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IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION



Claim No. HQ17M0412

[2018] EWHC 2240 (QB)

Royal Courts of Justice

Thursday, 19 July 2018

Before:

THE HONOURABLE MR JUSTICE NICKLIN

B E T W E E N :

MATTHEW ZARB-COUSIN

Claimant

- and -

(1) ASSOCIATION OF BRITISH BOOKMAKERS  
(2) MALCOLM GEORGE

Defendants

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MS A. MARZEC (instructed by Lupton Fawcett LLP) appeared on behalf of the Claimant.

MR A. SPEKER (instructed by Brett Wilson LLP) appeared on behalf of the Defendants.

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**J U D G M E N T**

MR JUSTICE NICKLIN :

- 1 These are libel proceedings brought by the claimant, Matthew Zarb-Cousin, against the Association of British Bookmakers and the second defendant Malcolm George.
- 2 On 26 September, the claimant and the second defendant appeared on Channel 4 News. A presenter, Cathy Newman, introduced a section of the programme which lasted for about 14 minutes. She said this:

“They have been called ‘the crack cocaine of gambling’ but the Government has hinted of a crackdown on high street betting machines. The money that can be lost in some fixed odds betting machines is eye-watering. It is theoretically possible to lose £18,000 in an hour. Labour has just demanded that the betting industry pay new tax to help addicts and the Government is expected to announce what action it will take shortly. But as our reporter, Andy Davies, found out in Gloucester, jobs might be at risk and problem gambling won’t go away if you just tinker with the machine.”
- 3 A pre-recorded item was then shown as part of the programme. It consists of mainly an interview with Hussain Varajee. He was a self-identified gambling addict who talks to the reporter about his addiction and the consequences for him. The item concentrates upon what are called “fixed odds betting terminals”. Pictures are shown of the machines in use, particularly offering roulette. The reporter outlines that up to four machines can be found in any betting shop and using them, it is possible to bet £100 every 20 seconds. Repeating a phrase from the introduction, he says the critics refer to them as “the crack cocaine of gambling”. Mr Varajee says that from the moment that he started using the machines he was addicted. You can see him walking through the centre of a Gloucestershire town with the reporter pointing out the large number of betting shops that can be seen walking only a short distance. The reporter says that Mr Varajee has been made bankrupt eight years ago and in 25 years, Mr Varajee estimates that he has lost over £1 million and that his addiction contributed to the breakdown of two relationships. His example is said to be fuelling:

“...one of the most vociferous campaigns yet to target the lucrative world of Britain’s 34,000 fixed odds betting terminals.”
- 4 Mr Davies then explains that the Government is expected to announce its review into gambling in the Autumn and that it was anticipated that the maximum stake for the fixed odds terminals would be reduced from £100 possibly to £2 as was lobbied for by some groups. One independent bookmaker in Gloucester, David James, was then asked by Mr Davies what would happen if the stakes were substantially lowered in this way. He states that he would have to close his business. At least 60% of his business is said to come from the fixed odds betting terminals in his shop. Mr James expressed his sympathy for those of his customers that have a gambling addiction but asks rhetorically: what is he supposed to do? He has a business to run and four people employed in it. Mr Davies tells viewers that the gambling industry says that thousands of jobs are at stake and it has significantly upgraded the support available for problem gamblers by enabling limits to be placed on betting and offering facilities to allow people to “self-exclude” from betting shops.
- 5 A man, introduced as Tony, is interviewed as another problem gambler who played roulette on fixed odds terminals every day. He identifies as a current gambling addict. Mr James is then asked whether he thinks the betting industry has acted responsibly in relation to these

machines. He responds that he does not think that more could have been done. Mr Davies puts it to him that the stake could be lowered from £100 but Mr James answers that, if that happened, no one would play the machines and the machines could be “chucked out on to the street”. At the end of the item, Mr Varajee says that he has stopped gambling but that he still feels a strong urge to use the machines. However, a final voiceover from Mr Davies tells viewers that Mr Varajee has, since the interview, admitted that he has started gambling again.

