hours BST on 20th June 2007. So far as relevant, the first column gives date and time in BST; the second, headed 'Script', gives the page or section on Facebook being accessed; the third, 'Scriptget', shows the activity being undertaken; and the fourth shows the name of the person whose Facebook user identity is being employed (not necessarily the same as the name of the actual user). What the activity log appears to show is a sequence of activity using the Facebook user identities of the Defendant, Ms Hallonqvist and 'M.Firsht'. There are no occasions when the log shows an overlap of times suggestive of the concurrent use of both computers in the Defendant's flat.

12. That fact caused concern to Mr Pendlebury. The Claimants had served a witness statement of a Mr Max Kelly, chief security officer of Facebook Inc. It had been intended that Mr Kelly would give evidence by video link. Mr Pendlebury (who was instructed by the Bar Pro Bono Unit and therefore did not have the help of a solicitor) had been asked by Olswang to draft a series of questions to be put to Mr Kelly, but was unable to do so, and decided to raise all the necessary questions in cross-examination. Unfortunately, 10 days before the start of the trial Mr Kelly told Olswang that he would be unable to give oral evidence because of pressure of work. Olswang therefore served a hearsay notice in respect of Mr Kelly's witness statement. In the event, Mr Pendlebury did not object to Mr Kelly's statement being received as hearsay. His position, as I understood him, was that he did not contest the accuracy of any of Mr Kelly's evidence, but that Mr Kelly's evidence did not go far enough, and did not deal with the matters which he would have wished to put to him. For example, he had not been able to ask Mr Kelly what would have shown on the activity log if two computers had been used at once, and in particular if they had accessed Facebook at once. Would only the first computer's usage be recorded, or would the activities of both computers be recorded, albeit that they used the same IP address? He was understandably concerned that the court would be invited to draw adverse inferences from usage recorded on an activity log which was correct so far as it went but might not show the full picture, and he submitted that it would be unfair if the Defendant suffered as a result of this lacuna, as he called it, in the evidence. Subject to that caveat, he did not in the event object to the admission of Mr Kelly's evidence. I bear his warning well in mind, although he does face the difficulty that Mr Kelly's statement says in terms that the activity log produced by Facebook Inc shows all the activity on Facebook from Mr Raphael's IP address on 19th and 20th June 2007. On the face of it, that evidence is clear and unqualified.

FRIENDSHIP AND FALLING OUT

13. Mathew Firsht is in his late 30s. He grew up in Brighton. He left school at 16 and had a number of jobs, including working as a runner for independent television companies, before setting up his own company, Power House Film and TV Ltd ('Power House'), in 1991. He did so with a friend, Marc Jay. Powerhouse specialised in researching and organising live television audiences. He and Marc Jay fell out towards the end of 2000, as a result of which Mr Firsht resigned from the company, although he retained his shareholding. Power House went into administration in mid 2001 and was eventually dissolved. Meanwhile, at the end of 2001 Mr Firsht had set up his own company, Applause Store, which has been extremely successful. It has become the leading supplier of audiences for television shows, and is expanding to America. Despite the growth of the company, Mr Firsht plays a very public part in many shows: for example, although his company employs a team to look after and co-ordinate audiences, he is personally commissioned by the producers of Britain's Got Talent to oversee the entire audience operation for each transmission, and in consequence his credibility and reputation - which has taken nearly 20 years to build up - are very important to him. Not surprisingly, he is well known in the television industry.

14. Mathew Firsht first knew Grant Raphael, the Defendant, when they were boys at school together in Brighton. They became good friends when Mr Firsht was 18. With Mathew's twin brother Simon, Marc Jay, Richard Jay (Marc's brother), Sam Wyner and Phil Brookes, they formed a group of friends who spent a lot of time in one another's company and several of them went on holiday together. For some years the group remained in close contact in adult life, for after Marc Jay and Mathew Firsht formed Power House they found work for Grant Raphael as a freelance cameraman, and Sam Wyner and Marc's father, Brian Jay, were company employees. It is notoriously difficult to combine friendship and business, and serious internal difficulties at Power House led to the dismissal of Sam Wyner and Brian Jay. That in turn led to the falling out of Mathew Firsht and Marc Jay. Marc Jay wanted to reappoint his father to take over his role in managing the company, and Mathew Firsht was adamantly opposed to the proposal. They were deadlocked, and Mathew Firsht felt that he had no choice but to resign. This was in about November 2000, although Mr Firsht had earlier believed (and said in his witness statement as it originally stood) that it had been a year earlier, in about November 1999. He accepted that he was not good with dates.

15. It was Mathew Firsht's evidence that he discussed resigning with Grant Raphael, who said that he understood how Mr Firsht felt and thought that he was doing the right thing, because it was not appropriate to reinstate Brian Jay. He was 100% sure that he had discussed the matter with Mr Raphael, as friends, in confidence, at Mr Firsht's house in Covent Garden. He was decorating his hall at the time, and Mr Raphael was sitting on his brother Simon's bed. A 'week or two' after his resignation, on his recollection, he found out from Phil Brookes that Grant Raphael had moved into his vacated office at Power House. This he considered very two-faced. He called Grant Raphael who, he said, became argumentative and could not understand how offensive it was for a good friend who had been supportive of his position should have moved into his office so soon after his resignation. A few days later, Grant Raphael telephoned to try to patch matters up, but so far as Mathew Firsht was concerned, the damage was done. It was also his evidence that he discovered several months later that Mr Raphael was using Power House to launch his own services through a new company, Perfection Film and Television ('Perfection'). He felt that Mr Raphael was profiting from his resignation, and he felt betrayed. He had not seen or spoken to Mr Raphael since. However, he did not hold grudges and quickly forgot about the whole episode. He had moved on and wanted to concentrate on his new life. I should mention that Simon Firsht ceased to be in touch with Mr Raphael, for the same reasons, and from that point on he also did not see or speak to Mr Raphael.

16. Mr Raphael did not accept that Mr Firsht discussed resignation with him. He remembered a conversation with him about Brian Jay, but the news of Mr Firsht's resignation came as a shock to him. The conversation which he remembers is likely, it seems to me, to have been the conversation which Mr Firsht describes, because it was the proposed role of Brian Jay which eventually made Mr Firsht feel that he had to resign. It probably does not matter whether resignation was discussed (as Mr Firsht believes), for it is clear that Mr Firsht did discuss his concerns about Power House with Mr Raphael. As for the reason for their falling out, Mr Raphael said that he

sympathised with Mathew Firsht's wish not to take back Brian Jay, yet he also sympathised with Marc Jay, and he felt that he was in a very difficult position. He was caught in the middle, and he felt that he had to make a choice between two close friends, because he could not remain friends with both. He made a conscious choice not to remain friends with Mr Firsht, and spoke to him only once after their friendship ended, which was an occasion a few months later when he dropped Phil Brookes off at Mr Firsht's house in Covent Garden, and on seeing Mr Firsht, left his car to see if reconciliation was possible. He was greeted, he said, by angry shouting, so drove off.

17. Mr Firsht was cross-examined at some length about the date when he and Mr Raphael fell out. He accepted (on being shown the certificate of the company's incorporation) that Perfection had not been formed until December 2001, but insisted that did not mean that Mr Raphael had not moved in shortly after his own resignation from Power House; nor did the fact that Mr Raphael was still working as a cameraman for the Big Breakfast, a Channel 4 programme: many cameramen also ran businesses. Indeed, it emerged from Mr Raphael's own evidence that when he was employed on the Big Breakfast he finished work by 10-10.30am, and he admitted that he did do some freelance work, including work for Power House. However, he insisted that he had not moved into the Power House offices until January 2002. He had been employed as a cameraman by Big Breakfast until December 2001 or January 2002, and to run his new Perfection business he had to move into the new office, and obtain funds and leases to buy equipment. He produced documents which clearly showed that in January 2002 he opened a new account with HSBC, set up a telephone line at 3 Bedfordbury in Covent Garden, the address of Power House, wrote his first cheque for rent to World Wide Power (apparently another name of Power House). He registered Perfection for VAT in February 2002 and incurred a number of other expenses. At least from January 2002, Mr Raphael (or his company) was renting an office in Power House's building on what appears to have been arm's length terms.

18. Mr Phil Brookes, who now works for Applause Store and has been a friend of both Mathew Firsht and Grant Raphael since his teenage years, also gave evidence about the circumstances in which the two friends fell out. He was caught in the middle, because he sympathised with Mathew Firsht's position, and he felt that he had to distance himself a little from Mr Raphael, because although he was not then working for Mr Firsht he felt awkward when Mr Raphael spoke critically and in a derogatory manner about him. However, he and Mr Raphael had not fallen out as such, and they remained 'friends' on Facebook.

19. Ultimately, I do not consider that much of this detail is very important. It does not matter precisely when Mr Firsht and Mr Raphael fell out: what matters is that they did fall out, and that for a number of years before 2007 they had not been in touch with one another. Nor does it matter precisely when Mr Raphael moved into the Power House building. What is important is that (as I accept) Mr Firsht and Mr Raphael discussed the situation at Power House, that Mr Firsht believed that Mr Raphael had been sympathetic to his concerns yet had moved in to his old offices shortly after his resignation, and that his belief, right or wrong, led him to regard Mr Raphael as a

friend who had betrayed him. It is common ground that their friendship came to an end as a result of the split between Marc Jay and Mathew Firsht, and that after the falling out - whenever exactly it took place - all friendly and social relations were over. In the years that followed, Mr Firsht recovered from the blow which he had suffered at Power House, and built up Applause Store into a very successful business. He said that he did not harbour a grudge, and that he simply moved on and got on with his life. I find that entirely credible. He is plainly a businessman of single-minded drive and dedication, and he did not strike me as being the kind of man to waste valuable time on ancient disputes. By contrast, Mr Firsht's erstwhile friends did not prosper. Power House, which with Mr Firsht's departure had lost the important part of its business which involved audience organisation, went into decline and ultimately out of business; and Perfection, Mr Raphael's company, traded for four or five years but ultimately became uneconomic and went into voluntary liquidation. By the time with which this case is ultimately concerned, Mr Firsht was prospering and highly successful, and Mr Raphael was not.

