

**THE HIGH COURT**

[2021] IEHC 433  
[2019 No. 9087 P.]

**BETWEEN**

**ANTHONY JAY ROBBINS**

**PLAINTIFF**

**AND**

**BUZZFEED UK LTD**

**DEFENDANT**

**JUDGMENT of Mr. Justice Mark Heslin delivered on the 4th day of June, 2021**

**Introduction**

1. This matter comes before the Court in circumstances where, on 27 March 2020, the defendant issued a notice of motion seeking orders as follows: declining jurisdiction pursuant to Council Regulation (EC) no. 1215/2012 (hereinafter "Brussels Recast") and/or the Rules of the Superior Courts ("RSC"); a declaration that the court has no jurisdiction over the subject matter of the proceedings; an order pursuant to O. 12, r. 27 of the RSC setting aside service of the proceedings on the basis of the doctrine of *forum non conveniens* and an order striking out and/or staying the proceedings on the basis of the doctrine of *forum non conveniens*.
2. The plaintiff in the proceedings resides in California and is domiciled in the United States. The defendant has its registered office in London. Messrs. Tweed, solicitors for the plaintiff, issued a plenary summons on 26 November 2019 seeking, inter alia, damages for defamation, malicious falsehood, misrepresentation, breach of privacy and intentional infliction of emotional distress as well as an injunction pursuant to s. 33 of the Defamation Act, 2009, restraining the defendant, its servants or agents, from publishing or causing to be published the said or any similar words which are said to be defamatory of the plaintiff. Beneath the general indorsement of claim, it is stated, inter alia, that this Court has jurisdiction to determine the proceedings by virtue of Article 7(2) of Brussels Recast. It is also stated that "*the plaintiff limits his claim to damage suffered within the jurisdiction of this honourable Court*".
3. The background to the proceedings, which were served the same day as being issued, concern articles which were posted in May, June and November 2019 on the website "BuzzFeedNews.com" which related to claims of sexual misconduct, bullying and harassment, by the plaintiff, of certain employees and attendees at his events, alleged to have occurred between the 1980s and 2009 in the United States and in Canada. In the plenary summons, the plaintiff is described as an entrepreneur, author, philanthropist and a life and business strategist. The articles in question were written by a Ms. Jane Bradley and Ms. Katie J. Baker and, in a manner explained later in this judgment, the defendant does not contend that Ms. Bradley and Ms. Baker were not employed by the defendant company, BuzzFeed UK Ltd., when they wrote the articles in question.
4. The evidence before the court comprised the contents of, and exhibits to, an affirmation of Ms. Ariel Kaminer dated 13 March 2020, grounding the defendant's motion; the replying affidavit sworn by the plaintiff on 13 November 2020 and the exhibit thereto, as

well as the replying affidavit sworn by the plaintiff's solicitor, Mr. Paul Tweed, on 13 November 2020 and it is to an examination of these I now turn.

**Affirmation of Ariel Kaminer**

5. At para. 1 of her affirmation dated 13 March 2020, Ms. Kaminer confirms that she is the "*Global Head of the Investigative Unit at BuzzFeed, Inc.*" and she affirms that she makes her affirmation for and on behalf of the defendant which is described as a wholly owned subsidiary of "BuzzFeed Inc". At para. 4, Ms. Kaminer asserts that the defendant is not the proper party to the proceedings and that BuzzFeed UK Ltd. does not own or operate the website BuzzFeedNews.com, which is where the allegedly defamatory statements were published. She states that BuzzFeed Inc. owns that website. At this juncture, it is appropriate to say that the foregoing issue does not appear to me to be one for this Court to determine in the context of the present application. The contention that the plaintiff should have sued BuzzFeed Inc., rather than the defendant seems to me to be a substantive matter for a trial judge to determine.
6. At para. 5, Ms. Kaminer asserts inter alia that the relevant statements relate to factual matters exclusively concerned with events in the United States and that this Court has no jurisdiction to determine the claim which is said to have no connection to Ireland. At para. 6, reference is made to BuzzFeed Inc's concerns in respect of the plaintiff's proceedings against a subsidiary in what is described as a completely unconnected jurisdiction apparently brought because the plaintiff perceives this to be a more favourable jurisdiction for a defamation claim. At para. 7 reference is made to the plaintiff's claim as pleaded in the plenary summons. At para. 8, Ms. Kaminer refers to the headings deployed in terms of the structure of her affirmation beginning with her description of the parties contained at para. 9 and 10. At para. 9, the plaintiff is described as a citizen of and domiciled in the United States, having an address in San Diego, California. The defendant is described, at para. 10, as an entity organised under the laws of the United Kingdom, having no ownership, interest in or operational control over BuzzFeedNews.com. It is stated, however, that employees of the defendant "*may create content that is posted on websites owned and operated by BuzzFeed Inc., including BuzzFeedNews.com . . .*". It is also stated that decisions about what does or does not get posted are made by BuzzFeed Inc. through its BuzzFeedNews.com division and that division's editorial leadership is based in New York City.
7. At para. 11, reference is made to BuzzFeed Inc. which is described as a leading independent digital media company headquartered in New York and organised under the laws of the State of Delaware which company owns and operates the English language website BuzzFeedNews.com, being a website operated from the United States hosted on the servers of a third party, Amazon Web Services, based in Virginia, USA. Ms. Kaminer also states that BuzzFeedNews is an unincorporated operating division of BuzzFeed Inc.
8. At para. 12, reference is made to investigations conducted by BuzzFeedNews reporters into allegations regarding the conduct of the plaintiff towards members of staff and attendees at events. Ms. Kaminer also refers to correspondence received by BuzzFeed Inc., during the course of that investigation, from US – based attorneys on behalf of the

plaintiff. At para. 13, Ms. Kaminer refers to articles posted on BuzzFeedNews.com in May, June and November 2019. From paras. 14 to 19, inclusive, Ms. Kaminer refers to the title, date and content of the relevant articles, comprising what is described as Parts 1 to 6 of the investigation. The following are the headings which appear in Ms. Kaminer's affirmation, immediately before paras. 14 to 19, with details set out in the relevant paragraphs themselves: -

*"Part 1: Leaked records reveal Tony Robbins berated abuse victims, and former followers accuse him of sexual advances" – 17 May 2019";*

*"Part 2: Tony Robbins accused of sexual misconduct by four more women" – 22 May 2019";*

*"Part 3: "Tony Robbins was filmed using racial slurs"- 23 May 2019";*

*"Part 4: "Tony Robbins punishes followers" – 18 June 2019";*

*"Part 5: "Tony Robbins has been accused of groping more women" – 19 June 2019";*

*"Part 6: "Tony Robbins has been accused of sexually assaulting a high schooler at a summer camp" – 22 November 2019".*

9. In the context of the application before this Court, it is unnecessary to look in any detail at the contents of the paragraphs which appear under the foregoing headings. At para. 20, Ms. Kaminer exhibits what she describes as Parts 1 to 6 of the investigation which she says has been reproduced as accurately as it can be. This material comprises Exhibit "AK 1", being a replication, in print, of material which appeared "online". Exhibit "AK 2" comprises a USB stick containing a "Word" document with hyperlinks to each of the online articles. At this juncture it is appropriate to point out to say that a detailed analysis of the nature of what is said in the relevant articles is not required for the purposes of the present application.
10. Paras. 21 to 28, inclusive, of Ms. Kaminer's affirmation appear under the heading *"Correspondence with Mr. Robbins' US legal representatives"*. At para. 21, Ms. Kaminer states that, between 30 November 2018 and 12 June 2018, there was extensive correspondence between (1) the plaintiff's US legal representatives, (2) BuzzFeed Inc. and (3) the BuzzFeedNews New York City office. Exhibit "AK 3" comprises what Ms. Kaminer describes as *". . . a booklet containing a selection of that correspondence . . ."*. Ms. Kaminer states that a review of this correspondence will show that the matter bears no relation to Ireland and that *" . . . during that period the plaintiff's legal representatives understood that the issues were US – centric and were dealing with the matter on that basis"*. The first letter which is included in Exhibit "AK 3" comprises a letter dated 30 November 2018 sent by Lavelly & Singer, being a firm of attorneys – at – law with an address in California. This letter was sent by email to the editor in chief and general counsel, respectively, of BuzzFeed.com and referred to what was then an

intended article. The first paragraph of the letter refers to representation of the plaintiff and a named company, Robbins Research International, Inc. ("RRI"), whereas the second paragraph of the letter begins as follows: - *"This letter pertains to a potential story by BuzzFeed writers Katie Baker and Jane Bradley (the "Writers") regarding Mr. Robbins and RRI. We have closely monitored the conduct of the Writers in their investigation of the potential story regarding our clients . . ."*. The letter is a detailed one, running to 12 pages and employing a number of headings, namely: -

- "1. *The Writers have in (sic) gaged in Fraudulent and Unethical Investigation Tactics*";
- "2. *The Writers Have Demonstrated Malicious Bias and Hostility Towards Mr. Robbins*;
- "3. *The Sources of the Potential Story Do Not Have Knowledge of the Purported Facts and Are Unreliable*";
- "4. *Should BuzzFeed Publish the Potential Story It Will Be Liable for Defamation*";
- "5. *The Writer's Bias/Hostility and Pre – determined Narrative Will Support a Finding of Malice*"; and
- "6. *BuzzFeed Will Be Liable for Re – publication of Defamatory Statements by Its Sources*".

The said letter cites US case law in support of the assertions contained in the letter. Having referred to various lines of authority, all of which would appear to be decisions of various US courts, in particular the courts of California, the letter states inter alia (on internal p. 11) the following: -

*"Based on the foregoing, demand is hereby made that BuzzFeed not publish, post or otherwise disseminate any Potential Story, statement or other writing containing any false or defamatory statements of or concerning Mr. Robbins or RRI, including without limitation the statements and accusations referenced above, or otherwise portraying Mr. Robbins or RRI in a false and fictitious light, and/violating any other rights of Mr. Robbins or RRI as set forth herein. The seriousness of this matter and potential liability of BuzzFeed cannot be overstated. Notwithstanding this notice, should BuzzFeed still consider publication of the Potential Story regarding our clients, then (1) We demand that you inform us of the content of the Potential Story sufficiently in advance of publication and provide our clients with a meaningful opportunity to address and respond to the contents as appropriate, and (2) We request an in – person meeting or telephone conference with you prior to publication of any story pertaining to our clients".*

11. Despite the undoubted reference to US authority, nowhere does the letter state that the plaintiff waived his right to pursue any other remedy legitimately available to him, be that in another jurisdiction or against another party. On the contrary, the final paragraph of the letter of 30 November 2018 stated as follows: -

*"This letter is not intended to constitute a full statement of all facts and circumstances related to this matter, nor is it intended to be, nor should it be construed as, a waiver, release, or relinquishment of any rights or remedies available to our clients, whether legal or equitable, all of which are hereby expressly reserved".*

It is also appropriate to note that the letter from Lavery & Singer sent to BuzzFeed Inc. dated 14 February 2019 concluded with the words *"all rights, claims and remedies on behalf of our clients remain reserved"*. That statement was repeated as the final sentence of the letter from Lavery & Singer, dated 21 March 2019, to the general counsel for BuzzFeed Inc. Statements reserving all of the plaintiff's rights, claims and remedies are also contained in other correspondence exhibited by Ms. Kaminer in "AK 3", including in several letters sent by Lavery & Singer to Ms. Jane Bradley, namely letters of 16 May 2019, 21 May 2019, and 12 June 2019. It will be recalled that Ms. Bradley was one of the authors of the articles in question. All three of the aforesaid letters sent to Ms. Bradley were addressed to Ms. Bradley, BuzzFeed UK at a London address. It is also appropriate to observe that, among the letters exhibited by Ms. Kaminer at "AK 3" is a letter dated 13 May 2019 sent by a firm of New York lawyers, Davis Wright Tremaine LLP. This letter, which was sent to Lavery & Singer in relation to what was then a *"Potential BuzzFeed Article"*, makes reference to BuzzFeed's reporters, Jane Bradley and Katie Baker, and the final paragraph of that letter states: -

*"Jane and Katie have already extended the offer to discuss their evidence in detail with Mr. Robbins or his representatives, including you and Mr. Claire, and they would continue to welcome this opportunity. The editors overseeing this story, BuzzFeed's UK investigations editor Alex Campbell and global investigations editor Heidi Blake, who are both currently in London, would be very glad to join that call or meeting – please communicate directly with them, with a copy to me, to set something up immediately".*

12. In light of the foregoing, although Ms. Kaminer asserts that, between 30 November 2018 and 12 June 2019, the plaintiff's legal representatives understood that the issues were US – centric and were dealing with the matter on that basis, the correspondence exhibited by her also demonstrates that during this same period the plaintiff explicitly reserved all rights and remedies which might be available to him. The correspondence during this period also referred to the relevant story being overseen by BuzzFeed's UK investigations editor. Furthermore, the reporters in question were named and there is no dispute that they were employed by the defendant at the relevant time.
13. At this point it is appropriate to say that I am entirely satisfied that the contents of pre-litigation correspondence is not determinative of the issues which arise in this motion. Paras. 29 to 34, inclusive, of Ms. Kaminer's affirmation appear under the heading of *"Correspondence with Mr. Robbins' European legal representatives"*. Paras. 29 and 30 refer to a letter from Messrs. Tweed solicitors, dated 12 June 2019, sent to the offices of

the defendant in London and a copy of this nine – page letter comprises Exhibit “AK 4”. The letter claims that the plaintiff has been defamed and, states inter alia, that: -

*“While our client fully respects the right to free speech and publication of genuine, fair and appropriate public interest articles, the conduct of your UK – based journalists and the subsequent publication of the subject articles, most certainly does not fall into that category and does not represent fair and accurate reporting”.*

14. A range of allegations are made in respect of what was referred to in the letter as “the conduct of your journalists”. Among other things, the letter states that:-

*“Furthermore, as you will have anticipated, and apparently intended, your spurious articles have also been disseminated extensively by the UK and Irish media, citing BuzzFeed as their source”.*

The letter also states inter alia that: -

*“As you will have been well aware, the offending articles and the posts on Twitter and Facebook are accessible in the UK and Ireland, and our client is entitled to the protection of the applicable defamation laws in each of these jurisdictions”.*

As well as seeking a meeting, the letter concludes with the following words: -

*“In the meantime, our client continues to reserve all rights”.*

At para. 30, Ms. Kaminer asserts that this letter failed to understand that BuzzFeed UK Ltd. did not publish anything and that it did not own BuzzFeedNews.com, where the articles were published, and that the defendant did not exercise any editorial control over the articles. Ms. Kaminer does not, however, assert that the investigative reporters, Ms. Baker and Ms. Bradley, who are named in the letter, were not employed by the defendant at the relevant time, nor is any such assertion made for the purposes of the present motion. Para. 31 refers to a further letter sent to the defendant by Messrs. Tweed, dated 17 June 2019. This referred to a meeting scheduled to take place that day and set out, in advance of such meeting, what are described as responses to the allegations put forward in correspondence of 11 June 2019, which allegations the plaintiff categorically and unequivocally denies. This material is set out in respect of each allegation in the form of a response to queries 1 to 11 and the letter concludes with the words *“in the meantime, our client continues to reserve all rights”*. Para. 32 refers to a letter dated 21 June 2019 sent by Messrs. Tweed to Messrs. McCann Fitzgerald, solicitors for the defendant. The letter refers to the publication of what is described as *“further malicious and defamatory articles”* which, according to the letter, remain accessible at [www.buzzfeednews.com](http://www.buzzfeednews.com). The letter states inter alia that: -

*“We have already made our client’s position absolutely clear in relation to the conduct of the journalists concerned, and which will be the subject of further examination in due course. The purpose of this correspondence is to deal with a number of the more blatant issues arising out of these most recent articles, despite*

*the material presented to your journalists at extremely short notice and against the background of your client's clear intention to publish regardless of the facts and the information provided to them. Taking each issue in turn: . . .".*

15. The letter then sets out a response in respect of eight matters, before referring to the availability of the article on "Twitter", with reference made to what is described as a "campaign" on Twitter and on "Facebook". The final page of the letter includes inter alia the statements that "Your client's journalists appear to have absolutely no regard for their obligations under what would be generally accepted as fundamental journalistic reporting standards". The final two paragraphs of the letter appear in the following terms: -

*"While your client's actions appear to have left our client with no alternative but to seek the assistance of the Irish Courts, we are nonetheless instructed to afford your client with an opportunity to acknowledge their inappropriate conduct, retract their defamatory allegations and interferences and apologise unreservedly to our client and also undertake to discontinue their harassment and vindictive campaign against our client, in terms and in a manner to be first agreed with us.*

*We are affording your client 48 hours within which to accede to this request, and in the meantime our client is continuing to reserve all his rights".*

A copy of this letter comprises Exhibit "AK 6".

