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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

CHRISTOPHER HUGHES

Plaintiff

and

ASSOCIATED NEWSPAPERS LTD T/A THE DAILY MAIL

Defendant

Mr Lavery KC (instructed by, McNamee McDonnell, Solicitors) for the Plaintiff
Mr Hopkins KC (instructed by Mills Selig, Solicitors) for the Defendant

MASTER BELL

Introduction

[1] On 23 October 2019 the bodies of 39 people from Vietnam were discovered in a container which had travelled from Zebrugge to Essex. A major, international police investigation immediately began into offences of the manslaughter and human trafficking of the victims.

[2] Subsequent to the discovery of the bodies, a number of persons were convicted both in England and in Belgium in connection with the deaths. On 22 January 2021, at the Central Criminal Court in London, Mr Justice Sweeney sentenced Gheorghe Nica, Ronan Hughes, Eamonn Harrison, Christopher Kennedy, Maurice Robinson, Alexandru Hanga and Valentin Calota for their participation in a conspiracy to facilitate unlawful immigration. In addition, Ronan Hughes and Maurice Robinson had pleaded guilty to, and Gheorghe Nica and Eamonn Harrison had been found guilty of, 39 offences of dangerous unlawful act manslaughter.

[3] As part of his sentencing remarks, Mr Justice Sweeney said:

> "Hughes (who is now aged 41) admits that he played a leading role, which he asserts was the result of an invitation from Nica. Albeit that Hughes was not (I accept) at the very top of the conspiracy, his role was clearly a pivotal one, in that he ran a haulage business and supplied the trailers and drivers used to transport the migrants – whether from the pick-up point on the continent to the UK, or (when required) to Zeebrugge and then from Purfleet to the drop off point. He also made the necessary transport bookings. He admits that the conspiracy began in 2008 and that he received £3,000 per migrant successfully transported, which he was paid in cash, and from which he paid the relevant driver."

[4] Between the discovery of the bodies and these criminal defendants being convicted, there was widespread news coverage, both domestic and international, in respect of the Essex Police investigation. One of the significant events which occurred was the holding of a press conference by the Essex Police. The exact terms of the information which was put into the public realm by police was not known to either counsel who appeared before me. However, Mr Hopkins did include in the defendant's trial bundle a document which had been printed out from the Essex Police website entitled, "Update; Friday 1 November 2019 12.05." Amongst the material contained in that document were the following:

(i) Ronan Hughes and his brother Christopher Hughes from Northern Ireland were wanted on suspicion of manslaughter and human trafficking in connection with the deaths of 39 people whose bodies were found in a container in Essex.

(ii) Detectives had urged Ronan and Christopher Hughes to come forward and hand themselves in to police in Northern Ireland.

(iii) The senior investigating officer had said, "Today I want to make a direct appeal. Ronan and Christopher, hand yourselves in to police. We need you both to come forward and assist us with this investigation."

(iv) The senior investigating officer thanked people from Northern Ireland, along with those in the road haulage and shipping industries, who had come forward to share information and knowledge with police. Their help had been invaluable.

(v) The senior investigating officer said, "Finding Ronan and Christopher Hughes is crucial to our investigation and the sooner we can make this happen, the sooner we can get on with our enquiries and bring those responsible for these tragic deaths to justice."

(vi) The two brothers were known to have links to Northern Ireland and Ireland, as well as the road haulage and shipping industries and detectives urged anyone who had been in contact with them or had any information about where they were, to get in contact with police.

(vii) On 31 October 2019 police had stopped a lorry believed to be connected to Ronan and Christopher Hughes. The vehicle was subsequently seized. No further arrests had been made.

(viii) The Essex Police wished to thank their colleagues in the PSNI and An Garda Siochana as well as communities on both sides of the boarder. They would continue to work with them until Ronan and Christopher Hughes came forward or were arrested.

[5] Following the Essex Police press conference an article was published by the MailOnline in the following terms:

> "Manhunt for Essex lorry tragedy 'killers': Detectives name two brothers who are on the run and wanted for manslaughter and human trafficking over deaths of 39 stowaways
>
> - Detectives in probe into the 39 deaths name two suspects they are hunting
> - Police want to question Ronan and Christopher Hughes over trafficking
> - The pair are understood to run a haulage firm from a farm near the Irish border
> - Container where bodies were found was reportedly leased by a 'Ronan Hughes'
>
> Detectives investigating the deaths of 39 people in a lorry in Essex are hunting two brothers suspected of manslaughter and human trafficking.
>
> Police want to speak to Ronan Hughes, 40, and his brother Christopher, 34, who are understood to run a haulage business from a farm near the border of Northern Ireland and the Irish Republic.
>
> The suspects are believed to be somewhere in Northern Ireland and detectives today urged those who know the pair to contact police.

Essex Detective Chief Superintendent Stuart Hooper said:

> 'This is a case where 39 men and women have tragically died and support from the community is going to be vital to help bring those responsible to justice.'

A family haulage business called C Hughes Logistics lists its address as a post box along a farm track in South Armagh, close to the border with County Monaghan in the Republic of Ireland.

Ronan Hughes lives a short distance away along a small country road in the sleepy hamlet of Tyhollad (sic) in Monaghan.

When MailOnline visited his home last week, Mr Hughes was unavailable for comment. Instead, hostile neighbours and friends of the Hughes family poured out of their homes to shout abuse…

Parked near Ronan's home was a lorry with C Hughes insignia.

A Ronan Hughes is said to have leased the refrigerated container from Dublin-based Global Trailer Rents (GTR).

He is also linked to the blue Scania lorry impounded by Garda at Dublin Port on Saturday.

MailOnline spoke to Christopher on the day the bodies were discovered but he denied he was involved."

The article then continued further, including material about what had been said by a local politician, the named individual who had had been charged in connection with the deaths, the arrest of three other persons, and profiles of some of the dead persons who had at that point been identified. That article was subsequently followed by the MailOnline publishing a second and third article in relation to the police investigation.

[6] On 23 October 2020 Christopher Hughes issued a writ against Associated Newspapers Ltd t/a The Daily Mail for defamation, misuse of private information and breach of his Article 8 right to privacy. (This is not the only litigation which the plaintiff has initiated in respect of the media coverage. He has initiated legal proceedings against a total of 19 media outlets for their coverage of the police

investigation). On 13 April 2023 the writ was followed by a Statement of Claim which stated that Mr Hughes had been improperly implicated, without any evidential basis, in the tragedy that had occurred in Essex where 39 migrants lost their lives. Despite the terms in which the Writ was drafted, the Statement of Claim limits the scope of the action to the tort of defamation and does not seek to pursue the defendant for misuse of private information or breach of Article 8. Further, while the Statement of Claim refers to the second and third articles, the plaintiff has confirmed that these are only referenced to support the aggravated damages claim in respect of the first article. The focus therefore during the hearing before me was the plaintiff's claim for defamation arising from the first article.

