OUTER HOUSE, COURT OF SESSION

[2020] CSOH 30

A111/17

OPINION OF LORD CLARK

In the cause

WILDCAT HAVEN ENTERPRISES CIC

Pursuer

against

ANDY WIGHTMAN

Defender

Pursuer: Mr P. O'Donoghue; Lay Representative
Defender: Dunlop QC; Balfour + Manson LLP

11 March 2020

Introduction

[1] In this action, the pursuer alleges that it suffered loss and damage as a result of the defender publishing defamatory material on internet blogs, Twitter and Facebook. The pursuer seeks damages in the sum of £750,000 and also seeks interdict to prohibit the publication of such material. The action called before me for a proof before answer. On behalf of the pursuer, an application was made under the relevant procedural rules to allow lay representation by Mr Paul O'Donoghue, who is a director of the company. The motion was opposed by senior counsel for the defender. I was satisfied that the requirements of the rules were met and I therefore granted the application.

The pursuer's pleadings

The published material founded upon by the pursuer

[2] The defender published blogs on his website which made statements about the pursuer. The pursuer is a private limited company registered in England. It is the fundraising vehicle for Wildcat Haven CIC ("WHCIC"), a company which has as its object the conservation of Scottish wildcats. The pursuer raises funds for WHCIC by various means, including selling small souvenir plots of land. The defender's website is entitled "Land Matters…the blog and website of Andy Wightman". He published two blogs which are said by the pursuer to contain defamatory statements. He also published or posted certain other allegedly defamatory statements on the social media platforms of Twitter and Facebook. The pursuer also refers to comments posted by others on the defender's website as being defamatory, for which the defender is said to be responsible. In order that the numerous allegations of defamation made by the pursuer can be properly understood and viewed in context, the blogs, comments, tweets and Facebook post are set out in the Appendix to this Opinion. Rather than set out every tweet or comment, I have identified only those that have any real bearing on the matters raised in the action. The Appendix follows the order in which the allegations appear in the pursuer's pleadings. When I come to discuss the allegations pled, I shall refer to the relevant section of the Appendix. However, when narrating below the parties' submissions on the allegedly defamatory imputations, and giving my reasons, a number of the statements made are set out. The identities of the various individuals referred to in the blogs, or who made comments or tweets, are not of particular relevance. I have therefore removed the names or profiles of those persons. Where hyperlinks appear in the blogs, these are underlined. I have had

regard to the full content of the published material relied upon by the pursuer in its averments, which I now briefly summarise.

Blog 1

[3] Blog 1 (set out in the Appendix, section 1) was published on 28 September 2015. The heading (or headline) at the start of the blog stated:

"Wildcat Haven, Bumblebee Haven or Tax Haven?"

Below these words, there was a box or graphic stating "Wildcat Haven is supported by…" and containing the logos of firstly, Highland Titles Limited ("HTL"), and secondly Volkswagen. The blog then went on to refer to Wildcat Haven as a project designed to protect the Scottish wildcat. It referred to one of the sponsors being HTL, a company based in Alderney that is wholly owned by a charitable trust, Highland Titles Charitable Trust of Scotland ("HTCTS"), registered in Guernsey. The blog mentioned that HTL appeared to have established a very close relationship with WHCIC and with the pursuer, and explained aspects of that relationship, including that HTCTS was identified as the body which would receive the assets of the pursuer should it be wound-up. It stated that Wildcat Haven had adopted Highland Title's dubious methods of selling small souvenir plots of land and claiming that the purchaser became the owner. Reference was then made to a letter from a university law professor to a newspaper, which explained the legal position in relation to ownership of souvenir plots. The blog also mentioned issues about the location of the plot of land from which the pursuer was selling souvenir plots, including that the plot was part of land (75 hectares in area) owned by HTL. An addendum was made to the blog, giving details of discussions between the defender and a senior official in the Channel Islands about access to accounting information regarding HTL and HTCTS.

Update to blog 1

[4] At 3 pm on 30 September 2015 the defender added what was described as an "Update" to blog 1 (Appendix, section 2). The update set out a response to blog 1 which had been received by the defender from a director of the pursuer. Among other things, the response stated that: HTCTS was to be replaced by another entity as the body to receive assets in the event of the pursuer being wound up; that the sale of souvenir plots was "a bit of fun"; that the "FAQ" on the Wildcat Haven website outlined that registration of souvenir plots was legally impossible; and that HTL had gifted part of its land to the pursuer. The update then went on to list a number of questions posed to the director of the pursuer by the defender, the last of which was whether "Highland Titles" received any payment or commission from the sale of souvenir plots by the pursuer.

Blog 2

[5] In blog 2 (Appendix, section 3), published on 24 February 2016, the heading was "Highland Titles day" followed by the same graphic as that in blog 1. Blog 2 contained a hyperlink to blog 1 and referred to it as being a blog about HTL's latest effort to raise lots of money. Blog 2 referred to the sale of souvenir plots and the controversy generated by doing so. It also referred to the financial affairs of HTL being opaque and it being registered in "a secrecy jurisdiction". It named an individual who was said to be a director of both HTL and the pursuer, as well as being a trustee of HTCTS. The blog then referred to HTCTS as being the designated body to become the potential recipient of assets from the pursuer. The questions asked by the defender in the update to blog 1 were repeated and further comments by the defender about the questions were also set out. Reference was again made

to the 75 ha site and the income that would be generated by the sale of plots on it. The blog went on to say that Wildcat Haven had been seeking to become involved in the community acquisition of a Forestry Commission forest near to Loch Arkaig. It ended with a statement that in early June 2015 "Highland Title's bankers and corporate service providers in Guernsey gave notice of the termination of their services". It then stated that Wildcat Haven Enterprises CIC (the pursuer) was incorporated in 30 June 2015.

[6] The pursuer avers that read in isolation and in conjunction with the comments generated by them (noted below) blog 1, the addendum and update, and blog 2 made eight separate defamatory imputations, which I deal with in turn later.

Tweets

[7] The pursuer goes on to aver that on 30 September 2015, after the publication of blog 1, the defender posted a number of tweets on his Twitter account (Appendix, section 4) addressed to "@wildcathavenuk" and asking questions about points mentioned in blog 1. The pursuer avers that these questions demonstrated the defender's lack of knowledge about the pursuer's activities at the time he published blog 1 and his failure to seek comment from the pursuer on the allegations in blog 1. The last question is said by the pursuer to show "that the defender had no factual basis for his allegations about a financial link between the proceeds of the pursuer's sales and HTL at that time". The pursuer goes on to aver that the defender also posted tweets on 29 September 2015, three of which are identified (Appendix, section 5). The pursuer avers that these tweets, taken in the context of all of the defender's comments and statements about the pursuer, showed that the defender was not simply commenting on the practice of selling souvenir plots. Rather, he was falsely accusing the pursuer of "funnelling" the proceeds of sale of souvenir plots into tax havens.

The second of the defender's tweets of 29 September 2015 was said to be defamatory in its own right in respect that it made the same false statement.

Facebook post

[8] The pursuer then refers to a Facebook post by the defender dated 25 February 2016 (Appendix, section 6), which contained a link to blog 2. The pursuer avers that the post contained a defamatory statement that Wildcat Haven, and by innuendo the pursuer, had been dumped by their bankers and corporate service providers.

Comments on the blogs

[9] The pursuer also lists in its averments a number of comments from third parties (made following blog 1) published on the defender's website. These comments (Appendix, section 7), posted on 29 and 30 September 2015, are also said by the pursuer to be defamatory, whether taken in their own right or read in conjunction with the blogs, and said to have the same meaning as two of the eight defamatory imputations alleged to have been made in the blogs.

Further tweets

[10] Averments are made by the pursuer about tweets by the defender between 16 November 2012 and 3 May 2017 (Appendix, section 8). Given the number of tweets mentioned, and the fact that they refer largely to HTL and HTCTS, I do not set them out in full in the Appendix. Several of the tweets refer to "Highland Titles" being, or operating, a "scam". Other tweets refer to the bankers and corporate service providers of Highland Titles having withdrawn their services. The pursuer avers that the defender did not rebut or

deny the suggestions made in these tweets by the others. These tweets were also alleged to be defamatory of the pursuer in the same manner and extent as two of the eight defamatory imputations averred earlier in relation to the blogs.

Further averments

[11] The pursuer avers that the offer for sale of souvenir plots of land made on its website did not represent that persons who bought these plots would obtain a real right to the land. The sales are said by the pursuer to be a marketing device which enables supporters of Wildcat Haven to donate funds in a novel, imaginative and light-hearted way. Such sales are said to be a commonplace method of raising funds for charitable and other causes. The pursuer's website stated that members of the public were being asked to help the pursuer by actually buying part of the land that Wildcat Haven planned to conserve. It also stated that "It's a bit of fun, being Laird of an estate, even if the estate is only a square foot of land. You may [style] yourself as Lord or Lady of Wildernesse…" At the time of the publication of blog 1, the land comprising the souvenir plots was owned by HTL. Subsequent to the publication of blog 1, HTL gifted a parcel of land to the pursuer. The pursuer further avers that the defamatory material centred on the activities of the pursuer and not simply on the practice of selling souvenir plots. The material inaccuracies at the centre of the defender's defamatory statements are said to be that the proceeds of sale of souvenir plots sold by the pursuer were not being used to fund wildlife conservation but were being paid to HTL and were being diverted into an offshore tax haven away from public scrutiny.

[12] The sum claimed in damages by the pursuer is £750,000. The pursuer avers that as a result of the defamatory imputations contained in the published material it has suffered reputational damage and financial loss. The losses are said to include that prior to the

publication of blog 1 the pursuer was involved in a proposal to purchase from the Forestry Commission an area of forest, as a community venture in partnership with a body called Arkaig Community Forest ("ACF"), and that opportunity has been lost. The purchase was to be funded by a grant of £500,000 from HTL. The pursuer alleges that, as a result of blog 1 and the comments which it generated, the proposal fell through because ACF immediately withdrew from the proposed partnership. The pursuer also avers that the volume of sales of souvenir plots diminished straight after the publication of the blogs.

The defender's pleadings

[13] The defender avers that the words used in the various material that was published were not capable of bearing, and in any event did not in fact bear, the meanings complained of by the pursuer. The defender also avers that the blogs represented the defender's honest comment on matters of public interest, conveying his opinions, honestly held by him. The facts upon which the comments were based were both accurately stated and sufficiently referenced. The defender also avers that, in any event, the blogs were published on an occasion of privilege and fell within the defence of *Reynolds* privilege (derived from *Reynolds* v *Times Newspapers Ltd and Ors* [2001] AC 127). The trade in souvenir plots is said to be a matter of public interest and concern. In relation to the alleged loss, the defender avers that the true reason why ACF withdrew from the partnership proposal was that the pursuer had failed meaningfully to engage with its requests for further information. The defender also denies causing any loss relating to the volume of sales of souvenir plots.

Community interest companies

[14] The blogs make reference to the concept of a Community Interest Company ("CIC"), and that the pursuer is such a company, as is WHCIC. A CIC is required to use its assets, income and profits for the benefit of the community it is set up to serve. It is also a requirement of a CIC that it has in its articles of association an "asset-lock" provision, which includes that, in the event of winding-up, the assets of the CIC will be transferred to a nominated "asset-locked body" that is another CIC, or a charity, or a body established outside Great Britain that is equivalent to a CIC or a charity. At the time of publication of blog 1, HTCTS (which is associated with HTL) was the designated asset-locked body of the pursuer. Following the publication of blog 1, the pursuer altered its articles of association by changing the designation of the nominated asset-locked body to a different entity, unconnected with HTL or HTCTS. In blog 2, the defender incorrectly repeated the assertion that HTCTS was the pursuer's designated body for asset-lock purposes.

Evidence and submissions

Witnesses

[15] Mr O'Donoghue gave evidence on behalf of the pursuer. His evidence-in-chief took the form of a witness statement which he adopted as part of his evidence. He was then cross-examined by senior counsel for the defender. Thereafter, he was given the opportunity (in effect, re-examination), to state his observations on the points raised in cross- examination and he did so. The evidence of Mr O'Donoghue covered his personal details, his involvement with wildcat conservation, WHCIC and the pursuer and their relations with HTL and HTCTS. He referred to the terms of the blogs, the addendum and update, comments posted by others, tweets and the Facebook post by the defender and

stated why these were false and defamatory. He spoke about the lack of any attempt by the defender to contact the pursuer prior to publishing the blogs and other material, and the impact of the defender's statements upon the pursuer and on him personally. He explained why the pursuer asserted that the statements were made maliciously. He also dealt with the losses alleged to have been suffered by the pursuer. No other witness was called on behalf of the pursuer.

