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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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BETWEEN:

ARLENE FOSTER

Plaintiff:

and

CHRISTIAN JESSEN

Defendant:

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Mr David Ringland QC led Mr Hugh MacMahon (instructed by Mr Paul Tweed of Gateley Tweed, Solicitors) on behalf of the Plaintiff
Mr Gavin Miller QC led Mr Peter Hopkins (instructed by Ms Olivia O'Kane of Carson McDowell, Solicitors) on behalf of the Defendant for the purposes of making an application for leave to enter a late appearance

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McALINDEN J

Introduction

[1] The plaintiff, Mrs Arlene Foster, brings this application for an assessment of damages in relation to a defamatory statement published by the defendant via his Twitter account between 23 December 2019 and 7 January 2020. Following initial publication of the defamatory statement on the defendant's Twitter page on 23 December 2019, a letter of claim was served on behalf of the plaintiff on 2 January 2020. The tweet and the thread of comments that the original tweet engendered on the defendant's Twitter page between 23 December 2019 and 7 January 2020 were removed on 7 January 2020 (this being confirmed in an e-mail directed by the defendant to Mr Tweed on that date) but no other steps were taken by the defendant and as a result a writ of summons was issued on 28 January 2020 which was then served by process server on 4 February 2020 and by first class post on 9 March 2020.

[2] No appearance was entered by or on behalf of the defendant to this writ of summons and as a result the plaintiff issued an application for judgment to be marked in default of an appearance being entered and this application was dealt with by Master Bell on 7 September 2020. The plaintiff was granted leave to issue a

default judgment against the defendant. A copy of the judgment dated 29 September 2020 was served on the defendant by first class post on 13 October 2020 and by process server on 16 October 2020. The defendant took no steps to have judgment set aside. An application was made to the court to have damages assessed by a judge without a jury. The defendant was given notice that such an application was to be made and a copy of this application was served on the defendant by first class post, dated 22 January 2021 and by means of process server on 24 January 2021. The application was granted by the court on 29 January 2021 and the matter was listed for hearing on 14 April 2021. The defendant was informed of the date of hearing by letter dated 11 March 2021. The defendant was subsequently provided with copies of the trial bundle by way of process server on 12 April 2021. Separately, by way of first-class postal correspondence, the defendant was reminded of the date of hearing for the assessment of damages and was provided with a copy of the plaintiff's position paper prepared by Mr Ringland QC dated 8 April 2021. Apart from the initial e-mail response to the letter of claim sent to Mr Tweed by the defendant on 7 January 2020, the defendant did not engage in any way with Mrs Foster or those representing her. When the assessment of damages application came on for hearing, I was entirely satisfied that the defendant had been served with all relevant court papers in this case and I was of the opinion that the defendant had chosen simply to ignore these proceedings. In those circumstances, I was satisfied that the only outstanding issue for my determination was the assessment of the amount of compensation to be paid by the defendant to the plaintiff.

[3] The application was duly heard by me on 14 April 2021. The defendant did not appear nor was he represented at the application. Mr David Ringland QC led Mr Hugh MacMahon on behalf of the plaintiff, instructed by Mr Paul Tweed of Gateley Tweed, Solicitors.

Factual Background

[4] The plaintiff was born into a Church of Ireland family in County Fermanagh, her family home being in Lisnaskea, where her mother still resides aged 87. She attended the Collegiate Girls' Grammar School in Enniskillen and subsequently studied law at Queen's University Belfast. She subsequently qualified as a solicitor and initially practised as a solicitor in Enniskillen and Portadown. She last practised as a solicitor in 2007. The plaintiff evinced an interest in politics from an early age and initially pursued a career in politics along with her career as a solicitor. She was elected to the Northern Ireland Assembly in 2003 and to Fermanagh District Council in 2005. She sat as a councillor between 2005 and 2010. The plaintiff was a member of the Northern Ireland Policing Board between 2006 and 2007. She was the DUP spokesperson on children, young people, equality and human rights for a number of years up to 2007 when she was appointed Minister for the Environment. It was at this stage that she gave up her legal career to concentrate on her career in politics.

[5] Mrs Foster was Minister for the Environment in the Northern Ireland Executive between 2007 and 2008. Between 2008 and 2015, she was Minister for

Enterprise, Trade and Investment and for a period of six weeks in early 2010, she was appointed Acting First Minister. Between May 2015 and January 2016, Mrs Foster was Minister for Finance and Personnel with another spell as Acting First Minister in the autumn of 2015. She was appointed First Minister of the Northern Ireland Executive in January 2016 and retained this position after the Assembly elections in May 2016. She actively remained in this position until the collapse of the Executive in January 2017. Delicate negotiations to restore the Northern Ireland Executive were ongoing and had entered a crucial phase when the Defendant posted his tweet on 23 December 2019. These negotiations were successful and the Northern Ireland Executive was restored on 11 January 2020 with Mrs Foster again in post as First Minister. Mrs Foster is to relinquish the leadership of the DUP on 28 May 2021 and will resign as First Minister at the end of June 2021. It is worthy of note that Mrs Foster is the first female leader of the Democratic Unionist Party and the first female to hold the post of First Minister in Northern Ireland.

[6] The plaintiff has been married to her husband Brian since 1995. Prior to that, they had been going out together for nine years. The couple have three children, a girl (the eldest) and two boys. The two older children are in third level education and the youngest is in secondary level education. At the time of the defendant's tweet, the children were aged 19, 17 and 12. The family live in the village of Colebrook in County Fermanagh. They are active members of the Church of Ireland congregation in Colebrook. The Church of Ireland is an important and integral part of Mrs Foster's life and she was a member of the parish choir when she lived in Lisnaskea. Her husband is a member of the select vestry in the Colebrook parish. In her evidence, the plaintiff described herself as a Fermanagh girl through and through and it is abundantly clear that despite holding the position of First Minister, her first priorities in her life were and are her family including her marriage, her home life including her Fermanagh roots, and her faith, and all these priorities merge and mingle to make her the person that she is and represent core aspects of the plaintiff's life.

[7] The defendant, Dr Christian Jessen, is a practising doctor who it would appear formerly worked in a clinic in Harley Street in London as well as being an author and a television celebrity who has co-presented such shows as "Embarrassing Bodies" and "Supersize vs Superskinny." Dr Jessen appears to also be active on the internet and on social media. He has his own webpage and a Twitter account which he opened in 2009. At the time of the offending tweet, he had over 311,000 followers on Twitter. If one visits his webpage http://www.christianjessen.co.uk it appears to be a portal to an online or virtual medical clinic where a "patient" can book either 30 minute or 1 hour virtual "appointments" with Dr Jessen. He describes this service in the following manner:

> "The Covid-19 pandemic has taught us many sobering lessons which, I'm quite sure, will make us all better patients, and better doctors. We have seen that doctors

> can offer effective and efficient online clinic services to patients anywhere in the world. So I have decided to move from the traditional clinic setting and work virtually, enabling more patients who want to consult with me to do so, without the need to travel. I continue to work with all conditions including sexual health, psychological and psychosexual medicine and, of course, anything that you might consider 'embarrassing.' Getting the advice and treatment you need has never been simpler."

[8] It is important to note that Dr Jessen specifically states on his website that the reason why he decided to move from the traditional clinic setting to working virtually was because doctors can offer effective and efficient online clinic services to patients anywhere in the world, enabling patients who want to consult with him to do so, without the need to travel. The importance of this will become apparent at a later stage of this judgment.

[9] Dr Jessen describes himself on his website as a health campaigner who combines his medical career with a successful media career. He describes himself on his Twitter page in the following terms: "'TV Doctor' (according to my critics) and scourge of pseudoscience. Old before my time. A patient with patients. Good without god. Definitely not homeopathy."

[10] It would appear that Dr Jessen uses Twitter as a platform to comment on matters relating to homosexuality. He frequently highlights and challenges what he perceives as homophobic actions or comments made by others in the public arena. For instance, on 17 February 2021 he tweeted: "I can't believe I dared to tweet this…🤣" He then proceeded to retweet a statement that he tweeted on 6 January 2014 which was in the following terms: "Being gay 'ain't normal' says a man who has spent his life being fisted in the ring. Nice one @holyfield #CBB." The original tweet by Dr Jessen would appear to have been made in response to a comment made by the "Big Brother" contestant and former world heavyweight boxing champion, Evander Holyfield, when he appeared on the Channel 5 programme in early 2014 to the effect that being gay "ain't normal" and can be "fixed."

[11] Dr Jessen is obviously a high-profile media personality and his position as a practising clinician and the forthright manner in which he expresses his views on matters close to his heart means that he has attracted a large following on social media and it is reasonable to assume that a large number of those following him attach weight, significance and credibility to statements made by him on Twitter and other platforms and it is to three particular statements made by him on Twitter that I now turn.

[12] During the week or so leading up to Christmas 2019, Mrs Foster was engaged in intense negotiations with a view to the re-establishment of the Northern Ireland

Executive. It was during the period that a number of anonymous tweets were posted alleging that Mrs Foster had been discovered having an affair with one of her Close Protection Officers and that her marriage had broken down. The plaintiff became aware of these Tweets when close political colleagues contacted her to advise her as to what was been put out on social media. These tweets were utterly baseless and they were very upsetting and hurtful and the plaintiff's immediate reaction was not to do anything which would raise the profile of these tweets in an effort to protect her children in the run up to Christmas. She was also deeply involved in intense and delicate negotiations at the time and she did not want to allow these scurrilous claims to distract her from what she perceived to be very important work. Mrs Foster gave evidence that she does not consider it to be coincidental that these tweets emerged at this time and that the timing of the publication of these baseless claims was deliberately chosen to undermine her and impede her ability to successfully conclude the negotiation process.

[13] Then on 23 December 2019, at 7.50 p.m. Dr Jessen, the defendant, posted the following tweet: "Rumours are bouncing around that the DUPs Arlene Foster has been busted having an affair. Isn't she the 'sanctity if marriage' preaching woman? It always comes to bite them in the arse in the end. Rather satisfying for us gay boys who she made feel even shittier…." A screengrab of the defendant's Twitter page taken on 6 January 2020 reveals that by that time this message had been retweeted (posted on other Twitter users' pages) 517 times and had been "liked" approximately 3,500 times. This means that 517 other Twitter users specifically incorporated the original tweet into their Twitter pages and at least 3,500 Twitter users read the tweet and have indicated they have done so by liking it. This does not account for those Twitter users who read the tweet but did not consider it appropriate to specifically signify that they agreed with its contents, nor does it account for those who do not have Twitter accounts but who heard about this Tweet and searched for it on the internet and read it by that means.

[14] Returning to the events of 23 December 2019, shortly after the initial tweet, at 8.05 p.m., the defendant corrected a typographical error so that the reader should read the original tweet as including the phrase "sanctity of marriage" as opposed to "sanctity if marriage." Later that same evening another Twitter user tweeted in response to the defendant's tweet: "Please, please let it be with a woman." Another Twitter user replied in the following terms also on 23 December 2019: "With her chauffeur. Who is Catholic. So if it's true at least she is an equal opportunities hypocrite." On the same night, yet another Twitter user tweeted the reply: "Let's hope its true she protests too much." The plaintiff was made aware of the tweet that evening when the DUP's Director of Communications who is based in Northern Ireland, contacted her and sent her a screenshot of the tweet. By that time, the tweet has been retweeted 21 times and had received 297 likes. In her evidence, the plaintiff recounted how she felt utterly humiliated and very deeply hurt in that the relationship that she holds dearest in her life was "trashed" in this very public fashion. She also found it really upsetting that such a high-profile public figure was

prepared to put his name to these baseless allegations. She was so upset she was unable to sleep that night.

[15] The plaintiff and her husband discussed matters and decided that immediate action had to be taken. The plaintiff contacted her solicitor Mr Tweed the following day and instructed him to take such action as was necessary to get the offending tweet and any resulting threads taken down. Mr Tweed was unable to confirm an address for the defendant on 24 December 2019 so as an initial step he posted the following response on the defendant's Twitter page:

> "I am putting Dr Christian Jessen on notice in relation to a totally false allegation he has tweeted regarding DUP Leader and former NI First Minister, Arlene Foster. Legal action will also be taken against any persons who have retweeted this highly defamatory allegation."