6 The programme then returns to the studio and the presenter, Cathy Newman. She introduces the second defendant as the spokesman for the first defendant sitting with her in the studio. The claimant participates on a video link and was introduced as “former gambling addict and campaigner”. Ms Newman asks the second defendant, who is captioned on screen as “CEO of the Association of British Bookmakers”, whether he feels sorry for Mr Varajee. There then follows a debate between the claimant and the second defendant moderated by Ms Newman. I say “moderated”, but Ms Newman presses the second defendant on his answers but does not probe the claimant’s answers. I am not being critical of that, it is entirely a matter of editorial judgment. I simply note it because it is fair to say that the second defendant would appear to viewers to be somewhat on the backfoot in this programme. As part of their on-screen argument, the claimant and the second defendant trade statistics as to the number of problem gamblers there are and whether there has been a significant or reliable statistical percentage increase in the number of problem gamblers between 2012 and 2015. In addition, the claimant makes a number of what would appear to be factual points during the debate: (1) that many betting shops are single-manned and comments that that limits the ability to enforce self-exclusion or to allow any meaningful monitoring of potential problem gamblers using the machines; and (2) 97% of police calls to gambling premises are to betting shops and that a third of fixed costs betting terminals are smashed every year. The claimant comments that the reason for this happening is because people are addicted to them.

7 When I had watched the item before this hearing, and that is deliberately before I had read and looked at the skeleton arguments, I gained an impression that the second defendant was making pointed references to casinos in a way that appeared unnatural. At one point, he says, “Do you move somebody like Mr Hussain [by which he means Mr Varajee] out of a betting shop where he gets personal interaction? Do you move him into a casino? Do you move him online? Do you move him into an amusement arcade?” implying that, in each of those alternative scenarios posited, Mr Varajee would be worse off and at greater risk. He repeats essentially the same points a few minutes later. Towards the end of the interview, the two men speak over each other. The claimant is attempting to make a point that a large number of people are addicted to the fixed odds machines and the second defendant says, although part is over-spoken by the claimant:

“It’s a complete misportrayal of our industry, deliberate, conscious, by a man who’s funded by the casino industry.”

The tone is dismissive of the claimant and then the claimant responds:

“I’m not, no. I’m not. No, absolutely not. Wow.”

8 It is those words, before the claimant’s response that I have just quoted, that form the basis of this libel action. A claim form was issued on 21 November 2017 and served with particulars of claim. The claimant complains of the publication of the words that I have quoted and contends that in their natural and ordinary meaning, the words meant and would have been understood to mean that:

“...the claimant is paid by the casino industry to make false and dishonest statements in order to protect that industry and that he deliberately misled and lied to Channel 4 News viewers for money while hypocritically pretending to be a campaigner acting in the public interest.”

9 A Defence was served on 11 January 2018. I have not read the defence in any detail save to note where any particular meanings are advanced by the defendant. One such meaning comes before an honest opinion defence:

“It was the second defendant’s honest opinion that in the exchange that took place on Channel 4 News between the claimant and the second defendant, the claimant, who worked for an organisation whose funding came from elements within the casino industry, was deliberately and consciously misportraying the bookmaking industry.”

10 There is a second meaning that is advanced but at the same time it is denied. I do not think it has been urged on me by Mr Speker during argument but, in relation to a potential truth defence, the defendants add to the end of the meaning I have quoted “or there were reasonable grounds to suspect as much”. The reason I have read nothing further in the defence, and deliberately so, is that it is important that I do not cloud my judgment of the meaning the hypothetical ordinary reasonable viewer would have understood the words complained of to bear by learning facts the viewer would not have known.

11 By Order of 9 May 2018, Master Thornett directed trial on the following preliminary issues:

- (a) what meaning the words complained of bear;
- (b) whether the words complained of are defamatory of the claimant at common law;
- (c) whether the publication of the words has caused or is likely to cause serious harm to the reputation of the claimant pursuant to s.1 of the Defamation Act 2013;
- (d) whether the words complained of were a statement of opinion; and
- (e) if yes, whether those words indicated in general or specific terms the basis of the opinion stated.

12 This hearing has been the trial of those preliminary issues as ordered.

13 It is common ground between the parties that although issue (c) would be, in the terms as drafted, an issue upon which evidence could be called as to the actual reputational harm, at this stage the Court should rule only whether any defamatory imputation the Court finds is sufficiently serious in the circumstances to raise the inference of serious harm applying *Lachaux -v- Independent Print Ltd* [2018] QB 594 at [82(3)] in which Davis LJ noted:

“If the meaning so assessed is evaluated as seriously defamatory it will ordinarily then be proper to draw an inference of serious reputational harm.”

Assuming preliminary issue (b) were resolved in the claimant’s favour and answer ‘no’ to the serious harm issue under (c) would not put an end to his claim, it would mean merely that he would need then to prove serious harm to reputation had been caused by the publication at a subsequent trial.

## THE LAW

- 14 As to the general principles to be applied, there is little dispute between the parties. In relation to meaning, I will need to deal with one submission particularly made by Mr Speker.