[16] Two witnesses were called for the defender. The first was Mr Servant from ACF. He spoke to the reasons why ACF had declined to deal with the pursuer in relation to the potential purchase of the forestry site at Arkaig. The defender then gave evidence, including about the documents and information that he had considered and the research he had carried out prior to making the blogs and other comments. In cross-examination he denied acting maliciously and explained why the points that he had made were not defamatory, or were substantially true or fair comment and had been stated in the public interest.

Submissions

[17] When I come to deal with each defamatory allegation, I shall summarise in broad terms the evidence relied upon and the submissions in respect of that allegation before giving my decision on it. It may however assist if I set out, very briefly, a summary of the respective submissions.

Submissions for the pursuer

[18] The pursuer's position was that the defamatory statements mainly focused on the assertion that the pursuer operated through a tax haven. The pursuer was said to be portrayed as an operation carrying out scams and acting illegally. Numerous statements

had been made on multiple platforms over a sustained period. The reasonable reader would be led to believe that:

> "the pursuer was a tax dodging scam, designed to con the public out of money and then funnelling money donated to wildcats to the Channel Islands, to line the pockets of corporate fat cats and aristocratic landed gentry".

The defender had admitted publishing factually incorrect information. He had been reckless and irresponsible and driven by malice. He had a clear disdain both for HTL and tax havens. He had stated that HTL and the pursuer are the same entity. The damage caused by the defender's publications had been disastrous and had destroyed a promising venture that was providing, and would have continued to provide, valuable funds for wildcat conservation. The vast majority of the statements published by the defender were statements of fact and so the defence of fair comment did not apply. If there were any comments, they did not state the facts that were founded upon, were not in the public interest, and were in any event driven by malice. Lack of responsibility on the part of the defender and the malicious nature of his statements defeated his arguments about qualified privilege. The defences should be rejected. Reference was made to *Allen* v *Times Newspapers* [2019] EWHC 1235 (QB); *Jeynes* v *News Magazines Limited* [2008] EWCA Civ 130; *Cruddas* v *Calvert* [2013] EWHC 1427 (QB); *Massie* v *McCaig* 2013 SC 343; *Horrocks* v *Lowe* [1975] AC 135; Cooper, *Defamation and Verbal Injury* (2nd ed.); *Joseph* v *Spiller* [2011] 1 AC 852; *Tse Wai Chun* v *Cheng* [2001] EMLR 31; *Doyle* v *Smith* [2018] EWHC 2935 (QB); *Economou* v *de Freitas* [2016] EWHC 1853 (QB); *Reynolds* v *Times Newspapers Ltd*; and *Loutchansky* v *The Times Newspapers Ltd (Nos 2,3 4 and 5)* [2002] EMLR 14.

Submissions for the defender

[19] On behalf of the defender, it was submitted that the pursuer had stuck doggedly to a position that was simply not borne out by the evidence. The meanings asserted by the pursuer were not justified by the words used. In any event, most of the statements were covered by the defence of fair comment. To the extent that factual assertions were made, these were substantially true. There was no allegation anywhere that the pursuer had paid HTL anything. As the pleaded meanings were largely not conveyed by the words used, that was an end to the matter. If the court was prepared to ask itself what is the true sting of the blogs, the answer was that the reasonable reader would have derived from them the simple impression the pursuer had hooked up with and adopted the business model of HTL, and that the defender was criticising the business model as dubious and controversial. This was all covered by the defence of fair comment. However, this true sting was not pled by the pursuer. In so far as there were any factual inaccuracies, these would not destroy defence of fair comment. The Facebook post complained of, when read along with blog 2, was not defamatory. The tweets complained of were not defamatory and in any event the various defences referred to also applied. In relation to the comments of others posted on the defender's blog, in terms of the Electronic Commerce (EC Directive) Regulations 2002, regulation 19, the defender was not liable. The defence of *Reynolds* privilege only required to be resorted to if the pursuer's pleaded meanings were both valid and not addressed by the defences of *veritas* or fair comment. The defender had made the statements in the public interest. His journalism was responsible. It satisfied the considerations listed in the *Reynolds* case. The defender had explained in his evidence why he did not seek any comment in advance of publication and respect should be given to his editorial judgement in that regard. The inclusion of any inaccurate facts was of limited importance and should not destroy the

privilege. There were significant doubts as to whether the pursuer's allegation of malice had any relevance to these proceedings. In addition to there being no real role for malice, the suggestion of malice was not made out. Turning to the question of damages, the pursuer required to show either actual financial loss or harm to trading reputation. Neither of these had been established. Much of the documentary evidence had not been spoken to by any witness. No satisfactory evidence of loss had been advanced. The pursuer had agreed at a previous hearing in the case that evidence would be needed from a forensic accountant to establish loss. The absence of such evidence was telling. This action was highly regrettable and had involved considerable expense. It was an attempt to silence a commentator who was exercising a legitimate entitlement to make comment and to raise concerns on matters which were admittedly in the public interest. His freedom to criticise and to ask questions should prevail. Reference was made to *Russell* v *Stubbs Ltd* 1913 SC (HL) 14; *James* v *Baird* 1916 SC (HL) 158; *Macleod* v *Newsquest (Sunday Herald) Ltd* 2007 SCLR 555; *Koutsogiannis* v *The Random House Group Limited* [2019] EWHC 48 (QB); *Chase* v *News Group Newspapers Ltd* [2003] EMLR 11; *Stocker* v *Stocker* [2019] 2 WLR 1033; *Curran* v *Scottish Daily Record and Sunday Mail Ltd* 2010 SLT 377; *Massie* v *McCaig*; Defamation Act 1952, section 6; *Joseph* v *Spiller* [2011] 1 AC 852; *Tse Wai Chun* v *Cheng*; *Adams* v *Guardian Newspapers Ltd* 2003 SC 425; *Reynolds* v *Times Newspapers Ltd*; *Jameel* v *Wall Street Journal Europe Sprl* [2007] 1 AC 359; *Flood* v *Times Newspapers Ltd* [2012] 2 AC 273; *GKR Karate (UK) Limited* v *Yorkshire Post Newspapers Limited and Others (No. 2)* [2000] EMLR 410; *Thomson* v *Ross,* unreported, 18 July 2000; *Lewis* v *Daily Telegraph* [1964] AC 234; *Waverley Housing* v *BBC*, unreported, 10 March 1993; Electronic Commerce (EC Directive) Regulations 2002, regulation 19; and *Gateway Assets Ltd* v *CV Panels Ltd* 2018 SCLR 736.

Decision and reasons

Relevant legal principles

[20] I begin by setting out the relevant legal principles on the following key matters: the meaning of the statements complained of, the defences of fair comment and *veritas* and the responsibility of a website proprietor for comments made by others. For convenience, I will deal with what in this case are more general issues of malice and *Reynolds* privilege after discussing the individual defamatory imputations, and then turn to the issue of loss.

Assessing whether statements are defamatory

[21] Words are defamatory when they cause harm to reputation. Among the classic definitions of defamation is whether the imputation would tend to "lower the [pursuer] in the estimation of right-thinking members of society generally": *Sim* v *Stretch* [1936] 2 All ER 1237 (at 1240). This approach is applied in cases in Scotland: see eg *Massie* v *McCaig*; *Kinley* v *Devine* 2014 CSOH 67. It is for the pursuer to aver the meaning which he alleges that the words complained of bear and it is that alleged meaning which the court requires to consider: *Russell* v *Stubbs Ltd*; *James* v *Baird*. The approach taken to identifying the meaning to be ascribed to the words is an objective one, involving a consideration of what the reasonable man would take from a reading of the material complained of: *Duncan* v *Associated Scottish Newspapers Ltd* 1929 SC 14, 1929 SLT 454 (*per* Lord Anderson at 20). The ordinary meaning of words includes what the reasonable reader would read into them. It is "necessary to confine innuendoes upon, and inferences from, such words within an area which admits of their being made without strain and as an expression of the reasonable, natural, or necessary meaning of the words employed": *Russell* v *Stubbs Ltd* (*per* Lord Shaw at 402-3). The ordinary and natural meaning of words may be either the literal meaning or it

may be an implied or inferred or an indirect meaning; any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words: *Lewis* v *Daily Telegraph* (*per* Lord Devlin at 279).

[22] The court should focus on how the ordinary reasonable reader would construe the words, being particularly conscious of the context in which the statement was made: *Stocker* v *Stocker* at [39]-[40]. The individual elements of the proper approach have been narrated in several cases in England: see e.g. *Allen* v *Times Newspapers*; *Jeynes* v *News Magazines Limited*. These include that the governing principle is one of reasonableness and that the ordinary hypothetical reader is taken to be representative of those who would read the publication in question. In Scotland, there is a helpful compilation of *dicta* in this regard in Lord MacPhail's decision in *Macleod* v *Newsquest (Sunday Herald) Ltd* at [13]-[14]. The principles in relation to meaning were more recently summarised by Nicklin J in *Koutsogiannis* v *The Random House Group Limited* (cross-references omitted):

> "11. The Court's task is to determine the single natural and ordinary meaning of the words complained of, which is the meaning that the hypothetical reasonable reader would understand the words bear. It is well recognised that there is an artificiality in this process because individual readers may understand words in different ways …
>
> 12. The following key principles can be distilled from the authorities …
>
> (i) The governing principle is reasonableness.
>
> (ii) The intention of the publisher is irrelevant.
>
> (iii) The hypothetical reasonable reader is not naive 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. A reader who always adopts a bad meaning where a less serious or non-defamatory meaning is

available is not reasonable: s/he is avid for scandal. But always to adopt the less derogatory meaning would also be unreasonable: it would be naive.

(iv) Over-elaborate analysis should be avoided and the court should certainly not take a too literal approach to the task.

(v) Consequently, a judge providing written reasons for conclusions on meaning should not fall into the trap of conducting too detailed an analysis of the various passages relied on by the respective parties.

(vi) Any meaning that emerges as the produce of some strained, or forced, or utterly unreasonable interpretation should be rejected.

(vii) It follows that it is not enough to say that by some person or another the words might be understood in a defamatory sense.

(viii) The publication must be read as a whole, and any 'bane and antidote' taken together. Sometimes, the context will clothe the words in a more serious defamatory meaning (for example the classic "rogues' gallery" case). In other cases, the context will weaken (even extinguish altogether) the defamatory meaning that the words would bear if they were read in isolation (eg, bane and antidote cases).

(ix) In order to determine the natural and ordinary meaning of the statement of which the claimant complains, it is necessary to take into account the context in which it appeared and the mode of publication.

(x) No evidence, beyond publication complained of, is admissible in determining the natural and ordinary meaning.

(xi) The hypothetical reader is taken to be representative of those who would read the publication in question. The court can take judicial notice of facts which are common knowledge, but should beware of reliance on impressionistic assessments of the characteristics of a publication's readership.

(xii) Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader.

(xiii) In determining the single meaning, the court is free to choose the correct meaning; it is not bound by the meanings advanced by the parties (save that it cannot find a meaning that is more

injurious than the claimant's pleaded meaning)."

Internet blogs and social media

[23] As noted above, context is extremely important, and that has particular relevance in relation to words used on social media. It has been said that "the advent of the 21st century has brought with it a new class of reader: the social media user": *Stocker* v *Stocker* (at [41]). The court should keep in mind the way in which such postings and tweets are made and read. It would be wrong to engage in elaborate analysis of a statement made on social media, or to parse it for its theoretically or logically deducible meaning: rather, the search for the single meaning should reflect the fact that social media is a casual medium that is in the nature of conversation rather than carefully chosen expression and is pre-eminently a medium in which the reader reads and then moves on: *Stocker* v *Stocker* (at [41]-[43]). Lord Kerr also referred with approval (at [44]) to the comments of Nicklin J in *Monir* v *Wood* [2018] EWHC 3525 (QB) (at [90] and [92]) to the effect that people scroll through Facebook posts and Twitter messages fairly quickly and they do not pause and reflect or ponder on what meaning the statement might possibly bear; their reaction to the publication is impressionistic and fleeting; the essential message that is being conveyed is likely to be absorbed quickly by the reader. In this case, the ordinary hypothetical reader must be taken to be a reasonable representative of the readers of the blogs, or in the case of the tweets, of the users of Twitter who follow the defender, and for the Facebook post, of those who read those posts (see eg *McAlpine* v *Bercow* [2013] EWHC 1342 (QB) at [58]).

