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Case No: HQ10D02588

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 January 2012

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

DAVID HUNT	**Claimant**
- and -	
TIMES NEWSPAPERS LIMITED	**Defendant**

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- -

Hugh Tomlinson QC and **Sara Mansoori** (instructed by **Hughmans**) for the **Claimant**
Gavin Millar QC and **Anthony Hudson** (instructed by **Simons Muirhead & Burton**) for the **Defendant**

Hearing date: 19 December 2011

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

Introduction

1. The article complained of in these proceedings was published by the Defendant ("TNL") on 23 May 2010 in *The Sunday Times* under the heading "Taxpayers fund land purchase from crime lords". There was also publication online from the day before. The claim was issued on 8 July 2010 and the claim form was served on the same day together with the particulars of claim.

2. The words complained of are undoubtedly seriously defamatory of the Claimant and there is little dispute as to the meanings they convey. Those pleaded at paragraph 4 of the particulars of claim, on behalf of the Claimant, and which TNL seeks to justify as its primary case, are as follows:

    i) The Claimant is a "crime lord" who controls a vast criminal network involved in murder, drug trafficking and fraud.

    ii) When the Claimant was prosecuted in 1999 he was responsible for a violent assault on the main witness against him and the intimidation of that witness's family.

    iii) In order to obtain a financial benefit from the sale of land to the London Development Agency, the Claimant attacked and threatened to kill a property developer [called Billy Allen] at a court hearing, and avoided prosecution for his attacks and threats by intimidating witnesses.

The Defendant's pleaded case

3. The original defence was served on 30 September 2010 and relied upon a plea of justification coupled with what was described as a "public interest speech/Article 10 defence", which appeared to correspond to what has become generally known as a *Reynolds* privilege defence: *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

4. I am not sure that the re-labelling is helpful, since Article 10 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention") always has to be balanced against Article 8, which seems in modern times, both in Strasbourg and in our own Supreme Court, to be acknowledged as embracing protection not only for personal privacy and family life but also for reputation. Long before these developments, however, Article 10(2) expressly recognised that the right to freedom of expression has to be qualified to take account of other countervailing public interests – including that in the protection of reputation. Thus, there can never be any "trump card" defence called either "public interest" or "Article 10". The issue is always going to turn on how the law provides for resolving the conflict between (at least) two competing public interests. This may take place either by the carrying out of a balancing exercise in the light of the particular facts of the case or, simply, by the application of established domestic principles (such as, for example, those relating to the well known libel defences). These were established long ago, for the most part, but were always intended to strike the right balance between the competing public

policy objectives (i.e. freedom of expression and protection of reputation) now reflected in "rights" under the Convention.

5. It is, of course, more frequently in cases turning solely on privacy rights that the court approaches the resolution by the "balancing exercise", since there were very few established principles of domestic law in that context prior to the implementation of the Human Rights Act 1998. In libel, it would generally be possible to achieve the appropriate outcome by reference to established principles of domestic law (which have proved, for the most part, to be Convention compliant). As to the particular defence known as *Reynolds* privilege, it will be for the relevant defendant(s) to demonstrate that allegations which are false and defamatory were nonetheless published "responsibly".

6. There was a serious setback when on 2 December 2010 before Tugendhat J no less than 49 sub-paragraphs of the particulars of justification were struck out. The order also recorded by way of recital that TNL wished to have an opportunity to reconsider the pleading of its defence not only of justification but also of "public interest", in particular by pleading further details in relation to the sources of the information relied on. I understand that there is no transcript of the judgment or rulings identifying the reasoning of the learned Judge. I believe that this is because the order was effectively made by consent.

7. The Claimant now applies to strike out the new draft amended defence dated 8 November 2011 pursuant to the provisions of CPR 3.4(2) on the basis that it fails to disclose any reasonable grounds for defending the claim and/or that it represents an abuse of the court's process and/or that it is otherwise likely to obstruct the just disposal of the proceedings.

The police action

8. Unfortunately, there is something of a history which complicates what might, at first sight, be thought to be a relatively straightforward case. Quite apart from the hearing before Tugendhat J in these proceedings, to which I have already referred, there was a separate claim (HQ11X00398) between the Commissioner of Police of the Metropolis, as the First Claimant, and the Serious Organised Crime Agency ("SOCA"), as the Second Claimant, against TNL and Michael Gillard (the author of the article in question).

9. The hearing was expedited and a trial took place over four days in July 2011, also before Tugendhat J, and judgment followed in October. For reasons which will become apparent, two judgments were delivered, one open and the other closed. This came about because TNL wished to rely on certain confidential documents which had been "leaked" to the author. Most of these originated from the Metropolitan Police, but there was one from SOCA. Those authorities asked that the Defendant be restrained from disclosing the documents concerned, or relying on them in the preparation of the defence in the libel action, on the ground of confidence. In particular, there was concern as to the risks attached to the potential identification of officers involved in investigating the Claimant and his allegedly criminal activities.

The Claimant and his advisers took no part in these matters. Indeed, they were excluded.

10. This judicial process involved a balancing of the rights of those concerned against the Claimant's rights under Article 6 and Article 8 of the Convention. He naturally has a *prima facie* right of access to justice, and to the opportunity of a fair trial, in respect of the issues raised as to his reputation in the libel action. The Judge made it clear, in granting injunctive relief, that his decision was not a once and for all determination and that matters would need to be kept under review. There was left open the possibility of further applications, at later stages of the libel action, when the balance might have to be struck rather differently.

11. Tugendhat J also expressed the view that he could not see, at that point, that his decision inhibited the Claimant from obtaining a fair trial in the libel proceedings, but recognised that the position could change in the light of later developments. Ultimately, it would be for the judge(s) dealing with the libel action to decide whether a fair trial was indeed possible at the material time. One of the suggestions made on TNL's behalf is that, by his present applications, the Claimant is seeking to take advantage of the injunction and to exploit the restrictions under which TNL is presently labouring, in order to take unfair advantage of the position.

The legal principles to be applied

12. Mr Millar QC has argued that the court should always have in mind the importance of the common law libel defences, such as justification and privilege, in the context of Article 10. They probably provide the principal means whereby English law seeks to achieve compliance with its obligations under the Convention. There should be no disproportionate inhibition upon a defendant in attempting to defend itself in respect of a communication to the general public, and especially on a matter of legitimate public interest.