### *Meaning*

- 15 In *Brown -v- Bower* [2018] EMLR 9, I set out the approach to assessing meaning in [10] to [17]:

- “10. My task is to determine the natural and ordinary meaning of the words complained of. That meaning is the meaning that the hypothetical reasonable reader would understand the words bear. In assessing meaning, no evidence beyond the words complained of is admissible: *Charleston -v- News Group Newspapers* [1995] 2 AC 65, 70 per Lord Bridge. The same case establishes the principle that the ordinary reasonable reader is taken to have read the whole of a publication; in this case, the whole of the Book. That is important, because the context in which the words complained of appear will often influence the meaning (see Paragraph 16 below).
11. By this process, the Court arrives at the single natural and ordinary meaning that the words complained of bear. It is well recognised that there is an artificiality in this process because individual readers may understand words in different ways: *Slim -v- Daily Telegraph* [1968] 2 QB 157, 173D-E per Lord Diplock.
12. It is common ground that in determining the single meaning, the Court is free to choose the correct meaning; it is not bound by the meanings advanced by the parties (save that it cannot find a meaning that is more injurious than the Claimant’s pleaded meaning: *Slim* 175F per Lord Diplock).
13. There are several authorities which guide the Court as to the process of determining the single meaning. Drawing together earlier authorities, Sir Anthony Clarke MR in *Jeynes -v- News Magazines Ltd* [2008] EWCA Civ 130 gave the following summary [14]:
  - ‘(1) The governing principle is reasonableness.
  - (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.
  - (3) Over-elaborate analysis is best avoided.
  - (4) The intention of the publisher is irrelevant.

- (5) The article must be read as a whole, and any ‘bane and antidote’ taken together.
- (6) The hypothetical reader is taken to be representative of those who would read the publication in question.
- (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, ‘can only emerge as the product of some strained, or forced or utterly unreasonable interpretation’
- (8) It follows that ‘it is not enough to say that by some person or another the words might be understood in a defamatory sense’.

14. In *Simpson -v- MGN* [2015] EWHC 77 (QB) [10], Warby J noted the following in relation to the third and sixth *Jeynes* principles.

‘As principle (3) indicates, the exercise is one of impression. As Eady J said in *Gillick -v- Brook Advisory Centres* (cited in *Jeynes* at [7]):

‘Judges should have regard to the impression the words have made on themselves in considering what impact it would have made on the hypothetical reasonable reader’.

Principle (6) requires the court to form a view on how the representative hypothetical reader of the particular publication concerned would be likely to understand the words, bearing in mind where in the publication the words appear; the reader’s familiarity with the nature of publication in question; and any expectations created by that familiarity: see *John -v- Guardian Newspapers Ltd* [2008] EWHC 3066 (QB), [22]-[23], [32]. I would add, however, that this is an exercise which needs to be undertaken with care. The court can take judicial notice of facts which are common knowledge, but facts which are not need in principle to be admitted or proved, not assumed. The court should beware of reliance on impressionistic assessments of the characteristics of a newspaper’s readership.’

15. In *McAlpine -v- Bercow* [2013] EWHC 1342 (QB) Tugendhat J dealt with the approach of the court where there are two (or more) rival meanings that are said to be the natural and ordinary meaning [66]:

‘...If there are two possible meanings, one less derogatory than the other, whether it is the more or the less derogatory meaning that the court should adopt is to be determined by reference to what the hypothetical

reasonable reader would understand in all the circumstances. It would be unreasonable for a reader to be avid for scandal, and always to adopt a bad meaning where a non-defamatory meaning was available. But always to adopt the less derogatory meaning would also be unreasonable: it would be naïve.’

16. The recent Court of Appeal decision in *Bukovsky -v- Crown Prosecution Service* [2017] EWCA Civ 1529 [13]-[16] emphasises the importance of the court having proper regard to the context in which the words complained of appear. Sometimes, the context will clothe the words in a more serious defamatory meaning (for example the classic ‘rogues’ gallery’ case). In other cases, the context will weaken (even extinguish altogether) the defamatory meaning that the words would bear if they were read in isolation (e.g. bane and antidote cases).

17. Finally, I need to refer to what are called the Chase levels of meaning. They come from the decision of Brooke LJ in *Chase -v- News Group Newspapers Ltd* [2003] EMLR 11 [45] in which he identified three types of defamatory allegation: broadly, (1) the claimant is guilty of the act; (2) reasonable grounds to suspect that the claimant is guilty of the act; and (3) grounds to investigate whether the claimant has committed the act. In the lexicon of defamation, these have come to be known as the Chase levels. Reflecting the almost infinite capacity for subtle differences in meaning, they are not a straitjacket forcing the court to select one of these prescribed levels of meaning, but they are a helpful shorthand. In *Charman -v- Orion* [2005] EWHC 2187 (QB), for example, Gray J found a meaning of ‘cogent grounds to suspect’ [58].”

