



Neutral Citation Number: [2019] EWHC 195 (QB)

Case No: HQ17M03630

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 February 2019

Before :

MR JUSTICE DINGEMANS

Between :

Richard Burgon MP
- and -
(1) News Group Newspapers Limited
(2) Thomas Zoltan Newton Dunn

Claimant
Defendants

Adam Speker (instructed by **Carter-Ruck Solicitors**) for the **Claimant**
Adam Wolanski (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendants**

Hearing dates: 23rd, 24th and 25th January 2019

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.

.....
THE HONOURABLE MR JUSTICE DINGEMANS

Mr Justice Dingemans:

1. This is the hearing of a claim made by the claimant, Richard Burgon, Member of Parliament for Leeds East and Shadow Secretary of State for Justice, (“Mr Burgon”) against the defendants, News Group Newspapers Limited (“News Group”) publishers of the Sun and the Sun’s website and Thomas Zoltan Newton Dunn (“Mr Newton Dunn”), political editor of the Sun. The claim arises out of the publication of an online article on Friday 14 April 2017 written by Mr Newton Dunn headed “Reich and Roll Labour’s justice boss ridiculed after he joins a heavy metal band that delights in Nazi symbols”. The heavy metal band was a reference to “Dream Troll” (“the band”). There was an article published in the Sun newspaper on Saturday 15 April 2017 but that was in different terms and is not the subject of this action. I will refer to it below.
2. The claim is for damages, including aggravated damages, an injunction and a declaration in respect of causes of action for libel, malicious falsehood and breach of statutory duty under the Data Protection Act 1998 (“the DPA”). The defendants defend the claim for libel denying libel or serious harm, and relying on defences that the words were honest opinion pursuant to section 3 of the Defamation Act 2013, true in substance or fact pursuant to section 2 of the Defamation Act 2013 or were published in the public interest pursuant to section 4 of the Defamation Act 2013. The defendants defend the claim for malicious falsehood denying any falsehood, contending that there was no malice on the part of the defendants and contending that there was no intention to cause financial damage. The defendants defend the claim for breach of the DPA claiming that any processing was fair or protected and contending that the claim adds nothing to the claims for libel or malicious falsehood.
3. The claim arises in respect of an article published on the Sun’s website from 14 April 2017 (“the article”). The article was in the following terms:

REICH AND ROLL Labour’s justice boss ridiculed after he joins a heavy metal band that delights in Nazi symbols

Shadow Justice Secretary and MP for Leeds East Richard Burgon has started doing vocals for rock band Dream Troll

Labour’s justice boss faced scorn last night after it emerged he has joined a heavy metal band that delights in Nazi symbols.

[There was then a picture of Mr Burgon in a sweat shirt with a heavy metal logo with a sheet of paper in his hands and he was either singing or speaking. The caption below read] Shadow Justice Secretary Richard Burgon has long been a fan of heavy metal.

[There was a picture of Mr Burgon in a suit speaking next to a poster saying “Jeremy Corbyn for Leader”. The caption below read] Mr Burgon is a key supporter of under fire Labour leader Jeremy Corbyn.

The group uses the name of Hitler’s infamous SS security unit as lettering in its promotional posters.

It also spells its name in German military font, complete with an umlaut over the letter “o”, and has the motto; “We sold our Soul for Rock n’Troll”

Mr Burgon posted a snap of himself recording with the band on Facebook last week, telling followers. “Away from politics, music is my main interest”.

[There was a picture of the Dream Troll image taken from Facebook, albeit without the hashtag “Black Sabbath” above the top left hand corner. The caption below read] He has now joined a new band – Dream Troll.

The revelation is an embarrassment for under-fire opposition boss Jeremy Corbyn, as Burgon is a key leftwing ally and one of his most loyal supporters.

It also follows furious protests from Labour MPs over the party’s failure to expel ex-London mayor Ken Livingstone for making offensive comments about Hitler.

Tories rounded on the 36 year old former trade union lawyer last night to demand he distances himself from the metal band.

Tory MP Charlie Elphicke said “It shows terrible misjudgement for Richard Burgon to associate himself with anyone who appears to enjoy Nazi iconography like this.

“For someone who aspires to represent the nation on law and order, it also sends utterly the wrong message.

He should distance himself from this bank as soon as possible.”

[Mr Burgon’s Facebook post was then set out which included the picture of Mr Burgon in the sweat shirt was repeated. The caption below read] He announced the news in a Facebook post

First elected only two years ago, Mr Burgon was promoted to the shadow cabinet last year after multiple resignations in protest against Mr Corbyn’s leadership.

.....

The 36-year-old was elected two years ago after a career as a trade union lawyer.

Burgon told The Sun last night “I grew up in Leeds with the members of this band. I have known them since we were teenagers.

They are ordinary decent blokes and there’s not a racist or Nazi bone in their bodies.”

4. The Dream Troll image (“the Dream Troll image”) as published by the band on Twitter consists of a black square with hashtag “Black Sabbath” above the top left hand corner of the black square. The words “Dream Troll” are written in white gothic lettering with an umlaut over the “O” of “Troll” on the black square. Underneath the words Dream Troll are the words in red, set out over two lines, “We Sold Our Soul for Rock N’ Troll”. This had stylised “S’s” for the “S’s” in “Sold” and “Soul”. The stylised “S” was at an angle, in white lettering and had a flat end. There was an umlaut over the Troll in the second line of the text. It was also published on

Facebook but did not have the hashtag Black Sabbath above the top left hand corner of the black square.

5. I should as a matter of fairness to Mr Burgon make it clear that it was common ground at trial that News Group and Mr Newton Dunn did not believe that Mr Burgon was a Nazi or that there were any grounds to believe that Mr Burgon was a Nazi. I should also as a matter of fairness to News Group and Mr Newton Dunn make it clear that the evidence showed that Mr Newton Dunn was a very experienced political editor who contributed articles both to the Sun website and to the Sun newspaper.

Issues

6. It is apparent from the written and oral submissions that the following issues arise in respect of the respective causes of action.
7. The issues in respect of the claim in libel are: (a) the meaning of the online article; (b) whether publication of the words caused or was likely to cause serious harm; (c) whether the publication was true; (d) whether the publication was honest opinion; (e) whether the publication was publication on a matter of public interest; (f) what, if any, remedy ought to be ordered.
8. The issues in respect of the claim for malicious falsehood are: (a) whether the words were false; (b) whether Mr Newton Dunn acted with malice; (c) whether publication was calculated to cause pecuniary damage to Mr Burgon; (d) what, if any, remedy ought to be ordered.
9. The issues in respect of the claim for breach of statutory duty under the DPA are: (a) whether the claim adds to the claims for libel and malicious falsehood; (b) whether News Group complied with the first, second and fourth data protection principles; (c) whether there is a defence under section 32 of the Act; (d) whether Mr Burgon suffered distress as a result of the publication of the online article; (e) what, if any, remedy ought to be ordered.

Evidence

10. There were witness statements on behalf of Mr Burgon from: Mr Burgon who made two witness statements; Matthew John Baldwinson (“Mr Baldwinson”) who was a band member of Dream Troll and a friend of Mr Burgon; and Russell John Fraser (“Mr Fraser”) a barrister who was working as Mr Burgon’s political adviser at the material time. Mr Burgon gave oral evidence and the statements from Mr Baldwinson and Mr Fraser were agreed. There were witness statements on behalf of News Group and Mr Newton Dunn from: Mr Newton Dunn; and Harry Tenwick (“Mr Tenwick”) who was a digital analyst working for News Group. Mr Newton Dunn gave oral evidence and the statement from Mr Tenwick was agreed.
11. A procedural point arose before the start of the evidence. It appeared that on Monday 21 January 2019 (with the trial starting on Wednesday 23 January 2019) RPC, solicitors for the defendants, wrote to Carter-Ruck disclosing “the below documents by way of supplemental disclosure, and propose that they are added to Bundle D”. The documents were Facebook posts, a letter to Mr Burgon from another MP about a statement he had made, and other articles and letters. Requests for an explanation as

to why the documents were disclosed so late and the issues to which they were related were made. These requests were not answered before trial and some time on the morning of the trial was taken up while the matter was resolved by agreement between the parties. In the event agreement was reached that certain documents could be put and other matters raised in cross examination and I was not required to make a formal ruling.