[24] There has also been some discussion in the English case law of the test for whether two publications are to be treated as one for the purposes of defamation: *Dee* v *Telegraph Media Group Ltd* [2010] EWHC 924 (QB), [2010] EMLR 20 at [29]. In considering how posts or

tweets published on different occasions might form part of the context in which a particular post or tweet is read and understood by the ordinary reasonable reader, I have had regard to the following comments by Warby J in *Monroe* v *Hopkins* [2017] EWHC 433 (QB); [2017] 4 WLR 68:

> "[39] I would include as context parts of a wider Twitter conversation in which the offending tweet appeared, and which the representative hypothetical ordinary reader is likely to have read. This would clearly include an earlier tweet or reply which was available to view on the same page as the offending material. It could include earlier material, if sufficiently closely connected. But it is not necessarily the case that it would include tweets from days beforehand. The nature of the medium is such that these disappear from view quite swiftly, for regular users. It may also be necessary, in some cases, to take account of the fact that the way Twitter works means that a given tweet can appear in differing contexts to different groups, or even to different individuals."

[25] On the question of whether material accessible by means of a hyperlink should be treated as relevant context, in *Poulter* v *Times Newspapers Ltd* [2018] EWHC 3900 (QB) Nicklin J referred to an earlier judgment of his (*Falter* v *Altzmon* [2018] EWHC 1728 (QB)) in which he explained:

> "[12] It is perhaps unrealistic to proceed on the basis that every reader will follow all the hyperlinks, but everything depends upon its context. For example, if in a single tweet there is a single statement that says, 'X is a liar' and then a hyperlink is given, it is almost an irresistible inference to conclude that the ordinary reasonable reader would have to follow the hyperlink in order to make sense of what was being said. At the other end of the spectrum, a very long article could contain a very large number of hyperlinks. Only the most tenacious or diligent reader could be expected to follow every single one of those hyperlinks. Such a reader could hardly be described as the ordinary reasonable reader. How many links any individual reader would follow would depend on an individual's interest in or knowledge of the subject matter or perhaps other particular reasons for investigating each of the hyperlinks in question.
>
> [13] It therefore does not seem to me to be possible to put forward a hard and fast rule that hyperlinks imbedded in an article that is complained of should be treated as having been read by the ordinary reasonable reader…
>
> [16] I suppose, ultimately, if it is a matter of dispute, the court is going to have to take a view as to what hypothetical reasonable reader is likely to do when presented

> by an online publication and the extent to which s/he would follow hyperlinks presented to him/her…"

In *Poulter*, Nicklin J then said:

> "[24] … Whether readers follow links provided like this is influenced by a number of factors, including: (1) their familiarity with the story or subject matter and whether they consider they already know that they are offered by way of further reading; (2) their level of interest in the particular article and whether that drives them to wish to learn more; (3) particular directions given to read other material in the article; (4) if the reader considers that he or she cannot understand what is being said without clicking through to the hyperlink. It might be reasonable to attribute items (3) and (4) to the hypothetical ordinary, reasonable reader, but (1) and (2) will vary reader by reader."

[26] In light of the points made in the case law, where the pursuer submits that more than one publication is to be taken into account to found the defamatory imputation, I conclude that the test to be applied is whether, having regard to all of the circumstances, it is to be inferred that hypothetical ordinary reasonable reader of the material complained of will also have read, or have in mind, the other material which is relied upon as context. For that to be possible, there must be a sufficient nexus, connection or association between the publications, which could include a reference or hyperlink or the publications being part of for example, a Twitter conversation, or a series or sequence of material.

[27] While it may be possible to classify different levels of defamatory meaning, there is in law no settled categorisation. In *Koutsogiannis*, Nicklin J (at [13]) made these observations:

> "… in *Chase -v- News Group Newspapers Ltd* [2003] EMLR 11 at [45] Brooke LJ identified three types of defamatory allegation: broadly, (1) the claimant is guilty of the act; (2) reasonable grounds to suspect that the claimant is guilty of the act; and (3) grounds to investigate whether the claimant has committed the act. In the lexicon of defamation, these have come to be known as the *Chase* levels. Reflecting the almost infinite capacity for subtle differences in meaning, they are not a straitjacket forcing the court to select one of these prescribed levels of meaning, but they are a helpful shorthand."

Fair comment

[28] A similar approach to that adopted for identifying the meaning of the allegedly defamatory statements is to be followed in assessing whether the meaning conveyed by the words complained of is an assertion of fact, or whether it is a comment or expression of opinion. As Nicklin J explained in *Koutsogiannis* (at [16]-[17]):

> "…when determining whether the words complained of contain allegations of fact or opinion, the Court will be guided by the following points:
>
> > (i) The statement must be recognisable as comment, as distinct from an imputation of fact.
> > (ii) Opinion is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc.
> > (iii) The ultimate question is how the word would strike the ordinary reasonable reader. The subject matter and context of the words may be an important indicator of whether they are fact or opinion…"

[29] The same sort of approach is adopted in Scots law: see *Curran* v *Scottish Daily Record and Sunday Mail Ltd* (*per* Lady Wise at [37]). The words must be recognisable as comment rather than an assertion of fact. If it is comment then "The expression of an opinion as to a state of facts truly set forth is not actionable, even when that opinion is couched in vituperative or contumelious language": *Massie* v *McCaig* at [30]. The defence of fair comment is thus made out under Scots law if the meaning complained of is (a) recognisable as a comment, (b) upon facts which are truly stated, (c) relating to a matter of public interest: *Massie, supra.* The rigours of requirement (b) have been relaxed by section 6 of the Defamation Act 1952:

> "…a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved".

Under Scots law, "malice is not part of the equation": if something is fair comment derived from true fact, whether it is maliciously made has no relevance: *Massie* at [32].

[30] It has also been held that public interest is not to be confined within narrow limits: see *Joseph* v *Spiller* (at [3]), citing with approval *Tse Wai Chun* v *Cheng*. I bear in mind the observations in *Massie* v *McCaig* as to the approach in Scotland. Malice in the sense of ill-will or spite cannot rebut the defence of fair comment, but if the maker of the statement has no belief in the opinion expressed that will mean that it is not a genuine opinion for the purposes of the defence of fair comment.

Veritas

[31] For the defence of *veritas* (truth), what is required is that the defamatory meaning conveyed by the defender, insofar as it amounts to an assertion of fact, is substantially true (*Gatley on Libel and Slander* 12th ed., para 11.7).

Responsibility for comments made by others

[32] In the present case, the defender did not seek to contend that he had no responsibility for comments on his website made by others, but relied upon the following defence. In terms of the Electronic Commerce (EC Directive) Regulations 2002, regulation 19, the defender is not liable for damages if he:

> "does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful".

In *Kaschke* v *Gray* [2010] EWHC 690 (QB) it was held that this provision applied to blogs hosted on a website.

The defamatory imputations

[33] The pursuer sets out in its pleadings the meanings it argues are to be taken from the relevant publications. The pursuer adopts the standard language used in defamation pleadings in Scotland that the words in the relevant publications "falsely and calumniously represent, and are understood by members of the public to represent directly and by innuendo" the alleged defamatory meaning. I therefore take into account that the pursuer relies upon innuendo as well as direct representations. It is however clear that innuendo, in the sense of the words themselves not being defamatory but becoming defamatory because of special knowledge on the part of a reader, is not asserted, either in the pleadings or in submissions. Separately, in the written and oral submissions for the pursuer, a different structure was adopted from that in the pleadings and the specific defamatory meanings averred were not each individually addressed. I have taken from the written and oral submissions for the pursuer the points that relate to the specific defamatory meanings alleged in the pleadings. In those written and oral submissions, individual statements from the blogs, posts or tweets were on occasion identified and founded upon and I record these below.

[34] As is obvious, where defamatory imputations are alleged to have been made in material placed on the internet or on Twitter or Facebook, the position differs from that of, say, an article in a newspaper. For example, a tweet is not itself a publication to the world at large. It is also of relevance to note that the material published commonly remains on the website and, at least for a period of time, on the Twitter account or on Facebook and that it can be accessed, including very easily by a hyperlink if one is made. Where multiple publications of this sort are relied upon (as is the case here) it becomes important for the pursuer to make clear the particular publications founded upon and how and when other

material should be taken to form part of the context in which the publication is to be understood. Where, for example, it is to be alleged that an earlier tweet is to form part of the context of a later tweet, or Facebook post, issues will arise as to how and when that can be established or inferred. As noted above, hyperlinks and references will no doubt be relevant factors, as will be the timing of the individual publications (for example, whether they are all part of the same Twitter conversation). However, if it is to be suggested that the reader of a tweet must have had in mind the content of a blog made say one month earlier, that inference may not be easy to draw. Evidence about the number of followers on Twitter, the number of friends on Facebook and of people who would or did read the blogs (but not of course about the natural and ordinary meaning of the words), might assist in supporting such an inference. Very little evidence of that kind was led in this case. It is correct that the defender plainly has an interest in issues concerning land: his website in entitled "Land Matters…" and the double meaning of "matters" indicates its clear importance to him. The tweets referred to in the present case relate to land matters and no doubt there will be other tweets by the defender about other land issues. The evidence was that the defender has some 8,000 followers on Twitter. Thus, it may well be the case that a number of people, interested in such issues, read both the blogs and the tweets by the defender. However, in order to allow an inference to be drawn that a reader of a tweet must have had in mind the contents of, for example, a blog made some time earlier to which there is no hyperlink or reference in the tweet, there requires to be a basis for that inference.

Material on the defender's website

[35] As noted, the pursuer avers that read in isolation and also in conjunction with comments generated by them, blog 1, the addendum, and blog 2 made eight defamatory

imputations. Blog 2 contained a hyperlink to blog 1. I now deal with each of the pleaded defamatory imputations (underlined below) in turn.

(a) The pursuer is acting in an immoral and illegal way by offering souvenir plots for sale.

[36] In support of this meaning, in its written submissions, the pursuer identifies one particular "defamatory statement". On 29 September 2015, a member of the public posted a query on the defender's blog asking why the pursuer's business methods are "not illegal under the trades description/consumer law?" In response, on the same day, the defender commented "It may well be illegal – I do recall some deliberations to this effect in the past". The pursuer contended that any reasonable reader seeing that statement from the defender would be led to believe that the pursuer was acting illegally and involved in criminal activities. The comment was therefore defamatory. The pursuer submitted that the allegation was untrue and was not backed up by any evidence or facts. Selling souvenir plots was a well-established business practice adopted by many companies since at least 1971. Also, in blog 2, the defender had said that selling souvenir plots may well be "a bit of fun" and it was not therefore feasible that the defender honestly believed that selling souvenir plots may well be illegal.

[37] The defender argued that there was no assertion of the pursuer acting in an immoral and illegal way. The closest the pursuer could come to anything of that nature was a reference to WHCIC (not the pursuer) having adopted HTL's dubious methods of selling souvenir plots of land and claiming that the purchaser is the owner. There was no assertion of guilt of criminality or immorality. In any event this was a clear instance of comment and it was covered by the defence of fair comment. The defender's response to the query posted on his blog, founded upon by the pursuer, was plainly an expression of opinion rather than

stating a fact. The opinion was based on the view that it is false advertising to assert that one is offering for sale a plot of land when title to the land will not pass on that sale and the seller is not the owner of the plot. That is obviously something which might be viewed by a commentator as relating to the law on trades description or consumer law. Accordingly the defence of fair comment was established in relation to the particular statement relied upon. In any event, if there was taken to be a factual assertion of illegality or immorality, that was substantially true. It was neither moral nor legal to offer for sale something that one does not own, or to offer land for sale without explaining the limitations of the effect of that sale, or to represent falsely that the purchase will entitle the buyer to style himself or herself as a Lord or Lady.

[38] Applying the relevant principles and viewing the words in the context of the relevant publications as a whole, the pursuer is correct as to the meaning which the words would have conveyed to the ordinary reasonable reader, subject to one qualification. The qualification is the insertion of the word "possibly" before "illegal", reflecting the point that the response to the question that the pursuer quotes, which concerned "trades description/consumer law", was that the sale of souvenir plots "may well be illegal". To assert that the pursuer is doing something which may well be illegal amounts to a defamatory imputation. That meaning does not directly assert criminality or immorality, but it does suggest that there may be grounds to at least investigate such a possibility (*Chase* level three). In addition, the clear theme of the blogs was that the sale of souvenir plots is a practice known to be dubious and in that sense is immoral. I accordingly conclude that the relevant publications had that defamatory meaning, which is sufficiently close to the pursuer's averred meaning.