[16] The trial bundle, between pages 16 and 76 contains printouts of the numerous tweets made by other Twitter users in response to the original tweet of the defendant and in many cases to the defendant's tweet and Mr Tweed's tweet. I will only refer to some of them that best encapsulate the content of all the tweeted comments. Some of these Twitter users appear to be identifiable by the name they have chosen for their account, others appear to have taken steps to protect their identity. In this judgment, I have chosen not to refer to any other Twitter user by name as some of the more offensive responses were anonymous. On 24 December 2019, the following response was tweeted to the defendant's original tweet: "He must be hard up." Yet another Twitter user replied to this specific comment on 1 January 2020 in the following terms: "You mean harDUP?" On Christmas Day 2019, the following response to the original tweet was posted by yet another Twitter user: "Good on ya Doc…Sick sore and tired of their hypocrisy over here! Getting into bed with Theresa May was their biggest mistake……The rest of the UK got to see what we have been dealing with over here! #DUPDinosaurs #Corrupt." The importance of this comment is that it clearly demonstrates that a Twitter user in Northern Ireland had by that time become aware of the defendant's tweet and has responded to it with approval.

[17] Mr Tweed's twitter post also attracted a number of responses. One such response on 24 December 2019 was "I retweeted it, sue me." Another was simply "Me too." Another such response on 25 December 2020 pointed out that Mr Tweed's reply had "pushed the original tweet through to your 12.3k followers. Everyone that liked and RT'd you has also pushed original tweet to their followers. So far you have generated over 100,000 impressions of @DoctorChristian tweet. Who sues you? @DUPleader." Crucially, also on Christmas Day, Dr Jessen had responded to this tweet by tweeting "lol" (laugh out loud). Also on Christmas Day another Twitter user replied in the following terms:

> "This should be fun DUP UDA anti-Gay Marriage Rights suing Brexit token Gay Celebrity Doctor MEP for mentioning what everyone had heard that there are rumours that Johnston wasn't the only one who fucked the DUP UDA boss."

[18] Further tweeted responses on Christmas Day included the following:

> "If the rumours are true it is very serious accusing someone who makes their living as chauffeur of doing something that could only be accomplished blind drunk"
>
> "What is Arlene's favourite cocktail? A screwdriver"
>
> "Streisand Effect"
>
> "Calling Barbara Streisand. Phonecall for Barbara Streisand"
>
> "The Streisand effect in all its glory"
>
> "I've heard a rumour that she is more corrupt than a 1970's met detective….bio fuels anyone."

[19] On Boxing Day 2019, at 12.26 p.m. Dr Jessen, in a general response to the various responses to his original tweet, posted the following tweet: "People are now comparing me to @BarbaraStreisand – this gay boy's life CANNOT GET ANY BETTER!!!" The so called "Streisand effect" is a social phenomenon which occurs when an attempt to hide, remove or censor information has the unintended consequence of further publicising that information, often via the internet. It may be the case that when Dr Jessen posted this tweet, he did not know what the phrase "Streisand effect" actually meant and he may simply have been revelling in what he perceived to be comparisons being drawn between him and Barbara Streisand, in terms of their vocal advocacy in respect of certain issues. Again, this issue will be addressed later.

[20] There was a further reply by another user of Twitter on 26 December 2019 in the following terms:

> "I for one am loving that the papers are now able to report what they weren't allowed to report before your tweet. Superb work Dr C!"

This tweet referred to the fact that main stream media outlets including those in Northern Ireland were by then covering the story from the perspective of legal

action being threatened by the plaintiff in relation to the defendant's original tweet. Also on 26 December 2019, another Twitter user replied as follows:

> "Arlene thinks she can bully everyone especially you pesky gays keep up the good work doc."

[21] On 27 December 2019, another Twitter user replied to the original tweet in the following terms: "Aul bitch." On 28 December 2019, the following response was tweeted: "don't worry nobody believes any human being with an ounce of dignity would ride that boot into battle." Subsequently, on 30 December 2019 another Twitter user replied as follows: "Funny how those injunctions have completely worked here – not a whisper apart from social media! #dinosaurs #hypocrites #rumours." The last Twitter post I wish to highlight which was posted in response to the defendant's tweet is one which was posted on 1 January 2020 by yet another Twitter user: "No stopping Arlene now - she's getting into bed with May as well…?!?" All these responses are clearly derogatory and disparaging. Some contain gross, base insult. Some contain allegations of dishonesty, hypocrisy and corruption and improper/unfair treatment of homosexuals.

[22] In the meanwhile, in the Foster household, the plaintiff had to sit down with her two older children on 24 December 2019 and explain to them what was happening on social media. She had to travel to Lisnaskea to see her 85 year old mother to explain the situation to her and assure her there was not a grain of truth in the statements appearing on Twitter. Mrs Foster also had to contact her sister by telephone in England. All these conversations were very difficult and distressing. She was also very distressed to learn that local constituents were contacting other party members in the local constituency and enquiring whether there was any truth in the statements appearing on Twitter.

[23] The Foster family, as is their usual practice, attended the Church of Ireland service in Colebrook parish church on Christmas Day. On the day after the service, Mr Foster, the plaintiff's husband got a call from the Minister who conducted the service to inform him that he had been telephoned by a journalist from a local paper enquiring whether the Fosters were at church on Christmas Day and, if so, whether they appeared stressed or distant from each other. In essence, this journalist was trying to get the Fosters' local minister to provide information about the demeanour of Mr and Mrs Foster which would support the accounts circulating on social media. The plaintiff, when she was informed of this, was deeply upset that the family's traditional private religious observances on Christmas Day should be subject to such scrutiny. That such an approach was made is, to my mind, truly shocking. The couple of days over Christmas 2019 were meant to be a brief respite from political life when the plaintiff could spend time with her family and escape the intense pressure of the negotiations to get the Northern Ireland Assembly up and running. Instead, that Christmas was largely ruined dealing with the untrue statements which had been posted on Twitter. Mrs Foster stated in evidence that she looked at the defendant's Twitter page on one occasion during this period in order to see for

herself what was being published. Her upset at what she read was such that she could not bring herself to view it on any subsequent occasion. It is important to note that Mrs Foster does not have a Twitter account. She had to search the internet to find a link to the tweet and the subsequent thread. It was not difficult to find.

[24] Mr Tweed, on behalf of the plaintiff, issued a letter of claim on 2 January 2020. In this correspondence, Mr Tweed restated the plaintiff's categoric and emphatic denial that she had committed adultery with her driver and that her marriage was a sham. This letter of claim reminded the defendant that, as of 2 January 2020, his defamatory tweet remained accessible on his Twitter page even though he had been put on notice on 24 December 2019 that the said tweet was false and defamatory. The letter of claim referred to the defendant's acknowledgement and apparent enjoyment and thus encouragement of responses to his original tweet including the suggestion that Mr Tweed by his actions had only succeeded in drawing further attention to the tweet; the so-called "Streisand effect." The letter stated that this behaviour by the defendant "has further exacerbated the damage caused to our client's reputation by portraying her as a liar and a hypocrite in her denials."

[25] The letter concluded by stating the following:

> "Our client is entitled to, and requires, the following steps to be taken by you forthwith, namely:
>
> (i) The removal of the offending tweet from your *Twitter* account;
>
> (ii) Your undertaking not to republish or retweet the subject or related allegations;
>
> (iii) The publication of a comprehensive retraction and apology, in terms and in a manner to be first agreed with us;
>
> (iv) Your proposals for compensating our client; and
>
> (v) Reimbursement of her legal costs.
>
> We await hearing from you within the next seven days, failing which we have instructions to institute legal proceedings against you in the High Court of Justice in Northern Ireland without further notice.
>
> We would urge you to pass this correspondence to your legal advisors without delay."

[26] There was no immediate response to this letter of claim and the tweet remained on the defendant's Twitter page along with all the responses and, as was stated by Stephens J in *Elliot v Flanagan* [2017] NI 264 "the speed of response is a particularly relevant matter to be taken into account in defamation proceedings." When the defendant did respond, he responded by e-mail in the following terms:

> "I received your letter which was sent to a general clinic e-mail address when I visited the clinic today.
>
> Whilst I do not agree with the suggestion that my tweet gives rise to a claim in defamation, I confirm that I have removed it from my account without any admission of liability and have no intention to re-publish it.
>
> I trust this resolves the matter."

[27] It is accepted by the plaintiff that the defendant removed the tweet and thread of responses from his Twitter page on that date. However, this would have had no impact on the presence of the tweet on the Twitter pages of other Twitter users who had retweeted it during the time that it remained on the defendant's Twitter page and we know that the number of retweets as of 6 January 2020 was 517. It is undoubtedly the case that publication did not come to an end on 7 January 2020 with the removal of the tweet from the defendant's Twitter page. There is no evidence to suggest that the defendant took any steps to identify those individuals who had retweeted his original tweet or to request them to take down the retweets from their Twitter accounts. I consider it very likely that the original tweet continued to appear on the Twitter accounts of those who had retweeted it. I find that in this manner the tweet could still be read and was read, even after it had been taken down from the defendant's Twitter account.

[28] Further, there is no evidence as to the number of followers that each of the 517 Twitter users who retweeted the defendant's tweet had at the relevant time. It is impossible to state with any degree of precision how many Twitter users ultimately read the defendant's tweet as a result of it being retweeted by at least 517 of the defendant's followers. There was no evidence as to whether any of the persons who received a retweet from the 517 individuals themselves retweeted it. Bearing in mind that the defendant at the relevant time had approximately 311,000 followers and that the defendant's tweet was retweeted at least 517 times and was liked by approximately 3,500 other Twitter users, it is clear that the publication in this case was on a very large scale and that does not take account of those individuals who became aware of the contents of the defendant's tweet by reason of it being the subject of coverage on mainstream media outlets in the context of reporting of the fact that legal proceedings had been threatened but despite that the defendant had failed to take down the offending tweet. The entirety of the evidence in this case clearly demonstrates that there was widespread publication in Northern Ireland and

the assertion that a significant majority of Dr Jessen's followers on Twitter reside outside Northern Ireland does not detract from that inescapable conclusion.

[29] In relation to Dr Jessen's pithy response to the letter of claim on 7 January 2020, Mr Tweed, on behalf of the plaintiff, responded by e-mail to Dr Jessen on 9 January 2020 in the following terms:

> "With respect, your decision to publish in the first place, which has been exacerbated by your inordinate delay in removing the offending material, has resulted in serious reputational damage to our client.
>
> Our client therefore requires your immediate proposals for the publication of a comprehensive retraction and apology, to be agreed with us at first instance, and also your proposals in relation to damages and costs as outlined in our letter.
>
> We would again urge you to appropriate legal advice without delay.
>
> In the meantime, we would confirm that legal proceedings are in the process of being drafted for issue in the High Court of Justice in Northern Ireland."

[30] There was no response to this e-mail. There was no response to any of Mr Tweed's 10 subsequent letters or e-mails sent between 20 January 2020 and 9 April 2021. There was no appearance entered by or on behalf of Dr Jessen when the writ of summons was duly served. There was no response when he was notified of the plaintiff's intention to mark judgment in default. Subsequent service of the default judgment did not evoke a response from Dr Jessen. Finally, there was no response to notification of the date for the assessment of damages or to the service of the court papers and the plaintiff's written submissions and as a result, it was necessary for Mrs Foster to attend court on 14 April 2021 and give evidence about highly personal matters involving herself and her family.

[31] In giving her evidence, Mrs Foster raised the issue of whether a man in her position would have been subjected to the same level of online abuse as she had been subjected to through the initial tweet and the responses. I tend to agree with her in that some of the most personally hurtful and abusive remarks could readily be labelled as misogynistic. Mrs Foster indicated that she had faced such abuse throughout her political career but that does not make it any easier to cope with and I am sure she is not the only female politician in Northern Ireland who has been the subject of such abuse. I note that Mrs Foster does not have a personal Twitter page and does not involve herself with social media simply because of the nature and extent of the abuse to which she has been subjected to in the past.