12. There was some common ground between the parties about relevant factual matters. The matters set out below represent my findings of fact unless otherwise stated.

The parties

13. Mr Burgon was born in Leeds in 1980. After university he converted to law and became a trainee solicitor at Thompsons, Leeds. He worked for 8 years as a trade union solicitor. On 7 May 2015 he was elected as a Member of Parliament for Leeds East and became Shadow Economic Secretary in September 2015. In July 2016 he became Shadow Secretary of State for Justice. Mr Burgon had kept a public profile and provided regular television interviews and often talked to constituents via posts on social media. Mr Burgon had been the subject of numerous newspaper stories.
14. The Sun is a well-known national daily newspaper which is published by News Group. Mr Newton Dunn is the political editor of the Sun newspaper. He writes for both the Sun newspaper and the Sun website.

The band

15. Dream Troll is a power metal band which, according to the evidence, is a “sub-genre of heavy metal music that has the characteristics of traditional ‘heavy’ metal music but is lighter and more uplifting both in lyrics and sound”. Mr Burgon had been friends with 3 of the band members since he was a teenager.

Mr Burgon’s recording with the band

16. On 16 March 2017 Mr Burgon was with members of the band at a gig in Leeds. There was a discussion about Mr Burgon recording a spoken word piece on a song. The song was then titled “Habet Montem” and is now titled “A fairy’s tale”. The song was one of a number of songs included on an album released by the band. The album, which was released on 19 May 2017, is called “The Knight of Rebellion”. The evidence shows that this guest appearance on the song was the full extent of Mr Burgon’s activities with the band.

The Dream Troll image and other images

17. Mr Baldwinson said he was a band member and a friend of Mr Burgon, having known him for about 18 years. He said he was very involved in the music scene at Leeds. He played bass and guitar with the Dream Troll. Mr Baldwinson said he had created the Dream Troll image. There was a call for puns on the band’s social media page. Mr Baldwinson said the Dream Troll image was created only as a “parodic piece of shareable content on social media”. It was a nod to the influences on the band, and a fun way of making a connection to Black Sabbath. I have described the Dream Troll image in paragraph 4 above.

18. The white “S”s on the Dream Troll image were similar to the “S”s used on the Black Sabbath poster for its album entitled “We Sold Our Soul for Rock ‘n Roll”. That album had the words “Black Sabbath” where the words “Dream Troll” were on the Dream Troll image. The “S” in “Sabbath” was also stylised. The colour scheme in the Black Sabbath album cover used red words on a black background with the white “S”s. The evidence showed that the Black Sabbath album had sold about 2 million copies in the USA and about 60,000 copies in this country.
19. The Nazi “SS” symbol stands for “Schutzstaffel”. The “S”s in the Nazi “SS” symbol were stylised and were vertical and had flat ends on the “S”s. The two “S”s were together. The colour scheme on the SS logo in the bundle before me was white lettering on a black background.
20. There were other examples of Nazi propaganda in the evidence before me. These included Gothic white lettering on a red background. Other colour schemes, and in particular the swastika on armbands and armbands were black, white and red. A poster showing a SS soldier showed that he had the two “S”s on his collar with white lettering against a black background and two “S”s on his helmet, with black lettering against a white background.
21. There were other examples of stylised “S”s in the materials before me. One was the “S” shape between Stage and Truck where the “S” shape was in a lightning shape with a pointed end to the “S”. Kiss, another heavy metal band, had used stylised “S”s for the two “S”s of “Kiss” in promotional material, and it was common ground at trial that that image had been banned in Germany, Austria, Switzerland and Israel because of its association with the Nazi “SS” image.
22. The evidence shows and I find that the Dream Troll image is based on the Black Sabbath album cover. This is proved by the hashtag which was used for the tweet on behalf of the band, which was hashtag Black Sabbath and the agreed evidence of Mr Baldwinson. The evidence shows that the Dream Troll image, as set out in paragraph 4 above, was tweeted by the band on 31 March 2017 and also placed on Facebook, albeit without the hashtag Black Sabbath. It is common ground that at the time of Mr Burgon’s guest performance on the song for Dream Troll and until he was told about the Dream Troll image on 14 April 2017 in the circumstances set out below, Mr Burgon was not aware of the Dream Troll image.

Mr Burgon’s Facebook post about the band and the song

23. On 11 April 2017 Mr Burgon made a Facebook post which publicised his interest in music and his appearance on the Dream Troll track. The picture of him singing or speaking was shown with the following words above it: “Away from politics, music is my main interest. This evening, after work, it was great to get stuck in to writing and recording for my guest appearance on the forthcoming album from Leeds’ power metal/New Wave of Traditional Heavy Metal champions, Dream Troll. The track I’m guesting on has a working title of ‘Omen Habet Montem’ – Latin for “Ominous Mountain”! The song – and album – is epic and powered by some of the best musicianship you’ll ever hear”.

Relevant background about the Labour party

24. It was common ground between the parties that there had been in the period leading up to 14 April 2017 many stories about anti-Semitism in the Labour party, and a particular issue about the Labour party's approach and disciplinary response to remarks made by the former Mayor of London Ken Livingstone about whether Hitler had ever been a Zionist. On 4 April 2017 Labour's National Constitutional Committee had held that Mr Livingstone had brought the party into disrepute.

Common ground about the Nazis

25. In the Particulars of Claim at paragraphs 4.1 to 4.4 as admitted in paragraph 5 of the Defence, and in paragraphs 7(a), (b) and (c) of the defence as agreed in the evidence, it was common ground between the parties that the Nazis were uniquely evil, explicitly anti-Semitic and racist, and responsible for the Holocaust.

The report to Mr Newton Dunn

26. On Wednesday 12 April 2017 Mr Newton Dunn received a tweeted message from a source. Mr Newton Dunn described the source as a Labour councillor who had provided him with some stories in the past. Mr Newton Dunn said it was apparent that the source was not a supporter of Mr Burgon.
27. Mr Newton Dunn copied the tweet into an email and forwarded it to himself at 1508 hours. The relevant text said: "Hi Tom ... It's not exactly Watergate but amusing little story involving Richard Burgon. He has this band and the band likes a bit of Nazi iconography". A link to Mr Burgon's Facebook post about his song with the band was provided, together with a link to the tweeted Dream Troll image.

The production of the online and hard copy article

28. Mr Newton Dunn said, in paragraph 6 of his witness statement, that when he looked "at the picture ... it seemed to me it was using Nazi iconography. I thought this called into question the Claimant's judgment". Mr Newton Dunn said when he saw the Dream Troll image he did not make any connection to the Black Sabbath album cover. It is apparent and I find that Mr Newton Dunn had no interest in heavy metal bands and was not aware of the Black Sabbath album cover. I accept his evidence that he did not immediately make any connection to the Black Sabbath album cover, notwithstanding the hashtag Black Sabbath on the tweet of the Dream Troll image.
29. Mr Newton Dunn said that the next day, which was Thursday 13 April 2017, Guido Fawkes, a political website, published a headline "Dream Troll. Labour MP to perform with power metal band". There was then an image (which it is not possible to see in the trial bundle) and Mr Burgon's Facebook post was set out. It does not appear from the evidence that Mr Newton Dunn took any active steps in relation to the proposed story about Mr Burgon on Thursday 13 April 2017.
30. It appears that at some time in the morning of Friday 14 April 2017, which was bank holiday Good Friday, Mr Newton Dunn worked on the first draft of the article. At 1145 hours on 14 April 2017 Mr Newton Dunn sent the "Good Friday Politics Late List" to the news desk. This is a list setting out news stories so that the editor can

make a decision about which ones to print. The first story related to the treatment of armed forces veterans by the NHS. The second was the outline of the story related to Mr Burgon. Other stories were set out.