16. Exhibit "AK 7" comprises a letter dated 24 June 2019 sent by McCann Fitzgerald, solicitors for the defendant, to Messrs. Tweed solicitors for the plaintiff which, inter alia, rejected the characterisation of the defendant's conduct and referred to what was described as "a very real public interest in discussing these issues". The said letter concluded with the following paragraphs: -

*"While we appreciate that your client would prefer these serious allegations not to have been aired, he is well positioned to respond to our client's news coverage and we note he has done so by way of a press statement in recent days, which is his entitlement.*

*We note what you say regarding your client's intention to 'seek the assistance of the Irish courts'. Ireland does not appear to us to be an obvious jurisdiction for litigation given that the parties do not reside or operate within Ireland but it obviously (sic) a matter for your client to proceed as he thinks fit. For the avoidance of doubt our client does not accept that it has any liability to your client necessitating the removal of our articles or social media posts and in the circumstances the question of such removal, or of a correction or apology to your client, does not arise".*

Para. 34 refers to a response sent by Messrs. Tweed solicitors, dated 26 June 2009 in which it was stated that they had instructions to issue legal proceedings in Ireland and, by reply dated 28 June 2019, McCann Fitzgerald Solicitors responded stating, inter alia: -

*"Our client's journalists have acted responsibly and professionally, and the coverage of the allegations against your client, based on complaints received by BuzzFeed, and your client's response to those allegations, is accurate, fair and reasonable. In particular, our client afforded your client every opportunity to put forward his responses to the allegations made and this is clearly reflected in what was published. There is an important public interest in discussion of these issues for the reasons set out in our previous correspondence. We therefore do not accept your characterisation of our client's coverage or its conduct in the preparation of the articles in question. We confirm we have authority to accept service of proceedings on behalf of our client. Any proceedings that do issue will be vigorously defended".*

The said correspondence comprises Exhibit "AK 8".

17. Paras. 35 to 37, inclusive, of Ms. Kaminer's affirmation refer to the proceedings, namely the plenary summons which issued on 26 November 2019 and the memorandum of conditional appearance which was entered on behalf of the defendant on 04 December 2019, in the context of the defendant wishing to contest the jurisdiction of this Court and exhibit "AK 9" comprises a letter from McCann Fitzgerald to Messrs. Tweed enclosing the memorandum of conditional appearance *"entered without prejudice and solely to contest the jurisdiction of the court to hear and determine this claim"*.
18. Paras. 38 to 40 of Ms. Kaminer's affirmation appear under the heading of *"Jurisdiction"* and reference is made, at para. 38, to the plaintiff's assertion that jurisdiction arises pursuant to Article 7 (2). At para. 39, Ms. Kaminer states that there is no evidence before the court that the articles in question *"were published in Ireland"* or *"were accessed or downloaded by a third party in Ireland"* and it is asserted that the plaintiff perceives Ireland to be a more favourable jurisdiction than the United States, where he and BuzzFeed Inc are based. At para. 40, it is denied that jurisdiction arises under Article 7 (2) and it is asserted that *"the Plaintiff must prove publication in this jurisdiction through actual evidence that a third party located in the jurisdiction accessed or downloaded the offending material, as required by law"*. The foregoing assertion is at the heart of the present motion and it is an issue I will return to in this judgment.
19. Paras. 41 to 43 appear under the heading of *"Forum non conveniens"*. At para. 41 (i) to (vii), Ms. Kaminer refers to numerous reasons why it is asserted that *"the United States is clearly and distinctly the more the (sic) appropriate jurisdiction for the trial of this action"*. At this juncture, it is appropriate to observe that Ms. Kaminer does not identify any one or more of the 50 different States in the United States which is or are said to be the appropriate jurisdiction(s). I make this observation in circumstances where a number of different States are referred to in the papers before the court including California (where the plaintiff resides), New York (the headquarters of BuzzFeed Inc.), Delaware (under the laws of which BuzzFeed Inc. is organised) and Virginia (where the party which hosts the relevant website servers is based). Among the numerous reasons referred to by Ms. Kaminer are that the defendant is not the publisher of the articles which were posted by



BuzzFeed Inc. on the website BuzzFeedNews.com; the defendant does not own, operate or control BuzzFeedNews.com; although employees of the defendant may create content that is posted on websites owned and operated by BuzzFeed Inc., including BuzzFeedNews.com, editorial decisions concerning what does or does not get published or made by BuzzFeed Inc.; although BuzzFeedNews.com is available globally, its Irish audience generally represents less than 0.5% of its total audience; the defendant has no employees or assets located in Ireland; the plaintiff's claim has no connection with Ireland, the plaintiff being a citizen of and domiciled in the United States which is his centre of main interests and business operations; the alleged events, the subject of the articles, took place in the United States and Canada; the defendant has its registered office in the United Kingdom; BuzzFeedNews.com is not hosted on Amazon Web Services' web servers in Ireland; the plaintiff has not proved that Articles were accessed or downloaded by a third party in this jurisdiction and has not identified any third party who says they accessed or downloaded same in this jurisdiction; the law of the United States is the applicable law in the case; the vast majority of witnesses are individuals based in North America and would have to travel from there with an Irish court being unable to compel attendance of witnesses outside the jurisdiction; evidence from an expert in the law of the United States would be required; to defend proceedings in Ireland would be to deprive the defendant of the legal system with which it is most familiar and would expose the defendant to additional cost; BuzzFeed Inc. could not reasonably have foreseen that posting the articles on BuzzFeedNews.com would expose the defendant to the risk that it might be sued in Ireland; an order pursuant to s. 33 of the Defamation Act 2009 is not capable of being enforced against the defendant which is outside the jurisdiction or against BuzzFeed Inc.; the plaintiff is a person of substantial means and it was open to him to sue BuzzFeed Inc. in the United States but, instead, he opted to put the defendant and this Court to considerable additional cost to avail of what is perceived to be a more favourable defamation regime.

20. Having set out the foregoing reasons, at para. 41, Ms. Kaminer describes the plaintiff's decision to sue the defendant in Ireland as "*a cynical exercise in forum shopping*" at para. 42. At para. 43, she again asserts that "*the United States is clearly and distinctly the more appropriate jurisdiction for the trial of this action*", and she asserts that it "*is the forum in which the case can be most suitably and conveniently tried in the interests of both parties*". It is claimed that the justice of the case requires the matter to be tried in that jurisdiction rather than in Ireland and at para. 44, relief in terms of the Motion is sought.

**Affidavit of Anthony Jay Robbins**

21. On 13 November 2020 the plaintiff swore a relatively short affidavit in opposition to the motion. After the usual averments, the plaintiff referred, at para. 5, to the swearing of an affidavit by his solicitor, Mr. Tweed. At para. 6 it was made clear that the fact that a substantive response was not furnished to Ms. Kaminer's affirmation did not constitute acceptance of its contents. It is appropriate to quote paras. 7 and 8 of the plaintiff's affidavit verbatim as follows:-

- "7. *In para. 39 of her Affirmation, Ms. Kaminer asserts that there is no evidence before the court that the articles the subject matter of the proceeding were published in Ireland. However, I believe that the defendant has, in a letter to Gately Tweed law firm, confirmed that there was publication in Ireland. In this respect, I beg to refer to a copy of a letter sent by my solicitors to the defendant's solicitors dated 11th June 2020 and the defendant's solicitors' reply dated 24th September 2020 upon which, pinned together and marked with the letters and number "AJR 1", I have signed my name prior to the swearing hereof.*
8. *Insofar as it may be contended by the defendant that I do not have a reputation in Ireland, this is categorically denied. I have and have for many years had a significant following in Ireland and am readily identifiable to a large number of people in Ireland, as I am in many other countries. The allegations made by the defendant in the articles I complain of clearly tend to injure me in the minds of reasonable people in Ireland".*

**The 11 June 2020 letter from Tweed Solicitors to McCann Fitzgerald Solicitors**

22. The 11 June 2020 letter to which the plaintiff refers at para. 7 of his affidavit and which comprises the first item in his exhibit "AJR 1" states the following: -

*"Dear Sirs,*

*Our client: Tony Robbins*

*Your client: BuzzFeed UK Ltd.*

*We refer to the Motion in this matter which you issued on 27th March. It appears to be dependent on a number of assertions. In order to avoid unnecessary expenditure of time and money we would be obliged if you could confirm the following:*

- (a) *Is it your contention that Jane Bradley and Katie J.M. Baker were not employed by BuzzFeed UK Limited when they wrote the articles which were published on BuzzFeedNews; and,*
- (b) *While we can prove publication in Ireland, do you contend, despite our assertion that we can do this, that there was no such publication?*

*While you are not obliged to answer either of these questions, they are in practice central in relation to your Motions and if you are aware both of employment and of Irish publication it is not really satisfactory that you bring your Motions on the basis that you do. If you decline to answer these questions we will rely on your failure to do so in relation to costs, including full indemnity costs, if in the outcome it becomes apparent that the Motion, so far as it relies on non – publication by BuzzFeed UK in Ireland, is a futile exercise.*

*We look forward to hearing from you".*

23. A number of comments can fairly be made in respect of the foregoing letter dated 11 June 2020. It was plainly written against the backdrop of the present motion and in the context of the plaintiff and his solicitors preparing their opposition to same. The letter made clear that the defendants' solicitors had no obligation to answer either of the questions posed, but the questions could hardly be said to be irrelevant given the matters at issue. Nor could it be said that it was not reasonable or appropriate to pose these questions which were asked for the explicit purpose of avoiding "*unnecessary expenditure of time and money*". It is perfectly clear from the contents of the letter that it was sent in the following circumstances. Firstly, it is obvious that the writer was aware that publication of the articles in this jurisdiction was a relevant issue. Secondly, there was a very explicit assertion that the plaintiff was in a position to prove publication in Ireland. Thirdly, the defendant was called on to confirm whether or not it asserted that there was no publication in Ireland. Fourthly, this request was clearly made in order that the plaintiff could know whether, for the purposes of the motion, this remained in issue. In other words, if the defendant's solicitors chose not to reply to the letter, or replied to say that the defendant contended that there was no publication in Ireland, the plaintiff would be aware that this was so. Alternatively, if the reply was to say that the defendant did not contend that there was no publication in Ireland, this would also clarify matters. It hardly seems unfair to infer from the contents of this letter that if no response whatsoever had been furnished or if a response had been furnished which made clear that the defendant contended that there was no publication of the articles in Ireland, the plaintiff and his solicitors intended to do what they said they could do at para. (b) of the letter, namely "*we can prove publication in Ireland*". In short, this correspondence appears to be a letter sent with a view to clarifying and potentially narrowing the issues in dispute for the purposes of the motion with a view to potentially saving costs and time. It is now appropriate to look at the response which came somewhat over three months later on 24 September 2020.

24 September 2020 letter from McCann Fitzgerald to Tweed solicitors

24. On 24 September 2020, the defendant's solicitors replied to the 11 June 2020 letter in the following terms: -

"Dear sirs

We refer to the above proceedings and to your letter of 11 June 2020.

We respond to your queries as follows: -

- (a) Our client does not contend that Ms. Bradley and Ms. Baker were not employed by BuzzFeed UK Ltd. when they wrote the articles.  
In the affirmation of Ariel Kaminer, affirmed on 13 March 2020 and grounding our client's motion dated 27 March 2020, Ms. Kaminer avers at para. 10 that:

- *"Employees of BuzzFeed UK Ltd. may create content that is posted on websites owned and operated by BuzzFeed, Inc., including BuzzFeedNews.com, but decisions about what does (or does not) get posted are made by BuzzFeed, Inc. through its BuzzFeedNews division and that division's editorial leadership, which is based in New York City)".*

Our client has made it clear that control of all editorial content is exercised by the New York City division of BuzzFeedNews, regardless of the location of the employees who create content. It is therefore irrelevant whether Ms. Bradley and Ms. Baker created the content while employed by BuzzFeed UK Ltd., as only BuzzFeed, Inc. has editorial control over the content that ultimately gets published through its BuzzFeedNews division, and that division's editorial leadership is based in New York City, USA.

- (b) Our client does not contend that there was no publication in Ireland.

As stated in Ms. Kaminer's affirmation, BuzzFeedNews.com's Irish audience

*"generally represents less than 0.5% of its total audience. BuzzFeed, Inc. does not operate any Irish domains (for example "BuzzFeedNews.ie") targeted to the Irish population, nor is advertising targeted at the Irish population and the content of BuzzFeedNews is international in its scope and perspective".*

On foot of your query our client has made enquiries as to the specific readership figures in respect of the articles for users geo – located Ireland. We can confirm that the articles had been viewed online 13,382 times by users geo – located in Ireland as at the date these proceedings issued, i.e. 26 November 2019. Globally, the articles had been viewed online 3,554,271 times as at 26 November 2019. Therefore, users geo – located in Ireland represented approximately 0.38% of the total global audience in respect of the articles as at the date proceedings issued. By contrast, users geo – located in the US had viewed the articles 2,939,579 times as at 26 November 2019 i.e. 82.71% of the total global audience in respect of the articles. In light of the above, it is clear that the readership figures in respect of the articles in Ireland as a percentage of the total global audience are negligible, whereas the vast majority of the access figures related to users geo – located in the US.

Yours faithfully".