[32] Having referred to the online treatment of other female politicians in Northern Ireland, I think it is appropriate at this stage to note that Mrs Foster was specifically asked by me if this matter was brought up by other politicians from opposing parties during the course of the delicate multi-party negotiations that were taking place at this time. I must state that I was greatly heartened to hear from Mrs Foster that those representatives of opposing parties engaged in the negotiations who did raise the matter universally expressed their concern and support for her and her family at that difficult time and it is to the credit of all those who did so. Mrs Foster drew great comfort from this and it is a positive development that following devolution, a good number of our local politicians across the political spectrum are wives and mothers who are sensitive to such issues as gender targeted abuse and can offer support and comfort when they see someone being attacked in this way.

[33] In relation to the core allegation that she had been discovered having an affair with her driver, Mrs Foster gave evidence explaining the security arrangements which are in place for her personal protection as a prominent politician in Northern Ireland. She has been assigned a team of close protection officers and when she has to travel anywhere, she is transported in an armoured vehicle with two armed police officers accompanying her. This is a long-standing arrangement and naturally she has got to know these officers as they have been with her for some time. For instance, she knows that all four of her regular team of police officers are married. She is aware that they may be identified in press photographs taken at public events because they are frequently seen standing in the background. In addition to the grave distress that she experienced at her family being exposed to these allegations in respect of her alleged behaviour, Mrs Foster testified that she was deeply upset that those officers' families might be experiencing the same or similar levels of upset and distress during the Christmas period.

[34] Concentrating on the allegation of adultery, it was clear from Mrs Foster's demeanour in the witness box that she found the whole experience of giving evidence about such personal matters to be very distressing. She emotionally stated that this allegation went to the very core of who she was and it cut her to the very core. For Mrs Foster, her relationship with her husband is the closest relationship in her life and her home life is the most important aspect of her life. It is from this relationship and this protective sanctuary that she gained the strength and resilience to perform her role as First Minister. I entirely accept Mrs Foster's evidence that the public "trashing" of the most precious relationship in her life by a prominent public figure caused her grave upset, distress, embarrassment and humiliation.

[35] Associated with the allegation that Mrs Foster had committed adultery is the allegation that she was a blatant hypocrite who on the one hand publicly preached about the sanctity of marriage at the same time as engaging in an affair with her driver. This accusation also stung deeply due to the depth and sincerity of her religious faith. She readily admitted that she holds very traditional religious views

about matters such as marriage. For her, marriage is a sacred relationship between a man and a woman. The accusation that she hypocritically made regular public pronouncements to this effect while at the same time engaged in a clandestine sexual relationship with someone assigned to protect her was extremely upsetting and distressing and I fully accept her evidence in that regard.

[36] Mrs Foster's evidence about the sanctity of marriage is clearly relevant to the issue of homophobia which is put forward as one of the bases of the claim for defamation. Mrs Foster was the DUP spokesperson for equality and human rights issues. She is acutely aware of the sensitivity of subjects such as same sex marriage. Her traditional religious views which I entirely accept are genuine and sincere and are an important part of who she is, are views which she is entitled to hold and entitled to express. Should she be pilloried with the accusation that she is homophobic because she sincerely holds such traditional religious views? As Northern Ireland becomes a more secular society, there must be room or accommodation for an individual to hold such traditional religious views without being automatically classed as homophobic. Mrs Foster, in her evidence stated that same sex marriage was now lawful in Northern Ireland and she respected the law and as a lawyer I would expect no less of her. Mrs Foster specifically denied having any negative attitudes or feelings towards individuals who were homosexual. She described genuine upset at being tarred with the brush of homophobia. When asked if she could understand why some individuals could interpret her views as being homophobic and whether there was anything she could do to persuade such individuals that she was not, she referred again to social media and the likelihood that any explanation would have to be put out on social media and stated that it was very difficult to encapsulate a nuanced position on a complex subject in 140 characters, referring to the former restricted nature of the size of individual tweets.

[37] Mrs Foster has strong traditional religious beliefs and she is entitled to hold those beliefs and her right to do so must be protected in a democratic society that values diversity, tolerance and respect for the rule of law. Her background as a lawyer has engrained in her the importance of these civic values. She is bound by her office to promote respect for the rule of law and that includes respect for the law on same sex marriage. The espousal by an individual of homophobic views or the promotion by that individual of a homophobic agenda, if established, would be incompatible with that individual holding the Office of First or Deputy First Minister in the Northern Ireland Executive and, therefore, to level such an accusation against Mrs Foster had added significance in that it called into question her fitness for office, especially at a time when negotiations were ongoing in relation to the re-establishment of the Northern Ireland Executive. I accept her evidence that she is not homophobic and I further accept her evidence that when such an allegation is levelled against her, it causes her significant upset and distress.

[38] This brings me briefly to the issue of the ordinary and natural meaning of the words contained in the tweet. I entirely accept that the ordinary and natural meaning of the words used meant and were intended to mean that the plaintiff had

been engaging in an adulterous affair; is a hypocrite; and is homophobic. The multitude of responses interpreting the tweet in this way leaves me in no doubt that this is the ordinary and natural meaning of the words contained in the tweet. The content of these responses convinces me that there were many to whom the defendant's tweet was published who did consider that the allegations contained therein were true and as a result of that thought the worse of the plaintiff and in doing so would, at least to some extent, have relied on the responsible position and prominent standing of the defendant, assuming that he would not have published such allegations unless he considered them to be well-founded.

[39] Mrs Foster gave evidence on 14 April 2021, following which I indicated that I would reserve my decision in respect of damages and give a full reasoned judgment as soon as possible. On Friday 16 April 2021, the court office was contacted by Ms Olivia O'Kane of Carson McDowell, Solicitors, who informed the office that she had been approached late on 15 April 2021 by Dr Jessen who apparently had only become aware of the assessment of damages hearing when friends had contacted him about the matter, following widespread press coverage of the hearing. Following this, on 19 April 2021, an application was lodged for leave to enter a late appearance on behalf of Dr Jessen for the purposes of challenging jurisdiction.

[40] Dr Jessen deposed in an affidavit that he had been suffering from mental health difficulties and as a result had given up his work, had retreated from public life and had moved in with his parents in order to recuperate. As a result, although he had received the writ, he had received no correspondence or papers thereafter and had not been aware of the fact that a default judgment had been obtained or that a hearing to assess damages had been arranged. He had assumed that no steps had been taken to progress the action following service of the writ because of Covid restrictions. He was under the impression that the courts were not operating due to the pandemic. Ms O'Kane also swore an affidavit which addressed the issues of service and jurisdiction. Paragraph 22 of Ms O'Kane's first affidavit refers to Dr Jessen obtaining "data analytics" regarding the extent to which any of Dr Jessen's followers are Northern Ireland residents. She refers to a date range from 20 March 2020 to 17 April 2021. This is clearly a typographical error. The exhibited documentation refers to a date range between 20 March 2021 and 17 April 2021.

[41] The matter was reviewed on 20 April 2021 when arrangements were made for Dr Jessen to give evidence in court in relation to the issue of service and he subsequently attended court to give oral evidence on 23 April 2021 during which he adopted his affidavit evidence and was then tendered for cross-examination by Mr Ringland QC on behalf of Mrs Foster.

[42] In his evidence, Dr Jessen asserted that, due to mental illness, he had retreated from public life and had moved in with his parents who live in Fulham in London (approximately five miles by road from his apartments). He had stopped work and had made the deliberate decision not to follow current affairs. In relation to his claim that he assumed that the courts had shut down due to the Covid pandemic,

Mr Ringland QC asked Dr Jessen whether he had been aware of the Johnny Depp libel trial that was covered extensively in the UK mainstream press, television news programmes and the internet. The trial before Nicol J sitting without a jury took place over a 16 day period in the Royal Courts of Justice in London in July 2020. The judgment dismissing Mr Depp's claim was delivered on 2 November 2020 (*John Christopher Depp II v News Group Newspapers Ltd and Dan Wootton* [2020] EWHC 1237 QB, with Mr Depp's appeal being dismissed by the Court of Appeal on 25 March 2021 *John Christopher Depp II v News Group Newspapers Ltd and Dan Wootton* [2021] EWCA Civ 423). Dr Jessen denied having any awareness of the trial or the widespread media coverage it engendered. However, he had to accept that on 3 May 2020 he had retweeted an item that had been published in the Sunday Times about Sir David King, the government's former chief scientific adviser, which would suggest that he had not cut himself off from all mainstream media dealing with current affairs. Further, I note that on 2 December 2020, Dr Jessen retweeted the following tweet from Jo Maugham, who describes himself as a director of the "Good Law Project", a Barrister and an Honorary Professor at Durham Law School:

> "We at @GoodLawProject are taking advice from several leading QCs in relation to yesterday's decision of the High Court which we believe to be legally, scientifically and morally flawed."

The case being referred to was the Divisional Court decision of *Quincy Bell and Mrs A v The Tavistock and Portman NHS Foundation Trust* [2020] EWHC 3274 (Admin), Dame Victoria Sharpe P, Lord Justice Lewis and Lieven J, which was handed down on 1 December 2020. It dealt with the issue of whether children with gender dysphoria could lawfully consent to treatment in the form of puberty blocking drugs.

[43] Earlier on 2 December 2020, Dr Jessen had responded to a tweet by Jo Maugham in which Mr Maugham had informed his followers that following the decision of the High Court on 1 December 2020, a "crowd funding" page in relation to transgender litigation had been re-opened. Dr Jessen's response was in the following terms: "Great work. Thank you for helping. X." Going back in time to 19 June 2020, Dr Jessen posted the following tweet:

> "I'm trying to stay off social media at the moment but I can't stay quiet about the potential changes to laws affecting trans people, making it more complicated to transition and access facilities such as toilets and changing rooms: a huge step backwards. Trans women are women!"

Going back even further in time, Dr Jessen tweeted the following on 17 March 2020:

> "Finally, I'm not really using social media much at the moment so be warned that I may not see your replies and be able to respond to them. Stay safe CX"

Shortly after this tweet, Dr Jessen tweeted the following:

> "For clarity: I'm not using social media at the moment as I've been really struggling with my mental health and Twitter isn't always the best place to be in such circumstances! I'll be back when better! X"

[44] Following this, on 2 April 2020, Dr Jessen tweeted about the extension of abortion rights to Northern Ireland in the following terms:

> "Some light in this darkness: after 50+ years of campaigning, access to safe, legal abortion is now available in N Ireland. This means women will finally be able to exercise autonomy over their bodies, and lead happier, healthier lives. Thankyou @Humanists UK and many others."

Dr Jessen may have been trying to stay off social media at that time but he was still active on Twitter between March 2020 and December 2020. On 5 April 2020, he commented on a CNN News item in which a woman, interviewed in her car while she was on her way to church in Ohio in the USA, told the interviewer that she was protected from the Covid virus because she was "covered in Jesus' blood." Further, Dr Jessen was obviously aware that the Prime Minister Boris Johnson had contracted Covid in April 2020 because he was tweeting sending the Prime Minister his best wishes for a speedy recovery on 6 April 2020. This followed the announcement that the Prime Minister had been admitted to hospital with Covid symptoms on 5 April 2020. Dr Jessen subsequently retweeted an item about Covid from "BuzzFeed News" on 7 April 2020. Thereafter, on 9 April 2020, Dr Jessen tweeted: "There is some pathetically lazy journalism going on at the moment. Is there nothing more important to write about….?" This would suggest that he was still following current affairs in April 2020. Dr Jessen tweeted on 12 April 2020 that he was delighted that the Prime Minister was "out of hospital and preparing to lead us once more!" It is to be noted that the Prime Minister was discharged from hospital on that date.

