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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/05/2013

Before :

MR JUSTICE NICOL

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Between :

Peter Cruddas	**Claimant**
- and -	
(1) Jonathan Calvert (2) Heidi Blake (3) Times Newspapers Ltd	**Defendants**

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Desmond Browne QC and Matthew Nicklin QC (instructed by **Slater and Gordon**) for the **Claimant**
Heather Rogers QC and Aidan Eardley (instructed by **Bates Wells and Braithwaite**) for the **Defendants**

Hearing dates: 18th April 2013

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Judgment

Mr Justice Nicol :

1. In this action for libel and malicious falsehood both the Claimant and Defendants issued application notices which were listed before me on 18th April 2013. As it happened, there was time only to consider the Claimant's application for permission to amend the Particulars of Claim. At the conclusion of the hearing I reserved my decision. One further matter, the Defendant's application for further information about the Claimant's pleading of financial loss, was dealt with by consent and while my order will incorporate the agreed terms, there is no need for me to say any more about it in this judgment.

2. The Claimant is a businessman and in March 2012 he was the Co-Treasurer of the Conservative Party. The Third Defendant is the publisher of the *Sunday Times.* The 1st and 2nd Defendants are journalists and part of that paper's 'Insight' team. The 1st and 2nd Defendants put together a plan whereby they would pretend to be agents for foreign investors who wanted to explore making donations to the Conservative Party. They hired a lobbyist called Sarah Southern and, through her, arranged to have a meeting with the Claimant on 15th March 2012. Unknown to him, each Defendant carried a concealed camera with an audio recording facility as well. Consequently, although I am told the quality is imperfect in places, there is a comprehensive record of the meeting and a transcript of it has been prepared.

3. As a result on 25th March 2012 the *Sunday Times* published four articles. The first began on page 1 and continued on page 2 under the headline 'Tory treasurer charges £250,000 to meet PM.' Page 1 also had a photograph of the Claimant. A sub-heading further reported that the day before 'Cameron's fundraiser [had been] forced to resign'. The second article was on pages 8 and 9 under the headline 'Cash for Cameron: cosy club buys the PM's ear'. The third article, also on page 9, had the headline, 'Pay the money this way and the party won't pry'. Page 9 carried the fourth article as well. This was written by Mark Adams under the headline 'Rotten to the Core'. These four articles in substantially the same form were also carried by the newspaper's website. The *Sunday Times* also published an editorial in the same issue on the theme 'Sack the Treasurer and Clean Up Lobbying.'

4. The claim form issued on 24th July 2012 complained of the first three articles, their republication on the website, but not the fourth article or the editorial. The original Particulars of Claim were served two days later on 26th July 2012. the first three articles (but not the fourth article or the editorial) were alleged to be defamatory of the Claimant. The first three articles were also said to be malicious falsehoods. Malice is an essential ingredient of malicious falsehood and it is the Claimant's case that the 1st and 2nd Defendants each published those first three articles maliciously and that the 3rd Defendant is vicariously responsible for their torts. The Claimant pleads that the meanings attributed to the articles (for the purpose of his claims in both defamation and malicious falsehood) were as follows:

> "(1) In return for cash donations to the Conservative Party, the Claimant corruptly offered for sale the opportunity to influence government policy and gain unfair advantage through secret meetings with the Prime Minister and other senior ministers.

(2) The Claimant made the offer, even though he knew that the money offered for secret meetings was to come, in breach of the ban under UK electoral law, from Middle Eastern investors in a Lichtenstein fund; and

(3) further, in order to circumvent and thereby evade the law, the Claimant was happy that the foreign donors should use deceptive devices, such as creating an artificial UK company to donate the money or using UK employees as conduits, so that the true source of the donation would be concealed."

5. The Defendants' defence in summary takes issue with the meanings attributed to the words by the Claimant, pleads justification in alternative meanings to the defamation claims, denies that the articles were false, were published maliciously or that they were calculated to cause him pecuniary damage in respect of his profession or business. While not accepting that the articles did have the following meanings, the Defendants are prepared to justify them if they did have those meanings:

" (1) That what the Claimant said in the course of a meeting on 15th March 2012, as co- Treasurer and Board member of the Conservative Party, in claiming:

a) that the Conservative Party would accept large donations from persons whose sole purpose in making the donations was to advance their business interests by obtaining direct access to the Prime Minister, by lobbying on policy areas affecting their business and by moving in circles where they would pick up useful intelligence to progress their business strategy;

b) That in return for six-figure donations, such persons would be able to achieve that purpose in the ways they wanted; and

c) That in return for donations of £250,000 a year, they would obtain special access to the Prime Minister and senior governments ministers, would get noticed and be taken really seriously, would be able to operate at a higher level within the Party (and, thus, the Government) and would have things open up' for them;

was inappropriate, unacceptable and wrong and gave rise to an impression of impropriety.

"(2) That the Claimant, when faced with the prospect of donations being made to the Conservative Party from an overseas fund (which was not itself eligible to make donations under the relevant law), was prepared to contemplate ways in which donations from that source could be made to the Party, namely;

(a) Through using a legal loophole that would permit a UK company, carrying on business within the jurisdiction, to make donations from such a source; or

(b) By having individuals on the UK electoral register make donations in their own name;

> even though the use of either route would result in the concealment of the true source of the donation, contrary to the spirit of the law which was intended to ensure that the source of any donation over £7,500 would be made public."

Alternatively, if (which the Defendants deny) the words complained of had the following meaning, the Defendants say they were also true,

> "in return for cash donations to the Conservative Party, the Claimant corruptly offered for sale the opportunity to seek to influence government policy and gain unfair advantage through secret meetings with the Prime Minister and other senior ministers."

6. For the most part the amendments which the Claimant wishes to make to the Particulars of Claim are to the particulars of malice (in paragraph 7.8 onwards). The Claimant explains that they have been prompted by disclosure which the Defendants have provided.