20. It is not difficult to understand why the plaintiff's solicitors sought confirmation as to whether the defendant in these proceedings contended that the individuals who wrote the articles in question were not employed by them. It is no function of this Court to make any findings in respect of the substantive proceedings and I do not purport to do so. It is clear, however, that in the context of replying to a letter which sought to clarify the issues in dispute for the purposes of the present motion, it was very plainly stated that the

defendant does not assert that the writers were not employed by BuzzFeed UK Ltd. when the articles were written. The second query which had been raised on behalf of the plaintiff in the letter from Messrs Tweed dated 11 June 2020 was also dealt with in clear terms, in that confirmation was given that the defendant "*does not contend that there was no publication in Ireland*". There is no ambiguity about this statement. Nor is there any suggestion that it was a statement made other than with the defendant's instructions and authority. The reason the query was raised in the first place is not in doubt, in that the question was posed on 11 June 2020 in the context of narrowing the issues in dispute against the backdrop of the defendant's motion. As will be discussed later in this judgment, a key element of the defendant's opposition to the present motion is to contend that the plaintiff has failed to establish that the relevant articles were read or downloaded in this jurisdiction. That is to contend that publication in this jurisdiction has not been established for the purposes of the present motion. It is, in reality to contend that, for the purposes of this application, there was no publication in this jurisdiction and there is no evidence of same before the court. In my view, however, I cannot ignore the contents of the 24 September 2020 letter from the defendant's solicitors.

21. Upon receipt of the 11 June 2020 letter from Messrs Tweed, the defendant had, it seems to me, a number of options. It could instruct its solicitors to ignore the request entirely or to give instructions that a response be sent. As to a response, the defendant could have instructed McCann Fitzgerald to send a response making clear that the defendant was not prepared to answer the request at all. Had this been done, the plaintiff would be on notice that the two issues (a) and (b) both remained "live" for the purposes of the motion and it would have been open to the plaintiff to take such steps as it considered necessary in that regard. The only other obvious option was to give instructions to respond to the queries raised. That is the option the plaintiff chose. That option appears to me to have been a perfectly reasonable and appropriate option to take. It is self-evident that where parties clarify and narrow issues in correspondence, it has the potential to avoid unnecessary time, effort and cost including legal costs, with the added potential of assisting the court by ensuring that unnecessary court time does not have to be devoted to issues which are not truly in dispute. In making the foregoing comments, it is entirely apparent from the submissions made with such skill by counsel for the defendant, that it is not accepted that the plaintiff has established publication in Ireland. In my view, however, this Court cannot be blind to what is said at para (b) of the 21 September 2020 letter and any fair reading of what is stated there reveals the following. The defendant was made aware of the relevant query. This is perfectly clear from the statement that, on foot of the query, the defendant "*made enquiries as to the specific readership figures in respect of the articles for users geo - located Ireland*". It is not appropriate to analyse the contents of a letter as if it were a piece of legislation. That said, the foregoing plainly indicates that the defendant looked for "*readership*" figures and was in a position to ascertain "*specific*" readership figures regarding the articles and in respect of persons "*geo - located Ireland*". There is no suggestion made that the phrase "geo-located Ireland" does not comprise readers located, insofar as it is technically possible to identify a location, in this jurisdiction. I should also say for the sake of completeness that nowhere is it claimed by the defendant that the phrase "*geo - located Ireland*" means readers located on this

island but located exclusively in the 6 counties of Northern Ireland, nor could this court take any such meaning from the phrase. In short, the parties did not draw any distinction between readers located in "Ireland" and readers located in this jurisdiction and, that being so, I am entitled to proceed on the basis that the readership figures furnished by the defendant in respect of readers located in Ireland comprises, or includes, figures for readers who are, in fact, located in this jurisdiction and I will draw no distinction, for the purposes of determining this application, which the parties did not draw themselves.

22. There is no ambiguity about the concept of "readership". If numbers are supplied in respect of readership in Ireland, it not only means that the articles were *accessible*, it must also mean that the articles were accessed, namely the articles were read in Ireland. The next sentence puts this beyond doubt in that the explicit statement is made "*we can confirm that the articles had been viewed online 13,382 times by users geo – located in Ireland as at the date these proceedings issued, i.e. 26 November 2019*". There is no ambiguity in relation to the meaning of the term "*viewed online*". To view something online is to *read* something online. At this juncture it seems appropriate to observe that the letter gives a very specific figure (13,382) for the number of times the articles were viewed online, but it makes no reference to the number of times the articles were "*downloaded*" by users of the internet located in Ireland. I make this observation because nowhere does the defendant's letter assert that viewing or reading the articles online required the articles to be downloaded. It is entirely obvious why this is so. It is uncontroversial to say that few people in Ireland will be unfamiliar with the internet and internet access is commonplace via a range of devices, from personal computers to laptops and smartphones. As any user of the internet will know, it is possible to read an article without first having to download it. In other words, the absence from the 24 September 2020 letter of any figure in respect of the number of times the articles in question were "downloaded" does not mean that users located in this jurisdiction were unable to read the articles in question. On the contrary, the letter is explicit and very specific about the number of times the articles were viewed in Ireland as at the date the proceedings were instituted, namely 13,382 times. I believe that it would be to create an injustice for this Court to engage in an act of "selective blindness" and to ignore this very specific information which was provided by the defendant, through its solicitors, as a result of enquiries made by the defendant in relation to specific readership figures in Ireland for the articles in question. In my view, this information supplied by the defendant entitles this Court to take the view, for the purposes of this motion, that there was, in fact, publication of the articles in this jurisdiction, namely a readership, as at 26 November 2019, of 13,382. As I say, there is no suggestion whatsoever that any, much less all 13, 382 comprised a readership located on the island of Ireland, but outside of this jurisdiction in Northern Ireland, and it would be to do violence to the plain words used in the relevant letter to draw such an inference.
23. The final section of the 24 September 2020 letter makes the point that readership of the articles in question, in Ireland, represented some 0.38% of the total global audience as at the date the proceedings issued. The foregoing does not, it seems to me, determine any

issue which arises in the present motion. It can fairly be said that a readership of 13,382 is, of itself, a not insubstantial number, even if it is dwarfed by a global readership figure, at the relevant time, of 3,554,271, of which 2,939,578 views are given in respect of users located in the US (although that figure is not broken down on a State by State level). Such considerations do not seem to me to be relevant in the context of whether jurisdiction arises under Article 7 (2) of Brussels Recast in circumstances where, for the purposes of this motion, the court is satisfied that there was, in fact, publication in this jurisdiction, and - as is made clear in the plenary summons - the plaintiff has limited his claim to damage suffered within this Court's jurisdiction.

24. Lest there be any doubt that the articles in question were, in fact, read, the word "*readership*" appears for a second time in the final paragraph of the 24 September 2020 letter in the context of an assertion that "*the readership figures in respect of the articles in Ireland*" represent a "*negligible*" percentage of the total global audience and it is asserted that "*the vast majority of the access figures relate to users geo - located in the US*". It is worth observing that the letter referred to and supplied specific numbers in relation to what the letter calls "*access*", not "*accessibility*". In other words, the figures given are explicitly and very specifically given in respect of readership by users who, in fact, accessed the articles and viewed them. For the sake of completeness, it is appropriate to observe that the figures given in this letter do not address the possibility that a single user may have viewed the articles more than once. That does not, however, detract from the fact that the articles were accessed and viewed by users located in Ireland well over 13,000 times as of the date the proceedings issued and, thus, publication in this jurisdiction has been established.
25. Even though, during submissions, counsel for the defendant submitted that the plaintiff had failed to establish that the articles in question were read or downloaded in this jurisdiction, the defendant cannot, in my view "unsay" the information which was provided on foot of the defendant's enquiries and this court cannot ignore it. There is no suggestion that the very specific information provided in the 24 September 2020 letter was not accurate then or that it has since been discovered to be inaccurate. No averment is made to that effect. In short, queries were raised on behalf of the plaintiff by letter of 11 June 2020 and these queries were engaged with and responded to very clearly and comprehensively by the defendant, via a 24 September 2020 letter from their solicitor. In my view, it was entirely appropriate for the defendant to have done so, given the nature of the queries raised which are of obvious relevance to the motion before the court. To engage, as the defendant has done, with the queries raised, was, it seems to me, to engage appropriately and reasonably in the context of potentially avoiding unnecessary time and cost. This Court cannot, however, ignore the reality of the situation as detailed in the response provided on behalf of the defendant. The final affidavit is one sworn by the plaintiff's solicitor and I now turn to an examination of same.

**Affidavit of Paul Tweed**

26. On 13 November 2020, the plaintiff's solicitor, Mr. Paul Tweed, swore an affidavit in opposition to the motion. After making the usual averments, and indicating that it was not

proposed to address Ms. Kaminer's affirmation on a paragraph – by – paragraph basis, Mr. Tweed pointed out, at para. 6, that Ms. Kaminer, who describes herself as the global head of the investigative unit at BuzzFeed Inc., did not confirm her authority to make an affirmation on behalf of the defendant. In circumstances where Ms. Kaminer affirms that the defendant is a wholly owned subsidiary of BuzzFeed Inc., I am satisfied that I am entitled to regard the contents of her affirmation as representing the defendant's position. At para. 7, reference is made by Mr. Tweed to Ms. Kaminer's assertion that the defendant is not the proper party to the proceedings and he avers that this is a substantive issue for the determination of a trial judge, not a matter which falls to be decided by the court in the context of the present application. At para. 8, Mr. Tweed refers to Ms. Kaminer's contention that the defamatory statements complained of by the plaintiff related to factual matters concerning events in the United States and he goes on to aver that this issue is not relevant to the determination of the present motion by this Court. Mr. Tweed avers that either the plaintiff is, or is not, entitled to issue proceedings in this jurisdiction regarding defamatory statements published in this jurisdiction and if this Court does have jurisdiction "libel tourism" is not an accurate characterisation of the proceedings. At para. 9, Mr. Tweed avers that it is not evident how any concerns on the part of BuzzFeed Inc. could have a bearing on the outcome of the present motion. Those concerns, referred to at para. 6 of Ms. Kaminer's affidavit, related to the choice of jurisdiction. At para. 10, Mr. Tweed avers *inter alia* that whether or not BuzzFeed Inc. makes decisions about what gets posted on BuzzFeedNews.com is not determinative of the issue of publication of the material which he describes as defamatory. He also refers *inter alia* that "*the fact that Jane Bradley and Katie J. M. Baker, the journalists responsible for the articles, were employed by the Defendant when they wrote the articles is not disputed by the defendant. In the circumstances, the articles were self – evidently written in the course of their said employment for the purposes, inter alia, of seeking their publication by BuzzFeed Inc.*".

27. At this juncture, it is appropriate to observe, once more, that the defendant does not content that Ms. Bradley and Ms. Baker were not employed by BuzzFeed UK Ltd. when they wrote the articles, something which was put beyond doubt at para. (a) of the 24 September 2020 letter sent by the defendant's solicitors to the plaintiffs. At para. 11 of his affidavit, Mr. Tweed refers to Ms. Kaminer's descriptions of the articles published as well as to Ms. Kaminer's reference to the correspondence exchanged between the parties' legal representatives. Among other things, Mr. Tweed avers that pre – litigation correspondence and the subject matter of the defamatory proceedings are not relevant to the legal test for the jurisdiction of this Court to hear the claim in question. As well as observing that Ms. Kaminer has exhibited merely a selection of the correspondence rather than the entirety of same, Mr. Tweed makes reference to a number of the communications having been sent to Ms. Bradley at the offices of BuzzFeed UK and he also avers that Ms. Bradley used her BuzzFeed UK address to communicate with him and he also avers that communications between the plaintiff's legal representatives in the USA were copied to Ms. Heidi Blake who, at the material time, managed and edited articles from the UK. At para. 12, Mr. Tweed takes issue with the averment (at para. 39 of Ms. Kaminer's affirmation) that there is no evidence before the court that the articles in



question were published in Ireland. In this regard, Mr. Tweed refers to the letter from McCann Fitzgerald dated 24 September 2020, averring that: -

*"In any case, as is entirely clear from the plaintiff's solicitor's letter dated 24th September 2020 exhibited at "HAR 1", the defendant itself now accepts that there was publication in Ireland. In the premises, the jurisdiction of the Irish courts to hear and determine the matter pursuant to Article 7 (2) of Council Regulation 1215/2012 has been established".*

28. Paras. 13 to 16, inclusive of Mr. Tweed's affidavit refer to the doctrine of *forum non conveniens* and issue is taken with what Ms. Kaminer has affirmed from para. 41 onwards of her affidavit. Mr. Tweed asserts that the doctrine of *forum non conveniens* does not apply to proceedings under Brussels Recast and it is asserted that, since the defendant cannot dispute publication in Ireland and *forum non conveniens* does not apply to the present proceedings, the defendant's application is wholly without merit. At para. 17, Mr. Tweed seeks that the reliefs sought in the motion be refused. This completes an analysis of the affidavits and exhibits before the court.

#### **Discussion and decision**

26. I am very grateful to counsel for both parties who furnished detailed written submissions which I have considered very carefully and which they supplemented by means of oral submissions made with skill during the hearing which took place on 20 April. Where relevant, I will refer to the various submissions during the course of this judgment.
27. Chapter II of Brussels Recast deals with "JURISDICTION" and s. 1 thereof sets out what are described as "*General provisions*", whereas s. 2 sets out provisions under the heading "*Special jurisdiction*". The first of the general provisions appears in the following terms: -

*"Article 4*

- 1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State".*

28. In submissions on behalf of the defendant, the foregoing is described as the "basic rule" and it is plain that the plaintiff does not claim jurisdiction pursuant to Article 4. It is not in dispute, however, that Article 5 of the general provisions goes on to state the following: -

*"Article 5*

- 1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter".*

Section 2, which deals with *Special jurisdiction* provides inter alia as follows:-

*"Article 7*

*A person domiciled in a Member State may be sued in another Member State:*

. . . .

(2) *in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur*”.

29. It is under Article 7 (2) that the plaintiff claims jurisdiction, defamation being a tort, and, as observed previously, the plaintiff has explicitly limited his claim to damage suffered within the jurisdiction of this Court.