[39] Turning to the defences, the meaning (as well as the specific statement made and complained of) is not an assertion of fact, that being plain from the language used in the articulation of the meaning and in the statement itself. A view that something is immoral is, at least in the present context, a matter of opinion. The factual basis for that meaning and for the comment that the acts "may well be illegal" is the discussion in the blog about the controversy over whether the sale of a souvenir plot results in the purchaser being, in law, the owner of the plot. That is plainly a matter of public interest. I therefore accept the defender's submission that this is an expression of comment or opinion based upon facts which are true and made on a matter of public interest. I do not consider that the comments in blog 2 relied upon by the pursuer justify the pursuer's position that the defender had no honest belief that selling souvenir plots may well be illegal: whether or not it was also "a bit of fun" does not contradict that opinion. It is clear that the defender reasonably believed that publishing the statement complained of (and indeed all of the other statements) was in the public interest.

[40] If for any reason the meaning stated is taken as an assertion of fact, it was in any event substantially true. At the time of blog 1 the pursuer did not own the land and hence could not purport to sell the plots. There was also evidence led that the "dispositions" given to particular purchasers referred to land to which the pursuer did not have title. Further, it is not correct that the purchase of a plot entitled the buyer to style himself or herself as a Lord or Lady.

[41] In its written submissions the pursuer alleges that there is a further statement in blog 1 which supports this alleged defamatory meaning:

> "Wildcat Haven has adopted Highland Titles dubious methods of selling small souvenir plots of land and claiming that the purchaser is the owner."

I conclude that the meaning of this statement alleged by the pursuer, again read in the context of the relevant publications, is the natural and ordinary one that the pursuer acted in the same dubious manner as a company (HTL) in relation to the sale of souvenir plots and claiming that the purchaser is the owner. That meaning does not directly assert criminality or immorality, but once again it does suggest that there may be grounds to suspect or at least investigate such a possibility (*Chase* levels two or three). This is therefore also a defamatory meaning. I do not consider that the ordinary reasonable reader would have drawn a distinction between the two Wildcat Haven entities; rather, that reader would conclude that the pursuer was, at least in part, the subject of the allegation. In any event, in blog 1 the defender had effectively defined "Wildcat Haven" as involving both the pursuer and WHCIC.

[42] However, again the defence of fair comment is made out. The meaning complained of can reasonably be taken to be an inference, conclusion, criticism, remark or observation. Whether conduct is "dubious" is not a matter of fact but an expression of a view. Whether the pursuer was claiming that the purchaser is the owner is also an inference or conclusion drawn from the points made in the pursuer's website: the blog refers to, and contains a hyperlink to, "extensive faq" on that matter. The basis of the statement was the facts narrated in the blogs (concerning the controversy about souvenir plots being ostensibly sold) which are plainly true and the issue is again clearly a matter of public interest (as indeed was admitted by the pursuer). Thus, the defence of fair comment applies also to this defamatory imputation. Again, if the meaning does not fall within the definition of fair comment, the requirements of the defence of *veritas* are met.

(b) The pursuer is tricking members of the public and is not using the proceeds of sale of souvenir plots to fund conservation of wildcats.

[43] In its submissions, the pursuer made no specific reference to this allegedly defamatory meaning. The pursuer did, however, refer to there being a defamatory statement that: "The land is 75 ha in extent and if all sold in 10 ft² plots would generate £40.35 million sales revenue paid to a company in Alderney in the Channel Islands". The pursuer argued that a reasonable reader would therefore assume that the proceeds of the purchase of a wildcat souvenir plot would be "funnelled" offshore.

[44] The context in which that particular statement is made in blog 1 is that the land from which the souvenir plots were being sold was owned by HTL. The blog referred to HTL as naming the area of land as "Bumblebee Haven" from which a person could purchase plots ranging from 10ft² to 100ft² and call oneself Lord or Lady Glencoe. The blog contains a link to the title and plan of the area of land. Thereafter the statement founded upon by the pursuer is made. There is no suggestion in the blog that the pursuer was selling plots of land of 10ft². The blog refers to the registered address of WHCIC and the pursuer as each being in Cornwall. It is clear that the ordinary reasonable reader would take the comment founded upon to be a reference to sales by HTL, that being the company which was selling 10 ft² plots and having its base in the so called "tax-haven" of Alderney in the Channel Islands.

[45] In blog 2, a similar statement is made. However, the context differed. The second blog refers to the requirement for an asset-lock that restricts the disposal of assets of the CIC. It states that in the case of the pursuer HTCTS is "the designated body to become the potential recipient of the assets". It then sets out the questions posed by the defender to the director of the pursuer. It goes on to narrate that following her claim that part of the land

had been gifted "to us" the defender had "checked the title" and discovered that HTL "remained the owner and had gifted no land to Wildcat Haven". It adds that on 9 December 2015, HTL had made an application to the registers of Scotland to transfer part of the land to the pursuer. It goes on to say that:

> "It remains unclear what financial arrangements have been entered into and why [DW] is a Director and why Highland Titles Charitable Trust for Scotland is the designated beneficiary of the assets of Wildcat Haven Enterprises CIC".

Thereafter, it repeats the point founded upon by the pursuer.

[46] I do not consider that these statements, read in the context of the relevant publications founded upon, mean that the proceeds of sale of souvenir plots by the pursuer were not being used to fund conservation of wildcats and hence that the pursuer was tricking members of the public. Specific reference is made to Highland Titles making an application to transfer part of the land to the pursuer, so the reader was made directly aware that some of the land might be transferred. It is then said that financial arrangements remained unclear, indicating that there is no direct assertion of what financial arrangements existed. Incorrectly, blog 2 states that HTCTS is the designated beneficiary of the assets of the pursuer. Read along with blog 1, the expression "designated beneficiary" means that the assets are transferred in the event of winding up. As the defender accepted, as at the date of blog 2, HTCTS was no longer the asset-lock body or designated beneficiary. However, read along with blog 1, the statement is simply repeating the position as to what sums of money would be generated to HTL in the event that the land owned by HTL (not WHCIC or the pursuer) was sold. That is the meaning. I therefore reject the pursuer's contention that this defamatory imputation is made, whether directly or by innuendo.

(c) The pursuer is selling plots which have already been sold as part of a Bumblebee Haven.

[47] While not directly asserted, it appears that the pursuer seeks to rely for this purpose on certain passages in the blogs. These passages were expressly referred to in the pursuer's submissions on allegation (f) which I discuss below. No other specific statement within the relevant publications founded upon was identified by the pursuer in support of this alleged defamatory imputation. Properly understood, applying the test of the ordinary reasonable reader, no such allegation was being made by the defender. The point being made was that HTL owned the land and was selling plots for the conservation of bumblebees. The defender simply did not state or imply that any actual souvenir plot was being sold by the pursuer when it had already been sold by HTL. Accordingly the meaning alleged by the pursuer is simply not made out, whether directly or by innuendo. The true meaning is simply that the pursuer was selling souvenir plots from the same area of land as Bumblebee Haven.

(d) The pursuer is paying and will continue to pay large sums of money comprising the revenue from the sale of souvenir plots to a company in Alderney in the Channel Islands where the destination of those sums is beyond public scrutiny and where that money may well be used for purposes unconnected with the conservation of wildcats.

[48] I have already set out the pursuer's submissions on this point in the context of discussing the second defamatory imputation. For the reasons there given, I reject the pursuer's contentions as to the existence of this defamatory meaning, again whether directly or by innuendo. I have also set out the true meaning. The relevant publications do not support the alleged imputation that the pursuer is and will continue to make payments to a company in Alderney. The reference to the asset-lock was made in the context of potential winding-up of the pursuer.

(e) (under reference to *inter alia* the opening passage of blog 2 linking into blog 1 and the use of the HTL logo and that links to other blogs which are critical of HTL and to the comments in the form of tweets generated by blogs 1 and 2 as hereinafter condescended upon) the pursuer is controlled by HTL which is a disreputable company engaged in diverting money offshore and in tax evasion.

[49] As is evident from the various publications founded upon, the pursuer here relies on a fairly complex jigsaw or mosaic of different online material. I have discussed earlier (at para [34] above) the difficulties with the approach of aggregating a number of individual online publications. No proper basis was given from which an inference can be drawn that these various publications would have been read together, either as a single publication or as part of the context of each other. For that reason, I reject that these various publications can be aggregated in order to found the meaning alleged. In its submissions, the pursuer argued that in the blogs the defender stated that HTL and the pursuer are the same entity. The pursuer also submitted that there are repeated assertions in blogs 1 and 2 that the pursuer is controlled by HTL. The pursuer referred to blog 2 and the statement therein that in early June 2015 Highland Titles bankers and corporate service providers had given notice of terminating their services and that the pursuer was incorporated on 30 June 2015. The pursuer argued that the reasonable reader would believe that due to losing their banking provisions, Highland Titles would cease trading and had created a new entity which they controlled, being the pursuer, and this would allow them to continue funnelling money offshore. I conclude that the ordinary reasonable reader would take from the blogs that there was a close link between HTL and the pursuer, including that HTL appeared to have established a very close relationship with Wildcat Haven which operates via the pursuer, that DW was a director of both, that HTL owned land in respect of which the pursuer was apparently selling plots, that HTL had applied to transfer part of the land to the pursuer and

that HTCTS is the asset-lock of the pursuer. However, this link between HTL and the pursuer as explained in the blogs did not go as far as meaning, or allowing the inference to be drawn, that HTL actually controlled the pursuer. While I accept that the structure of this part of blog 1, and its reference to when the pursuer was incorporated, may carry some implications, the reference to the bankers and service providers terminating their services did not imply or infer that HTL would cease trading and, more importantly, did not allow the inference that the pursuer had been created by HTL and was controlled by it. On that basis, I reject the defamatory imputation founded upon by the pursuer. I also conclude that the ordinary reasonable reader would not have taken the material to mean that the defender was alleging that HTL was "a disreputable company engaged in directing money offshore and in tax evasion". There were plainly statements that HTL engaged in dubious or controversial business methods, in particular in the selling of souvenir plots when the buyer does not acquire legal title to the plot, and that the proceeds go to an offshore base, which is a "tax haven", but that does not go the distance of alleging that HTL is disreputable or engaged in tax evasion. I conclude that the reader would not take from the relevant publications, whether directly or by innuendo, that HTL had the characteristics alleged. To the extent that the pursuer suggests that it was untrue that HTL's bankers and service providers had withdrawn their services, the evidence was to the contrary.

(f) The pursuer is paying money raised from the sale of souvenir plots to HTL.

[50] In its written submissions, the pursuer founded upon the statement in blog 1 to the effect that the land that the "supporters are being invited to acquire is not only already owned by a company in Alderney and being sold plot by plot for bumblebees, this 'first wildcat haven' is 60 miles to the north of Ardnamurchan and Morvern and well outside the

area being promoted for wildlife conservation". The pursuer argued that the defender was stating that land not owned by the pursuer, from which the plots were being sold, was also not located where the Wildcat Haven project operates or planned to operate, the clear suggestion being that this was a scam and that the money raised would be going to an offshore tax haven. I reject that alleged meaning. The natural and ordinary meaning of the words is plain and, at the risk of repetition, is simply that the land was at the time of the blog owned by a company in Alderney, was being sold plot by plot for bumblebees and was located well outside the area that the pursuer currently stated it was promoting for wildlife conservation. Those facts are substantially true. At the time of blog 1 the land was owned by HTL. The disposition in favour of the pursuer occurred on 24 November 2015. HTL was at the time of blog 1 selling plots to support bumblebees. The area of land was outwith that which the pursuer was publicising as being used for the wildcat project.

[51] The pursuer makes similar contentions in the second and fourth defamatory allegations referred to above. For the reasons given there, I do not accept that the defender's statements would be taken to mean, directly or by innuendo, that the pursuer was paying the money raised from the sale of its souvenir plots to HTL. The real meaning is that the pursuer was seeking to raise money from the sale of souvenir plots and had adopted a similar approach to that taken by HTL, with whom it had certain links. It is true that in response to the comments from the director of the pursuer the defender asked the question whether HTL received any payment or commission from the pursuer. I accept that in some circumstances a question can, in context, itself convey a defamatory meaning, for example viewed by the ordinary reasonable reader as being aimed at gathering evidence for an allegation already plainly made. However, when read in the context of the whole of the relevant publications, this was truly just a genuine question in the terms stated. The

ordinary reasonable reader would not have considered this to be an actual allegation in the guise of a question. Accordingly, I conclude that this alleged defamatory meaning is not supported by the terms of the relevant publications.

