Neutral Citation Number: [2013] EWHC 283 (QB)

Case No: ATC/11/0841

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2013

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

(1) GERRY MCCANN (2) KATE MCCANN	**Claimant**
- and -	
TONY BENNETT	**Defendant**

- -
- -

Ms Adrienne Page QC and Mr Jacob Dean (instructed by **Carter-Ruck**) for the **claimants**
The Defendant appeared in person

Hearing dates: 5 and 6 Febraury 2013

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Judgment

Mr Justice Tugendhat :

1. On 1st December 2011 the Claimants issued an application notice. They allege that the Defendant has been guilty of contempt of court in that he is in breach of the undertakings given to the court in an order dated 25 November 2009 ("the Undertakings"). They ask that he be made subject to such penalty as the court thinks appropriate. The penalty for contempt of court may include committal to prison: it is for the court to decide the penalty, if any. I indicated at the hearing that I would first consider (and reserve) my judgment on the question whether the Defendant has committed a breach of his Undertakings, and, if I found that he had, I would consider the question of any penalty after I had handed down my reserved judgment.

2. The Claimants are the parents of Madeleine, who disappeared at the age of 3 years when she was on holiday with her family in Portugal in May 2007. The Claimants state the little girl was abducted, that they believe and hope that she is still alive, and that she may one day be found and re-united with her family.

3. The Defendant is a former social worker and solicitor, now in retirement, who has written at very great length about the affair. He claims to have written as a member of the public interested in the welfare of children. What he has written has been throughout critical of the Claimants and of what the Claimants have said about the disappearance of their daughter.

4. On 27 August 2009 Carter-Ruck, solicitors for the Claimants, wrote to the Defendant stating that he had been engaged in a course of conduct, largely under the guise of "The Madeleine Foundation" which, as they advised, constituted harassment pursuant to the Protection from Harassment Act 1997. They also stated that he was responsible for the publication of numerous grave and actionable libels. They asked him to desist, failing which proceedings would be issued in the High Court.

5. The Defendant took advice from solicitors, and correspondence ensued. On 3 October he wrote a fourteen page letter. It included that he had been advised that:

> "there was a real and live risk, however low, that [the Claimants] might win a libel action and that therefore we could each literally face financial ruin".

6. In that letter he went on to offer undertakings and assurances to the Claimants substantially in the terms that he subsequently gave to the Court. He also wrote that he had made the following or similar statements on all places where he posted regularly:

> "Just to make it absolutely plain for the written record, I am no longer accusing the McCanns of knowing that their daughter Madeleine is dead and that their [sic] parents have knowingly covered up this fact".

7. In a 9 page letter dated 30 October 2009 the Defendant offered further undertakings and assurances in terms even more emphatic ("I undertake from hereon not to publish any allegation that may suggest that there is even one scintilla of evidence that Madeleine McCann died in her parents' holiday apartment") and set out steps he had taken to comply with the undertakings given in his letter of 3 October.

8. Nevertheless, on 10 November 2009 Carter-Ruck wrote enclosing the screenshot of a website and complaining that the Defendant had, in spite of his undertakings and assurances, been directing people to other websites which continued to publish a leaflet the Claimants had complained of: "What really happened to Madeleine McCann? 10 key reasons which suggest that she was not abducted ("the 10 reasons leaflet"). The screenshot was of the Madeleine Foundation website ("the MF website"). It included a statement that the "10 reasons leaflet" was available to download from a number of websites to which the links were given.

9. Carter-Ruck required the Defendant to give his undertakings to the Court, and to pay as a contribution to the Claimant's costs the sum of £440, which they explained was the court fee the Claimants would have to pay for the undertakings to be given to the court.

10. By e-mail dated 12 November 2009 the Defendant agreed to this requirement. The claim form was issued on 25 November 2009. In it the Claimants claimed damages for libel and an injunction to restrain the Defendant from further publishing the words complained of, or similar words defamatory of them. The publications complained of were set out in a Schedule to the claim form.

11. On 25 November 2009 the court made an order which included the following:

> "All further proceedings in this action be stayed except for serving the claim form and this order on the Defendant and carrying out the terms of settlement, and for this purpose the parties are at liberty to apply".

12. The Order was headed with a penal notice (that is the words "If you the Defendant breach the undertakings given in this order you may be held to be in contempt of court and you may be imprisoned, fined or have your assets seized"). The Undertakings, which were then given by the Defendant to the court, were set out in the Order. They were:

> "A. to deliver up all hard copies of and to destroy any electronic version of the following publications, or any similar publications in the possession or control of the Defendant: (1) the book entitled "What really happened to Madeleine McCann? 60 key reasons which suggest that she was not abducted" ["the 60 reasons booklet"] first published on or around 7 December 2008; (2) the leaflet entitled "What really happened to Madeleine McCann? 10 key reasons which suggest that she was not abducted"
>
> B. to use his best endeavours to delete or otherwise prevent access to any and all defamatory allegations about the Claimants published by him on the following websites: [and these are identified]
>
> C. not to repeat the same or any similar allegations about the Claimants as those set out in Schedule A hereto, whether by his servants or agents or otherwise howsoever….
>
> Schedule A: The Defendant undertakes not to repeat allegations that the Claimants are guilty of, or are to be suspected of, causing the death of their daughter Madeleine McCann; and/or of disposing of her body; and/or of lying about what had happened and/or of seeking to cover up what they had done."

13. The committal application came before the court for directions on 8 February 2012, on 17 April 2012 and 11 October 2012. On 24 October I handed down a judgment ("my October judgment") Neutral Citation Number: [2012] EWHC 2876 (QB). In that judgment I explained the procedural history in more detail, and why the case had been adjourned in order for the Defendant to obtain public funding for his defence, if he could. He has not been able to obtain public funding because his means are above the level for eligibility.

14. The Defendant does not dispute that, as Sir John Donaldson MR said in *Hussain v Hussain* [1986] Fam 134, 139:

> "an undertaking given to the court is as solemn and binding and effective as an order of the court…"

15. But the Defendant has at this hearing submitted, as he did in October 2012, that his Undertakings were not binding because they were given under duress, that is the fear of financial ruin which he expressed in his letter of 3 October 2009. However, as I explained to him in October, and repeated in para 26 of my judgment, that cannot be an answer to this application to commit him for contempt of court. The law has long been as was recently stated by the Court of Appeal in *Ketley v Brent* [2012] EWCA Civ 324 at para 20:

> "… unless and until the orders about which [the defendant] complains are actually set aside he is required to obey them. The position was made crystal clear by Lord Diplock in *Isaacs v Robertson* [1985] AC 97. He approved the following passage from the judgment of Romer LJ in *Hadkinson v Hadkinson* [1952] P 285:
>
> > "It is the plain and unqualified obligation of every person against, or in respect of whom an order is made, by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. 'A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and void -- whether it was regular or irregular. That they should come to the court and not take it upon themselves to determine such a question: that the course of a party knowing of an order, which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.'... Such being the nature of this obligation, two consequences will, in general, flow from its breach. The first is that anyone who disobeys an order of the court...is in contempt and may be punished by committal or attachment or otherwise."

THE ISSUES ON THIS APPLICATION

16. In an application for an order that a defendant be committed to prison for contempt of court in a case such as the present the claimant must prove the following: (1) that the defendant had proper notice of the undertakings which the defendant is alleged to have breached, and that the order was in the proper form; (2) that the defendant was responsible for one or more of the publications alleged to be a breach of the undertakings; and (3) that the publication(s) for which the defendant was responsible make(s) one or more of the allegations which the defendant undertook not to make.

17. On all of these issues the burden is on the Claimants to satisfy the court to the criminal standard of proof that the Defendant is in contempt of court. The court must be satisfied so that it is sure before it can find that a person is in contempt of court.

18. The events that led up to the Defendant giving the Undertakings are recounted in the first affidavit of Ms. Martorell (that is, Ms Hudson, as she was at the time). The Undertakings were given as set out above. When the notice was originally issued the claimants relied on 153 publications as acts constituting breaches of the undertakings. They are listed in the schedule to the Application Notice (as required by O.52 PD2.6(2), which is the procedural provision in force at the relevant time), and a copy of each of the publications is exhibited to Ms Martorell's first affidavit. The Claimants also identified ten which Ms Martorell described as the most serious.

19. Following an invitation from the court given at the first directions hearing held on 8 February 2012, the Claimants' advisers made a selection of 26 publications for consideration at this hearing. This involved no concession on the part of the Claimants that any of the other publications was not in breach by the Defendant of his undertakings.