31. The next activity occurred at some time before 1242 hours when Mr Newton Dunn telephoned the Labour Party press office. The evidence showed that the contact details for Mr Burgon's office were published, and it was suggested that Mr Newton Dunn should have phoned Mr Burgon's office. Mr Newton Dunn said he did not contact Mr Burgon directly as he did not have contact details for him. Mr Newton Dunn said that there would have been no one in the office on the bank holiday Friday 14 April 2017 and that inquiries to cabinet ministers and shadow cabinet ministers tended to go through party press offices.
32. Mr Newton Dunn said he did not contact the band because "so far as I was concerned there was no doubt the band had used Nazi iconography on its album and the interesting thing was not that the band was using it (that would not have been a story) but that the Shadow Justice Secretary was associating with a band that was using it". I will deal with the issues about whether contact should have been made directly with Mr Burgon and the band below.
33. Mr Newton Dunn spoke to Vicky Street, the duty press officer, about his proposed story and his question or query for Mr Burgon. Ms Street asked for the query to be put in writing and at 1242 hours Mr Newton Dunn emailed Ms Street showing a link to the Dream Troll image taken from the Twitter post, albeit with the hashtag Black Sabbath not shown. Mr Newton Dunn wrote "Our question; is it really appropriate for a shadow justice secretary to be associating with a band that uses Nazi iconography to promote itself? Thanks".
34. Having sent this email Mr Newton Dunn then emailed the pictures desk with the pictures "to go with a story we're doing tmrw, list line below". He sent links to the Dream Troll image as sent to Ms Street, and the picture of Mr Burgon taken from his Facebook post.
35. Ms Street emailed Mr Fraser, Mr Burgon's political adviser, at 1334 hours apologising for making contact on a bank holiday, and asking "is this anything that Richard wants to send a comment to? Let me know if you need anything". The evidence shows that Mr Fraser was flying to Rome for the Easter weekend. By 1439 hours he had landed and he replied to Ms Street saying "Sorry I've been on a flight I'll ask him".
36. Mr Fraser sent by WhatsApp a copy of the Guido Fawkes article, which included Mr Burgon's Facebook post, to both Mr Burgon and a Parliamentary assistant, Ben Folley. Mr Folley reported at 1500 hours that it was quite concerning and they could "seek to turn this into another 'problem with anti-semitism' story". Mr Folley was concerned that the public will agree with a media assertion "it looks like they are take[n] from the SS logo and you need to disassociate yourself at least from the image ...". Mr Folley also suggested considering if the band had used anything similar and that it might be worth getting advice from the Leader of the Opposition press office. Mr Folley continued at 1502 hours that the Dream Troll image "could well be innocent" and suggested Mr Burgon contact the band. The contact details of a member of the press office were forwarded to the WhatsApp group.

37. It appears that on Friday 14 April 2017 Mr Burgon was in Leeds but he could not recall what he was doing at any particular time. At some stage Mr Fraser telephoned Mr Burgon. Mr Burgon said he was shocked when he saw the use of the words “Nazi iconography” in the question raised by Mr Newton Dunn but when he saw the forwarded Dream Troll image he said he recognised it to be an obvious parody of the Black Sabbath album cover. Mr Burgon was asked about Mr Folley’s responses and it was apparent that he did not share Mr Folley’s assessment apart from the fact that if the media suggested that the “S”’s were Nazi symbols the public might agree.
38. As appears above Mr Burgon also gave evidence which was not challenged and which I accept that he did not see the image at any time before he was contacted about the image by Mr Newton Dunn on Friday 14 April 2017. Mr Burgon said that when he had seen the Black Sabbath album cover in the past it had never occurred to him that the iconography used on the front would be a reference to Nazi Germany or have anything to do with Nazism. I accept that evidence because it was apparent that Mr Burgon had a strong interest in heavy metal and saw only what Mr Baldwinson had attempted to do with the Dream Troll image, namely to make an image with a link to the Black Sabbath album cover. Mr Burgon was challenged about various hypothetical situations and it was said he was being evasive in his answers. I did not find the hypothetical situations to be particularly helpful because they did not assist in determining the relevant contested factual issues and in my judgment Mr Burgon was doing his best to assist the Court.
39. Mr Burgon posted a message at 1558 hours to the WhatsApp group stating “It’s a rip off of a famous Black Sabbath album cover ...”. Mr Burgon then posted a message at 1559 hours saying he had known the band since he was 17 and there was nothing remotely dodgy or right wing about them. Various other messages were exchanged and attempts were made to contact a press officer. At 1616 hours Mr Burgon posted a message that he had spoken to a press officer who was “going to get back to me in a minute. He thinks it’s stupid”. The press officer suggested that Mr Newton Dunn be emailed and asked whether it was about a Black Sabbath album cover, and he sent a post of the album cover, to see what was said.
40. In the meantime a shorter version of the story was added to the list line by Mr Newton Dunn at 1522 hours. At 1559 hours Mr Newton Dunn emailed Ms Street again saying “I’ve heard nothing from richard burgon’s people about the below, have you yet?”. The next email was at 1608 hours from Mr Newton Dunn containing his first draft of the story. This story contained a comment by Charlie Elphicke MP, the Conservative MP for Dover. Mr Newton Dunn said that to include some political comment he telephoned Mr Elphicke at sometime around 4 pm to 5 pm, but the call must have been made before 1608 hours. Mr Newton Dunn said he thought Mr Elphicke would be willing to provide a comment and he was right.
41. Mr Newton Dunn said that he gave Mr Elphicke a fair appraisal of the story and asked for his thoughts and he provided the quotation detailed in the article. It is apparent that there was no email communication between Mr Newton Dunn and Mr Elphicke. There are no notes or records of the conversation between Mr Newton Dunn and Mr Elphicke because Mr Newton Dunn said that he typed Mr Elphicke’s response into the draft article. I accept that Mr Newton Dunn typed Mr Elphicke’s response into the draft article. However it is more difficult to know what information was provided by Mr Newton Dunn to Mr Elphicke because of the absence of notes and because Mr

Newton Dunn said, and I accept, that he had no clear recollection of the conversation. The evidence shows and I find that Mr Elphicke was not provided with a copy of the Dream Troll image. It is apparent from the terms of Mr Elphicke's response, and I find, that he must have been told by Mr Newton Dunn that the band had produced an image which used Nazi iconography. I find that Mr Elphicke was not told that the Dream Troll image was based on the Black Sabbath album cover. I make this last finding because Mr Newton Dunn had not taken any account of the hashtag Black Sabbath and had not made the connection with the Black Sabbath album cover or had it pointed out to him at that time. It was in these circumstances that Mr Elphicke said that "it shows terrible misjudgement for Richard Burgon to associate himself with anyone who appears to enjoy Nazi iconography like this".