[45] On 3 May 2020, Dr Jessen tweeted a comment on a report on the BBC News about Covid 19 patients presenting with rashes. On 17 May 2020, Dr Jessen retweeted a news comment item which was critical of the review of gender recognition laws being conducted by Liz Truss, then the UK Equalities Minister. On 19 May 2020, Dr Jessen retweeted a tweet about streamlined HIV testing in Scotland.

[46] I also note that during the period between January 2020 and February 2021, Dr Jessen was regularly hosting and taking part in podcasts on the internet on

mental health-related issues. These podcasts took place on various dates between 20 January 2020 and 5 February 2021. During the podcast "Living in Lockdown" on 9 April 2020, Dr Jessen commented on reports in the news about 5G mobile telephone masts being vandalised due to concerns that 5G radio waves were being linked to the spread of the Covid virus. He also tweeted about this issue on 5 April 2020. Finally, on 9 December 2020, Dr Jessen also hosted an on-line book launch of an autobiography written by Dr David Nutt, an English Neuropsychopharmacologist.

[47] Having regard to the widespread coverage that the Depp libel trial received on all forms of media in July 2020, in early November 2020 and in March 2021, I find it very difficult to understand how Dr Jessen can honestly assert that he had no knowledge of that trial taking place at the Royal Courts of Justice in London in July 2020. However, I do not have to make a positive finding one way or another on this specific point because, having considered the activity on Dr Jessen's Twitter page during this time and, in particular, his tweets on 2 April 2020 and 2 December 2020, and having listened to excerpts of his podcasts, I am left in no doubt that he was following current affairs and knew full well that the courts were operating during the pandemic.

[48] Dr Jessen claims that the reason for him giving up his work in a clinic in Harley Street, retreating from public life and moving in with his parents was a marked deterioration in the state of his mental health. No medical evidence of any nature was provided to the court to support this claim. The only material that was provided was introduced via Ms O'Kane's second affidavit at paragraph 9. It would appear that Ms O'Kane was provided with two items of correspondence by Dr Jessen. The first item of correspondence is stated to be a letter dated 21 April 2021 from Tony Babarik, a psychotherapist, that indicated that Dr Jessen had been receiving weekly psychotherapy treatment since November 2019. No diagnosis is referred to. No further details are provided.

[49] The second item of correspondence is stated to be a letter from an unidentified consultant physician based at the Chelsea and Westminster Hospital, also dated 21 April 2021. The fact that the identity of the doctor who is the author of the correspondence is withheld is of some concern. The fact that the unidentified doctor is a physician and not a psychiatrist, is relevant in relation to the issue of diagnosis. For what it is worth, Ms O'Kane's affidavit states that the correspondence from this unidentified physician indicates that during 2019/2020, Dr Jessen required treatment "regarding a diagnosis known to be associated with mood disorder and depression." Ms O'Kane indicates that the correspondence goes on to state that Dr Jessen may have an "adjustment disorder related to his diagnosed physical illness borne out as a maladaptive behaviour of difficulty in coping." Ms O'Kane goes on to state that the unidentified clinician has been informed by Dr Jessen about a diagnosis of depression "and treatment for same with antidepressants from a Psychiatrist and treatment from a therapist." In essence, the diagnosis of depression is relayed to the court by Dr Jessen informing a physician who is unidentified, who writes a letter to

that effect to Ms O'Kane, who then places this information in an affidavit. One would have thought that a much more direct means of providing this information to the court would have been for the psychiatrist to have provided a report or note for the court. This did not happen.

[50] Looking again at Dr Jessen's Twitter page, I note that on 11 May 2020, Dr Jessen tweeted the following:

> "Big thank you to the endocrinology department at @ChelWestFT and Dr M.S for some excellent help and advice today. Learning to consult with colleagues when we are ill doesn't always come easy to us doctor! X."

This tweet may or may not relate to the diagnosed physical illness referred to in Ms O'Kane's affidavit. Whether it does or not is not a matter that needs to be determined by the court. The important matter is the court's assessment of Dr Jessen's claim that the reason for him giving up his work in a clinic in Harley Street, retreating from public life and moving in with his parents was a marked deterioration in the state of his mental health. There is no objective evidence supporting this assertion. The evidence supporting the existence of a significant depressive disorder is frankly very weak and deficient.

[51] The identification of the real reason behind Dr Jessen leaving the Harley Street Clinic on the evidence that has been made available to the court is, to say the least, problematic. In contrast to what Dr Jessen stated in his evidence, I note the content of his webpage, which is set out in paragraph [7] above. According to his webpage, it was a matter of choice for Dr Jessen "to move from the traditional clinic setting and work virtually, enabling more patients who want to consult with me to do so, without the need to travel." In summary, I am not satisfied to anything like a standard approaching the balance of probabilities that the reason for Dr Jessen giving up his work in a clinic in Harley Street, or retreating from public life and or moving in with his parents, if he actually did so, was a marked deterioration in the state of his mental health. I now turn to deal with Dr Jessen's specific evidence about service of correspondence, pleadings and other documentation in this case.

[52] Dr Jessen accepted that Mr Tweed's tweet did come to his attention over the Christmas period of 2019 but he had no idea who Mr Tweed was and had no idea that he was a prominent defamation lawyer with an international reputation. He did not carry out an internet search to discover whether Mr Tweed had any form of web profile. He considered that Mr Tweed's tweet might be an example of "trolling" and he stated that he doubted the bona fides of the tweet because he thought at the time that it would have been unprofessional for a lawyer to post a tweet of this nature. However, following receipt of the letter of claim on 2 January 2020, Dr Jessen could have been in no doubt as to the seriousness of the situation and it would appear that he immediately took steps to obtain legal advice.

[53] The second affidavit of Ms Olivia O'Kane provides the following information obtained from Harbottle & Lewis, Solicitors. It would appear that Dr Jessen e-mailed Harbottle & Lewis at 4.19 p.m. on 3 January 2020 thanking them for taking the time to talk "just now" and enclosed a copy of the letter of claim. Harbottle & Lewis responded by e-mail at 5.51 p.m. the same evening. This e-mail set out in draft form the response which Dr Jessen sent to Mr Tweed on 7 January 2020. I cannot accept that the draft response, when composed by Harbottle & Lewis on the evening of 3 January 2020, was factually accurate when it stated: "I received your letter, which was sent to my work e-mail address, when I returned to the office today." Dr Jessen stated in paragraph 7 of his affidavit that he received the letter of claim by e-mail on 2 January 2020. The response as drafted by Harbottle & Lewis on the evening of 3 January 2020 was materially inaccurate and misleading in relation to the issue of when Dr Jessen had received the letter of claim. The issue as to who is responsible for this materially inaccurate draft cannot be determined on the information available to the court. However, what is clear is that this statement was certainly not factually accurate when Dr Jessen sent the response by e-mail to Mr Tweed on 7 January 2020. It is also abundantly clear that Dr Jessen knew that the response was factually inaccurate and misleading when he sent it. Dr Jessen made no attempt to amend the draft that had been provided to him by Harbottle & Lewis on 3 January 2020 before he sent it on 7 January 2020 in order to ensure that it was factually accurate at the time that he sent it. The only amendment he made to the draft was to substitute the phrase "work e-mail" with the phrase "generic clinic e-mail address." When questioned about this matter, Dr Jessen had significant difficulty accepting that the statement referred to above was inaccurate, false and misleading at the time that it was sent. Furthermore, Dr Jessen could give no explanation whatsoever as to why he delayed sending the response. He received the draft from his solicitor on the evening of 3 January 2020. He delayed removing the offending tweets and responding to the letter of claim until the evening of 7 January 2020. What makes this delay more difficult to understand is the fact that his solicitor e-mailed him on 6 January 2020 at 9.59 a.m. enquiring whether he had received the solicitor's earlier reply and whether he had responded to Paul Tweed.

[54] One cannot enquire into the advice provided by Harbottle & Lewis in relation to the stance to be adopted to the contents of the letter of claim but what is clear from the stance that was adopted is that a decision was taken to play down the seriousness of the situation by having the response to the letter of claim issued by Dr Jessen via e-mail rather than his solicitors responding by formal correspondence. One further e-mail is worthy of note. On 7 January 2020, Dr Jessen responded to Harbottle & Lewis informing them that he had received their earlier e-mails and that he would send the draft response as proposed and would let them know if Mr Tweed responded to his e-mail.

[55] Dr Jessen sent the e-mail response to the letter of claim using his work e-mail address christian.jessen@doctorcall.co.uk on 7 January 2020. This was despite the fact that according to his evidence he already knew he was leaving that employment with his last scheduled clinical appointments taking place on 10 January 2020 and

would have no means of accessing this e-mail account after that time. It is clear that Mr Tweed replied to this e-mail address on 9 January 2020 at 2.31 p.m. in the terms set out in paragraph [29] above. He received no response to this e-mail correspondence. Dr Jessen's evidence is that he did not receive this e-mail. His evidence is that although he was in the clinic on 10 January 2020 in order to see his final list of patients, he saw those patients in a different room from the usual one and he was not able to access the room in which the computer was located from which he could log onto this specific e-mail account. He stated that another doctor was using that room on that particular day. He stated that since leaving the clinic on that occasion, he had been unable to access this particular e-mail account. The e-mail account was not set up on any other device or computer other that the computer in one particular room in the clinic. He stated that upon his employment coming to an end in January 2020, he did not make any arrangements for personal correspondence and e-mails to be forwarded to him by his former employer.

[56] Dr Jessen stated that the original letter of claim was sent by e-mail to clinic@doctorcall.co.uk which is the general clinic e-mail account that is accessed by secretarial staff. It would appear that the letter of claim was also posted to the clinic address at 121 Harley Street, London. It would appear that the letter of claim came to the attention of Dr Jessen's employer and Dr Jessen's evidence was to the effect that his employer expressed disappointment at this turn of events and this matter had caused him problems at work, somehow hastening his departure from the clinic. Despite knowing that he would be leaving the clinic in the near future, Dr Jessen responded to the letter of claim using a doctorcall.co.uk e-mail address. Dr Jessen was unable to state whether he was in the clinic on the afternoon of 9 January 2020 and whether he was in a position to check the christian.jessen@doctorcall.co.uk e-mail account on that date. However, he was certain that he did not check that e-mail account when he was in the clinic on 10 January 2020 which was his last day working in the clinic and he did not ask for any e-mails from that e-mail account to be forwarded to him. The evidence is that as of April 2021, e-mails that were directed to christian.jessen@doctorcall.co.uk were not bouncing back and were being delivered to that e-mail address. Dr Jessen must have anticipated that Mr Paul Tweed would quickly respond to his e-mail of 7 January 2020. Dr Jessen specifically stated that he would let Harbottle & Lewis know if a response was received. It is very difficult to understand why Dr Jessen would send an important e-mail using an e-mail account that he knew he would not have any means of accessing after he left the clinic at a time when he knew full well that his time at the clinic was coming to an end.

[57] Dr Jessen's explanation as to why he would not have received Mr Tweed's e-mail response sent on 9 January 2020 is very peculiar, to say the least. Even if I were to accept that Dr Jessen did not access the christian.jessen@doctorcall.co.uk e-mail account on 10 January 2020 or at any time thereafter, I simply do not believe that he would not have made some arrangements with his former employer to have personal e-mails and correspondence forwarded to him, particularly when his former employer was aware of the potential for a claim being instituted by

Mrs Foster and when Dr Jessen must have anticipated that there would be a response from Mr Tweed to a doctorcall.co.uk e-mail address. I do not need to decide whether Dr Jessen did receive Mr Tweed's e-mail of 9 January 2020. I strongly suspect that he did and that he decided to do nothing about it in the hope that whole affair would be forgotten about. In summary, I find Dr Jessen's evidence about the e-mail from Mr Tweed dated 9 January 2020 to be wholly unsatisfactory and unconvincing.

