Neutral Citation Number: [2013] EWCA Civ 136

Case No: A2/2012/0083

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Tugendhat
[2011] EWHC 3197 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2013

Before :

LORD JUSTICE LAWS
LORD JUSTICE RICHARDS
and
LORD JUSTICE McCOMBE

- -

Between :

Nigel Waterson	**Respondent**
- and -	
(1) Stephen Lloyd MP	**Appellants**
(2) Rebecca Carr	

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

- -

Desmond Browne QC and **David Hirst** (instructed by **Irwin Mitchell LLP**) for the **Respondent**
Richard Rampton QC and **Ian Helme** (instructed by **Goodman Derrick LLP**) for the **Appellants**

Hearing date : 17 December 2012

- -

Judgment
As Approved by the Court

Lord Justice Richards :

1. Mr Nigel Waterson (the respondent) was formerly Conservative Member of Parliament for Eastbourne. At the general election in May 2010 he lost his seat to the Liberal Democrat candidate, Mr Stephen Lloyd (the first appellant). He subsequently brought a claim in libel against Mr Lloyd and Mr Lloyd's campaign agent, Ms Rebecca Carr (the second appellant), in respect of two pieces of campaign literature produced and distributed by the appellants in the constituency in the run-up to the general election. The appellants raised the defence of honest comment.

2. Following cross-applications for summary judgment, Tugendhat J handed down a judgment on 8 December 2011 ("the first judgment") in which he determined the meanings of the words complained of and ruled that those meanings constituted defamatory allegations of fact rather than comment. On consideration of a draft of the first judgment and before the judgment was handed down, the appellants applied for permission to amend the defence to plead justification in respect of the factual meanings identified by the judge. For reasons given in a further judgment handed down on 13 December 2011 ("the second judgment") the judge dismissed the application. As a consequence of those rulings, summary judgment was entered for Mr Waterson.

3. Permission to appeal against the first judgment was granted by Dame Janet Smith. Permission to appeal against the second judgment was granted at a later date by Norris J, sitting as a judge of the Court of Appeal. The appeals came on for hearing together before us. Having heard argument on the first appeal, however, we decided to reserve judgment on it and to adjourn the hearing of the second appeal, the need for which appeared likely to depend on the terms of our judgment on the first appeal. Accordingly, this judgment deals only with the first appeal.

The first publication

4. The two publications complained of each took the form of a single folded sheet with the broad appearance of a free local newspaper but containing nothing but Liberal Democrat campaign material. They were two in a series of publications of that character.

5. The first publication complained of is headed "Sussex Courier", below which there appear in small black capitals the words "New issue, March 2010", and in slightly larger red capitals the words "Your free local newspaper".

6. On the front page, in bold capitals some 4 centimetres high, is printed the headline "Expenses scandal MP faces defeat", which in strict pleading terms may not form part of the words complained of but provides important context for those words and is certainly included within the general ambit of the complaint. The article underneath the headline is in three columns and is said to be "By Jonathan Walsh Chief Political Correspondent". Mr Waterson does not complain of the first five paragraphs of the article (these explain why it is said he was facing defeat), but he does complain of the following three paragraphs which read as follows:

> "The borough of Bromley is where Mr Waterson and his family live, more than 60 miles from his constituents.

> Taxpayers have paid almost £70,000 during the last four years towards the cost of Mr Waterson's Kent family home. The MP also claimed for food, cleaning, utility bills and over £1,000 to have his garage redecorated at the taxpayers' expense.
>
> Mr Waterson has also claimed for the cost of glossy brochures, featuring the photo-opportunities for his visits to Eastbourne".

7. On the second page, alongside what purports to be a Sussex Courier "Comment" column, appears an article under the bold headline "Expenses scandal: Eastbourne residents speak out". The words complained of in that article read:

> "Local residents have delivered their verdict on the MPs' expenses scandal.
>
> Eastbourne's Conservative MP Nigel Waterson has come under fire in recent months for his own scandalous expenses claims.
>
> Mr Waterson claimed almost £70,000 for the mortgage on his large family home in Kent, which is over 60 miles away from his constituents.
>
> He also claimed over £1000 to have his garage re-decorated.
>
> It's clear that Mr Waterson's expenses claims have upset many people in Eastbourne."