20. Where a person is alleged to have committed a large number of criminal offences, it is common for those drafting an indictment to include only a proportionate number. One reason for this is that if the defendant is convicted the court will arrive at the sentence after taking into account all of the defendant's offences. Above a certain number, each additional conviction cannot lead to an increase in the sentence. It is therefore often a disproportionate expenditure of time and resources to seek a conviction in respect of each and every instance on which it is alleged that a defendant has offended. The same principle applies to contempt of court, for which the maximum sentence of imprisonment is one of two years.

21. Ms. Page explains that the publications were selected in the following ways: (1) they included the original "top 10" relied on in Ms. Martorell's first affidavit; (2) a small number of hard copy publications, the distribution of which has been a matter of particular concern to the Claimants; and (3) a sample of the remainder which is intended to be representative both in terms of the type of publication (that is, website, Twitter message etc...) and in terms of the meaning (that is the nature of the allegation made and the clarity with which it is made).

22. These selected 26 publications were summarised in a table (the Table"). The Table identifies the publication complained of and the particular passage in the publication which is complained of, or, as the case may be, that it is the whole publication that is complained of. It also sets out the aspect of the undertakings which the claimants say the publication breached.

23. At the start of the hearing, I gave to the Defendant a reminder that he had the right not to give evidence, if he so chose, alternatively to give evidence and submit to cross-examination. At that point the Defendant expressly stated that he did not dispute at this hearing, and that he had never disputed, responsibility for the publications. Consistently with that stance, when he came to cross-examine Mr Gunnill and Ms. Martorell, he did not challenge any of their evidence as to his responsibility for the publications.

24. At the start of the hearing Ms Page stated that the Claimants had made a further selection of 13 out of the 26 publications in the Table, and that for the purposes of the hearing she would confine her case to those 13. She made clear, as the Claimants had made clear in February 2012, that in making these selections from the original 153

publications complained of the Claimants were making no concessions at all. They maintain that all of them are breaches of the undertakings. But no useful purpose would be served in seeking to prove them all.

25. The documents before the court are very voluminous: 12 lever arch files. In addition to the very large number of publications alleged to constitute breaches of the Defendant's Undertaking, there has also been extensive correspondence between the solicitors for the Claimants and the Defendant in person.

CHRONOLOGY

26. The following is a chronological summary of the main events relevant to this application. The bracketed numbers in the headings identify the 13 matters on which Ms Page relies in this application to commit the Defendant for contempt of court (while not resiling from the Claimant's contention that there have been very many more breaches). The numbers refer to the numbering in the Table.

(1) Breach #1: The sale of a book

27. Within weeks of the order dated 25 November 2009, the correspondence started on the topic of alleged breaches. On 5 February 2010 the Defendant wrote that the sum and costs which he was ordered to pay under that order, namely £440, was too high (he had not been asked to pay any damages). The solicitors replied the same day explaining the figures and going on to state

> "In the meantime, and of far greater concern, is the fact that we have received evidence to suggest that you are both continuing to promote the publication of the "60 reasons" booklet (by directing enquiries to websites where it may be downloaded or purchased) as well as that you have directly sold at least one copy of the book. Both these actions constitute not only a breach of the undertakings you gave (which as you are aware is actionable as a contempt of court), but also a further publication by you of the libels complained of … [there are then references to the home page of the website of the "Madeleine Foundation"] the purpose of this letter is to "require you immediately to remove the above mentioned passage on your homepage and article, and to provide your response to this letter as a matter of urgency. In the meantime we must reserve all our clients' rights to bring proceedings for committal for contempt of court and/or libel".

28. On 8 February the Defendant replied. His email included the following:

> "… so far as I am aware on the new Madeleine Foundation website there is no promotion of the "60 reasons" book whatsoever. We have made clear statements that it is no longer available for sale.
>
> I have myself on a few occasions directed people to websites where "60 reasons" is available to read on the internet. I

> emphasise once again that I have not in any way helped or encouraged these websites to reproduce the booklets… I am further willing to endeavour to contact any website that may have reproduced "60 reasons" (in all cases without my consent I may add) and ask them to remove it from their site forthwith.
>
> You refer in the same paragraph to "at least one copy of the booklet" being sold. On 13 January this year, a Mr. Mike Gunnill, a freelance photo journalist who is in contact with you, attempted to buy a booklet using the false name of Michael Sangerte, and purporting to live in "Reading, Berkshire". He claimed to be willing to pay "a good price" for it. He followed up this deception by insisting that he required a hard copy of it as he believed it would become "an important historical document".
>
> At this stage I suspected that he was not a genuine customer and accordingly a booklet was sold to him. Believing that it would yield me useful information, a booklet was indeed sent to him…."

29. Quoted in this email from the Defendant are emails he had sent to operators of websites requiring them to cease publishing, selling and distributing the 60 reasons booklet.

30. What the Defendant wrote in the letter about Mr. Gunnill is accepted by the Claimants and Mr Gunnill himself to be correct, except for one important point. As the Defendant now expressly accepts, Mr Gunnill was not in contact with the Claimants. He wanted the book for the purposes of journalism and he was in touch with a newspaper publisher.

31. The 60 reasons booklet is about 60 pages long. On the cover it states that it is written by the Defendant. The gist of the book is given on the back page as follows:

> "About The Madeleine Foundation
>
> The Madeleine Foundation was set up in January 2008 to try to ensure that the right lessons were learnt from Madeleine McCann's disappearance. Madeleine – whatever happened to her – was a victim of child neglect, being left exposed to all manner of risks while her parents were wining and dining out of sight in a bar over 100 yards away. ….
>
> About this booklet
>
> This booklet has one simple aim: to enable the British public to learn something of the many reasons which suggest that Madeleine was not abducted, but, rather, that something else happened to her… It is necessary because the British press, perhaps cowered by the McCann's having successfully sued some of them for over half a million pounds, has failed to

> explain and analyse the powerful evidence against the McCann's which has emerged in the past 12 months. ….
>
> About the author – Tony Bennett
>
> Tony, 61, qualified as a social worker in 1975, and later as a solicitor in 1995. He has a track record of successful campaigning…. now Tony has turned his research skills to exposing the lack of evidence that Madeleine was abducted and, by contrast, the mountain of evidence that points in a different direction. …."

32. In addition to the title ("What really happened to Madeleine McCann? – 60 reasons which suggests she was not abducted") the Claimants rely on the whole book, but in particular to the passages in the Introduction:

> "The Madeleine Foundation's view on what really happened to Madeleine is precisely the same as the view held by the senior Portuguese detective, Mr Goncalo Amaral… the facts point not to Madeleine having been abducted but in an entirely different direction… Was she really abducted? Or did she die as a result of an accident, perhaps of over-sedation, or from another crime?"

33. On 9 February the Defendant wrote again to Carter-Ruck. He said he had made changes to the material on the website they complained of to comply with their requirements.

(2) Breach #4: 4 July 2010

34. On 4 July 2010 the Defendant posted on the MF website the text of a letter which he said he had sent to the Home Secretary. This was the first of the original top ten breaches complained of. No complaint is made by the Claimants of the letter insofar as it was sent to the Home Secretary. The complaint relates to the publication to the world at large. The letter refers to an article in the issue of the *Sunday Express* of the same date reporting that the Home Secretary hoped to meet the Claimants. The letter includes the following:

> "You may wish to recall that the McCann parents were and remain suspects in the reported disappearance of their daughter. … could you please let me know whether any proposed re-investigation will actively and diligently pursue the line of enquiry mentioned in the interim and final report of the Portuguese Police, to the effect that Madeleine may have died in the McCanns' apartment and her body may have been hidden or disposed of, either by or with the certain knowledge of the parents? …the McCanns' were two of three prime suspects in this case and …there is no evidence whatsoever to suggest that Madeleine McCann was abducted, but yet there is much evidence to the contrary …we are constantly being fed the abduction theory when we know too well that there is no

> evidence of the alleged abduction, a theory that was proven as virtually impossible by the Portuguese Police. Contrary to this, we have the thesis of the Portuguese Police which points to the death of Madeleine in her parent's apartment, a theory which is supported by much evidence which can be found in the original police files, now made public and available on the internet. Please confirm that any new enquiry will focus on all possibilities including abduction and also the theory as reported in the interim and final statements of the Portuguese Police, which states that Madeleine may have died in the McCann's apartment."

48 questions

35. On 13 July 2010 the Defendant posted on YouTube a video recording which he had created and which featured himself. It related to questions which Dr Kate McCann had been asked by the Portuguese Police and which she had declined to answer. On the same day the Defendant posted a link to this recording on a website under the name Jill Havern ("the JH website"). These two actions are items 11 and 26 of the list of 26 alleged breaches referred to in the table prepared after February 2012. They were items 46 and 148 in the original list of 153.

36. On 15 July 2010 Carter-Ruck wrote to the Defendant reminding him of his Undertakings and complaining that he had on a number of occasions breached them. The letter refers to the posting of 4 July 2010 and, amongst other matters, to the posting of the video recording on YouTube. They required him to remove the video from YouTube and to cease other publications they complained of. They warned him that the Claimants had a right to bring proceedings for contempt of court and urged him to seek legal advice.