THE DEFENDANT'S SITUATION IN JUNE 2007

20. In June 2007 Mr Raphael lived at Willow Road in Hampstead, some 7 or 8 minutes from Hampstead Underground station. He had a flat there, which he rented: as he said, he was not a rich man. From the front door, a hallway turned sharply left. There was a shower room and WC near the front door. Beyond the first left turn, the kitchen lay straight ahead. Before that, another left turn led to a second hallway, running between the bedrooms and the living room. It had a door on the left to a spare bedroom-cum-study and, beyond it, another door to the main bedroom, which had an ensuite bathroom. Anyone heading for the living quarters would go straight past the second hallway, and turn left just before the kitchen into a more or less rectangular living room. This had a dining area by the door into the kitchen, and two double doors or French windows which opened onto an outside terrace or patio. Asa Hallonqvist, who is from Sweden, had been dating Mr Raphael for about three weeks as at 19th June: they were not living together, but she often stayed with him for the night. There were two computers in the flat on 19th and 20th June: one was Ms Hallonqvist's laptop computer, which Mr Raphael often used, and the other was a desktop computer which was kept in the study or spare bedroom, the first room on the left in the hallway which separated the living room from the bedrooms. Although not (on his own assessment) a rich man, Mr Raphael had some valuable possessions. He explained that he is fascinated by gadgets, and he had a very expensive plasma television which cost him about £3500, an I-Pod and speakers worth perhaps £500, a DVD player, a video recorder, a digital camera, and the like. He was a reasonably tidy person, he said. He produced photographs of his flat, which he said showed fairly accurately its state of tidiness. They show what I would call a neat and tidy living room, not very large, but of a reasonable size: perhaps 12 or 15 feet wide, to judge from the furniture. It is not possible to tell the room's length, but from Mr Raphael's evidence that in 2007 the dining room table would have been visible in one of the photographs, it is clear that the distance from the far end of the living room, where the fireplace and wall-hung plasma television were, to the dining room table, would have been no more than perhaps 20 feet. In 2007, he had an L-shaped sofa which, he said, occupied the space

taken up by the two blue sofas shown in the photographs. In other words, the L-shaped sofa would have been arranged with one part of the L against the left hand wall of the living room (the wall behind which lay the central passage) and the other part of the L with its back towards the dining area and kitchen door.

21. He registered as a Facebook user in April 2007, so he was a fairly new user as at June of that year, but he said that it became addictive. He used it more for professional than social reasons. He would leave it open on his study desktop computer, which was an old machine that took a long time to switch on and off. When he had guests he would from time to time play with his computer - I took him to be referring to Ms Hallonqvist's laptop, which he was certainly using on the evening of 19th June. He was a bit obsessive about computers, he said. He was on the London network of Facebook, where he believed that anyone on the network would be able to see his profile unless he altered his privacy settings to restrict access. He accepted that if the user clicks on the 'privacy' link on his profile page, he is taken to a section where privacy settings can be adjusted, for example so as to prevent any but friends from accessing his profile and contact information. He thought that he had used those settings to block some people.

THE EVENTS OF 19TH JUNE 2007

22. The Claimants were not able to give any oral evidence about what happened on 19th or 20th June 2007. Their evidence consisted of the hearsay statement of Max Kelly and the activity log. As I have already mentioned, the activity log shows all the activity on Facebook on 19th and 20th June from Mr Raphael's IP address. Before 4.35pm on 19th June, only Ms Hallonqvist accessed Facebook from Mr Raphael's IP address. Mr Raphael's usage started at 4.35. From then until 4.48pm on 19th June a user using Mr Raphael's Facebook identity was accessing Facebook. He accepts that he was the user. It appears that he looked at his own profile and searched for three people (Mike Cunliffe, Ali Trott and Alicia Pau). I say that he appears to have searched for them: what appears on the activity log (under the column 'script', which according to Mr Kelly shows the Facebook page being viewed) is the letters 's.php', and (under the column 'scriptget', which shows any parameters passed to the script) 'q=[firstname]+[secondname]. So, in the case of Alicia Pau, the log shows 'q=Alicia+Pau'. Asked about these entries in the log, Mr Raphael accepted that they showed him searching for the three, and that he had indeed done so. They were all people whom he knew; Alicia had been his girlfriend.

23. Mr Raphael came back onto Facebook from 5.03 until 5.20pm. He accepted that during that session (as the entries suggest) he searched for Nathan Hill (a cameraman), Mathew Firsht, Simon Firsht, Dani Roams and Sam Wyner (who was not really, he said, a good friend). He accepted also that the log showed him looking at Simon Firsht's profile and at photographs on his profile. It was put to him that at 17.16.34 BST the log appeared to show him blocking Simon Firsht: the column 'scriptget' shows a formulation which includes Simon Firsht's name and the word

'block'. He said he thought he was doing that: maybe, he said, he did not want Simon Firsht to see his Facebook page. He also accepted that the log appeared to show him trying to block Mathew Firsht. He agreed that Mathew Firsht did not then have a Facebook profile, so he suggested that he might have blocked Mathew because he had blocked Simon. He logged off Facebook at 5.20pm and came back online at 5.33, remaining on Facebook under his own user identity until 5.40pm. The next entry in the log did not occur until 9.04pm, over 3 hours later.

24. Mr Raphael pointed out that it was not until 21st August 2007, when he received a letter from Olswang, that he had any reason to remember the events of 19th and 20th June, and that after some 8 weeks he had no clear recollection of conversations or people's movements, nor (although he did not dissent from the data in the activity log) of the tasks which he performed on the two computers during those two days. Lapse of time apart, his memory was not helped, he said, by the facts that at the time there was no reason to remember the evening, and that he had held a party that evening, at which (unusually on a weekday) he had drunk alcohol). I would have thought that the second fact (and, as will be seen, the presence at the party of complete strangers who stayed the night and, apparently, much of the next day) might have amounted to a reason to remember the evening, but of course I accept the difficulty of remembering events in detail after even a few weeks.

25. Mr Raphael's evidence was that at about 6pm on the evening of 19th June he met up with two friends from work, Cein McGillicuddy and Matt Pothecary, at a local Hampstead bar, the Bar Rhumba. He had not eaten, and was not normally a heavy drinker, so a few pints of beer went to his head rather quickly. I pause there, because there was a good deal of evidence about Mr Raphael's temperate drinking habits in earlier years. I did not find that evidence helpful. That fact that neither Mathew nor Simon Firsht remembered him ever drinking alcohol in the 1990s (while by contrast Phil Brookes, who gave evidence for the Claimants, said that he did remember Mr Raphael having a drink with him in Somerset in 1992, although later in the 1990s he was a non-drinker) has no useful bearing on his behaviour in 2007. I see no reason not to accept that he was an occasional drinker and that he had a few alcoholic drinks during the evening of 19th June. He stayed in the bar for perhaps two hours, after which his girlfriend Asa Hallonqvist joined them with two friends of hers who were visiting England, Alejandro Meizoso and Josefin Gustavsson. At some point, two friends of Cein, known as Andy and Dan, also joined them. He had not met them before that evening. The party now consisted of 8 people, all of whom he either knew or had been introduced to that evening. At around 8pm, they all left the bar and walked back to his flat. Asa Hallonqvist's evidence tended to agree with that estimate of the time, for she thought that she had arrived at the bar at around 7.30pm, and stayed there for 30 minutes or so.

26. Somehow, Mr Raphael said, four 'strangers' came back to the flat with the party, making 12 people in all. 'Strangers', in inverted commas, is how he himself described them in his witness statement, although Mr Pendlebury preferred to call them the 'new acquaintances', or 'new companions'. He could not recall specifically inviting

them, nor did he know who had invited them, but he did not recollect wondering why they were there. He did not usually invite strangers back to his flat, although he claimed that he had done so before. He accepted in cross-examination, with some reluctance, that it was 'reasonably' out of the ordinary for him to do so. He could not remember introducing himself to them, or offering them drinks: he thought they helped themselves to drinks, which were in the kitchen. He could only remember their names in very rough terms: there was a girl called Vicky, a girl named Zoe, a girl named Nicko or Nikoo and a boy called Arun or Adam. Ms Hallonqvist thought that there had been five 'strangers', three girls and two men, who were not Mr Raphael's friends, although she did not know whether or not they were known to him, but they seemed to have been invited anyway. It does not appear that Mr Raphael spoke to them much if at all during the evening, for he was on the patio with his friends most of the time, talking and using Asa Hallonqvist's laptop computer to access Facebook. He agreed with Ms Hallonqvist's recollection that he was on the patio, she was in the living room - I understood her to mean on the L shaped sofa - with her friends, while the 'strangers' were up at the kitchen end of the living room, around the dining room table, and in the kitchen itself. There were therefore at least three separate groups of people at the gathering, although - given the size of the flat - they were not very far apart, and there was some degree of intermingling between the 'strangers' and Ms Hallonqvist's group, for although on her account they mainly sat and socialised among themselves, they did also talk to her friends, and she met them briefly. But she did not pay them much attention, and thought that she would not have noticed if one had disappeared for an hour. They were not behaving suspiciously.

27. At some point in the evening, Mr Raphael went to bed. Ms Hallonqvist and Mr Raphael thought this would have been at around 10pm, although Ms Hallonqvist accepted that it could have been half an hour later. Asked if he was not leaving her with strangers, Mr Raphael said that he was not deliberately doing so, and in any event they did not strike him as terrible people - just youngish people. At this point, Asa Hallonqvist's friends decided to leave, and did in fact leave about 20 minutes later. Mr Raphael's friends at the other visitors remained in the living room and patio, and continued talking and drinking. Mr Raphael, she said, appeared happy to let them stay on. She thought they were all known to him. She joined Mr Raphael in his bedroom, and went to bed about 45 minutes after he did.