8. There follow two paragraphs of which Mr Waterson does not complain. Immediately under the article is a section presented as "Latest letters to the paper: Eastbourne Herald" (the Eastbourne Herald is a genuine local newspaper) which provides additional context for the words complained of. The "letters" read:

> "The electorate is fed up with the entire House of Commons, our MP included … It is time for Eastbourne to vote for a new Member of Parliament".
>
> "Why does Mr Waterson need a large house in Beckenham?"
>
> "I for one would prefer my local MP to live in Eastbourne full-time and offer us taxpayers value for money. Eastbourne deserves more than second best and perhaps it's time we got it".
>
> "Why are you allowed to claim £70,000 of tax payers' money for the mortgage on your home in Beckenham, Kent … why are you allowed to claim tax payers' money to fund your 'Sea Vews' [*sic*] magazine'? … you do not seem to enjoy mixing with the ordinary voter."

9. Mr Waterson attributes to the words complained of both a natural and ordinary meaning and an innuendo meaning. As Tugendhat J helpfully explains at [10] of his judgment, an innuendo meaning is the technical term for a meaning that would only

be understood by a reader who knows facts not stated in the words complained of (in this case those facts are set out in paras 8(1) to (3) of the Particulars of Claim), and the reader interprets the words in the light of those facts. The relevant paragraphs of the Particulars of Claim, taking unopposed amendments into account, are these:

> "7. In their natural and ordinary meaning the words complained of … meant and were understood to mean that the Claimant's conduct in making the various expenses claims listed had given rise to legitimate outrage, and that the cause of such scandal was his grave abuse for his own financial advantage of the Parliamentary rules governing such claims.
>
> 8. Further, or in the alternative, the words complained of … meant and were understood to mean that the Claimant was one of a number of notorious Members of Parliament, whose conduct had rightly become a subject of recent scandal, because their claims were unlawful and/or in breach of the Parliamentary rules, or such that they were liable to repay the amounts they had received.
>
> **Particulars of Innuendo**
>
> 8(1) In or about July 2009 the *Daily Telegraph* published over a number of days details of expenses claims made by individual Members of Parliament between 2004 and 2009. The details published became an unprecedentedly notorious matter of national scandal, and it emerged that a very large number of Members of Parliament had made unlawful claims or claims for payment to which they were not entitled under the Parliamentary rules or claims which though within the rules were essentially improper.
>
> 8(2) As the scandal increased, on 19 May 2009 the Prime Minister asked Sir Thomas Legg to investigate MPs' claims, and on 19 June 2009 Scotland Yard announced that a number of MPs would face criminal investigation. On 5 February 2010 the Director of Public Prosecutions announced that three MPs would face criminal charges of false accounting.
>
> 8(3) Following the articles in the *Daily Telegraph* a large number of MPs of all parties repaid monies to which they had not been entitled, either voluntarily or as a result of rulings by Sir Thomas Legg.
>
> 8(4) The above facts and matters were known to a very large but unquantifiable proportion of the readers of the words complained of."

10. The appellants' Defence attributes the following meaning to the words complained of (the same meaning is given to the relevant words of the second publication, considered below):

> "10. The words complained of constituted honest comment on a matter of public interest, namely, the generosity of the Parliamentary expenses system as it was at the time of publication, the use that the Claimant had made of that system while he was MP for Eastbourne and the anger and resentment that those matters were apt to cause, and had caused, amongst voters and taxpayers.
>
> **Particulars of Comment**
>
> 10.1 The comment expressed by the words complained of in their natural and ordinary meaning and in their proper context was that Claimant's conduct in exploiting the expenses system to help purchase and maintain a large house in Kent, sixty miles from his constituency, at considerable expense to the taxpayer, and in maintaining his family home there in preference to Eastbourne, was scandalous and such as to cause legitimate anger, resentment and criticism, with the result that it would be no more than the Claimant deserved if he lost his seat in the forthcoming General Election for those reasons (amongst others)."

11. At the hearing before the judge it was made clear on behalf of the appellants that the meaning for which they contended contained no suggestion that Mr Waterson had broken any rules but was confined to the simple comment that he had used the expenses system for his own benefit in a way that was open to criticism, particularly at a time when he was seeking re-election.