7. The Defendants object only to some of the proposed amendments and it is therefore only those which I need to consider.

8. The starting position is that

> "Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed." – see *Cobbold v Greenwich LBC* 9 August 1999 unreported, CA.

As is apparent from the date of that case it was decided very shortly after the introduction of the Civil Procedure Rules, but Ms Rogers QC, on behalf of the Defendants, did not suggest it had been overtaken in a way material to this case. Nor did she argue that the Defendants would be prejudiced in a way which could not be compensated in costs because the matters which the Claimant wished to plead were coming in by way of amendment rather than in the original pleading.

9. Mr Browne QC, on behalf of the Claimant, also accepted that permission to amend could be refused if the proposed pleaded case would be liable to be struck out or subject to summary judgment on that aspect in the Defendants' favour. In those circumstances, giving permission to amend would be fruitless and lead to wasteful expense.

10. The test for summary judgment in CPR 24.2 is that there is no realistic prospect of success for the issue in question and there is no other compelling reason why that issue should be tried. There is a complication in this case that the Defendants have exercised their rights under s.69(1) of the Senior Courts Act 1981 for trial by judge and jury. At trial, issues of malice will (largely) be ones of fact for a jury to decide. One of the other applications which the Claimant has made is for mode of trial to be changed to judge alone, but for the time being, I must assume that the trial will involve a jury. That fact does not preclude the possibility of summary judgment (or the refusal of leave to amend because the pleading would be vulnerable to an application for summary judgment) but it does mean that a more circumspect view

should be taken as to whether there is or is not a realistic prospect of the issue in question being successful. In essence the question becomes whether a reasonable jury could (if properly directed) find in favour of the party advancing the issue. If, on the contrary, any such verdict would be perverse, the fact that the ultimate trial would be by judge and jury is no barrier to granting summary judgment – see for instance *Alexander v Arts Council of Wales* [2001] 1 WLR 1840. Correspondingly, if the proposed amendment could only lead to a perverse verdict on that issue in favour of the party seeking to amend, then that would be a good reason for refusing the amendment.

11. Mr Browne observed that some of the authorities on which Ms Rogers relied, involved the question as to whether a trial judge had been right to leave an issue to the jury. It is right that by that stage the evidence will be closed. When considering an application for summary judgment (or opposition to an application for permission to amend) because there is no realistic prospect of success it is right, up to a point, to bear in mind that the evidence may develop if the case is allowed to proceed. It is, though, well established, that it is not enough for some Mr Micawber to observe that something might turn up. Where the pleading is of dishonesty (of which malice is an example), the scope for anticipating further evidence is very limited – see for instance *Three Rivers DC v Bank of England* [2003] AC 1 per Lord Hobhouse at [160]. And, after making due (but no more than due) allowance for the possibility of further evidence the test at the stage where summary judgment or leave to amend is sought is still whether there is a realistic prospect of a verdict on the contested issue (in favour of the party seeking to amend or opposing summary judgment) which would not be perverse. I bear in mind that another consequence of the issue being one of malice is that the burden of proof is not easily satisfied – see e.g. *Bray v Deutsche Bank* [2009] EMLR 12 at [32]-[36].

12. The Defendants are not seeking summary judgment in their favour on the malicious falsehood claim (at least not at this stage). They are not objecting to all of the proposed amendments. They do submit that each of the particulars of malice must be more consistent with the existence of malice than its absence. I did not understand Ms Rogers to argue that this involved a mechanistic breakdown of the pleading into the numbered paragraphs or sub-paragraphs, each of which had to pass muster. Rather she was submitting that each theme or strand of the Claimant's case in malice had to do so. She relied on a passage from the speech of Lord Porter in *Turner v MGM* [1950] 1 All ER 449 at p.455

> " Where [an allegation of malice] is made it is the duty of the plaintiff to establish the existence of malice and, unless he does so, the defendant succeeds. If, however, the plaintiff can show an example of spite or indirect motive, whether before or after the publication, he would establish his case provided that the examples given are so connected with the state of mind of the defendant so as to lead to the conclusion that he was malicious at the date when the libel was published. No doubt, the evidence must be more consistent with malice than with an honest mind, but this does not mean that all the evidence adduced of malice towards the plaintiff on the part of the defendant must be set against such evidence of a favourable attitude towards him as has been given and the question left to, or withdrawn from, the jury by ascertaining whether the scale is tipped when they are weighed in the balance one against the other. On the contrary, each

piece of evidence must be regarded separately, and even if there are a number of instances where a favourable attitude is shown, one case tending to show malice would be sufficient on which a jury could find for the plaintiff. Nevertheless, each particular instance of alleged malice must be carefully analysed, and, if the result is to leave the mind in doubt, then that piece of evidence is valueless as an instance of malice whether it stands alone or is combined with a number of similar instances, Maule J delivering the judgment of the court in *Somerville v Hawkins* (1851) 10 C.B. 583 and referring to the facts in that case, said (10 C.B. 590):

> '…the facts proved are consistent with the presence of malice, as well as with its absence. But this is not sufficient to entitle the plaintiff to have the question of malice left to the jury…It is certainly not necessary in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence.'"

13. Mr Browne relied on other authorities which say that the test is whether the evidence, taken as a whole, is such that a reasonable jury could find malice – see Lord Cooke sitting as a Non-Permanent Member of the Court of Final Appeal of Hong Kong in *Next Magazine Publishing Ltd v Ma* 5th March 2003 at [131] and *Alexander v Arts Council of Wales* [2001] 1 WLR 1840 at [37] adopting the approach to submissions of no case to answer in criminal prosecutions as established by *R v Galbraith* [1981] 1 WLR 1039.