28. It is necessary now to return to Facebook. The activity log shows that a user employing Mr Raphael's identity logged on to Facebook again at 9.04pm, perhaps an hour into the party. Mr Raphael accepted that he was the user. During that session, he searched for Ben Brewin and Hamish Hamilton, both of whom were in the television industry; for Phil Brookes; for Russell Hicks, who, he accepted, was a mutual friend of his and Mathew Firsht; for Elle Phillips and Mitchell Phillips, of whom Mitchell was a good friend known to Mathew Firsht from Brighton days; for Olivia Lee, another person whom he knew; for Paul Shampalina, Daniel Levene and Mark Shaw, friends from Brighton days; for Max Lewis, and for Emma Spitzer. He accepted that the log appeared to show him reading a message from Russell Hicks. Messages on Facebook change in appearance, he said, once they have been read, rather as they do on Outlook Express. He accepted that the log appeared to show him blocking Amanda

Shaw, possibly because she was a 'massive gossip', and Carl Spitzer, a friend of his: he was not sure why he did not want Carl to see his profile. He accepted that the log appeared to show him going into the privacy section of his own profile, apparently limiting the accessibility of his profile. He logged off under the user name G Raphael at 9.24.50pm. As I say, he accepted that at that point he was the user.

29. At 9.25.31pm, a computer at Mr Raphael's IP address accessed Facebook again. The last entry for that session is timed at 9.28.49, but it is not clear to me whether that was in fact the time when the user logged off, or simply the time of the last action during that session. The log shows the user as 'null'. At 9.33.44, the computer again accessed Facebook, but this time under the user name 'M Firsht', with a new user identity number. That time coincides precisely with the moment when, as is not disputed, the false profile of Mathew Firsht appeared on Facebook. On the screenprint of the false profile, under the date June 19, the words appear: 'Mathew joined Facebook. 9.33pm'. In cross-examination, Mr Raphael accepted that to register for Facebook you have to provide the details of the user and an email address. The user is then sent an email, which contains a link on which he clicks to complete registration. It was suggested to him that during those minutes that was precisely what he was doing: he was creating the false profile in the name of Mathew Firsht, and waiting for the validatory email to come through. Mr Raphael insisted that it was not his doing, but in my judgment it is clear beyond any doubt that during the period (between 3 and 8 minutes) the false profile was created on a computer at Mr Raphael's flat. That computer was either the laptop which Mr Raphael was using, or it was the desktop in the study/spare bedroom. If it was not Mr Raphael's doing, the profile must have been created by someone else at the party, presumably one of the 'strangers', and the process must have been commenced 41 seconds, at most, after he himself left Facebook. Even making full allowance for Mr Pendlebury's note of caution about the lack of information about the possibility that two computers were being used simultaneously, and about how the Facebook log would cope with two simultaneous visits from computers at the same IP address, the coincidence of timing is telling.

30. At 9.33.44, as I have said, the user posing as 'M Firsht' logged on to Facebook, and remained on the site until 9.42.38. During that period, the user searched for Grant Raphael, apparently entered the words Applause Store, and searched for the name Simon Firsht. This, as Ms Skinner observed, was something of a coincidence, given that Mr Raphael had himself searched for Simon Firsht earlier that evening.

31. At 9.42.54pm, the user identity changed on the log. Facebook was now accessed by a user who employed the username G Raphael. Mr Raphael did not think that it had been him, and suggested that one of the strangers must have been messing around with the desktop computer. His Facebook profile would have been open on the computer, he maintained. During that session, the user appeared to access Mr Raphael's privacy settings.

32. The activity log shows that at 9.44.28pm the user calling himself or herself M Firsht logged back on to Facebook. Ms Skinner suggested that the profile 'switched', to which Mr Pendlebury protested that it was possible that two computers were in use simultaneously and both accessing Facebook. That might theoretically be possible, and of course I do not know what the effect on the activity log would be if that were the case, but - as I have said before - it is Mr Kelly's evidence that the activity log for Mr Raphael's IP address shows *all* the activity on Facebook during 19th and 20th June, and moreover if two computers were being used simultaneously it would be curious indeed if the activity log at one moment showed a user under the name M Firsht on the desktop computer (as it would have had to be), and at the next moment, and without any overlap of time, a user under the name G Raphael on the laptop. One might expect that it would show one, or both, but not one, then the other, and then the first one again. It is surely more probable that, after 9.24.50pm (the time of the last activity for which Mr Raphael accepts that he was responsible), the same user was accessing Facebook, whether from the desktop or the laptop. At all events, the false M Firsht logged back on at 9.44.28pm. As is clear from the screenprint of the false profile, 9.44pm is the exact moment when Mathew Firsht is shown as having joined Facebook's London network. Moreover, in under a minute the user had searched for Mr Raphael's profile. The last entry for that session is timed at 9.46.21.

33. 28 seconds later, the log shows a user accessing Facebook under Mr Raphael's user name. The user searched for Max Lewis, for whom a search had been made at 9.17.01pm during the last session in which Mr Raphael accepted that he had been the user. That was a very short session. The first entry is timed at 9.46.49; the last at 9.47.58.

34. At 9.48.12pm, the pseudo 'M Firsht' is shown to have logged on again. This time, the user searched for Simon Firsht's profile, and the log appears to show, as Mr Raphael accepted, that a photograph on that profile was being accessed and added to the false profile. It was Simon Firsht's evidence that the photograph of him and his brother which appeared on the false profile had been taken from his profile. It had been posted on his profile by a friend. His evidence was that anyone would have been able to see it on his profile, because then he used no privacy settings. After about a minute in which the log shows 'null' user, the pseudo 'M Firsht' returned to Facebook at 9.59.47pm and searched for 'Gay Groups'. That session ended at 10.06.54, and the log then shows a session which lasted only a few seconds, under the G Raphael username. The user searched again for Simon Firsht. At 10.07.38, the log shows that the 'M Firsht' user was logged on again, and immediately searched for Simon Firsht, then someone called Petrina Good, whom Mr Raphael knew (she was head of production at the production company Endomol, and he had worked with her) and then searched for him, Mr Raphael.

35. Thirty seconds after the last entry on the 'M Firsht' session, at 10.11.51pm, the 'G Raphael' user logged on. Mr Raphael accepted that, as the log appears to show, the user had tried to block Mathew Firsht from finding his, Mr Raphael's profile. He did not know why. The user (Mr Raphael did not think it was him) then searched for

Samantha Barnett, who is a friend of Mr Raphael's, and for Katie McCracken, of whom Mr Raphael said that he did not remember doing that search. 13 seconds after the last entry on that session, the 'M Firsht' user is shown by the log as being logged on to Facebook for a matter of seconds, during which the user searched for Mr Raphael again. With effect from 10.14.56pm, the 'G Raphael' user was logged on. Again, Mr Raphael did not believe that it was him. This user searched for Rosie Lewis (Mr Raphael's ex-wife), and visited Mr Raphael's privacy settings. The last entry shown for that session is times at 10.23.13pm, and at 10.23.58pm the 'M Firsht' user had logged on again. The first thing that the user did was to search again for Grant Raphael, and then for Big Brother groups, several of which (as Mr Raphael accepted) were linked to the false profile. That session is last timed at 10.27.46, and at 10.28.11 the 'G Raphael' user was logged on again. Again, Mr Raphael did not think he was the user. The user searched for Deborah Aharoni, another acquaintance of Mr Raphael. The log only records that session as lasting a little over a minute, before the 'M Firsht' user is shown as logged on again, at 10.29.57pm. The user searched for Iki Ahmed, and for Jay Tubb, a cameraman, both of whom Mr Raphael knew. The final session shown on the log that evening was in the name of G Raphael, appears to have lasted for just under two minutes, ending at 10.35.07pm. There was no further activity on Facebook at the Defendant's IP address until the following morning.

36. The Defendant, as I have said, accepted that he was the user up to 9.24pm. After that point, he regarded it as possible that he accessed Facebook at times until 10.35pm, although when most individual instances were put to him he said he did not believe that he was in fact the person logging on under his user name. However, he was firm in his denial that he accessed Facebook under the name M Firsht, whether to create the false profile or to search for his own name. That could only have been the work of one of the strangers, working at the desktop computer in the study, where Facebook was left open. But how was it that the stranger, sitting in his study for over an hour without being observed by him or Ms Hallonqvist, should have searched the names of a large number of people, all of whom were friends or acquaintances of Mr Raphael?

37. The answer lay primarily, on Mr Raphael's account, in paperwork which lay around the study. It was his evidence that he kept by his desktop computer a list of people whom he wanted to look up on Facebook, and he added to the list regularly as and when names came into his head. Anyone who came into the study would have found the list next to the keyboard and mouse. The list was disclosed for the first time as an attachment to Mr Raphael's witness statement for trial. It is headed 'Facebook Peeps'. It seems to have survived Mr Raphael's move away from Hampstead to his current address, as does another document, a photocopy of five 'Post-It' notes which were attached to his desktop computer, one of which carried Mr Raphael's Facebook password. The difficulty with the list of Facebook Peeps is that not all the names for which the 'M Firsht' user searched were on the list. Petrina Good, for example, the head of production at Endomol, was not on the list, yet the 'M Firsht' user searched for her name at 10.11pm. Mr Raphael responded that the user could have got her name from documents and invoices on his desk. The user searched for Iki Ahmed at 10.29pm: his name was not on the list of Peeps either. How could the user have obtained that name? Mr Raphael's answer was that he had on his desk a list of

freelance cameramen, of whom Iki Ahmed is one, because he was always recruiting people for projects. The same applied to Jay Tubb, who could have been on the same list as Iki Ahmed. Asked why his list of cameramen was not disclosed, he replied that he had not thought it relevant.