The second publication

12. The second publication is headed "Eastbourne & Willingdon Express", below which appear in small print the words "Printed & delivered at not [*sic*] cost to the taxpayer. Paid for entirely by volunteer contributions." The article on the first page, under the headline "Stephen Lloyd is set to win", helps to provide context. It asserts that after years of let-down from a Labour Government and an unpopular Conservative MP, residents of Eastbourne and Willingdon are calling for change; people feel let down by the MP, whose large family home is over 60 miles away in Beckenham and has got many of the issues wrong over the years; and "the choice here is between local man Stephen Lloyd or more disappointment with a unpopular Conservative, whose family home is sixty miles away". The words specifically complained of appear on the second page and the fourth page and are as follows.

13. On the second page, in a column headed "Courier Comment: It's time for change", and sandwiched between references to the dreadful recession and to taxes rising for ordinary people while bankers continue to collect obscene bonuses, are these words:

> "We've seen the scandal of MPs abusing their expenses."

Alongside that column, under the headline "Eastbourne needs a new MP", is an article the second paragraph of which reads:

> "Local residents were angry to discover that Nigel Waterson claimed £70,000 in just four years for his large Kent family home, 60 miles from his constituents."

Laid out next to the article is a column headed "Nigel Waterson's Roll of Shame" which includes the following entry in capital letters:

> "In just four years claimed £70,000 for his family home sixty miles away in Kent."

On the fourth page, under the headline in capitals "It's a two horse race" and after assertions that Labour cannot win in Eastbourne and that this means the choice for local people is between a new Liberal Democrat MP or the unpopular Conservative, it is stated:

> "Voting Labour here in Eastbourne and Willingdon will just let our expenses scandal MP off the hook."

14. As in the case of the first publication, Mr Waterson attributes to the words complained of both a natural and ordinary meaning and an innuendo meaning. The natural and ordinary meaning alleged in the amended Particulars of Claim is that:

> "10(1) the Claimant's conduct in making an expenses claim in relation to his home in Kent was a shameful abuse of the Parliamentary rules for his own advantage, and had given cause for legitimate public indignation and anger, and
>
> 10(2) he would escape his just deserts for such scandalous conduct in relation to his expenses, unless the electorate voted for the First Defendant."

The innuendo meaning alleged is in the same terms as that pleaded in respect of the first publication.

15. The appellants' pleaded case in respect of the second publication repeats, so far as relevant, the matters pleaded by them in respect of the first publication.

16. There is a further issue as to whether, even if the words complained of were comment, the appellants had an honest belief in what they published. That issue does not affect the determination of this appeal, which relates only to the judge's determination of the meaning of the words. It does, however, affect the question whether the appellants would be entitled to summary judgment if they were to win the appeal.

The legal framework

17. As to the court's general approach towards determining the meaning of a publication, it is common ground that the judge was correct to refer to the guidance in *Skuse v Granada Television Limited* [1996] EMLR 278 as summarised by Sir Anthony Clarke MR in *Jeynes v News Magazines Limited* [2008] EWCA Civ 130 at [14]:

> "The legal principles relevant to meaning … may be summarised in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any 'bane and antidote' taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation …' …. (8) It follows that 'it is not enough to say that by some person or another the words *might* be understood in a defamatory sense.'"

18. As to the defence of honest comment (or fair comment, as it was formerly known), the judge referred to the judgment of Lord Phillips of Worth Matravers in *Joseph v Spiller* [2010] UKSC 53, [2011] 1 AC 852. Lord Phillips set out at [3] a summary by Lord Nicholls of Birkenhead in *Tse Wai Chun v Cheng* [2001] EMLR 777:

> "16. … First, the comment must be on a matter of public interest ....
>
> 17. Second, the comment must be recognisable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege. Much learning has grown up around the distinction between fact and comment. For present purposes it is sufficient to note that a statement may be one or the other, depending on the context. Ferguson J gave a simple example in the New South Wales case of *Myerson v. Smith's Weekly Publishing Co Ltd* (1923) 24 SR (NSW) 20, 26: 'To say that a man's conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment.'
>
> 18. Third, the comment must be based on facts which are true or protected by privilege …. If the facts on which the comment purports to be founded are not proved to be true or published on a privileged occasion, the defence of fair comment is not available.
>
> 19. Next, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment

> is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.
>
> 20. Finally, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views: ….
>
> 21. These are the outer limits of the defence. The burden of establishing that a comment falls within these limits, and hence within the scope of the defence, lies upon the defendant who wishes to rely upon the defence."