37. On 19 July the Defendant replied to Carter-Ruck. As to the video, he claimed to be acting on legal advice, but said that he had taken it down from YouTube. His reply refers to libel, but not to contempt of court, at least not in terms. For example he said, as he has said in relation to a number of the Claimants' complaints that it did not seem to him that the publication was "capable of being construed as libellous".

38. On 21 July 2010 the Defendant wrote again to Carter-Ruck. It is a 5 page letter. He wrote:

> "I am happy to repeat my undertakings given previously to the court. In particular, in the light of your e-mail, I will refrain from suggesting that Mr Amaral's suspicions about your client may be correct, whilst at the same time we are advised that to continue reasonable discussion of the information he has provided us is not libellous…
>
> … the legal advice I received is that neither myself nor any one else can be prohibited by a libel court or otherwise from reporting on and making reasonable comment on information in the public domain, and especially so given this information comes specifically from police sources…".

(3) Breach #12: 24 July 2010

39. On 24 July 2010 the defendant posted messages on the JH website. He made a long and detailed posting. It includes the following:

> "I believe only two basic scenarios are worth spending much time on: Maddie was taken by a child predator. Maddie died in the apartment and the parents are covering up a crime…
>
> Summary
>
> So, to recap, Madeleine McCann is 99% likely to be dead. My top suspects at this point, based on behaviour and what information can be validated, are the McCanns."

40. On 3 August 2010 Carter-Ruck wrote to the defendant. The letter includes:

> "While you claim to be complying with the requests contained in our letter of 15 July 2010, including that you do not continue to publish the "48 questions" video you made… you have recently been republishing articles/postings by others, many of which clearly allege that our clients are guilty of, or are to be suspected of, causing the death of their daughter… we must require your immediate response to this continuing clear breach of the undertakings which you gave to the court, which appears to demonstrate how disingenuous your purported assurances are".

41. The Defendant replied by email and then by a 25 page letter dated 16 August 2010. Again he concentrates on the complaint of libel rather than contempt of court. The letter includes a theme which he repeated at the hearing. His point is that it would be ludicrous if others were able to report what he could not. He claimed not to know what Carter-Ruck referred to as the recent articles/postings, and he stated that he would remove any posting on the website or elsewhere if the Claimants would name the articles or postings in question and explain in clear terms how they say they are libellous.

42. The Defendant wrote two letters to Carter-Ruck dated 20 August 2010. They cover 10 pages. He raises questions about the disappearance of Madeleine which he claims the Claimants ought to answer. He gave assurances that he will not publish links to the 60 reasons booklet and claimed to have removed those documents from "our website".

43. The Defendant wrote a further series of letters one dated 9 September and another 16 September 2010. Within a letter dated 1 October 2010 his tone changed. Referring to material which he had previously agreed to cease publishing in response to Carter-Ruck's letter of 15 July, he wrote:

> "I write to inform you that we have now reconsidered our position and we now see no reason to cease distributing 'your questions answered about [Mr] Amaral'".

(4) Breach #5: 24 September 2010.

44. On 24 September 2010 there was posted on the MF website a document headed "News from the Madeleine Foundation…" above the Defendant's signature. There appears in the last paragraph the following words:

> "Despite the severe restrictions now imposed on me as a result of the McCann's hiring Carter-Ruck to threaten a High Court libel writ against me, the obvious contradictions in the accounts of events… are among the factors that tell me the whole truth about Madeleine's disappearance has not been told. I therefore remain personally committed to continuing the campaign to prise out the truth, the whole truth and nothing but the truth about why she was reported missing…".

45. In October 2010 the Portuguese courts discharged an interim injunction restraining publication of a book by Mr Amaral which had been granted on the application of the Claimants.

(5) Breach #13: 2 January 2011

46. On 2 January 2011 the Defendant posted on the JH website a document headed "Wendy Murphy writes about the cases of John Bennett Ramsay, Caylee Anthony and Madeleine McCann in the context of child sexual abuse and the use of sedatives". After referring specifically to the Claimants as Madeleine's parents, and to Dr Kate McCann as "mom", the document ends with the following:

> "… all three cases involve sedatives and young, cute kids… it doesn't feel very good to believe parents sell their children for sex and porn. But what's more important? Children – or the comfort of our denial?"

6 January 2011.

47. On 6 January 2011 Mr Clarence Mitchell gave an interview on Radio Humberside. He is described as chief public relations officer for the Claimants. The transcript is exhibited to the Defendant's affidavit. He referred to it a number of times in the correspondence, and again at the hearing before me. It is a document to which he attaches great importance.

48. The interviewer asked Mr Mitchell what the Claimants thought was the strongest possibility of what happened to Madeleine. The transcript of his answer reads as follows:

> "Kate and Gerry know Mad… know their daughter well enough to know she didn't wander out of the apartment as has often been speculated. The only <u>assumption</u> they can make is that someone took her out of the apartment that is the <u>working hypothesis</u> on which the private investigation is also based. That there is somebody, perhaps or just two or three people out there who know what happened and that there was an element

> of pre-meditation, preplanning went into it. …the very fact that nothing has been found of Madeleine since, not a trace, tends to suggest that she has been taken somewhere else and has been… hopefully, is being looked after, or at least cared for… with someone. …that is…the working hypothesis. In some cases, if … God forbid, she had been harmed she probably would have been found long ago which she hasn't been and that's why they keep going… until they have the answer as to what has happened and until they are presented with incontrovertible proof that she has been harmed, they will continue to believe – just as logically, without any evidence to the contrary – that she could still just have easily be alive." (the emphasis is the Defendant's)

49. On 2 February 2011 the Defendant wrote to Carter-Ruck. After referring to, and citing from, Mr Mitchell's words he wrote:

> "Whilst I'm aware that that undertaking remains in place, nevertheless your clients, through their spokesmen, have conceded that the abduction is "only an assumption", and not a fact, still less a universally acknowledged or forensically proven fact. It is just what their spokesmen said twice in the same interview, namely, just a "working hypothesis". I therefore give notice that I consider that these statements by Mr Mitchell give me complete freedom to give reasons why I question your client's assumption and equally, to bring forward provable facts and coherent arguments against the hypothesis put forward by your clients, and, indeed to advance facts and arguments to support alternative hypothesis".

50. On 3 February 2011 the Defendant restored to the MF website the full version of an article, parts of which he had edited out in February 2010 in response to a request from Carter-Ruck. The article was under the heading "How did the alleged abductor snatch Madeleine in a time slot of no more than 3 – 4 minutes?". It referred to the interview given by Mr Mitchell. The print out covers over 8 pages. This was item 6 of the 26 items in the claimant's table of breaches.

51. On 31 March 2011 there were distributed in the streets near where the Claimants live and work, and in neighbouring towns, a leaflet published by the defendant headed "What happened to Madeleine McCann? 50 facts about the case that the British media are not telling you please copy this leaflet or pass it to others when you have read it – thank you" (the "50 facts leaflet"). This was item 25 on the list of 26 alleged breaches in the claimant's table.

(6) Breach #14: 16 April 2011

52. On 16 April 2011 the Defendant posted on the JH website the text of the 50 facts leaflet together with an introductory message. This was the third of the original top ten alleged breaches. His introductory message reproduced from *The Daily Mail* a statement recording that the Madeleine Foundation:

> "now plans to distribute [copies of the leaflet] to homes and shops across the country. The leaflet is divided into four sections: 1) Major contradictions in the statements of the McCanns… 3) Strange things the McCanns have said and done. 4) How the McCanns have wasted public money on useless private detectives".

53. Near the start are the words:

> "Can we be sure Madeleine McCann really was abducted by a stranger? Please take a careful look at these facts about the case, which you won't find in any of our mainstream media. And if you are concerned about the contents of the leaflet, please copy and pass on to your friends and contacts".

(7) Breach #15: 2 May 2011

54. On 2 May 2011 the Defendant posted on the JH website a text under the title "Suspicious minds – a thought with Daniel Freeman". The text is printed out over 6 pages in a very small single spaced typeface. This was the second of the original top ten alleged breaches. It is in the form of a dialogue between the Defendant and the person referred to as Garth. Garth wrote that continued doubt or suspicion is nothing short of paranoia. He refers to the Defendant as a spreader of suspicion, and he cites one of the other campaigns which the Defendant had referred to in his 60 facts booklet. In response to statements by Garth the Defendant posted the following:

> "… I have seen evidence that those closely associated with … the disappearance of Madeleine McCann were not telling the truth …
>
> … in that lucid and concise report [of a Portuguese Police officer dated 10 September 2007] are several clear lines of evidence and arguments suggesting that Madeleine McCann died in Apartment 5A and that her parents and others covered it up. I do not in any way risk libel action for saying that, because what I have just written is an entirely factual statement about the contents of [the] report …
>
> By and large I have not speculated about how she might have died. If she died, it is entirely logical to think that the parents might have had many reasons for not wishing their child to be subject to a post-mortem by a Portuguese pathologist …
>
> There have been many instances in recorded history, a lot of them quite recent, where young children have died because of their parents' deliberate or accidental act, negligence or neglect, and have then gone on to hide their bodies and make up the most elaborate stories to hide what really happened. Many of them were found out, sooner or later".