THE EVENTS OF 20TH JUNE 2007

38. In outline, the account of the day given by Mr Raphael in his witness statement was that he woke later than he intended and felt a little under the weather after the previous evening, so left the flat in a hurry at 5.30am. He saw when he went through the living room that some people had stayed over, sleeping on the L shaped sofa, and wondered whether he should ask them to leave. He assumed that it was Matt Pothecary and his friends, and since it was so early, he decided to leave them. He filmed on location that morning in Leicester Square. He arrived at about 6.30am and left at about 3.30-4pm, after waiting for the equipment to be collected. He worked with Bob Mackenzie and Philip Chavannes, both of whom gave evidence. After the shoot, he ran various errands, went to Selfridges to find some jeans, and got home at about 6.30pm. This timetable is important, because the activity log clearly shows that - after early morning activity by Ms Hallonqvist - a user logged on to Facebook under the name of Mr Firsht at 2.11.40 pm and (as is common ground) created the defamatory group page, including the photograph of Mathew and Simon Firsht taken from Simon Firsht's Facebook profile. There is no dispute that the defamatory material was uploaded between 2.11 and 2.22pm that afternoon. If Mr Raphael's evidence as to his activities that afternoon is truthful, he cannot have been the author of the defamatory group page.

39. Cross-examined about his activities in the early morning, Mr Raphael said that he was 'frantically running around' to get to work. The living room was dark, with the thick curtains drawn, and there might have been 3 or 4 people asleep, with covers over them: definitely there were more than one. He was not happy about leaving them there, but he was in a rush and it would have taken time to wake them. He presumed they were his friends. He did not really think, he said, even though he might have been leaving strangers with his valuable possessions. He said that he left in a hurry at 5.30am because he was uncertain whether he needed to be at work at 6.30 or 7am, although he conceded that the tube journey would only have taken him 20 or 25 minutes. At the end of the shoot, he had to wait for the equipment to be collected. Even though it was worth £50,000 to £100,000, the equipment did not need to be signed for, so there was no receipt showing the time of collection. The job finished at 1 or 1.30pm, and so far as he remembered Mr Mackenzie stayed with him. Then he went shopping, but had no receipts to prove it: he would have used cash. He might have spent an hour or an hour and a half in Selfridges, where there was a good gadgets department. He insisted that there was no question of his having left the shoot at around 1.45pm and returning home by 2.11pm.

40. Asa Hallonqvist used her laptop computer when she woke up, after Mr Raphael had left for work: she would have checked emails and visited various sites, including Facebook. When she got up, she saw that several people (more than 2: her best guess was 3) were asleep in the living room, but presumed they were friends of Mr Raphael. She checked them again later: they were still asleep when she left at 11.30am. Not knowing them, she did not want to talk to them. She called Mr Raphael to tell him that they were there, but she was unable to speak to him and did not leave a message. She did not return to the flat until between 6 and 7 in the evening, by which time Mr Raphael had returned. Plainly, she could not assist on the timings of Mr Raphael's shoot.

41. The evidence of Mr Raphael's colleagues, Robert Mackenzie and Philip Chavannes, is potentially very important to the question of when he left the shoot. Both men's witness statements were in identical form, and the reason for that was, as Mr Pendlebury at once explained, was that he prepared a pro-forma, or draft, for Mr Raphael to send to each witness: they were to fill in the gaps, sign and return their statements. The draft contained the following paragraphs:

> "1. [State occupation and qualifications]"
>
> 2. On 20th June 2007, I was working on the NBC corporate shoot with Grant Raphael in Leicester Square London. My role that day was [state role].
>
> 3. We had arrived by around 7am and we were finished by around 2pm.
>
> 4. Grant was Camera Supervisor that day, so he stayed until the equipment (which had been hired) was collected. I left at around ---- approximately; and Grant was still there when I left."

42. Mr Mackenzie's statement did not change any of the draft which he was sent by Mr Raphael, so it read, when signed, that 'we' had arrived at the shoot at about 7am and were finished by 2pm. He was the sound engineer. Paragraph 4 of his statement inserted 2pm as the time when he left. However, in oral evidence he corrected this. On reflection, he thought that he left at about 3pm, or at least closer to 3 than 2. The shoot finished at about 1.30pm, he thought, after which they had to move equipment and wait for a driver to take their gear away. Cross-examined, he accepted that he did 50 or 60 one-day jobs - like this one - in a year, and he said that he worked with Mr Raphael reasonably often. He said that he remembered waiting with Mr Raphael for the driver, to keep him company and to help move boxes. He accepted that his statement 'could sound' as if he went off first, but in reality they both stayed until the equipment was collected. He insisted that although he could not remember to within a quarter of an hour when he left, but he could within half an hour. However, he could

not remember whether he went to work the following day, or the day before. His diary would not have given the times of his arrival and departure. He accepted that he had spoken to Mr Raphael about the proceedings, and he understood that the time when Mr Raphael left was important to the case.

43. I do not criticise Mr Pendlebury, who most ably and selflessly acted for Mr Raphael under the auspices of the Bar Pro Bono Unit, and who had to manage trial preparation without the help of a solicitor; but the dangers of this kind of pre-cooked witness statement are obvious, especially when the contents suggest most of the answers that are required, and when a significant time has elapsed since the events to be recalled. In this case, the lapse of time was almost a year. I do not think that Mr Mackenzie set out to mislead the court, but I am very sceptical that he would have had any recollection of the time of his arrival at or departure from the shoot on 20th June 2007, had the details not been suggested to him. It is noteworthy that his statement said quite clearly that he left before Mr Raphael; yet in oral evidence he said they both stayed until the equipment was collected. Moreover, no particular reason was suggested as to why he should have remembered the detailed events of one of many one-day filming jobs almost a year after the events in question, and I found it highly significant that he could not, unaided, remember what he had been doing the day before or the day after: yet he claimed to remember to within half an hour, without the aid of a diary note of his timings, when he had left the shoot on 20th June. I am quite unable to place any reliance on the accuracy of his recollection of the timings that day, and I cannot derive any corroboration for his account from the evidence of Philip Chavannes, whose evidence seems to me to be tainted in exactly the same way as Mr Mackenzie's.

44. Philip Chavannes was camera operator that day. His statement appeared to be identical to the draft, except that in paragraph one he said that his occupation was freelance lighting cameraman, in paragraph 2 he said that his role that day was camera operator, and at paragraph 4 he said 'I left at 2pm approximately; and Grant was still there when I left'. He had not filled in the blank left for [address]. In short, it was perfectly clear that he had filled in the draft which Mr Pendlebury had prepared and which Mr Raphael had sent him. However, under cross-examination, he absolutely insisted that he had written out the entire statement on his computer after discussing it with Mr Raphael: no-one had given him a draft. Ms Skinner pressed him on this, and showed him the draft witness statement: even then, he insisted that he had seen nothing like that, and had been given no draft with gaps to fill in. As to the day's timings, he thought that he left at about 2pm, although he could have had a wrap time of 1.15 or 1.30pm, and then 15 minutes to put away equipment, but he said that he would not have left earlier than 1.50pm. I have no reason to believe that Mr Chavannes was not trying to tell the truth as he remembered it, but he gave no reason for his ability to remember the detailed timings of that day's shoot, and given on the one hand his acceptance that he discussed his evidence with Mr Raphael beforehand, and on the other hand the fact that, when tested in court, he could not remember even the circumstances in which the statement was undoubtedly created, I was quite unable to place any more reliance on his recollection of the events of 20th June than I was on the recollection of Mr Mackenzie.

45. I now return to the Facebook activity log for 20th June. Ms Hallonqvist accepted that the intermittent usage under her name that morning, between 6.16 and 11.05am, would have been her doing. However, from 2.11pm until 5.32pm there is substantial usage of Facebook by a user or users employing the user names of M. Firsht and Mr Raphael. On Mr Raphael's case, none of that was his doing: this usage can only have been the doing of the people who (as I accept) had remained in the flat after Ms Hallonqvist had left. At least one of them must have stayed in the flat until 5.32pm, and must have spent a very substantial amount of time using their host's computer and accessing his Facebook pages, without permission.

46. The log shows a very similar pattern of activity to that shown on the evening before: first the user operates under the name M. Firsht, then G. Raphael, and so on, with the exception of a brief log on under the user name of Ms Hallonqvist, whose evidence, which I accept, shows that she cannot have been responsible. As I have already mentioned, the 'M Firsht' user logs on first, at 2.11 pm, and appears to create a group page with a photograph: this, as is undisputed, was when the defamatory group page 'Has Mathew Firsht lied to you?' was created, and no doubt when the link to that group was created on the false profile. Mr Raphael was taken through the log in detail. As he accepted - for the accuracy of the log was not disputed - first the group page was created by 'M. Firsht'; then 'G. Raphael' logged on and looked at the photographs on Mr Raphael's page, read one of Mr Raphael's messages, searched for Russell Hicks (someone whom Mr Raphael knew and for whom he himself had searched at 9.12pm the previous evening), read another message, went to the profile of Richard Jay, Mr Raphael's friend and formerly a friend of Mr Firsht; then 'M. Firsht' logged on again briefly; then he was replaced again by 'G Raphael', who searched for Amanda Goodhew and then read another of Mr Raphael's messages. Given that Amanda Goodhew was not one of the names on Mr Raphael's list of 'Facebook Peeps', Mr Raphael was asked how the user would have known to search that name. He answered, with what I have to say was little conviction, that he could only think that he had gone to her house for drinks for her birthday in early July and there might have been an invitation from her on his desk. He accepted that the user seemed to be going through a lot of the papers on his desk. Then the user switched back to Facebook for 20 minutes under the name 'M. Firsht', after which he immediately switched back to G. Raphael, where he once again read one of Mr Raphael's messages. Briefly, there was usage in the name of Asa Hallonqvist, which, as I say, cannot have been by her; and then the user name 'G Raphael' logged on again after an interval of over half an hour (the first substantial gap in Facebook usage during the afternoon). This time, as Mr Raphael accepted, the log appeared to show the user uttering or receiving 'banter' on his 'wall'. A 'wall' on Facebook is, as Mr Raphael explained, a kind of noticeboard on which people can talk to each other. Each user has their own wall, and the 'G Raphael' user appeared to be making or reading remarks, or banter, on Mr Raphael's wall. Then the user read three of Mr Raphael's messages and looked at his photographs. At 5.09, he took what appears to have been a break of almost 10 minutes, and then returned under the same user name, after which there was more banter on Mr Raphael's wall and a search for Louis Paltnoi, one of the names on Mr Raphael's list of 'Facebook Peeps'. The session came to an end at 5.32.47pm, and there was no more Facebook usage on Mr Raphael's IP address until 7.54.17pm. That, he accepted, was his own usage after he returned home. In short,

between 2.11pm and 5.32pm a stranger or strangers had, after waking up in Mr Raphael's flat, spent over two hours accessing Facebook under his name and that of M. Firsht, checking his messages, searching for his friends, and exchanging banter with others on Mr Raphael's 'wall', and fortunately, perhaps, had left before Mr Raphael returned.