13. Reference was made, for example, to the recent decision of the European Court in Strasbourg in *Kasabova v Bulgaria*, App No 22385/03, on 19 April 2011. Consideration was there given by Sir Nicholas Bratza to a presumption of falsity applying in Bulgarian law. He observed that it was particularly important for the courts to examine the evidence adduced by the defendant very carefully in such circumstances, so as not to render it impossible for him or her to make out the defence of truth. It seemed to be suggested in the Bulgarian courts, whether correctly or otherwise, that in their jurisdiction the only way of corroborating the allegation that someone had committed a criminal offence was to show that he or she had actually been convicted of it. The European Court was not prepared to condone such a position. While a final conviction could, in principle, amount to incontrovertible proof that the offence was committed, the reverse was not the case. Courts hearing a libel case cannot expect defendants to act like public prosecutors, or make their fate dependent on whether the prosecuting authorities choose to pursue criminal charges against, and manage to secure the conviction of, the person against whom they have made the allegations.

14. It is necessary to remember that there are certain differences between the position in Bulgaria, as it emerges from that decision, and that in our own jurisdiction. First, these proceedings are civil and not criminal. Secondly, the standard of proof relates to the balance of probabilities. Thirdly, a defendant is not inhibited in any way from proving the truth of criminal activity by reason of the fact that the claimant has not been convicted of the relevant offence(s) in a criminal court. Fourthly, it is not necessary to prove every detail provided the substantial truth of the defamatory sting is established.

15. Nevertheless, a defendant is clearly entitled to be given an effective opportunity to adduce evidence to support the defamatory allegations and to show their truth: see e.g. *Busuioc v Moldova*, App No 61513/00, 21 December 2005.

16. Thus, for example, if it were to transpire at any stage that the inability to refer to the leaked documents meant that TNL simply could not establish a defence of justification, the position would need to be carefully reviewed.

17. At the present stage, however, the court is simply required to address the pleading requirements of English law which, as Mr Millar points out, are not reflected in most European jurisdictions. They are nonetheless based on a number of elementary principles which are not in themselves incompatible with those underlying the Convention and are intended to ensure fairness for both sides. For example, a claimant in a libel action accused of criminal misconduct, as in the present case, is entitled to know the case he has to meet so as to enable him to respond effectively. Another principle of relevance, on the present facts, is that mere rumour is not enough to establish a case, although it is still the rule that a defendant may rely on general bad reputation by way of mitigating damages.

18. It is said that the new amended defence contains particulars of justification which suffer from the same pleading defects as the original defence that came before Tugendhat J last year. There is criticism, however, not only of the plea of justification but also of the *Reynolds* privilege defence.

19. The new version contains alternative *Lucas-Box* meanings in relation to the second and third pleaded meanings. In other words, it is suggested, in the alternative, that there are reasonable grounds to suspect the Claimant of being responsible for the intimidation of the prosecution witness in 1999 and, likewise, that there are reasonable grounds to suspect that the Claimant threatened to kill Billy Allen and attacked his minders at a court hearing.

20. The Claimant's criticisms of the pleading are set out in a detailed schedule and require to be considered individually. Generally, however, the criticisms are to the effect that many of the particulars pleaded in support of the plea of justification are vague, prejudicial, irrelevant or embarrassing and that they lack particularity. It is, of course, elementary that where a plea of justification asserts that the relevant Claimant has committed a criminal offence, or offences, it is necessary to set out the nature of the facts relied upon "with the same precision as an indictment": see e.g. *Hickinbotham v Leach* (1842) 10 M&W 361, 363.

21. Thus, submits Mr Tomlinson QC, it would hardly suffice for TNL to plead in relation to the first, and perhaps most serious, of the defamatory meanings merely that the Claimant was "responsible for numerous murders and serious assaults" without giving any of the appropriate details.

22. A number of other well known principles were identified on which there was little, if any, disagreement between counsel. I do not believe it can be said in relation to any one of them that it is inherently inconsistent with the approach adopted at Strasbourg.

23. Reference was made to *Gatley on Libel and Slander* (11th edn) at para 29.1:

> "The defendant must plead with sufficient precision and clarity so as to enable the claimant to know what he will be obliged to prove and what case he must prepare to meet, while also paying due regard to the requirement of proportionality in the manner in which he advances his case."

24. Moreover, each sub-paragraph of particulars of justification should be relevant to and supportive of one or more of the defamatory meanings sought to be justified. Of course, it is right that some material may appear as necessary background, but it must genuinely form part of the narrative for the purpose of achieving that ultimate objective. It is obviously not appropriate to include allegations merely with a view to creating a climate of prejudice.

25. Where there is a general allegation of wrongdoing, it will ordinarily need to be supported by examples, which should be sufficiently particularised for the claimant to know what are the issues to be tried. As Ashurst J put it in a well known passage in *J'Anson v Stuart* (1787) 1 TR 748, 752:

> "When [the defendant] took upon himself to justify generally the charge of swindling, he must be prepared with the facts which constitute the charge in order to maintain his plea: then he ought to state those facts specifically, to give the plaintiff an opportunity of denying them; for the plaintiff cannot come to the trial prepared to justify his whole life."

In so far as it may be appropriate to test these principles of English law against the values broadly expressed in the Convention, the words of Ashurst J can be justified by reference to the right to a fair trial guaranteed under Article 6.

26. Mr Tomlinson argues also, so far as inferences are concerned, that they need to be properly pleaded so that it appears that there is a rational nexus between the fact(s) and the inference to be invited.

27. Furthermore, in relation to the defence based on "reasonable grounds to suspect", a number of guiding principles are set out in *Gatley on Libel and Slander* at para 11.6:

i) It is necessary to plead (and ultimately prove) the primary facts and matters giving rise to reasonable grounds of suspicion objectively judged.

ii) It is impermissible to plead as a primary fact the proposition that some person or persons (e.g. law enforcement authorities) announced, suspected or believed the claimant to be guilty.

iii) A defendant may (for example, in reliance upon the Civil Evidence Act 1995) adduce hearsay evidence to establish a primary fact – but this in no way undermines the rule that the statements (still less beliefs) of any individual cannot themselves serve as primary facts.

iv) Generally, it is necessary to plead allegations of fact tending to show that it was some conduct on the claimant's part that gave rise to the grounds of suspicion (the so-called 'conduct rule').

v) It was held, however, by the Court of Appeal in *Chase v News Group Newspapers Ltd* [2003] EMLR 11 that this is not an absolute rule and that, for example, 'strong circumstantial evidence' can itself contribute to reasonable grounds for suspicion.

vi) It is not permitted to rely upon post-publication events in order to establish the existence of reasonable grounds, since (by way of analogy with fair comment) the issue has to be judged as at the time of publication.

vii) A defendant may not confine the issue of reasonable grounds to particular facts of his own choosing, since the issue has to be determined against the overall factual position as it stood at the material time (including any true explanation the claimant may have given for the apparently suspicious circumstances pleaded by the defendant).

viii) Unlike the rule applying in fair comment cases, the defendant may rely upon facts subsisting at the time of publication even if he was unaware of them at that time.

ix) A defendant may not plead particulars in such a way as to have the effect of transferring the burden to the claimant.