42. Mr Newton Dunn said the email sent at 1608 hours was to the online news desk and at that point he had not heard back from Mr Burgon or the Labour party. Mr Newton Dunn believed that the copy that he provided for the print version would have been the same as for the online version, but he said, and I accept, that the print version is usually sub-edited into a shorter version for space reasons.
43. At 1712 hours Mr Fraser emailed Mr Newton Dunn with the comment about the Black Sabbath album. As appears above this must have been after the conversation between Mr Newton Dunn and Mr Elphicke. Mr Newton Dunn said he heard back from Mr Fraser at 1712 hours and looked at the hyperlink provided to the Black Sabbath album cover, but said it did not change his views about Mr Burgon's judgement.
44. Mr Newton Dunn responded by email at 1716 hours (it is common ground that the time of 1816 hours showing on Mr Fraser's copy of the email was because Mr Fraser was in a different time zone in Italy) saying "it's still Nazi iconography, is it not, to use the SS symbol and German military font in the band's name". Mr Burgon said he was distressed to hear of that response and he noted that when it was published there was an absence of any reference to Black Sabbath in the online article.
45. Mr Newton Dunn offered to include a quotation from Mr Burgon. Mr Fraser then emailed a quotation from Mr Burgon which was that he had grown up in Leeds with members of the band and had known some of them since they were teenagers and which made it clear that members of Dream Troll had no Nazi or racist affiliations. It is apparent that the article was then altered to include the quotation which appeared in the online and hard copy articles.
46. The article submitted by Mr Newton Dunn was not altered to include any reference to Black Sabbath. I make this finding because the reference to Black Sabbath was not in the online article, but it was inserted into the newspaper article and Mr Newton Dunn said he must have omitted the reference to Black Sabbath in the article which he submitted. This means that the reference to Black Sabbath in the newspaper article must have been inserted by a sub-editor. The sub-editor must either have seen some reference to Mr Fraser's response, or seen the Dream Troll image as tweeted by the band with the hashtag Black Sabbath, or have worked out for himself or herself that it was based on the Black Sabbath album cover. It is not possible to make a finding between these possibilities because there was no evidence of the identity of the sub-editor for this story. This is because the electronic record relating to the production of

the story appears to have been automatically deleted before a pre-action letter was sent.

Publication of the online article and the newspaper article

47. The article was published online as appears above. Analysis of the number of hits was provided by Mr Tenwick, a digital analyst for News Group. There were 6514 unique hits on the article from around the world. There were also hits to the article from Facebook and Twitter links. The total number of hits from any source was 8714 or 8093 (depending on which analytical programme was used). The total number of unique hits from England and Wales was 7030. This is the relevant figure for my purposes. Mr Burgon gave evidence to the effect that many members of the Labour party got their news online and he did not know which persons of influence or opinion formers had read the online article. Mr Newton Dunn gave evidence that many politicians got their news online.

48. The hard copy article was published the next day which was Saturday 15 April 2017 on page 22. As issues about causation of harm have been raised I have set out the whole article below. The headline was “Rock Bank MP ‘Nazi’ Logo Rap”

“Labour’s justice chief faced scorn last night after it emerged he has joined a heavy metal band that appears to use Nazi symbols in a poster.

Richard Burgon, 36, is singing with little-known rockers Dream Troll.

Their motto We Sold our Sold for Rock ‘n Troll uses S in a font similar to Hitler’s SS logo.

It takes off Black Sabbath’s 1975 album We Sold Our Soul for Rock ‘n Roll which has the same fonts.

They also have a German umlaut on the O in their name. Leeds East MP Mr Burgon put a snap of him and the band on Facebook saying “Away from politics, music is my main interest”. Tory MP Charlie Elphicke urged him to quit the band, saying “It shows terrible misjudgment for Richard Burgon to associate himself with anyone who appears to enjoy Nazi iconography”. Mr Burgon said: “I grew up with them. They are ordinary decent blokes and there’s not a racist or Nazi bone in their bodies”.

[Between the two columns of the article there was a picture of Mr Burgon in a sweat shirt and he was either singing or speaking. There was also a picture of the Dream Troll image taken from Facebook, albeit without the hashtag “Black Sabbath” above the top left hand corner].

49. Mr Tenwick said that the print circulation for the hard copy article was 1,941,612 of which 1,584,796 were published in England and Wales.

50. Mr Newton Dunn said he thought that the story merited a higher ranking in the newspaper but also made the fair comment that every journalist would like to see their stories on the front cover.

Matters following publication

51. Mr Burgon said that the likely damage from the online publication was obvious. Mr Burgon said he found reading the article extremely unpleasant, feeling angry at the injustice of a story with such a serious allegation. There was nothing humorous or light-hearted about the article as was later suggested by News Group. Mr Burgon considered that Mr Newton Dunn was intending to smear him to cause maximum damage and that the article suited News Group's political narrative, noting that Mr Livingstone had been suspended from the Labour Party and there had been calls for his expulsion.
52. Mr Burgon said he feared for his safety and received an email on 20 April 2017 which said "Kill yourself ... anti-English, anti-British ... fucking traitor". It was suggested to him that this email was more likely to have been caused by a Mail Online article dated 16 April 2017 about Mr Burgon which was headlined "Jeremy Corbyn's justice chief, 36, poses with his 'lawbreaker' lover, 26 who believes religious extremists should have the right to break the law". The Mail Online article referred to the fact that Mr Burgon was a republican and that he had spoken at the Leeds branch of the Communist party celebrating the 1917 Russian Revolution. I am unable to find that the anonymous email sent to Mr Burgon was sent as a result of the article which is the subject of this claim because it might have been sent by someone who had read the Mail Online article or by someone whose motivation for sending the email is unknown.
53. Mr Burgon said he was very distressed by the publication of the Sun online article. He had broad shoulders but said that there were limits. He said he was not a litigious person but he was genuinely hurt and distressed. Mr Burgon said he feared for his safety while performing his constituency duties and campaigning and took security measures. I accept this evidence.
54. Mr Burgon said that the article also would cause him financial loss in that he might not be re-elected, and might not get appointed to ministerial office or be invited to social events.
55. On 19 May 2017 Dream Troll released an album "The Knight of Rebellion" which featured the song. The album cover did not use the Dream Troll image.
56. There was a general election which was called shortly after publication of the article.
57. By letter dated 21 July 2017 Carter-Ruck wrote on behalf of Mr Burgon complaining about the online article but also stating that "it was also published in the hard copy newspaper". The article was set out together with the sequence of events. Claims for malicious falsehood, defamation and breach of the DPA were outlined. Reference was made to the emails received by Mr Burgon. Issues about the Representation of People Act 1983 and IPSO were raised and it was noted that the article was still being published. A list of requirements was set out including removal of the article from publication and removal of cached versions of the article by contacting google. The letter did ask for publication figures for the article together with similar publications on social media or in the hardcopy Sun newspaper.

58. A response dated 28 July 2017 was sent on “The Sun” headed letter paper by senior editorial legal counsel. It was denied that either the online or print articles were defamatory. As to serious harm it was said “it is inconceivable that these innocuous and light hearted articles could have caused serious harm to your client’s reputation”. It was said that the articles were honest opinion and said that “Mr Newton Dunn did hold, and continues to hold, the opinion that it was unwise of your client to join a band which uses Nazi symbols given he is a prominent member of the Labour party”. Mr Burgon’s claims were rejected and it was said that News Group would not be complying with any of Mr Burgon’s demands.
59. Proceedings were issued on 4 October 2017. It appears that the online article was removed on about 1 November 2017. It appears that there were just under 100 hits on the article from 5 August to 1 November 2017.