19. Lord Phillips went on to note a sixth proposition, namely the absence of malice: a defendant is not entitled to rely on the defence of fair comment if the comment was made maliciously; the onus of proving malice lies on the claimant.

20. He then added this about the second proposition:

> "5. This merits elaboration. Jurists have had difficulty in defining the difference between a statement of fact and a comment in the context of the defence of fair comment. The example given in *Myerson v. Smith's Weekly Publishing Co Ltd* … cited by Lord Nicholls is not wholly satisfactory. To say that a man's conduct was dishonourable is not a simple statement of fact. It is a comment coupled with an allegation of unspecified conduct upon which the comment is based. A defamatory statement about a person will almost always be based, either expressly or inferentially, on conduct on the part of the person. Judges and commentators have, however, treated a comment that does not identify the conduct on which it is based as if it were a statement of fact. For such a comment the defence of fair comment does not run. The defendant must justify his comment. To do this he must prove the existence of facts which justify the comment."

21. Later in his judgment he examined the fourth proposition in some detail, holding that Lord Nicholls was wrong to require that the comment must identify the matters on which it is based with sufficient particularity to enable the reader to judge for himself whether it was well founded. He said that the comment must identify at least in general terms what it is that has led the commentator to make the comment, so that the reader can understand what the comment is about and the commentator can, if challenged, explain by giving particulars of the subject matter of his comment why he expressed the views that he did. He concluded:

> "105. For the reasons that I have given I would endorse Lord Nicholls's summary of the elements of fair comment that I have set out at para 3 above, save that I would rewrite the fourth proposition: 'Next the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based."

22. We were referred by counsel to a number of additional authorities illustrating the development and application of those principles.

23. In *Hunt v The Star Newspaper Company Limited* [1908] 2 KB 309, it was stated by Fletcher Moulton LJ at pages 319-320 that "comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment", and that "[a]ny matter, therefore, which does not indicate with a reasonable clearness that it purports to be comment, and not statement of fact, cannot be protected by the plea of fair comment".

24. In *Smith's Newspapers Ltd & Another v Becker* (1932) 47 CLR 279, in the High Court of Australia, Evatt J observed at page 303 that "an avenue of escape via fair comment will seldom, if ever, be open to a newspaper which uses defamatory headlines or headings, without making it quite clear that a mere expression of opinion is being announced to the world, upon the basis of the facts to be stated in a subjoined article". In similar vein, in *Galloway v Telegraph Group* [2004] EWHC 2786 (QB), [2005] EMLR 7, the terms of the headline to a leader were central to the court's conclusion that the leader was factual in character.

25. In *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 the Court of Appeal, reversing the decision of the first instance judge, found that in their natural and ordinary meaning the words complained of were fair comment on a matter of public interest: Diplock LJ observed at page 177 that the court was in as good a position as the judge to determine the natural and ordinary meaning of the words, and at page 179 that "we can decide this case in accordance with common sense and first impression by allowing the appeal".

26. The balance between freedom of speech under article 10 ECHR and the protection of reputation under article 8 was considered in *Joseph v Spiller* at [74] to [79] and was taken into account in the court's approval, with the qualifications indicated above, of Lord Nicholls's summary of the elements of fair comment.

27. Mr Rampton QC drew particular attention to the judgment of the Strasbourg court in *Jerusalem v Austria* (2003) 37 EHRR 25 at [36] and [38]:

> "36. … the Court recalls that while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to its preoccupations and defends its interests. Accordingly, interferences with the freedom of expression of an opposition Member of Parliament, like the applicant, call for the closest scrutiny on the part of the Court.
>
> 38. The Court recalls that the limits of acceptable criticism are wider with regard to politicians acting in their public capacity than in relation to private individuals, as the former inevitably and knowingly lay themselves open to close scrutiny of word and deed by both journalists and the public at large. Politicians must display a greater degree of tolerance, especially when they

themselves make public statements that are susceptible to criticism …."