14. It seems to me that there is a danger in this becoming a semantic argument and the reality of the nature of evidence being lost. When a Claimant relies on intention to harm as malice it will commonly be the case that he invites that conclusion to be drawn as a matter of inference. There will be cases (of which the House of Lords no doubt thought *Turner v MGM* was one) where the differing strands of evidence on which the Plaintiff relied were so independent of each other that they could not be mutually supporting. Consequently, if one, individually examined, did not lead to at least the probability of the existence of malice it was nothing to the point that there were other strands which also did not lead to the probability of its existence. As Lord Greene said in the same case at p. 468 (though in connection with a different aspect) "nought plus nought still equals nought." But there will be other factual situations where the position is, or may be, different and where two or more strands of evidence are capable of leading to an inference which could not reasonably be drawn if the strands were looked at individually. An example of this is what Lord Diplock had to say in *Horrocks v Lowe* [1975] AC 135 at 151 about the inclusion of extraneous defamatory material on an occasion of qualified privilege. In itself it may or may not show malice: the proper course is to consider this aspect together with all the other circumstances of the case in deciding whether an inference of malice can properly be drawn. *Horrocks v Lowe* was a decision on the meaning of malice in the context of qualified privilege, but the Court of Appeal has said that the same tests apply for the purpose of malicious falsehood – see *Spring v Guardian Assurance* [1983] 2 All ER 273 (the decision of the House of Lords did not touch on this point).

15. A further issue on which some of Ms Rogers' opposition depended, was whether malice could be established by an intention to injure someone other than the Claimant. The Claimant wished to advance as part of his case of malice that the Defendants' intention in publishing the articles was to harm others (as well as himself) and in particular to charge the Prime Minister, Mr Cameron, with hypocrisy because what the articles said had been revealed was contrary to Mr Cameron's public opposition to secret political donations being used to secure preferential advantage for the donors. Mr Browne submitted that if there was a malign motive on the part of the Defendants it was unnecessary for it to be directed at the Claimant. He commented that some of the decisions on malice speak of "intention to injure" or "improper purpose" without being specific as to who must be the object of the Defendant's intentions - see *Gatley on Libel and Slander* 11th edition para 21.7 and the cases cited at note 50. Mr Browne argued that I should draw an analogy from the criminal law where the concept of "transferred malice" means that a defendant will be guilty of intentional injury if his intention was to injure X and, inadvertently, he injures Y.

16. However, there are decisions which do assume that the intention must be to injure the Claimant. Thus in *Horrocks v Lowe* at p. 149, Lord Diplock said,

> "'Express malice' is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove."

This was followed by the Court of Appeal in *Alexander v Arts Council of Wales* at [34].

Ms Rogers also referred to the decision of the Court of Appeal in *Wilts United Dairies v Thomas Robinson Sons and Company Ltd* [1957] RPC 220. At p. 234 Stable J. said,

> "I am quite satisfied here that there was never any intention - that is to say deliberate intention – in the mind of the Defendants or anybody connected with them to do the Plaintiff Company harm. I do not think that the Defendants cared a row of pins whether it was the Plaintiffs' milk or whether it was one of their competitors' milk. They were not there to harm the Plaintiffs, what they were out for was making a profit, to advantage themselves. So that if you limit 'malice' in this context in this way, that there cannot be malice unless there is the direct intention to harm the Plaintiffs – or, putting it another way, unless the object in view was to harm the Plaintiffs then, accepting that as being the definition of 'malice' in this context, there was no malice."

After reviewing the authorities, Stable J. said at p.237,

> "As I understand the law it is this, that if you publish a defamatory statement about a man's goods which is injurious to him, honestly believing that it is true, your object being your own advantage and no detriment to him, you are obviously not liable. If you publish a statement which turns out to be false but which you honestly believe to be true, but you publish that statement, not for the purpose of protecting your own interest and achieving some advantage to yourself but for the purpose of doing him harm and it transpires, contrary to your belief, that the statement you believed to be true has turned out to be false, notwithstanding the

bona fides of your belief because the object that you had in mind was to injure him and not to advantage yourself, you would be liable for injurious falsehood."

It is right to observe that Stable J. had in mind the juxtaposition of the defendant intending to advance his own interests on the one hand and intending to harm the Plaintiff on the other, rather than the contrast posed by the present issue, namely intending to injure the Claimant on the one hand and intending to injure a third party on the other. Lord Coleridge CJ likewise in *Halsey v Brotherhood* (1881) 19 Ch D 386, 388 said that an intention to injure the plaintiff was a necessary ingredient of slander of title (an alternative name for the same tort) but again he was distinguishing that state of mind from a *bona fide* defence of the defendant's own property.

17. This aspect of Ms Rogers' objection is really that permission to amend should be refused because the proposed reference to an intention to injure people other than the Claimant is not capable of assisting him to establish malice as part of his cause of action. In other words, it is a submission that this part of the proposed amendment should be disallowed because it would otherwise be vulnerable to a strike out application under CPR r.3.4(2)(a). So far as this aspect of her objection is concerned, it does not, therefore, turn on predicting whether a jury could rationally decide the matter in the Claimant's favour. If she is right, this part of the evidence which the Claimant wishes to lead simply should not be before the jury at all.