55. On 12 May there was published the book by Dr Kate McCann "Madeleine – Our Daughter's Disappearance and the Continuing Search for Her".

(8) Breach #16: 14 May 2011

56. On 14 May 2011 the Defendant engaged in an exchange of messages posted on the JH website. The transcript extends to over two and a half pages. The other person wrote about the appearance of the Claimants on a television programme. It is the responses written by the Defendant which the Claimants allege to be made in contempt of court. These responses include the following:

> "… People nowadays seem less able than they used to be to distinguish truth tellers from liars …
>
> They've come up with this story in recent times as it gives a (just) plausible reason as to why an abductor might have been checking on apartment G5A … After four years, they still can't get their story straight … I can scarcely believe that newspapers and media can recycle such utter and patent rubbish … It's so easy to pick their ludicrous statements apart …".

(9) Breach #7:18 May 2011

57. On 18 May 2011 the Defendant posted on the MF website a copy of a letter which he said he had written to the Prime Minister that day. No complaint is made of the fact that he wrote the letter to the Prime Minister. What the Claimants complain of is that he posted it on the public website. This was the fifth of the original top ten alleged breaches. The letter is under the heading "The need for a full public enquiry into the disappearance into Madeleine McCann". There is a sub heading "two rival explanations of what really happened to Madeleine McCann". The first of these accounts is identified as that put forward by the Claimants, namely that Madeleine was abducted.

58. The letter then goes on to include the following

> "By contrast, a great many people consider that there is more than adequate evidence that Madeleine McCann died in the McCann's holiday apartment and that her parents and others have covered up this fact, and arranged to hold a hoax "abduction" of Madeleine on the evening of 3 May 2007, Madeleine having already died before that evening's event … Dr Amaral … advances the view that she may have died as the result of an accident whilst her parents and friends were dining one and half minute's walk away. Another view of what might have caused Madeleine's death is the possibility that she was over-sedated by the McCanns.
>
> We do not wish to review in this letter all the evidence that suggests that Madeleine did die in the McCann's apartment, … There is also a very large amount of circumstantial evidence

> suggesting that the McCanns and their friends have not told the truth …
>
> The 48 members of the Madeleine Foundation, our many supporters, and a huge number of others subscribe to the view that the balance of evidence points in the direction of Madeleine having died in the McCann's holiday apartment. If that hypothesis is correct, then the McCanns' motive for wanting a "Review" which would now open up the many files that the Portuguese Police have up to now withheld would be clear: not to find Madeleine, but rather to trawl the files for any other evidence that may be against them, so that they can defend themselves and deal with any such evidence.
>
> You may recall that the *Daily Mirror* published an article in February 2010 … part of the *Mirror's* report ran
>
> > … The contradictions in Gerry McCann's statement might lead us to suspect a homicide …
>
> Our requests
>
> In the light of all the above however we make these requests: (4) that you …. make it crystal clear to both the reviewing team and to the public that this "Review", if it is to proceed, will be able to pursue the hypothesis that Madeleine McCann died in her parent's holiday apartment and that the McCann's conspired to hide her body …."

59. On 3 June 2011 Carter-Ruck wrote to the American Internet Service Provider ("ISP") which hosted a website on which there was posted the "50 facts" leaflet and other materials. They stated that the purpose of the letter was to put the ISP on notice of the unlawful content of the website and to invite them to cease hosting it.

60. The letter was passed to the Defendant and on 8 June 2011 he posted his response to it on the MF website. This posting was item 8 in the list of 26 in the claimants' table, and had been item 34 in their original list of 153 complaints. The Defendant's posting was in the form of a 14 page letter addressed to Carter-Ruck. On pages 8 and 9 of that letter he wrote the following:

> "Given these accurate statements by [Mr Mitchell] on behalf of your client, it is clearly open to others to work on alternative assumptions …
>
> There is an unfortunate history of parents covering up the death of a child (whether the child had died by negligence, neglect, accident or deliberate act, by claiming that their child has been abducted …)"

61. The letter also included the following:

> "… I have so far as I am aware, avoided, in line with my court undertaking, direct accusations that your clients have or are to be suspected of, causing the death of Madeleine or of disposing of her body, or that they have lied about what happened or have covered up what they have done.
>
> Signing that court undertaking was not, as you know, a vow of Trappist-like silence over the continuing mystery of what really happened to Madeleine McCann …
>
> The legal advice I received following your letters to me of 27 and 28 August 2009 was clear. Direct and false accusations unsupported by facts rendered themselves liable to be treated as libel. However, by the same token, the rights of all citizens of Council of Europe countries to free speech as enshrined in article 10 of the European Convention … entitled one to, for example, criticise others and to challenge claims made by others. The advice I received also included very specific advice that asking questions about claims by others did not and could not amount to libel. …"

62. On 22 June 2011 the Defendant posted on the JH website words attributed to a lady called Pat Brown under the heading "Pat Brown thinks that Madeleine died between 8:30pm and 9:05pm on Thursday 3 May 2007". This was item 17 on the Claimants' table of 26 complaints.

63. On 7 July he posted on the same website a posting printed out over 4 pages under the heading "Contacting the Scotland Yard Review Team (SYRT) …" This was item 18 on the Claimants' list of 26, and had been number six of the original top ten.

64. On the same day the Defendant posted on Twitter a link to the posting on the JH website. This was item 24 on the Claimants' list of 26 complaints.

(10) Breach #9: 11 July 2011

65. On 11 July 2011 the Defendant posted on the MF website a copy of the 5 page letter he had written that day to DCI Redwood of the Review Team. No complaint is made of the fact that the Defendant wrote to a police officer. The complaint is that he posted the letter on a public website. This was the seventh of the original top ten alleged breaches. The letter includes the following:

> "We wish to submit evidence to your Review which suggests that Madeleine's parents … have not told the truth … about the disappearance of their daughter. This evidence also suggests that the McCann's friends in Portugal … may also not have told the truth to the police about Madeleine's disappearance. Moreover, the evidence we wish to present to you tends to suggest that Madeleine McCann may have died in her parents' apartment howsoever that death may have been caused, and that others beside the McCanns and the "Tapas 7" have conspired to cover up the true circumstances of her death.

> We have 3 classes of evidence which we wish to submit to you these are as follows:
>
> 1. A comprehensive dossier of circumstantial evidence including new material not disclosed in the Portuguese Police files … which demonstrates, we say with clarity, that the McCanns and their friends did not tell the truth …
>
> [2] Evidence is provided to support the claim that the man who funded and directed the McCann's private investigations, … is deeply implicated in intimidating relevant witnesses into silence …
>
> [3] Information of a first hand nature, received from a female insider within the McCann Team, whose information strongly tends to suggest that the entire McCann Team private investigation team was exercised in the creation of a huge smokescreen to cover up what really happened to Madeleine McCann, rather than being a genuine attempt to find Madeleine …
>
> What we need to know, in the clearest possible terms, please, is whether your team is prepared to review in full any evidence, forensic or circumstantial, that tends to show that Madeleine died in the McCann's apartment … and her body then hidden …
>
> … Last year we published: "the Madeleine McCann case files: volume 1" which reproduces evidence from the case which tends to suggest that Madeleine McCann was not abducted …"

66. On 20 July the Defendant posted on the JH website extracts from, and a paraphrase of parts of, the letter he sent to the SYRT on 11 July 2011. This was item 19 in the Claimants' table of 26 complaints and had been item 97 of the list of 153, and number eight on the original top ten.

(11) Breach #20: 3 August 2011

67. On 3 August 2011 the Defendant posted on the JH website a posting headed "Scotland Yard WILL examine parents' possible guilt re Madeleine - official". The Defendant referred to a number of serious criminal offences with which he states the Claimants could be charged under English law, including causing or allowing the death of a child and hiding the body and preventing an inquest. He concludes with the words:

> "Those of us who believe the evidence strongly suggestS that Madeleine McCann died in Apartment G5A have, I believe, a solemn duty to explain this to DCI Andy Redwood and his colleagues."

68. On 4 August 2011 an employee of Carter-Ruck was able to purchase from the Defendant a copy of "the Madeleine McCann case files: volume 1". This sale was item 2 on the Claimants' list of 26 complaints.