28. Mr Browne QC countered with the observation that whilst a high article 10 value is to be placed on political speech, it does not mean that politicians should be open to being freely defamed. He pointed to the concurring opinion of Judge Loucaides in *Lindon & Others v France* (2008) 46 EHRR 35, at [O-I11], where it was stated that "false accusations concerning public officials, including candidates for public office, may drive capable persons away from government service, thus frustrating rather than furthering the political process".

29. It seems to me, on consideration of those authorities, that in this case we can apply the domestic law as set out in *Joseph v Spiller* without needing to import any further qualifications by reference to human rights principles.

The judgment below

30. The appellants' case before the judge was in summary that reading the words in context the "scandal" referred to in the first publication (the Sussex Courier) was simply that Mr Waterson had been allowed to claim £70,000 of taxpayers' money for the mortgage on his home in Beckenham and for decoration of the property; there was no suggestion of any other scandal, such as breach of the rules or impropriety short of a breach of the rules. Similarly in respect of the second publication (the Eastbourne & Willingdon Express), the "scandal" referred to in respect of Mr Waterson was confined to the criticism that he had claimed £70,000 from the taxpayer for a home that was 60 miles from the constituency; there was no room for any suggestion that those claims constituted a breach of any rules. It was submitted that the pleaded innuendo meaning took the matter no further, since there was nothing in the words complained of to suggest that Mr Waterson might fall into any of the three categories set out under the particulars of innuendo: even readers who knew those facts could not reasonably assign his conduct to any of those categories.

31. I need to give a slightly fuller summary of the case presented below by Mr Browne on behalf of Mr Waterson, since the judge said in his decision that he preferred the submissions of Mr Browne "for all the reasons that he gives". The case advanced was that the passages complained of would not reasonably be understood as meaning that the scandal was the mere fact of making the claims for mortgage interest and costs of decoration pursuant to a scandalous system. In the first publication there was a general reference to "the MPs' expenses scandal", which included all the forms which the scandal had taken, including those MPs whose claims were unlawful in the sense of criminal, those whose claims were in breach of the rules, and those criticised by their parties and by Sir Thomas Legg so that they made voluntary repayments. The alternative, innuendo meaning was pleaded to cover the possibility of an argument that those facts were not so generally known to readers in Eastbourne that the law required it to be proved that some readers had that knowledge. There were repeated references in the first publication to the amounts that Mr Waterson had claimed, with no indication that it was the mere fact of such expenses being claimed that was the scandal. There was the repetition of the fact that the home in respect of which the claims were made was a home in Kent 60 miles from the constituency, which could only be factual statements and were said to be part of the scandal. The passages in question were presented in the style in which newspapers presented news pieces, as

opposed to comment pieces, with no indication (e.g. by the use of quotation marks) that the word "scandal" was attributed to anyone who might have expressed such an opinion.

32. Mr Browne submitted that in the second publication there was again a general statement about "the scandal of MPs abusing their expenses", and "abuse" in that context did not convey the meaning that might be conveyed by words which referred to MPs merely using a system that was itself a scandal: abuse could only connote a breach of the rules or worse. This was emphasised by the words that voting Labour "will just let our expenses scandal MP off the hook". And again there were statements that could only be statements of fact as to the amounts claimed, the location of the house "in Kent" and it being "60 miles from his constituents".

33. It was also submitted that reasonable readers would include many who would be fooled by the spoofs and believe that they were reading a real newspaper.

34. As I have said, the judge said that he preferred the submissions of Mr Browne. He continued:

> "47. I have no hesitation reaching this conclusion. On the contrary, I found difficulty in following how a reasonable reader in the circumstances specified in *Jeynes* could be expected to understand the 'scandal' in question to be confined to the mere fact that Mr Waterson made a claim in respect of a mortgage and decoration. The scandal referred to would reasonably be understood as meaning, and in my judgment does mean in each publication, that Mr Waterson was himself guilty of abuse of the Parliamentary rules for his own financial advantage, as more fully set out in each of the natural and ordinary meanings and innuendo meanings which Mr Waterson attributes to the two publications that he complains of. These meanings are plainly defamatory (as is not in dispute), and in my judgment they are plainly statements of fact. There is no attempt by the writers to distinguish what can only be factual statements (such as the amounts of the claims, and the location of the house in Kent) from matters of comment or opinion.
>
> 48. The court is not required in a case such as this to choose between the meanings advanced by each of the parties. The court must come to its own conclusion as to what the words complained of mean. In the present case I conclude that the meanings attributed to the words complained of by Mr Waterson are the meaning that those publications do bear.
>
> 49. For the avoidance of doubt, I accept that it would have been possible for the Defendants to do what Mr Rampton submits that they did. It would have been possible to identify the scheme applicable to MPs' expenses, to have expressed the opinion that it was a scandalous scheme, to state that Mr Waterson had made claims under the scheme entirely lawfully, and to express the opinion that nevertheless it was wrong for