18. As I have tried to show, the authority on which she principally relied (the *Wilts Dairies* case) did not have to confront the precise issue. Nor, so far as I have been able to discover, has any other decided case. Even so, the assumption that it will be an intention to injure the Claimant which constitutes malice, where there is any reference to the object of the defendant's malign intentions, does somewhat assist her. Thus, while the authorities are not decisive, I do consider that overall, their balance of authority favours her position. I did not find the criminal law analogy helpful. The purpose of the criminal law is to protect the public interest. In that context it makes obvious sense for the law to be indifferent whether the intention was to injure the actual victim or someone else. The purpose of tort law is different: it is to provide redress to individual claimants for individual wrongs to them. In any case, the limits of the tort of trespass are different to those of malicious falsehood. Malice is an essential ingredient of the latter but not of the former. Furthermore, the other elements of the tort of malicious falsehood must clearly relate to the Claimant. Thus the words published must concern *the Claimant*, or his property or his economic interests and the publication must have caused *him* pecuniary loss (or in circumstances covered by Defamation Act 1952 s.3(1) be calculated to cause *him* pecuniary loss). I consider that it would be anomalous if the third element, malice, could be sufficiently established by an intention to injure, not the Claimant, but some third person. Thus, in my judgment, what the Claimant is here seeking would be a novel extension of the law and that is not a step which I would be justified in taking. I consider also that it would be particularly inappropriate to do so in a context where the third party in question is the Prime Minister. Of course, he, like anyone else has individual rights which he is entitled to protect, but in the present case it is the private rights of Mr Cruddas, not Mr Cameron, which are in issue. The courts should be particularly careful about novel extensions of the law which impinge on areas of political debate, as *Horrocks v Lowe* itself was at pains to emphasise.

Amendments to which the Defendants object and my decisions (references are to the paragraphs in the Revised draft Amended Particulars of Claim)

5.2

19. The Claimant wishes to add to the current pleading regarding the extracts from the covert recordings which it provided on its website a reference to a further article published in the *Sunday Times* on 1st April 2012 and the words "the Tories could hardly dispute Cruddas' words as they were crystal clear on video footage of him talking to the undercover reporters." The Defendants say this is irrelevant. The Claimant submits it goes to aggravation of damages.

    If the Claimant succeeds in his claim and is right in his pleading that the chosen extracts gave a distorted impression of the meeting, I consider that he is entitled to argue that these words should have an impact on the damages.

    I will allow the amendment.

5.5

20. The original pleading says that sections of the extracts from the covert recordings were shown on BBC and Sky. The proposed amendment adds a reference to News Corporation owning a controlling stake in Sky. The Defendants say this is irrelevant. The Claimant says it is relevant that both the *Sunday Times* and Sky are owned ultimately by News Corporation.

    The amendment does not allege that the Defendants used their corporate relationship to procure the broadcasting of the extracts on Sky. I agree that this proposed amendment is irrelevant.

    I will disallow it.

7.9

21. This, and all the following proposed amendments to which the Defendants take objection, concern the Claimant's particulars of malice. Paragraph 7.9 presently alleges that the 1st and 2nd Defendants knew that the allegations against the Claimant as set out in the pleaded meanings were false. The Claimant wishes to add (and, to this, the Defendants do not object) that the 1st and 2nd Defendants published the Articles complained of intending to cause serious harm to the Claimant. The Defendants do object to the further plea that they also published the Articles "for their own advantage". Ms Rogers argues that it is not malice to act for one's own advantage. *Wilts United Dairies v Thomas Robinson Sons and Company Ltd* is one of many authorities for that proposition. Mr Browne accepts that as a general proposition but argues that this was not legitimate journalism. The Defendants gave a particular slant to the exercise because they wanted to try and demonstrate that Mr Cameron was a hypocrite because of what he had said in a speech in 2010 about secret political lobbying.

    I agree with Ms Rogers on this matter. In the present context it is very likely to be malice for a person to publish untrue matter knowing that it is false. It is malice to

publish untrue matter intending to injure the Claimant. It is not malice for the Defendants to act for their own advantage.

I will disallow this amendment.

7.9A (1 and 2)

22. These paragraphs set out the 9 earlier drafts of the first article and 5 earlier drafts of the second article. In themselves they say nothing of significance but they are preliminary to matters which the Claimant wishes to plead later in the particulars of claim and which he wishes to argue demonstrate malice on the part of the Defendants. It is convenient to postpone detailed consideration of those matters until later, but for the reasons which I give below I consider that some of these amendments should be allowed. It follows that these preliminary averments should also stand.

I will allow this amendment.

7.9B

23. This paragraph refers to a memorandum which the 1st Defendant sent to Mr Hymas, the Managing Editor News. This, too, is only introductory. Again I will postpone detailed discussion until later of the substantive matters which arise from this memo. Since I will allow at least some of those amendments, I will allow this amendment.

7.10A

24. Paragraph 7.10 of the original pleading refers to a public brochure which spoke of various ways in which supporters of the party could make donations. They were labelled as "groups". One of them was called "the Leader's Group" and was for those who donated £50,000. Paragraph 7.10 currently says that a copy of the brochure had been handed to the first two Defendants at the meeting with the Claimant. A contrast is drawn between this and the description in the second article of a "secretive group of donors who pay £50,000 a head to attend dinners with Cameron in private houses." The existing defence denies paragraph 7.10 (see paragraph 9.13.1 of the Defence). It is accepted that the fact of the Leader's Group was public (Defence paragraph 9.13.3), although its membership and activities were said not to be (ibid and paragraph 7.51). In proposed paragraph 7.10A the Claimant wishes to allege that the 1st and 2nd Defendants knew all about the Leader's Group because of what they were told about it in a document from Ms Southern. The Defendants submit that this amendment is unnecessary. They say there is no dispute that the two journalists knew about the Leader's Group. Mr Browne argues that if there is no dispute then the Defendants can admit the allegation in their amended Defence, but it is important for his client to establish what the 1st and 2nd Defendants actually knew.

In view of the admission that the existence of the Leader's Group was public knowledge, the proposed amendment carries the matter only a little further. But since it does speak to the specific knowledge of the 1st and 2nd Defendants (as opposed to the public generally), it is a matter which in my judgment the Claimant is entitled to plead. I will allow this amendment.