(g) DW (who is a director of the pursuer) is also a director of HTL and a trustee of HTCTS and that, accordingly, the pursuer has close ties with HTL which are alleged to be involved in dubious and illegal sales of souvenir plots and who are said to have opaque financial affairs.

[52] This particular allegation was not specifically addressed in the written or oral submissions of the pursuer. There was, however, reference in those submissions to the pursuer being controlled by HTL, and HTCTS being the asset-lock, and related matters. The allegation begins with a specific factual point (concerning DW) which is said to give rise to close ties with HTL. It is not legitimate to identify only one statement from the blogs which relates to close ties, when there are others that are true; that divorces the specific point from the rest of the context. Also, no actual allegation of illegality is identified by the pursuer, although I accept that the defender had of course said in a comment following blog 1 that the acts "may well be illegal" and I accept that this comment can be taken to be part of the relevant publications. The meaning which the ordinary reasonable reader would take from the relevant publications is that the pursuer has close ties with HTL which is alleged to be involved in dubious and possibly illegal sales of souvenir plots and said to have opaque financial affairs. This is a defamatory meaning and I regard it as being sufficiently close to the meaning averred by the pursuer as to form part of the pursuer's case. The question then arises as to whether this meaning is a comment or an assertion of fact. While there are plainly factual elements in the imputation, viewed by the ordinary reasonable reader it is comment, as the key point is the inference or conclusion of there being close ties. Taking the

words "may well be illegal" to form part of the material from which the meaning is drawn, along with the references to "dubious" and to "opaque financial affairs", these expressions also point to this being a comment. As to the mention of "close ties", while this could be regarded as a factual statement (capable of verification) rather than a comment, viewed in the context of the meaning I have accepted, it is a comment, an inference or conclusion from other factual material. In any event, that part of the meaning is plainly true. The close ties included that at least for a period of time DW was a director of the pursuer and HTL and that HTCTS was, at least for a period of time, the asset-lock of the pursuer and in due course there was the gift of land from HTL to the pursuer. The evidence indicated that DW was a director of HTL until 21 August 2015, but then resumed his directorship from 21 October 2015 until 17 February 2016. He was a trustee of HTCTS until 6 July 2015. Accordingly, he was a not a director of HTL at the time when blog 1 was published, nor was he a trustee of HTCTS when either blog was published. However, he was a director of HTL and of the pursuer when blog 2 was published. There is therefore some factual inaccuracy in the material published by the defender, but there was ample other evidence of close ties existing at the time of each blog, including HTCTS being the asset-lock at the time of the first blog and HTL at the time of blog 1 owning the land from which souvenir plots were being sold on behalf of the pursuer. That evidence suffices, but I note that there was also other evidence given about ties between the entities, including that Mr O'Donoghue accepted that there had been an ongoing relationship with HTL, with it giving funds and supplying gift packs in relation to the souvenir plots. Thus, while there are certain factual inaccuracies, the comment is based upon facts which are true. Those facts include the links between the entities, the controversy as to the sale souvenir plots and the secrecy of the accounting affairs of HTL/HTCTS. The comment was also made on matters of public interest. For those

reasons, the defamatory imputation is covered by the defence of fair comment. If that conclusion is incorrect, then the defence of *veritas* would apply to the meaning which I have identified. I therefore sustain the defender's defence of fair comment, which failing *veritas,* in respect of this allegation.

(h) In the event of the pursuer being wound up its assets will pass to HTCTS

[53] This meaning derives from what is plainly stated in parts of the relevant publications and when read in context it is clearly what the reasonable reader would understand from the material. However, the meaning is not one which is defamatory. It deals solely with the situation of winding-up. The matter mentioned forms part of the "close ties" which existed, albeit that by the date of blog 2 it was no longer true that HTCTS was the asset-lock. The statement, when repeated in blog 2, was incorrect but not defamatory, whether directly or by innuendo. There is no suggestion of the pursuer ever being at risk of being wound up, or of the pursuer collecting money and not using it for wildcat conservation, but intending to get wound-up and pass it on to HTCTS.

The pursuer's allegation of the central sting

[54] In relation to the blogs and the material on the defender's website, the pursuer averred that:

> "The material inaccuracies at the centre of the defender's defamatory statements are that the proceeds of sale of souvenir plots sold by the pursuer are not being used to fund wildlife conservation but are being paid to HTL and are being diverted into offshore tax havens away from public scrutiny".

I have already rejected the suggestion that the relevant publications have that meaning. I therefore conclude that the pursuer's articulation of the central sting is simply not correct.

The true sting is that the pursuer was closely associated with HTL and HTCTS, and these were entities which carried out dubious selling of souvenir plots and were based in a tax haven. However, this meaning did not include that the pursuer was not using the proceeds of souvenir plots to fund conservation of wildcats, or that the pursuer was paying large sums of money to HTL/HTCTS, or that the pursuer was paying money raised from selling souvenir plots to HTL. The key problem for the pursuer is the lack of reference in the relevant publications to any such payments. The potential slight confusion regarding the sale of plots within the 75 ha site, and the total sums generated by sales which would come to include the gifted land, is not sufficiently clear to establish payments by the pursuer to HTL/HTCTS. Contrary to my understanding of the submissions for the defender, the pursuer does indeed allege what I have described as the true sting, or at least something sufficiently close to it, as a defamatory meaning: see imputation (g) above. However, for the reasons given on that point, this meaning is not defamatory and even if it is the defences of fair comment or, failing which, *veritas* apply.

Tweet dated 29 September 2015

[55] The tweet founded upon by the pursuer and made by the defender on 29 September 2015 (the day after blog 1) contained a link to that blog and was in the following terms:

> "Free advice for charities. Have nothing 2 do with souvenir plots, lords and ladyships and funnelling £ thro tax havens".

As noted, the evidence was that the defender had some 8,000 followers on Twitter. In my view, the hypothetical ordinary reasonable reader is likely to have required to click through to the hyperlink, and read the blog, in order to understand what is being said in the tweet. The pursuer also argued that on 29 September 2015 another person tweeted "Become a laird

– help save the #wildcat", with a link to a newspaper article promoting the pursuer's conservation activities. In response, the defender tweeted: "…er no. Please don't". The defender also added, alongside this tweet, a link to blog 1. I am again prepared to accept, given the timing of the tweet and the hyperlink, that the hypothetical reasonable reader would have read both tweets and blog 1. The second tweet and the blog therefore form part of the context. The pursuer also referred in its submissions to another tweet by the defender, on 28 September 2015, where he used the words "Highland Titles Latest wheeze", with a hyperlink to blog 1. This was not the subject of averment and I cannot take it into account as part of the context. However, even if I did it would make no difference to my conclusions.

[56] The pursuer contended that the first tweet on 29 September referred to above was defamatory in its own right in respect that it falsely stated that the proceeds of sale of souvenir plots was being funnelled through tax havens. The defender argued that this could not be read on its own as defamatory of the pursuer, which is not named. Further, read alongside blog 1, various defences applied. The defender also contended that it required a strained or sinister meaning for someone reading that "ephemeral tweet" and then reading the entirety of blog 1 to then recall the tweet and decide that the entity "funnelling £" was the pursuer.

[57] For the reasons I have given above, I do not consider that the reasonable reader would take from blog 1 that the pursuer was giving or paying the proceeds of the sale of souvenir plots to HTL or HTCTS. There is no suggestion that the pursuer was "funnelling" money through tax havens. The material which could reasonably be read as involving "funnelling" money through tax havens identified only HTL and HTCTS. Blog 1 also states that:

> "Wildcat Haven is a project designed to protect the Scottish wildcat by preventing hybridisation with feral cats and providing a network of reserves to manage as wildcat habitat".

This is clearly not suggestive of any immoral or illegal conduct but rather is a fair description of the project's objectives. In blog 2, reference is made to the latest efforts of HTL to garner greater respectability by becoming involved with "a conservation project called Wildcat Haven CIC". Blog 1also mentions that the pursuer is registered in Cornwall, and hence not in a tax haven. Blog 2 refers to the pursuer's registered office being in North Wales. The whole content of the blogs and the tweet, and the absence of any reasonable basis for inferring from the relevant publications that the pursuer, rather than HTL/HTCTS was "funnelling £" through tax havens, result in the defamatory meaning averred by the pursuer as not being one which the ordinary reasonable reader would take from that material, whether directly or by innuendo. The meaning is simply that charities should have nothing to do with selling souvenir plots, lords and ladyships and funnelling money through tax havens.

Facebook post on 25 February 2016

[58] The Facebook post by the defender dated 25 February 2016 stated "LATEST BLOG on Highland Titles/Wildcat Haven and being dumped by their bankers and corporate service providers". It contained a link to blog 2, which is titled "Highland Titles Day". The pursuer submitted that this was put forward as a clear statement of fact and that the ordinary reasonable reader would be aware that bankers would typically only withdraw their services if they had suspicions of financial impropriety. The defender submitted that the Facebook post could not be read on its own. It was in essence a headline, with blog 2 being the article. When read along with the post, the blog made clear that it was Highland

Titles that were dumped by their bankers and corporate service providers. In any event, the reference was to Wildcat Haven and not to the pursuer.

[59] The Facebook post by the defender showed the graphic of blog 2 and referred to his "latest blog", and as I understand it, contained a link to that blog. The hypothetical ordinary reasonable reader would understand the post to be, in effect, a headline point, making a promotion or advertisement of the blog, or an invitation to peruse it. In order to understand the words in the post I am satisfied that the reader would have accessed and read blog 2. The relevant publications for present purposes are therefore the post and the blog. Alternatively, the blog would at least form part of the context in which the post was read. Taking into account the contents of the blog, I reject the defender's submission that the reference to Wildcat Haven would not be taken by the reader to be a reference to the pursuer. In blog 2 the defender identified Wildcat Haven as involving WHCIC and made several references to the pursuer, which was the fundraising arm. The reasonable reader, if he had read the blog and the Facebook post, would not interpret this as a reference only to the company WHCIC. However, the blog states that "Highland Title's bankers and corporate service providers in Guernsey gave notice of the termination of their services". The Facebook post should be read in the way described in *Stocker* and similar cases. The language used is not designed to be viewed with absolute precision, especially when it is really simply inviting perusal of the blog. The words in the post are capable of being read as referring to the blog as concerning "Highland Titles/Wildcat Haven" with the remainder of the post being rather unclear, until read along with the blog. The blog itself makes specific reference only to Highland Titles losing its bankers and corporate service providers. In my view, that is the meaning of the post when read in the context of the blog. While the Facebook post may introduce some ambiguity, the ordinary reasonable reader would not

take it, when read in context, to mean that the pursuer was in the same position. I accordingly do not accept the defamatory imputation alleged by the pursuer.

Comments by others posted on the defender's website

[60] It was accepted that the comments posted by others on the defender's website were, as a matter of law, to be taken as published by him. I do not intend to set out the content of these other comments in any detail, but they included "many might have been tempted to contribute to this ***** scheme, purely out of desire to help a threatened species and help Scotland's wildlife. It is truly sickening that a loathsome enterprise is operating in this way". Other comments said "It's totally appalling", a "scam" and "It's a pity they can't be gaoled". Another comment was in these terms:

> "I completely agree with you that it is sickening to think of people using other people's love for a beautiful endangered animal to spiv some money. It also angers me that our laws are so weak for crimes against life. In this particular case I just urge you to keep reading, keep watching how the story evolves. I'm counting on all of us to make sure in this case that the truth will out."

[61] The pursuer argued that these comments, taken in their own right and read in conjunction with blog 1, the addendum and the update, and blog 2 represented that (i) the pursuer is acting in an immoral and illegal way by offering souvenir plots for sale; and (ii) the pursuer is tricking members of the public and is not using the proceeds of sale of souvenir plots to fund conservation of wildcats. The defender contended that there was no suggestion that the defender himself was responsible for the actual content or making of any of these comments, and that in unchallenged evidence he had explained that these comments represented the honest views of certain people who had read his blogs and that it was not for him to censor such views. The defence under regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 was therefore made out: the defender did not

have "actual knowledge of unlawful activity or information". The pursuer did not seek to contend that regulation 19 did not apply in the present circumstances and in light of the decision in *Kaschke* v *Gray* it appears to apply to a website host who is merely storing comments.