[58] A further e-mail enclosing a letter was directed to the christian.jessen@doctorcall.co.uk e-mail address by Mr Tweed on 20 January 2020. Dr Jessen's evidence was that he did not receive this e-mail either. He asserted that by that time he did not have access to this e-mail account. Dr Jessen again reiterated that his former employer did not forward any e-mail correspondence to him. He accepted in evidence that in order to prepare for the hearing on 23 April 2021, he had requested his former employer to confirm the last date on which he saw patients at the clinic. However, for some reason, he did not request his former employer to check whether there had been any correspondence or e-mails addressed to the christian.jessen@doctorcall.co.uk e-mail account and, if so, to forward any such correspondence or e-mails to him, even though the issue of service was going to addressed at the hearing on 23 April 2021. No cogent explanation was provided to the court for his failure to make such pertinent and reasonable enquiries.

[59] Dr Jessen gave evidence that at the start of 2020 he was living with his partner in an apartment at 77 Walpole House, 126 Westminster Bridge Road, London SE1. He accepted that he was recorded on the electoral roll as residing at that address for 10 years. He also accepted that in addition to owning apartment 77 in Walpole House he also owned apartment 79. His evidence was that approximately two weeks after his birthday in March 2020, his mental health became so fragile that he decided to return to live with his parents in Fulham. From the middle of March 2020 until April 2021, he did not reside in Walpole House and would only have visited those premises on a limited number of occasions in between those two dates. In April 2021, he moved back to Walpole House to take up residence in number 79. During this period when he was mainly residing with his parents in Fulham, his partner would, in the main, have been residing in number 77 Walpole House.

[60] Dr Jessen confirmed that Walpole House had a dedicated concierge service and that the individuals who worked in this capacity were attentive and reliable. Dr Jessen's evidence was to the effect that deliveries to apartments in Walpole House were usually accepted by the concierge service and were held in a store room where they were collected by residents. Occasionally, the concierge would deliver the material to the relevant apartment. Persons making deliveries were not usually granted access to individual apartments. However, the Royal Mail postman was permitted to deliver Royal Mail post to individual apartments.

[61] The statement of service made by the process server, Mr Duncan Redpath, dated 12 February 2020, indicates that on 4 February 2020, he attended Walpole

House and handed a copy of the writ in this action along with a notice of writ of summons to Alin Alexandru, the concierge on duty that day who confirmed that Dr Jensen resided in Apartment 77 and stated that he would ensure safe delivery to him. Dr Jessen confirmed in evidence that he knew Mr Alexandru and regarded him as efficient and conscientious. The evidence in the case indicates that this method of service was followed up on 9 March 2020 by service of a copy of the writ of summons and notice of the writ by first class post addressed to Dr Jessen at 77 Walpole House. It is not disputed that the writ of summons and notice of writ were served on Dr Jessen because on 30 April 2020, Dr Jessen e-mailed Harbottle & Lewis again and thanked them for talking to him and enclosed with the e-mail a number of photographs of the letter from Mr Tweed dated 9 March 2020 together with the writ of summons and the notice of writ. The only explanation that was forthcoming from Dr Jessen as to why he waited until the end of April 2020 before providing these documents to his solicitors was that as a result of delays in the postal service due to Covid, the documentation was only delivered to his apartment at the end of March 2020. But if that was the case, by the end of March 2020, Dr Jessen was already living with his parents and so he would not have known when the documentation was delivered. Further, he gave no evidence about having been contacted by anyone residing in Flat 77 at the time to inform him that there was mail for him. I, therefore, conclude that there is no cogent evidence to explain why Dr Jessen delayed contacting his solicitors about this important matter.

[62] Dr Jessen was adamant that the concierge, Alin Alexandru, who he knew to be efficient and conscientious, did not provide him with the material that had been delivered by Mr Redpath. I simply do not accept this evidence. I am satisfied that a dependable and reliable concierge service would have ensured that Dr Jessen was provided with the documentation delivered by Mr Redpath on 4 February 2020 and that Dr Jessen chose to take no steps in response to that documentation and only belatedly chose to respond to the writ and notice of writ when these were subsequently posted to him and this belated response took over 7 weeks from the date on which the documentation was posted to him.

[63] Strong support for these conclusions is found in the approach adopted by Dr Jessen to the advice which Harbottle & Lewis provided to him on 6 May 2020. On that date, Harbottle & Lewis advised Dr Jessen to approach Ms O'Kane with a view to retaining her to represent him in the proceedings issued in Northern Ireland. The e-mail also informed Dr Jessen that Harbottle & Lewis would be raising an invoice for the work done to date and this was done on 31 May 2020. Dr Jessen eventually paid the invoice raised by Harbottle & Lewis on 21 September 2020 but he did absolutely nothing about obtaining legal representation in Northern Ireland. He could not have forgotten about this matter. He had the advice of his solicitors on 6 May 2020. He had their invoice dated 31 May 2020 which would have reminded him about this matter and he paid the invoice on 21 September 2020 and this would again have served as a reminder to him. There is no cogent evidence to support the case that his state of mental health preventing him from acting on his solicitors' advice at that time. He was able to host podcasts on 6 May 2020 and 15 May 2020.

He was able to tweet about the review of gender recognition laws in the UK on 17 May 2020. I specifically asked Dr Jessen whether his state of mental health was such at this time that he felt he could not deal with this matter and simply pushed it to one side but he was clear that this was not what had happened.

[64] Following the hearing on 23 April 2021, I listened to the two podcasts which Dr Jessen produced in May 2020 along with the journalist Alex Stanger in order to ascertain whether there was anything that would give a clue as to Dr Jessen's state of health at that time. In the podcast entitled "Light At The End of the Lockdown Tunnel" broadcast on 6 May 2020, Dr Jessen complained of having hay fever. He stated that he was doing bits of work but he hadn't got that strict routine that he used to have. He described himself as a sexual health and HIV doctor and engaged in a discussion about the possibility that the lockdown might assist in stopping new HIV infections. He also encouraged his listeners who were smokers to take up the less harmful alternative of vaping. At one stage, he described taking his dog out for a walk and noticing how nature was regenerating during lockdown. His co-host Alex Stanger then made a comment about Dr Jessen being in the centre of the town whereas she was out in the sticks. This is at a time when Dr Jessen is supposed to be living with his parents in Fulham. Dr Jessen then started a discussion about misinformation being put out on the internet about Covid and recounted how he and other media doctors had written a joint letter to a prominent social media platform in order to get a very misleading video produced by David Icke taken down. He then discussed whether his actions in doing so amounted to censorship and an attack on free speech.

[65] The podcast entitled "The Importance of Music with Nicola Benadetti" was broadcast on 15 May 2020. During the tripartite discussion between Dr Jessen, Alex Stanger and Nicola Benadetti, the violinist, Dr Jessen recounted how he started playing the piano as a child but did not enjoy this and he moved on to playing wind instruments, starting with the recorder and then the oboe and finally the bag pipes. He stated that he still regularly plays the oboe and is a friend of the famous English oboist, Nicholas Daniel. Dr Jessen was then asked whether he still played the bag pipes. He stated that they were at his parents' house. He stated that they were in a cupboard in his old bedroom which his mother had turned into an office. He recounted how his mother had noticed a smell "like a dead mouse" in the room and it had turned out to be the set of bag pipes stored in the cupboard. Neither of these podcasts contain anything which would overtly support Dr Jessen's case that he was having considerable difficulties with his mental health at that time. However, both podcasts contain comments which suggest that Dr Jessen was not living with his parents at that time.

[66] In order to ensure that Dr Jessen had an opportunity to offer an explanation in respect of the contents of his podcasts and certain entries on his Twitter page, arrangements were put in place for him to return to Belfast to give further evidence on Friday 21 May 2021. In advance of his attendance, he was provided with details of the matters he would be invited to comment on. In respect of the podcast entitled

"Light At The End of the Lockdown Tunnel" broadcast on 6 May 2020, Dr Jessen stated that the "bits of work" he was referring to were to do with "the media" and were not related to clinical practice, despite this reference to work being proximate to references to him being a sexual health and HIV doctor and in the context of a discussion about the possibility that the lockdown might be instrumental in stopping new HIV infections. He stated that the reference to him taking his dog out for a walk was actually a reference to him taking his parents' dog out for a walk. He stated that although he did tell his co-host Alex Stanger about his mental health difficulties, he did not reveal to her that he had moved out of his apartment to live with his parents and that was the reason why she referred to him living in the centre of the town. He explained that his involvement in the joint letter about David Icke's video was only fleeting and peripheral in that his friend Rachel Riley had "Whatsapped" him to ask if she could include his name on the letter and he had agreed to this. When asked why he was so concerned about issues of censorship and free speech when his involvement in this campaign was so peripheral, he explained that for some reason the press had regarded him as the main organiser of this campaign.

[67] I found Dr Jessen's explanations to be most unconvincing. I am convinced that he was much more involved in the David Icke campaign than he is now prepared to admit to. In his podcast, he did not mention Rachel Riley at all. He just talked about himself and other media doctors. I cannot understand why he would casually talk about taking his dog for a walk when he was actually referring to his parents' dog. Why would he tell his co-host sensitive and personal information about his mental health difficulties and yet not reveal that he had decided to move back to his parents' home for support? I have considerably difficulty reconciling the contents of the podcast with Dr Jessen's explanations in his evidence on 21 May 2021 and I also take into account that Dr Jessen had a good deal of advance notice that these issues would be raised with him when he returned to give evidence on that date.

[68] In relation to the contents of the podcast entitled "The Importance of Music with Nicola Benadetti" which was broadcast on 15 May 2020, Dr Jessen stated that when he returned to live with his parents in March 2020, he resided in their guest room as his old bedroom had been converted into a study. I will return to the issue of Dr Jessen's main place of residence between March 2020 and April 2021 in the following paragraphs of this judgment. Returning to the more general point referred to in the first sentence of paragraph [64] above, I am firmly of the opinion that neither podcast recorded in May 2020 contains any material which would lend support to the proposition that Dr Jessen's state of mental health at that time prevented him from acting on his solicitors' advice in respect of the instruction of solicitors in Northern Ireland. I conclude that Dr Jessen simply chose to ignore the advice of his English solicitors. As a result, Dr Jessen did not retain any legal representation in Northern Ireland, despite being aware that proceeding had been issued in this jurisdiction and despite being properly served with those proceedings. No memorandum of appearance was entered to the writ. The plaintiff was,

therefore, entitled to apply for and did obtain a default judgment on 29 September 2020.

[69] In relation to the issue of where Dr Jessen was living between March 2020 and April 2021, his evidence on the subject is contained in paragraph [59] above. When questioned about this by Mr Ringland QC, on 23 April 2021, Dr Jessen admitted that he had not asked the Post Office to forward his mail to his parents' address while he was supposedly living with his parents in Fulham. Further, he accepted that he had not informed the concierge service that he would not be residing in Walpole House for some time. He also accepted that he could adduce no supporting evidence from his parents or partner to state that he was living in Fulham during the material time and could adduce no supporting evidence from the concierge service in Walpole House to state that during the relevant time he had seldom if ever been seen entering or leaving the building.

[70] I have commented on the contents of two podcasts broadcast in May 2020 at paragraphs [64] and [65] which do not appear to support Dr Jessen's case in relation to where he was residing at the material time. The contents of two other podcasts also shed some light on this issue. The podcast entitled "Living in Lockdown" which was broadcast on 9 April 2020 includes a section in which Dr Jessen discussed the potential for social isolation which can be associated with lockdown to be harmful to one's mental health. In this section, he recounted how his "other half" has friends who are not from the UK who are "stuck in a bedsit" and how he and his partner were regularly contacting them on "Facetime" to cheer them up. Further, in the podcast entitled "Lockdown Gaming with Linda Papadopoulos" broadcast on 29 April 2020, there is a section in which Dr Jessen described playing sports games on his old "X Box" and finding that this was "fantastically good for exercise." Dr Jessen went to state: "You know, there I am with my other half and we are like going bowling or playing virtual ping pong or something because we don't have the room at home and it's exhausting and we're covered in sweat and sort of lying on the floor in a heap, panting." These two contemporaneous vignettes of Dr Jessen's home life do not support his evidence that in the period between March 2020 and April 2021, he was living with his parents in Fulham while his partner was living at 77 Walpole House. If anything, they substantially undermine that evidence.