16 Both parties have naturally emphasised the importance of context in the assessment of meaning and I will bear that firmly in mind. It is why that I have set out in some detail a description of the full news item that preceded the debate.

17 The legal test of whether an allegation is defamatory at common law is not in dispute. In *Sube -v- News Group Newspapers Ltd* [2018] EWHC 1234, Warby J said this in [23]:

“The starting point is the common law principle that a meaning is defamatory of the claimant if it ‘[substantially] affects in an adverse manner the attitude of other people towards him, or has a tendency to do so’: *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB) [2011] 1 WLR 1985 [96] (Tugendhat J). This is the common law ‘threshold of seriousness’, which requires a ‘tendency’ to affect adversely the attitudes of others towards the claimant, to a ‘substantial’ extent.”

18 Mr Speker on behalf of the defendants rightly identifies two further important principles that apply when the Court is determining meaning and whether the words complained of make an allegation of fact or opinion.

- a. First, particular care needs to be adopted when determining the meaning of a television broadcast. An ordinary, reasonable viewer is unlikely, indeed most will be unable, to watch the item more than once. In that respect, television broadcasts are

different from newspaper articles where the reader does have at least the opportunity to look back to an earlier part perhaps to remind him or herself as to what a later paragraph is referring to. That principle was made clear and established in *Skuse -v- Granada Television Ltd* [1996] EMLR 278, 286 *per* Sir Thomas Bingham MR. The effect is that the Court must be even more vigilant against over analysis. This is particularly so in the case where the defamatory words are delivered in a manner of seconds at the end of a longer segment of a news broadcast.

- b. Second, the Court must heed the cautionary words of the Court of Appeal in *British Chiropractic Association -v- Singh* [2011] WLR 133. In essence, the Court should guard against compartmentalising the process of assessment of meaning and fact or opinion. To do so risks the Court unwittingly stifling a proper assessment of the latter by the former (see also Warby J in *Sube* at [33]). There are some obvious parallels that can be drawn between this case and *Singh*.

- 19 The rather more contentious submission Mr Speker makes is that the Court, when assessing meaning, should make appropriate allowance for the fact that this was “political speech” in the sense that it was a debate between people on a matter of significant public interest. He has referred me to *Crow -v- Johnson* [2012] EWHC 1982 (QB) where Bob Crow had sued Boris Johnson over an election leaflet issue by Mr Johnson. The words of the leaflet are set out in paragraph 6 and the meaning attributed to them in paragraph 8. Tugendhat J was asked to determine meaning and he applied the conventional authorities to the task but, in doing so, he also referred to a Scottish decision of *Curran -v- Scottish Daily Record & Sunday Mail Limited* [2011] CSIH 86; [2012] SLT 359 and quoted from that decision in paragraph 14, the thrust of which was that:

“...wide latitude is allowed to comment and criticism in the political and public sphere.”

- 20 The judge held that one of the meanings complained of was not defamatory at all and the other two were not meanings that bore any defamatory meaning of the claimant (at [22]-[23]). In [24] he said:

“Further, in the context of a hotly contested election, these meanings could not in any event be held to be defamatory. In defamation context is crucial. In the context of an election, statements by one candidate about another candidate, or about a person associated with another candidate, are not capable of being understood as anything other than partisan. In the present case it cannot be said that right thinking members of society generally could understand the partisan statements in the leaflets complained of as adversely affecting Mr Crow in their estimation.”

- 21 Obviously, that statement has to be read in light of his earlier findings that the statements were not defamatory of the claimant. Indeed, I understand Tugendhat J there to be emphasising the importance of context in the determination of meaning. That is uncontroversial. Mr Speker, however, sought to extract the additional principle that partisan statements, that are seen as such, are not capable of being defamatory. I do not accept that Tugendhat J was laying down any such broad principle. Indeed, it would run contrary to the authorities as to the proper approach to meaning. If a clearly defamatory statement is made by one political opponent against another, the fact that they would be seen to be partisan cannot strip the words of their objective meaning or lead them to be assessed in any different way. The objective meaning of words, assessed in their proper context, is a constant.