This last point was one that loomed large in Mr Tomlinson's submissions (on both *Chase* Level 1 and Level 2).

28. Mr Tomlinson also referred to the guidance given by the Court of Appeal in *McDonald's Corp v Steel* [1995] 3 All ER 615. In order to plead a defence of justification, a defendant needs to believe that the words complained of are true in the relevant defamatory meaning or meanings, must intend to support that defence at trial, and have reasonable evidence to support the plea or reasonable grounds to suppose that sufficient evidence will be available by the time of trial. It would seem to follow that, if a defendant has no evidence at the time of pleading the defence, and there is no solid basis for assuming that evidence will emerge by way of disclosure of documents or the supply of further information pursuant to a request, the court should be astute to prevent a weak plea going forward and thus wasting everyone's time and money. There must be something going beyond bare Micawberism.

29. More generally, this is a libel action in which the words are obviously defamatory, and the central issues relate to defences in respect of which the burden lies on the Defendant. In such cases, the court may well direct in due course that the Defendant should open and prove its case first. If no admissible evidence is available to support any of the pleaded allegations, there is likely to be a corresponding submission of no case at the close of the Defendant's case. Even if no such direction is given, and the Claimant goes first, the Defendant would be in no better position. That is because it is not a legitimate tactic to proceed to court on vague allegations of wrongdoing in the hope that cross-examination will elicit some bonus admission. (That principle, again, would appear compatible with Article 6.) It is necessary to remember these practicalities when assessing whether any pleaded allegation should be allowed to stand.

30. So far as inferences are concerned, it is right to say that the court should only be invited to draw the particular inference from facts which are either admitted or capable of proof. Thus, in accordance with the principle in the *McDonald's* case, there must be some basis for believing that the relevant facts will be capable of proof at trial.

31. In the context of *Reynolds* privilege, my attention was drawn also to the observations of the learned editors of *Gatley on Libel and Slander* at para 29.20;

> "The defendant must also set out the circumstances of the publication said to support publication in the public interest, existing at the date of publication, such as the seriousness of the allegation, the extent to which it was a matter of public concern, the source and the status of the information, the steps taken to verify it, the urgency of the matter and the steps taken to obtain and print the claimant's side of the story. Responsible journalism, in all the circumstances, must be demonstrated."

As was observed by Lord Hope in *Reynolds v Times Newspapers Ltd* at p.230:

> " … care should be taken not to give the benefit of the privilege too readily to persons or organisations whose sources of information are themselves protected to an extent which renders the issue of malice inscrutable."

Of course, it is necessary to take full account of source protection, for which provision is made in s.10 of the Contempt of Court Act 1981 and also, implicitly, in Article 10 of the Convention itself. But that does not mean that a claimant is precluded from having the opportunity of making an assessment of the weight to be attributed to the sources in question; see e.g. *Jameel v The Wall Street Journal Europe Sprl* [2003] EWCA Civ 1694 and *Gaddafi v Telegraph Group Ltd* [2000] EMLR 431. For example, if a journalist is relying upon a source from the criminal underworld, that may be highly material for the court to take into account in assessing how much reliance can be placed upon it.

32. It cannot be assumed that it will be sufficient for a defendant merely to say that the information was based on Source A or Source B, and thereby seek to take advantage of *Reynolds* privilege so as to avoid altogether the disciplines of the "repetition rule": see e.g. the discussion in *Roberts v Gable* [2008] QB 502. The terminology of the "repetition rule" was introduced in modern times, but the principle goes back a long way. It means that a defendant cannot prove a defamatory allegation to be true by simply establishing that somebody has made the allegation. Although the point was queried by Mr Millar QC, there can be no doubt that the rule is compatible with Convention values. It is directed not only to the protection of reputation but also to ensuring a fair trial: see e.g. the general discussion in *Stern v Piper* [1997] QB 123 and *Curistan v Times Newspapers Ltd* [2008] EWCA Civ 432.

The particulars of justification

33. Against the background of these principles, I turn to consider the particulars of justification in further detail. Paragraphs 7.4 to 7.6 do not, in Mr Tomlinson's submission, "get off to a very good start". They are based upon a work of fiction by a Mr Jimmy Holmes which was published under a pseudonym in 2004. It was called *Judas Pig* and is said to contain an account of the Claimant's criminal activities "between the mid 1980s and 1995", describing him for the purpose of the book as "Danny". It is claimed on the basis of this text, somewhat breezily, that "the Claimant was responsible for numerous murders and serious assaults whilst running drug/porn/ protection operations in London and Essex". Relevant though such allegations potentially are, they are plainly very grave indeed and the Claimant is entitled to subject them to the ordinary disciplines of particularisation. He must surely be allowed to know, at least, whom it is that he is supposed to have murdered or seriously assaulted. These fictitious allegations are said to be converted into legitimate particulars of justification by reason of the fact that Stephen Hunt, the Claimant's brother, is supposed to have admitted to a police officer that *Judas Pig* is "a book of truth". That will not suffice – not least because there is no plea to the effect that Stephen Hunt had the Claimant's authority to make an admission *on his behalf* to the effect that he (the Claimant) was guilty of the crimes portrayed in the book. Furthermore, no particulars are given as to why *Judas Pig* refers to the Claimant at all – let alone under the guise of "Danny". As a means of pleading justification, I am afraid that Mr Tomlinson was fully entitled to describe these paragraphs as "utterly hopeless".

34. The next topic is to be found in paragraphs 7.7 to 7.14 of the particulars of justification. They are headed "The 1999 prosecution" and concern the second of the pleaded defamatory meanings. A Mr Paul Kavanagh, said to have been "a member of the Claimant's gang", was interviewed by police officers in prison and voluntarily made a statement in which he claimed that the Claimant had slashed his face with a blade. It is also pleaded that the Claimant had an office in the *locus in quo*, namely premises in South Woodford known as Palmer Motors, where forensic evidence was found on the Claimant's desk "suggesting that Kavanagh had been wounded in those premises".

35. It is also pleaded that the Claimant was charged with wounding contrary to s.18 of the Offences against the Person Act 1861 and remanded in custody for some nine months.

The Defendant invites the inference that the Claimant must have brought pressure to bear on Mr Kavanagh and/or upon his family in order to explain the fact that his statement was subsequently withdrawn.

36. This plea is supplemented by two other propositions. First, it is said that it is relevant to take into account the fact that the Claimant made no complaint against the police following the decision not to continue with the prosecution. Little weight can be attached to this in the circumstances, since he could have been advised, for all I know, that there was no evidence of malice to support a claim in malicious prosecution. Secondly, reference is made to matters pleaded "below", which are said to establish a "practice" on the part of the Claimant and his associates of discouraging potential witnesses by way of intimidation and threats.