[62] In my view, the first comment must be taken as referring to the pursuer, given its reference to a "threatened species" and "Scotland's wildlife". Perhaps arguably, it could be taken as referring to HTL, particularly in respect of bumblebees, but there was nothing in the evidence to suggest that bumblebees were themselves a species that was threatened. The rest of the comment could readily be taken as a reference to the sale of souvenir plots. The comment has a defamatory meaning, that the pursuer is involved in a sickening and loathsome enterprise. Viewing this as a comment on the defender's website, not his own but one for which he accepted he has legal responsibility, the elements of the defence of fair comment are met. There was an ample basis on true facts for the making of such a comment, on a matter of public interest, and there is no reason to conclude that the person who made the comment, or for that matter the defender, did not hold the view expressed. It is far from clear that the other comments (apart from the final one) were referring to the pursuer. Given the repeated reference to HTL and HTCTS in the blogs I am unable to conclude that the other comments were indeed directed at the pursuer.

[63] More importantly however, I conclude that on the evidence the requirements for the defence under regulation 19 of the 2002 Regulations are satisfied. No basis was suggested for the defender having actual knowledge of unlawful activity or information or of being aware of facts or circumstances from which it would have been apparent to him, as the service provider, that the activity or information was unlawful. I accept the defender's position that he had no actual knowledge to that effect.

Tweets by the defender between 16 November 2012 and 3 May 2017

[64] The pursuer alleges in it pleadings that a number of tweets by the defender between 16 November 2012 and 3 May 2017 (Appendix, section 8) are defamatory of the pursuer in the manner and to the extent of points (e) and (f) above. Some of the tweets complained of were posted relatively close to each other in time, on 25 and 29 September 2015. I conclude that the hypothetical reasonable reader reading the second of these tweets would have in mind the content of the first or at least would, in seeking to understand the second tweet, have scrolled to recent tweets including the first. The same applies to the two tweets on 24 and 25 February 2016. No basis was presented and no evidence was led which would support the view that tweets published on various other dates, including 16 November 2012, 21 February 2015, 6 April 2016 and 3 May 2017 could, individually or collectively, be taken along with any of the other tweets to form part of the context of those tweets. Most of these tweets are not therefore set out in the Appendix.

[65] The submissions made by the pursuer identified two specific tweets by the defender, said to support the contention that the defamatory allegations were made. The first was "Fact that Wildcat Haven has blocked my IP address suggests whole operation is being run by Highland Titles", tweeted on 29 September 2015. The second was in response to the following tweet on 10 March 2016 from someone from BBC Scotland: "this Wildcat Haven project on the @bbcscotland news site, is the one run by the Highland Titles mob?" The response by the defender was "...@bbcscotland news it is the one where the fundraising arm is run by Highland Titles – yes". The defender submitted that the complaints made had not been explored in evidence and in any event that the comments made were not defamatory of the pursuer, were directed more towards HTL and indeed were plainly true.

[66] The tweets which are founded upon were referred to in the evidence. The first of the tweets quoted above was posted shortly after another tweet which referred to the "Latest scam from Highland Titles". The tweet founded upon is expressed as suggesting that the whole operation, including the pursuer's operation, is being run by HTL. The meaning of these tweets is that the pursuer may be being run by a company engaged in a scam, which is a defamatory imputation relatively close to that averred in item (e) above. This is, however, plainly a comment or expression of opinion: it is a deduction or inference that the defender has drawn from the fact stated (that he was blocked from the website). It was an understandable inference on the part of the defender and it was based on the true fact of him being blocked from the website. It was also dealing with a matter of public interest. I therefore conclude that this is covered by the defence of fair comment.

[67] In the second of the tweets quoted above, posted on 10 March 2016, in answering whether the Wildcat Haven project is the one run by "the Highland Titles mob", the defender repeats the question and answers "yes", in respect of the fundraising arm (that is, the pursuer). The project referred to in the tweet would have been taken by the ordinary reasonable reader to include the operations conducted by the pursuer. The reader would undoubtedly simply take the natural and ordinary meaning of these words and understand them to mean that "Highland Titles" ran and hence controlled the Wildcat Haven project. The question is whether this tweet, read in that context, has the defamatory imputation (identified as (e) above) claimed by the pursuer. In my view, it does not. There is nothing in this tweet from which it can be taken that HTL is a disreputable company engaged in diverting money offshore and in tax evasion. If there had been some evidence for concluding that this tweet was read in the context of the blogs or other tweets posted in

September and October 2015 to which I have referred above, there may have been potential for that imputation to have been made out, but there was no such evidence.

[68] For the reasons given above in relation to imputation (f), that imputation is also not made out in the tweets complained of by the pursuer.

Conclusion on the defamatory imputations

[69] The result of this reasoning is that a number of the defamatory imputations founded upon by the pursuer are not the meanings which the ordinary reasonable reader would have taken from the relevant material and so those claims cannot succeed. Some of the defamatory imputations alleged by the pursuer are made out as meeting that test, but in relation to those imputations defences raised by the defender are established and so these claims must also fail. It is apparent that there are a number of meanings which the pursuer relies upon which are not true meanings and indeed are overstatements by the pursuer of what was actually stated. These include the pursuer's allegations that the defender referred to it as the same entity as HTL and that the pursuer itself was "a tax dodging scam designed to con the public out of money and then funnelling money donated to wildcats to the Channel Islands, to line the pockets of corporate fat cats and the aristocratic gentry".

Untrue factual statements made by the defender

[70] In the various publications founded upon, the defender made four untrue statements. Firstly, in blog 1, that DW was at that time a director of HTL and a trustee of HTCTS, the latter point also being incorrectly stated in blog 2. Secondly, in blog 2, that HTCTS was at that time the asset-lock of the pursuer. Thirdly, in a tweet, that HTL ran or controlled the pursuer. Fourthly, in a Facebook post (read in isolation), that Wildcat Haven

had been dumped by its bankers and service providers. Apart from the first point, which was mistakenly confirmed by an authority in Guernsey, there was no proper basis for the defender to reach these conclusions. The true position in relation to the second point was available to the defender when he searched the records of the pursuer at Companies House, but he failed to notice the amended articles of association of the pursuer which changed the asset-lock from HTCTS to another entity. The third and fourth points appear to be somewhat careless observations. However, the fact that the defender has made certain statements which are untrue does not itself mean that the defamatory allegations complained of by the pursuer were made. I have taken the untrue statements into account and already explained why they do not have that result. For the defence of fair comment to be available, it is not necessary that every fact founded upon is true. Moreover, to the extent it may apply as noted above, the defence of *veritas* is founded upon statements being substantially true. The fact that there are these untrue statements made within the material complained of does not alter my views as to defamatory meanings and the available defences. The statements in the blogs are, however, relevant to the issue of *Reynolds* privilege, which I discuss below.

Malice

[71] The pursuer's fourth plea-in-law is that the defender's publications having been actuated by malice, the fourth plea-in-law for the defender (dealing with *veritas*) should be repelled. That contention is not relevant: if the statements of fact were substantially true, malice cannot affect that defence. Malice is not averred by the pursuer to apply in any other context. For that reason alone, the pursuer's position on malice cannot succeed. However, it is appropriate that I express my views on the points raised in the pursuer's submissions.

The pursuer submitted that the defender was driven by malice and that there was a dominant intent to injure. Malice was said to be demonstrated by alleging that the pursuer operated in a tax haven when he knew that to be untrue. The pursuer also claimed that the defender was fully aware that HTCTS were no longer the asset-lock for the pursuer well before the publication of blog 2. Further, the pursuer contended that the defender knew very well that selling souvenir plots was legal. There was, the pursuer claimed, a relentless, unprovoked defamatory campaign against it, using multiple platforms. The publications were said to be reckless. In relation to the main defamatory sting, the pursuer submitted that the defender admitted that he never thought that the pursuer operated through a tax haven. The pursuer also argued that the defender never believed the truth of comments made in blog 2 about the gift of land by HTL to the pursuer. The defender argued that the issue of malice had no real part to play in these proceedings. In any event, malice (as defined in the case law) was not made out.

[72] In relation to malice, the leading authority is *Horrocks* v *Lowe*, referred to by Lord Eassie in *Thomson* v *Ross* (at [55]) as showing:

> "that a pursuer in a defamation action may aver and prove malice either (i) by averring and proving that at the time at which the statement was made its maker knew that what he or she was saying was untrue (or had that wholly reckless indifference to truth which the law in cases such as fraud equiparates with positive knowledge of untruth) or (ii) by averring and proving that the statement was made predominantly for some private spite or ulterior motive divorced from the proper use of the privileged occasion. On the other hand the fact that the maker of the statement is by reason of the matter with which he is concerned ill-disposed, or unfriendly towards, or prejudiced against the person who is the subject of the statement or to whom the statement relates does not amount to 'malice' in the legal sense."

As noted above, malice is not part of the equation for the purposes of the defence of fair comment and it is also irrelevant to the defence of *veritas*. The only potential relevance for

present purposes is in relation to *Reynolds* privilege and whether the defender's writings constituted responsible journalism: if actuated by malice, they would not do so.

[73] In my opinion, the pursuer's submissions about malice (which were in any event not the subject of specific averments) are without foundation. Mr Wightman was a credible and reliable witness. He gave his evidence in an honest, straightforward and coherent manner. I accept his evidence about what he knew and did not know at the time of the various publications. The suggestion that he made statements that he knew were untrue simply has no proper basis. He did not state that the pursuer operated in a tax haven. In relation to HTCTS as the asset-lock, he openly accepted that the information that the pursuer had changed the asset-lock to a different entity was available at Companies House and that when doing the electronic search he should have spotted it, but did not, as he thought the relevant documents were things he had seen before. The pursuer's further assertion that the defender acted as an internet troll is manifestly unsupported. The pursuer's allegations of malice must fail.

Reynolds privilege

[74] In light of the conclusions I have reached about the meaning of the publications and the defences thereto, the issue of *Reynolds* privilege does not arise for consideration. It was, however, the subject of fairly detailed submissions and I shall briefly give my views as to whether it would apply in the event that my conclusions above are incorrect. *Reynolds* privilege, or public interest privilege, is recognised in Scotland: *Adams* v *Guardian Newspapers Ltd*, following *Reynolds* v *Times Newspapers Ltd*. For present purposes, the two most important authorities on this topic are the decision of the House of Lords in *Jameel* v *Wall Street Journal Europe Sprl* and of the Supreme Court in *Flood* v *Times Newspapers Ltd*. The

plea of privilege should be directed at the actual publication and not at the various meanings or innuendoes which the pursuer claims to arise from the words of the publication: *Gatley on Libel and Slander* (12th ed., at 27.26). The standard of responsible journalism is to be applied "in a practical and flexible manner" and not "exclusively by reference to the single meaning which the law attributed to the particular words" (*Flood*, para [128]). As is made clear in *Jameel*, it is the publication as a whole that has to be assessed when considering the public interest, not merely the particular defamatory allegations of which the pursuer complains. If the article as a whole is in the public interest, the next question is whether the inclusion of the defamatory statement was justifiable (*Jameel*, para [51]). The question of whether the defamatory statement should have been included is often a matter of how the story should have been presented (*ibid*). The inquiry then shifts to whether the steps taken to gather and publish the information were responsible and fair (*Jameel*, para [53]) and hence constituted responsible journalism. As Lord Hoffman observed in *Jameel*, (para [54]):

> "…the defence is of course available to anyone who publishes material of public interest in any medium. The question in each case is whether the defendant behaved fairly and responsibly in gathering and publishing the information. But I shall for convenience continue to describe this as 'responsible journalism'."

A number of more detailed propositions are set out in *Jameel*. The reasoning in *Flood* is consistent with that in *Jameel*, and adds some further guidance. There is no need to set out these propositions here, but I have taken them into account. A well-recognised instance in which *Reynolds* privilege may arise is that of consumer protection. In that area, even where individual criticisms might be made of the publisher, an honest publication alerting the public to concerns as to the validity of certain activities is likely to be privileged: see eg *GKR Karate (U.K.) Limited* v *Yorkshire Post Newspapers Limited and Others (No. 2)* (at 429-430).