[7] In this application, the defendant's summons seeks to have Mr Hughes' defamation proceedings struck out on the basis that:

(i) Under section 8 of the Defamation Act 1996 and Order 82 Rule 9(2) of the Rules of the Court of Judicature the proceedings have no reasonable prospect of success and there is no reason as to why they should be tried.

(ii) In the alternative, the proceedings should be struck out under Order 18 Rule 19(1)(a), (b) and (d).

At hearing, however, the defendant adopted the position that it would abandon its application under Order 18 Rule 19(1)(a).

[8] The defendant's application is grounded by an affidavit by its solicitor, Ms Hunt. On behalf of the plaintiff, a replying affidavit was filed by his solicitor, Mr McDonnell, and a further affidavit by Mr Heatley. I was assisted by skeleton arguments from Mr Hopkins and Mr Lavery, both of whom also made oral submissions. At this juncture I take the opportunity to remind the parties of what Horner J pithily stated in *Galloway v Frazer and others* [2016] NIQB 7 and which appears to be frequently forgotten:

> "Affidavits should not be used as an opportunity to rehearse legal argument or make comments. Skeleton arguments are for legal propositions and comments."

Defendant's submissions

[9] The defendant's first submission is that the plaintiff's claim has no realistic prospect of success, and it ought therefore to be struck out under the summary disposal provisions contained in Section 8 of the Defamation Act 1996 which state:

> "(1) In defamation proceedings the court may dispose summarily of the plaintiff's claim in accordance with the following provisions.

(2) The court may dismiss the plaintiff's claim if it appears to the court that it has no realistic prospect of success and there is no reason why it should be tried.

….

(3) In considering whether a claim should be tried the court shall have regard to—

(a) whether all the persons who are or might be defendants in respect of the publication complained of are before the court;

(b) whether summary disposal of the claim against another defendant would be inappropriate;

(c) the extent to which there is a conflict of evidence;

(d) the seriousness of the alleged wrong (as regards the content of the statement and the extent of publication); and

(e) whether it is justifiable in the circumstances to proceed to a full trial."

[10] In *MacAirt v JPI Media NI Ltd & Ors* [2021] NIQB 52, Scofield J said in relation to a section 8 application:

> "…I am required to seek to give effect to the overriding objective: see RCJ Order 1, rule 1A(3). The overriding objective is to deal with the case justly, including so far as practicable saving expense, ensuring that it is dealt with expeditiously (as well as fairly), and allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases. These various factors appear to me to favour grasping the nettle where, as here, the court has reached a view that the defamation claim rests on an unsustainable foundation."

[11] The basis for the defendant's submission that the plaintiff's action has no realistic prospect of success is that the defendant has three unassailable defences based on:

(i) Reportage at Common Law

(ii) Qualified Privilege

(iii) Section 15 of the 1996 Act

The reportage submission

[12] The first defence which the defendant claims it has against the plaintiff's action is the defence of reportage. As *Gatley on Libel and Slander* (13th Edition) explains in paragraph 15-15, reportage first surfaced in the Common Law in *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634 where its existence was affirmed by a majority of the Court of Appeal. It was later described by Lord Phillips in *Flood v Times Newspapers Ltd* [2012] UKSC 11 as a special form of the *Reynolds* privilege. As Ward LJ described in *Roberts v Gable* [2007] EWCA Civ 721:

> "to qualify as reportage the report, judging the thrust of it as a whole, must have the effect of reporting, not the truth of the statements, but the fact that they were made… If upon a proper construction of the thrust of the article the defamatory material is attributed to another and is not being put forward as true, then a responsible journalist would not need to take steps to verify its accuracy. He is absolved from that responsibility because he is simply reporting in a neutral fashion the fact that it has been said without adopting the truth."

[13] As *Gatley* explains in paragraph 15-16, Ward LJ offered a vivid differentiation in *Charman v Orion Publishing Ltd* [2007] EWCA Civ 972 between the book "Bent Coppers" and reporting that might be covered by the reportage doctrine. The two were described as being "miles removed" because the book was:

> "a piece of investigative journalism where [the author] was acting as the bloodhound sniffing out bits of the story from here and there, from published material and unpublished material, not as the watchdog barking to wake us up to the story already out there."

[14] In *Jameel and Another v Wall Street Journal Europe SPRL* [2006] UKHL 44, Lord Hoffmann explained:

> "In most cases the *Reynolds* defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true but there are cases ('reportage') in which the public interest lies simply in the fact that the statement was made, when it may be clear

> that the publisher does not subscribe to any belief in its truth."

[15] The Northern Ireland Court of Appeal recognised this line of authorities in relation to reportage in their decision in *Coulter v Sunday Newspapers Ltd* [2017] NICA 10, where Gillen LJ emphasised that the issue for the court was whether the newspaper was merely reporting allegations made by others and the public interest was in knowing that the allegations had been made. In such circumstances the article would not be a piece of investigative journalism in which the journalist was reporting her conclusions after investigation.

[16] Although the Common Law defence of *Reynolds* qualified privilege was abolished under section 3 of the Defamation Act (Northern Ireland) 2022 and replaced by a statutory version of the concept, that legislation came into force on 2 June 2022. Since the alleged defamatory material was contained in a MailOnline article dated 28 October 2019, it is the Common Law principles in relation to reportage which must be applied in this application.

The qualified privilege submission

[17] Secondly, the defendant submitted that there was a basis for a qualified privilege defence, namely that it was in the public interest for the police to be able to communicate with the public during an investigation into serious crime.

[18] Mr Hopkins submitted that the words which Mr Hughes complains are defamatory broadly correspond to the statement issued by the Essex Police. Mr Hopkins argued that in *Bento v Chief Constable of Bedfordshire Police* [2012] EWHC (QB) 1525 the court accepted that it was in the public interest for the police to communicate with the public during an investigation into a suspicious death in order both to retain the community's confidence that the case was being taken seriously and to encourage the flow of information which might assist the police. Hence, Mr Hopkins argued that, in the case before me, it must be in the public interest that the police communicated with the public regarding their search for individuals in connection with the deaths of the 39 persons in the container and that the media were permitted to assist the police in passing this message on to the general public.