22 In support of that, Ms Marzec has referred me to Warby J’s decision in *Barron MP & Ors -v- Collins MEP* [2015] EWHC 1125 (QB) at [54]. The judge said:

“The law must accommodate trenchant expression on political issues, but it would be wrong to achieve this by distorting the ordinary meaning of words, or treating as opinion what the ordinary person would understand as an allegation of fact. To do so would unduly restrict the rights of those targeted by defamatory political speech. The solution must in my judgment lie in resort, where applicable, to the defences of truth and honest opinion or in a suitably tailored application of the law protecting statements, whether of fact or opinion, on matters of public interest, for which Parliament has provided a statutory defence under s 4 of the Defamation Act 2013.”

23 The law of defamation must give due effect to Article 10 but, as Warby J has made clear in that paragraph, this is done by other means than the rules governing meaning. It is to be remembered that one of the important functions for the determination of meaning is to assess the objective harm that is caused to reputation. That is separate from the question of whether there is a defence available.

#### *Fact/Opinion*

24 As to the approach when determining whether a publication is a statement of fact or an expression of opinion, I direct myself as to the correct approach by reference to *Morgan -v- Associated Newspapers Limited* [2018] EWHC 1850 QB at [13]:

“In relation to the determination of whether defamatory imputations are fact or opinion, again both counsel are agreed as to the law. Drawn from Warby J’s judgment in *Yeo -v- Times Newspapers Limited* [2015] 1 WLR 971 [88]-[89]. When determining whether the words complained of contain allegations of fact or opinion, the court will be guided by the following points:

- (a) The statement must be recognisable as comment, as distinct from an imputation of fact.
- (b) Comment is “*something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc.*”: *Branson -v- Bower* [2001] EMLR 32.
- (c) The ultimate question is how the word would strike the ordinary reasonable reader: *Grech -v- Odhams Press* [1958] 2 QB 75. The subject matter and context of the words may be an important indicator of whether they are fact or comment: – *British Chiropractic Association -v- Singh* [2011] 1 WLR 133.
- (d) Some statements which are, by their nature and appearance comment, are nevertheless treated as statements of fact where, for instance, a comment implies that a claimant has done something but does not indicate what that something is, i.e. that the statement is a bare comment...”

25 Ms Marzec, for the claimant, submits that allegations attacking somebody’s integrity or alleging that they are dishonest or lying are not generally treated as statements of opinion.

She relies for that proposition upon passages from Eady J's judgment in *Wasserman -v- Freilich* [2016] EWHC 312 (QB) [16] and [21]-[22]:

“16. The common sting in the various natural and ordinary meanings, pleaded in paragraph 27 of the particulars of claim, is that the Claimant was dishonest. That has generally been regarded as a factual allegation. It has long been recognised that ‘the state of a man’s mind is as much a fact as the state of his digestion’: *Edgington -v- Fitzmaurice* (1885) 29 Ch D 459. Juries are deciding on every day of the week, as a matter of fact, whether a particular defendant was, or was not, dishonest. Accordingly, it is an allegation which in the context of libel is readily understood as being susceptible to a plea of truth under s.2 of the 2013 Act (as was the case with justification). It is not thought to be a matter of opinion: nor can one convert an allegation of dishonesty (or, for that matter, of murder or rape) into a matter of opinion by merely inserting in front of it a formula such as ‘I believe...’ or ‘she thinks...’: see e.g. *Hamilton v Clifford* [2004] EWHC 1542.

...

21. There has been some debate as to whether the appropriate dividing line between statements of fact and statements of opinion depends on whether the relevant defamatory allegation is verifiable or not: see e.g. the discussion in **Gatley on Libel & Slander**, cited above, at 12.10. It is surely a matter of plain English. The word ‘verifiable’ means ‘capable of being proved to be true’. If a statement is capable of being proved to be true, then a defendant would now be able to rely on a s.2 defence (if the evidence is available). If, on the other hand, it is not capable of being proved to be true, it would follow that neither he nor anyone else could do so. In such circumstances, however, a defendant might well be able to take advantage of s.3: it is likely that the statement will be recognised by readers (and ultimately the court) as the expression of an opinion.

22. In the present case, these refinements do not need to be considered: the question is relatively straightforward to resolve. An allegation of dishonesty, fraud or attempted fraud will usually fall fairly and squarely on the side of fact rather than opinion. The same is true also, as I have already mentioned, where the allegation is of ‘reasonable grounds to suspect’. Accordingly, I cannot allow a pleading to go forward in the form of paragraph 19A. It must be struck out.”