[71] Dr Jessen was given the opportunity to address these matters when he returned to give evidence in court on 21 May 2021. His explanations were, to say the least, concerning. His evidence was that these accounts of his domestic life were entirely fictitious. He did not use Facetime and he never played virtual ping pong. He stated that he made up these accounts to hide the fact that he was suffering from depression and was living with his parents. He further stated that he made up these accounts using "artistic licence" in order to both entertain his listeners and to educate them about the importance of: (a) staying in touch with others in less fortunate circumstances who were isolated during lockdown; and (b) exercising even in the confines of their homes during lockdown.

[72] When one listens to the accounts of domestic life in these two podcasts, there is not a hint or suggestion that these accounts are fictitious and the spontaneous conversational nature of the exchanges and, indeed, the general tenor of the podcasts certainly give the clear impression that these accounts are based on Dr Jessen's recent personal experiences during lockdown. If these accounts are, indeed, entirely fictitious then it is clear that Dr Jessen is very skilled at spontaneously and casually inventing and recounting quite complex and entirely fictitious accounts relating to his personal life. However, even when pressed, neither Dr Jessen nor his counsel would accept that these accounts were lies. They were invented but they were the product of "artistic licence" in the context of being contained in podcasts which were intended to entertain. I do not, for one minute, accept this explanation or submission. Having carefully considered his evidence and his demeanour whilst giving that evidence, I am convinced that Dr Jessen has deliberately chosen to describe these accounts as fiction in a forlorn attempt to persuade the court that he was not residing with his partner in Walpole House during the time he states he was living with his parents in Fulham. It is not the account in the podcasts that is made up. It is the account in the witness box.

[73] Careful study of Dr Jessen's Twitter page casts further doubt upon Dr Jessen's evidence about where he was residing during the relevant period. If one considers the contents of Dr Jessen's Twitter page, there is a tweet which was posted on 26 January 2021 in the following terms: "Amazing graffito appeared overnight near me!" There is a photograph of a piece of graffiti which is a depiction of a very plump faced "Ronald McDonald" character against a red background with the statement "Fit as Fuck" to the right of the face from the viewer's perspective. This image is also commented on by another Twitter user, Mark Hill (@antiquemark) who follows Dr Jessen on Twitter, and who posted a tweet including a photograph of the same image on 9 February 2021. Mr Hill tweeted the following in relation to this and three other images:

> "I love the @Leakestreet and @LeakeStArches. Deserted as they are amidst lockdown, the art remains plentiful. In a world that is largely stuck and static, I love seeing the changes in zingy colour, variety, skill and emotions on my way to the supermarket every few days."

Using Google maps reveals that the Leake Street Arches are approximately 0.3 miles walking distance away from Walpole House. There is a second photograph included in Dr Jessen's tweet and this shows a concrete block which is located in the Waterloo Station Car Park at the junction of York Road and Leake Street, close to one entrance to Leake Street Arches. The words "Knowledge Destroys Fear" have been painted on the concrete block. The tweet posted by Dr Jessen on 26 January 2021 which included these two images and the accompanying comment: "Amazing graffito appeared overnight near me!" would tend to suggest that he personally observed these two images while in the vicinity of the Leake Street Arches at the end of January 2021 and photographed the same and that he was regularly in this area so he could

comment as a matter of fact that the images had appeared overnight. This, in turn, would suggest that he was residing in the Walpole House at the time.

[74] Dr Jessen's explanation when he returned to give evidence on 21 May 2021 was that although these examples of urban graffiti were located very near to Walpole House, he did not take these photographs when out walking in the vicinity of Walpole House in January 2021. These photographs were either sent to him by a friend on "Whatsapp" or he had seen them on the internet and he had decided to post them on his Twitter page. He could not identify the friend who might have sent them to him on "Whatsapp" although that information should still be available on his mobile phone and he could give no explanation as to why he tweeted that the graffiti "appeared overnight." He specifically denied that he would walk in this area as (a) it was not that safe and (b) there was a very bad smell in the Arches, although he accepted that the Arches were a major tourist attraction. I also note that Mr Mark Hall appears to walk through the Arches on his way to and from the supermarket every few days.

[75] I have to weigh up and assess the contemporaneous information contained in Dr Jessen's Twitter post on 26 January 2021 against the account which Dr Jessen had time to prepare when he gave his evidence on 21 May 2021. I take into account the fact that Dr Jessen was unable to adduce any evidence to support his claims in relation to how he was either sent or discovered these images. I also take into account the findings I have made about Dr Jessen's evidence about "Facetiming" his partner's friends and playing the "X Box." Taking all relevant matters into account, including Dr Jessen's evidence, I remain of the view that the tweet posted by Dr Jessen on 26 January 2021 which included photographs of an image of Ronald McDonald and a concrete block upon which a pithy aphorism was painted, which were preceded by the accompanying comment: "Amazing graffito appeared overnight near me!" would tend to suggest that he was residing in the vicinity of the Leake Street Arches at the end of January 2021 and was not residing in Fulham.

[76] Following the conclusion of Dr Jessen's evidence on 23 April 2021, I specifically asked his counsel if it was the intention of the defendant to seek to adduce any further evidence on the issues relating to the service of proceedings and I was specifically advised by Mr Millar QC that the defendant did not intend to adduce any further evidence. However, when it became clear that the defendant would have to return to court on 21 May 2021 in order to address a number of specific issues arising out my consideration of the contents of his podcasts and his Twitter page, an attempt was made to adduce further evidence in the form of an affidavit from Dr Jessen's father dealing with the issue of Dr Jessen's place of residence during the relevant time. Upon being made aware of this attempt, I directed that the court office should inform the parties that I would not permit any such further evidence to be adduced at this late stage. At the hearing of the matter on 21 May 2021, no attempt was made by or on behalf of Dr Jessen to make or renew an application to have this affidavit admitted in evidence. In the preceding paragraphs, I have dealt at length with the issue of where Dr Jessen was living

during the period between March 2020 and April 2021. For the avoidance of any doubt, I make it clear that I am certain that I have not been told the truth about the two accounts of domestic life recounted by Dr Jessen in his podcasts and, overall, I do not accept his evidence that he was residing with his parents for anything approaching the entire period between March 2020 and April 2021.

[77] Returning to the issue of service of specific documentation, it is the plaintiff's case that a copy of the default judgment was served on the defendant by first class post and e-mail on 13 October 2020. The address used was Flat 77 Walpole House and the e-mail address used was christian.jessen@doctorcall.co.uk with the e-mail being sent at 2.44 p.m. on that date. In addition to these methods of service, the process server, Duncan Redpath, was also engaged and he handed a copy of the judgment and a copy of the covering letter in a sealed envelope addressed to Dr Jessen and marked private and confidential to the concierge, Natalic Swic, on 16 October 2020. Ms Swic confirmed Dr Jessen's residency and stated that she would ensure safe delivery and would also e-mail Dr Jessen. Dr Jessen, in his evidence stated that he knew Ms Swic and had confidence in her that she would do her job properly. He denied ever receiving an e-mail from Ms Swic about this delivery and further denied that he received this envelope from the concierge service. Dr Jessen also gave evidence that when he returned to Flat 77 Walpole House on 22 April 2021, he found a small collection of mail inside the apartment and, on checking this, there were only two items that related to the case; one was a letter sent by second class post, dated 2 February 2021 relating to a review of the case on 26 February 2021 and the other was a bundle of papers for use at the assessment of damages hearing, listed for 14 April 2021. Dr Jessen's case is that the first class correspondence dated 13 October 2020 was not delivered to his apartment by Royal Mail and the envelope given by Mr Redpath, the process server to Ms Swic, the concierge, on 16 October 2020 was neither given to him nor delivered to his apartment.

[78] A further letter was sent by Gateley Tweed to Dr Jessen by first class post to 77 Walpole House and by e-mail to christian.jessen@doctorcall.co.uk on 17 December 2020 sent at 6.48 p.m. This correspondence informed the defendant that the plaintiff intended to make an application to have damages assessed by a judge, following on from the obtaining of a default judgment. Dr Jessen in his evidence denied ever receiving either the letter or the e-mail. According to his evidence, this letter was not included in the collection of mail Dr Jessen found in the apartment on 22 April 2021. A copy of the application for an assessment of damages was subsequently posted and e-mailed to Dr Jessen using the above addresses on 22 January 2021. In addition to these means of service, Mr Redpath, the process server, attended Walpole House on Sunday 24 January 2021 at 12.05 p.m. and obtained permission from the concierge to deliver the envelope containing the papers to Dr Jessen at 77 Walpole House. This was just 2 days before Dr Jessen tweeted photographs of fresh graffiti that he stated had appeared overnight in the Leake Street Arches.

[79] The statement provided by Mr Redpath indicates that the concierge confirmed Dr Jessen's residency and that he was the same Dr Jessen who is a TV celebrity. The statement of Mr Redpath also confirms that he spoke to a male occupier of Flat 77 Walpole House who confirmed that Dr Jessen resided there but was not present. Mr Redpath then posted the envelope addressed to Dr Jessen and marked private and confidential through the letterbox of Flat 77 Walpole House. This is crucial evidence in this case. I specifically asked Mr Millar QC who appears for Dr Jessen whether he wished to have any of the process servers in this case brought to court for the purposes of cross-examination and this opportunity was not availed of. Dr Jessen's evidence was to the effect that a concierge would never allow someone up to an apartment to deliver an envelope other that the Royal Mail post man and a concierge would never divulge the identity of a resident. Further, Dr Jessen confirmed that his partner was residing in 77 Walpole House at the time and Dr Jessen had specifically enquired of his partner whether a process server had spoken to him on the day in question or whether an envelope addressed to Dr Jessen had been put through the letter box of 77 Walpole House on the day in question. Dr Jessen stated that he trusted his partner implicitly and that his partner had assured him that no such conversation took place on this or any other occasion and no such delivery took place on this or any other occasion. The defendant's partner has not sworn an affidavit to this effect nor has he been called to give evidence in relation to these matters.

[80] I accept as true and accurate the contents of the statement of Mr Redpath, the process server, dated 27 January 2021. Despite being given the opportunity to cross-examine the maker of this statement, this opportunity was not taken up by Mr Millar QC on behalf of Dr Jessen. I accept as true and accurate the statement of Christine Pickney, a partner in PB Process Servers UK, dated 22 April 2021, in which she stated that she had spoken to Duncan Redpath and Ray Finch, both process servers employed by her. They confirmed that the concierge staff usually do not permit access to Walpole House to allow deliveries to be made to a specific apartment. The concierge staff would usually telephone the apartment and if there is no answer, having confirmed residency, the concierge would usually take possession of the delivery and then pass it directly to the resident. However, on 24 January 2021, Mr Redpath, in an exceptional instance, was granted access to Walpole House to deliver documents to a specific apartment. Despite being given the opportunity to cross-examine the maker of this statement, this opportunity was not taken up by Mr Millar QC on behalf of Dr Jessen. Finally, I accept as true and accurate the contents of the statement of Mr Ray Finch, process server, dated 23 April 2021. I accept that he attended Walpole House on 22 April 2021 and spoke to the male concierge, Hrictiaa Christia. This concierge checked the front of house book and confirmed that Dr Jessen was the occupier of both 77 and 79 Walpole House and that he had been receiving his post and deliveries. Despite being given the opportunity to cross-examine the maker of this statement, this opportunity was not taken up by Mr Millar QC on behalf of Dr Jessen.

[81] I find as a fact that the male person Mr Redpath spoke to in Apartment 77 Walpole House at lunchtime on 24 January 2021 was Dr Jessen's partner and that this individual informed Mr Redpath that Dr Jessen was a resident of the premises but was not there at that time. I accept as a fact that Mr Redpath posted an envelope addressed to Dr Jessen through the letterbox of Apartment 77 Walpole House on that occasion. If Dr Jessen's evidence is to be believed then he has been lied to by his partner who has disposed of the envelope that was delivered by Mr Redpath and has deliberately withheld details of Mr Redpath's visit to the premises on 24 January 2021. I discount the possibility that Dr Jessen's partner might have forgotten about this incident having regard to the relatively short timescales involved and having regard to Dr Jessen's evidence that his partner had assured him that no such conversation took place on this or any other occasion and no such delivery took place on this or any other occasion.