The Section 15 submission

[19] Thirdly, the defendant argues that the article is a publication which also attracts qualified privilege under the provisions of section 15 of the Defamation Act 1996 and Schedule 1(2) thereto. Section 15 of the 1996 Act provides:

> "(1) The publication of any report or other statement mentioned in Schedule 1 to this Act is privileged unless

the publication is shown to be made with malice, subject as follows.

(2) In defamation proceedings in respect of the publication of a report or other statement mentioned in Part II of that Schedule, there is no defence under this section if the plaintiff shows that the defendant—

(a) was requested by him to publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction, and

(b) refused or neglected to do so.

For this purpose, 'in a suitable manner' means in the same manner as the publication complained of or in a manner that is adequate and reasonable in the circumstances.

(3) This section does not apply to the publication to the public, or a section of the public, of matter which, is not of public concern and the publication of which is not for the public benefit."

[20] The list of those reports attracting qualified privilege in Schedule 1 to the 1996 Act includes:

"9.—(1) A fair and accurate copy of or extract from a notice or other matter issued for the information of the public by or on behalf of—

(a) a legislature in any member State or the European Parliament;

(b) the government of any member State, or any authority performing governmental functions in any member State or part of a member State, or the European Commission;

(c) an international organisation or international conference.

(2) In this paragraph 'governmental functions' includes police functions."

(The wording of section 15(3) was amended by the Defamation Act (Northern Ireland) 2022 but that amendment only came into force after the

publication of the MailOnline article and hence it is the original wording of section 15(3) which applies).

[21] On behalf of the defendant, Ms Hunt swore an affidavit in which she averred that the article constituted neutral reporting, without embellishment, of the statement by Essex Police that they were seeking to locate and question the plaintiff on suspicion of serious criminal charges and were requesting the public's assistance in locating him.

[22] Mr Hopkins argued that in neither the plaintiff's Statement of Claim nor in Mr McDonnell's affidavit is any allegation of malice presented against the MailOnline. Therefore, the defendant argues that the article is clearly a publication which is expressly privileged under section 15 and Schedule 1(2) to the 1996 Act as it was a fair and accurate representation of material issued for the information of the public. As a result, it was submitted that the plaintiff's claim has no realistic prospect of success and ought to be dismissed.

The abuse of process submission

[23] The second limb of the defendant's application is that the action ought to be struck out either because it is frivolous or vexatious in the sense of being obviously unsustainable or incontestably bad or because it is an abuse of the process of the court. Order 18 Rule 19(1) provides that:

> "The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –
>
> (a) it is scandalous, frivolous or vexatious, or
>
> …
>
> (d) it is otherwise an abuse of the process of the court."

Although not explicitly argued by Mr Hopkins, it was implicitly submitted that there is some overlap between grounds (b) and (d) of Order 18 Rule 19(1).

[24] The defendant's abuse of process argument is broken down under three headings. The first is that the proceedings are frivolous and vexatious. The second is that the action ought to be dismissed under the *Jameel* principle. The third is that the case ought to be dismissed on the basis that all the essential facts and matters are the same as those raised in an earlier set of proceedings which were abandoned by the plaintiff.

(1) Frivolous or vexatious

[25] Order 18 Rule 19(1)(b) provides that the court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that it is scandalous, frivolous or vexatious. Mr Hopkins submitted that the action in this case was "frivolous or vexatious." He submitted that it was so in the sense that the action was obviously unsustainable and incontestably bad.

(2) The Jameel argument

[26] The second limb of the defendant's abuse of process argument can be simply stated. The defendant relies on the decision of *Jameel (Yousef) v Dow Jones & Co Inc* and submits that, to use the language of Eady J, "The game is not worth the candle" and that the proceedings therefore ought to be struck out as an abuse of process.

(3) The previous proceedings argument

[27] The third limb of the defendant's abuse of process argument is that the plaintiff's action ought to be struck out on the basis that he has previously abandoned similar proceedings against a different defendant. In *Schellenberg v BBC* [2000] EMLR 296 the claimant had settled defamation actions against the Guardian and the Sunday Times on disadvantageous terms, when it seemed likely that he was about to lose. He then pressed on with an almost identical action against the BBC. Eady J struck out that action as an abuse of process, commenting that judges are now expected to be more proactive even in areas where angels have traditionally feared to tread. He rejected the submission that he should not do so as this would deprive the claimant of his "constitutional right" to trial by jury, observing that, while it was an important right, the meaning of that emotive phrase was a little hazy. He said:

> "… I see no reason why such cases require to be subjected to a different pre-trial regime. It is necessary to apply the overriding objective even in those categories of litigation and in particular to have regard to proportionality. Here there are tens of thousands of pounds of costs at stake and several weeks of court time. I must therefore have regard to the possible benefits that might accrue to the claimant as rendering such a significant expenditure potentially worthwhile."

Eady J added that the overriding objective's requirement for proportionality led to this conclusion:

> "I am afraid I cannot accept that there is any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the

> parties in terms of expense, and the wider public in terms of court resources."

[28] Mr Hopkins therefore argued that a claim may be struck out as an abuse of process where the essential facts or matters going to liability would be the same as those already raised in earlier proceedings brought by the same claimant against another defendant in respect of a similar publication which either failed or was abandoned by the claimant.

[29] To her affidavit Ms Hunt exhibits a copy of the judgment against the plaintiff in *Hughes v Independent Digital News & Media Limited trading as The Independent*. This was an order of McAlinden J made on 23 May 2023 that, by consent, judgment be entered for the defendant against the plaintiff with no order as to costs.

Plaintiff's submissions

No defence

[30] The plaintiff's first submission in response to the defendant's application was that the defendants had failed to file a defence to the plaintiff's action. Mr Lavery emphasised that the defendant does not deny that the words contained in the article were in fact defamatory of the plaintiff. He submitted that no issue has been taken with and of the meanings pleaded in the Statement of Claim nor is any defence of justification intimated in the plaintiff's grounding affidavit. The plaintiff alleges that he is put in the embarrassing position of responding to a defence which has not been pleaded and which may change in character when it is actually pleaded. Such an application is, he claims, itself an abuse of process.

Fair and accurate reporting of the Essex police statement?