26 I think that some caution must be applied before overly prescriptive rules are adopted as to the assessment of fact or opinion. The pitfalls of doing so are perhaps demonstrated by *Singh*. In my judgment, what Eady J is saying in those passages is that context is likely to play a critical role in this assessment. It is the fourth point from *Morgan* about bare comment. There is no fixed rule that a statement that someone has been dishonest must be treated as an allegation of fact. The real question is whether, in context, the allegation of dishonesty would be understood to be the deduction or inference of the speaker. In most cases, it will be the context in which the words appear or are spoken that will provide the answer to whether the words are (or would be understood to be) opinion or whether the statement is ‘bare comment’ and therefore potentially liable to be treated as an allegation of

fact. Asking a question of whether the statement is “verifiable” is perhaps a dangerous gloss on this approach.

27 Indeed, I note from Eady J’s decision in *Lowe -v- Associated Newspapers Ltd* [2007] QB 580, he said this in relation to the test:

“55. ...readers need to be able to distinguish facts from comment for the defendant to be permitted to rely upon the defence of fair comment. A bald comment, made in circumstances where it is not possible to understand it as an inference, it is likely to be treated as an assertion of fact which will only be susceptible to a defence of justification or privilege.

56. Where facts are set out in the words complained of, so that the reader can see that an inference or opinion is based upon them, then the defence of fair comment will be available; but the defendant is not tied to the facts stated in the article. He may invite the jury to take into account extrinsic facts ‘known to the writer’ as part of the material on which they are to decide whether a person could honestly express the opinion or draw the inference.

57. Whilst it is necessary for readers to distinguish fact from comment, it is not necessary for them to have before them all the facts upon which the comment was based for the purpose of deciding whether they agree with the comment (or inference). I draw that conclusion with all due diffidence, since Lord Nicholls has twice expressed the opposite view, but it does seem consistent with principle and, in particular, with the undoubted rule that people are free to express perverse and shocking opinions and may nevertheless succeed in a defence of fair comment without having to persuade reasonable readers, or the jurors who represent such persons, to concur with the opinions. It is difficult to see why it should matter whether a reader agrees; what matters is whether he or she can distinguish fact from comment. Sometimes that will be possible, as it was in *Kemsley v Foot*, without any facts being stated expressly, because either they are referred to or they are sufficiently widely known for the readers to recognise the comment as comment.

58. I can give examples of each situation:

- i) The minister is unfit to hold public office because he lied to the House of Commons;
- ii) The minister is unfit to hold public office because of what he said in the House last week;
- iii) Mr A [who is widely known to have pleaded guilty to perjury] is unfit to hold public office.

Obviously, in the first example the fact is stated, in the second it is referred to, and in the third the facts are notorious.”

28 As to “bare comment”, Lord Phillips in *Joseph -v- Spiller* [2011] 1 AC 852 said at [88]-[89]:

“88. The common law had to decide how to deal with a general or ‘bare’ comment, which inferred discreditable conduct of some kind without giving any particulars of the conduct. The damage that such a comment can do is relatively limited. Actions speak louder than words. Most people judge their fellow men by the way that they behave, not on the basis of general opinions expressed by others. The common law might have held that bare comments were not actionable at all. Or it might have held that a defence of fair comment would lie in respect of a bare comment provided that the defendant could identify the factual basis for his comment by giving evidence of what it was that he had had in mind. It did not, however, take either course. It held that the defence of fair comment could not be invoked in relation to a comment that inferred that the claimant had conducted himself in some unspecified discreditable way. The ground for so holding was sometimes not happily expressed. In the 11<sup>th</sup> edition of **Winfield and Jolowicz on Tort**, (1979) p 304 the editors stated:

‘To say that ‘A is a disgrace to human nature’ is an allegation of fact, but if the words were ‘A murdered his father and is therefore a disgrace to human nature’, the latter words are plainly a comment on the former.’

Lord Walker commented in argument on the fallacy of the first part of this proposition. See also my comments at para 5 above.

89. The courts have always held that the only defence to a bare comment which infers the existence of discreditable conduct but does not identify it is justification – see for example Bingham LJ in *Brent Walker* [1991] 2 QB 33, 44H. In justifying a bare defamatory comment the defendant is entitled, in accordance with the principles that govern that defence, to plead any fact, whether or not it was known to him when he made the comment in order to show that the comment was justified.”

29 Then in [5], Lord Phillips said this:

“5. ...Jurists have had difficulty in defining the difference between a statement of fact and a comment in the context of the defence of fair comment. The example in *Myerson* (1923) 24 SR (NSW) 20, 26 cited by Lord Nicholls is not wholly satisfactory. To say that a man’s conduct was dishonourable is not a simple statement of fact. It is a comment coupled with an allegation of unspecified conduct upon which the comment is based. A defamatory comment about a person will almost always be based, either expressly or inferentially, on conduct on the part of that person. Judges and commentators have, however, treated a comment that does not identify the conduct on which it is based as if it were a statement of fact. For such a comment the defence of fair comment does not run. The defendant must justify his comment. To do this he must prove the existence of facts which justify the comment.”