47. Mr Raphael told the court that when he arrived home at about 6.30pm no-one else was there. He went on to Facebook at 7.54pm, using the desktop computer in his study, but did not notice the banter on his wall, which he rarely looked at. He said that the wall got longer and longer as more rubbish was added to it. However, he accepted that new 'banter' would appear at the top of the wall. He did not notice that his messages had been read, although, as he suggested, it was possible that they might have been deleted. At 8.00.19pm, he sent a Facebook 'karate chop' to Richard Jay, brother of Marc and son of Brian, one of the friends who had fallen out with Mr Firsht in 2000. It was not explained what a 'karate chop' is, except that it is a kind of message. The activity log shows that Mr Firsht's profile was accessed at 8.00.57pm. Mr Raphael said that this was when he discovered the false profile. He clicked on the profile, which was on a tab or task bar on his screen. He was shocked and confused, he said, and wondered if it was a 'surreal prank'. He agreed that he had been concerned about what else had been accessed on his computer. He only looked at the profile for just over a minute, he accepted, after which he went back to his own profile for 12 minutes, searching for Max Lewis and another friend. It was suggested to him that these were not the actions of a man who, as he had said in his witness statement, had felt a 'mixture of shock and confusion' when he found the false profile, or of a man who had discovered that his private matters had been abused by strangers. I found his response unconvincing. As he had done on other occasions when faced with awkward questions, he talked too much: he didn't know that his things had been abused, he said, and then he accepted that someone had been on the computer whom he didn't know, but he had a lot of 'stuff' on discs which were not on the computer, and the computer was old and did not have much 'stuff' on it. That was a defensive and unconvincing attempt to explain a response which, it seemed to me, was not the response of someone whose hospitality had plainly been abused by strangers and whose private affairs had plainly been intruded upon: nor was his behaviour, as recorded by the activity log, consistent with someone shocked and confused. If he had indeed found the false profile for the first time at 8pm, I find it surprising that he should have glanced at it for so short a time, and then logged on to his own profile. Asked whether he had checked his flat, he agreed that he had, and that it was a mess: he said that he looked at his DVDs, a check which, he said, 'sounds strangely possessive and unnecessary'. If he had indeed been concerned about what the strangers might have done to his flat, it was neither possessive nor unnecessary. He said that he showed Ms Hallonqvist the profile, remarking to her that it was unbelievable. She was not very interested, he said. In fact, Ms Hallonqvist's witness statement records that he never spoke to her about a Mathew Firsht until 21st August 2007, the day he received the first letter from Olswang, and she confirmed in oral evidence that she did not think that she saw the false profile on 20th June. She thought that she would remember if Mr Raphael had told her that strangers had accessed the computer.

THE INFORMATION ON THE FALSE PROFILE AND GROUP

48. Questioned about the information on the false profile, Mr Raphael accepted that whoever created the profile (and took the picture of the Firsht twins from Simon Firsht's profile) would have known that Mathew had a twin brother, which of course he knew. He knew that Mathew Firsht was from Brighton; he knew his religion, which was a variety of Judaism; he knew that he was managing director of Applause Store; he knew that the business was based at Elstree; and he knew of Mr Firsht's connections with the Big Brother programme, for which he had provided audiences (four of the groups with links on the false profile were linked to Big Brother). He denied knowing Mr Firsht's birthday, which also appears on the false profile, although in cross-examination he accepted that he and Mathew and Simon Firsht celebrated their birthdays together (they are a matter of days apart) for many years, and exchanged gifts. I do not doubt that he did know Mr Firsht's birthday.

49. As for the false group page, the words 'Otherwise catch him on Big Brother eviction shows stood very sadly and very smug in the pathway between fans and photographers' showed, as Mr Raphael accepted, that the creator of the group knew that Mr Firsht worked for the Big Brother programme; he accepted that the correct web address for Applause Store, which he would have known in July 2007, was stated on the group page; and he accepted that the user knew Mr Firsht's correct - and unusual - spelling of 'Mathew', with one 't' instead of two. As for the assertion on the group page that Mathew Firsht owed money, it had been Mr Raphael's evidence that, on his understanding, one of the factors in the falling out between Mr Firsht and Mark Jay had been (as he was told) that Power House's bills were not being paid, and this might have been an attempt to run the company down so that Mr Firsht could leave and run his own company. He did not think this hypothesis made much sense, since Mr Firsht 'lived and breathed' the company, but it was what he was told. He had also alleged, in his original Defence in the action, that in 2002 Mr Firsht had been obliged to repay to Power House a director's loan of £50,000. These, suggested Ms Skinner, were instances evidencing Mr Raphael's belief that Mr Firsht had owed money, of which Mr Raphael knew before 19th June 2007. Finally, he was asked about these words on the group page: 'You won't miss him, he is the one for some stupid reason stood there to feel important with no real reason to be there and catch him looking pathetically at the camera as it passes him ... two words egomaniac and insecure!!'. There were several references in the evidence to an expression which (as Mr Pendelbury put to Mr Firsht in cross-examination) Mr Raphael is said to have used to Mathew Firsht, namely 'It's nice to be important, but more important to be nice'. Phil Brookes mentioned the phrase in his evidence, saying that Mr Raphael used it of Mathew Firsht, and said that it had been Mr Raphael's view that Mathew Firsht had an over-inflated sense of self-importance, and would regularly criticise and make fun of Mathew in his presence. It was because of his knowledge of Mr Raphael's opinion that Mathew Firsht was full of his own self-importance, he said, that when he was first shown the false Facebook pages by Mr Firsht on 21st August 2007 he immediately thought that Mr Raphael was the author, and he told Mr Firsht so. He knew of no-one else who criticised Mr Firsht for being self-important. He could not

imagine that anyone else would have held such a view of Mathew Firsht, who lived and breathed his work and had a very small social circle.

THE EVENTS OF 21ST AUGUST 2007

50. On 21st August 2007, Olswang's letter before action was delivered by hand to Grant Raphael. It was not until 21st August that Mathew Firsht spoke to anyone apart from his close family about the case. He did not even tell Phil Brookes, his old friend and the general manager of Applause, until mid-morning that day. In his original Defence (and in his solicitors' reply dated 12th September 2007 to the letter before action), Mr Raphael claimed that on the very day that he received the letter before action, but a few hours before, he received a telephone call from a woman called either Amy or Naomi. The woman explained that she was an ex-partner of Mathew Firsht, who had treated her and her family very badly, and she wanted revenge. For that reason, she wanted Mr Raphael to know that Mr Firsht would be serving papers on him that day. He inferred from this call that the woman was either a friend or work colleague of Mr Firsht, instructed by him to make what an entrapment call; or that she was one of the strangers at his house on 19th and 20th June, who felt guilty at having created the false profile and group page; or that the person who created the false profile and group page knew about the party at Mr Raphael's house on 19th June, and told Mr Firsht about it, whereupon Mr Firsht took the 'ideal vengeance opportunity to orchestrate the creation/publication of the page/group to create a form of revenge for the past, towards myself'. That especially, in Mr Raphael's view, 'seems more possible given the way Mr Firsht is **pursuing** (his emphasis) this matter'. That third 'possibility', as Mr Raphael would call it, is in my judgment profoundly implausible, for any of a number of reasons, not least because, in my view, Mr Firsht plainly had no continuing interest in Mr Raphael after they fell out, let alone a desire for revenge, and because - on Mr Raphael's own evidence - the 19th June party was an impromptu event which none of the guests knew about in advance. Mr Raphael suggested in his Defence that the caller might have been Naomi Channell, who worked for Mr Firsht. Mr Firsht said that he knew of one Amy and one Naomi who did work or had worked for Applause. Amy Crick was a current member of staff, and Naomi Channell no longer worked for the company. He regarded it as unbelievable that anyone should have made such a call. He knew of no member of staff at Applause Store who had a grudge against him. This, it seems to me, is not a matter with which I need deal further, because if the call took place it was, in my judgment, not prompted by Mr Firsht, and it certainly does not begin to persuade me that the mystery caller was the person responsible for creating the false profile and group page. At the most, it might suggest that someone in the Applause office did, unknown to Mr Firsht, bear a grudge against him, and discovered in the course of the day about the letter before action. That, even if true, takes matters no further.