[75] Applying these principles (and I stress that this issue only arises if my earlier conclusions are incorrect), I conclude that the defence of *Reynolds* privilege would not have been made out. *Reynolds* privilege cannot in my view apply to the tweets or Facebook post made in this case, and I do not understand the defender to suggest otherwise. The principal reason for reaching that view is the nature and content of the tweets and the post: they are simple and short statements which do not constitute journalism of the kind referred to in the case law. Turning to the blogs, including the update and the addendum, I accept that these relate to a matter of public interest, that is, the sale of souvenir plots. I also give appropriate weight to what might be called the editorial judgment of the defender and overall I accept that he sought to act reasonably. I also take into account that if the thrust of the blogs is true, and the public interest condition is satisfied, the inclusion of an inaccurate fact may not have the same appearance of irresponsibility as it might if the whole thrust of the article is untrue. Failure to seek comment in advance of publication is a factor, but will not in and of itself automatically be fatal to the defence, and will only have that result if it makes the journalism as a whole irresponsible.

[76] In applying the standard of responsible journalism in a practical and flexible manner, I nonetheless conclude that the blogs do not meet that test. There was an important factual inaccuracy contained in the blogs, as noted above. While it is correct that the defender did research and sought verification on a number of the matters mentioned in the blogs, he made a material omission in failing to take into account that the pursuer had altered the identity of its asset-lock from HTCTS to another entity; this was stated in the altered articles of association that he came across when searching the records, but did not peruse. This resulted in the false statement to that effect in blog 2. The defender made the statement despite the director of the purser having advised him, several months beforehand, that the

company had already sent in paperwork replacing HTCTS with another organisation and that the records would be updated shortly. If the pursuer's allegations of defamation founded upon that statement had succeeded, the defender's failure to peruse the public documents lodged by the pursuer would have been a key factor. More importantly, on the information available to me, the pursuer is a small company engaged in a genuine scheme aimed at the conservation of wildcats, run by well-intentioned and enthusiastic individuals. This must have been apparent to the defender, at least as being a serious possibility. The scheme was still seeking to get off the ground around the time of blog 1, as the defender was fully aware. There was no urgency to publish either of the blogs; unlike a newspaper seeking a scoop, there was no specific newsworthy matter that had just occurred and required immediate publication. The defender had, at his leisure, put together the contents of the blogs. In those circumstances, responsible journalism carried with it the need to seek comments on behalf of the pursuer in advance of publication. I accept that the contents of an email from a director of the pursuer were placed as an update of blog 1 the day after its publication, but that does not affect the impact of the blog on the date of publication. Moreover, the terms of the email were not established on the part of the defender to represent what might have been said on behalf of the pursuer had it been given advance notice. In these circumstances, if (and of course only if) the blogs and comments had indeed defamed the pursuer in the manner alleged, publication without seeking comment from the pursuer would have resulted in the test for responsible journalism not being met. Accordingly, if, contrary to the decisions I have reached, the defamatory meanings alleged by the pursuer were made out and no other defence was available, the defence of *Reynolds* privilege would have failed.

Loss

[77] As I have explained, the defamation claims made by the pursuer fail because the meanings alleged are not made out, or available defences apply. The pursuer's claim for damages (in the sum of £750,000) must fail. It is however appropriate that I record my views on the damages claim. A corporate body cannot claim *solatium* for hurt feelings, as it has no feelings to hurt (Norrie, *Defamation* p 66). In *Lewis* v *Daily Telegraph* (at 262), quoted in *Jameel* (at [155]) Lord Reid observed:

> "A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money. The injury need not necessarily be confined to loss of income. Its goodwill may be injured."

In *Jameel*, by a majority, the Appellate Committee held that a trading company with a reputation but no actual trade in the UK was entitled to recover general damages for libel without pleading or proving special damage if the publication had a tendency to damage it in its way of business. There is no Scottish authority applying *Jameel*, but in my view the approach fits with that in *Waverley Housing* v *BBC* where Lord Cullen said (at 12-13):

> "I am satisfied that as a matter of general principle it is open to the second pursuers to claim general damages, as opposed to specific damages based on the loss of particular contracts or the diminution of turnover. However, it has to be recognised that the fundamental basis of any award of damages to a company pursuer is patrimonial loss".

Thus, patrimonial loss remains as the key requirement, but it can be established by showing damage to goodwill, or a tendency to damage the company in its way of business, rather than only loss of income.

[78] Two heads of loss are pled here: losses resulting from a proposed deal to purchase Arkaig forest; and lost sales of souvenir plots. In relation to Arkaig forest, the purchase was to be made by the pursuer in partnership with ACF and funded by a grant of £500,000 from HTL. After blog 1, ACF withdrew from the proposed partnership. Mr O'Donoghue

explained that ACF had been actively seeking the pursuer as a partner and doing everything it could to facilitate the purchase of forest land by the pursuer, before blog 1. The forest was worth £495,000 and had an annual rental value of about £13,000. Various lost opportunities were said to have resulted, including the generation of further revenue from the forest. In relation to lost sales, the pursuer averred that in the fifteen days preceding the publication of blog 1, sales revenue of £4,761.32 (£317.42 per day) had been generated. In his evidence, Mr O'Donoghue stated that the impact of the defamatory imputations was still being felt and the relationship between the pursuer and the press, media and local schools had changed completely. Relations with the replacement asset-lock entity and the press had also been damaged. The pursuer's fund raising had "got off to a fantastic start, raising thousands of pounds in around a couple of weeks" which then, after the blogs "dwindled to nothing".

[79] The defender submitted that in relation to the loss of the Arkaig deal, the evidence did not support that having occurred as a result of the blog. As to loss of sales, there was no satisfactory evidence of a downturn in sales, or that it was caused by the blogs or other publications, or to what extent any such downturn had resulted in actual loss to the pursuer. No accounts had been produced and no evidence had been led from a forensic accountant, despite the pursuer having accepted at a previous hearing that this would be necessary.

[80] I conclude that the pursuer has failed to prove any loss. In relation to the Arkaig forest matter, the evidence of Mr Servant refuted in its entirety the factual basis presented by the pursuer for this alleged loss. In short, his position was that while the blog gave a negative impression, the true reason for ACF withdrawing from the deal was delay and failures on the part of the pursuer to progress matters and ACF's desire to engage with the Woodland Trust as the appropriate partner. Turning to losses said to arise from loss of

sales, there was simply no proper basis in the evidence from which any such loss could be established. The evidence about any actual decline in sales was at best unclear (partly because in December 2015, after blog 1, the pursuer apparently enjoyed its highest ever sales) and in any event there was simply nothing to show the net effect in monetary terms, having regard to costs and expenses, of the decline in sales. I have had regard to the fact that after the defender's publications there was some evidence of reactions which were adverse to the pursuer, expressed on the defender's website and on social media. If one or more of the significant defamatory imputations had been established, with no defence, there may arguably have been some ground for awarding general damages within appropriately modest bounds. However, if only less significant defamatory imputations had been established, I would have found it impossible, on the evidence led, to conclude that any damage to trading reputation was thereby caused; it could equally have resulted from the statements by the defender which are legitimate because of the defences of fair comment or *veritas*.

Other matters

[81] Certain documents lodged as productions and founded upon by the pursuer were said to have emanated from HTL. However, in cross-examination of Mr O'Donoghue, reference was made to the electronic "properties" records of these documents. Some of these records showed either a different date or a different author (namely a person associated with the pursuer) from the date or author (a person from HTL) stated in the paper versions. The defender relied on this point as indicative that these documents could not be accepted as what they bore to be. There is certainly force in this submission, but the difficulty is that the court did not hear evidence in any detail as to how, when and by whom these documents

might have been created, saved or revised and on that basis it is not possible to infer anything negative about the pursuer's position in respect of these documents. The defender also argued that the absence of anyone from HTL to speak to the matters complained of by the pursuer was worthy of comment, and allowed the court to draw inferences favourable to the defender: *Gateway Assets Ltd* v *CV Panels Ltd* (at [59]). However, I do not accept that there are any such specific inferences capable of being drawn from that fact in the present case. I have based my findings on the evidence.

Conclusion

[82] For these reasons, the pursuer's claim fails. Accordingly, I shall repel the pursuer's pleas-in-law, and sustain the second, third, fourth and fifth pleas-in-law for the defender in the manner and to the extent explained above, and grant decree of absolvitor.

APPENDIX

1. Blog 1 (29 September 2015)

"Wildcat Haven, Bumblebee Haven or Tax Haven?" …

"If you plan to set up a fundraising campaign for an environmental project, it is a good idea to think carefully about who is involved and what techniques you plan to use.

Wildcat Haven is a project designed to protect the Scottish Wildcat by preventing hybridisation with feral cats and providing a network of reserves to manage as wildcat habitat.

Yesterday, it launched its campaign. Sponsorship has been provided by Volkswagen, a company responsible for polluting the environment with nitrous oxide emissions that it attempted to conceal through one of the biggest corporate frauds of recent decades. The other sponsor is our old friend Highland Titles, a company based in Alderney that is wholly owned by a charitable trust (Highland Titles Charitable Trust of Scotland) registered in Guernsey. See my blog of February for further information on their operations.

Some time ago, Highland Titles Ltd. blocked my IP address but it came as something of a surprise to discover that I have also been blocked from Wildcat Haven's website despite only having just seen it. Despite this, I have access via a proxy IP in Germany.

Highland Titles appear to have established a very close relationship with Wildcat Haven which operates via Wildcat Haven CIC (Community Interest Company) and Wildcat Haven Enterprises CIC. The Registered Address of both is in Cornwall. One of the defining features of a Community Interest Company is the asset lock – provision that in the event of winding up, the assets must transfer to a nominated body that is a company interest company, charity or Scottish charity; or a body established outside Great Britain that is equivalent to any of those persons.

In the case of Wildcat Haven CIC, the nominated body is a community-based company, Sunart Community Company. The money, however, is being raised by Wildcat Haven Enterprises CIC and the nominated body here is Highland Titles Charitable Trust for Scotland. Thus, in the event of Wildcat Haven Enterprises CIC being wound up, its assets will be taken over by Highland Titles Charitable Trust for Scotland in Guernsey.

Wildcat Haven Enterprises CIC was incorporated on 30 June 2015 with two Directors, [EO and DW]. [DW] is a Director of Highland Titles Ltd and a Trustee of Highland Titles Charitable Trust for Scotland.

Wildcat haven has adopted Highland Title's dubious methods of selling small souvenir plots of land and claiming that the purchaser is the owner (see extensive faq to this effect). This claim was comprehensively debunked in February this year by legal blogger loveandgarbage. If there remains any doubt, here is the content of a letter written by [a university law professor]… to the Daily Record newspaper.

Dear Mr [*F*],

Under Scots law, ownership of land passes from seller to buyer by registration in the Land Register of Scotland. No registration? Then no transfer. This is currently set out at section 50 of the Land Registration etc (Scotland) Act 2012. (The previous law was essentially the same.)

("Souvenir plot" is a term defined in section 22 of the 2012 Act.)

Therefore, if a souvenir plot is sold, registration is required, if the buyer is to acquire ownership of the plot.

But the Land Register does not accept souvenir plots: this rule is set out at section 22 of the 2012 Act. (The previous law was essentially the same.)

So if a company sells a souvenir plot, the sale cannot be completed. The buyer of the plot does not become owner of the plot. Ownership of such plots remains with the company.

Whether buyers of souvenir plots are informed that the seller will retain ownership is something I have no information on.

Sincerely, …

[The professor] should know… See also, a recent academic paper by [JR] and [MC] which reviews the law in this area.

The plots being offered for sale by Wildcat Haven cost from £30 to £250 for one square foot of land which purchasers are assured, gives them a "personal right to a souvenir plot of land in Wildernesse Wood and the opportunity to change their name to Lord or Lady Wildernesse. Wildernesse Wood is described as "*part of the first Wildcat Haven*". "*We are asking you to help us by actually buying part of the land we plan to conserve.*", the website claims.

So where is Wildernesse Wood? The Wildcat Haven website does not say, but from this promotional video, it is clear that it is a plot of land above Loch Loyne on the A87 between Invergarry and Glen Cluanie.