## SUBMISSIONS

- 30 Ms Marzec submits that the words spoken by the second defendant - "It's a complete misportrayal of our industry, deliberate, conscious, by a man who's funded by the casino industry" - make a clear allegation of fact that the claimant is paid by the casino industry to make false and dishonest statements in order to protect that industry. She contends that, by implication, he deliberately misled and lied to Channel 4 News viewers for money whilst hypocritically pretending to be a campaigner acting in the public interest.
- 31 Mr Speker submits that, having regard to *Singh*, the Court ought first to ask whether the second defendant's words were expression of opinion. He submits that the words "complete misportrayal of our industry, deliberate, conscious" are clearly an expression of opinion on the statements made by the claimant during the debate. That, he submits, would have been obvious to viewers. They are the second claimant's view.
- 32 He also submits that the words "by a man who's funded by the casino industry" are an expression of an opinion also and would be recognised as such and are, in any event, not defamatory.
- 33 But, perhaps most importantly, he contends that viewers would see that this was a partisan debate between two people and that any suggestion that the claimant had been taking money from the casino industry to say what he had said was "water off a duck's back".

## DECISION

### *Fact/Opinion*

- 34 There is perhaps a danger here of being overanalytical. Mr Speker's argument that the first half of the statement is opinion expressed on the claimant's contribution to the debate might have been unanswerable if it had stopped there, but it did not and I am not sure that separating out the parts of the statement in this way is the correct approach, but even if were, Mr Speker would be left with the statement that the claimant was being funded by the casino industry. Although that is not a defamatory allegation of fact if isolated in that way, in my judgment, that is a plain statement of fact and it cannot be regarded as a statement of opinion, even making allowances for the nature of the debate, the partisan appearance of the parties, and all the context. It comes, as Ms Marzec rightly says, out of the blue in the programme. I described it in argument as a "reveal". It is a factual statement the second defendant deployed to support his contention that the claimant had been guilty of a complete misportrayal of the bookmaking industry, a misportrayal that was both deliberate and conscious.
- 35 In my judgment, it is important not to dissect the statement in this way but to look at the overall impression that it would have had on viewers. The overall impression I got from viewing the programme once - I have now seen it twice as it was played at the beginning of the hearing - was that the claimant was the paid mouthpiece of the casino industry. This was not an insignificant piece of information and I think it would clearly have struck viewers. Up to that point, although the second defendant might have been regarded as someone who was speaking on behalf of an organisation with a vested interest, the claimant did not appear (or at least not obviously appear) as a spokesman for any particular body that would have such a vested interest. It is true that the claimant is captioned as being from the 'Campaign For Fairer Gambling' but I confess that was something that I had missed at the time I watched the programme because, when I was watching it, the claimant had already been introduced already as someone who had had a problem with gambling. My attention was

drawn more to what the was saying. In any event, I do not think this is a big point. Even if a viewer had seen the caption, it would not have been immediately clear what stance this organisation would have (it was not obviously an “anti-gambling group”). A viewer’s impression of the claimant’s stance would be judged by what he had to say and what he said did not articulate the view of any particular body or interest group. He put forward statistics and arguments about the harm caused by FOBTs. Other than obviously being opposed to FOBTs, he did not appear to have any particular axe to grind.

- 36 When, therefore, at the end of the programme the second defendant dismisses the claimant’s points as a complete misportrayal, the really significant point that comes across is that he is a paid spokesman. The obvious implication in those words is that what the claimant said could not be relied upon *because* he was the paid spokesman of the casino industry. The viewer knew, because it was a point that the second defendant made twice, that if gamblers were not able to bet on FOBTs, they would be driven potentially to casinos or other places at which there was less control or care for those with gambling addictions. The claim that the claimant was the paid lobbyist immediately called into question his integrity and the reliability of the information that he had put forward during the debate. There is no doubt that the second defendant said what he did to undermine the claimant personally as an effort to discredit what he said.
- 37 I am quite satisfied the overall effect of the statement was not to convey the expression of an opinion but to make a clear factual statement as to the status of the claimant. That is inexorably linked to what that is said to have led to: his willingness deliberately to mislead the audience as to the facts relating to FOBTs.
- 38 Applying the guidance of *Singh* to the approach of determining fact or opinion before finding the single meaning, I reject the submission that the statement complained of was an expression of opinion.