Legal principles to determine the meaning of the words published in the online article

60. The test to be applied to ascertaining the meaning of the online article was common ground and it is not necessary to repeat in full the relevant legal principles. In summary when deciding the meaning of words, a judge is providing written reasons for his conclusion as to the meaning to be attributed to the words sued upon. A Judge should not fall into the trap of conducting an over-elaborate analysis of the various passages relied on by the respective protagonists. The meaning is to be determined from the viewpoint of the layman, not by the techniques of a lawyer, see *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 and the principles set out at paragraph 14, *Waterson v Lloyd* [2013] EWCA Civ 136; [2013] EMLR 17 at paragraph 53 and *Doyle v Smith* [2018] EWHC 2935 (QB). In libel there will be one single meaning to be determined from a reading of the article. The exercise has been described as one of ascertaining the broad impression made on the hypothetical reader by the words. The natural and ordinary meaning of words includes what the reasonable man will infer from the words. The hypothetical reasonable reader will be taken to have read the whole of the publication which is the article. Bane and antidote must be taken together. It was common ground that the Court is entitled to reach its own conclusions on meaning and is not required to adopt meanings advanced by either party, so long as the Court does not find a meaning more injurious than the claimant’s pleaded meaning.
61. When a meaning is determined, the Court will have to consider whether the meaning is a statement of fact or opinion. Opinion must be recognisable as an opinion, as distinct from an imputation of fact. The opinion must explicitly or implicitly indicate, at least in general terms, what are the facts on which the opinion is formed, otherwise the opinion will be treated as a statement of fact. It has been said that the sense of opinion “*is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc.*”, see *Branson v Bower* [2001] EWCA Civ 791; [2001] EMLR 32 at paragraph 12 and the authorities there considered. A statement may be fact or opinion, depending on context.

The respective cases on the meaning of the online article

62. In the letter of claim dated 21 July 2017 it was contended that the clear meaning conveyed by the online article is that Mr Burgon “has joined, and willingly agreed to

be associated with, a heavy metal band that knowingly delights in using highly offensive Nazi symbolism and iconography and/or are Nazi sympathisers”.

63. In the Particulars of Claim and at trial it was contended on behalf of Mr Burgon that in their natural and ordinary meaning, alternatively by way of innuendo, the words meant “that the claimant has joined, and thereby willingly associated himself with, a heavy metal band that he knows delights in using Nazi symbols and iconography; and, therefore, is actively sympathetic to Nazi beliefs and ideology, alternatively, there are reasonable grounds to so suspect”. Particulars of innuendo referred to facts about the Nazi party, the holocaust and the fact that these matters would be known to some or all of the readers.
64. News Group and Mr Newton Dunn contend that in the defence and at trial that the article made or contained a comment or expression of opinion, namely “that the claimant had demonstrated terrible misjudgement and exposed himself to ridicule by associating himself with a band which, as he knew, uses Nazi associated iconography in its promotional material”. It might be noted that the meaning contended for on behalf of Mr Burgon related to matters of fact, and did not complain about the expression of opinion of terrible misjudgement.

The meaning of the online article – paragraph 7(a)

65. In my judgment applying the principles set out above, the meaning of the online article was “**Mr Burgon joined a band which as he knew took great pleasure in using Nazi symbols**”. I accept that the article also bore the meaning which was a statement of opinion that “Mr Burgon thereby made a terrible misjudgement”, but although I am entitled to select a meaning not contended for by the parties, I am not entitled to make the meaning more serious by including opinion which is not the subject of complaint.
66. As is apparent this is a meaning which incorporates some of the contentions made on behalf of both sides. It was common ground that the meaning was that Mr Burgon knew what the band was doing with the Nazi symbols or Nazi associated iconography. I agree that this was the meaning because unless Mr Burgon knew what the band was doing there would have been no basis for writing about his links to the band and its symbols.
67. I have found that the meaning is that the band “took great pleasure in using Nazi symbols” because “great pleasure” is the meaning of the word “delights” and because the article talked about “Nazi symbols”, and did not talk about “Nazi associated iconography”.
68. I have not found that the online article means that Mr Burgon “is actively sympathetic to Nazi beliefs and ideology, alternatively there are reasonable grounds so to suspect”. This is because in my judgment this is taking too much from the article and ignores the “antidote” in the form of his comments about the band at the end of the article. As appears below in my judgment it is defamatory to say of someone that they have joined a band that takes great pleasure in using Nazi symbols because of the uniquely evil nature of the Nazis, but that is a different meaning from saying that the person joining the band is sympathetic to, or to be reasonably suspected of being sympathetic to, Nazi beliefs and ideology.

Legal principles relating to serious harm

69. Section of the 2013 Act is headed “Requirement of Serious Harm” and provides:

“1 Serious harm

- (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.*
- (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is “) likely to cause the body serious financial loss.”*

70. The Court of Appeal has addressed the meaning of serious harm in *Lachaux v Independent Print Ltd* [2018] QB 594, which is the subject of an outstanding appeal to the Supreme Court, and *Economou v De Freitas* [2018] EWCA Civ 2591 at paragraphs 27-28 and 37-41.

71. Section 1 requires the claimant to prove as a fact, on the balance of probabilities, that the statement complained of has caused or will probably cause serious harm to the claimant’s reputation. It should be noted that unless serious harm to reputation can be established an injury to feelings alone, however grave, will not be sufficient.

72. It is right that issues of causation can arise, see *Economou v De Freitas* at paragraphs 28 and 32. If the meaning is an opinion this will be relevant to the assessment of serious harm, see by way of example *Sube v News Group Newspapers Ltd* [2018] EWHC 1234 (QB). This is because the fact that an article is presented as opinion may mitigate its defamatory impact, because it is someone else’s evaluation of the behaviour. In such a case the gravity of the opinion or criticism expressed is relevant, compare *Morgan v Associated Newspapers* [2018] EWHC 1725 (QB); [2018] EMLR 25.

My determination on serious harm – paragraph 7(b)

73. I find that the online article was defamatory of Mr Burgon at common law. This was because the online article would have substantially affected in an adverse manner the attitude of other people to Mr Burgon. The article itself makes it clear that Mr Burgon faced scorn. In my judgment it is defamatory to say that a person joined a band which as he knew took great pleasure in using Nazi symbols. This is because the Nazis were, as was common ground between the parties, uniquely evil and no right minded person would join a band which he knew took great pleasure in using Nazi symbols.

74. In my judgment the publication of the online article to the thousands of persons who read it has caused serious harm to the reputation of Mr Burgon. This is an inevitable inference to be drawn from the publication of an online article with the meaning identified above. There was no evidence before me at the trial which would rebut the inference of serious harm that was to be drawn from the publication of the online article.

75. I should record that in my judgment the publication of the article in the newspaper does not affect this conclusion. The words used in that article are different, there is

express reference to Black Sabbath as the source for the Dream Troll image and the symbols used, and the meaning of the newspaper article is different from the online article. Further there is nothing to suggest that the readership of the online article would have mirrored the readership of the newspaper.

Legal principles relating to truth, honest opinion and public interest

76. I will address the relevant legal principles relating to the defences below. I will deal with truth first because I have determined that the facts set out in the article are defamatory and have caused serious harm.
77. Truth is a defence to imputations in libel actions. Section 2(1) of the Defamation Act 2013 provides that it is a defence to an action for defamation to show that the statement complained of is substantially true. Section 2(3) of the Defamation Act 2013 provides that: “If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation”. It is important to isolate the essential core of the libel and not to be distracted by inaccuracies around the edge if the imputations are substantially true.
78. Section 3 of the Defamation Act 2013 provides for the defence of honest opinion. So far as is material section 3 provides: “(1) It is a defence to an action for defamation for the defendant to show that the following conditions are met. (2) The first condition is that the statement complained of was a statement of opinion. (3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion. (4) The third condition is that an honest person could have held the opinion on the basis of – (a) any fact which existed at the time the statement complained of was published; (b) anything asserted to be a fact in a privileged statement published before the statement complained of. (5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.”
79. In *Burki v Seventy Thirty Limited* [2018] EWHC 2151 (QB) at paragraphs 224 to 232 the statutory defence was considered together with the Guidance Notes on the Defamation Act 2013. It was noted that the statement must be a statement of opinion pursuant to section 3(2) of the Defamation Act 2013, which reflects the pre-existing common law. It was noted that sections 3(3) and 3(4) of the Defamation Act 2013 were intended to retain the broad features of the common law defence as to the necessary basis for the opinion expressed “but avoid the complexities which have arisen in case law” in particular as to sufficient truth of the facts on which the comment is based and the need to indicate facts on which the comment is based.
80. Any approach to this defence must be consistent with the protections given to freedom of expression as set out in article 10 of the European Convention on Human Rights (“ECHR”). This includes the essential role of the press in a democratic society and its duty to impart information and ideas on matters of public interest. The vital importance of political speech, to which the highest value is attributed by the law, means that the limits of acceptable criticism of a politician are wider than for another individual, see *Lingens v Austria* (1986) 8 EHRR 407 and *Flood v Times Newspapers* [2012] UKSC 11; [2012] 2 AC 273. *Yeo v Times Newspapers Ltd* [2015] EWHC 3375 (QB); [2015] 1 WLR 971.