**Coty Germany GmbH v. First Note Perfumes NV**

30. In submissions on behalf of the defendant, the court’s attention was drawn to the decision in *Coty Germany GmbH v. First Note Perfumes NV* (C-360/12) Bus. LR 1294 [2014], being a decision of the Court of Justice of the European Union (“CJEU”). In *Coty*, the CJEU analysed the provisions of Article 5(3) of Council Regulation (EC) no. 44/2001, being the predecessor of Brussels Recast, Article 5(3) being the equivalent of what is now Article 7(2) of Brussels Recast and Article 2(1) of the 2001 Regulation being the equivalent of the current Article 4(1). It is appropriate to quote the following from *Coty*: -

“43. *With regard to the interpretation of Article 5(3) of Regulation No 44/2001, it should be recalled at the outset that the provisions of that regulation must be interpreted independently, by reference to its scheme and purpose: Melzer v. MF Global UK Ltd. Case C – 228/11 [2013] QB 112, para. 22 and the case law cited.*

44. *It is only by way of derogation from the fundamental principle laid down in Article 2(1) of Regulation No 44/2001, attributing jurisdiction to the courts of the Member States in which the defendant is domiciled, that Section 2 of Chapter II makes provision for certain special jurisdictional rules, such as that laid down in Article 5(3) of that regulation: The Melzer case, paragraph 23.*

45. *In so far as the jurisdiction of the court of the place where the harmful event occurred or may occur constitutes a rule of special jurisdiction, it must be interpreted restrictively and cannot give rise to an interpretation going beyond the cases expressly envisaged by that Regulation: The Melzer case paragraph 24”.*

31. The fact that Article 7(2) (formerly Article 5(3)) must be interpreted restrictively and cannot give rise to an interpretation going beyond cases expressly envisaged by same, does not vest in this Court a discretion, under Brussels Recast, to refuse jurisdiction under Article 7(2) in respect of a case which comes within that rule of special jurisdiction. In other words, although the fundamental principle set down in Article 4(1) is that a person may be sued in a Member State of their domicile, there are other rules as to special jurisdiction, one being the rule found in Article 7(3) which is discussed in the following terms at paras. 46 and 47 of the *Coty* decision: -

“46. *The fact remains that the expression ‘place where the harmful event occurred or may occur’ in Article 5(3) of Regulation No 44/2001 is intended to cover both the place where the damage occurred and the place of the event giving rise to it, so*

*that the defendant may be sued, at the option of the applicant, in the courts for either of those places: The Melzer case paragraph 25.*

47. *In that connection, according to settled case-law, the rule of special jurisdiction laid down in Article 5(3) of Regulation No 44/2001 is based on the existence of a particularly close linking factor between the dispute and the courts of the place where the harmful event occurred or may occur, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings: The Melzer case [2013] QB 112, paragraph 26”.*

32. As regards the reference to the “*option*” available to an applicant, counsel for the plaintiff submits that the plaintiff has chosen the option to sue in the place where the harmful event occurred or may occur, in accordance with the provisions of Article 7(2). In submissions on behalf of the defendant, counsel laid particular emphasis on the contents of para. 47 of the CJEU’s decision in *Coty*, stressing that the rule of special jurisdiction for which Article 7(2) provides is based on the existence “*of a particularly close linking factor between the dispute and the courts of the place where the harmful event occurred*”. The submission made was that this is what the court is looking for and it was argued that this is absent, creating a problem for the plaintiff in invoking Article 7(2). Regardless of the skill with which that submission is made, it seems to me that this Court cannot ignore the following: firstly, the existence of legal proceedings which seek *inter alia* damage for tort in respect of articles which, for the purposes of this application, the defendant does not dispute were written by its employees and; secondly, that for the purposes of this application, publication in this jurisdiction has been established, indeed very specific readership figures in respect of users located in Ireland have been confirmed by the defendant; thirdly, the plaintiff has limited his claim to damage suffered within the jurisdiction of this Court. It seems to me that the reference by the CJEU, in para. 47 of *Coty*, to the existence of “*a particularly close linking factor*” is not to lay down an additional test which is not found in the plain meaning of Article 7(3) itself. Rather, the contents of para. 47 of *Coty* seem to me to be a setting out of the justification for the rule of special jurisdiction found in Article 7(2).

**Shevill & Ors. v. Presse Alliance S.A.**

33. The court’s attention was also drawn to the decision of the CJEU in *Shevill & Ors. v. Presse Alliance S.A.* (Case – 69/93) [1995] 2 AC 18. In that case, a UK national who was resident in Yorkshire complained that she had been libelled in an article in a French newspaper published by the defendant. The newspaper, “*France Soir*”, was primarily distributed in France and it was estimated that more than 237,000 copies of the relevant issue were sold in France, with approximately 15,500 copies distributed in other European countries, of which 230 were sold in England and Wales, with 5 copies sold in Yorkshire. It was estimated that 32 copies were sold in the Channel Island, 28 copies in Scotland and two in Northern Ireland. The defendant argued that the French courts had jurisdiction, as the defendant was domiciled in France. The plaintiffs brought proceedings in England, alleging that the article in question suggested that they were part of a drug – trafficking

network for which they had laundered money. The defendant argued that the English courts did not have jurisdiction pursuant to Article 5(3) (now 7(2)) since the “*place where the harmful event occurred*” within the meaning of the provision was France and no harmful event occurred in England. The House of Lords referred a number of questions to the CJEU in respect of the proper interpretation of Article 5(3). It is appropriate to quote the order made in the case, as appears on the very final page of the decision, where, in answer to the questions referred to it by the House of Lords, the court ruled as follows: -

- (1) *On a proper construction of the expression 'place where the harmful event occurred' in Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised.*
- (2) *The criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged by the victim of the defamation are not governed by the Convention but by the substantive law determined by the national conflict of laws rules of the court seised, provided that the effectiveness of the Convention is not thereby impaired”.*

34. It is plain from the decision in *Shevill* that, even though the circulation of the relevant newspaper in England represented a small fraction of a percent of the overall circulation and even though the defendant was domiciled in France, the plaintiff was entitled to bring defamation proceedings in England in respect of publication in England. It can fairly be said that *Shevill* articulates the following principles with regard to a case of libel by a newspaper article distributed in several contracting states. Firstly, a plaintiff can sue where the publisher is established and can bring a claim before the courts of that State seeking damages for *all* the harm caused; secondly, the plaintiff can elect under what is now Article 7(2) to bring proceedings in the place where the damage occurred. The meaning of that phrase is clear from para. 28 of *Shevill*, wherein it is stated: “*The place where the damage occurred is the place where the event giving rise to the damage, entailing tortious, delictual or quasi-delictual liability, produced its harmful effects upon the victim*”. Para. 29 goes on to make clear that, with regard to international libel through the press, injury caused by defamatory publication occurs in the places where the publication is distributed, when the victim is known in those places. *Shevill* makes clear that the courts of each contracting State in which the defamatory publication was distributed and in which a plaintiff claims to have suffered injury to his reputation have jurisdiction to rule on the injury caused in that particular State.

35. Counsel for the defendant drew the Court's particular attention to the following passages from the *Shevill* decision:-
- "34. *The national court's fourth, fifth and seventh questions, which should be considered together, essentially ask whether, in determining whether it has jurisdiction qua court of the place where the damage occurred pursuant to Article 5(3) of the Convention as interpreted by the Court of Justice, it is required to follow specific rules different from those laid down by its national law in relation to the criteria for assessing whether the event in question is harmful and in relation to the evidence required of the existence and extent of the harm alleged by the victim of the defamation.*
35. *In order to reply to those questions, it must first be noted that the object of the Convention is not to unify the rules of substantive law and of procedure of the different Contracting States, but to determine which court has jurisdiction in disputes relating to civil and commercial matters in relations between the Contracting States and to facilitate the enforcement of judgments: see Kongress Agentur Hagen GmbH v. Zeheaghe BV (Case C – 365/88) [1990] E.C.R. I – 1845, 1865 para. 17.*
36. *Moreover, the Court has consistently held that, as regards procedural rules, reference must be made to the national rules applicable by the national court, provided that the application of those rules does not impair the effectiveness of the Convention: paragraphs 19 and 20 of the same judgment.*
37. *In the area of non-contractual liability, the context in which the questions referred have arisen, the sole object of the Convention is to determine which court or courts have jurisdiction to hear the dispute by reference to the place or places where an event considered harmful occurred.*
38. *It does not, however, specify the circumstances in which the event giving rise to the harm may be considered to be harmful to the victim, or the evidence which the plaintiff must adduce before the court seised to enable it to rule on the merits of the case.*
39. *Those questions must therefore be settled solely by the national court seised, applying the substantive law determined by its national conflict of laws rules, provided that the effectiveness of the Convention is not thereby impaired.*
40. *The fact that under the national law applicable to the main proceedings damage is presumed in libel actions, so that the plaintiff does not have to adduce evidence of the existence and extent of that damage, does not therefore preclude the application of Article 5(3) of the Convention in determining which courts have territorial jurisdiction to hear the action for damages for harm caused by an international libel through the press.*

41. *The answer to the referring court must accordingly be that the criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged by the victim of the defamation are not governed by the Convention but by the substantive law determined by the national conflict of laws rules of the court seised, provided that the effectiveness of the Convention is not thereby impaired”.*

36. In submissions on behalf of the defendant, particular emphasis is laid on para. 41 of *Shevill*, which makes clear that the criteria for assessing whether the relevant event is harmful for the purposes of Article 7(2) and the evidence required of the existence and extent of such harm alleged by the victim of defamation, are governed by national law. The defendant also submits that publication to a third party is an essential element of the tort of defamation in this jurisdiction. No plaintiff could hope to succeed in a defamation action in this jurisdiction without satisfying a trial court that there had been publication but it does not seem to me, however, that *Shevill* is authority for the proposition that, in order to successfully invoke jurisdiction pursuant to Article 7(2), a plaintiff has an obligation to prove publication or that, having regard to the facts in the present case, a plaintiff must prove that articles which he says were defamatory and which were in fact available to readers in this jurisdiction were downloaded or read by specific numbers of persons in this jurisdiction. Even if I am entirely wrong in that view, I have already explained the reasons why, for the purposes of the present application, publication of the offending articles in this jurisdiction has been established, specifically readership figures of more than 13,000 as at the date the proceedings were instituted. It is also appropriate to observe that *Shevill* was not a case which concerned internet publication and it is to a decision of the CJEU which specifically concerned internet publication, I now turn.

**Martinez & Anor v MGN Limited**

37. Article 5(3), which is reflected precisely in the wording of Article 7(2) of Brussels Recast, was considered by the CJEU in two joined cases which concerned internet publication, being *eDate Advertising GmbH v X and Martinez & Anor v MGN Limited (together, “Martinez”)*. In the first case, an Austrian defendant published information on its website concerning the claimant’s conviction some years previously for murder. The claimant was a German national who brought proceedings in Germany seeking an injunction to prevent the defendant from publishing any further information about him. In the second case, a French actor and his father brought a claim in France against a publishing company incorporated in England and Wales asserting that a posting on a website of an English newspaper, published by the defendant, interfered with their private lives. In each case, the defendant contended that the court in which proceedings had been brought lacked jurisdiction and the national court referred to the CJEU questions concerning how Art. 5(3) of Regulation No. 44/2001 was to be applied to an alleged infringement of personality rights by means of content placed on a website. The decision in *Martinez* was opened to the court, including para. 40 which states:

“40. *It is settled case law that the rule of special jurisdiction laid down, by way of derogation from the principle of jurisdiction of the courts of the place of domicile of*

*the defendant, in Art. 5(3) of the regulation is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings: see the Zuid Chemie case, para. 24 and the case law cited.”*

38. It seems clear that the foregoing is, in effect, a re-statement of the policy which is behind the special jurisdiction which arises pursuant to Art. 7(2) constituting, as it does, an exception to the principle that the courts where the defendant is domiciled have jurisdiction.

**Online content**

39. The particular issues which arise in respect of content placed online as opposed to the distribution of printed material was specifically acknowledged in *Martinez* in the following terms:
- “45. *However, as has been submitted both by the referring courts and by the majority of the parties and interested parties which have submitted observations to the court, the placing online of content on a website is to be distinguished from the regional distribution of media such as printed matter in that it is intended, in principle, to ensure ubiquity of that content. That content may be consented instantly by an unlimited number of Internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person’s member state of establishment and outside of that person’s control.*
46. *It thus appears that the Internet reduces the usefulness of the criteria relating to distribution, in so far as the scope of the distribution of content placed online is in principle universal. Moreover, it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular member state or, therefore to assess the damage caused exclusively within that member state.*
47. The difficulties in giving effect, in the context of the Internet, to the criterion relating to the occurrence of damage which is derived from Shevill’s case contrasts, as the Advocate General noted at point 56 of his opinion, with the serious nature of the harm which may be suffered by the holder of a personality right who establishes that information injurious to that right is available on a worldwide basis.”
40. At para. 41 in *Martinez*, reference was made to the expression “*place where the harmful event occurred*” and the CJEU made clear that this phrase is intended to cover both the place where the damage occurred and the place of the event giving rise to it. The court made clear that those two places could constitute “*a significant connecting factor insofar as jurisdiction was concerned.*” Para. 42 of *Martinez* referred to the application of those

two “connecting criteria” to actions for defamation and the rule derived from *Shevill* was referred to. From para. 48 onwards, the CJEU stated the following in *Martinez*:

- “48. *The connecting criteria referred to in para. 42 of the present judgment must therefore be adapted in such a way that a person who has suffered an infringement of a personality right by means of the Internet may bring an action in one forum in respect of all of the damage caused, depending on the place in which the damage caused in the European Union by that infringement occurred. Given that the impact which material placed online is liable to have on an individual’s personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests, the attribution of jurisdiction to that court corresponds to the objective of the sound administration of justice, referred to in para. 40 above.*
49. *The place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a member state in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that state.*
50. *The jurisdiction of the court of the place where the alleged victim has the centre of his interests is in accordance with the aim of predictability of the rules governing jurisdiction (see *Berliner Verkehrsbetriebe (VBG)*, and *Anstalt Des Öffentlichen Rechts v J. P. Morgan Chase Bank NA (Case – 144/10) [2011] 1 WLR 2087, Para 33*) also with regard to the defendant, given that the publisher of harmful content is, at the time at which that content is placed online, in a position to know the centres of interests of the person who are the subject of that content. The view must therefore be taken that the centre of interests criterion allows both the applicant easily to identify the court in which he may sue and the defendant reasonably to foresee before which court he may be sued: see *Falco Privatstiftung v Weller – Lindhorst (Case – 533/07) [2010] Bus LR 210, para 22 and the case law cited.*”*

In light of the foregoing it is open to a plaintiff who seeks damages for defamation to sue where the defendant is domiciled or to sue where the plaintiff has their centre of interests, which may or may not correspond to their habitual residence, insofar as Art. 5(3), now Art. 7(2) is concerned.