SUBMISSIONS ON LIABILITY

51. Mr Pendlebury made the valid point that there was no primary witness evidence that the Defendant was responsible for the creation of the false Facebook pages. The Defendant's evidence, by contrast, was almost exclusively primary witness evidence. In order for the Second Claimant to win on the privacy claim (which turns on the creation of the false profile on 19th June 2007), the Claimants had to establish that the Defendant was either lying or so drunk that he could not remember the events of 19th June 2007. I do not think for a moment that he was too drunk to remember the events of that evening, and I accept that there is no room for mistake: to find against the Defendant, I must find that he was lying. Mr Pendlebury submitted that in order for the Claimants to succeed on the libel claim (which turns on the group page, created on the afternoon of 20th July), they must persuade me that the Defendant was lying, that he was not at his flat between 2.11 and 2.21pm that afternoon, when the group page was created, and that Mr Mackenzie and Mr Chavannes were either lying, or else so unreliable that their evidence must be rejected, in saying that they were with the Defendant until 2pm or later. I have dealt with Mr Mackenzie and Mr Chavannes, and have explained why I cannot rely on their evidence. As Mr Pendlebury rightly argued, the key is whether the Defendant was responsible for the group page material which was posted between 2.11 and 2.21pm. If he was not responsible for it, then it was much less likely that he was responsible for the false profile during the previous evening. I agree, but would go further: if he was not responsible for the group profile, it would be highly improbable that he was responsible for the false profile. Conversely, as counsel accepted, if I find that he was responsible for the creation of the group page, it would be remarkable if I found that he was not responsible for the false profile. It is surely overwhelmingly likely that the same person was responsible for both.

52. As for the events of 19th June, he argued that the Claimants' case was built on a series of inferences - that it was unlikely that there was a party or any strangers at the party; that it was unlikely that one of them would know Mr Firsht, that he had a twin, his background, his job, and his connection with Big Brother; that it was unlikely that this new acquaintance would do searches on Max Lewis, Petrina Good and other friends of Mr Raphael; that the pattern of use shown by the activity log and adjustment of Mr Raphael's privacy settings showed that he was trying to protect himself; that the patterns of use on 19th and 20th June were similar; and that Mr Raphael did not notice that his messages had been read. As he said, to find that there was no party or no strangers in the flat I would have to find the evidence of Ms Hallonqvist unreliable, or indeed dishonest. That I do not do. I am confident that she was doing her best to tell the truth, and I have no reason to regard her evidence as unreliable. In my judgment there was a party, there were strangers there whom Mr Raphael had not met before that evening, and some of the guests stayed in the flat both overnight and at least until after Ms Hallonqvist left the flat late in the morning of 20th June. The fact that the mystery user must have known Mr Firsht and all the relevant information about him was coincidence: and coincidences happen. Mr Firsht is well known in the television industry, counsel argues. The user's searches for people who were friends or contacts of the Defendant was explained primarily by the Facebook 'Peeps List', which, if a

forgery, would be a very poor one. As for the activity log, it should be approached with caution as a means of interpreting activities and functions carried out without positive evidence from Mr Max Kelly of Facebook. Mr Pendelbury himself had raised a number of questions for Mr Kelly in a Part 18 request, and the fact that they were not dealt with in Mr Kelly's witness statement was the fault of the Claimants' team. They should not be permitted to capitalise on their own failings to rely on interpretations adverse to the Defendant which are not supported by Mr Kelly. For example, what the Claimants would describe as the apparent switching from profile to profile by one user on the evening of 19th June could be sporadic use by Mr Raphael and contemporary misuse by another user, either by competition between Mr Raphael on his own profile and the other user on the Firsht profile, or by competition between both of them on Mr Raphael's profile. We do not know, he argued, how the Facebook data would be presented in either situation. The events between 9.25 and 10.35pm were consistent, he submitted, with dual use. Some 'switches', as Ms Skinner would call them, need be nothing of the kind: for example, Mr Raphael was visiting his Facebook privacy settings at 9.24.50pm, and again (with usage by the 'M Firsht' user in between) at 9.42.54pm. Why should that not show Mr Raphael leaving Facebook for (for instance) I-Tunes, while the usage in between was by a stranger on the desktop? In short, he invited me to reject any inferences which could not be supported by unequivocal evidence from Mr Kelly. As for patterns of use on 19th and 20th June, which he anticipated that Ms Skinner might argue showed similarity of use, in his submission there was no pattern, which supported simultaneous use by two users. Finally, the fact that Mr Raphael did not notice that his messages had been read took matters no further forward, because the user might have deleted them, in which case they would not be visible.

53. Counsel addressed the question of Mr Raphael's credibility, arguing that if he was lying, he would have made a better fist of it. He had weeks to invent and elaborate an account after receiving the first Olswang letter on 21st August. Why not improve on his lie by filling in the gaps, for example by saying that one of the strangers, in conversation, told him that he knew Mathew Firsht? Moreover, in his submission it was ludicrous to suppose that Mr Raphael would have done what is alleged against him from his own computer, for he would have known he could be traced. On peripheral issues, counsel argued, Mr Raphael's credibility was good: for example, he was able to show from documents that he did not move into Power House until early 2002. Moreover, if there was any grudge, it was a grudge held by Mr Firsht against Mr Raphael, because Mr Raphael moved into Power House. It was very significant, counsel argued, that the false profile was only accessed on 19th and 20th June 2008. It is common ground that the false profile was not accessed after those days. Surely, if Mr Raphael had created it, he would have gone back to it day after day? The overwhelming inference was that the profile was only accessed when the stranger was in the flat.

54. Ms Skinner, for the Claimants, argued that all the evidence pointed towards the Defendant as the culprit, and that there was no other credible alternative. She put her case on six broad foundations, which she summarised as being (1) the Facebook data as shown by the activity log, (2) the content of the false profile and group, (3) motive,

(4) the implausibility of the Defendant's case as to events on 19th and 20th June 2007, (5) his failure to adduce evidence from material important witnesses, and (6) failures and lateness of disclosure.

55. As to (1), she submitted that the only sensible inference was that all the relevant usage was the work of one person. Nothing in the data pointed to any other interpretation, or to two computers being used simultaneously. She suggested that if both computers were being used together, the data would be more interspersed, and there would be coincidences of time. The data, she said, would still be recorded if both computers were used at the same time.

56. Moreover, the Defendant accepted that all the activity on 19th June was his work until 9.24pm, and during that time he searched for a number of names, 8 of which were known to both him and Mathew Firsht from Brighton. This was a trip down memory lane, she said. The Defendant accepted that he had looked through Simon Firsht's photographs, and that he had tried to block Mathew and Simon Firsht from viewing his profile, which she said was done to cover his tracks. Having done that, it was less than two minutes before the 'null' period when the fake profile created. The data clearly pointed, on counsel's submission, to the Defendant having been the user throughout the evening of 19th June, for a number of reasons, of which I give a selection: the first activity after the creation of the false profile was a search by 'M Firsht' against the Defendant's name, which there was no credible reason for a stranger to do, while there was every reason for the Defendant to check that Mr Firsht was blocked from access to his profile; there were several later searches for the Defendant by the 'M Firsht' user, which no stranger would have a reason to do; the 'M Firsht' user searched for Simon Firsht from the false profile, and saved a photograph from Simon Firsht's profile, which replicated the Defendant's own admitted activity shortly after 5pm (it must be remembered that it is common ground that the false profile and group page both carried a photograph from Simon Firsht's profile); the 'M Firsht' user searched coincidentally for several people known to both the Defendant and Mathew Firsht, some of whom (Petrina Good, the executive producer of Big Brother, Iki Ahmed, Jay Tubb and - on 20th June - Amanda Goodhew) were not on the list of 'Facebook Peeps' - this, on the Defendant's evidence, could not have been undertaken by him, and the explanation that the user got the names from documents in the study was incredible.

57. As for the usage on the afternoon of 20th June, there were various factors in the data from which it should be inferred that the user was the Defendant. In particular, the pattern of activity was consistent with the activity on 19th June, despite the fact that there can have been no simultaneous use; the vast majority of the activity was devoted to the Defendant's profile, not the false one; and it should be inferred from the apparently relaxed attitude of the stranger - accessing the Defendant's inbox many times, undertaking activity relating to banter on the Defendant's wall - at a time when the Defendant might, for all the stranger knew, return at any time, that the user was not a stranger at all. Moreover, the Defendant's behaviour on his supposed return

when he found the false profile was inconsistent with his seeing it then for the first time.

58. On her point (2), Ms Skinner relied on the improbability of anybody other than the Defendant having known the totality of the information entered on the false profile and group. As for motive, her point (3), she suggested that the Defendant had borne a grudge since the two men fell out, and that while playing around on Facebook on 19th June he discovered, on searching against Mr Firsht's name, that he did not have a profile, so decided to create one for him. It was Mr Firsht who had broken off their long-standing friendship, and the Defendant regarded him as a self-important person who needed to be taken down a peg or two. Moreover, Mr Firsht was a successful businessman, while the Defendant's business had failed.

59. On her point (4), Ms Skinner pointed out that it was implausible that a stranger should have created a profile in the name of the man with whom Mr Raphael had fallen out, with no motive to do so that Mr Raphael could suggest, in circumstances in which neither he nor Ms Hallonqvist noticed any suspicious behaviour by the strangers during the evening. She argued, naturally, that the evidence of Mr Mackenzie and Mr Chavannes was unreliable. She argued (point 5) that it was remarkable and telling that the Defendant had not called any other evidence as the events of 19th June. I should interject that Mr Raphael did say in evidence that he had tried to trace the 'strangers' later by asking at the bar and asking his friends, but without success. He described it as 'not a huge mission', but he conceded that it was an important one. He also asked his friends Matt and Cein what they remembered, to which Matt had said he remembered the party, but (as I understood him) nothing much more, which was not surprising because he was a heavy drinker and 'party boy', while Cein, who was not 'the sharpest tool in the shed', could not remember either.

60. As to disclosure, Ms Skinner made much of the Defendant's failings: for example, there was no disclosure of electronic evidence, the Facebook Peeps and Post-It notes were disclosed very late in the day, and there was no disclosure of any material which might have backed up the Defendant's supposed activities on the afternoon of 20th June. I did not find this a helpful line of argument. For much of the time, the Defendant has been a litigant in person; more recently, he has been greatly helped and very effectively represented by Mr Pendlebury, but counsel could not begin to duplicate the work which would have been done by a solicitor to rectify disclosure shortcomings. I draw no conclusions adverse to the Defendant from the limitations of his disclosure.