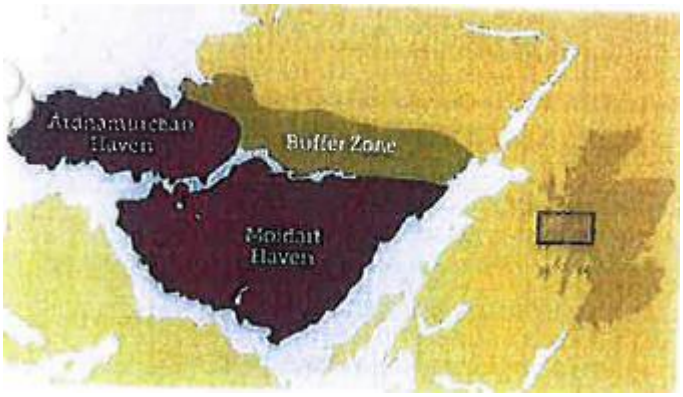
In the video, Dr Paul O'Donoghue is filmed standing in the wood. He claims that "*Every square foot of land we buy has a direct positive impact on the Scottish wildcat. By supporting this project, you're helping save the Scottish wildcat step by step*."

There are two problems with this claim.

First of all, this land is, in fact owned by Highland Titles Ltd. who are already selling souvenir plots in a "nature reserve" they have named Bumblebee Haven where you can purchase plots ranging from 10 square feet (£49.99) to 1000 square feet (£499.99) and call yourself Lord or Lady Glencoe (even though the land is 50 miles north of Glencoe).

The land was acquired in February 2014 and the title can be seen here and the plan here. The land is 75ha in extent which, if all sold in 10 square foot plots would generate £40.35 million in sales revenue paid to a company in Alderney in the Channel Islands.

But the more fundamental problem is that the Wildcat Haven project is in Ardnamurchan and Morven – see map below.



The land that supporters are being invited to acquire in not only already owned by a company in Alderney and being sold plot by plot for bumblebees, this "*first wildcat haven*" is 60 miles to the north of Ardnamurchan and Morven and well outside the area being promoted for wildcat conservation.

I offer this information in the spirit of consumer advice to anyone considering taking up the offer to become the owner of a square foot of land to create a Wildcat Haven.

AN ADDENDUM

As an addendum to the Highland Titles blog in February, I contacted the Chief Minister of Guernsey [JT] to ask whether it would be possible to examine copies of Annual Returns and Accounts of both Highland Titles Ltd., registered in Alderney and Highland Titles Charitable Trust for Scotland, registered in Guernsey. As I argued then,

"Revenue is paid into a company registered in Alderney but as no accounts are published, it is impossible to be sure. The sole share is held by [W and M] as Trustees for the Guernsey charity. Under the law of Guernsey, no charity is obliged to provide accounts for public inspection and it need only file accounts under certain circumstances.

Thus nobody knows if in fact the charity is in receipt of any funds whatsoever. As the sole shareholder it is not entitled to have any of the revenues of Highland Titles Ltd. transferred to it. These revenues may well be paid out by the Alderney company as management fees or any manner of other payments to third parties."

[JT] informed me that under Guernsey law, the charity is not required to submit any financial returns and access to the Alderney company records would only be available to law enforcement agencies if there was evidence of criminal conduct.

Thus, because this land is owned in an offshore tax haven, we are unable to obtain any information about what happens to the money generated by selling off their souvenir plots.

(1) There is some disagreement over the appropriate strategy to be adopted to save the Scottish wildcat. An official project, Scottish Wildcat Action is being run by 20 organisations with the support of the Scottish Government and Forestry Commission among others. Those behind the Wildcat Haven project, however, have criticised the official programme.

(2) The Community Interest Company Regulations 2005"

2. Update to Blog 1

"UPDATE 1500hrs 30 Sept 2015

The following response was emailed to me by [EO] and posted on the Wildcat Haven website here. The response is also contained in a comment below this post together with my follow up questions.

Dear Andy,

Just hoped to respond briefly to your primary concerns about the Wildcat Haven project.

Highland Titles Charitable Trust is currently listed as our nominated body, it is acting as a placeholder whilst we agree a few local organisations in the West Highlands who would be best placed to become the ongoing nominated body. Of course, you'll have to wait and see on this one, but we have already sent in paperwork replacing HT with another organisation, I'm sure records will be updated shortly.

Our website repeatedly states that the plots being sold are souvenir plots and "a bit of fun", our own FAQ outlines that registration of souvenir plots is legally impossible so this seems little revelation.

In terms of location, the current Haven fieldwork area is in West Lochaber (Ardnamurchan, Morvern and Sunart). We have been highly successful in neutering feral cats in this area (we have neutered 50 in the last 7 months alone, leaving close to 500 square miles free of intact feral or pet cats) and are now ready to expand. You are right to highlight that the land in Loch Loyne is north of the current Haven area, however that is the very point, we are expanding northwards and the long term goal has always been to cover the entire Highlands west of the Great Glen. Loch Loyne is ideally situated being to the east of the Knoydart peninsula and near to a major land bridge to the rest of the Highlands, which needs to be protected from feral cat migration. Wildcat monitoring activities are already underway in the area, we are also looking to start operations in Sutherland which you will note is also well north of the current Haven zone, as well as looking to buy land within the current fieldwork area.

Part of the Loch Loyne site has been gifted to us by Highland Titles and no plots in the area provided to us has been previously sold, so it was free for them to pass on, allowing us to offer actual physical plots to customers immediately, rather than just a promise of buying land in future.

Wildcat Haven has been around protecting wildcats since 2008, our team comes with considerable scientific and conversation credibility, we are currently the only effort to protect wildcats in the wild rather than place them in captivity and our work has been commended and supported by organisations such as Humane Society International for its exceptional standards of animal welfare and delivery of humane feral cat control, as well as receiving considerable coverage across national media recording our work with feral cats, wildcats, local schools and communities for many years.

We'd also like to take this opportunity to thank you for providing us with reduced rate access to the Who Owns Scotland database around 2008/2009 when the project was starting up and needed to start communicating with landowners: you helped us get where we are today, thanks a lot for your support and promotion of the Wildcat Haven projects.

[EO]
Director,
Wildcat Haven

I replied as follows.

[E],

Thanks for your response.

1. It may be a bit of fun but you are asking folk to help you by "actually buying parts of the land we plan to conserve" You need to be much clearer that people who spend £100 do not become owners of the land.

2. You say that part of the Loch Loyne site has been gifted to you. Can you tell me when this transaction took place and when it was submitted to the Registers of Scotland for recording? Can you advise the extent and location of this land?

3. Are there any wildcats on the Loch Loyne land?

4. Why is my IP address blocked from viewing your website?

5. What is the role of Highland Titles in your fundraising? Do they receive any payment? Do they receive any commission on each plot sold?

Thank you."

3. Blog 2 (24 February 2016)

"Highland Titles day"

"*I intended to have published this blog on Highland Titles Day (10 February – see [MC's] blog) Apologies to those who were expecting it then.*

Last September, I blogged about the latest effort by Highland Titles Ltd. to raise lots of money from people who think they get to own some land in Scotland and help conservation at the same time (see a recent advert in BBC Wildlife magazine – 1.6Mb pdf – for a flavour of their business model).

Highland Titles Ltd. is a company registered in Alderney. It is owned by Highland Titles Charitable Trust which is registered in Guernsey. See my blog of 12 Feb 2015 for further background. The company makes its money from purporting to sell small plots of land as "souvenir plots". The controversy over the affairs of this company has been generated because no-one who buying such plots can in law become the owner of the land and because the financial affairs of the company remain opaque, being registered in a secrecy jurisdiction.

In its latest effort to garner greater respectability, Highland Titles has become involved with a conservation project called Wildcat Haven CIC. The fundraising arm of this organisation is a Community Interest Company called Wildcat Haven Enterprises CIC with its registered office at Sage & Co Chartered Accountants in Denbighshire, North Wales. There are two Directors of the company, [EO] and [DW]. [DW] is resident in Alderney and is also a Director of Highland Titles Ltd and a Trustee of Highland Titles Charitable Trust for Scotland.

One of the requirements of a Community Interest Company is the provision of an asset lock that restricts the disposal of assets of the CIC. Assets can be transferred to another CIC or charity and such a body must be designated in the Articles of the CIC. In the case of the Wildcat Haven Enterprises CIC, the designated body to

become the potential recipient of the assets is Highland Titles Charitable Trust for Scotland.

In my response to my September blog, [EO] (who is a Director of both Wildcat Haven CIC and Wildcat Haven Enterprises CIC) responded and I published the response as an update to the blog. In turn, I then posed a number of questions to [EO] as follows"…

[see update to blog 1]

"I never received a reply but can provide an update on some of the questions.

1. The Wildcat Haven website still contains the claim "We are asking you to help us by actually buying part of the land we plan to conserve."
2. Following [EO]'s claim that part of the land had been gifted "to us", I checked the title and discovered that Highland Titles Ltd. remained the owner and had gifted no land to Wildcat Haven. Interestingly, on 9 December 2015, however, Highland Titles Ltd. made an application to the Registers of Scotland to transfer part of Paitna Wood/BumbleBee Haven/Wildcat Haven to Wildcat Haven Enterprises CIC.
3. No response.
4. No response.
5. No response.

It remains unclear what financial arrangements have been entered into and why [DW] is a Director and why Highland Titles Charitable Trust for Scotland is the designated beneficiary of the assets of Wildcat Haven Enterprises CIC.

As I pointed out in my September blog, if all of the 75 hectares of Paitna Wood/BumbleBee Haven/Wildcat Haven/Wildernesse Wood were sold even as 10 square foot plots, this would generate £40.35 million in sales revenue paid to a company in Alderney in the Channel Islands. In normal circumstances, a conservation project would be established as a charity and a trading body or fundraising enterprise would be established as a whole owned subsidiary of the charity. There's a lot of money at stake.

Most recently, Wildcat Haven has been seeking to become involved in the community acquisition of a Forestry Commission forest by Loch Arkaig.

Finally, a very significant development took place in early June 2015.

Highland Title's bankers and corporate service providers in Guernsey gave notice of the termination of their services.

Wildcat Haven Enterprises CIC was incorporated in 30 June 2015."

4. Tweets by the defender on 30 September 2015

"…specifically, what extent (ha) of land has been gifted to you and when was this registered in the Land Register?"

"…are there any wildcats resident in the Loch Loyne woodland?"

"…your website invites purchasers to help u "by actually buying part of the land we plan to conserve" is this correct?"

"…do Highland Titles receive any payment or commission on souvenir plot sales?"

5. Tweets by the defender on 29 September 2015

[in response to this tweet by another person: "Become a Laird and save Scotland's wildcats"]

"or maybe don't'"

"Free advice to charities. Have nothing 2 do with souvenir plots, lords and ladyships and funnelling £ thro tax havens"

[in response to this tweet by another person: "Become a laird – and help save the #wildcat", referring to a newspaper article promoting the pursuer's conservation activities]

"…er no. Please don't".

6. Facebook post on 25 February 2016

"LATEST BLOG on Highland Titles/Wildcat Haven and being dumped by their bankers and corporate service providers"

7. Comments by others on the defender's website

"I am extremely grateful to you for this Andy, as I'm sure many might have been tempted to contribute to this ***** scheme, purely out of desire to help threatened species and help Scotland's wildlife. It is truly sickening that such a loathsome enterprise is operating in this way."

"I completely agree with you it is sickening to think of people using other people's love for a beautiful endangered animal to spiv some money. It also angers me that our laws are so weak for crimes against life. In this particular case I just urge you to

keep reading, keep watching how the story evolves. I'm counting on all of us to make sure in this case that the truth will out.

And when we know for sure who's been lying be happy to join you in throwing everything at them the law allows."

"It's totally appalling. Imagine sitting down and hatching this scam. And on such a scale. It's a pity they can't be gaoled."

"Sadly… it's what goes on in that sickening loathsome enterprise, currently operated as 'modern' Scotland."

8. Further tweets by the defender

25 September 2015: "Latest scam from Highland Titles" along with a picture of Highland Titles Nature Reserve.

29 September 2015: "Fact that Wildcat Haven has blocked my IP address suggests whole operation is being run by Highland Titles."

26 February 2016: [in response to this tweet by another person - "You have made people think the Haven is a mere scam and said nothing to alter that perception"]

> "Do u think it wise 2 be in bed with an offshoreCo whose bankers & service providers have withdrawn their services?"

10 March 2016: [in response to this tweet from someone from BBC Scotland - "this Wildcat Haven project on the @bbcscotland news site, is the one run by the Highland titles mob?"]

> "...@bbcscotland news it is the one where the fundraising arm is run by Highland Titles – yes".