37. I am prepared to allow these sub-paragraphs to stand, since I must assume that the Defendant will succeed at trial in establishing the facts pleaded and I do not consider it unreasonable, at least, to invite the inference that the statement by Mr Kavanagh must have been withdrawn as a result of pressure brought to bear by or on behalf of the person charged with the assault. It is, of course, possible that Mr Kavanagh changed his mind for conscientious reasons – having recognised, for example, that it would be wrong to pursue an allegation he knew to be false. But a jury would have to make its mind up at the end of the trial, on the totality of the evidence before it, whether the Defendant's inference should properly be drawn. I do not believe it would be right to classify it at this stage as necessarily unsustainable.

38. The next topic relates to the alleged threat to kill Billy Allen at a court hearing, which is pleaded at paragraphs 7.15 to 7.19. That, of course, is directed primarily at the third of the defamatory meanings. It is said on the Claimant's behalf that they only go to a very small part of the Defendant's case (i.e. the third pleaded meaning) and would not be capable of supporting the primary "crime lord" allegation. That may be so, but the allegations are plainly serious and I am not convinced that the meanings can be separated out into wholly distinct compartments. If established, the Billy Allen incident could make a significant contribution towards partial justification and, at least, play a corresponding role in diminution of damages.

39. What is alleged is that the Claimant assisted a man called Charles Matthews Snr in a dispute over valuable development land in East London which he had occupied, and on which he had carried on business, since 1990. That dispute had become the subject of legal proceedings launched in the Central London County Court in 2004 by Billy Allen, who apparently owned the beneficial interest and sought possession. Mr Matthews counterclaimed on the basis of adverse possession for more than 12 years, which Billy Allen was resisting. The suggestion is that Mr Matthews enlisted the Claimant's assistance because his "status as the head of a violent criminal gang" would deter Billy Allen from further resisting the adverse possession claim.

40. A hearing was due to take place on 6 and 7 February 2006, prior to which Allen is said to have received a number of anonymous telephone threats telling him to withdraw. Indeed, on his way to court on 6 February, the caller made the following threat:

> "You fucking cunt. We've just watched your wife put the rubbish out. We'll kill your family if you go to court."

41. The link to the Claimant comes by way of a pleaded inference that he was responsible for these threats. The facts relied upon for the inference are not spelt out very clearly, but reliance is placed on what has been pleaded earlier ("the premises") and on "the matters particularised below". Complaint is made that he does not know what case he has to meet. Yet it is pleaded at paragraph 7.23 that the Claimant was outside the court when Allen arrived and that he told his four "minders" that they were on the wrong side and that they should "hand him over to us". The minders, it is said, were brought by Allen to afford him some protection in view of the telephone threats. If the pleaded facts are established (which again I must assume at this stage), I see no reason why a reasonable onlooker should not draw the inference from what the Claimant said outside the court that he was also behind the telephone threats (or some of them). It would all fit together as part of a pattern of discouraging Allen from maintaining his case in the litigation.

42. Furthermore, it is also pleaded (at paragraph 7.25) that the Claimant attended on 7 February 2006, the second day of the hearing, with his brother Stephen, a man called Billy Ambrose and a "group of about 15 men". The Claimant, it is alleged, then threatened to kill Allen and, together with the other men, physically attacked Allen and his minders, one of whom (Daniel Wollard) sustained serious injuries. Thus far, I see no difficulty for the Claimant in knowing the case he has to meet. That passage in itself is not objected to. Nor is paragraph 7.26, which asserts that he again contacted Allen by telephone on 1 March 2006 and threatened to kill him.

43. Objection is raised, however, to what follows. It is sought to explain the "background" to the Claimant's threat of 1 March by reference to a meeting said to have taken place on the same day at the Customs House Hotel. What is alleged is that Allen had asked for the meeting, at which two "go-betweens" called Biju and Tony Singh should offer the Claimant £1m in order to persuade Charles Matthews to abandon his claim to the disputed land.

44. It so happened (according to paragraph 7.28) that on the same day, "by coincidence", police officers executed search warrants at business premises of Messrs Charles Matthews, both Senior and Junior. This was part of a wider "Operation Houdini". It seems that they carried on the businesses there, respectively, of London City Metals and London City Storage. It is alleged that during the meeting at the Customs House Hotel the Claimant took a telephone call informing him of these raids, whereupon he brought the meeting to a close. The suggestion is made that he did so because he "assumed" that the raids had taken place as a result of information provided by Allen. Later the same day, he telephoned Allen and told him that he would get a bullet through his head. A criticism is made of the pleading that the "assumption" pleaded on the Claimant's part is "unparticularised and improper".

45. Whether the relevant facts can be proved at trial is a matter on which I cannot speculate, but I should assume that the following can be established:

i) On 1 March 2006 the Claimant was holding discussions with Allen, through his representatives Biju and Tony Singh, who offered Matthews £1m (through the Claimant) to drop his claim to the relevant land.

ii) In the course of the discussions, the Claimant was notified of the police raids at the Matthews' premises and broke off discussions.

iii) Shortly afterwards, the Claimant told Allen that he would be getting a bullet through his head.

On those assumed facts, I do not consider it inappropriate or "improper" to invite the inference that the Claimant broke off the discussions because he blamed Allen for the raids.

46. For these reasons, I would not strike out paragraphs 7.27 to 7.28.

47. The pleading then moves forward to events of 7 November 2006. On that date, the Claimant and his brother were arrested for alleged offences of blackmail, causing grievous bodily harm, intimidating witnesses and threats to kill – all in connection with the events (referred to above) of 6 and 7 February and 1 March of that year. I believe that paragraph 7.29 is legitimate as background to the following paragraphs (some of which I would admit). Since it has earlier been pleaded that the brother was participating in the events in February 2006, I would not exclude the reference to his arrest. The pleading is clearly alleging that they were taking part in a joint enterprise.

48. Allegations are also made, however, of questionable relevance either to a *Chase* Level 1 or a *Chase* Level 2 pleading. It is said (at paragraph 7.30) that the police also arrested the Claimant's "mistress", Kelli Love, in his office. It is not easy to see the relevance of this at the moment. Also, it is said (at paragraph 7.31) that the officers who arrested the Claimant did not reveal their names because of "concerns for their safety". That would appear to offend against the "conduct rule", as well as falling outside the concept of "strong circumstantial evidence". I do not permit these passages to remain in the pleading.