[31] The plaintiff's second submission was that the defendant's article can only be non-defamatory if the words of the article do not go beyond what was actually contained in the police press release. The plaintiff submits that, however, the defendant went beyond its very limited terms "in a way which was sensationalist, irresponsible and reckless as to the reputation, character and integrity of the plaintiff who was and is an innocent man but was labelled by the defendant as a killer who was on the run." He submits therefore that no Common Law defence of privilege can avail the defendant in these circumstances.

The Section 15 submission

[32] Mr McDonnell in his affidavit states that the defendant's application is misconceived as the issue in dispute is a classic issue for resolution at trial, namely whether the defences of public interest and/or privilege apply to the impugned article. Therefore, it was not plain and obvious case that could be disposed of in this way.

[33] Mr Lavery also made a further point. He refers me to section 15(2) of the 1996 Act which provides:

> "In defamation proceedings in respect of the publication of a report or other statement mentioned in Part II of that Schedule, there is no defence under this section if the plaintiff shows that the defendant—
>
> (a) was requested by him to publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction, and
>
> (b) refused or neglected to do so.
>
> For this purpose, 'in a suitable manner' means in the same manner as the publication complained of or in a manner that is adequate and reasonable in the circumstances."

[34] Mr Lavery argued that, by way of pre-action correspondence and these proceedings, the plaintiff had requested that the articles published by the MailOnline be removed and that a clarification, apology and retraction be provided. He submitted that the defendants had failed to take any steps whatsoever to vindicate the reputation of the plaintiff despite the sensationalist and scurrilous allegations made against him. Hence, Mr Lavery suggested that the section 15 defence was not available to the defendant.

Abuse of process and other proceedings

[35] In reply to Mr Hopkins' submission that other proceedings dealing essentially with the same matters had been abandoned, Mr Lavery argued that individual publications by different media sources had to be treated differently. In any event each publication is to be regarded independently and separately in terms of the extent to which the publication went beyond the terms of the Essex Police statement and the factors to be identified in terms of whether the reporting could be regarded as responsible.

[36] The plaintiff asserted that the defendant had not provided details of the publication by The Independent newspaper, nor had it referred to the details of any settlement. Furthermore, as stated in Mr McDonnell's replying affidavit, the terms of such settlement were confidential between the parties.

Conclusion

No realistic prospect of success

[37] The plaintiff's argument that the defendant had failed to file a defence to the plaintiff's action and, hence, that this application was itself an abuse of process has no merit whatsoever. It is a regular feature of High Court litigation that, before a defence is served, plaintiffs face applications to have their actions struck out on the basis that there is no reasonable cause of action or that the action is an abuse of process. Indeed, the whole purpose of such applications is to avoid the unnecessary expense in terms of court time and financial expense in hopeless cases. There are many instances where defendants in defamation proceedings have applied for summary disposal of the litigation on the basis that the plaintiff has no realistic prospect of success.

[38] In *Alsaifi v Amunwa* [2017] EWHC 1443 (QB), Warby J explained why applications under section 8 are now few and far between in England and Wales:

> "Mr Amunwa's application is made in reliance on s 8 of the Defamation Act 1996. This is another slightly antique procedural weapon which is little used today. It allows the Court to deal with hopeless claims or defences in various ways. One of these is to 'dispose summarily of the plaintiff's claim' by dismissing it 'if it appears to the court that it has no realistic prospect of success and there is no reason why it should be tried.' That form of wording is familiar to lawyers from CPR 24.2, although there are some small differences. Section 8 was introduced because, at that time, defamation was outside the scope of the general powers to enter summary judgment. Now, causes of action for defamation are within the scope of those powers. Since that change in the law all or most applications for summary determination of such claims are made under Part 24. One reason for that is that Part 24, unlike s 8, permits summary determination of individual issues in a case. Section 8 has some remaining uses, but it has been largely left to gather dust."

That reasoning does not of course apply in Northern Ireland where the Civil Procedural Rules do not apply, and hence section 8 applications for summary disposal may be of very significant use to plaintiffs or defendants in this jurisdiction.

[39] *Gatley on Libel and Slander* (13th Edition) at paragraph 30-22, in dealing with the issue of summary disposal of defamation proceedings under section 8 of the 1996 Act, observes that the explanations of Lord Woolf MR in *Swain v Hillman* [2001] 1 All

ER 91 as to the meaning of "no real prospect" offers material guidance as to the circumstances when the summary procedure should be employed. Lord Woolf said:

> "[t]he words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success … (the words 'no real prospect of succeeding') direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

Gatley therefore comments that the party resisting an application for summary judgment has to have a case which is better that merely arguable and noted that, in the House of Lords debate on the Bill, Lord Hoffman observed that the object of using the wording "realistic prospect of success" was to encourage judges to use the power to grant summary relief "in a vigorous, humane and commonsense way."

[40] As I stated in *Kelly v O'Doherty* [2024] NIMaster 1:

> "[77] Borrowing from and adapting the language used by Lewison J in *Easyair v Opal* [2009] EWHC 339 (Ch), where he set out the principles applicable to the equivalent test for summary disposal in summary judgment applications, I consider that the approach under section 8 of the Defamation Act 1996 should be as follows:
>
> 1. The court must consider whether the Claimant has a 'realistic' as opposed to a 'fanciful' prospect of success.
>
> 2. A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.
>
> 3. In reaching its conclusion the court must not conduct a 'mini trial.'
>
> 4. This does not mean that the court must take at face value and without analysis everything that a plaintiff says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by the documentary evidence.
>
> 5. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary

disposal, but also the evidence that can reasonably be expected to be available at trial.

6. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus, the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

7. If the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it."

The reportage argument

[41] The issue to be decided is whether the article published by the MailOnline was simply reporting in a neutral fashion what had been said by police without adopting and representing it as the truth. Before I address this issue directly, I will outline factors which need to be borne in mind as the court seeks to assess what was published.