7.10B

25. This refers to the Hymas memo in which the 1st and 2nd Defendants said the existence of the Leaders' Group was openly acknowledged. The Defendants again say this is not in dispute and therefore should not be pleaded. However, as I said in relation to the previous proposed amendment, the Claimant is entitled to plug what may be a pleading gap between information publicly known and information known to the 1st and 2nd Defendants and plead that this shows that both were the case. This paragraph goes on to quote a further comment from the Hymas memo that the 1st and 2nd Defendants believed their investigation provided a vivid confirmation of what Sir Christopher Kelly and others had long suspected. The Defendants submit this is at least consistent with an honest belief that the Leader's Group was a matter of concern (including for Sir Christopher's investigation into party funding). Mr Browne argues that this helps to demonstrate that the 1st and 2nd Defendants thought that something significant had come out of their meeting with the Claimant. I consider this to be marginal. However, in paragraphs 7.10E-7.10F (to which the Defendants do not object) the Claimant will plead particulars of a conversation which the 2nd Defendant had with Sir Christopher on 23rd March 2012, their expectation of what his reaction would be, what his reaction in fact was and what the Defendants did or did not do in consequence. Since all this will be part of the Claimant's pleaded case, I consider that he is also entitled to plead the remainder of paragraph 7.10B

I will allow this amendment.

7.10C and D

26. The Claimant wishes to allege that the first and second articles were progressively edited so as to downplay the significance of the Leader's Club and indeed to remove all reference to it so as to make it appear as if the group was secret. This was said to support the charge of corruption which they were making against the Claimant and hypocrisy against the Prime Minister. The Defendants argue (a) The changes made in interim drafts could be for many reasons and so cannot support a plea of malice; (b) In any case these changes are anodyne; (c) A plea of malice cannot rely on an intention to injure a third party.

I reject a similar argument to (a) in my decision on proposed paragraph 7.15A below, but in the context of the present paragraph, Ms Rogers' second objection is well founded. I cannot see how the further particulars in paragraphs 7.10C.1 and 7.10C.2 could lead a jury to the conclusion in the opening part of 7.10C. Before the changes set out in 7.10C.1 and 7.10C.2 the draft as pleaded did not say that the Leader's Group/Club was referred to publicly. Before and after the changes the references were to a 'secretive grouping'**.** It will still be open to the Claimant to argue that the final version as published gave a false impression of the secretive character of the Leader's Group, but I do not consider that the interim changes which he here wishes to plead could arguably advance that case. I also agree with the Defendants' third response for the reasons given above.

I will disallow these proposed amendments.

7.15A

27. Paragraph 7.15 of the original Particulars of Claim already pleads that a section of the second article which said that the Defendants had presented to the Claimant a

shopping list of what they wanted in return for a large donation was completely false and known to the Defendants to be false. Proposed paragraph 7.15A wishes to allege further that this part of the second article was not in the first version but was added at the second stage and was further altered in the fourth version to make specific the allegation that the Defendants said they wanted to influence policy for the sake of their business. The Claimant argues that this is another example of the ramping up of the allegations in the article and is evidence from which the jury could conclude that the Defendants intended to injure the Claimant. The Defendants submit that the changes are anodyne and incapable of proving malice. More fundamentally they argue that changes in the course of editing could be for many reasons. This strand of evidence on which the Claimant wishes to rely is not therefore more consistent with the existence of an intent to injure the Claimant than its absence. To that the Claimant responds that the Defendants can set out their alternative explanation in their pleading and evidence and the jury can decide, but he should be entitled to argue that this is one part of the corpus of evidence from which he will ask the jury to infer a malicious intention towards the Claimant. Mr Browne argued that he could not have been stopped at trial from asking the Defendants questions about the evolution of their articles in order to demonstrate their intentions. All that these particulars are doing is giving advance notice of that line of questioning.

I am somewhat sceptical as to how far this line could benefit the Claimant. After all, if, as the existing paragraph 7.15 pleads, this part of the article was false and the Defendants knew it, he will very likely have established malice since malice will usually be inferred from the defendant's publication of material about the claimant which he knows to be false. If this part of the article was not false or the Defendants did not know that it was false, it is hard to see how the addition of this part of the article illustrates their malign intention. Nonetheless, as Mr Browne submitted, a Claimant in malicious falsehood is entitled to plead that what the Defendant published was both knowingly false and published with the intention of harming the Claimant. Furthermore, I could not say that a jury would be perverse if it drew a conclusion adverse to the Defendants from this change in the editing either taking those facts on their own or in conjunction with other evidence as to the Defendants' intention.

I will allow this amendment.

7.19

28. In his meeting with the Defendants the Claimant referred to a "premier league" group of donors who gave around £250,000 each. The existing paragraph 7.19 says that he used that description because they were, in the context of donations to the party as a whole, very significant. This amendment wishes to add that this fact was confirmed by Ms Southern prior to publication. The Defendants object that the amendment serves no purpose. Mr Browne put forward no specific argument for this change. I agree with the Defendants.

I will disallow this amendment.

7.26B

29. This proposed paragraph pleads that Mr Hymas instructed the Defendants to add elements to the story including "Past scandals using proxy donors including

Abrahams". Abrahams was someone who notoriously had made donations to the Labour Party through his secretary. Paragraph 7.26B would continue, "From this it is clear that he and the First and Second Defendants intended that the Articles should convey a clear allegation that the Claimant had been guilty of soliciting and funnelling a foreign donation to the Conservative Party from a concealed source in breach of electoral law." Ms Rogers argues that this paragraph is irrelevant. The state of mind of Mr Hymas is not what the Claimant has to prove. Times Newspapers Ltd was the employer of Mr Hymas as well, but the Claimant puts his case as to why it is liable on the basis of its vicarious responsibility for the 1st and 2nd Defendants alone. As published the articles complained of made no mention of Abrahams or other past scandals of proxy party donors. The omission is therefore equally consistent with the lack of any intention to make this allegation. In any event the meaning pleaded in this paragraph is not any of the meanings which the Claimant pleads the ultimately published articles bore. Mr Browne accepted that he did not seek to make the 3rd Defendant vicariously responsible for malice on the part of Mr Hymas, but, he argued, Mr Hymas' frame of mind tainted that of the two journalists.