49. Challenge is also made to paragraph 7.32, which refers to the Claimant as having given "no comment" answers to all questions asked of him in interview by the officers. That may be his entitlement, but I am not persuaded that in civil proceedings of this kind it is necessarily impermissible to place weight on a Claimant's failure to give any explanation when faced with criminal charges. For the moment, it can remain in the pleading, although admissibility may have to be addressed by the trial judge.

50. At paragraph 7.33, reliance is placed on certain "unsolicited statements" made by the Claimant at Dagenham Police Station on 7 and 8 November 2006. Again, I would not strike these out of the pleading, as it may be argued in due course that they can properly be interpreted as admissions, against interest, of involvement in the underworld and/or as to his reputation in that context. It is true that some of them are ambiguous and/or capable of some innocent interpretation and that could no doubt be a matter for argument at trial.

51. Paragraph 7.34 refers to the Claimant as having asked officers the identities of those who had made statements against him. This would appear in itself to be neutral and I would be inclined to strike it out for that reason, save for the context. Where there are other pleaded allegations of threats against or intimidation of witnesses, it seems to me that this should be allowed to stand for the moment on the basis that it would form part of a general pattern of conduct. The unspoken inference is that the Claimant wished to have the names with a view to some form of intimidation. It may be that this should be made express.

52. At paragraph 7.35 there appear the allegations in relation to the Claimant's brother, to which I have already made reference, where he is said to have made admissions as to the Claimant's behaviour, including as to the truthfulness of the claims made in *Judas Pig*. I do not understand how these can legitimately stand as particulars of justification.

53. In paragraphs 7.36 to 7.38, the Defendant seeks to rely again on "no comment" interviews on 18 December 2006, during which the Claimant had the opportunity to explain or exonerate himself in respect of the allegations of wrongdoing (relating to February and March of that year). As I have already indicated, I would not strike such a pleading out in civil proceedings.

54. On the other hand, since paragraphs 7.39 to 7.40 relate to the Claimant's brother, I would exclude them.

55. Reliance is placed at paragraph 7.41 on an incident at 01.35 on 19 December 2006, the day following the further release of the Claimant and his brother without charge. It is said that both men were sitting in a white Mercedes vehicle about 50 yards from the police station when the officer in the case left the station in an unmarked vehicle. After watching his departure, they drove off. This is pleaded as an attempt to intimidate the officer and it seems to me a legitimate pleading. The Claimant can easily deny that he was there or, if he was, he can offer any explanation there may be.

56. In the three succeeding paragraphs, 7.42 to 7.44, the Defendant pleads that the CPS decided not to prosecute the Claimant because Allen's minders were afraid of further violence from the Claimant "and his gang". If it can be proved, this would be a legitimate allegation in support of the third pleaded meaning at least. I should assume at this stage that it can be established by admissible evidence. This does not offend against the conduct rule, since it is based upon the incidents of violence pleaded in relation to the County Court hearing.

57. The next section has a heading which appears to relate to the first of the pleaded meanings: "A violent and dangerous criminal and the head of an organised crime group ("OCG") involved in murder, drug trafficking and fraud". Reference is made back, however, to some of the particulars already pleaded, as well as new material. Specifically, at paragraph 7.45, the Defendant seeks to pray in aid the unsolicited remarks of both the Claimant and his brother at Dagenham Police Station on 7 to 8 November 2006. While I would again exclude those of the brother, I believe that the Defendant should have the opportunity to rely on what the Claimant is alleged to have said, as constituting admissions that he is a violent and dangerous criminal who heads

an organised crime group. Of course, at trial it may emerge that they cannot be proved or that they bear a different interpretation. But that is not a reason to exclude them now.

58. It is also sought to rely once again on the earlier pleaded allegations of threats and intimidation of witnesses. It is said that these are "characteristic of a senior crime figure". I consider it legitimate for the Defendant to rely on this conduct, if proved, as having that broader significance. The argument may not succeed but it should not be precluded at this stage.

59. I turn to the new material, which is expressed in general terms and covers a considerable period of time. In paragraph 7.47, for example, it is alleged that the Claimant shot and killed a man called Nicky Gerard in 1982 in a street in Stratford. Subject to further particularisation (analogous to that of an indictment), I would allow this plea in support of the first meaning, even though it could not sustain it if taken in isolation. The Claimant is surely entitled to know when and where the killing took place. If the Defendant is unable to be more specific now, it is difficult to see that there is any chance of proving this grave allegation at trial.

60. At paragraphs 7.48 and 7.49, a very general allegation is made that over 20 years ago the Claimant (and someone called Jimmy Holmes) regularly imported cannabis from Spain and Holland in collaboration with criminal gangs run by a Terry Adams or a family known as "the Wrights". If true, the allegation would be a legitimate plea in support of the first defamatory meaning. But how is the Claimant to deal with it in its present form? If the Defendant can give no better particulars than this, there would be no chance of establishing it at trial. If more information is available, it should be given now. Thus, the paragraph cannot be permitted to stand in its present form.

61. Similar considerations apply to the historic allegations raised in paragraph 7.50. The Claimant is said to have "kidnapped and tortured" a drug trafficker called James Masterson with a view to his revealing the whereabouts of more than £1m in cash. Again, a quite legitimate plea so far as it goes. But, since the Claimant "cannot come to the trial prepared to justify his whole life", he is entitled to greater specificity. If he was convicted of such an offence, then that conviction would be likely to prove conclusive in accordance with the provisions originally brought into effect by s.13 of the Civil Evidence Act 1968, following the well known case of *Hinds v Sparks*. If not, however, this very serious allegation would have to be proved on its own merits (to the civil standard). This could only be done by calling evidence from the alleged victim or from someone else who witnessed the criminal activity in whole or in part. Some indication of the time(s) and place(s) would have to be provided and the Claimant is entitled to be given such specificity as the Defendant can disclose (subject, for the time being at least, to any considerations of source protection). It cannot stand as it is.

62. The same paragraph also makes the remarkably casual allegation that the Claimant murdered a nightclub doorman in the Mile End Road by slitting his throat. Who was he? When did it happen? If there is no recorded conviction to prove the Defendant's case, it will have to call evidence to establish the charge. The Claimant is entitled to know of what the relevant witness or witnesses will accuse him. In one sense, of

course, the Claimant can deal with the allegation. Most of us could go into the witness box and say with confidence that we have never murdered any doorman. It is not like a parking offence, which might slip someone's memory. But that is not the point. The burden is upon the Defendant and it is not permitted simply to put an allegation as vague as this to the Claimant and, by what Mr Tomlinson calls a "nudge and a wink", invite the tribunal of fact to disbelieve his denial ("He would say that, wouldn't he?"). He must know the case to be adduced by the Defendant. It is clear from *inter alia* the decision in *McDonald's* that grave allegations of criminal misconduct should not be pleaded on this basis, which amounts to no more than bare assertion. How can the pleader suppose that sufficient evidence is available to prove the murder, or that it will become available before trial, without being in a position to supply at this stage further particulars as to its nature? Further information about the murder in question (assuming it occurred) must be available. It would not have gone unreported.