[42] Firstly, Sir Anthony Clarke MR explained in *Jeynes v News Magazine Limited* [2008] EWCA 130 how the meaning of words ought to be approached in defamation actions:

> "The legal principles relevant to meaning have been summarised many times and are not in dispute. …
>
> They are derived from a number of cases including, notably, *Skuse v Granada Television Limited* [1996] EMLR 278, per Sir Thomas Bingham MR at 285-7. They may be summarised in this way:
>
> (1) The governing principle is reasonableness.
>
> (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between

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

[43] Secondly, as was pointed out by Lord Shaw of Dunfermline in *Stubbs Ltd v Russell* [1913] A.C. 386, the court must avoid the danger of straining the meaning of the words used. Lord Shaw stated:

> "For I think the test in these cases is this: Is the meaning sought to be attributed to the language alleged to be libellous one which is a reasonable, natural, or necessary interpretation of its terms? It is productive, in my humble judgment, of much error and mischief to make the test simply whether some people would put such and such a meaning upon the words, however strained or unlikely that construction may be. The interpretation to be put on language varies infinitely. It varies with the knowledge,

> the mental equipment, even the prejudices, of the reader or hearer; it varies - and very often greatly varies - with his temperament or his disposition, in which the elements, on the one hand of generosity or justice, or, on the other, of mistrust, jealousy, or suspicion, may play their part. To permit, in the latter case, a strained and sinister interpretation, which is thus essentially unjust, to form a ground for reparation, would be, in truth, to grant reparation for a wrong which had never been committed."

[44] Thirdly, another significant factor which I bear in mind in approaching the words used in the article is that I must consider the article as a whole and not in terms of isolated parts. In *Charleston v News Group Newspapers* [1995] UKHL 6 it was argued that, in appropriate circumstances, it is possible and legitimate to identify a particular group of readers who read only part of a publication which conveys to them a meaning injurious to the reputation of a plaintiff and that in principle the plaintiff should be entitled to damages for the consequent injury he suffers in the estimation of this group. Giving the judgment of the House of Lords, Lord Bridge said:

> "The first formidable obstacle which Mr Craig's argument encounters is a long and unbroken line of authority the effect of which is accurately summarised in *Duncan & Neill on Defamation,* 2nd ed. (1983), p. 13, para. 4.11 as follows:
>
> > 'In order to determine the natural and ordinary meaning of the words of which the plaintiff complains it is necessary to take into account the context in which the words were used and the mode of publication.'
>
> Thus, a plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage."
>
> The locus classicus is a passage from the judgment of Alderson B. in *Chalmers v Payne* (1835) 2 C.M. & R.156, 159, who said:
>
> > 'But the question here is whether the matter be slanderous or not, which is a question for the jury; who are to take the whole together and say whether the result of the whole is calculated to injure the plaintiff's character. In

> one part of this publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and antidote must be taken together.'"

This passage has been so often quoted that it has become almost conventional jargon among libel lawyers to speak of the bane and the antidote."

[45] Fourthly, a further factor which I must bear in mind is that there are different styles of writing. I note therefore what other members of the judiciary have previously said about the tabloid press and its use of language. As Neill LJ recognised in *Re W (Wardship: Publication of Information)* [1992] 1 FLR 99, a tabloid newspaper is entitled to publish a story "in a manner which will engage the interest of its readers." Also, Sir James Munby, President of the Family Division, observed in *Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam) that the language of the tabloid press can be "more robust, colourful or intemperate." These comments, with which I agree, do not of course give additional licence to tabloid newspapers to breach legal standards, but rather merely describe a different style of writing than that which might appear in other types of publication.

[46] Fifthly, I bear in mind that the reportage argument is an important one if society is to have a free press. In *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, Sir John Donaldson MR explained the crucial position occupied by the press as follows:

> "It is because the media are the eyes and ears of the general public. They act on behalf of the general public. Their right to know and their right to publish is neither more nor less than that of the general public. Indeed, it is that of the general public for whom they are trustees."

[47] The plaintiff's claim of defamation centres on two aspects of the MailOnline article. The first is the use of the word "killers" and the second is the use of the expression "on the run." The plaintiff alleges in his Statement of Claim that in their natural and ordinary meaning the words were meant and understood to mean that the plaintiff was "a killer." In respect of the use of the word "killers", the defendant argued that the suggestion that the plaintiff was "a killer" did not appear anywhere in the article and that the main headline referred to there being a "manhunt for Essex lorry tragedy 'killers.'" Undoubtedly, the public would legitimately expect that goal to be the police's objective. However, in the sub-headlines, it is stated that the Hughes brothers were "suspects" whom the police wished to "question." This is clearly not an imputation or declaration of guilt. Furthermore, the very first sentence of the article below the headline is also clear:

> "Detectives investigating the deaths of 39 people in a lorry in Essex are hunting two brothers suspected of manslaughter and human trafficking."

Furthermore, later on in the article it is stated:

> "MailOnline spoke to Christopher Hughes on the day the bodies were discovered but he denied he was involved."

[48] I, therefore, do not consider that the way in which the word "killers" was used in the article suggests that that word is being directly applied to the plaintiff, particularly so when the article is taken as a whole. The plaintiff's argument on this point is without merit.

[49] In respect of the use of the expression "on the run", the plaintiff alleges the defendant insinuated that, as a guilty person, he had made a decision to avoid law enforcement for that reason. The defendant responds that this was entirely consistent with the Essex Police statement that they wanted to speak to the plaintiff but had been unable to do so to date and were seeking information about his whereabouts. I conclude that a reasonable implication of the statement by the senior investigating officer that he wished Ronan and Christopher Hughes to "hand themselves in" and his statement that "Finding and speaking to the Hughes brothers is crucial to our investigation" is that they were avoiding contact with police. I do not consider that the use of the phrase "on the run" was inconsistent with the statement released by the Essex Police.

[50] For the avoidance of doubt, I observe that I also do not find the defendant's use of the verb "to hunt" problematic. The word does not in itself contain an implication that the individual being sought for is guilty. The dictionary definition means to "search determinedly for someone or something." The word "hunted" does not therefore imply the guilt of the plaintiff in respect of criminal offences. The word is a neutral word, implying earnestness, as in the example, "He desperately hunted for a new job."

[51] However, a court must do more than consider the specific words used in the article. It must go on to decide whether the material has been presented in a neutral manner. As was said in *Charman v Orion Publishing Group* [2007] EWCA Civ 972

> "The protection is lost if the journalist adopts what has been said and makes it his own or if he fails to report the story in a fair, disinterested, neutral way."

As Eady J noted in *Prince Radu of Hohenzollern v Houston and another* [2007] EWHC 2735 (QB) an article does not lose the status of "report" merely by including other material by way of background or journalistic colour, but a reader should be able to recognise what is reporting and what is not.

[52] It is at this point that I am obliged to consider again the style of language used by the defendant. As Eady J observed in *Ismail & Another v News Group Newspapers Ltd* [2012] EWHC 3056 (QB) "the headline was of course intended to be punchy and eye-catching" and the basic facts were given a "tabloid tweak", but he did not regard such a gloss as falling outside the permitted leeway. Accordingly, the defendant obtained summary judgment, and the Court of Appeal subsequently refused permission to appeal against that. Has the defendant in this case gone further than adopting a "punchy and eye-catching" style of writing? I do not consider that it has.