69. On 12 August 2011 Carter-Ruck wrote to the Defendant with a number of complaints and gave him notice that they would apply to the court to commit him for contempt of court. They referred to their letters of 5 February, 15 July and 3 August 2010, and continued as follows:

> "While it is the case that you confirmed you would cease to publish material which formed the subject of those complaints, you have subsequently gone on to publish a large volume of very similar material on your own website and elsewhere.
>
> Our clients have given you every opportunity to comply with the undertakings which you gave, and we have in the past gone to some length to explain to you why – contrary to your purported position – publications you have made or procured have constituted both actionable libels and placed you in contempt of court. However, despite our efforts to explain the position to you, and despite our clients giving you a number of opportunities to desist from this behaviour it is clear that you have no intention whatsoever of complying with your undertakings, and therefore our clients have resolved now to seek your committal for contempt of court.
>
> We must also make clear that while our clients reject as absurd the "theories" which you advance about Madeleine's disappearance neither our clients nor we seek (and have never sought) to prevent you from raising those "concerns" with the appropriate authorities – whether it be the law enforcement agencies, elected representatives such as your Member of Parliament, Home Secretary or even (as you have also done) the Prime Minister …
>
> Our clients' overriding purpose in bringing complaints against you has always been to prevent your dissemination of false and defamatory allegations about them which risk causing damage to the ongoing search for their daughter, in addition to unjustifiable damage to their reputation. For this reason, they did not (as they were clearly entitled to do) insist that you pay them libel damages after they complained to you in 2009, and were content to accept undertakings from you that you would desist from the behaviour complained of …"

70. On 17 August 2011 the Defendant replied stating that he had just received the letter and accompanying document. He wrote:

> "In view of your client's request, I will embark straight away without any admission of liability or concession as to being in

> contempt of court as you allege, on removing or amending the articles or threads to which your client objects".

71. On 18 August 2011 the Defendant wrote to Carter-Ruck saying that, at his request, the forum owner of the JH website had informed him that she was in the process of removing the posts to which the Claimants objected. He gave reasons why he contended he was not in contempt of court, and concluded by saying that he would defend any application to commit and "will in addition make an application to vary the terms of the undertaking".

(12) Breach #22: 7 September 2011

72. On 7 September 2011 the Defendant posted text on the JH website under the heading "What is the likelihood that the SY 'review' will be a whitewash?" He has since altered the heading to read "DCI Redwood may be an honest man of unimpeachable integrity and honesty who will conduct an impartial, robust, full and fair review without fear or favour". This was the tenth of the original top ten alleged breaches. In it he refers to the matters which he had included in his letter 11 July to DCI Redwood, adding that:

> "this is all evidence that points in the direction of Madeleine McCann having died in her parents' apartment rather than that she was abducted".

(13) Breach #23: 1 November 2011

73. On 1 November 2011 the Defendant posted on the JH website a text under the heading "Sofa + accident = death, really?" It includes the following:

> "At the risk of triggering a writ for contempt of court for breaching a court undertaking given two years ago, I will comment on this speculation about when and how Madeleine died… In summary, looking at what evidence we have, Madeleine died in the flat … her body was removed before 3 May, this was not premeditated.."

The proceedings

74. On 1 December 2011 the Claimants issued their application that the Defendant be committed for contempt of court.

75. On 9 February 2012, the day after the first directions hearing, the Defendant states that he resigned from the Madeleine Foundation Committee.

76. On 22 February 2012 the Defendant issued his application to be released from or to vary the Undertakings. In support he made his first affidavit dated 21 March 2012. It is 58 pages long.

77. I described the basis for this application in my October judgment and how that application related to the Claimants' application to commit the Defendant for contempt of court:

"16. In lengthy documents which he has submitted to the court the Defendant makes clear that the basis upon which he applies for a variation of the undertakings is that he contends that there is evidence, (which he claims is fresh evidence at least in part), which would satisfy the court that the three allegations which he wants to be free to make to the public at large are true, or alternatively, that they are honest opinion. He submits that there has been a material change in the law of honest comment as laid down by the Supreme Court in the case of *Spiller v. Joseph* [2010] UKSC 53; [2011] 1 AC 852. In support of his application to vary the undertakings he wishes to argue these points, and to put forward evidence to prove what he says is the truth of what he has published, and of what he wishes to publish.…

21. The discharge of an injunction, or of an undertaking, is not of itself a licence or judgment of the court that a publication, which was previously restrained by such injunction or undertaking, may lawfully be published. There would need to be determined, in one way or another, at least two issues before it could be said that the Defendant is to be entitled to make public the allegations he wishes to make. The first issue is whether he can overcome the preliminary obstacle which Mr Dean submits is presented by the principle that settlements are not to be reopened in circumstances such as those existing in this case. If the Defendant succeeds on that first issue, the second issue would be whether the Claimants have a good cause of action, whether in libel, or harassment (if they wish to revive the harassment claim), such as would entitle them to have re-imposed an injunction in terms similar to the undertakings which the Defendant gave.

22. It seemed to me that, as a matter of procedure, the appropriate course to follow in order for all these issues to be raised in an orderly fashion, and properly determined, is to treat the Defendant's application to vary the undertaking as an application to lift the stay of the proceedings which was ordered on 25 November 2009.

23. I express no view, one way or the other, as to whether the Defendant has any prospect of persuading the court to lift the stay. But if the court were minded to lift the stay, it would not follow that it would immediately permit a variation of the undertakings. One course that the court could follow would be to take it in stages, as the court might determine. If the court did lift the stay, the next step would be for the Claimants to serve Particulars of Claim.

24. There are detailed rules in the CPR governing the pleading and conduct of defamation actions, including provision for resolving issues in stages. These are important for the

> protection of both claimants and defendants. I see real dangers in the court attempting to resolve issues of truth and honest comment in the context of an application to vary an injunction, where the rules which govern pleadings and other interlocutory matters in defamation proceedings have no direct application. It would also be anomalous for issues of truth and honest opinion to be raised in an application to vary an undertaking at a time when the defamation proceedings in which those allegations would normally fall to be determined are ordered to be stayed. In effect the stay would be overridden, while formally remaining in place.
>
> 25. In my judgment it is in the interests of justice that this committal application, like all committal applications, be heard as soon as possible. It should not be adjourned pending the hearing of any application made or to be made by the Defendant….
>
> 28. … It would be a matter for the court hearing the committal application, if it found that the Defendant had committed a breach of the undertaking, to decide at that point whether to proceed immediately to determine the penalty, or whether to adjourn, and if so, whether or not to hear the Defendant's application [to vary or discharge the Defendant's undertaking] before determining the penalty."

78. On 3 May 2012 at the second hearing for directions I adjourned the application to commit to give the Defendant time to make a further attempt to obtain public funding for his representation.

79. On 12 July 2012 Carter-Ruck wrote to the Defendant complaining that there had been further breaches of his undertaking in postings he had made on the JH website on 13 February 2012 and on 15 and 22 May 2012.

80. On 4 January 2013 Carter-Ruck wrote to the Defendant in response to his request that they agree to an adjournment of the committal hearing then expected to take place at the end of January. They declined to agree. But they also went on to complain of what they said were further breaches of the undertakings in the form of website postings on 19 November and 19 December. They complained that the Defendant was treating his obligations to the court "with the utmost derision".

MEANINGS

The law

81. Since the Defendant has never disputed responsibility for publication, and has raised no issue as to any procedural matter (other than his separate application to vary or discharge the Undertakings), the only issue before the court on the question whether the Defendant is in breach of his Undertakings is what the publications complained of meant.

82. In approaching this issue I shall first consider what the publications complained of meant objectively. I shall consider separately what the Defendant claims he intended or thought they meant. In considering the objective meaning I will apply the test which a court is required to apply at the trial of a libel action where there is an issue as to what is the natural and ordinary meaning of words alleged to be defamatory of a claimant. But in applying that test I shall abide by the requirement that I must be satisfied so that I am sure that an alleged breach of an undertaking is indeed a breach.

83. Guidance on how to determine the meaning of words alleged to be defamatory has been given by the Court of Appeal, and recently summarised by Sir Anthony Clarke MR in *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 at [14]. It included the following:

> "The governing principles relevant to meaning . . . may be summarised in this way:
>
> (1) The governing principle is reasonableness.
>
> (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.
>
> (3) Over-elaborate analysis is best avoided.
>
> (4) The intention of the publisher is irrelevant.
>
> (5) The article must be read as a whole, and any 'bane and antidote' taken together.
>
> (6) The hypothetical reader is taken to be representative of those who would read the publication in question…

84. I have not set out the whole of the words which the Claimants claim are breaches of the Undertakings, although the meaning of words must always be considered in the light of the context in which they are published. The main reason for my not doing this is that the Defendant is extremely verbose, and this judgment would be enormous if I were to set out the whole context of each publication.