81. Section 4 of the Defamation Act 2013 provides: “(1) it is a defence to an action for defamation for the defendant to show that- (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and (b) the defendant reasonably believes that publishing the statement complained of was in the public interest. (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case. (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it. (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate. (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion. (6) The common law defence known as the Reynolds defence is abolished.”
82. The proper approach to take to this section is set out in the judgment of Sharp LJ in *Economou v De Freitas* from paragraph 75. Although the common law defence was abolished previous cases were relevant in interpreting section 4. Section 4 is “concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern”, see *Economou v De Freitas* at paragraph 78 referring to a statement in *Bonnick v Morris* [2002] UKPC 31; [2003] 1 AC 300. The approach to section 4 must be consistent with the protections for freedom of expression provided by article 10 of the ECHR as set out above.
83. It was common ground that the non-exhaustive checklist of factors relevant to whether a publisher had acted responsibly as set out in *Reynolds v Times Newspapers* [2001] 2 AC 127 was still relevant. The factors included: (1) the seriousness of the allegation; (2) the nature of the information, and the extent to which the subject-matter is a matter of public concern; (3) the source of the information; (4) the steps taken to verify the information; (5) the status of the information; (6) the urgency of the matter; (7) whether comment was sought from the claimant; (8) whether the article contained the gist of the claimant’s side of the story; (9) the tone of the article; and (10) the circumstances of the publication. The lack of hindsight available to journalists must be remembered. The need to avoid discouraging investigative reporting is vital. Responsible journalism creates a fair balance between freedom of expression on matters of public concern and the reputations of individuals. There is a helpful consideration of relevant factors in *Yeo v Times Newspapers* [2015] EWHC 3375; [2017] EMLR 1 at paragraphs 133-148.

No defence of truth – paragraph 7(c)

84. The evidence shows that Mr Burgon did not join the band, but he did make a guest appearance on one of the songs for the band. If it could be shown that Mr Burgon performed a guest appearance on a song for a band “which he knew took great pleasure in using Nazi symbols” I would find that the defence of truth would not fail having regard to the imputations which are shown to be substantially true because a guest appearance with such a band would raise issues similar to those raised by joining such a band.

85. In my judgment the evidence does not show and I do not find that the band took great pleasure in using Nazi symbols. The band did produce the Dream Troll image and published it by tweeting it with the hashtag Black Sabbath, and putting it on Facebook without the hashtag Black Sabbath. The evidence showed and I have found that the Dream Troll image was produced as a form of tribute to or imitation of the Black Sabbath album cover.
86. I also accept that, whatever the inspiration for the Dream Troll image, the question is whether it used Nazi symbols. In my judgment the two “S”s in the Dream Troll image are not “Nazi symbols”. I make this finding because the two “S”s are not positioned together and, much less importantly but still relevant, the angles of the “S”s are different. The colour scheme of red, white and black and the Gothic writing and umlaut for the words “Dream Troll” do not change my finding on this because the colour scheme and form of writing cannot convert a symbol into something it is not. In my judgment the stylised “S”s used in the promotional material about the heavy metal band “Kiss” are different because the “S”s are together and read, when together, as “SS”. I note that the defence pleaded only that the band used “Nazi associated iconography” in its promotional material and did not assert that the band used “Nazi symbols”.
87. I accept that some persons, particularly if they are told that they are Nazi symbols, may consider the use of the “S”s in the Dream Troll image, when together with the red, white and black colouring and the Gothic writing, to be similar to the “S”s in the “SS” Nazi symbol and therefore associated with Nazi iconography. This is because the “S” is stylised. However there is no evidence that anyone in the band thought that the Dream Troll image was similar to the “S” in the Nazi symbol, or that they took great pleasure in using the “S” because some persons might make the link to the Nazi symbol. Indeed Mr Baldwinson who created the Dream Troll image electronically made it clear that the Dream Troll image had no political purpose and was not intended to make or include any political reference and his evidence was agreed.
88. Further, showing that some persons might consider the use of the “S” in the Dream Troll image, when taken together with the colour scheme and gothic writing, to be similar to the “S” in the “SS” Nazi symbol does not show that the defamatory meaning that I have identified did not seriously harm Mr Burgon’s reputation for the purposes of section 2(3) of the Defamation Act 2013. This is because, although a story might be made from the fact that the stylised “S” might be taken to be similar to the “S”s used in the “SS” symbol, it is a different and much less serious imputation than asserting that Mr Burgon has joined a band which as he knew took great pleasure in using Nazi symbols. This is because one is a Nazi symbol and it is common ground that the Nazis were uniquely evil. The other is a stylised “S” which is derived from the Black Sabbath album cover which if placed together with another “S” (which it was not) might resemble the “SS” symbol.

No defence of honest opinion – paragraph 7(d)

89. In this case the meaning which I have identified is one of fact, and therefore the first condition set out in section 3(2) of the Defamation Act 2013 cannot be satisfied.
90. In this respect I note that the opinion sought to be defended, namely a terrible misjudgement was based on the “facts” that Mr Burgon joined a band which he knew took great pleasure in using Nazi symbols. In some respects there is no need to say that joining a band which you know takes great pleasure in using Nazi symbols is a

terrible misjudgement because every right minded person will form a very negative opinion of the person who has joined such a band. I have already found that these facts were not true but it is not necessary to get into an analysis of whether the facts referred to in section 3(3) on which the honest person could have held the opinion, need to be the facts set out in the article because this is not a case of opinion.

91. There was an issue about whether Mr Newton Dunn held the opinion that Mr Burgon had made a terrible misjudgement. In the email sent to Ms Street Mr Newton Dunn asked “is it really appropriate for a shadow justice secretary to be associating with a band that uses Nazi iconography to promote itself?” suggesting that Mr Newton Dunn thought that it was inappropriate for Mr Burgon to be associating with the band and that the band used Nazi iconography to promote itself. After being told about the Black Sabbath album cover Mr Newton Dunn said “it’s still Nazi iconography, is it not, to use the SS symbol and German military font in the band’s name?” showing that Mr Newton Dunn believed the Dream Troll image to use Nazi iconography. The letter dated 28 July 2017 stated that Mr Newton Dunn did hold, and continues to hold, “the opinion that it was unwise of your client to join a band which uses Nazi symbols given he is a prominent member of the Labour party”. In the defence at paragraph 7 it was pleaded that the opinion was that “the Claimant had demonstrated terrible misjudgment and exposed himself to ridicule by associating himself with a band which, as he knew, uses Nazi associated iconography in its promotional material”. In further information dated 16 January 2018 it was identified that the opinion identified in paragraph 7 of the defence was held by Mr Newton Dunn. As noted above Mr Newton Dunn said “when I looked at the picture of the band’s album it seemed to me it was using Nazi iconography. I thought that this called into question the Claimant’s judgment” and later on in the statement he said “I remain firmly of the opinion that it is completely inappropriate for the Claimant as Shadow Justice Secretary to maintain associations with imagery, iconography and cultural references which are offensive, provocative and potentially upsetting to a number of everyday British citizens”. Mr Newton Dunn confirmed that he considered the story about Mr Burgon to be serious and not light hearted.
92. Although when being cross examined there were parts of Mr Newton Dunn’s evidence when it was apparent that he was fencing with Mr Speker (for example about whether Mr Elphicke was speaking for all of the Tories and what he thought amounted to a poster) in my judgment on the essential issue Mr Newton Dunn did honestly believe that Mr Burgon should be seriously criticised for associating with a band which used stylised “S”’s in a promotional tweet which persons might think were similar to the “S”’s in Nazi “SS” symbols. Mr Newton Dunn formed this opinion, part guided by his source’s comment and part because he was not aware of the Black Sabbath album cover, on the basis that Mr Newton Dunn considered that the Dream Troll image used Nazi iconography. Although he expressed this opinion in different ways and it was Mr Elphicke that had first used the words “terrible misjudgement”, Mr Newton Dunn did consider a serious misjudgement to be a terrible misjudgement.
93. It is right to record that Mr Newton Dunn had formed his opinion on the basis that he mistakenly believed that Mr Burgon knew about the Dream Troll image before Mr Newton Dunn had raised the issue with the Labour party duty press officer on 14 April 2017. This meant that Mr Newton Dunn was relying on the fact that Mr Burgon