63. At the moment, to the reasonable observer, it would appear that allegations of this kind are merely rumours, or based on rumours. The position does not improve by aggregating several rumours and hoping that each will thereby gain greater evidential status. Rumour is rumour and is not admissible. For these reasons, the allegations cannot survive without more.

64. By way of bathos, a third allegation is contained in the same paragraph. This merely asserts that the Claimant used offshore companies (unidentified apart from Winton Investments in the Isle of Man) to hold commercial properties in London. That in itself would not appear to support any of the defamatory meanings.

65. Further violence is alleged in paragraphs 7.51 and 7.52. This is more specific. The Claimant is accused of head-butting a crime reporter called Peter Wilson on 19 March 1992 outside his (the Claimant's) house in Epping. It is specifically alleged that this assault was linked to inquiries being carried out at that time by Mr Wilson into the alleged murders of Maxine Arnold and Terry Gooderham. It is also alleged that criminal proceedings were withdrawn because Wilson feared for his safety. I consider that this is sufficiently specific to pass muster in support of the first defamatory meaning.

66. On the other hand, it is asserted that Wilson had been investigating "allegations that the Claimant had committed serious criminal offences, including the murders of Maxine Arnold and Terry Gooderham". It is one thing to allege that the Claimant attacked a journalist, and quite another to use the paragraph as a vehicle for introducing unparticularised allegations (by persons unspecified), or rumours, that he had murdered two people. That passage therefore seems to me to be impermissible as an element in particulars of justification.

67. One can sometimes be over-analytical about a pleading, but I would be inclined to allow the assertion that Wilson had been investigating serious criminal offences (including the two murders) without these being attributed personally to the Claimant. I say this because such an allegation would be capable of contributing to a plea of justification in support of the first defamatory meaning. It seems to me to be potentially relevant in that context that the Claimant attacked (if he did) a crime

reporter who was in the process of investigating serious crimes in the relevant part of London. A so-called "crime lord" might well take such a course with a view to protecting his own area of activity or "patch".

68. In paragraph 7.53, reference is made to Galleons Reach Ltd, a Jersey company to which (it is said) the Claimant transferred some commercial property interests from Winton Investments in "the mid-1990s". The paragraph is rather jumbled in that it refers to an accountant called Peter Michel as having pleaded guilty, on 15 June 2010, to seven charges of money laundering. He was apparently sentenced to a term of four years imprisonment and an order was made against him in the sum of £6.5m. One naturally looks for the relevance of this to the Claimant and, in particular, having regard to the fact that the plea was entered after the date of the original *Sunday Times* publications.

69. What is said in relation to the Claimant is that one of the property interests he transferred to Galleons Reach Ltd, all those years ago, was the freehold of premises at No 2 Green's Court in Soho. These premises were, or had been, used for prostitution at some unspecified time. It is not alleged that the Claimant knew this or was profiting from it, although if that were the position it would be capable of supporting the defamatory meaning that the Claimant was "a crime lord". The link with the Claimant is said to be that "initially" Galleons Reach had been registered at Peter Michel's address. Again, no date is given or any information as to where Galleons Reach was registered at the time when the Claimant's interests were transferred to it.

70. Nor is it pleaded that any of the money laundering charges to which Michel pleaded guilty had anything to do with the Claimant. I think more specificity would be required before any of this material could stand, even in support of "reasonable grounds for suspicion". The jumble would need to be unscrambled and the Claimant's activities more clearly spelt out (not least for the purposes of the "conduct rule").

71. The bare allegation that "The Claimant has also used Galleons Reach Ltd to launder the proceeds of crime" cannot stand by itself. If it were allowed to do so, the effect would surely be to reverse the burden of proof and to impose on the Claimant a hugely expensive trawl through accounts and underlying documentation going back for many years in order to prove a negative. The paragraph cannot stand in its present form.

72. Finally, as to the plea of justification, there is a section (at paragraphs 7.54 to 7.59) headed "Operation Houdini". Again, it is something of a muddle and needs to be carefully unscrambled in order to see how much of it amounts to an allegation against the Claimant and how much is purely prejudice. It will be remembered that this ties in with the incident on 1 March 2006, when the Claimant is said to have terminated a meeting with the Singhs because he heard of the police raids at Charles Matthews' premises on that date (being part of Operation Houdini).

73. An inference is invited that the Claimant was responsible for the organised theft of lorry loads and the handling of stolen goods in Canning Town from about 2004 onwards. Over £1m worth of stolen property was found at the Matthews' warehouse

premises during the raid of 1 March 2006, which was said to derive from five commercial burglaries and 18 lorry diversions. The allegations relied upon to support the inference include the following:

a) that unidentified police officers believed him to have been involved in sophisticated lorry diversions in that area since the 1980s;

b) that he had been involved in Charles Matthews' claim to the disputed land;

c) his reaction to the news that the search was taking place on 1 March 2006, which is said to have been consistent with his having an interest in the criminal operations carried on at the land;

d) the fact that he had asked the police to return some marble to him which had been found on the premises (not identified as stolen);

e) the finding in his office in November 2006 of 40 cases of champagne which had been stolen following a lorry diversion during the previous July.

I would disallow the reference to the officers' belief pleaded at (a) above. I will not strike out the remaining sub-paragraphs, however, which taken together are potentially capable of supporting inferences (i) that the Claimant was interested in using the premises, (ii) that he did use them for storage, and (iii) that he was found with stolen goods in his possession (albeit elsewhere) which could be linked to a lorry diversion.

74. I would disallow paragraphs 7.56 and 7.57, which make no mention of the Claimant and are concerned with the discontinuance of handling charges against Charles Matthews Jr and others.

75. At paragraphs 7.58 and 7.59 it is alleged that the author of the article complained of in these proceedings, Michael Gillard, received threats by telephone between 26 May and 30 June 2010. The final message was to the effect that the Claimant would either sue or have him shot. He had been told beforehand that Kelli Love had been seeking his mobile number. Strictly, of course, it would be the fact that she had been seeking the number that matters – rather than the fact that the Claimant had been told. These paragraphs seem to me to be legitimate as being capable of establishing a pattern of intimidation.

The plea of privilege

76. I must now address the criticisms of the *Reynolds* defence. Mr Tomlinson set the context by referring to a passage in *Roberts v Gable* [2008] QB 502 at [32]. This was to the effect that public interest has to be judged against the quality of the journalism and not merely the subject-matter of the article in general terms. It is not disputed that the subject-matter of this article (if well founded) is arguably of legitimate public interest, dealing as it does with serious issues of crime and the administration of justice.