85. But there is a further reason. I do not consider that it would be fair to the Claimants for the court to repeat in a judgment the entirety of the publications by the Defendant which the Claimants allege both to be in contempt of court, and to be a further series of libels upon them. If I were to do that it would facilitate the further publication of these details under cover of the defence of privilege. The meanings which the Claimants attribute to the words complained of in this committal application are allegations of the utmost gravity. If the Defendant or anyone else chooses to repeat these allegations, then the court should not pre-empt the decision of any other court as

to whether such republication is lawful or not. Compare *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253 para [26].

86. The decision not to identify in a reserved judgment a fact or person that has been identified in open court is not a reporting restriction, nor any other derogation from open justice. The hearing of this committal application was in public in the usual way. The decision not to set out everything in a judgment is simply a decision as to how the judge chooses to frame the judgment.

87. I make this clear because on occasions in the past when I have not included in a judgment the names of individuals, or other information, that form of drafting has been misunderstood as a decision to derogate from open justice. In *Graiseley Properties Ltd v Barclays Bank Plc* [2013] EWHC 67 (Comm) my judgment in *Joseph v Spiller* [2012] EWHC 2958 (QB) was apparently cited by counsel as an example of an anonymity order, although no such order had been made by me in that case. In the judgment in *Joseph* I used only initials to refer to certain individuals who were not witnesses, but whose names had been mentioned in documents, and by witnesses, in open court. This has apparently been misunderstood as indicating that I had granted anonymity orders when in fact I had not. Their names had been freely mentioned in open court in the usual way. But what happens in court, if not reported at the time, may be ephemeral, and may soon be forgotten and become difficult to recover, whereas a reserved judgment may appear in law reports, or on the internet, indefinitely. So it may be unnecessary, and unfair to some persons, to name them in a judgment.

Submissions of the parties

88. Ms Page submits that the 60 reasons booklet, the sale of which is complained of as breach #1, bears the meanings that the Claimants are actually guilty of (a) causing the death of their daughter, and (b) disposing of her body, lying about what happened and covering up what they had done; in the alternative, (c) that in any event that the Claimants are to be suspected of each of those acts. I shall refer to these as meanings (a), (b) and (ca) and (cb).

89. Ms Page submits that these meanings are also the meaning borne by each of the following alleged breaches, as follows:

    i) Meaning (a) guilty of death: breaches #1, #12, #13 (in the alternative and in any event Ms Page submits that these publications carry meaning (ca), that the Claimants are to be suspected of causing the death.

    ii) Meaning (b) guilty of disposing of the body etc: breaches #1, #4, #7, #9, #12 , #13, #14, #15, #16, #20, #22, #23 (in the alternative and in any event Ms Page submits that these publications carry meaning (cb), that the Claimants are to be suspected of doing these acts.

    iii) Meaning (ca) to be suspected of meaning (a), causing the death: breaches #7, #15, #20

    iv) Meaning (cb) to be suspected of meaning (b): breach #5.

90. The document which primarily sets out the Defendant's case is his second affidavit sworn on 21 March 2012. He there addresses a number of general points, as well as his specific points related to each alleged breach.

91. The Defendant submits that he has not at any time either before or after the giving of the undertakings accused the Claimants of causing their daughter's death.

92. The Defendant further submits that his statements should go unpunished because they are honest comment as that defence is explained by the Supreme Court in *Spiller v Joseph* [2011] 1 AC 852; [2010] UKSC 53, and/or that it would be a violation of his right under ECHR Art 10 to freedom of expression. I shall address these arguments below.

93. The Defendant does not make specific submissions on the meanings of breach #1, other than his general denial that he has ever accused the Claimants of causing their daughter's death.

94. In my judgment breach #1 (February 2010) is proved: I am satisfied that the booklet bears meanings (b) and (ca) and (cb). As to meaning (a), I accept that many readers might reasonably understand the meaning to be that the Claimants did cause the death of their daughter, but applying the high standard that I must apply on this application, I am not satisfied that that is the objective meaning that would be understood by the hypothetical reasonable reader.

95. On breach #4 the Defendant concedes that it would have been better if he had said "there is no evidence apart from the claims of the McCanns and their friends to suggest that Madeleine was abducted", and other formulations. He concedes that the Claimants may have highlighted another breach, but he goes on to say of that:

> "If so, then in response the Defendant submits that it is factually accurate to say that one of the lines of enquiry pursued in both the interim and final reports of the Portuguese Police was indeed the possibility that Madeleine might have died in the McCanns' apartment".

96. In my judgment breach #4 (4 July 2010) is proved: I am satisfied that the posting bears meanings (b) and (ca). In the alternative, it would in any event bear meaning (cb).

97. The Defendant does not make specific submissions on the meaning of breach #5.

98. In my judgment breach #5 (24 September 2010) is proved: I am satisfied that the posting bears meaning (cb).

99. The Defendant does not make specific submissions on the meaning of breach #7.

100. In my judgment breach #7 (18 May 2011) is proved: I am satisfied that the posting bears meanings (b), (ca) and (cb). The posting includes the words quoted and adopted from another publisher "The contradictions in Gerald McCann's statements might lead us to suspect a homicide".

101. The Defendant does not make specific submissions on the meaning of breach #9.

102. In my judgment breach #9 (11 July 2011) is proved: I am satisfied that the posting bears meanings (b) and (ca). In the alternative it would in any event bear meaning (cb).

103. The Defendant does not make specific submissions on the meaning of breach #12.

104. In my judgment breach #12 (24 July 2010) is proved: I am satisfied that the posting bears meaning (b) and (ca) ("the parents are covering up a crime… I would not rule out the possibility of a child predator"). In the alternative it would in any event bear meaning (cb).

105. In relation to breach #13 the Defendant submits that this bears none of the meanings complained of.

106. In my judgment breach #13(2 January 2011) is proved: I am satisfied that the posting bears meanings (a), (b). They would in any event bear meanings (ca) and (cb). The posting specifically adopts the "early news reports" that Madeleine had been sedated.

107. The Defendant submits that the posting complained of as breach #14 is purely factual and contains nothing libellous.

108. In my judgment breach #14 (16 April 2011) is proved. A list of factual statements can carry an inferential meaning additional to the literal meaning of each fact, and that is very clearly the case here. I am satisfied that the posting bears meaning (b) and (ca). It would in any event bear meaning (cb).

109. The Defendant submits that in the postings complained of as breach #15 he was replying to an attack on himself by Garth. He submits that he was merely repeating what was in the Portuguese Police Reports.

110. In my judgment breach #15 (2 May 2011) is proved. It is no answer to say that the Defendant was being attacked by Garth. He does not merely repeat what is in the Portuguese Police Reports: he clearly adopts it. I am satisfied that the postings bear meanings (b) and (ca). They would in any event bear meaning (cb).

111. On the posting alleged to be breach #16 he wrote that "the Defendant admits that he could have put this differently" and that his "comment" was "robust".

112. In my judgment breach #16 (14 May 2011) is proved. I am satisfied that the posting bears meanings (b) and (ca). It would in any event bear meaning (cb).

113. The Defendant submits that the posting alleged to be breach #20 merely raises questions and gives hypothetical answers. This is an unrealistically and unreasonably literal approach.

114. In my judgment breach #20 (3 August 2011) is proved. I am satisfied that the posting bears meanings (b) and (ca). It would in any event bear meaning (cb). It specifically raises the suggestion that the Claimants caused or allowed the death of their daughter.

115. The Defendant makes no submission on the meaning of the posting alleged to be breach #22.

116. I am satisfied that breach #22 (7 September 2011) is proved. I am satisfied that the posting bears meaning (b). It would in any event bear meaning (cb).

117. In respect of the posting alleged to breach #23 the Defendant accepts that he "re-asserted that it was likely on the evidence that Madeleine McCann died in her parents' apartment, in line with the conclusions of Dr Amaral …"

118. I am satisfied that breach #23 (1 November 2011) is proved. The posting bears meanings (b) and (ca). It would in any event bear meaning (cb).

MENTAL ELEMENT OF CONTEMPT OF COURT

119. In respect of some of the alleged breaches the Defendant has said that he did not intend the meanings that I have found the publications to bear. In addition the Defendant asked the court to have regard to the occasions on which he had complied with the Claimants requests to take down or cease distribution of material.