CONCLUSIONS ON LIABILITY

61. I can now state my conclusions. As I have said, I entirely accept the evidence of Ms Hallonqvist, who in my view was plainly doing her best to give an accurate account of events. I therefore accept that perhaps four strangers, whom the Defendant had met for the first time in the bar, accompanied the party back to his flat. I also accept that

three or four people stayed the night and remained in the flat, still asleep, until at least after Ms Hallonqvist left in the late morning. Those who slept over were probably the strangers, although they could have been friends of Cein McGillicuddy. That may not matter very much.

62. However, I found the Defendant's explanation for the Facebook usage on 19th June utterly implausible from start to finish. The proposition is that on 19th June a complete and random stranger, visiting the Defendant's small flat for the first time, should first have gone into the Defendant's study and started using his computer, without permission, over a period of about an hour, without being observed, should then have created a false and hurtful Facebook profile about a man whom the Defendant knew well and had fallen out with, containing private information and other information which few people apart from the Defendant would have known, and should have searched from that profile for a number of people known to the Defendant. In my judgment, the proposition has only to be stated to be rejected as utterly far-fetched. Mr Pendlebury spoke of coincidence, and coincidences do happen; but the more remote and unlikely the apparent coincidence, the less probable it is that coincidence is the explanation. If, as I find to be the case, it was not a stranger who was responsible for this usage, the person responsible can only have been the Defendant. That is my conclusion.

63. I have stated that primary conclusion in a compressed form, but it contains a number of components. It is possible, though unlikely, that the stranger might have got away unnoticed with making an hour's unauthorised use of his host's computer in a small and crowded flat. It is possible, though unlikely, that he or she would have known, and disliked, Mr Firsht. It is highly unlikely, in my judgment, that he or she would have been in possession of the detailed information which appears on the false profile. It is highly unlikely that he or she, having created the profile, would then spend many further minutes using the new profile to search for a number of individuals whom he or she would have been unlikely to have known, simply on the basis that the names were on the Defendant's desk, whether on the 'Facebook Peep' list or other documents. If those unlikelihoods are put together, the conclusion is, it seems to me, inescapable. It is hardly necessary to add the further implausibility of the proposition that the stranger, having set up the false profile, should immediately and several times thereafter search for Mr Raphael, and in addition search for Simon Firsht and save a photograph from his profile, as Mr Raphael himself had admittedly done earlier in the day.

64. Alive though I am to Mr Pendlebury's warning about the shortcomings of the technical evidence, and the possibility that the activity log records simultaneous use by two computers, I find that possibility remote, and accept Ms Skinner's contention that the only sensible inference is that all the relevant usage was by one person. Firstly, Mr Max Kelly's evidence is that the activity log shows all the activity on Facebook from the Defendant's IP address. Secondly, while it is true that we do not know how exactly Facebook's logs record simultaneous usage on one IP address by two different computers, it does seem to me inherently unlikely, as I have said, that if

two computers were being used at once, the log would show at one moment the usage on one computer and then the usage on the other, in such a fashion that there are no overlaps of time. Ms Skinner's explanation, that one user is switching between two profiles, is more plausible. Thirdly, the Defendant himself did not accept that any of the usage under his name after 9.24pm was in fact carried out by him. In other words, the effect of his own answers was that the usage was all by one person. This undermined the force of Mr Pendlebury's warning. Fourthly, the pattern of use during the afternoon of 20th June, when even on the Defendant's case there was only one user, appears to me to be no different from that on 19th June. Of course, it follows from my conclusion that the Defendant must have created the false profile that he will have been the user throughout, and he will have switched between the profiles.

65. It seems to me to be relevant also that the Defendant had searched on Facebook for Mr Firsht earlier that afternoon, and had discovered that he had no Facebook profile. That in itself creates a likelihood that it was the Defendant who, having made the discovery, decided to make use of it. Moreover, in my judgment there was a degree of needle, to put it no higher, on the Defendant's part. He had been rejected by his old boyhood friend several years before, and the old friend had prospered greatly in the intervening years, while the Defendant had not. He had a motive (if not a justification) to inflict some damage on Mr Firsht, something which, on a smaller scale, he had been prepared to do years before, when embarrassing Phil Brookes by speaking of Mr Firsht in a derogatory and critical manner.

66. As for 20th June, I have already stated that I can place no reliance on the evidence of Mr Mackenzie or Mr Chavannes as to the time when the Defendant will have left his shoot in Leicester Square. That conclusion takes out of play the alibi which, on the Defendant's case, would have made it impossible for him to have been back in his flat by 2.11pm. Having concluded that the Defendant created the false profile during the previous evening, it seems to me that I must conclude that he was responsible also for the usage on the afternoon of 20th June during which the group page was created. There will not have been two different users on the two days, and that was not suggested by the Defendant. But even had I been in doubt about the events of the previous evening, there are several factors which, independently, would have made me profoundly sceptical about the Defendant's account of the afternoon of 20th June. Firstly, as Ms Skinner pointed out, the majority of the usage during the afternoon of 20th June was devoted not to the false profile, but to the Defendant's profile. I cannot imagine why a mischievous stranger, using the Defendant's computer, should wish to spend much of his afternoon using the Defendant's profile, exchanging banter on the Defendant's wall, making searches against the Defendant's friends and contact, and reading the Defendant's messages; nor why he should apparently briefly take on the user name of Ms Hallonqvist. That makes no sense whatever. The obvious conclusion is that the user is the Defendant himself. Secondly, I find it very unlikely that an unauthorised stranger would have spent over 3 hours, between 2.11pm and 5.32pm, using his host's computer, when at any moment his host or his host's girlfriend might have returned and caught them red-handed. Thirdly, it is profoundly implausible, as Ms Skinner suggests, that the Defendant would have reacted as the log shows that he did, and as his evidence would have it, had he discovered the false profile at 8pm. He

could hardly have digested the false profile in the minute or two during which he looked at it. He would not immediately have left it and gone to his own profile for some 20 minutes, knowing that his computer (and possibly his flat, with his valuable possessions) had been grossly and inexcusably interfered with: he would surely have reacted at once by searching the flat. Indeed, before the usage shown on the activity log was pointed out to him, he did claim to have checked his DVDs, but that would have been later, if it happened at all. And he would have told Ms Hallonqvist (but, as her evidence showed, he did not: she would have remembered if he had) about such shocking behaviour, which plainly threatened not only his personal security, but also hers, for her laptop had been left in the flat.

67. Moreover, notwithstanding Mr Pendlebury's submissions as to his credibility, I was very far from impressed by the Defendant as a witness. He was glib and loquacious, always prepared, it seemed to me, to talk his way out of a difficulty, with no apparent insight into the implausibility of some of his answers. I have referred at paragraph 47 to his answer during cross-examination about his reaction to 'discovering' the false profile at 8pm on 20th June. Another example is his response to a question by Ms Skinner as to why it was that all the names on his list of 'Facebook Peeps' were written in capital letters. He answered at once that he always wrote in capitals. It was his 'absolute habit' to do so all the time. Taken by Ms Skinner to his Post-It notes, which were very largely in lower case, he instantly explained that he used lower case 'for email type things'. Ms Skinner observed that it was not only email addresses on the Post-It notes which were in lower case, to which he replied that he saw what she was saying, and thought it was because he was 'relating' them to email addresses. On one occasion he almost parodied himself: asked by Ms Skinner why it was that his list of 'Facebook Peeps', which he said that he kept and added to over the months, had apparently been written using a single pen, he replied 'I have a good answer to that question' (the answer being that he had been given the pen by a promotions company and he kept it for general use at his desk). Almost immediately thereafter, he was forced to concede that notwithstanding his assertion that he used one pen at his desk, he had used another pen for some at least of the Post-It notes - that might have been because the Post-It notes were considerably older. It seemed to me that he was a witness who believed in his own ability to talk himself out of trouble. It gives me no pleasure to conclude that he lied to me about his involvement in the creation of the false profile and group page, but that is the conclusion which I have reached.

68. Given that, on my findings, the Defendant was responsible for creation of the Facebook material complained of, I therefore find for the Second Claimant in so far as his claim relates to misuse of private information (the false profile), and for the First and Second Claimants in so far as their claim is in defamation (essentially the group page).

QUANTUM

69. Mr Firsht in his evidence, which I accept, spoke of his response to discovering the false Facebook material on 4th July 2007. He was shocked and extremely upset: he regarded the material as a gross invasion of his privacy, and he was particularly distressed by the fact that his personal details, including false details as to his sexuality, had been 'laid bare for all to see'. He was a very private person, and found it extremely intrusive. Moreover, he was worried that the defamatory material had the potential to cause serious damage to his professional reputation and that of his company. He knew that many people in the industry had joined Facebook, and that anyone who searched against his name would discover the profile and group. He regarded it as important to establish that the allegations were wholly false, and to ensure that it did not happen again. The damage which he suffered was made worse by the fact that he was compelled to endure an expensive and time consuming court process to achieve vindication, in the face of what he considered (and I have found) to be the Defendant's lies. Cross-examined, he accepted that Applause Store was still the market leader, and he could not say that any contract had been lost as a result of the posting of the false material. No-one in the industry had commented on it to him. Had the Defendant apologised at an early stage, he would have accepted that apology and avoided going through the stress and expense of litigation. He agreed that a primary element in his hurt and upset was the Defendant's refusal to admit responsibility.