[53] Importantly, I am also satisfied that in the MailOnline article the defendant was not asserting the truth of the statements made by the Essex Police but rather merely repeating the fact that they had been made. There was additional material included in the article which had not been made by the police. For example, the article mentioned the existence of the company C Hughes Logistics. This is an entirely neutral fact, as the plaintiff's Statement of Claim recognises in its first paragraph when it states that the plaintiff is a business owner in the haulage industry. Any additional material is balanced by the fact that the article specifically reports that the MailOnline had spoken to Christopher Hughes and that he had denied he was involved in the incident. To use the phraseology employed by Ward LJ in *Charman v Orion Publishing Ltd,* was the article in the MailOnline a piece of investigative journalism where the author was acting as a bloodhound sniffing out bits of the story from here and there from published material and unpublished material, or was the author acting as a watchdog barking to wake the public up to the story already out there? I have to conclude that, when taken as a whole, the tenor of the article is that of the barking watchdog and not that of the sniffing bloodhound.

[54] I conclude therefore that, firstly, the words do not bear any defamatory meaning in respect of the plaintiff and, secondly, even if they had been defamatory, the plaintiff's claim has no realistic prospect of success in the face of the defendant's reportage defence.

The qualified privilege argument

[55] Qualified privilege has been described as "a buttress of free expression" (Laws LJ in *Curistan v Times Newspapers* [2008] EWCA Civ 432). It appears clear, not least from *Bento v Chief Constable of Bedfordshire Police*, that it is in the public interest for the police to communicate with the public, including through media briefings, during an investigation into a suspicious death so as to retain the community's confidence that the case was being taken seriously and to encourage the flow of information which may be of assistance. It is a category of qualified privilege. Mr Lavery did not seek to attack this principle. What he argued was that what was reported by the MailOnline could not go beyond what was stated by the police. The issue is therefore whether what the MailOnline reported was a fair and accurate representation of what the police communicated.

[56] Lord Denning memorably made the point in *Dingle v Associated Newspapers* [1964] AC 371, that fairness can be lost by the presence of extraneous material in a newspaper article:

> "If a newspaper seeks to rely on the privilege attaching to a parliamentary paper, it can print an extract from the parliamentary paper and can make any fair comment on it. And it can reasonably expect other newspapers to do the same. But if it adds its own spice and prints a story to the same effect as the parliamentary paper, and garnishes and embellishes it with circumstantial detail, it goes beyond the privilege and becomes subject to the general law. None of its story on that occasion is privileged. It has put the meat on 'the bones' and must answer for the whole joint."

[57] In *Alsaifi v Trinity Mirror Plc & Ors* [2017] EWHC 1444 (QB) Warby J summarised the well-established principles for determining whether a publication is fair and accurate for the purposes of the statutory privilege:

> "Fairness for this purpose means fairness in terms of presentation. In order to be fair and accurate for this purpose, an extract or summary need not be verbatim, or indeed accurate in every detail. It can be selective; and a fair, even if very brief, summary of the proceedings will be privileged. Minor inaccuracies and 'tweaking' will not displace privilege."

[58] In *Qadir v Associated Newspapers Ltd* [2012] EWHC 2606 (QB), [2013] EMLR 15, Tugendhat J observed at [68]:

> "What is fair and accurate is to be judged by comparing the words complained of with the document from which the words complained of are said by the defendant to be an extract. Where the complaint is of unfairness arising out of the omission to publish information extraneous to that document, such as another document or comments of the complainant, then that issue is to be decided under s.15(3) (public concern [now public interest] and public benefit) or s.15(1) (malice)."

[59] As Laws LJ explained in *Curistan v Times Newspapers* [2008] EWCA Civ 432 there are occasions where a newspaper takes the material that would be protected by qualified privilege and adds its own material to it. In *Curistan* therefore the article at issue included "both a report of Parliamentary proceedings and some comments of

the newspaper's own." It then became a hybrid publication. Laws LJ concluded that the publisher had "produced a critically different text."

[60] In *Hawrami v Journalism Development Network Inc & Ors* [2024] EWHC 2194 (KB) the defendants claimed qualified privilege (albeit the statutory version under section 15 of the 1996 Act). Their defence was that what had been published was based on a judgment given by Christopher Clarke LJ following a lengthy trial in the Commercial Court in *Excalibur Ventures LLC v Texas Keystone Inc and others* [2013] EWHC 2767 (Comm) and on transcripts of those proceedings. Steyn J said:

> "In my judgment, it is manifest that the article is a 'critically different text' in which the material contained in the Excalibur judgment and materials has been so embellished, indeed contradicted, and so intermingled with extraneous material, that the quality of fairness required for reporting privilege has been entirely lost."

[61] The question to be addressed therefore is whether the MailOnline has produced "a critically different text" by having embellished the material presented by the Essex Police or has intermingled the Essex Police material with extraneous material, so that the quality of fairness required for qualified privilege has been entirely lost.

[62] One of the difficulties in this case is that the plaintiff cannot demonstrate exactly what was said by the Essex Police. I was presented with no video or transcript of what was said at the press conference by the police. The only indication of what had been said was the printout from the Essex Police website described as "an update." But there was no clear evidence of what exactly was said (unlike for example in *Curistan* where there was a record of what was said in Parliament through Hansard).

[63] Utilising the only evidence available from the parties as to what was said by police, namely "the update" from the police website, I do not consider that a court could be satisfied that the MailOnline article amounted to "a critically different text" from what was said by the police. To express the same idea in different words, I am not satisfied that the MailOnline went beyond "tabloid tweaking" and embellished the Essex Police material or intermingled extraneous material with it, so that the quality of fairness required for qualified privilege has been lost. I therefore conclude that the defendant has a robust defence of qualified privilege and the plaintiff's claim appears to have no realistic prospect of success.

The Section 15 argument

[64] The section 15 argument, dealing with the statutory version of qualified privilege, has certain resemblances with the Common Law qualified privilege argument raised by the defendant. But there are other aspects also to consider.

[65] It is of note that the plaintiff's Statement of Claim does not plead any allegation of malice despite the fact that proof of malice is necessary to defeat a defence of qualified privilege. I do not take the absence of a pleading of malice into account in this application. The general approach to pleading defects is that a court will give the party concerned an opportunity of putting right the defect. Indeed, had this action proceeded further and an application not made for summary disposal, this would have been a matter which the defendant would undoubtedly have raised by way of a Notice for Further and Better Particulars.