### *Meaning*

- 39 Turning now to what I consider the single meaning of the statement to be, I do not accept Ms Marzec’s submission that the words implied dishonesty. Of course, somebody who is willing to mislead may resort to dishonesty but not necessarily so. There are ways of presenting information which mislead but which are not dishonest. In context, I do not think that the statement goes so far as to allege dishonesty but, equally, I am quite sure that the conduct of the claimant alleged is said to be deliberate. The contrary is unarguable. That is the plain meaning of “deliberate and conscious”.
- 40 Mr Speker, however, makes a powerful point as to what the viewer is to make of the emphatic denial that they see from the claimant immediately after the second claimant’s words. I think there is force in this submission. It is analogous to the newspaper article that reports allegations made against somebody but also includes a clear denial by that person. Whilst everything does depend on the context, the effect of that type of reporting is often not to create the impression of guilt but to leave in the mind of the ordinary reasonable reader grounds to suspect the person of guilt of the conduct alleged. Sometimes, the effect of the denial can itself be undone by the way it is reported. If a mountain of evidence is presented in an article and there is a mealy-mouthed denial, the reader may conclude that the denial is insincere or not to be accepted.
- 41 Here, the relevant exchange is so quick the viewer is really only left with an allegation and a denial. Of course, context applies equally to this question. I do bear in mind in assessing the overall meaning that the second defendant, given his position, would have appeared to

viewers to be somebody who would know about the industry. This allegation would not therefore be one that would be immediately discounted by viewers as not being reliable.

42 In my judgment, therefore, the single meaning of the words complained of is that “there are reasonable grounds to suspect that the claimant was willing deliberately to mislead the audience of Channel 4 News with inaccurate information because he was paid to do so by the casino industry.”

43 It would not be right to find that the meaning was one of guilt (*Chase* level 1) because that would be to ignore completely the clear denial of the claimant. The ordinary reasonable viewer would not ignore that in reaching his or her conclusion about the overall message or meaning that was conveyed. Certainly, in my judgment, the second defendant’s statement would give viewers real reason to doubt what the claimant had to say on this topic.

#### *Defamatory at common law?*

44 Is the meaning that I have found defamatory at common law? In my judgment, the answer is clearly ‘yes’. Although it is a *Chase* level 2 meaning, it is a meaning that attacks the claimant’s integrity and whether he could be trusted. As I have said, the immediate effect of it would have led people to doubt what he said. Obviously, a level 1 meaning would have been more damaging, but I am quite satisfied the *Chase* level 2 meaning that I have found would “substantially affect, in an adverse manner, the attitude of other people towards the claimant or would have a tendency to do so.”

#### *Serious Harm*

45 The final issue that I have to decide is whether that defamatory meaning is sufficiently serious that the Court can draw the inference of serious harm and whether the Court would be willing to draw that inference. I am satisfied that it is. Mr Speker’s arguments on this were mainly premised on a finding that the words were an expression of an opinion. He had developed submissions that, in the rough and tumble of a political debate, the expression of a defamatory opinion, not adopted by the broadcaster, would not be likely to cause serious harm to reputation. As I have found that the words do make an allegation of fact, largely the strength of those arguments falls away. I do bear in mind that this is a *Chase* level 2 meaning and that is not a conduct of the most serious kind, for example, criminal or seriously antisocial activity. Nevertheless, as I have found, it does strike at one of the core attributes of personality: the claimant’s integrity. It is an allegation, even at *Chase* level 2, that could not be described as insignificant. Even discounting republication that is relied upon, this was an allegation that was published to hundreds of thousands of viewers of Channel 4 News. In my judgment, the Court can and should draw the inference of serious harm.

#### *Basis of the opinion indicated?*

46 In light of my findings, it is not necessary for me to decide the final preliminary issue of whether the opinion indicated, in general or specific terms, the basis of the opinion stated. In case I were wrong in my finding about the statement being an allegation of fact rather than the expression of opinion, although the element of the meaning relating to misportrayal of the bookmaking industry did indicate, in general terms, the basis of the opinion stated, i.e. the statements put forward by the claimant during the debate, the claim that the claimant was funded by the casino industry did not indicate the basis on which that opinion was based either in general or specific terms. Mr Speker said the basis would be the same: the statements he made during the programme. In my judgment, that does not follow but it

becomes rather difficult to apply this argument given that whether a person is paid by a particular interest group is a matter of fact and not opinion.

47 Those are my determinations on the preliminary issues.

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