In this connection, I accept the submissions of Ms Rogers. It might have been different, as she says, if, after Mr Hymas' memo, the articles had been changed to refer to Mr Abrahams or other past scandals, but that is not what appears to have happened. I also have some sympathy with her comment that the meaning referred to in this paragraph is not wholly in line with the meanings pleaded earlier in the Particulars of Claim. Had that been the only objection, I would have given Mr Browne an opportunity to tweak the wording of the proposed amendment, but since there is the more fundamental objection I will simply disallow this amendment.

7.26C and D

30. In these paragraphs the Claimant wishes to refer to a conversation which the 1st Defendant had with a Mr Karim Aziz of the Electoral Commission. It is alleged that the Defendants hoped to get a quote from the Electoral Commission that a payment whose source was a foreign fund would be contrary to electoral law and Mr Cruddas should not have even contemplated it. The 1st Defendant is said to have presented Mr Aziz with a hypothetical case of a foreign company making a donation to a UK political party through a UK subsidiary or a UK director. Mr Aziz is said to have responded that a donation through a UK subsidiary would be lawful, but the article made no mention of his views because it undermined the case the Defendants wished to present in the articles, namely that the Claimant's conduct was a breach of electoral law.

Ms Rogers responds that the articles contained nothing equivalent to the hoped for quotation. The third article did say that a loophole in the present law allowed payments to political parties from foreign funds through functioning British subsidiaries and referred to the view of the Electoral Commission that the loophole should be closed. It was irrelevant that the article did not say the Electoral Commission acknowledged that payment through a UK subsidiary would currently be lawful.

It seems to me that Ms Rogers' objection is seeking to draw me into a ruling on the meaning of the articles. Although the Claimant's application asks for such a ruling, the parties are agreed that it makes sense to postpone that issue until mode of trial has

been resolved. If the articles have the meanings for which the Claimant contends and, if in those meanings the articles were false, the Claimant would be entitled to rely on what the Defendants had been told by the Electoral Commission.

I will allow these amendments.

7.26E &F

31. Mark Adams was the author of the fourth article which appeared in the same edition. In these proposed paragraphs the Claimant wishes to refer to an email exchange between Mr Adams and the 1st Defendant in which Mr Adams said he was thinking of making a complaint to the police. Paragraph 7.26F pleads that the 1st Defendant did not tell him that the Electoral Commission considered there would be no breach of electoral law and this was because he wanted to add a news angle to the coverage of his scoop and cause further damage to the Claimant.

Ms Rogers says that the Claimant has misconstrued the 1st Defendant's email to Mr Adams and the exchange is incapable of supporting a malicious design. Mr Browne says that it will be for the trial jury or judge to construe the exchange. I agree with him that I cannot say at this point that the exchange could not support a plea of malice.

I will allow this amendment.

7.28A

32. Over several sub-paragraphs the Claimant proposes to show how the articles heightened and increased the severity of the allegation of the Claimant's willingness to accept a foreign donation in breach of election law and to permit devices to conceal its true source. The Defendants repeat their objection that changes over the course of drafting the articles could have been due to many reasons, they are not more consistent with malice than its absence. Furthermore the changes themselves are anodyne. In addition, paragraph 7.28A.7 refers to a change made by Mr Hymas, but, as appears from 7.28A.8 his addition was deleted shortly afterwards.

In my view, there is sufficient in the Claimant's arguments for these additions to be included. Whether the changes were indeed anodyne or whether they were the product of an intention to harm the Claimant can be further debated at trial. Paragraph 7.28A.7 may not do much to advance the Claimant's case in isolation, but its inclusion is necessary to complete the story of how these particular sections of the article evolved.

I will allow this amendment.

7.28D

33. The beginning of this proposed paragraph (to which the Defendants do not object) refers to a statement by the Conservative Party that it would not accept donations from a shell company but only from a fully operational UK company. It is to be pleaded that the 1st and 2nd Defendants omitted to mention this even though it was important. Again no objection is made. The final sentence of the paragraph (which is challenged) says "It is to be inferred this was because this ran counter to the

impression [the 1st and 2nd Defendants] wanted to create of the Conservative Party's willingness to accept an illegal foreign donation." Ms Rogers objects on two grounds: the Defendants' alleged attitude to the Conservative Party (as opposed to the Claimant) is not material to malice. In any event, they say, the 1st article did say that the Conservative Party insisted that donations complied with electoral law. Mr Browne made no specific submissions on this aspect and I agree with Ms Rogers.

I will disallow this amendment.

7.30C

34. The Defendants' objection here is limited to the fourth sentence which they say misquotes the document to which it refers. That document was a record of a committee established by the 3rd Defendant to consider certain types of journalistic activities. The passage concerns the views of the editor, Mr Witherow.

The sentence in the proposed pleading is not a quotation from the document, but purports to be a summary of it or part of it. Whether it is a fair summary can be resolved at trial. In any case, I assume, the document itself will be available.

I will allow this amendment.

7.31

35. The existing pleading says that the Defendants deliberately delayed contacting the Claimant until 3pm on the afternoon prior to publication. The amendment proposes to allege that they also delayed contacting others affected by the proposed publication.

Ms Rogers submits that it will not assist the Claimant to show the Defendants' malice towards him by proving that there was a delay in giving other people a chance to comment. What those others were told concerned what the articles were going to say about them. It was not the case that they were going to be asked to comment on what the Defendants were going to publish about the Claimant. Mr Browne made no specific response to this objection which I consider is a sound one.

I will disallow this amendment.