120. The Defendant contended before me that the publications on the JH website which the Claimants complain of were not sufficiently serious to amount to breaches of the Undertaking. He suggests that this was a forum to which members of the public had access, but only after some registration or other procedure. He had not raised this suggestion in his affidavits, or at any time before the hearing. Further, he submitted that it is clear from the postings on the JH website other than his own that contributors are overwhelmingly individuals whose views of the Claimants' case are similar to his own. He referred to *Smith v ADVFN Plc* [2008] EWHC 1797 (QB) where Eady J said:

> "13. It is necessary to have well in mind the nature of bulletin board communications, which are a relatively recent development. This is central to a proper consideration of all the matters now before the court.
>
> 14. This has been explained in the material before me and is, in any event, nowadays a matter of general knowledge. Particular characteristics which I should have in mind are that they are read by relatively few people, most of whom will share an interest in the subject-matter; they are rather like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or "give and take". ..
>
> 16. When considered in the context of defamation law, therefore, communications of this kind are much more akin to slanders (this cause of action being nowadays relatively rare) than to the usual, more permanent kind of communications found in libel actions. People do not often take a "thread" and go through it as a whole like a newspaper article. They tend to read the remarks, make their own contributions if they feel inclined, and think no more about it.

> 17. It is this analogy with slander which led me in my ruling of 12 May to refer to "mere vulgar abuse", which used to be discussed quite often in the heyday of slander actions. It is not so much a defence that is unique to slander as an aspect of interpreting the meaning of words. From the context of casual conversations, one can often tell that a remark is not to be taken literally or seriously and is rather to be construed merely as abuse. That is less common in the case of more permanent written communication, although it is by no means unknown. But in the case of a bulletin board thread it is often obvious to casual observers that people are just saying the first thing that comes into their heads and reacting in the heat of the moment. The remarks are often not intended, or to be taken, as serious. A number of examples will emerge in the course of my judgment."

121. It may be that there were relatively few publishees of the words that the Defendant posted on the JH website. I need make no finding on how many there were. And, in the case of the postings in response to the person named Garth, I am prepared to accept that the Defendant may have gone further than he would otherwise have done, because he felt himself to be provoked. But even on those assumptions there can be no question in the present case that each of the numerous postings by the Defendant should be construed as "not to be taken literally or seriously and is rather to be construed merely as abuse". The repetitions on this and the MF website, and the production of the booklet and other documents, make clear that the Defendant intended to say what he said, and that he intended what he said to be taken seriously.

122. It is clear is that the representative of Carter-Ruck who searched the 300 most recent entries by the Defendant on the JH website (and that is the extent of the search done) faced no material obstacle to accessing the site as an ordinary member of the public.

123. *Cruddas v Adams* [2013] EWHC 145 another case on publications in a weblog, and the facts in question more closely resemble those of the present case than the facts in *ADVN*. As Eady J said at para [47]:

> "As to vindication, it is probably fair to say that, however high the sum awarded, the purpose can hardly ever be fully achieved. At one end of the spectrum, there will be readers who choose to go on believing the allegations, perhaps out of cynicism about libel proceedings, or because some people are willing to believe anything which confirms their own pre-existing prejudices. At the other end, there will be those who did not take the allegations seriously because experience tells them to be wary of florid allegations circulating on the Internet, unsupported by evidence, from people who appear to have bees in their bonnets. In the centre ground, however, there will be readers for whom the allegations have raised at least a suspicion over a claimant's reputation which will only be removed by a convincing apology or finding of the court. It is to those people that the court's attempts at vindication must be primarily directed."

124. As the Court of Appeal said in *Cairns v Modi* [2012] EWCA Civ 1382, [2012] WLR(D) 302 at [27]:

> " … We recognise that as a consequence of modern technology and communications systems any such stories will have the capacity to 'go viral' more widely and more quickly than ever before. Indeed, it is obvious that today, with the ready availability of the worldwide web and of social networking sites, the scale of this problem has been immeasurably enhanced, especially for libel claimants who are already, for whatever reason, in the public eye."

125. In the course of his evidence in chief the Defendant said, according to my note:

> "My understanding, however wrong, was that proceedings against me would be a libel action and that I would be able to bring forward factual allegations. I was at no time deliberately trying to flout the Undertakings. If I have trespassed and have breached the Undertakings, I would like to apologise".

126. I have found that he did allege that the Claimants caused the death of their daughter: breach #13 (2 January 2011). In that case I am not sure that he intended to make the allegation when he adopted the words of another person.

127. The mental element of contempt of court is set out in cases cited in Arlidge Eady & Smith 4th ed paras 12-83 to 12-96. It has since been restated in *Masri v Consolidated Contractors International Company SAL* [2011] EWHC 1024 (Comm) at paras [150] to [155] as follows:

> "150. In order to establish that someone is in contempt it is necessary to show that (i) that he knew of the terms of the order; (ii) that he acted (or failed to act) in a manner which involved a breach of the order; and (iii) that he knew of the facts which made his conduct a breach: *Marketmaker Technology (Beijing) Co Ltd v Obair Group International Corporation &* Ors [2009] EWHC 1445 (QB). There can be no doubt in the present case but that the judgment debtors have at all times been fully aware of the orders of this court. It is not and could not sensibly be suggested that the conduct of which complaint is made was casual or accidental or unintentional. However, the question arises whether it is, also, necessary to show that they acted knowing that what they were doing was a breach of, and intending to breach, any of the orders.
>
> … 155 … In my judgment the power of the court to ensure obedience to its orders for the benefit of those in whose favour they are made would be inappropriately curtailed if, in addition to having to show that a defendant had breached the order, it was also necessary to establish, and to the criminal standard, that he had done so in the belief that what he did was a breach of the order – particularly when a belief that it was not a breach

> may have rested on the slenderest of foundations or on convenient advice which was plainly wrong."

128. In the present case there can be no doubt that the Defendant had the required knowledge. In any event, I am sure that he intended to allege that the Claimants are to be suspected of causing the death of their daughter, and did in fact dispose of her body, lie about what happened and covered up what they had done. I am sure that he intended his words to bear the other meanings which I have held they do bear. The words are too clear, and the repetitions too numerous, for any other interpretation to be put upon what he did. And while the Defendant has made frequent references to statements emanating from the Portuguese authorities during their investigations, he makes no mention of the Report of the District Attorney dated 21 July 2008, a copy of which is exhibited to the third affidavit of Ms Martorell. That includes the following (in translation):

> "With regard to other possible crimes, whilst we cannot dismiss the possibility of a killing, given the high degree of probability, there is no evidence for this in the case records.
>
> The non-involvement of Madeleine's parents in any criminally significant action is apparent from the fact that they were not in the apartment at the time of her disappearance, their normal behaviour up to that moment and afterwards, as witnessed by the statements of the witnesses, the analysis of the telephone communications and the conclusions of the experts reports…
>
> None of the indications which led to their being made suspects was substantiated later; there was no proof of them having notified the media before the police, the laboratory did not confirm the traces found by the dogs, and the initial e-mail indications transcribed above later turned out to be harmless
>
> …. Therefore having considered the foregoing, I order:
>
> … b) Filing of the papers concerning the suspects Gerald Patrick McCann and Kate Marie Healy, as there is no evidence that they committed any crime defined by Article 277.1 of the Code of Criminal Procedure".

129. The point that the Defendant had complied with his Undertakings some of the time might be relevant to penalty. It could not be relevant to the breaches which have been proved. But even as to penalty it is of little help to the Defendant. Ms Page described the Defendant's conduct as playing cat and mouse with the Claimants. He was testing them with false or disingenuous assurances and demands for explanations to which, as a member of the public with no responsibility for law enforcement, he was not entitled. Ms Page's description of what the Defendant has been doing is apt. I find that his assurances were sometimes genuine, in that he has in fact complied with his Undertakings some of the time. But he has been testing the Claimants with disingenuous assurances which he has subsequently retracted, as appears from the extracts from the correspondence cited above.

130. I do not find credible that, after he had given the Undertakings, he believed that the proceedings against him would be in the form of a libel action, or that he would be able to attempt to prove the truth of his allegations. I find that he was deliberately flouting the Undertakings, and that his apology is insincere.

131. For the purposes of considering the appropriate penalty, the court will take into account the extent of each publication, and the circumstances of each publication, which the court has found to be in breach of an undertaking or injunction.

THE RIGHTS TO FREEDOM OF SPEECH, ACCESS TO THE COURTS AND TO JUSTICE

132. The Defendant relies on his rights to freedom of expression and to a fair trial. He cites Arts 10 and 6 of the Convention, as advocates commonly do, although in this case these Convention rights add nothing to the rights that have long been recognised at common law. See most recently *The Children's Rights Alliance for England, R (on the application of) v The Secretary of State for Justice* [2013] EWCA Civ 34 para [29].

133. Article 10 of the Convention reads, so far as material:

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…
>
> (2) The exercise of these freedoms since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society … for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, and for maintaining the authority… of the judiciary".

134. Article 6 of the Convention reads, so far as material:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…."

135. There is no doubt that a defendant's right to freedom of expression is engaged when he is sued for libel. The right is engaged at every stage of the proceedings: to whether or not he has a defence, what remedies the claimant may be entitled to, whether the defendant is to be found to be in breach of an undertaking or injunction, and, if so, what penalty should be imposed.