[82] Why on earth would Dr Jessen's partner perpetrate such an awful deceit upon Dr Jessen? In fairness to Dr Jessen, he is not suggesting that he would. I believe the simple answer here is that Dr Jessen did receive his post and deliveries as the concierge confirmed to Mr Finch and that Dr Jessen has chosen to ignore the contents of the correspondence from Gateley Tweed in respect of Mrs Foster's claim. I do not accept that the Royal Mail would have successfully delivered one second class letter from Gateley Tweed to 77 Walpole House but would have failed to deliver a number of items of correspondence sent by first class post. I do not accept that the concierge service would have failed to ensure the delivery of items of correspondence to Dr Jessen which had been left with the concierge service by the process servers. If these items had not been delivered, unless disposed of by the concierge service, they would still be in the possession of the concierge service and it is clear that the concierge informed Mr Finch as recently as 22 April 2021, that Dr Jessen had been receiving his post and deliveries. I, therefore, find as a fact that Dr Jessen was aware that the plaintiff in this action was applying to have damages assessed by a judge and that the application was listed for review on 29 January 2021 and deliberately chose to take no steps to protect his interests in this matter.

[83] The plaintiff's case is that three further items of correspondence were directed to Dr Jessen at Flat 77, Walpole House, by Gateley Tweed. The first in time was a letter sent by first class post, dated 11 March 2021, informing Dr Jessen that the assessment of damages hearing was fixed for 14 April 2021. The second in time was a letter sent by first class post, dated 9 April 2021, enclosing a copy of the plaintiff's position paper which was drafted by the plaintiff's counsel for submission to the court at the assessment of damages hearing. This letter also informed Dr Jessen that a copy of the trial bundle would be delivered to him. Mr Ray Finch, a process server, made a statement on 13 April 2021 in which he stated that he delivered the trial bundle in a sealed envelope addressed to Christopher Jessen, Flat 77, Walpole House, 126 Westminster Bridge Road, London, marked strictly private and confidential, by handing the sealed envelope to Natalia Swic, the female concierge in Walpole House, at 2.45 p.m. on 12 April 2021. Ms Swic telephoned Flat 77 but there was no reply. Ms Swic suggested that Dr Jessen was out and stated that she would

make sure that he received the envelope. It is clear that even on Dr Jessen's case, this envelope was delivered because, according to Dr Jessen, this envelope with the enclosed trial bundle was part of the collection of correspondence Dr Jessen found in the apartment when he checked the apartment for mail on 22 April 2021. However, Dr Jessen was adamant that the other two items of Royal Mail correspondence dated 11 March 2021 and 9 April 2021 were not included in that collection.

[84] If Dr Jessen's account of what he found in the apartment on 22 April 2021 is true then all the Royal Mail processed items relating to this action, that were addressed to Dr Jessen at Flat 77, Walpole House, 126 Westminster Bridge Road, London, that were dispatched after 9 March 2020, apart from one second class letter in February 2021 (of which he acknowledges receipt), were either lost in the post or were delivered to the correct address but were disposed of by another person who was residing in Flat 77, Walpole House, during the relevant period without being brought to the attention of Dr Jessen. If Dr Jessen's account of what he found in the apartment on 22 April 2021 is true, then all the correspondence relating to this action which was delivered by process servers to the concierge service in Walpole House, apart from one such item in April 2021 (of which he also acknowledges receipt), were either retained or disposed of by the concierge service without being handed to the defendant or being delivered to Flat 77 or were delivered to Flat 77 but were disposed of by another resident of Flat 77, Walpole House, during the relevant period. These various proposed eventualities are so far-fetched and unlikely that they can be firmly discounted.

[85] It is to be remembered that Dr Jessen in his evidence stated that he had confidence in Ms Natalia Swic. It would appear that such confidence was justified in that Dr Jessen accepts that the correspondence that was given to Ms Swic by the process server on 12 April 2021 was delivered to his apartment. There is no reason to conclude that the confidence which was rightly reposed in Ms Swic in April 2021 should be withheld in relation to her actions on and immediately after 16 October 2020. I conclude that Ms Swic did ensure safe delivery of the envelope containing a copy of the default judgment and a copy of the covering letter from Gateley Tweed dated 13 October 2020 to Flat 77 Walpole House and that Dr Jessen is simply not telling the truth when he asserts that he did not receive a copy of the default judgment. My firm conclusion is that he did so receive a copy of the default judgment in October 2020 and he deliberately chose not to take any steps to protect his interests in this matter.

[86] This brings me to the two items of Royal Mail post, dated 11 March 2021 and 9 April 2021. Having discounted the two far-fetched and unlikely eventualities referred to in paragraph [84] above, I am left with the unedifying task of trying to determine which lie has Dr Jessen told. His evidence is that he did not receive either letter and neither letter was in the small collection of mail he retrieved from the apartment on 22 April 2021. Given that I have discounted the eventualities of the letters not being delivered by Royal Mail or being so delivered but being surreptitiously disposed of by another resident of the apartment, the two letters, if

they had not been opened and read by Dr Jessen prior to 22 April 2021, would have been in the small collection he found on 22 April 2021, in which case he has lied to the court about the contents of the small collection; and if the two letters were not in the small collection he discovered on 22 April 2021, then that is because the two items of correspondence came to his attention on a date or dates earlier than that date, in which case he is lying to the court.

[87] This, in turn, brings me back to the matters raised in paragraph [53] above. In his affidavit evidence, Dr Jessen stated that he received the letter of claim in this case on 2 January 2020 and then contacted his solicitors Harbottle and Lewis, on 3 January 2020 who drafted a reply for him later on the same day. The reply was sent on 7 January 2020 in the following terms:

> "I received your letter which was sent to a general clinic e-mail address when I visited the clinic today…."

I specifically asked Dr Jessen which account was false; the account given by him in his affidavit that he received the letter of claim by e-mail on 2 January 2020 or the account given to Mr Tweed in the response to the letter of claim that he received it when he visited the clinic on 7 January 2020? He responded in the following manner: "I think to be fair then, the statement to Mr Tweed about receiving it today was a mistake." When I challenged him in terms that it was not a mistake, it was a falsehood, he replied: "It was a falsehood. That's fine, ok….I'd like to say that it wasn't an intentional falsehood." When asked to explain this he stated: "Well I didn't wilfully aim to mislead, if I might say that."

[88] I am completely satisfied that Dr Jessen knew that the response he sent to Mr Tweed on 7 January 2020 was factually inaccurate and misleading when he sent it. He altered the draft before he sent it but did not alter it in such a way as to remove the misleading and inaccurate statement contained therein. I am satisfied that the reason why he knowingly sent the inaccurate and misleading response in the terms drafted was that he was attempting to mitigate his failure to remove the offending tweets in the period between 2 January 2020 and 7 January 2020 by informing Mr Tweed that he has just received the letter of claim and had straight away taken the tweets down. This episode encapsulates and epitomises Dr Jessen's approach to this matter. Turning now to consider Dr Jessen's evidence in respect of the two letters dated 11 March 2021 and 9 April 2021, I consider that his evidence is an attempt to mislead and mitigate. I am unable to place any weight upon Dr Jessen's evidence in relation to the small collection of correspondence allegedly found by him on 22 April 2021 and I am similarly unable to place any weight upon his evidence that the correspondence of 11 March 2021 and 9 April 2021 did not come to his attention. Irrespective of which lie he is telling, I am completely satisfied that Dr Jessen was aware of the date of the hearing set for the assessment of damages in this case and that he deliberately chose to take no steps to protect his interests in this matter.

[89] Dr Jessen stated in his evidence that he first became aware of the assessment of damages hearing when friends and well-wishers contacted him to ask him how he was keeping following widespread press coverage of Mrs Foster's evidence before this court on 14 April 2021. I accept that Dr Jessen was probably contacted by a significant number of acquaintances enquiring about this matter, having regard to the press coverage that it received but I certainly do not accept that this was the manner in or means by which he first became aware of the date of the assessment of damages hearing. There is no dispute as to what happened thereafter. There were communications between Dr Jessen and Harbottle & Lewis again and Ms Olivia O'Kane of Carson McDowell was instructed to represent the interests of Dr Jessen and the application for leave to enter a late memorandum of appearance was launched and pursued with all due alacrity and professionalism by Ms O'Kane who instructed Mr Gavan Millar QC and Mr Peter Hopkins to represent Dr Jessen in this application.

[90] For the reasons set out in detail in the preceding paragraphs of this judgment, I am compelled to state that I do not accept the evidence of Dr Jessen in respect of service of the various key documents in this case. Dr Jessen has chosen to ignore these proceedings until shocked into action by the scale of the press coverage of Mrs Foster's evidence. I do not consider that there is any legitimate basis upon which the court could or should exercise its discretion in favour of Dr Jessen by allowing him to enter a late memorandum of appearance. His application to do so is refused and I shall now proceed to deal with the quantum of damages in this case.

Legal principles in relation to the assessment of compensation in a defamation action

[91] Stephens J, as he then was, in a recent judgment dealing with the assessment of damages under section 3(5) of the Defamation Act 1996 (*Elliot v Flanagan* [2017] NI 264) gave very valuable guidance as to the approach to be adopted in the assessment of damages in defamation cases generally. I intend to closely follow the approach indicated by Stephens J. The amount to be paid by way of compensation in defamation proceedings is to be determined by the court on the basis of following general principles. Firstly, the award of general damages in defamation proceedings is intended to serve the following 3 functions, namely:

(i) To act as a consolation to the plaintiff for the distress the plaintiff suffers from the publication of the statement;

(ii) To repair loss to the plaintiff's reputation; and

(iii) As a vindication for the plaintiff's reputation.

[92] The assessment of damages is not achieved by following some mechanical, arithmetical or objective formula (see *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1071). The court is entitled to take into account a wide range of matters and it is

useful to have regard to the checklist adopted by Hirst LJ in *Jones v Pollard* [1996] EWCA Civ 1186 which highlighted the following matters:

> "1. The objective features of the libel itself, such as its gravity, its prominence, the circulation of the medium in which it was published, and any repetition.
>
> 2. The subjective effect on the plaintiff's feelings (usually categorised as aggravating features) not only from the publication itself, but also from the defendant's conduct thereafter both up to and including the trial itself.
>
> 3. Matters tending to mitigate damages, such as the publication of an apology.
>
> 4. Matters tending to reduce damages, *e.g.* evidence of the plaintiff's bad reputation, or evidence given at the trial which the jury are entitled to take into account in accordance with the decision of this court in *Pamplin v Express Newspapers Ltd* [1988] 1 W.L.R. 116.
>
> 5. Special damages.
>
> 6. Indication of the plaintiff's reputation past and future."

[93] Vindication is an aspect of the award so that if the allegations should re-emerge, the damages must be large enough to proclaim the baselessness of the libel or as put in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1071 the plaintiff "must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge." Vindication can also be achieved, either in whole or in part, by an apology or by a categorical statement by the defendant that the statement is unfounded.

[94] When determining the appropriate level of general damages for defamation, the court is entitled to take into account such matters as the plaintiff's status and reputation, the mode and extent of publication, the conduct of the publisher and any injury to the plaintiff's feelings as a result of the defamation or a consequence of highhanded, oppressive or insulting behaviour by the publisher. In this case, Mr Ringland QC, in his position paper, does not argue that an award of exemplary damages is warranted and there is nothing to indicate that such an award would be appropriate in the specific circumstances of this case. Any award of damages will be compensatory but that does not mean that such an award is not capable of having some deterrent or exemplary effect as explained by Lord Hoffmann in paragraphs [41] - [42] of *Gleaner Co. Limited and another v Abrahams* [2004] 1 AC 628.