#### **Where online content is accessible**

41. The foregoing is not, however, the end of the analysis with regard to the jurisdiction of Member States pursuant to Brussels Recast insofar as a claim for defamation in respect of content placed online is concerned. The judgment in *Martinez* continued as follows:

- “51. *Moreover, instead of an action for liability in respect of all of the damage, the criterion of the place where the damage occurred, derived from *Shevill v Presse Alliance SA (Case C – 68/93) [1995] 2 AC 18*, confers jurisdiction on courts in each member state in the territory of which content placed online is or has been*



*accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the member state of the court seised."*

42. Counsel for the plaintiff submits that it is the foregoing jurisdiction upon which they rely. It is appropriate to observe that para. 51 of *Martinez* uses the term "accessible", not the term "accessed". The distinction between the two will come into sharp focus when, later in this decision, reference is made to the judgment of this court (Hyland J.) delivered on 22 September 2020 in *Grovit v Jan Jansen* [2020] IEHC 501 wherein the *Martinez* decision was examined, in circumstances where it is submitted on behalf of the defendant that the High Court's analysis of *Martinez* is inconsistent with the Court of Appeal's 4 October, 2016 decision in *Ryanair v Fleming* [2016] 2 IR 254. For the purposes of the motion which is before this court I am satisfied that any alleged inconsistencies between the analysis of *Martinez* which is found in *Grovit* and any principles derived from *Ryanair* are not relevant to the determination which this Court must make having regard to the facts which emerge from the evidence before it. I say this because, in the manner analysed earlier in this judgment, I am satisfied that, for the purposes of the present application, this court is entitled to conclude that there has, in fact, been publication in this jurisdiction of the offending articles. In the manner previously examined, this court is entitled to come to the view that the relevant articles were viewed online 13,382 times by internet users located in Ireland as at the date the present proceedings issued, namely 26 November 2019. The facts which emerged from the evidence before the court certainly indicate that the readership figures in this jurisdiction in respect of the relevant articles represents an extremely small proportion of the total global readership. It is, however, plainly a readership and, of itself, not at all insubstantial, being in the thousands. In other words, the facts emerging from the evidence before this court demonstrate not only that the allegedly defamatory articles were *accessible* in this jurisdiction, but that the articles were accessed, namely the articles were viewed or read. Returning to the *Martinez* decision, it is also appropriate to quote para. 52 in which the CJEU set out clearly the position pertaining in relation to online content and for the sake of clarity I have highlighted the final and most relevant section in bold, as follows:

*"52. Consequently, the answer to the first two questions in Case C-509/09 and the single question in Case – 161/10 is that Article 5(3) of the Regulation must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an Internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the member state in which the publisher of that content is established or before the courts of the member state in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each member state in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the member state of the court seised."*

43. In the present case I am satisfied that the relevant online content has not only been accessible but has, in fact, been accessed and, in circumstances where this court has jurisdiction only in respect of the damage caused in this Member State, the relevant plenary summons explicitly limits the plaintiff's claim to damage suffered within this court's jurisdiction. Thus, I am satisfied that the principles derived from *Martinez*, applied to the present application, provide no support for the defendant's motion.

**Ryanair v Fleming.**

44. On behalf of the defendant, considerable emphasis was laid on the Court of Appeal's decision in *Ryanair v Fleming*. At the outset, it is appropriate to observe that, in *Ryanair*, jurisdiction was not pleaded on foot of Brussels Recast or its predecessor. The respondent was an Australian pilot domiciled in New South Wales, with no connections with Ireland. The appellant, Ryanair, sued Mr. Fleming for allegedly defamatory comments made by him under a pseudonym on an internet website forum operated by a company based in California, USA, which forum was entitled "Professional Pilots Rumour Network". Participation in the forum required prior registration but could be accessed by members of the public and issues raised by forum participants were occasionally picked up by mainstream media. Mr. Fleming's post challenged both the experience of Ryanair pilots and the wisdom of minimum fuel policies, which he maintained were practiced by Ryanair, and this gave rise to defamation proceedings. Ryanair asserted that it was entitled to have these issues determined by the courts of the place where the defamatory post had been published and central to this contention was the assertion that the defamatory post had, in fact, been published in this jurisdiction. Mr. Fleming denied that the comments were defamatory and he maintained that Ryanair had sought to ground Irish defamation proceedings on a slender and technical jurisdictional basis, namely, that the tort was committed in Ireland which would have the effect of depriving him of his right to be sued in the courts where he is domiciled. Mr. Fleming had never even visited Ireland and the uncontradicted evidence was that any judgment given by an Irish court would not be enforced by the Australian courts in the absence of proof that the foreign defendant was either present or domiciled in Ireland at the time the proceedings were commenced. Following the commencement of defamation proceedings in this jurisdiction, the court made orders authorising service of the proceedings on the defendant in Australia. The defendant issued a conditional appearance to the proceedings and sought to set aside the order authorising service. In October 2015 the High Court (O'Connor J.) set aside previous orders authorising service outside the jurisdiction in circumstances where the High Court took the view that, even if the Irish courts technically had jurisdiction in respect of these proceedings, it would be appropriate on *forum conveniens* grounds to have the proceedings dismissed. It was against this decision that Ryanair appealed to the Court of Appeal.
45. Having already observed that one very significant difference between the facts in *Ryanair* and the position in the present application is that jurisdiction was not asserted on foot of Brussels Recast, a second very significant difference is that there was uncontroverted evidence, in *Ryanair*, that any judgment given by an Irish court would not be enforced by the courts of Australia in the absence of proof that the foreign defendant was either

present or domiciled in Ireland and the time the proceedings were commenced. The defendant was not domiciled in Ireland and had never been to Ireland. In the Court of Appeal Mr. Justice Hogan quoted the *ex tempore* ruling of the High Court wherein O'Connor J. summarised his reasoning for dismissing the proceedings as follows:

*"The plaintiff is a successful commercial airline operating throughout Europe with vast resources and interests. The defendant is an airline pilot with a wife and two children who reside in Australia having no connection with Ireland. Order 11(2) of the Rules of the Superior Courts provides for the Court to have regard to the amount of value of the claim... and to the comparative costs and convenience of proceedings in Ireland and the place of the defendant's residence. There is nothing but a tenuous connection by way of a suggested inference between the plaintiff's alleged cause of action and Ireland. There is no evidence that Ireland compared to Australia would be more convenient or less costly for the parties to litigate the issues raised by the plaintiff."*

46. Hogan J. went on, at para. 16 of his judgment in *Ryanair* to state the following:

*"In my view, there are two fundamental reasons why the decision of the High Court should be affirmed. First, there is no evidence of actual publication (in the sense of the post having been accessed or downloaded by a third party) of this post in Ireland, so that the Irish courts in any event lack jurisdiction. Second, even if the technical requirements of jurisdiction were satisfied, I agree with the conclusions of O'Connor J. that there is at most a tenuous connection between the alleged tort of defamation and this jurisdiction, so that in these circumstances one must agree with him that the natural forum for the hearing of this dispute remains that of the defendant's domicile, namely the Australian courts."*

47. The foregoing was stated by the Court of Appeal in respect of a case which has fundamentally different facts and is brought against a fundamentally different backdrop. *Ryanair* was not at all concerned with Brussels Recast and, thus, when Mr. Justice Hogan observed that there was no evidence of actual publication - in the sense of the post having been accessed or downloaded by a third party in Ireland, so that the Irish courts lacked jurisdiction - it was plainly not a comment which was referable to a set of proceedings where an International Convention explicitly grants jurisdiction to bring defamation proceedings in a member state in which content placed online is or had been accessible (such jurisdiction only being in respect of the damage caused in the territory of that Member State). Given the fundamentally different facts and context, I fail to see how Mr. Justice Hogan's findings in *Ryanair* constitute authority for the proposition that where jurisdiction has been established pursuant to Art. 7(2) of Brussels Recast, in the sense explained in *Martinez* as regards online content, the Irish courts must refuse such jurisdiction absent proof that the online content was "accessed or downloaded by a third party" in this jurisdiction. Even if I am entirely wrong in that view, I have already explained why, for the purposes of the present motion, this court is satisfied that the relevant articles were in fact accessed in this jurisdiction, having been viewed, that is to

say read and this court being satisfied, for the reasons given, that publication in Ireland took place before the proceedings issued.

48. It is also clear from the Court of Appeal's decision in *Ryanair* that the matter was approached in the High Court, and correctly so according to the Court of Appeal's judgment, on the basis of *forum conveniens* principles. This is a third material difference between the situation in *Ryanair* and that before this court. In the present motion, it was made clear that the primary argument canvassed by the defendant is that the plaintiff has failed to establish jurisdiction pursuant to Brussels Recast. What was described as a secondary argument was that, if the court was satisfied that the plaintiff had not established jurisdiction pursuant to Brussels Recast, this court may consider the question of *forum conveniens* and, having done so, should refuse jurisdiction on the basis that there is another jurisdiction that is clearly and distinctly more appropriate. Without, as I say, identifying any specific State jurisdiction within the United States (and I want to make clear that for the purposes of this judgment, nothing turns on that) the defendant's written submissions argue, inter alia, that "*the United States is clearly and distinctly the more appropriate jurisdiction for the trial of this action*".
49. It is clear from para. 16 in *Ryanair* that the Court of Appeal agreed with the High Court's conclusions, on *forum conveniens* grounds, that the natural forum for the dispute was the Courts of Australia having regard to the facts in that case. At para. 17 in *Ryanair*, the Court of Appeal articulated the fundamental principle of this jurisdiction's conflict of laws rules, namely that, absent special circumstances, a defendant should normally be sued where they are domiciled and Mr. Justice Hogan was explicit that this general principle "... must, accordingly, inform any consideration of whether the plaintiff can satisfy the Court that the High Court had jurisdiction in the matter and, even if it had, whether it would be appropriate to exercise that jurisdiction on *forum conveniens* grounds". This situation in the present case is wholly different in that what informs this court's determination of the matter must be the provisions of Brussels Recast and the jurisprudence of the CJEU with regard to the proper interpretation and scope of its articles, in particular, Art. 7(2). That is not for a moment to give other than due deference to the Court of Appeal's decision in *Ryanair*. It is simply to acknowledge the reality that the context in which *Ryanair* was decided is markedly different to the position before this court.
50. Hogan J. continued, from paras. 17 to 23 of the *Ryanair* decision to set out a number of principles underpinning the conflict of law rules in this jurisdiction including, in particular "... to promote the orderly administration of international justice so that potential defendants can arrange their affairs in such a manner as will enable them to predict where such conduct will (or, as the case may be) will not render them liable to suit". It will be recalled that this is a principle which has been articulated explicitly by the CJEU with regard to the provisions of Brussels Recast and, at para. 21 of *Ryanair*, Mr. Justice Hogan referred to the Brussels Regulation and Lugano Convention stating that these have been "... the mainstay of the European Union's jurisdiction allocating rules for the best part of 50 years. It is true, of course, that the present jurisdictional dispute falls completely outside the scope of the Brussels/Lugano system and is governed by our own

*national conflict of law rules. The point, however, is that conflict of law rules reflecting the principal allocation of jurisdiction as between competing fora must, in general, at least, in order to be fair, reflect these considerations of foreseeability and the orderly administration of international justice."*

51. The case before this court falls within the scope of Brussels Recast and it seems to me to be entirely consistent with both Mr. Justice Hogan's decision in *Ryanair* and with the CJEU jurisprudence that this court give effect to the regulations with which *Ryanair* was not concerned but which arise in the present case given the fundamentally important principle, articulated by Mr. Justice Hogan, of the orderly administration of international justice. At para. 22, Hogan J. referred to and quoted from the *Martinez* decision, specifically paras 45 and 46 which I have quoted in full earlier in this judgment. At para 23, Hogan J. observed that the difficulties identified by the Court of Justice in *Martinez* applied to the case before the Court of Appeal. He observed that the forum was hosted in California and that the participants came from a variety of (mainly) European jurisdictions with the affidavit evidence of *Ryanair* indicating that 12 participants identified themselves by reference to an Irish location. Hogan J. then stated:

*"This, however, does not in and of itself necessarily mean that any of them actually accessed or downloaded Mr. Fleming's post when they were in Ireland. It is, nevertheless, hard to say that a participant posting from Australia on an international website based on [sic] California in relation to incidents which took place in Spain could reasonably foresee that he would thereby expose himself to litigation in this jurisdiction simply by reason of comments made about an Irish-based airline in the course of that posting where that poster had no other connections with this jurisdiction and where the forum itself was not hosted in Ireland."*

52. Unlike the factual position in *Ryanair*, publication in Ireland of the relevant articles has been established for the purposes of this application. The Court of Appeal's comments regarding the reasonable foreseeability of an individual being exposed to litigation arising out of comments made concerning an Irish-based airline in an online posting also highlights the difference between the situation in *Ryanair* and that before this court. The question of foreseeability, according to the facts in *Ryanair* as opposed to the position in the present case are utterly different in my view because of the relevance, for the application before this court, of a set of international rules comprising Brussels Recast adopted by Member States which, at the relevant time the proceedings were commenced, included the United Kingdom where the defendant is registered.
53. During submissions on behalf of the defendant, particular emphasis was laid on para. 24 of the *Ryanair* decision which appears as follows: -

*"The jurisdiction of the Irish courts*

*It is against this general background that the question of jurisdiction may now be considered. Quite apart from any other consideration, the plaintiff must, of course, establish publication in this State in order to establish jurisdiction. There is, however, no evidence before the court to establish that this post has been seen, accessed or down-loaded by any third party within this jurisdiction. Proof of publication to a third party is, of course, an essential ingredient of the tort: see s. 6(2) of the 2009 Act. There could, of course, be many circumstances where the fact of publication in an on-line version – such as the of a major newspaper - would, as a matter of common sense, lead to the inference that it was so published to a third party. This cannot, however, obscure the fact that the plaintiff is still required to prove that the material was accessed or downloaded by a third party in this jurisdiction”.*

54. Several comments appear to me to be relevant in respect of the foregoing. The Court of Appeal did not state that a plaintiff who has established jurisdiction under Article 7(2) of Brussels Recast in accordance with the relevant CJEU jurisprudence must, in addition, establish publication in this State in order to establish jurisdiction. Rather, in the context of very particular facts and in a case where Brussels Recast had no application, the Court of Appeal made clear what the particular plaintiff in that case was required to establish. Furthermore, in *Ryanair*, there was no evidence of publication in this jurisdiction, whereas in the application before this Court, the defendant has very clearly and to my mind very appropriately confirmed very specific readership figures in respect of internet users based in Ireland with regard to the articles written by employees of the defendant. There is no dispute about the fact that proof of publication to a third party is an essential ingredient of the tort of defamation in this jurisdiction. In my view, however, nothing said by the Court of Appeal in para. 24 of *Ryanair* is authority for the proposition that a plaintiff who has established jurisdiction pursuant to Article 7(2) in accordance with the explicit terms of that article, as interpreted by the CJEU, in particular in the *Martinez* decision, still faces *uncertainty* with regard to their ability to bring a defamation claim in a Member State where the relevant content placed online is or has been accessible and to sue there for damage caused in that Member State.
55. The gravamen of the defendant’s submission is to say that there is still uncertainty because, submits the defendant, the Court of Appeal mandates that such a plaintiff to go further that Article 7 (2), as interpreted in *Martinez*, requires, namely to prove that the material was accessed (as opposed to being accessible) in this jurisdiction. Such a proposition seems to me to undermine the certainty which international regulations exist to remove and to undermine the principle of the orderly administration of international justice – a principle Mr. Justice Hogan articulated explicitly in *Ryanair*. It also seems to me to run contrary to the principle outlined at para 39. in *Shevill*, which, for the sake of clarity, I have underlined below, having also quoted paras 37 and 38b in order to illustrate the context in which the principle was articulated:

"37. *In the area of non-contractual liability...the sole object of the Convention is to determine which court or courts have jurisdiction to hear the dispute by reference to the place or places where an event considered harmful occurred.*

38. *It does not, however, specify the circumstances in which the event giving rise to the harm may be considered to be harmful to the victim, or the evidence which the plaintiff must adduce before the court seised to enable it to rule on the merits of the case.*

39. *Those questions must therefore be settled solely by the national court seised, applying the substantive law determined by its national conflict of laws rules, provided that the effectiveness of the Convention is not thereby impaired."* The proposition contended for on behalf of the defendant seems to me to be one which would *impair* the effectiveness of the Convention. It is, it seems to me, a submission that national conflict of law rules be applied to rob the Convention of effectiveness, insofar as establishing jurisdiction pursuant to Article 7 (2) in respect of a defamation claim regarding online content. To say the foregoing is not for a moment to suggest that there is any lesser burden facing a plaintiff who has established jurisdiction pursuant to Article 7(2) at a future trial. The burden they face is, of course, one laid down by national rules. In other words, to be successful in making a claim for defamation in this jurisdiction it will plainly *not* be sufficient for a plaintiff who has invoked Article 7(2) on the basis (per *Martinez*) that the offending material was accessible in this State, to suggest that accessibility, for the purposes of a successful defamation claim in this State, is equivalent to the requisite publication, i.e. access. Plainly, it is not, but the present application is concerned with jurisdiction only and the proper interpretation of a test pursuant to Article 7(2) concerning same, not the extensive proofs required in respect of a successful action. It is also uncontroversial to say that any plaintiff who launches proceedings does so risking an award of costs against them if their proceedings ultimately prove to be unsuccessful. Although the foregoing comments seem to me to be appropriate, given the stark differences between the position in *Ryanair* and that before this Court, it needs to be emphasised that, for the purposes of the present application, this Court has been satisfied that the material in question, namely the relevant articles, were accessed by persons in this jurisdiction and that is a finding insofar as this application is concerned, not a finding in respect of any future trial of the substantive matter.