77. Obviously, it is not intended that a plea of *Reynolds* privilege should simply be treated as a longstop defence for a failed or inadequate plea of justification. The mere fact that allegations have been made, or that rumours are circulating, could not found such a defence (any more than a defence of justification). The court will need to focus on proportionality, having regard always to the gravity of the allegations, and the quality of the research which is said to justify the public interest in their publication – irrespective of their truth or falsity.

78. Objection is taken to paragraphs 9.11 to 9.13. It is founded upon arguments which were upheld on the previous occasion by Tugendhat J. It is said that the defects have not been corrected and they consist of unparticularised and general claims about investigations (over many years) and various unidentified sources. Even if a source is not to be identified, it will often be possible to give some information about it, so as to enable the relevant claimant, and the court in due course, to make some realistic assessment of how much weight can be attached to it. Otherwise, once again, the Claimant would not be in a position to know the case he has to meet.

79. In paragraph 9.11 reference is made to "publicly available material about the court proceedings and convictions". That can and should clearly be specified.

80. Reliance is also placed on "authoritative official sources" with direct knowledge of the criminal activities referred to – itself said to have been based on diligent work by law enforcement agencies over many years. Without more information, how is it to be seriously suggested that the court can form a view as to how "authoritative" the sources were, for example, or how "diligent" the research was? There is no reason why *assumptions* on these matters should be made in the Defendant's favour.

81. The question arises whether the lack of particularity in these paragraphs is cured by what follows in paragraph 9.14, which is sub-divided by reference to periods of time and purports in each case to set out information obtained by Mr Gillard between 1999 and 2008, while investigating other matters, and more recently while working on the article now complained of. The information appears to have consisted of allegations or suspicions, some of which were unconnected with the subject-matter of the present article. Relevance is therefore difficult to assess.

82. Source A apparently told Mr Gillard about a police operation in the 1980s called "Soldier 3" in which various alleged criminals, including the Claimant, were investigated in respect of lorry deviations and warehouse robberies. This would appear to be consistent with the Claimant having been investigated and cleared. If the investigations were fruitful, presumably there would be something positive to show for it such as criminal convictions. It is not easy to understand how an allegation by Source A merely to the effect that he was investigated can support, as responsible journalism, an allegation that he was guilty of criminal activity.

83. Similarly, Source A is again referred to as having told Mr Gillard of an "Operation Tiger" (again placed vaguely in the 1980s) and as making allegations of a general nature that the Claimant had a gang involved *inter alia* in protection rackets and drug dealing. It is not suggested that any of these investigations or allegations ever crystallised in prosecution for criminal offences, still less convictions. Merely

repeating allegations from an unidentified source could never found a plea of justification. It is necessary to focus, therefore, exactly on how they can support a defence of "responsible journalism" in making allegations of guilt that cannot be justified.

84. A "Source C" is also pleaded as someone who had worked in Operation Tiger to whom Mr Gillard had (merely) spoken. Nothing of substance is said to have emerged from the conversation, let alone anything which would render it "responsible" to accuse the Claimant of guilt.

85. Source A is again relied upon as having alleged that the Claimant's brother Raymond had been convicted of an offence in relation to stolen travellers' cheques. If true, this would presumably be a matter of public record and thus capable of verification, but more importantly its supposed relevance remains unexplained.

86. Another police officer, "Source B", is then introduced, who passed on allegations that the Claimant had a gang which had been involved in "unspecified" criminal activities with "the Wrights", described as "another East End criminal family". The only particularity given is to the effect that the Claimant's gang had been enlisted to resolve an (unspecified) "problem with a drugs importation route". In the first place, this kind of pleading can hardly fulfil the function of supporting "responsible journalism", as required by *Reynolds*, since it amounts to no more than the repetition of vague unsubstantiated rumour and has not been investigated by the journalist at all with a view to corroboration. Secondly, there is no way that the Claimant can sensibly meet it. This is not quite the same as saying that the burden of proof is reversed since, in a *Reynolds* context, the issue is not truth or falsity but rather the responsibility of the journalism in making an *ex hypothesi* false allegation that is supposed to be in the public interest. It is obviously not in the public interest, *per se*, to regurgitate allegations of criminality – even though the prevention or detection of crime is, in general terms, in the public interest. Something more has to be shown to support the public interest defence.

87. Source B is again prayed in aid as having told Mr Gillard that the Claimant's gang had invested £250,000 in a drugs importation from Holland organised by the Adams gang. He also appears to have told Mr Gillard about an "Operation Blackjack", whereby police officers targeted their inquiries on the Claimant's gang and said that they feared he might "legitimise" his criminal wealth through contracts with Railtrack (i.e. presumably through some form of laundering). Since nothing else is pleaded, it would seem that the inquiries led nowhere. It is not clear when this information came to light, but it would seem to be long ago, since it is said to have led Mr Gillard to continue his investigations into the Claimant's activities in 1999-2000. The relevance of this pleading for *Reynolds* privilege seems to me obscure, especially in relation to an article published ten years later.

88. At this point, Mr Paul Kavanagh comes back into the picture. It will be recalled that he was the man whom the Claimant was said to have wounded in 1999. The *Reynolds* plea refers to this incident in the context of "Operation Blackjack", stating that it was during this operation that evidence of the wounding came to light. It is added that

"years later" Mr Gillard saw a document which referred to Mr Kavanagh having withdrawn the allegation because of "pressure on his family".

89. The pleading makes reference to Mr Gillard having researched and written a book between 1999 and 2004, which contained other references to the Claimant, but I cannot see the relevance of it for *Reynolds* privilege purposes.

90. The pleading then moves forward to the two year period prior to publication of the article and to its subject-matter of land ownership. It is said that Mr Gillard learned about this from a police document contained on the Crime Report Information System ("CRIS"). It also made reference to searches having been carried out at various premises. During one of these, Kelli Love was found and admitted her relationship with the Claimant and also to being in possession, herself, of the 40 cases of champagne (already addressed in the context of justification). Again, I am not clear what this information is supposed to add. I gather that it had earlier been struck out of the plea of justification. It cannot gain any greater respectability by being simply transferred to a general melange labelled "public interest".

91. In conclusion, I do not believe that these paragraphs can stand in their present form.

92. As to paragraph 9.15, Mr Tomlinson submits that "the Defendant cannot properly pray in aid material which is manifestly irrelevant and inadmissible or plead as 'fact' material which is, in reality, simply allegation". Facts must be capable of proof even if relied on in support of *Reynolds* privilege.