[95] The approach adopted by the defendant to this case means that the court, despite careful scrutiny of all the relevant facts and circumstances of this case, is unable to identify any matters which would tend to mitigate damages in this case. Yes, the defendant did take down the tweet after two weeks but this has to be seen in the context of the plaintiff's solicitor highlighting the highly defamatory nature of the allegation at a very early stage and writing a detailed letter of claim thereafter; and it must be judged in the context of numerous other Twitter users taking the opportunity to tweet responses to and comments on the defendant's tweet, with at least 517 other Twitter users retweeting the defendant's tweet and approximately 3,500 Twitter users liking the defendant's tweet in the two week period that the tweet remained on the defendant's Twitter page. Further, it is highly relevant to note that during the two week period that the tweet remained on the defendant's Twitter page, the mainstream media particularly in Northern Ireland published stories highlighting the fact that the defendant had failed to take down the offending tweet. If anything, the removal of the tweet after two weeks only serves to place a cap on the aggravating factors in this case, rather than constituting a mitigating factor.

[96] I have already commented in an earlier section of this judgment on the deliberately inaccurate and misleading e-mail response issued by Dr Jessen on 7 January 2020 to the letter of claim, in which he asserted that he had only accessed the e-mail account to which the letter of claim was sent when he attended his clinic on 7 January 2020. Even if true, which it is not, this does not constitute a valid reason for not taking the tweet down sooner as the defendant was clearly aware of Mr Tweed's earlier efforts to highlight the defamatory nature of the tweet.

[97] As clearly indicated by Stephens J in the *Elliot* case, freedom of expression is protected by Article 10 ECHR. A disproportionate award of damages will constitute a violation of that Article, see *O'Rawe v William Trimble Ltd* [2010] NIQB 135 at paragraph [115]. Any award of damages must bear a reasonable relationship of proportionality to the injury to reputation as suffered, see *Steel & Morris v UK* App No 68416/01: ECHR 2005-11; [2005] EMLR 15 ECtHR. In that case the awards were determined to be disproportionate when compared to the meagre incomes and resources of the defendants. In this case, the defendant has failed to engage at the appropriate stage and has not been permitted to enter a late appearance to the writ and, as a result, there is no evidence as to his income or as to his resources. However, it is not unreasonable to assume that a media figure with his profile and independent standing as a prominent clinician would have substantial resources. In this case, there is no evidential foundation for the suggestion that a substantial award in this case would be disproportionate when compared to the income and resources of the defendant. The award in this case will primarily be compensatory in nature and will be based on the plaintiff's loss. A fundamental and long-established principle of domestic law is that the means of a defendant are irrelevant to the assessment of damages for a tort. See *Rai v Bholowasia* [2015] EWHC 382 at paragraph [181] and *Gur v Avrupa Newspaper Ltd* [2009] E.M.L.R. 4.

[98] In arriving at an award in this case, I take into account the purchasing power of money in accordance with the practice set out in *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153 and followed in cases such as *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, 696 and *John v MGN Ltd* [1997] QB 586, 608. In arriving at an award, I will consider what the result would be in terms of weekly, monthly or annual income if the money were invested in a building society deposit account without touching the capital sum awarded or, if I have in mind smaller sums, to consider what could be bought with it.

[99] I will have no regard for awards made by juries in other cases but following the decision in *Rantzen,* I note that it is, however, appropriate to take account of awards which have been approved by the Court of Appeal or which have been made by the Court of Appeal in the exercise of its powers to make its own awards in cases in which the award made by the jury has been disallowed on appeal. I also note that it is appropriate to take account of reasoned awards made by first instance judges sitting without a jury, see *Gur v Avrupa Newspaper Ltd* [2008] EWCA Civ 594; [2009] E.M.L.R. 4 at [28] and in this regard, I will pay particular attention to the award made by Stephens J in the *Elliot* case in 2016. In that regard, I note that the defendant in the *Elliot* case was a Sinn Fein MLA. At the time that he posted the offending tweet defaming Mr Elliot, he had 5,000 followers on Twitter. The offending tweet which was, in essence, a statement that Mr Elliot had killed Catholics when serving in the UDR, was taken down within an hour of it being posted. In the limited time that it remained on the defendant's Twitter page it was read 167 times and retweeted 6 times.

[100] I am acutely aware of the cautionary advice given by Stephens J when he stated that there is a danger in making comparisons with other cases in that there may be a tendency for different features of the different cases being stressed by the different parties and this may not only be inconclusive but also produce its own injustice, as well as being time consuming and costly. In addition, there is a limit to the value of supposedly comparable first instance decisions, because the facts of each case vary so much, see *Applause Store Productions Limited, Matthew Firsht v Grant Raphael* [2008] EWHC 1781 (QB) at paragraph [77] and the variables may be too many to be "conducive to making worthwhile comparisons" see paragraph [58] of the *Gleaner*. Furthermore, a consideration of comparables must take into account the particular assessment of, for instance, the effect of the defamatory publication on the particular plaintiff involved in the case which is to be decided. That is an assessment peculiar to each individual case and the impact on the particular individual is an assessment at the hearing of the particular action. Finally, in taking into account awards in England and Wales, I also note that conventional awards in personal injury cases in England and Wales were taken into account as a check on the reasonableness of a proposed award of damages for defamation and the personal injury awards in England and Wales are lower than in Northern Ireland.

[101] As noted by Stephens J in *Elliot*, taking into account conventional awards in personal injury cases as a check on the reasonableness of a proposed award of

damages for defamation should not distract from the three functions of damages for defamation and a consideration of aggravating and mitigating circumstances in the particular case. In *Jones v Pollard* [1997] EMLR 233 at 257 Hirst LJ said that "(the) purpose of the personal injuries comparison sanctioned in *John* is in my judgment to assist juries and the Court of Appeal to maintain a sense of proportion, by drawing a comparison between any prospective award of damages for defamation with the type of personal injury which would lead to a similar award, without of course seeking any precise correlation." Like Stephens J in the *Elliot* case, I will assess damages in accordance with the principles applicable to defamation and seek to maintain that sense of proportion by comparing the proposed award with personal injury awards in Northern Ireland.

[102] Finally, I must take into account that this tweet was made in the context of other earlier anonymous tweets which had been circulating to some extent in the "Twittersphere" for a number of days before the defendant's tweet was published. The defendant's tweet encapsulates the contents of the earlier anonymous tweets. However, there is a very significant difference between a number of anonymous Twitter users posting allegations of this nature and a significant public media figure who is also a practising clinician taking up the allegations and publishing them on his Twitter page which at that time had approximately 311,000 followers. There is a lot of force in Mr Ringland's submission that many of those reading the tweet on Dr Jessen's Twitter page would have thought "if Dr Christian Jessen is tweeting this, then it must be true" especially when the tweet was not taken down and particularly when Dr Jessen subsequently tweeted "lol" and thereafter tweeted his clear enjoyment of comments and responses made by other Twitter users on his Twitter page that Mr Tweed's intervention had precipitated a "Streisand effect" increase in awareness of the original allegations.

Discussion

[103] Following the guidance in the *Elliot* case, I will now consider the relevant matters contained in the checklist in *Jones v Pollard*, starting with a consideration of the objective features of the libel itself. To state that a woman, married for 25½ years and the mother of three children, who is a committed Christian and is publicly recognised as such, who has publicly made statements extolling the sanctity and importance of marriage as a sacred relationship between a man and a woman, who also happens to be the leader of the Democratic Unionist Party, its former spokesperson on equality and human rights and a holder of the Office of First Minister of Northern Ireland, was an adulterer, a hypocrite and a homophobe, is a most serious libel and is grossly defamatory. It was an outrageous libel concerning an individual of considerable standing, attacking her integrity at a most fundamental level and it involves the "trashing" in a very public fashion the relationship that Mrs Foster holds dearest in her life. It affected core aspects of the plaintiff's life, namely, her relationship with her husband and her deep Christian faith. It called into question the plaintiff's fitness and suitability to occupy the Office of First Minister at a time when delicate negotiations were continuing on the

re-establishment of the Northern Ireland Executive. In short, I consider that this was an outrageously bad libel.

[104] In relation to the issue of prominence, there can be no doubt that this is a highly prominent libel. In terms of the circulation of the medium in which it was published and the issue of repetition, the offending tweet remained on the defendant's Twitter page for two weeks; a Twitter account with 311,000 followers. The tweet was liked approximately 3,500 times and the tweet was retweeted 517 times. The fact that the defendant had failed to take down the offending tweet was the subject of mainstream media coverage, especially in Northern Ireland. In this case the duration of publication of the libel on the defendant's Twitter account, the large numbers who became aware of the content of the defamatory statement and the significant number who repeated it are important factors to take into account when determining the appropriate award.

[105] The next aspect is to consider the subjective effect on the plaintiff's feelings. I readily accept the plaintiff's evidence that this outrageously bad libel cut her to the core, causing very considerable upset, distress, humiliation, embarrassment and hurt. Bearing in mind the time of year and the work-related pressures the plaintiff was under at that time, I fully accept this libel took a heavy emotional toll on the plaintiff despite her experience of having to deal with the heat of robust political debate. Her marriage, her family life and her faith are the most important things in her life. These things provide important pillars of support for her and it was these things that were being publicly "trashed." In terms of the timing of the tweet, Mrs Foster is genuinely concerned that the timing may have been deliberately chosen to undermine the negotiations concerning the restoration of the Northern Ireland Executive. For the avoidance of doubt, I do not ascribe to the defendant the knowledge of or interest in Northern Ireland politics which would be a prerequisite to giving any detailed consideration to the possibility that the timing of this tweet was intended to influence the outcome of the negotiations. However, in respect of the anonymous tweets that preceded the defendant's much more prominent statement, such a motivation cannot be dismissed out of hand.

[106] I have also considered how other people treated the plaintiff in the aftermath of this tweet being published as an aspect of the effects on her. On a positive note, I note that she received the personal support of political opponents during this difficult time. That is a great credit to those individuals. On the deficit side of the balance sheet, I note that constituents were enquiring of other elected representatives in Fermanagh whether the claims were true and I also note the sometimes quite vile comments which were posted on the defendant's Twitter page in response to his tweet. By tweeting "lol" and expressing obvious enjoyment in respect of what was viewed on Twitter as the "Streisand effect" in action; at best, Dr Jessen did nothing to discourage such responses; at worst, he positively encouraged them. In any event, he knowingly allowed such responses to remain on his Twitter page up to 7 January 2020. These matters constitute significantly aggravating features in this case.

[107] Further aggravating features include the tardy response to the letter of claim, the woefully inadequate and deliberately misleading response when one was finally made, the failure to respond to any subsequent correspondence, the failure to publish any form of apology or retraction, and his failure to make any offer of compensation, which has resulted in the plaintiff being required to give evidence, with such evidence attracting significant press coverage. This is compounded to a significant extent by Dr Jessen's evidence given on 23 April 2021 to the effect that at the time he believed the rumours about Mrs Foster were true and he wanted to expose what he saw as Mrs Foster's hypocrisy on matters such as same sex marriage.

[108] I turn to consider vindication. The absence of an apology means that the need for vindication remains unaddressed. It is necessary for any award made in this case to be sufficient to convince a bystander of the baselessness of the charge. As I have already indicated, this was a most serious libel and there should be no doubt as to the baselessness of the allegations. There should be a considerable element of vindication in the award and no reduction is warranted bearing in mind the absence of any form of apology.

[109] Finally, I reiterate that there is nothing in the defendant's conduct in this case or indeed any other relevant consideration that could constitute a mitigating factor in this case.

Conclusion

[110] I consider that the appropriate award is £125,000. In terms of proportionality, I look to the latest edition of the Green Book and I note that the guidance in respect of the range of compensation for the total loss of one eye is £80,000 to £140,000. Damages for female infertility: up to £150,000. Bladder, complete loss of natural function and control: £125,000 - £170,000. Total or effective loss of one hand: £85,000 - £145,000. Amputation of 1 foot: £150,000 - £250,000. Having considered the guidance contained in the Green Book (2018), I am satisfied as to the proportionality of the award in this case.

[111] I order the defendant to pay the plaintiff's costs to be agreed or taxed in default of agreement. Having heard submissions of counsel, I award costs on an indemnity basis.