136. There is also no doubt that a defendant's right to a fair trial is engaged at each of those stages of the proceedings. But so too are the rights of a claimant engaged at each of those stages.

137. Since I have not heard the Defendant's application to vary the Undertakings, I make no ruling as to whether his right to a fair trial was, or was not, infringed when the court accepted his Undertakings. The fear of financial ruin which he claims to have had, if he defended the claim for libel, has not apparently deterred him from defending the committal proceedings, or from attempting to defend it with defences which are irrelevant to the committal proceedings, but would have been available to him in the libel action. But that is simply one factor that a court hearing the application to vary the Undertakings may have to take into account.

138. So far as the committal hearing is concerned, the Defendant has demonstrated the capacity to research the law and draft legal documents that is to be expected of someone who had been a social worker and a solicitor. I have endeavoured to ensure that he has had a fair hearing, as I believe that he has. But whether or not he has is for others to judge.

139. However, the Defendant has demonstrated no recognition that the Claimants have rights to a fair trial as well as himself, and that they also have a right to their reputations. The main difference between the submissions that he has advanced for himself and the submissions that would (I apprehend) have been advanced for him if he had been professionally represented is that a professional advocate would have brought to the case an objectivity (that is a recognition of the Claimants' rights), which the Defendant has failed to demonstrate. And if he had been professionally represented he would not have caused the Claimants to incur the costs of dealing with the adjournments and the prolix and irrelevant material that the Defendant has put before the court. It is not just a self represented litigant who bears adverse consequences from the fact that he is self represented.

140. In *XY v Facebook Ireland Ltd* [2012] NIQB 96 McCloskey J was considering an interim application for an injunction to restrain the publication of postings on the internet about a person who had been convicted of sexual offences. There are two significant differences from the present case: in the present case the Claimants obtained a final Undertaking from the Defendant, and they have been convicted of nothing. So what McCloskey J said applies with greater force in the present case. He said at para [13]:

> "These proceedings serve as a timely reminder that we live in a society governed by the rule of law. This is the supreme principle. All members of society submit and subscribe to a system wherein the law is dominant. This system protects every member of the population. The efficacy of this system requires, and is guaranteed by, an independent judiciary. Non-discrimination, or equality of treatment, is one of the towering principles of the common law. Furthermore, it is a universally recognised value and is enshrined in the Human Rights Act 1998. It is easy to overlook that this principle is also of biblical pedigree and vintage,... Furthermore, this cornerstone principle was identified by Professor Dicey [in the Law of the Constitution, published in 1885] as one of the three core components of the rule of law. At its heart, it ensures that all citizens are equal before the law. As Lord Bingham has observed, this general principle is nowadays beyond question

> [The Rule of Law, p. 56]. In addition, by virtue of section 6 of the Human Rights Act 1998, the Court must avoid acting in a manner incompatible with any person's Convention rights, where engaged. Thirdly, the sanctions imposed by the criminal law on offenders are, presumptively, adequate and exhaustive. Allied to this is the rule that criminals are punished by due process of law, and not otherwise, in a society which treats anarchy as repugnant."

141. The principle that "… unless and until the orders about which [the defendant] complains are actually set aside he is required to obey them" (para 15 above) is a principle that is necessary if there is to be the rule of law and not anarchy.

142. The right to freedom of expression, whether at common law or under Art 10, is not an absolute right that prevails over all others. In the present case it is subject to the Claimants' rights under the judgment which they obtained in November 2009 (which incorporates the Undertakings), and to the need to uphold the authority of this court, which made that order.

THE DEFENDANT'S APPLICATIONS AT THE START OF THE HEARING

143. At the start of the hearing before me the Defendant made three applications of which he gave notice in a letter dated 30 January 2013 and a document of the same dated headed "The Defendant's response 30 January 2013 to the Claimants' Skeleton Argument dated 29 January 2013": (1) that the proceedings should be adjourned indefinitely, or so long as he was without publicly funded legal representation; (2) the proceedings should be stayed as an abuse of the process of the court; (3) that there should be admitted in evidence a statement from a witness with expertise in accountancy who had given a statement on the disposal of the funds which the public had contributed to support the Claimants.

144. I rejected all three applications. The evidence of the witness has no relevance at all to whether or not the Defendant is in breach of his Undertakings.

145. In support of the application for an adjournment, the Defendant submitted that so long as he was without publicly funded legal representation, there was such an inequality of arms between him and the Claimants that he could not have a fair trial.

146. That he does not have public funding to defend himself against the Claimants' claims for libel, and their application to commit him for contempt of court, cannot have the consequence that his rights must prevail and that he can simply ignore the Undertakings he has given to the court.

147. In effect, the Defendant's submission is a straightforward denial of the Claimants' rights to equal treatment and protection under the law. His attitude that fundamental or human rights are only for himself is one that is by no means unique to himself. It brings the law of human rights into disrepute. The true position is obvious: there can be no human rights unless those claiming them also acknowledge their responsibility to respect the rights of others, as Art 10 specifically provides.

148. I would add that the court will generally never know why a litigant is self-represented. The court does not have to take the explanation put forward by the litigant at face value. Communications between lawyers and litigants are privileged, so no questions can be asked about attempts that a litigant may have made to obtain legal representation. A self-represented litigant may have funds in excess of the limit for eligibility for public funding, and choose not to spend his own funds on legal representation. A self-represented litigant may have had the benefit of legal advice, and chosen to reject that advice. If that is the case, the litigant is under no obligation to inform the court or his opponent. There can be no presumption in favour of self-represented litigants that, but for the unavailability of public funding, they would be represented by an advocate who would be willing to advance, and better able to advance, the submissions that the self-represented litigant has himself put before the court. There are no presumptions one way or the other as to whether there is an inequality of arms. The court must decide each case on the basis of the evidence and submissions which are in fact before it. In a case where one party is self-represented the court will be bound to look for points that the litigant may have missed, and counsel for the other party is under a duty to the court to assist by reminding the court of points of law which may be available to the litigant. Ms Page included such points in her submissions.

149. The application for a stay was on the basis that the extent of publicly expressed doubt about the Claimants' claim that Madeleine was abducted is such that it is disproportionate and unreasonable to charge the Defendant with contempt of court for publishing such doubts. He submitted that it is also unfair that he should be prevented by his Undertakings from publishing statements which others may publish, and continue to publish, in this jurisdiction and abroad, without being subject to the sanction of committal for contempt of court. He claims that there are tens of thousands of persons who publish such material. This evidence does not support his case, and he rightly did not refer me to website postings other than those adduced in evidence by the Claimants.

150. The Defendant gave the Undertakings, whereas others have not. It appears that there are other members of the public who have published defamatory allegations about the Claimants, but whom the Claimants have not sued. However, the Defendant acknowledges in his first affidavit that they sued Express Newspapers Ltd. On 19 March 2008 Express Newspapers Ltd acknowledged in a statement in open court that there was no truth in the allegations that they had published in their newspapers. As recounted in that statement, which is available on the Lawtel website, what that defendant accepted as being "entirely untrue" was

> "the general theme of the articles was to suggest that [the Claimants] were responsible for the death or disappearance of Madeleine or that there were strong or reasonable grounds for so suspecting, and that they had then conspired to cover up their actions, including by creating "diversions" to divert the police's attention away from evidence that would expose their guilt".

151. There is undisputed evidence from Ms Martorell that the Claimants have attempted to stop others from publishing the same or similar allegations, with varying degrees of success. It is well known, as Ms Martorell records, that Associated Newspapers Ltd

also apologised to the Claimants. Both they and Express Newspapers Ltd also paid substantial damages to the McCanns. If it were the law, as the Defendant appears to submit it should be, that the Claimants cannot proceed against him unless they also proceed against all other publishers of similar allegations, it would follow that the Claimants would in practice have no access to justice at all.

152. The Defendant further submitted that he should in these proceedings be permitted to establish the truth of his allegations, and to advance the other defences that would be available in a libel action, namely honest comment and qualified privilege. He persisted in attempting to introduce evidence as to the truth of his allegations, both in submissions and in his cross-examination of Ms Martorell, notwithstanding that I had explained to him why he could not do so, not only in my October judgment (see para 15 above) but also at the start, and at various other stages, of the present proceedings.

CONCLUSIONS ON CONTEMPT OF COURT

153. For the reasons given above, I am satisfied that the Defendant has been in breach of the Undertakings in each of the thirteen instances which the Claimants set out to prove at the hearing of their application to commit him for contempt of court. I make no findings in relation to any of the other alleged breaches.

154. The case is re-listed, at the same time as the handing down of this judgment, for consideration of the penalty which should be imposed and any other issues that remain.