93. The form of the pleading is that various matters are listed as having been (merely) "considered" by Mr Gillard – not "checked", "established" or "verified". It is by no means self-evident that it is "responsible journalism" to do no more than "consider" defamatory allegations or rumours before repeating them. The first "information" considered was what Source B had apparently said about the Claimant having a gang which had assisted "the Wright family" in drug importation from Spain 20 years ago. The Claimant has no obvious way of testing the value or weight to be attached to this allegation.

94. As I understand it, the other passages to which objection is taken in this paragraph are as follows. In paragraph 9.15(d), reference is made to "very old (and manifestly irrelevant) spent convictions" dating from 1981-1987. Spent convictions can sometimes be admitted by way of supporting a plea of justification if their exclusion would lead to injustice and enable an undeserving claimant to recover damages or obtain vindication on a false basis: see s.8 of the Rehabilitation of Offenders Act 1974. But it has to be remembered that the allegations in this case are very grave indeed and the offences of which the Claimant is said to have been convicted appear to be of a different order (taking and driving away, criminal damage and handling stolen goods).

95. At paragraph 9.15(e) mention is made of an application by police officers dated 8 January 2007 for surveillance of the Claimant and his brother. That is hardly adequate to support "responsible journalism" in respect of the allegations actually published.

96. Reference is made to a "non-police source" at paragraph 9.15(f). The passage alleges that the Claimant had murdered Nicky Gerard and the unidentified "doorman" and also states that he was himself concerned that he could be identified by DNA evidence. Even if these "facts" are relied on for *Reynolds* purposes, they have to be proved by admissible evidence. As I have said, it is obvious that this new form of defence cannot be simply used as a repository for inadequate particulars of justification. It is, generally speaking, not capable of supporting a "responsible journalism" defence for the pleader merely to repeat unsourced allegations of murder. It is partly a question of proportionality. Two allegations of murder plainly require to be either justified or, perhaps in some circumstances, defended by a *Reynolds* plea which demonstrates convincingly that proportionate investigation and verification took place before making such accusations public. It is surely not "responsible journalism" merely to publish unsubstantiated rumours of murder. There is then repeated the allegation about attacking the journalist, which I have said can be admitted for justification purposes, as explained above. In those circumstances, I believe it would not be appropriate to strike it out in this context, although it would be of little value in supporting a privilege plea in relation to the murder allegation.

97. In paragraph 9.15(g), the Defendant returns to the case of *R v Matthews and ors*, following Operation Houdini. Reference is made in the most general terms to "material relied upon by the Crown" to support an application for jury protection and to alleged "criminal links" between the Claimant and Matthews. Unparticularised allegations of this kind would appear to go no way towards supporting a privilege defence in respect of the words complained of or to establishing "responsible journalism".

98. Finally, at paragraph 9.15(h), the pleader relies upon "an MPS report dated 25 January 2008" as having been "considered" by Mr Gillard. This is about as vague as it could be and is said to concern "potential threat to life issues". I cannot allow this to go forward. It could not be meaningfully addressed by either the Claimant or the court.

99. I turn to paragraph 9.16. This cites the Claimant's "lack of any current convictions", rather curiously, on the basis that it is "not unusual for leading organised crime figures". A general assertion is made that such "figures" distance themselves from criminal activities and dispose of any potential witnesses against them by threatening violence or paying them off. I believe that Mr Tomlinson is correct in saying that this has no legitimate role to play in a *Reynolds* plea as demonstrating, for example, that the journalist has acted responsibly.

100. Paragraphs 9.17 to 9.21 do focus on inquiries made by Mr Gillard into the subject-matter of the article complained of. How far they may take matters in due course is not for me to speculate upon, but I do not think they are objectionable in pleading terms. It may be that the inquiries yielded no useful information, but it seems to me that it is legitimate for them to be listed because otherwise the journalist could be criticised in a *Reynolds* context if he had *not* pursued them. He is entitled to show that such avenues were explored as far as possible.

101. Paragraph 9.22, however, refers to Mr Gillard having been "aware" of certain matters. His awareness seems to me irrelevant. The paragraph refers back to the Claimant

being "a very violent man" and to the "head butting" incident of March 1992. What primarily matters is the underlying information and the steps he took (if any) to verify it – in other words, the grounds for his belief rather than the belief itself. Mr Tomlinson raises the additional point that, in any event, such matters could not give rise to a *Reynolds* defence in relation to the serious charges actually made in the article (i.e. at *Chase* Level 1). I do not think that this paragraph can stand as it is.

102. At 9.23 reliance is placed on Mr Gillard's earlier writing, which cannot in itself create a privilege for him or the Defendant. Also, he refers to allegations made by a Mr Thompson. It cannot give rise to a defence merely to refer to others having published similar allegations in the past – whether sued upon or not: see e.g. *Dingle v Associated Newspapers Ltd* [1964] AC 371.

103. The final *Reynolds* paragraph to which objection is raised is 9.24. It purports to explain why Mr Gillard did not approach the Claimant directly before publication but, instead, contacted his solicitor, Mr Scott Ewing. While he is entitled to refer to his means of contact, in supporting a case of "responsible journalism", it does not follow that the paragraph can be used as a means of introducing unparticularised and prejudicial allegations of wrongdoing. Thus, the explanatory sub-paragraphs (a) to (c) should come out. So should the irrelevant reference to Kelli Love. I consider that the remainder of the plea (paragraphs 9.25 to 9.31) can stand.

Miscellaneous objections to the defence

104. Objection is taken to a curiously hybrid paragraph 10, which appears to be a mixture of general bad reputation (which would, if properly pleaded, be legitimate in itself) and an allegation as to the beliefs of unidentified police officers. It clearly cannot stand as presently drafted.

105. Paragraph 13 seems intended to be a conventional plea of "general bad reputation" but seeks, impermissibly, to incorporate the whole plea of justification. Obviously, at the conclusion of a trial it is legitimate to rely on a partially successful defence of justification in mitigation of damages, but that is quite another matter. Reference is also made to a claim against another newspaper. I take this merely to be a reference to s.12 of the Defamation Act 1952, which is intended to avoid double recovery. Although it may be unnecessary, I do not consider it objectionable as such.

The outcome

106. The passages I have identified should be struck out of the defence. Having seen this judgment in draft, Mr Tomlinson submitted that it would seem to follow that the first of the *Lucas-Box* meanings in the defence should also be struck out. He argues that none of the surviving particulars is capable of justifying that meaning. He goes further and submits that therefore the whole defence of justification should be struck out, since none of the remaining particulars would be capable of passing the test in s.5 of the Defamation Act 1952. I see the force of his argument, but I will hear counsel as to the appropriate form of order and any directions that should follow.