56. As I have already observed, para. (b) of the 24 September 2020 letter gives readership figures for what the defendant calls "*users geo - located in Ireland*", and no distinction is made between Ireland and the Republic of Ireland. I am nevertheless satisfied that the information provided constitutes evidence for the purposes of the present application of publication of the relevant articles in this jurisdiction, in circumstances where nowhere is it claimed that all, or indeed any, of the 13,382 times the articles were viewed, represented views by users located exclusively in Northern Ireland. Furthermore, no such

avertment was made on behalf of the defendant nor was any suggestion made to that effect, be it in writing or orally, during submissions at the hearing.

57. At para. 25 of *Ryanair*, reference was made to the decision in *Al Amoudi v. Brisard* [2006] EWHC 1061, [2007] 1 WLR 113, wherein an Ethiopian businessman based in Saudi Arabia who also spent two months each year in the United Kingdom commenced defamation proceedings in the English High Court against a Swiss – based and relatively obscure financial website hosted by a French national. As Hogan J. explained, the plaintiff sought to have part of the defence struck out on the ground that the very existence of a publicly accessible website itself gave rise to a presumption of publication but the English court held that there could be no such presumption, Gray J. stating that in every case the question of publication was a matter of fact for the jury and the plaintiff needed to prove that the material “*was accessed and downloaded*”. Several comments can fairly be made in relation to the foregoing. Firstly, the plaintiff in *Al Amoudi* was not relying on Brussels Recast as governing his entitlement to sue in the English courts. Wholly unlike the case before this Court, but similar to the position in *Ryanair*, the question of jurisdiction fell outside the scope of Brussels Recast. Nor does the plaintiff in the present case argue that the existence of a publicly accessible website gives rise to a presumption of publication. Rather, the defendant in this case, having made inquiries as to the specific readership figures for users located in Ireland in respect of the articles in question, has confirmed that it was viewed online 13,382 times by such users as at the date the proceedings issued. By contrast, in *Al Amoudi*, it appears that the number of “hits” made on the website from the United Kingdom had been “few”. In short, the facts in *Al Amoudi* are wholly unlike those in the present case. Hogan J. went on, at para. 26 in *Ryanair* to state:

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*“If one applies the reasoning in Al Amoudi to the facts of the present case, it is clear that in order to show that the tort of defamation has been committed in Ireland, it would be necessary for Ryanair to prove that some third party had either accessed or downloaded this post in the State”*

Mr. Justice Hogan then went on to examine affidavits sworn on behalf of *Ryanair* in which it was asserted that the relevant website: -

*“could be accessed by any user of the world wide web and is to be inferred that a substantial number of users have in fact accessed it and read the words complained of”.*

It was in the absence of a specific regulation which, per *Martinez*, entitles the plaintiff to bring defamation proceedings in the Member State of which content placed online is or has been accessible, that Hogan J., applying the reasoning in *Al Amoudi* to the specific facts in *Ryanair* held that, to show that *Ryanair* had been defamed in Ireland, required proof that a third party either accessed or downloaded the relevant post in this State. Having examined the specific affidavit evidence including the identification, by *Ryanair*, of eleven contributors to the particular website discussion who stated that they were located in Ireland and one other contributor based in Europe but identified as a named individual



living in Co. Meath, Hogan J. held at para. 27 that: - “None of this, however, in itself establishes that any of these twelve particular contributors accessed or downloaded the offending post in this jurisdiction”, going on to state the following from paras. 28 to 30, inclusive: -

“28. *It is true that the website could have been accessed by anyone with access to the internet anywhere in the world. Nevertheless, Ryanair has not identified any third party who has come forward to say that they have accessed or downloaded this particular post in this jurisdiction.*

29. *The Supreme Court's decision in Coleman v. MGN Ltd. [2012] IESC 20 is also of some importance in this context. Here the question was whether the publication in the on line edition of the well-known British newspaper, The Daily Mirror, was sufficient to ground the defamation proceedings in this jurisdiction for the purposes of Article 5(3) of the Brussels Regulation. Denham C.J. held that the fact of such publication had not been made out, 'as there was no evidence of any hits on such site in this jurisdiction.' In the absence of such proof, the Supreme Court held that it had no jurisdiction in the absence of evidence that a tort had been committed here.*

30. *It follows, therefore, that independently of any other consideration, the plaintiff has not demonstrated that the Irish courts have jurisdiction in the matter since, to repeat, there is no actual evidence that a third party located in this jurisdiction has accessed or down-loaded the offending post”.*

58. Later in this judgment I will refer to the *Coleman* decision which, it is fair to say, has a number of unusual features, the facts of which being wholly unlike those in the present case. With regard to the Court of Appeal’s decision in *Ryanair*, in particular what Hogan J. stated at para. 30 above, the situation in the motion before this Court is utterly different. This Court is satisfied for the purposes of the motion that there is evidence that third parties in this jurisdiction accessed the relevant articles. Indeed, the scale of such access has been confirmed with precision. It is clear, including from the *Ryanair* decision, that in appropriate cases, a court can infer that publication took place within the jurisdiction. As to that issue, the following comments seem to me to be appropriate. Although BuzzFeedNews.com is a website operated from the United States, it is not in dispute that, wholly unlike the facts in *Ryanair* and in *Al Amoudi*, it has a global audience. Indeed, the letter from the defendant’s solicitors dated 24 September 2020 makes specific reference to the global audience, giving specific figures in respect of the number of times the relevant articles had been viewed online globally (3,554,271). The letter also confirmed the percentage of the global audience represented by the audience located in Ireland (approx. 0.38%) and in the United States (approx. 82.71%). The Court of Appeal in *Ryanair* was concerned with an internet website forum entitled the “Professional Pilot’s Rumour Network” and, even though issues raised by forum participants were, on occasion, subsequently picked up by mainstream media, that website forum is utterly different to a news website with a global reach and an Irish audience which is not in

dispute. To my mind, any fair consideration of the totality of the evidence before this Court would entitle me to take the view that publication in this jurisdiction *can* be inferred. I would stress, however, that is not necessary to infer publication, as access to the relevant articles in this jurisdiction has been established, as has accessibility.

59. Even if, having confirmed through its solicitors on 24 September 2020 that the defendant "*does not contend that there was no publication in Ireland*", the defendant now seeks to resile or, in fact, resiles from that statement for the purposes of this application, I take the view that publication has *still* been established. It has been established by virtue of the very specific readership figures provided in respect of the articles for users located in Ireland as at the time the proceedings were issued. In other words, I take the view that the plaintiff respondent was entitled to approach this motion on the basis that the fact of publication in this jurisdiction was no longer in issue but, insofar as it is placed in issue, there has been no *change* whatsoever in respect of the readership figures which were given, even if the defendant now contends for the purposes of this application that there was no publication. Even if the defendant's attitude has changed, the relevant figures have not. No revised figures have been proffered, for example, to suggest that there was *no* readership in this jurisdiction after all. That being so, I am satisfied that there is sufficient evidence before the court of publication, there being no evidence whatsoever to the effect that the position confirmed in explicit and specific terms by the defendant, through its solicitors on 24 September 2020, has changed in any way, that confirmation being as follows: - "*We can confirm that the articles had been viewed online 13,382 times by users geo – located in Ireland as at the date these proceedings issued, i.e. 26 November 2019*".
60. In the manner examined above, I do not believe that, fairly considered, the Court of Appeal's decision in *Ryanair* is truly authority for the proposition that the state of the law in this jurisdiction is other than as set out in *Martinez* as regards jurisdiction arising by virtue of Article 7 (2) entitling the plaintiff to bring defamation proceedings before this Court in respect of the relevant articles which were *accessible* in this jurisdiction, with this Court having jurisdiction only as regards the damage allegedly caused in this State. Of course, to succeed, the plaintiff will have to prove publication being a fundamentally important element of the tort as it exists in this jurisdiction and as governed by this State's national law. That, however, is an observation which relates to the merits and the relevant proofs at a substantive hearing, not to jurisdiction in the manner provided for under Article 7 (2) as interpreted and clarified in *Martinez*. In short, a successful defamation claim under national law will undoubtedly require proof of publication, i.e. *access*, whereas *Martinez* refers to content placed online which is or has been *accessible*, the latter being what is required to ground jurisdiction. Even if I am entirely wrong in my views as to the interplay between the Court of Appeal's decision in *Ryanair* and what the CJEU held in *Martinez*, I am entirely satisfied that if *Ryanair* sets the bar higher for a plaintiff who invokes jurisdiction pursuant to Article 7 (2) and requires proof of *access*, in addition to *accessibility*, the former has also been established for the purposes of this application.

61. In a recent judgment in *Grovit v. Jan Jansen* [2020] IEHC 501, Hyland J. considered the proper interpretation of Article 5 (3), being the predecessor to Article 7 (2). In that case the defendant, a Dutch national, was pursuing the plaintiff and his son in proceedings in the Netherlands seeking to enforce a substantial money judgment which the defendant had obtained against a corporate entity. The plaintiff was born in India and later became resident and domiciled in the UK and the proceedings were conducted by an administrator *ad litem* in circumstances where the plaintiff had passed away. The proceedings with which the Irish court was concerned comprised a defamation action and an application for a negative declaration brought by the plaintiff which had the effect of staying the Dutch debt proceedings since 2016, on the basis that the Irish courts were first seized, for the purposes of jurisdiction, with the claim for a negative declaration. The defendant sought to strike out the plaintiff's claim on the basis that the Irish courts did not have jurisdiction and on a range of alternative grounds. It is clear from the judgment of Hyland J. delivered on 22 September 2020 that, by reference to the CJEU's decision in *Martinez*, the court confirmed that evidence of a third party in Ireland accessing or downloading the relevant article was not required where jurisdiction is pleaded pursuant to Article 5 (3) (now 7(2) of Brussels Recast). It is appropriate to quote at some length from the decision in *Grovit* wherein Hyland J. also examined the CJEU's 1995 decision in *Shevill*, the Supreme Court's 2012 decision in *Coleman*, and this Court's 2013 decision in *CSI Manufacturing Ltd. v. Dun and Bradstreet*. Although there was no dispute in respect of publication of a particular newspaper, the question of internet publication of the relevant article was a significant issue and the analysis by the court in *Grovit* was as follows: -

*"Publication*

44. *The first hurdle a party must surmount when seeking to establish jurisdiction in a defamation case under Article 5(3) is that the words have been published in the Member State where proceedings have been issued. In respect of the Notice, Counsel for the defendant accepts that there is sufficient evidence before the court to prove publication of the Times in Ireland at the date of the publication of the Notice, being 19 June 2014.*
45. *The question of publication in respect of the Website statement is more difficult. It is not disputed that the Notice was on the website of the Dutch law firm and therefore accessible from any country in the world. There is no evidence of any person in Ireland accessing that website or downloading the article. Nonetheless, in my view the decision of the Court of Justice in Case C-509/09 Martinez [2011] ECR I-10269 makes it quite clear that no such evidence is required. . . .*
46. *At paragraph 51, the Court referred back to Case C-68/93 Shevill and Others [1995] ECR I-415, noting that:*

*"instead of an action for liability in respect of all of the damage, the criterion of the place where the damage occurred, derived from Shevill and Others, confers jurisdiction on courts in each Member State in the territory of which content placed online is or has been accessible."*

*The Court had summarised the questions in respect of Article 5(3) as asking how the expression "the place where the harmful event occurred or may occur" is to be interpreted in the case of an alleged infringement of personality rights by means of content placed online on an Internet website. It answered that question by noting that the person who alleges rights have been infringed may, instead of an action for liability in respect of all the damage caused, "bring his action before the courts of each member state in the territory in which content placed online is or has been accessible".*

47. *What is notable about the response to that question is that there is no requirement to prove that the material has been accessed or downloaded in the Member State in which the action has been brought. The wording of paragraph 51 of Martinez is unambiguous: Article 5(3) confers jurisdiction on courts in each Member State where content placed online is or has been accessible (my emphasis)".*
48. *The defendant relies on two Irish cases to support the proposition that evidence must be given that the material is not just accessible but has actually been accessed. However, properly construed, I do not believe that either Coleman v. MGN Limited [2012] 2 I.L.R.M. 81 nor CSI Manufacturing Limited v. Dun and Bradstreet [2013] IEHC 547 are authority for the proposition that it must be proved that internet material has been accessed in the Member State where proceedings are brought to ground jurisdiction under Article 5(3).*
49. *In CSI, Martinez was considered but because the website in question, generated by a credit rating agency, was available only to subscribers, Kearns P. quite logically held that it must be proven that it had been accessed by a subscriber since accessibility could not be presumed where payment was required to access the site.*
50. *In Coleman, which concerned an allegedly defamatory newspaper article and photograph published in the Daily Mirror, a UK publication, the plaintiff only identified that the newspaper was accessible on-line when the matter came back before the Supreme Court having been adjourned so evidence of sales of the Mirror in Ireland could be produced. No such evidence was produced but when the matter was back before the court, counsel sought to rely upon the presumed publication on the internet of the relevant editions of the Mirror without any evidence of such publication or access from Ireland. The Court held it had no jurisdiction on the following basis:*

*"First there is no pleading that the publication alleged of the relevant articles is by internet publication of the relevant newspaper. Nor could such a pleading be inferred from the words of the Statement of Claim. Secondly, there is a need for evidence of publication to establish the tort of defamation. There is no evidence before the Court that the Daily Mirror was published on-line in 2003. There is no evidence that the daily edition of the Daily Mirror was on the world wide web in 2003. Thirdly, there is no evidence of any hits*

*on any such site in this jurisdiction. These are fatal flaws in the plaintiff's case".*