did not disassociate himself from the image or band after the issue was raised with the Labour party duty press officer. This might be considered to be a strong judgement to form on someone reacting on a Good Friday bank holiday to a story about a band which has produced an image obviously modelled on the Black Sabbath album, but the issue here is honesty and not reasonableness. Mr Newton Dunn was clear in his evidence that he held the opinion that even if the Dream Troll image was modelled on the Black Sabbath album, it did not excuse what Mr Newton Dunn considered to be his misjudgement in not disassociating himself from the image, and I accept Mr Newton Dunn's evidence about his opinion. For completeness I should record that neither party adduced evidence of what had led Black Sabbath to use the stylised "S"'s in "Save our Soul". I am therefore not in a position to make any findings in relation to this and it is not necessary to do so.

94. I should note that the defence as pleaded did not fully reflect Mr Newton Dunn's opinion because that referred to "Nazi associated iconography" rather than Mr Newton Dunn's belief that the band used "Nazi iconography". However, whatever the scope of the changes made to the common law defence by the statutory wording, which can be determined in cases where it is necessary to do so, in my judgment this difference would not have undermined the defence of honest opinion if it was otherwise available.

No publication in the public interest – paragraph 7(e)

95. On behalf of Mr Newton Dunn and News Group reliance was placed in particular on: the public interest in the conduct and judgment of the Shadow Secretary of State for Justice and whether Mr Burgon, whilst not being anti-Semitic, had a tin ear to issues of anti-Semitism; the fact that the article constituted political speech; the steps taken by Mr Newton Dunn to verify the allegations with Mr Burgon before publication; and the inclusion, in full, of Mr Burgon's on the record response to the article.
96. On behalf of Mr Burgon reliance was placed on a number of matters including: the fact that the band were not contacted; contact was made to the Labour party press office and not Mr Burgon's office; there was no reference to Black Sabbath in the online article when it was included in the hard copy; in the hard copy the way in which it was said that the "S"'s appeared to be Nazi symbols was explained together with the fact that it was a take-off of the Black Sabbath album.
97. The issue of public interest needs to be considered in relation to the "statement complained of", see paragraph 4(a) of the Defamation Act 2013. This means that it is not just the issue of the judgement of the Shadow Secretary of State for Justice which needs to be a matter of public interest, which it clearly is, but also the online article as published. Further for the detailed reasons set out in *Economou v De Freitas* at paragraph 85 what a journalist needs to verify before publishing will depend in part on what he considered his words to mean and I should record that, as appears above, I accept Mr Newton Dunn's evidence that he believed that the "S"'s in the Dream Troll image were Nazi iconography.
98. So far as responsible journalism is concerned in my judgment Mr Newton Dunn cannot be fairly criticised for contacting the Labour party press office and not Mr Burgon's office. This was a bank holiday Good Friday and Mr Newton Dunn was

right to suppose that if he contacted the press office he would get an answer from Mr Burgon, which he did.

99. I also consider that, having regard to the fact he did in fact get a reply from Mr Burgon, Mr Newton Dunn was entitled not to contact the band. I accept that some reasonable journalists would have contacted the band but the focus of the story was on Mr Burgon, and not the band. Further Mr Burgon was able to supply the relevant information to Mr Newton Dunn. The defence in section 4 of the Defamation Act 2013, which creates a fair balance between freedom of expression on matters of public concern and the reputation of individuals should not be whittled away by an overly restrictive approach to responsible journalism.
100. However in my judgment the online story does not attract the protection of section 4 of the Defamation Act 2013. This is because, having contacted Mr Burgon through the press office, and having been told about the source of the symbols in the Dream Troll image, Mr Newton Dunn failed to include that in the online article. As appears above I have found that Mr Newton Dunn did not at first understand the significance of the hashtag Black Sabbath above the Dream Troll image on the tweet, but he properly put the story to the duty press officer. Mr Newton Dunn said that the response that he was given about the Black Sabbath album cover was off the record. I do not find that the statement about the Black Sabbath album cover was off the record. This is because there was nothing in the response to suggest that the comment about Black Sabbath was off the record. Further there was no suggestion that the earlier hashtag on the tweet, whose significance should now have been apparent to Mr Newton Dunn, was off the record. In my judgment Mr Newton Dunn has convinced himself that the statement was off the record in an attempt to rationalise what was otherwise an inexplicable failure to include the reference to Black Sabbath in the online article. When Mr Newton Dunn got the response about the source of stylised “S”s being the Black Sabbath album cover he was entitled to maintain his opinion, but if he wanted the protection of section 4 of the Defamation Act 2013 he was not, in my judgment, entitled to ignore that information and not include it in the online article.
101. I accept that Mr Newton Dunn did include Mr Burgon’s quotation in the online article, but this makes the failure to include the reference to Black Sabbath even more inexplicable, because it shows that there would have been time to include the reference to Black Sabbath in the online article. I note that the reference to Black Sabbath was incorporated into the newspaper article. I have been careful to avoid using hindsight, and making the impermissible leap that because one sub-editor included the reference to Black Sabbath it follows that it must be included in the online article, but in my judgment in order to obtain the protection of section 4 of the Defamation Act 2013 a reference to Black Sabbath was necessary as part of responsible journalism.
102. The evidence shows that Mr Newton Dunn still holds the view that Dream Troll (and Black Sabbath) were wrong to use the stylised “S” and he is entitled to share that view, but Mr Newton Dunn had to deal with the points made on behalf of Mr Burgon fairly. When dealt with fairly there was a story to be had (as part appears from the newspaper article) but the essential thrust of the story is different. One is about Mr Burgon joining a band which as he knew took great pleasure in using Nazi symbols. The other is about Mr Burgon joining a band which had produced an image based on

the Black Sabbath album cover which used stylised “S”s, which some persons might consider to be similar to the “S”s used in the “SS” symbol.