[66] There is no dispute between the parties that Schedule 1 to the 1996 Act gives qualified privilege to a fair and accurate copy of, or extract from, a notice or other matter issued for the information of the public by or on behalf of an organisation which has police functions. I have already considered the issue of whether the MailOnline article amounts to a fair and accurate report and concluded that it was. However, this is not an end of the matter as far as section 15 is concerned.

[67] The plaintiff argues that by way of pre-action correspondence, and these proceedings, the plaintiff had requested that the articles published by the MailOnline be removed and that a clarification, apology and retraction be provided. Mr Lavery submitted that the defendants had failed to take any steps whatsoever to vindicate the reputation of the plaintiff. As a result, by virtue of section 15(2) of the 1996 Act he submitted that there was no defence available to the defendant because the defendant had been requested to publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction and refused or neglected to do so. Mr Heatley's affidavit on behalf of the plaintiff exhibited correspondence between the parties' solicitors to demonstrate that such correspondence had been sent.

[68] This submission on behalf of the plaintiff is necessarily founded on the crucial assumption that the published words were defamatory. Gatley explains in paragraph 16-8 of its 13th Edition (though it is expressed even more clearly in paragraph 17-007 of the 12th Edition) that there is no general right of reply in UK law but section 15(2) of the 1996 Act may provide some form of redress in relation to a defamatory publication. I have, however, already concluded that the publication in this instance was not defamatory of the plaintiff. The correspondence between the parties as to the lack of a clarification having been published is therefore without impact and Mr Lavery's argument must fail.

[69] Furthermore, I observe that the MailOnline did update the articles published to reflect the fact that Essex Police had determined that no further action was being taken against the plaintiff in relation to the matters under investigation in relation to the trafficking and the deaths. Mr Heatley's affidavit avers that the deaths were discovered on 23 October 2019, the updates to the newspaper articles were made on 30 October 2020 and on 1 November 2020, and that this was before the service of the plaintiff's Letter of Claim which was sent on 27 November 2020.

[70] Taking these matters into account, I consider that the defendant's defence under section 15 is also entirely viable.

The abuse of process argument

[71] In considering these arguments, I bear in mind the governing principles on strike out applications set out by the Court of Appeal for Northern Ireland in *Magill v Chief Constable of the Police Service of Northern Ireland* [2022] NICA 49.

Frivolous or vexatious

[72] Order 18 Rule 19(1)(b) provides that the court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that it is scandalous, frivolous or vexatious. These words are well understood by lawyers. In a legal context they mean that a claim is "obviously unsustainable" (*Attorney General of Duchy of Lancaster v L & NW Ry* (1892) 3 Ch 274 at 277) and does not contain "a serious question to be tried" (*Re M (Care: Contact: Grandmother's Application For Leave*) [1995] 2 FLR 86).

[73] The defendant's submission that the action ought to be dismissed on the basis that it was incontestably bad is simply a restatement that the defendant has, in its view, solid defences to the action. Having dealt with those matters already in this conclusion and having reached a conclusion that the defendant has good defences of reportage, qualified privilege and under section 15 of the 1996 Act and that the plaintiff's claim has no realistic prospect of success, then it follows that the action is frivolous and vexatious. Hence, it is also a matter which should be struck out under Order 18 Rule 19(1)(b).

The Jameel argument

[74] The defendant's second line of argument on abuse of process is a *Jameel* argument. I previously described the legal background and principles to a *Jameel* application in *Kelly v O'Doherty* as follows:

> "[79] … This test was introduced with a view to excluding trivial claims. In *Lachaux v Independent Print Ltd and another* [2019] UKSC 27 Lord Sumption observed that caselaw in the last two decades has determined that the damage to reputation in an apparently actionable case must pass a minimum threshold of seriousness. The first of two notable cases was *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946. The plaintiff had sued the publishers of the Wall Street Journal for a statement published online in Brussels to the effect that he had been funding terrorism.

The statement was shown to have reached just five people in England and Wales. The Court of Appeal rejected a submission that the conclusive presumption of general damage was incompatible with article 10 of the Human Rights Convention. Lord Phillips of Worth Matravers MR, delivering the leading judgment, observed (para 37) that:

> 'English law has been well served by a principle under which liability turns on the objective question of whether the publication is one which tends to injure the claimant's reputation.'

[80] But he held that the presumption could not be applied consistently with the Convention in those cases, said to be rare, where damage was shown to be so trivial that the interference with freedom of expression could not be said to be necessary for the protection of the claimant's reputation. The appropriate course in such a case was to strike out the claim, not on the ground that it failed to disclose a cause of action, but as an abuse of process. The Court of Appeal held that it was an abuse of process for the action before them to proceed 'where so little is now seen to be at stake' and duly struck it out.

[81] The effect of this decision was to introduce a procedural threshold of seriousness to be applied to the damage to the claimant's reputation. Two things are clear from the language of Lord Phillips' judgment. One is that the threshold was low. The damage must be more than minimal. That is all. Secondly, the Court of Appeal must have thought that the operation of the threshold might depend, as it did in the case before them, on the evidence of actual damage and not just on the inherently injurious character of the statement in question.

[82] The second notable case on this issue was *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985. It arose out of an application by the Defendant newspaper to strike out part of the particulars of claim in a libel action on the ground that the statement complained of was incapable of being defamatory. Allowing the application, Tugendhat J held that, in addition to the procedural threshold recognised in *Jameel*, there was a substantive threshold of seriousness to be surmounted before a

statement could be regarded as meeting the legal definition of 'defamatory' The judge's definition (para 96) was that a statement "may be defamatory of him because it substantially affects in an adverse manner the attitude of other people towards him or has a tendency so to do." He derived this formula from dicta of Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237. At para 94, he dealt with the relationship between the definition thus arrived at and the presumption of general damage, in terms which suggested that (unlike the *Jameel* test) the application of the threshold depended on the inherent propensity of the words to injure the claimant's reputation:

> 'If the likelihood of adverse consequences for a claimant is part of the definition of what is defamatory, then the presumption of damage is the logical corollary of what is already included in the definition. And conversely, the fact that in law damage is presumed is itself an argument why an imputation should not be held to be defamatory unless it has a tendency to have adverse effects upon the claimant. It is difficult to justify why there should be a presumption of damage if words can be defamatory while having no likely adverse consequence for the claimant. The Court of Appeal in Jameel (Yousef)'s case [2005] QB 946 declined to find that the presumption of damage was itself in conflict with article 10 (see para 37) but recognised that if in fact there was no or minimal actual damage an action for defamation could constitute an interference with freedom of expression which was not necessary for the protection of the claimant's reputation: see para 40.'