51. *It is difficult to conclude from that extract that a lack of evidence of any hits is a stand-alone ground for holding that there has been no publication. In that case, there were two additional overwhelming problems: internet publication had not been pleaded and there was no evidence of any publication. It is by no means clear that, had internet publication been pleaded and evidence of publication adduced, the court would have taken the same view. The question of the necessity of hits in Ireland does not appear to have been argued before the Supreme Court at all.*
52. *In the circumstances, I am not persuaded that it is a requirement of Irish law that to establish publication in respect of an internet publication, it is necessary to establish that it has actually been accessed in Ireland. As pointed out by the Court in Martinez, to quantify the distribution of material on the internet with certainty and accuracy in relation to a given Member State may not always be possible. Moreover, the wording of Martinez is clear and unambiguous i.e. that jurisdiction exists under Article 5(3) where content placed online is or has been accessible. Where, as in this case, there is no contest to the averment that the website containing the statement was accessible in Ireland, there is in my view no scope for adding an additional requirement of proof of access or hits by users in Ireland. Any such requirement would not be in keeping with the judgment in Martinez".*
62. The foregoing analysis is one I gratefully adopt. For the defendant in the present case, it is argued that the judgment in *Grovit* is inconsistent with, and runs contrary to, the dicta in *Shevill*, in *Coleman* and, in particular, in *Ryanair*. For the reasons set out in this decision, I cannot agree with that submission. Given how different the background and factual position were in *Ryanair* and in *Coleman*, I am not at all convinced that they are authority for the proposition that Martinez does not represent an accurate and complete analysis of the effect of Article 7 (2) or that an additional hurdle exists being, in the present case, to prove the fact of access, as opposed to accessibility, for a plaintiff to establish jurisdiction pursuant to Article 7 (2). Even if I am entirely wrong, the fact of access has been established for the purposes of the motion before this Court. Among the submissions made, particular reliance is placed by the defendant on para. 41 of *Shevill*. The thrust of the argument is that, because at para. 41 in *Shevill*, the CJEU held that *"...the criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged by the victim of the defamation are not governed by the Convention but by the substantive law determined by the national conflict of laws rules of the court seised"*, there is an additional obligation on the plaintiff in the present motion to prove the fact of publication in Ireland, not merely the accessibility of the offending articles. If that is the case, I am satisfied that the plaintiff has met this additional requirement, although, for the reasons detailed in this judgment, I am not convinced that such an additional requirement truly arises on a proper analysis of various decisions, domestic and European. It will be recalled that, earlier in this judgment, I quoted from para. 39 in *Shevill*, having set out paras 37 and 38 by way of

context and the principle which emerges from *Shevill* appears to me to be that in the application of national conflict of law rules, the effectiveness of the Convention cannot be impaired in the manner contended for by the defendant. It should also be noted that, para. 41 in *Shevill* is where the CJEU provided an answer to questions which were set out at para. 34 in the following terms: "*The national court's fourth, fifth and seventh questions, which should be considered together, essentially ask whether, in determining whether it has jurisdiction qua court of the place where the damage occurred pursuant to Article 5(3) of the Convention as interpreted by the Court of Justice, it is required to follow specific rules different from those laid down by its national law in relation to the criteria for assessing whether the event in question is harmful and in relation to the evidence required of the existence and extent of the harm alleged by the victim of the defamation*". The foregoing recognises that different national systems may require different evidence of for example, publication or harm, and that, once seized with jurisdiction pursuant to Article 7 (2) the applicable national law will govern the main proceedings. For example, in certain jurisdictions, damage may be presumed in libel actions, whereas not in others, but this question is one for the applicable national law of the relevant Member State where the claim is brought, jurisdiction having been determined by, for present purposes, Article 7 (2).

63. Just as this Court did in *Grovit*, I take the view that, in order to establish that this Court has jurisdiction to determine defamation proceedings pursuant to Article 7 (2) of Brussels Recast, the plaintiff must demonstrate that the articles are or have been accessible in this jurisdiction. It might also be noted that *Shevill* was decided seventeen years prior to *Martinez* and the CJEU plainly had regard to its earlier decision in *Shevill* when formulating the applicable test in *Martinez* in respect of content placed online. Few people will be unaware of the growth of the internet between 1995 (when *Shevill* was decided) and 2012 (when the decision in *Martinez* was given) and *Martinez* represented an explicit attempt by the CJEU to set out an appropriate interpretation of the principles governing special jurisdiction derived from Article 7 (2) which recognised the very particular challenges posed by internet content. Indeed *Martinez* acknowledged explicitly the difficulties, in the context of the internet, in giving effect to the criterion relating to the occurrence of damage as derived from *Shevill*, contrasting this with the serious nature of the harm which may be suffered by someone who establishes that information injurious to their personality right is available on a worldwide basis. It was in this context *Martinez* updated and set out the relevant principles which, I am satisfied, govern the present application. This has been demonstrated and the requirements for establishing jurisdiction have been satisfied. Even if I am entirely wrong in the view that accessibility is sufficient in the manner explained in *Martinez*, I am satisfied that access occurred as a matter of fact in that the articles were viewed by a substantial readership in this jurisdiction prior to the proceedings being commenced.
64. In seeking the relief in the motion, the defendant also places reliance on the Supreme Court's decision in *Coleman v. MGN Ltd.* [2012] 2 ILRM 81 wherein Denham C.J. stated, at para. 14 that: - ". . . *there is a need for evidence of publication to establish the tort of defamation*", the court also noting that there was "*no evidence of any hits*" on the

relevant website in Ireland. For the defendant, it is submitted that publication to a third party is an essential element of the tort of defamation pursuant to s. 6 (2) of the Defamation Act 2009 and the mere fact that defamatory material was accessible cannot, of itself, amount to harm for the purposes of the tort. As regards the foregoing, it is not in dispute that an essential element of the tort of defamation is publication and there is no dispute that, in order to succeed in its claim at trial, the plaintiff must prove publication as an essential element of the tort. That is not, however, to say that, with regard to the rules derived from Brussels Recast, in particular Article 7 (2) as interpreted by the CJEU in *Martinez*, a plaintiff must also prove the fact of publication or access (as opposed to or, rather, in addition to, accessibility of the online material) in the context of asserting jurisdiction pursuant to Article 7 (2).

65. Having already adopted, with gratitude, the analysis of *Coleman* as set out in the *Grovit* decision, it is useful to examine the facts in *Coleman*, as follows. The plaintiff commenced proceedings in 2006 claiming damages for defamation, breach of contract, negligence, breach of duty and breach of statutory duty. The defendant filed a memorandum of conditional appearance to contest jurisdiction. A statement of claim was delivered pleading matters relating to tort and contract but, in submissions to the Supreme Court in March 2012, the plaintiff's counsel indicated that the claim was now in tort alone based on the principles in *Martinez* and on publication on the internet. In 2007, the High Court (Charleton J.) refused the defendant's application which sought an order that the court had no jurisdiction. The defendant appealed this decision to the Supreme Court. The appeal came before the Supreme Court in October 2010 when it was indicated in the course of the hearing that there was evidence of circulation of the defendant's newspaper in Ireland but that it was not before the court. The court was informed of a belief by counsel for the plaintiff, on instructions, that the "Daily Mirror" newspaper in issue was available in Ireland in ordinary retail outlets and, in those circumstances, the Supreme Court gave time to the plaintiff and to the defendant to file evidence on affidavit. The case resumed in March 2012 at which point, counsel for the plaintiff confirmed that the claim was now one of internet publication, having regard to the decision in *Martinez*. It was also submitted that the "Daily Mirror" is online every day, although counsel for the plaintiff admitted that there was no evidence of such publication or of any person accessing such a site, with counsel also submitting that the "Daily Mirror" being online gave rise to a presumption that there would be hits on the site.
66. At this juncture, it is appropriate to point out several factors which distinguish *Coleman* from the case before this Court. Firstly, it was not until 2012 that the plaintiff invoked the *Martinez* principles in respect of proceedings commenced six years earlier. Furthermore, in 2010 the Supreme Court was told that there was evidence of circulation of the relevant newspaper in Ireland which was not before the court and time was given to the plaintiff to file such evidence on affidavit yet, in 2012, instead of evidence of circulation of a physical newspaper, there was an alteration in the case in that the claim was said to relate to internet publication. There has been no such shift in the plaintiff's position in respect of the present case. Furthermore, it was admitted on behalf of the plaintiff in *Coleman* that there was no evidence of online publication or of any person accessing a site. In contrast,

over 13,000 people located in Ireland have viewed the relevant articles in the present case, as confirmed by the defendant, through its solicitors. Furthermore, and wholly unlike the situation in *Coleman*, there is no dispute about the fact that the relevant articles appeared on a particular website, namely BuzzFeedNews.com. and there is no dispute that this website has a global audience and was accessible to viewers based in Ireland. The height of the plaintiff's case in *Coleman* was to submit that the "Daily Mirror" being online gave rise to a presumption that there would be hits on the site. The facts in the present case are utterly different.

67. As the then – Chief Justice observed, at para. 11 of *Coleman*, it transpired that the instructions given to counsel for the plaintiff in 2010 were incorrect and, consequently, there had been no need to adjourn the case to obtain evidence but the adjournment had given the plaintiff the opportunity to bring evidence in support of his case. As to the basis of the hearing which took place, Denham C.J. stated the following: "*On the hearing of the appeal, however, counsel sought to rely on the presumed publication on the internet of the relevant editions of the Daily Mirror. It followed that there was no evidence of such internet publication, or of access from Ireland*". By contrast, in the case before this Court, there is evidence that the relevant articles appeared on BuzzFeedNews.com – something not disputed - and, furthermore, there is evidence of access from Ireland, in that very specific readership numbers have been confirmed by the defendant in respect of internet users who viewed the relevant article. It is appropriate to quote the following from the end of the *Coleman* decision;-

*"Decision*

12. *The case is now one where it is the plaintiff's case that the defamation was published on the internet. Specifically, he referred to the Daily Mirror on line. There was also reference to UKPressOnline, which is an archival website, to which institutions, such as academics, have access if they subscribe, but there is no general access other than to a thumbnail miniature of part of the article and photograph. It was agreed by counsel that the plaintiff could not be recognised on such a miniature, which could not be legibly enlarged. Further, as the plaintiff's name was not mentioned in the articles in question he could not be identified by a search on that basis. Thus, the case for the plaintiff is now based on a publication of the Daily Mirror on line in 2003.*
13. *There has thus been a shifting nature to this appeal in its progress in this Court.*
14. *There are several relevant difficulties which arise on the plaintiff's case. First, there is no pleading that the publication alleged of the relevant articles is by internet publication of the relevant newspaper. Nor could such a pleading be inferred from the words of the Statement of Claim. Secondly, there is a need for evidence of publication to establish the tort of defamation. There is no evidence before the Court that the Daily Mirror was published on line in 2003. There is no evidence that the daily edition of the Daily Mirror was on the world wide web in 2003. Thirdly,*



*there is no evidence of any hits on any such site in this jurisdiction. These are fatal flaws in the plaintiff's case.*

#### *Conclusion*

15. *The basic grounds upon which the plaintiff now moves his case in this Court was never pleaded and is not established in evidence. In spite of the ingenuity of counsel for the plaintiff in his submissions, these difficulties are insurmountable. Neither on the pleadings nor on the evidence does the Court have jurisdiction. Consequently, I would allow the appeal, and order that in the circumstances of the case the Court has no jurisdiction over the subject matter of the proceedings”.*
68. A number of comments can fairly be made in relation to the foregoing. The defamation in question constituted an article in the “Daily Mirror” newspaper under the heading “*Yob War – Boozy: Lads on a typical night out in Britain*”, which article went on to state *inter alia*: “*A major crackdown on yobs, drunks, litter bugs and noisy neighbours was launched by David Blunkett yesterday. . . .*” The article was accompanied by a photograph, but the plaintiff, described in the statement of claim as a resident of Mayo, was not named at all in the article. The underlying facts in *Coleman* could hardly be more different to those in the present case. It is not in dispute that the plaintiff was named in the relevant articles and is someone who, wholly unlike the plaintiff in *Coleman*, is a well-known individual. That is not for a moment to make any finding touching on the merits but, for the purposes of this application, there is an uncontested averment at para. 8 of the plaintiff’s affidavit wherein he states that: “*I have and have for many years have had a significant following in Ireland and readily identifiable to a large number of people in Ireland, as I am in many other countries. The allegations made by the defendant in the articles I complain of clearly tend to injure me in the minds of reasonable people in Ireland*”. Again, without purporting to make any determination whatsoever touching on the substantive claim, the fact that investigative reporters, employed by the defendant, produced a series of articles in respect of the plaintiff for publication on a website which has a global audience illustrates the very different factual background between *Coleman* and the present matter.
69. Another very significant distinction is that the “UKPressOnline” website referred to by the Supreme Court was, firstly, only available to subscribers and, secondly, provided access only to what was described as a “*thumbnail miniature of part of the article and photograph*” in which the plaintiff could not be recognised, which miniature could not be legibly enlarged. There is no evidence before this Court that the relevant website where the articles appeared was subscriber – only. Nor is there any evidence that, although accessible to users based in Ireland, the articles were somehow illegible. Nothing of the sort arises. These distinctions as to facts seem to me to be important and recalling that, in *Martinez*, the CJEU referred to the option to sue in the Member State where online content is or has been “*accessible*”, it is entirely understandable why online content requiring a subscription, with no general access other than to a miniature extract in which

the relevant plaintiff, who was never named, was not recognisable, would fail to satisfy the test of accessibility as articulated in *Martinez*.

70. Another significant point of distinction between *Coleman* and the present case is, of course, that the case was in being for several years and a statement of claim had been delivered. The observation made by Denham C.J. that "*there is no pleading that the publication alleged of the relevant articles is by internet publication of the relevant newspaper*" plainly does not arise in the application before this Court and is not a criticism which could fairly be levelled at the plaintiff. This is for the very understandable reason that no statement of claim has yet been delivered, the appearance filed on behalf of the defendant being a conditional one exclusively for the purposes of challenging jurisdiction.
71. On the evidence before this Court in the context of the motion it has to decide, it is also plain that the plaintiff fully intends to plead internet publication. Among other things, at para. 7 of the plaintiff's affidavit he refers to the letter from the defendant's solicitors averring to his belief that it was confirmed there was publication in Ireland and I have examined that 24 September 2020 letter in detail earlier in this decision. It is also perfectly clear from the averments made by the plaintiff's solicitor, Mr. Tweed, that he is alive to the importance of proof of publication as an element of the tort of defamation. In light of Mr. Tweed's averment at para. 12 that "*Although it is for the plaintiff to establish publication in Ireland, it is unusual, if not unheard of, for a plaintiff to be required to provide such evidence at this early stage*", I believed I am entitled to infer the intention of the plaintiff to plead, in due course, that the relevant articles were published in this jurisdiction, via internet publication. Furthermore, at para. 19 of the plaintiff's written submissions it is explicitly stated that: - "*In the present case, internet publication will be pleaded by the plaintiff and the fact that such publication occurred is not in dispute*". In other words, and wholly unlike the position in *Coleman*, there is no question of having to "infer" a plea as regards internet publication from a statement of claim which failed to include such a plea. It is clear that the plaintiff fully intends to plead internet publication. There is obviously a need for evidence of publication to succeed in the tort of defamation and that is not in dispute.
72. In short, the various difficulties identified by the Supreme Court in *Coleman* appear to be difficulties referable to the specific facts of the case before it. Whereas the Supreme Court in *Coleman* found that the basic grounds upon which the plaintiff moved his case were neither pleaded nor established in evidence, the plaintiff before this Court explicitly relies on Article 7 (3) and there is evidence both of accessibility and access to the relevant articles in this jurisdiction. That said, and for the reasons articulated by Hyland J. in *Grovit*, I am not satisfied that *Coleman* is authority for the proposition that a plaintiff who invokes jurisdiction pursuant to Article 7 (3) must go further than the CJEU explained in *Martinez*.
73. To look more closely at *CSI Manufacturing v. Dun & Bradstreet* [2013] IEHC 547, in that case the impugned content was placed on a website which was accessible only to subscribers and, having noted that the complexities of internet publication were

addressed by the Supreme Court in *Coleman* and, having referred to the decisions in *Shevill* and in *Martinez*, Kearns P. stated the following at para. 14: -

"14. *In Martinez the court clarified that for internet publications it suffices that the content has been placed online or otherwise made accessible in the country of receipt. It is alleged by the applicant that the publication in the instant case is different to that in the Coleman case. It was alleged in Coleman that, as the site in question was a site accessible only to subscribers, the defamatory publication could not be deemed to have been published in this jurisdiction. The site in the present case is a subscription site. Akin to Coleman it cannot be inferred that publication has occurred. Where a site is a subscription site the information is not readily available across jurisdictions. The court in Coleman required evidence of internet publication and access from Ireland. The only evidence of access to the information in the present case is of access by Thales International, a company situated in Belfast*".