7.31A

36. In this proposed paragraph the Claimant wishes to add detail as to the time table in which the articles were prepared and that they did not turn until late on Friday 23rd March to dealing "perfunctorily with their obligations as journalists to give the subjects of highly damaging allegations an opportunity to respond." Ms Rogers objects to this last part only on two grounds. First she says that it extends beyond the Claimant to others who were referred to in the article. Second, she argues that a failure to abide by journalistic obligations is not the same as malice.

I agree with the first (for the reasons given previously). However, I do not accept her second objection. By itself a failure to comply with journalistic obligations cannot equate with malice, but I cannot say that, as one of the circumstances from which the Claimant might invite the jury to infer malice, it is irrelevant.

I would be prepared to allow this amendment if the last sentence was changed to read, "The Articles were virtually in their final form before the First and Second Defendants turned late on Friday 23 March 2012 to deal perfunctorily with their obligations as journalists to give the Claimant as the subjects of highly damaging allegations an opportunity to respond."

7.31B

37. In this paragraph the Claimant alleges that the Defendants did not get back to him to discuss Ms Southern's proposal that the foreign fund, for which the 1st and 2nd Defendants purported to be acting, could make donations through the two of them. The amendment would go on to say,

> "In consequence of the deliberate refusal to confirm the Claimant's position with him, a clumsy (and in the circumstances wholly ineffective) legal paragraph had to be added to the end of the Third Article: 'As Cruddas was not directly consulted on this point it is unclear what his view was'. But even that was misleading - and known to be misleading by the First and Second Defendants – given the Claimant's clear statement in the meeting that third-party payments were not an acceptable way of making a donation to the Party."

Ms Rogers argues that there is no real prospect of establishing that the quotation from the end of the 3rd article was misleading given what the Claimant had said in the meeting. She also objects to the characterisation of the quoted paragraph as a "legal" addition which she says is wholly speculative.

I agree with Mr Browne that it is a matter for the trial as to whether the Claimant can make out his case that the quoted passage was misleading. I do agree that it is speculative to characterise the quoted passage as a "legal" paragraph.

Subject to the deletion of the word "legal" I will allow this amendment.

7.31C-7.31D

38. These proposed paragraphs concern the drafting of letters which the Defendants sent to the Claimant and Ms Southern in advance of publication, what are referred to as "Front-ups". The final emailed letter to the Claimant itself was, of course, known about at the time the original Particulars of Claim were prepared and is quoted at paragraph 73F.6 (and the amendments to that paragraph are not the subject of any objection). The Claimant pleads that the earlier draft of the letter to him specifically alleged that he knew what was proposed was a foreign donation which would break election rules, but he offered a way around this by setting up a UK subsidiary company. The Claimant goes on to allege that the suggestion of criminality or breach of the rules concerning political donations was removed from the Front-up so as to give no idea to the Claimant that these allegations were to be included in the articles.

The Defendants allege that the editing changes were anodyne. It is just speculation that the change was intended to keep the Claimant in the dark and the text of the draft to Ms Southern is irrelevant to proof of malice towards the Claimant.

I consider that the Claimant is entitled to plead the omission of the allegation in the draft that is quoted at para 7.31C and that this was for the purpose which is set out at the conclusion of paragraph 7.31D. It may be that there were other explanations for its removal from the front-up, but, if there were, these can be set out in the amended defence. I agree with Ms Rogers that the draft of the front-up to Ms Southern appears to go nowhere in establishing malice towards the Claimant. Paragraph 7.31D would need to be changed to omit reference to it.

Subject to this alteration, I will allow this amendment.

7.31E

39. This proposed paragraph refers to an instruction from Mr Hymas to the 1st and 2nd Defendants to delay sending the front-ups until the timing of them had been approved by John Witherow, the editor. It also elaborates on the duty of journalists to give advance notice to those who were to be the subject of criticism. It would go on to say that the delay was to avoid the risk of an injunction.

Ms Rogers says that this paragraph is objectionable so far as it concerns front-ups to people other than the Claimant. I do not accept that criticism in the context of this paragraph. As I understand it, in each case the reference to the front-ups generally is made because they included the front-up to be sent to the Claimant. He is part of the class to which reference is being made.

I will allow this amendment.

7.31F

40. This proposed paragraph and its sub-paragraphs plead further matters in relation to the front-ups. The Defendants do not object to 7.31F. 5 and 7.31F.6 because these concern the front-up to the Claimant. They do object to the other sub-paragraphs because they concern front-ups to other people and, as such, they are irrelevant to malice.

I agree that there is nothing or nothing sufficient to warrant inclusion in the particulars of claim in paragraphs 7.31F.1, 7.31F.2, 7.31F.4, 7.31F.7. In 7.31F.3 the Claimant refers to the 2nd Defendant's dealings with Henry Macrory, of the Conservative Party press office. It is alleged that she told him that nothing had yet been decided as to where the story was going in the paper. The Claimant alleges that she was dishonest in this regard because she knew that the story was going to be on the front page. Mr Macrory is also said to have asked for publication to be delayed by a week, but that request was inferentially refused by publication taking place the next day. I accept that the Claimant should be able to rely on the allegation of dishonesty. Even though it was not directly to the Claimant, it was in connection with the publication of which he complains and very shortly before that publication took place. The request for a delay is different. I do not see how the fact that such a request was made by someone other than the Claimant or the Defendants' response to that request can assist the Claimant in establishing malice. Mr Browne suggested it might be relevant to damages, but I do not see how it could be relevant in that context either.

I will disallow the amendments in paragraphs 7.31F.1 and 7.31F.2. In its present form I disallow the amendment to 7.31F.3 but I would allow a suitably re-cast amendment which, after explaining the context of their conversation, focussed on the allegation of deception by the 2nd Defendant. I disallow paragraph 7.31F.4. There being no objection, I allow the amendments to 7.31F.5 and 7.31F.6. I refuse the amendment to 7.31F.7.