[83] In *Higinbotham (formerly BWK) v Teekhungam & Anor* [2018] EWHC 1880 (QB) Nicklin J helpfully summarised the principles to be applied in a *Jameel* application:

> '(i) The Court has jurisdiction to stay or strike out a claim where no real or substantial wrong has been committed and litigating the claim will yield no tangible or legitimate benefit to the claimant proportionate to the likely costs and

use of court procedures: in other words, 'the game is not worth the candle': *Jameel* [69]-[70] *per* Lord Phillips MR and *Schellenberg -v- BBC* [2000] EMLR 296, 319 *per* Eady J. The jurisdiction is useful where a claim 'is obviously pointless or wasteful': *Vidal-Hall -v- Google Inc* [2016] QB 1003 [136] *per* Lord Dyson MR.

(ii) Nevertheless, striking out is a draconian power and it should only be used in exceptional cases: *Stelios Haji-Ioannou -v- Dixon* [2009] EWHC 178 (QB) [30] *per* Sharp J.

(iii) It is not appropriate to carry out a detailed assessment of the merits of the claim. Unless obvious that it has very little prospect of success, the claim should be taken at face value: *Ansari -v- Knowles* [2014] EWCA Civ 1448 [17] per Moore-Bick LJ and [27] per Vos LJ.

(iv) The Court should only conclude that continued litigation of the claim would be disproportionate to what could legitimately be achieved where it is impossible "to fashion any procedure by which that claim can be adjudicated in a proportionate way": *Ames –v- Spamhaus Project Ltd* [2015] 1 WLR 3409 [33]-[36] *per* Warby J citing *Sullivan –v- Bristol Film Studios Ltd* [2012] EMLR 27 [29]-[32] *per* Lewison LJ.'"

[75] Earlier in this judgment I have concluded that the use of the word "killers" in the article was not applied to the plaintiff and hence was not defamatory of him. I also concluded that the use of the expression "on the run" was not inconsistent with the statement released by the Essex Police and hence the article as a whole was not defamatory. If I am incorrect in respect of my view of the words "on the run" and they do indicate the plaintiff was evading law enforcement, then I consider that under the *Jameel* approach, it might well be the position that, in the words of Eady J, "the game is not worth the candle" if that was the limit of the defamatory expression. This might well depend on the parties putting forward affidavit evidence as to when and how the plaintiff subsequently came to be interviewed. In the event that he came forward immediately upon the media reports occurring, it might be an easier argument that the expression was defamatory and that the action should not be struck out under the *Jameel* approach. If it took a number of weeks for

him to come forward to police or was interviewed only because he was found and arrested by police, and he did not have a good explanation for his delay in coming forward, then the expression "on the run" might be regarded as entirely accurate. On a sliding scale between those two possibilities might be circumstances where a *Jameel* approach would be justified. Without clear affidavit evidence as to what occurred it is impossible to make a decision on this issue. I, therefore, consider that the *Jameel* limb of the defendant's abuse of process argument must fail.

The previous proceedings argument

[76] Inevitably, I must conclude that the defendant has not placed before the court sufficient material to be successful under this heading. Mr Hopkins has referred me to the decision in *Schellenberg v BBC* where the court struck out a defamation action on the basis that the claimant had previously commenced similar actions against the Guardian and The Times but had then settled them to his detriment.

[77] However, in reaching his decision, Eady J indicated in his judgment that he had significant material before him upon which to reach such a decision. He noted that Mr Schellenberg had filed a witness statement explaining how many witnesses had been heard in the previous action, the offer that had been made by the other side, the costs implications for Mr Schellenberg if he did not settle, and an analysis of how the action before Eady J was materially different from the compromised proceedings before Morland J. Eady J also had before him in *Schellenberg* the pleadings in the previous actions against The Guardian and The Times, quotations from Morland J, in the previous litigation as to the likelihood of the success of the action. Morland J was recorded as having said that the comments made in the newspapers in his view amounted to fair comment on facts that he would have found to be true. He stated that if he had been trying that case on his own, without a jury, it is likely that he would have already come to the conclusion that sufficient facts had been proved to be true to justify the comments that have been made about Mr Schellenberg.

[78] By way of comparison with *Schellenberg*, I have had no sight in the case before me of the original article in The Independent which was complained of by Mr Hughes; I have not been furnished with copies of the pleadings in that case; there has been no analysis either in terms of affidavit evidence or in terms of submissions from counsel as to the similarities and differences between this action and Mr Hughes' action against The Independent; and there has been no indication of any view expressed by McAlinden J about the viability of the proceedings against The Independent.

[79] Eady J subsequently commented about what he had said in *Schellenberg* in his later decision in *Howe & Co v Burden* [2004] EWHC 196 (QB) where he said:

> "It will be remembered that there had been a lengthy trial which the claimant had abandoned without a definitive

> result having been achieved. The essential point was that he had the opportunity in those proceedings of having a determination on the merits of substantively the same issues as those in the later action which came before me. That was the context of the remarks."

[80] Mr McDonnell's affidavit states that the defendant relies on "the novel argument" that the essential facts and matters going to liability are the same as those already raised in earlier proceedings. He states that the previous proceedings were based on an article by The Independent which is not the same article that was published by the MailOnline. Those proceedings were resolved, and the reasons and terms are privileged.

[81] Not only do I therefore have nothing approaching the volume of material available to Eady J in *Schellenberg* which led him to make the decision he made, but the defendant has put no evidence before me as to what the issues were in the Independent proceedings.

[82] I agree with Mr Lavery's observation that individual publications by different media sources have to be treated individually (unless there is clear evidence before the court that the two published materials are the same). The absence in evidence of a copy of the impugned publication from The Independent means that the court cannot compare the impugned publication by the MailOnline with the publication by the Independent which ended in judgment being marked for the defendant. I must, therefore, also reject this limb of the defendant's argument on abuse of process.

Order

[83] Having considered the defences of reportage, qualified privilege and statutory privilege under section 15 of the 1996 Act being put forward by the defendant, I conclude under section 8 of the Act that the plaintiff has no realistic prospect of succeeding in his defamation claim and that there is no reason why it should be tried. I must, therefore, dismiss the plaintiff's claim.