70. The extent of publication of the Facebook material was not entirely clear. It was common ground that the defamatory group page was published to Richard Jay, Darren Levy and Carole Davies, and of course Simon Firsht and his girlfriend saw all the material when they discovered it with Mathew Firsht on 4th July 2007. Ms Skinner relies also on the following factors in support of her case that an inference of wider publication to a 'not insubstantial number of people' should be drawn:

    (1) The evidence of Max Kelly, who explained that Facebook does not store data showing how many Facebook users merely viewed the profile or group, but only shows those users who performed some activity in relation to them. I think that Ms Skinner is right to characterise his evidence in that way. He did say that Facebook kept no records which showed how many users accessed either the profile or the group, but he also said that the group was 'accessed' by Richard Jay, Darren Levy and Carole Davies. All 'accessed' the group on 20th June. It is not clear to me what the difference is between 'accessing' a profile or group and merely viewing it, but that there is a difference is clear;

    (2) The general popularity of Facebook as a social networking tool, not least in the television industry;

    (3) The fact that the false profile and group were placed on the London network, which then had over 850,000 members, to any of whom they would have been visible. In that connection, Ms Skinner points to the fact that one Clifford White, who had offices at Elstree Studios, sent an email to

> the profile less than 30 minutes after it was created, saying that he had just found Mr Firsht on Facebook and wondered if he would be interested in setting up a Facebook club for 'studio residents'.

71. Ms Skinner relied on the press coverage of the trial in support of her submission that vindication was necessary: because of the trial, the facts of the case had come to a wider audience. That made it necessary to award enough to 'nail the lie'. Moreover, she argued that so far as Mr Firsht was concerned, the damage done to him by the libel had been aggravated by the fact that publication had been caused maliciously, in the layman's sense - to cause him harm and distress; by the Defendant's insistence on denying responsibility; and by the assertions made in the original defence. She accepted that while the defamatory allegations were relatively serious, they were not at the top end of the scale, and helpfully suggested brackets. These were between £5,000 and £7,500 for Applause Store, and £15,000 to £25,000 for Mr Firsht.

72. As for the privacy claim, Ms Skinner submitted that there was no overlap between privacy and defamation, and suggested a bracket of £3,500 to £5,000 for Mr Firsht.

73. For the Defendant, Mr Pendlebury accepted that the nature of the defamatory material was unpleasant and potentially damaging to the character and reputation of Applause Store, but publication was minimal. He relied on the fact that there was no evidence that more than four people, apart from Mr Firsht, his brother and his brother's girlfriend, saw the material, and suggested that the impact on the four publishees would have been slight, since the emails of two of them (Clifford White and Darren Levy) do not indicate that they took any notice of the material, there is no statement from Carole Davies, and Richard Jay was the brother of Marc Jay, with whom Mr Firsht fell out - so that, I infer, he would not have thought the worse of Mr Firsht for reading it. I think, in fact, that the evidence shows only that Clifford White saw the false profile, not the defamatory group page, so I should discount him from the list of publishees of the libel. Mr Pendlebury did not accept that either Claimant had suffered any damage from the libel, although he did concede that Mr Firsht would have suffered some hurt and distress, but he argued that aggravated damages were not appropriate because justification had not been pleaded. That may be a rather narrow view to take of the potential scope of aggravation. Counsel also made the bold submission that I should make no distinction between Mr Firsht and his company, and make only one award, since the one was no more than the incorporated personality of the other. I do not think that would be a correct approach.

74. As far as the privacy claim was concerned, Mr Pendlebury argued that the private material was unremarkable, and that the facts in both *Campbell v Mirror Group Newspapers* and *Djerdjar v Commissioner of Metropolitan Police* were more serious, both in terms of content and in terms of extent of publication.

75. I will deal first with the claim in defamation. The principles which apply to the assessment of damages in defamation are well established: see for instance *John v MGN Ltd* [1997] QB 586 at 607, where the Court of Appeal said this:

> "The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way."

76. Of course, a company stands in a slightly different position, for it has no feelings to hurt, and it follows that considerations of aggravation which might be relevant if the claimant is an individual do not apply. However, the entitlement of a company to recover general damages has recently been affirmed by the House of Lords: see *Jameel v Wall Street Journal* [2007] 1 AC 359. A company's good name is a thing of value, but it can only be hit in its pocket, and there is no evidence here of actual financial loss. That is not to say that it may not merit vindication. The function of damages for vindication was well explained by Lord Hailsham in *Broome v Cassell* [1972] AC 1027 at 1071c-e in terms of the need, 'in case the libel, driven underground, emerges from its lurking place at some future date', for the claimant (whether personal or corporate) to be able to point to a sum sufficient to convince a bystander of the baselessness of the charge. Of course, those words were spoken in the context of a jury award, and it could fairly be said that the need for vindication by an award of damages is less in a case where some vindication is provided by a reasoned judgment.

77. I should mention that the notional ceiling for libel damages is currently about £215,000, which would be applicable for the most serious libels: see for instance per Eady J in *Tierney v News Group Newspapers* [2006] EWHC 3275 at [10]. That ceiling has been reached in consequence of the decision of the Court of Appeal in *John* that it is appropriate to have regard to the conventional scales of general damages awarded in personal injury actions. However, I have not had the benefit of any submissions in this case as to the appropriate personal injury comparables, and in the circumstances I do not think that it would be right for me to refer to them. Mr Pendlebury, however, did refer to one first instance quantum decision as a comparable: that was the decision of HH Judge Macduff (as he then was), sitting as a judge of the High Court, in *Keith-Smith v Williams* [2006] EWHC 860 (QB). I have taken that decision into account, but there is a limit to the value of supposedly comparable first instance decisions, because the facts of each case vary so much. In that case the judge awarded a claimant who had been seriously defamed on an internet discussion group £10,000, of which £5,000 was by way of aggravated damages. The libels were probably somewhat more serious than they are in the present case, but there was a default judgment and no trial of liability nor opposition to the assessment of damages, the judge found that it was likely that very few people had read the libels, and he suspected that many of those who did read them would have dismissed them as the rantings of someone who was not to be believed. That seems to have been accepted by the claimant himself. That presents a sharp contrast with the group page in this case, which could well have been taken very seriously by those who saw it. Indeed, there is no reason to suppose that it would not have been. As I say, the difficulty with such comparables is that the facts of each case vary so substantially that it is hard to obtain very much of assistance from them.

78. Ultimately, I have to approach the question of damages in the same way as a jury would, giving a verdict without a reasoned judgment. I bear in mind, of course, that the profile and group were only available on Facebook between 19th/20th June and 6th July 2007, when Facebook appears to have taken the material down at Mr Firsht's request. Given the times when the material was put up and taken down, that is a period of 17 days (for the profile) and 16 days (for the group). I bear in mind also the limited extent of proved publication, but I accept that Facebook is a medium in which users do regularly search for the names of others whom they know, and anyone who searched for the name Mathew Firsht during those few days will have found the false group without difficulty. In my view, a not insubstantial number of people is likely to have done so. By that I have in mind a substantial two-figure, rather than a three-figure, number. I also accept that the Defendant has increased the hurt and upset of Mr Firsht by the allegations which he rashly made in his original Defence and by his persistence in a defence which I have founded to be built on lies, which has compelled Mr Firsht to give evidence and face lengthy cross-examination in a public trial.

79. The libel is, as Ms Skinner rightly said, not at the top end of the scale, although it is serious enough to say of a successful businessman that (as I have found the words to mean) he owes substantial sums of money which he has repeatedly avoided paying by lying and making implausible excuses, so that he is not to be trusted in the financial conduct of his business and represents a serious credit risk. I do take into account also

the effect on Mr Firsht of the unpleasant allegations against him which the Defendant made in his original Defence, and the fact that the Defendant has persisted to trial in a case which I have found to be no more than a lie. It seems to me that a proper award for the libel of Mr Firsht, to include an element for aggravation of damage, is £15,000. The pleaded meaning in the case of the company - against which the allegations of debt and dishonest prevarication are not directly made - is just the consequential meaning, that as a result of Mr Firsht's conduct the company is not to be trusted in the financial conduct of its business and represents a serious credit risk. It seems to me that a substantially lower award should be made in respect of the company, and in my judgment the right figure is £5,000.

80. As far as the tort of misuse of private information is concerned, I accept Mr Firsht's evidence that it caused him, a very private person, great shock and upset. The information which has been conceded to be private, or which I have held in the private annex to this judgment to be private, related to his supposed sexual preferences, his relationship status (single or otherwise), his political and religious beliefs, and his date of birth. It seems to me that the most important information is that which relates to his supposed sexual preferences.

81. It is reasonably clear that damages in cases of misuse of private information are awarded to compensate the claimant for the hurt feelings and distress caused by the misuse of their information: see for instance *McKennitt v Ash* [2006] EMLR 178 [162]. Typically, such damages have been modest: in *McKennitt* the damages were fixed at £5000, and in *Campbell v MGN Ltd* at £2500, plus £1000 aggravated damages. It does appear from Morland J's judgment in *Campbell v MGN Ltd* [2002] EWHC 499 (QB) [138] that aggravated damages may be awarded where there has been persistence in the accusation after the publication complained of, where that conduct has caused increased injury to the claimant's feelings. That conclusion was endorsed by Lord Nicholls in the House of Lords: see *Campbell v MGN Ltd* [2004] 2 AC 457 at [35]. In this case, the extent of publication of the false profile will have been very much less substantial than in either *McKennitt* or *Campbell*. Ms Skinner is right in a sense to say that there is no overlap between the privacy claim and the defamation claim, because the two publications are distinct, but that seems to me to be unrealistic. It is likely in reality that most publishees will have seen both publications - probably the profile first, followed by the group page, after clicking on the link to the group. I do not think it would be right for me to treat the privacy claim as if it was entirely free-standing; nor do I believe that it would be right for me to award aggravated damages under both heads. It is necessary to take a global view. In all the circumstances, I do not think that it would be right to award Mr Firsht more than £2000 for the breach of his privacy, and that is the sum which I award under this head.

82. Finally, there is the question of injunctions, in defamation and in privacy. The grant of an injunction in practice usually follows from an award of damages, whether in defamation or in misuse of private information. However, I will hear counsel on the need for an injunction and, if appropriate, on the form which it should take.