74. The foregoing analysis by Kearns P. seems to me to be entirely supportive of the plaintiff's position and indicates that, per *Martinez*, the question is whether the online content was *accessible* and where, as in *Coleman*, the site was subscriber – only, this did not constitute accessibility and, thus, the court in *Coleman* required evidence of access from Ireland. Having quoted from the *Martinez* decision, Kearns P. went on to explain that, on the facts of the case in question, which involved a subscriber – only site, the material was accessible in a technical sense in Ireland due to the fact that the respondent company had Irish clients. It was in that context that he stated that it must still be proved that the material was accessed in this jurisdiction to show publication within s. 28 of the 2009 Act stating further: -

"16. *The fact that the site is subscription only means that the information is only available to those who subscribe and in this instance the only subscribers who requested the defamatory information were in fact Thales. Thus the only publication was to Thales. This is evident from the spreadsheet attached to Ms. Moorcroft's affidavit of the 17th January, 2013. Further, the only publication was to Thales Limited in Belfast.*

17. *On a strict interpretation of Martinez, which is the relevant law on the matter, and on an application of the rules in that decision, this Court considers: first that the particular nature of the publication in this case was to a restricted audience; and second, that the centre of interest of the injured party in this case requires examination*".

75. In the foregoing passage, Kearns P. was explicit as to the fact that the interpretation given in *Martinez* constituted the relevant law in this jurisdiction. He then examined the centre of interest test, referring both to *Shevill* and to *Martinez* and quoting paras. 42 – 52, inclusive, from the *Martinez* decision. It is also appropriate to quote, in full, the conclusion to the judgment of Kearns P. in *CSI Manufacturing*, as follows: -

## "CONCLUSION

21. *The publication in question by the respondent was on a subscription site only accessible to people paying a fee. In the instant case the publication was seen only by a subscriber in Belfast and the publication was from a company based in the United Kingdom. Hence publication which fulfils the requirements of s.28 of the Act of 2009 has not been made out.*
22. *Looking at the European jurisprudence as outlined in Martinez and Shevill the court will only proceed to apply the centre of interest test after publication is made out. The Supreme Court examining the same jurisprudence in Coleman could not infer publication from a subscription site where the information was not readily accessible in this jurisdiction. Furthermore, no evidence of publication in Ireland has been made out.*
23. *Shevill confers jurisdiction on courts in each Member State in the territory where the content is accessible. Although the content is available to subscribers in Ireland it has not been proven to have been accessed by subscribers in Ireland. I would therefore allow the respondent's appeal".*
76. The facts in the case before this Court are wholly different to those in *CSI Manufacturing*. The present application does *not* involve a subscriber – only site. Far from there being a *single* subscriber based in Belfast, in excess of 13,000 people located in Ireland viewed the relevant articles as at the date the proceedings were issued. It is also clear from the decision in *CSI Manufacturing* that Kearns P. was alive to the distinction between material being accessible, as outlined in *Martinez*, and online content being accessible only in a technical sense, in that it could be accessed if but only if one were a subscriber. It was in the latter context that Kearns P. held that it had not been proven that the online content was accessed by subscribers in Ireland.
77. Properly examined, the decision in *CSI Manufacturing* is not, in my view, authority for the proposition that, whereas *Martinez* gives jurisdiction where material is accessible, one also has to establish that the material was in fact accessed. Rather, Kearns P. noted the correct test as per *Martinez* and, just as Hyland J. considered same in *Grovit*, and dealing with a subscriber – only site where the only evidence of access was from one subscriber in Northern Ireland, Kearns P. found on the facts of the case before him that the material was not accessible, not having been accessed. The approach taken by Kearns P. was consistent with that adopted by the Supreme Court in *Coleman*. As Kearns P. observed, the Supreme Court in *Coleman*: "...could not infer publication from a subscription site where the information was not readily accessible in this jurisdiction". The use of the term "accessible" is significant, accessibility being the test in *Martinez*, not access. In circumstances where, being on subscriber – only sites, the material both in *Coleman* and in *CSI Manufacturing* may have been technically accessible but certainly not readily accessible, evidence of access was required, but was lacking. No such circumstances arise in the present case.

78. For the reasons explained in this decision, I am satisfied that, for the purposes of the present application, it has been established that there was publication in this jurisdiction of the articles complained of. It has been established, for the purposes of this application that the articles were, not only accessible to internet users located in this jurisdiction, but also accessed by such users, the defendant's calculation being that the relevant articles were viewed online 13,382 times by users geo – located in Ireland as at 26 November 2019, being the date the proceedings issued. Although the case has not reached the statement of claim stage, it is clear that the plaintiff intends to plead internet publication. In my view, the plaintiff has discharged the burden of establishing that this Court has jurisdiction pursuant to Article 7 (2), the plaintiff having limited the claim which this Court has jurisdiction to hear pursuant to Article 7 (2), to a claim for damage suffered within this Court's jurisdiction. In the manner explained in this judgment, I do not accept the submission that this Court's decision in *Grovit* is at odds with the Court of Appeal's decision in *Ryanair* as to the relevant test established by the CJEU in *Martinez* but even if I am wrong in that view, the evidence before this Court is sufficient to demonstrate both access as well as accessibility, in this jurisdiction, to the online material complained of.
79. As to the doctrine of *forum non conveniens*, I am satisfied that it is not applicable in circumstances where, as found in the present case, jurisdiction is derived from Brussels Recast. In *Owusu v. Jackson* (Case C – 281/02), 1 March 2005, the CJEU made clear that the doctrine of *forum non conveniens* would undermine the predictability of the rules of jurisdiction laid down in the Brussels Convention if it were to be applied to cases where jurisdiction arose under the provisions of the Brussels Convention, specifically Article 2: -
- "41. *Application of the forum non conveniens doctrine, which allows the court seized a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention . . . .*
- Moreover, allowing forum non conveniens in the context of the Brussels Convention would be likely to affect the uniform application of the rules of jurisdiction contained therein in so far as that doctrine is recognised only in a limited number of Contracting States, whereas the objective of the Brussels Convention is precisely to lay down common rules to the exclusion of derogating national rules".*
80. On behalf of the defendant it is made clear that the *forum non conveniens* argument is very much a subsidiary one. Nevertheless, it is one which is urged on the court, the submission being that there is no authority which specifically says that the special jurisdiction provided for under Article 7 (2) of Brussels Recast excludes the application of *forum non conveniens* principles. The submission is made that, at a level of principle, it cannot be the case that Article 7 (2) can be relied upon to the exclusion of what is described by the defendant as a "more appropriate jurisdiction" with this Court also being excluded from considering the appropriateness of the Irish courts dealing with the

proceedings, having regard to *forum non conveniens* grounds. Regardless of the skill with which this submission is made, I regard myself as bound to reject it. In *O’K v. A* [2008] 4 IR 801, this Court rejected the defendant’s argument that the CJEU’s decision in *Owusu* applied only in cases where jurisdiction was derived from Article 2 of the predecessor to Brussels Recast, stating, at [17] of the decision: “*Counsel for the respondent submitted that the court should not apply the judgment of the European Court of Justice in Owusu v. Jackson & Ors (Case C – 281/02) [2005] E.C.R. I-01383 to this case as he maintained it only applied in cases which derived jurisdiction under Article 2 of Brussels I” and going on to state, at [29] of the decision: “I hold that the doctrine of forum non conveniens, or forum conveniens as it is also called, does not survive Brussels II bis”.*

81. In *Abama & Ors. v. Gama Construction (Ireland) Ltd. & Ors* [2015] IECA 179, the Court of Appeal upheld a decision of this Court (Dunne J.) to the effect that the doctrine of *forum non conveniens* is not applicable where jurisdiction is based on the provisions of Brussels Recast or its predecessor, stating as follows at para. 5: -

“5. *In the Court below, Dunne J. decided that the claim came within the Regulation and that, in accordance with the judgment in Owusu v. Jackson (trading as Villa Holidays Bal-Inn Villas and others (Case C281/02 [2005] E.C.R-1 383) common law principles of forum non conveniens must yield to the jurisdiction founded upon the Regulation...”.* It is also appropriate to quote the following extracts from paras. 37 – 40, inclusive of the Court of Appeal’s decision in *Abama*: -

“37. *Having noted the answer given by the ECJ in Owusu, Dunne J. went on to note the comments of Clarke J. in Goshawk when he refused a stay in that case on the grounds that the Regulation removed the discretion of the court under the common law, and she noted also that the Supreme Court had agreed. Dunne J. concluded in this regard:*

*“The thrust of the decision in Owusu is that national courts are deprived of the common law jurisdiction to stay proceedings on grounds of forum non conveniens. The decision in Donohue v. Armco emphasised that it will be a rare case in which a choice of jurisdiction clause will not be given effect but having said that it is a discretionary decision as to whether or not to grant a stay to give effect to a choice of jurisdiction clause. It is my view that Owusu is equally binding to deprive a national court of the common law jurisdiction in relation to the exercise of discretion in the context of a choice of jurisdiction clause subject, of course, to the provisions of the Regulation in relation to choice of jurisdiction clauses. In this case, the plaintiffs have contended that Article 21 of the caps on regulation which concerns contract of employment precludes the operation of the choice of jurisdiction clause relied on by the defendants as it was not entered into after the dispute between the plaintiffs and the defendants had*

*arisen. Assuming that the Regulation is applicable to this case, I agree with that contention."*

38. *Dunne J. went on to conclude that the Regulation was applicable and could be invoked by the plaintiffs despite the fact that they had moved their application for service out of the jurisdiction under O.11. and had not invoked O.11A or 11B RSC, and had not included within the Plenary Summons the endorsement required by O. 4, rule 1A RSC as already referred to above. Her conclusion that the Regulation is the basis of the Court's jurisdiction over the plaintiffs' claims despite a procedural irregularity by the plaintiffs in failing to include that endorsement in their Plenary Summons was, she felt, and correctly so in my view, supported by a passage which she quoted in her judgment from Cheshire, North and Fawsett on Private International Law (4th ed.) at p.300 . . .*
39. *Dunne J. concluded that the failure to adhere to the correct procedure by the plaintiffs did not oust the application of the Regulation, and suggested that an application to amend may be necessary to show the basis on which jurisdiction is invoked. The plaintiffs, as already noted, made such an application to amend before White J. and this was granted. That order is the subject of appeal before this Court also.*
40. *I am satisfied that the reasons stated by Dunne J. for her conclusion that the plaintiffs are entitled to rely on the provisions of the Regulation as forming the basis of jurisdiction, and therefore that the discretionary application made by the defendants for a stay in these proceedings is precluded by virtue of the application of the Regulation having regard to the decision in Owusu are correct".*
82. Furthermore, in *Vodafone GmbH v. IV International Leasing*, this Court (Barrett J.) with reference to the decision in *Owusu* and in *Abama*, reaffirmed the principle that there was no scope for a *forum non conveniens* argument to be raised where jurisdiction is established under Brussels Recast, the following being stated at para. 178: - *"...in circumstances where there is a Brussels Regulation defendant there is no scope for the application of the common law doctrine of forum non conveniens. In such circumstances, it appears to the court, the Recast Brussels Regulation is transcendent and ousts any attempt to rely on forum non conveniens".*
83. In the present case, jurisdiction has been established pursuant to Article 7 (2) of Brussels Recast. That being so, and having regard to the decisions in *Owusu*, *Abama* and *Vodafone GmbH*, I am satisfied that it would not be appropriate for this Court to proceed to consider the defendant's arguments in relation to the doctrine of *forum non conveniens*. I am satisfied that, in circumstances where the plaintiff has established jurisdiction pursuant to Article 7 (2), there is no scope for the defendant in the present proceedings to deploy common law *forum non conveniens* principles to try and undo the effects of the proper application by this Court of the provisions of Article 7 (2) of Brussels Recast, as

interpreted by the relevant jurisprudence. At a level of principle, were this Court to entertain a *forum non conveniens* argument, in circumstances where jurisdiction has already been established under Article 7 (2) of Brussels Recast, it would be to introduce the very type of uncertainty which Brussels Recast has, as its aim, to avoid and it would be to undermine the aim of the orderly administration of international justice. For these reasons I am satisfied that submissions made on *forum non conveniens* grounds with reference to decisions including *Richardson v. Schwarzenegger* [2004] EWHC 2422 (QB); *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] AC 460; *Irish Bank Resolution Corporation v. Quinn* [2016] 3 IR 197 cannot avail the plaintiff.

84. For the reasons set out in this decision I am satisfied that the appropriate order for this Court to make is to refuse the reliefs sought in the notice of motion. On 24 March 2020, the following statement issued in respect of the delivery of judgments electronically: “*The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.*”
85. Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order, including as to costs. In default of agreement between the parties, short written submissions should be filed in the Central Office within 21 days from the date of this judgment. This is not to direct that submissions be exchanged. It is to direct that submissions be filed. The said period will allow 7 days for agreement to be reached, failing which, there will be 14 days to facilitate the delivery to the court of such submissions, if any, either side wish to make in respect of the form of the final order reflecting this decision and including the appropriate order to be made in respect of costs, this court’s preliminary view being one guided by the long-standing principle that, generally speaking, “costs should follow the event”, which principle has been articulated in many authorities, including in *Veolia Water UK plc v. Fingal County Council* [2007] 2 I.R. 81 and in *Godsil v. Ireland* [2015] 4 I.R. 535, also finding expression in ss. 168 and 169 of the Legal Services Regulation Act of 2015 and in Order 99 of the Rules of the Superior Courts (as amended by S.I. 584 of 2019).