Legal principles for the assessment of damages and the award of aggravated damages for libel

103. It is established that libel damages have a threefold purpose namely: (1) to compensate for distress and hurt feelings; (2) to compensate for actual injury to reputation which has been proved or might reasonably be inferred; and (3) to serve as an outward and visible sign of vindication. Damages are to be compensatory, and not punitive, see generally *Cairns v Modi* [2012] EWCA Civ 1382; [2013] 1 WLR 1015.
104. Damages are at large and a wide range of matters may be taken into account including the conduct of the Claimant, his position and standing, the subjective impact of the libel on him, the gravity, mode and extent of publication, the absence or refusal of retraction or apology, and the relevant conduct of the Defendant to verdict.
105. In coming to a figure the standard tariffs for pain and suffering in personal injury awards can properly be taken into account, as well as jury awards approved by the Court of Appeal and previous awards by judges, see *John v MGN Limited* [1997] QB 586. I am conscious of the direction not to adopt an analytical approach involving conventional bands of damages, for the reasons given in *Cairns v Modi*.
106. My function “*is to try to relate the right range of compensation to the gravity of the particular libel and to any aggravating or mitigating features*”, paragraph 33 of *Cleese v Associated Newspapers* [2003] EWHC 137 (QB). It might be noted that when assessing 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*”. I also note that a reasoned judgment rejecting a truth defence is capable of providing some vindication of a Claimant’s reputation. The proper defence of an action is not to be taken into account in aggravation of damages in libel proceedings. Any award for aggravated damages should be proportionate.
107. A helpful summary of principles relevant to the assessment of damages is set out in paragraphs 79-90 of *Barron v Vines* [2016] EWHC 1226 (QB). At paragraph 87 there was specific reference to the proposition that politicians might be expected to tolerate more than would be expected of others. When considering what is a proportionate award, particular care must be taken to avoid the chilling effect of large awards.

Damages and an injunction – paragraph 7(f)

108. I have set out the relevant evidence and principles above. I note that the online article continued to be published until 1 November 2017 and I have reflected the continued publication in the assessment of damages, rather than as a matter of aggravation of damages, to avoid any double counting. There has been no apology. Having regard to all of the relevant factors including the meaning, the publication to around 7,000 persons, and the need to ensure that damages are proportionate, in my judgment an award of damages of £30,000 is appropriate.

109. I will also grant an injunction to restrain further publication of the article. This is because there remains a risk of further publication if an injunction is not ordered.

No malicious falsehood – paragraphs 8(a), (b) (c) and (d)

110. For the tort of malicious falsehood it is necessary to show the publication of words: (1) which were false; (2) which referred to the claimant; (3) which were published maliciously; and (4) which caused special damage, or were “calculated”, meaning more likely than not, to cause pecuniary damage to the claimant, see *Gatley on Libel and Slander*, Twelfth Edition at 21.1 and 21.14.
111. It is apparent that words have been published which were false for the reasons given above. It was common ground that the relevant words referred to Mr Burgon.
112. It was common ground that, so far as malice was concerned, it is necessary to show that there was a lack of honesty by Mr Newton Dunn. Mr Burgon’s case is that Mr Newton Dunn was not acting honestly in that: the Dream Troll image was “doctored” by removing the hashtag “Black Sabbath”, which would have shown what was intended by the use of the “S” letters; it was withheld from readers that the image was a take-off of the Black Sabbath album cover; readers were told that the “S’s” were the actual “SS” symbol when they were not; claims were made that the Gothic font used for the band’s name was German military font or Nazi imagery; it was claimed that Mr Burgon had joined the band when he had not done so; there was a statement that the band used “Nazi symbols” and “posters” when there was only one possible candidate for a symbol being the “S” and there was only one Dream Troll image; there was an assertion that the band “delights” in the use of Nazi symbols without any evidence to support that point; and there was generated a fictional political controversy by calling Mr Elphicke, without telling him about the Black Sabbath album cover and referring to Tories rounding on Mr Burgon when there was no evidence of that.
113. In my judgment, for all the detailed reasons given above, Mr Newton Dunn was acting honestly when he wrote the story. Mr Newton Dunn did not appreciate the significance of the hashtag Black Sabbath. He should have included the reference to Black Sabbath in the online article but the failure was not dishonest because the reference to Black Sabbath had not altered Mr Newton Dunn’s view. Mr Newton Dunn did consider the font to be significant and the use of the plural was not evidence of dishonesty. Mr Newton Dunn called Mr Elphicke because he considered there to be story and believed rightly that Mr Elphicke would provide a comment. This conclusion about honesty means that the claim for malicious falsehood fails.
114. This also means that it is not necessary to consider the issue of pecuniary damage. I therefore dismiss the claim for malicious falsehood.

Relevant principles of the DPA

115. Section 4(4) of the DPA requires data controllers to comply with the data protection principles. The first data protection principle requires that “personal data shall be processed fairly and lawfully ...” and requires compliance with the schedule 2 conditions. Schedule 2 sets out conditions relevant for the purposes of the first data protection principle, and paragraph 6 requires that “the processing is necessary for the

purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed”.

116. The second data protection principle requires that: “personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes”. The fourth data protection principle requires that: “personal data shall be accurate and, where necessary, kept up to date”. Schedule 1, Part II at paragraph 7 provides that there will not be a breach if having regard to the purposes for which data is obtained and processed reasonable steps have been taken to ensure accuracy. Section 70(2) of the DPA provides that “... data are inaccurate if they are incorrect or misleading as to any matter of fact”. The reference to fact makes it clear that the principle is not concerned with comment or opinion, see *NTI v Google* [2018] 3 WLR 1165.
117. Section 27(1) of the DPA provides for exemptions. A set of exemptions is set out in Part III at section 32. This section is headed “Journalism, literature and art”. Section 32 provides: “(1) personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if (a) the processing is undertaken with a view to the publication by any person of any journalistic ... material, (b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and (c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes ...”. Again interference with free speech must be justifiable and proportionate, there must be “careful management so as to ensure that the litigation process ... is not used as a means of stifling criticism under the guise of correcting inaccuracy”, see *Prince Moulay Hicham v Elaph Publishing* [2017] EWCA Civ 29; [2017] 4 WLR 28.
118. Section 13 provides that an individual who suffers damage by reason of any contravention by a data controller of any of the requirements of the DPA is entitled to compensation from the data controller for that damage. Damage includes non-pecuniary damage including distress, see *Vidal-Hall v Google* [2016] QB 1003 which set out the proper approach to section 13(2) of the DPA. In paragraphs 81 and 82 of *Vidal-Hall* it was noted that there would be some cases which did not justify an award of damages. Section 14 provides that the Court may order rectification, blocking, erasure or destruction of data and notification of such actions to third parties to whom the data has been disclosed. Although in *Halliday v Creation Consumer Finance* [2013] EWCA Civ 333 the sum of £750 awarded by way of damages was described as a “relatively modest nature” more substantial sums have been awarded where there was a deliberate breach of the DPA (£9,000 in one case) or where control of personal and confidential information which should never have been processed had been lost (£39,5000 shared amongst 6 Claimants in *TLT v Secretary of State for the Home Department* [2016] EWHC 2217 (QB)).
119. It is permissible to bring claims under the DPA together with claims for libel because the DPA provides for a statutory cause of action, see *Hicham v Elaph Publishing*. However where it can be seen at the conclusion of the trial that the DPA claim adds nothing to the existing proceedings, it may be appropriate either to make no order on the claim or to dismiss it. It might be noted that the focus of libel proceedings under

the Defamation Act 2013 is serious harm to reputation, whereas the DPA is concerned with, among other matters, accuracy and the fairness of the processing of data.

DPA claim adds nothing – paragraphs 9(a), (b), (c), (d) and (e)

120. Mr Wolanski and Mr Speker agreed that the claim under the DPA might require to be addressed in very particular circumstances, for example if the claim for libel had succeeded on all grounds but failed because there was no finding of serious harm. In the circumstances where the claim for libel has succeeded it is not necessary to address this claim separately and I do not do so.

Conclusion

121. For the detailed reasons set out above I find that: (1) the claim for libel in respect of the online article succeeds and I award damages of £30,000 and an injunction to restrain further publication of the online article; (2) I dismiss the claim for malicious falsehood; and (3) it is not necessary to address the claims under the DPA given my finding on the claim for libel.
122. I am very grateful to Mr Speker and Mr Wolanski, and their respective legal teams, for their excellent written and oral submissions.