7.32 and 7.33

41. The proposed amendments to these paragraphs in summary expands what is presently pleaded in relation to the front-up to the Claimant to all the various front-ups referred to in paragraph 7.31F.

Ms Rogers' objection is that the front-ups to others are not relevant to the Claimant's plea of malice.

I agree. There are other changes which these paragraphs seek to bring about. If the Claimant wishes, those may be made, but only if it is clear that the subject of these paragraphs is the front-up to the Claimant, the Defendants' intention towards him, the warning he was being given, the Defendants' wish to ambush the Claimant (rather than others) and the Defendants' lack of interest in anything the Claimant had to say in response to his front-up.

With this qualification I will allow these amendments.

7.34 and 7.35

42. The Claimant wishes to plead that the Defendants were concerned that the articles might be injuncted if proper advance notice was given to the Claimant and this was why the Claimant was sent the front-up so shortly before the publication time and why strict embargoes were placed on broadcasters to whom the 3rd Defendant sent extracts of the covert filming of the meeting. The Claimant refers to a passage in the 2nd Defendant's notebook in which she says 'could be injunct'.

Ms Rogers argues that the notebook entry is too flimsy a basis for the conclusion that there was concern about an injunction. She argues that the stringent test set by the law for prior restraint of allegedly libellous publications would mean that there was no serious risk of an injunction being granted as Mr Witherow and Mr Hymas (very experienced newspapermen) would know. There was no prospect of a claim for infringement of private information. In any case, the notice which the Claimant was given would still have allowed him the opportunity to go before a judge for an injunction if that was what he had been minded to do. Furthermore, it is a common practice for embargoes to be imposed to prevent other newspapers spoiling a scoop. Mr Browne argued that the passage in the 2nd Defendant's notebook did give a basis for saying that there was a fear of injunction and the fact of secret filming made an injunction the more likely. What other purpose, he asked, could there be in delaying the front-up to the Claimant. The embargo on use of film footage was at least consistent with that concern.

The Claimant will already have before the jury evidence of the timing of the front-up. Ms Rogers appeared to accept that *if* the jury was satisfied that the Defendants had

deliberately delayed giving notice to the Claimant so as to minimise the chance of him getting an injunction, that could be relevant to malice. In my judgment, the note in the journalist's notebook when taken with the timing of the front-up, does at least give the Claimant grounds for arguing that this was indeed the case. The points which Ms Rogers makes as to why, objectively, there was no risk of an injunction being granted, can be canvassed at trial, but in my judgment the answer is not so clear cut that the Claimant should be prevented from pleading the point. Had the embargo on use of film clips stood alone, the position might have been different, but it does not and I will allow the Claimant to rely on that paragraph as well.

Consequently, I will allow the amendments in paragraphs 7.34 and 7.35

7.36 -7.38

43. The Claimant wishes to argue that the Defendants' investigation into him involved a great deal of expense, the Defendants were aware of this, they were under pressure to deliver stories to justify the expense and he will invite the court to infer that their willingness to publish false and damaging allegations against him was driven by a desire to ensure that the *Sunday Times* got its money's worth. In paragraph 7.38 it is to be pleaded that the 3rd Defendant required a fee from other news organisations after the first 24 hours. This, too, was with an eye to recouping the costs of the investigation.

The Defendants submit that pursuit of their own advantage is not evidence of malice – see for instance *White v Mellin* [1895] AC 154, 160-161. Indeed, when a Claimant cannot show that the defendant knew what was published was false, he must prove that the defendant's dominant intention was to injure the Claimant rather than advance his own interest. In addition, paragraph 7.38 adds nothing since it is common practice in the industry for efforts to be made to market rights generated by a story.

In my judgment, Ms Rogers' objection misses the point of why the Claimant wishes to rely on the costs. It is to establish a motive for the Defendants to publish the stories even though (as pleaded elsewhere) they knew that they were false. It is not necessary for a claimant to prove why a defendant has engaged in dishonest conduct, but it must be open to him to show that there is such a reason in order to show that it is more likely than not that this is what the defendant in fact did. The position is analogous to that which prevails in criminal law. It is not incumbent on the prosecution to prove a motive for murder, but evidence that there was such a motive is admissible as relevant to the question of whether the defendant did intentionally kill the victim. Ms Rogers argued that there was nothing in the disclosure to show that the Defendants were influenced in what they published or when notice was given to the Claimant because of the expense which had been incurred. The exchange between the 1st and 2nd Defendants took place at a very early stage of the investigation in December 2011. Mr Browne argued that this did evidence their concern about the need to get stories from this costly enterprise. It is not necessary for me to resolve this dispute. Even if Ms Rogers is right about this particular exchange, in my judgment the Claimant should still be entitled to plead that it was the costly nature of the exercise which led the Defendants to press ahead with publication of what they knew were untrue allegations. It is unnecessary for me to emphasise that whether this allegation is correct or not will be determined at trial. All I am deciding is that the Claimant should be able to plead it.

I will allow the amendments in paragraphs 7.37 and 7.38.

44. In paragraph 9.1 of the original Particulars of Claim the Claimant relies on the plea of malice in support of his claim for damages. At times during his submissions Mr Browne argued that, even if the amendments were not capable of supporting malice, they were nonetheless relevant for the purpose of damages. Ms Rogers argued that it was only if the Claimant was aware of what had happened that they could be relevant for damages.

45. Ms Rogers has also asked me to consider the proposed amendments in the light of the principle of proportionality. The pleadings in this case are already extensive. The amendments will make them significantly longer still. However, they are not disproportionate. I bear in mind the importance of the matter for the Claimant (and, for that matter, the Defendants). In addition, as Ms Rogers reminded me, the task of proving malice is an onerous one. In light of these matters it would not be right to exclude any of the proposed amendments on which the Claimant wishes to rely on grounds of proportionality.