> him to have made the claims. But I do not accept that a reasonable reader would understand that that is what the Defendants achieved in the publications Mr Waterson complains of."

35. I should also refer to the penultimate paragraph of the judgment, since it draws attention to certain background facts that I have not otherwise set out above:

> "52. Readers of this judgment will appreciate that the Defendants accept that Mr Waterson had a home in the Eastbourne constituency. They also accept that the second home which he had with his family in Kent was a home in the London Borough of Bromley, which is close enough to Westminster to have enabled him to attend Parliament conveniently (particularly late at night), and for his wife to attend the hospital where she works at Great Ormond Street. They also accept that since Parliament sits at Westminster, it is necessary for MPs to have a place to stay near to Westminster, in addition to a home in the constituency, where the constituency is not itself in London. A reader of the publications complained of might not have understood that the Defendants did accept all these things. But it was for Mr Waterson to choose what to complain about. I have dealt in this judgment with the matters which he has complained about, and am not concerned with matters which he has not complained about."

The arguments on the appeal

36. The arguments before us were in large measure a repeat of those advanced before the judge. It was common ground that we should not intervene unless satisfied that the judge's decision on meaning was wrong.

37. Mr Rampton submitted that we could and should conclude that the judge's decision was wrong. The "scandal" comments about Mr Waterson were themselves clear expressions of opinion and were based on non-defamatory facts set out with clarity in the publications, concerning his expenses claims in respect of his large family home in Kent, over 60 miles away from his constituency. The expenses claims were said to have made constituents angry or upset, but there was no suggestion that they were unlawful, in breach of the rules or otherwise improper. It was the fact of expenses being claimed for his home a long way from the constituency that was said to be scandalous: the point being made was that he was MP for Eastbourne and if he was to have a large family home funded by the taxpayer it should be in the constituency. The reference in the first publication to "the MPs' expenses scandal" was a comment about the system as a whole, not about Mr Waterson. The reference in the second publication to "the scandal of MPs abusing their expenses" was likewise a general complaint, not an allegation that Mr Waterson had abused his own expenses: given the specificity of what was said about him, there was no room for reading it in context as such an allegation.

38. Mr Browne, on the other hand, submitted that we could not be satisfied that the conclusion reached with "no hesitation" by this highly experienced judge was wrong. He contended that (1) in context, the words were statements of fact (and defamatory statements of fact), not comment, and if there was any comment at all it was so intermingled with fact that it had to be justified (see *Hunt*, cited above); and (2) even if this was comment, it lacked the necessary factual foundation to be defensible. Without factual basis, the publications lumped in Mr Waterson with "expenses scandal MPs" who had committed criminal offences or other breaches of the expenses rules or had acted improperly in relation to them. Those matters were relevant to the ordinary meaning if the hypothetical reasonable reader was to be taken to know them, but they otherwise came into play for the purposes of the innuendo meaning. Mr Browne relied on a passage in the first instance judgment of Eady J in *Lait v Evening Standard Limited* [2010] EWHC 642 (QB) at [8]:

> "In the light of all that has take place over the past 12 months, it is in my judgment unreal to suggest that readers would not think the worse of a member of Parliament who had taken advantage of (or 'milked') the expenses system simply because he or she had stayed within the letter of the law or of the rules. Everybody knows that some members of Parliament have been forced to 'pay back' sums of money, either by party leaders or by media pressure, even though the payments had originally been made in accordance with the prevailing rules. That is because they are perceived now as having behaved disreputably."

39. Mr Browne further submitted that readers would have been familiar with the layout of local newspapers, which these publications purported to be, and that the words complained of appeared for the most part in what were presented as factual news articles. In this context it was also legitimate to attach significance to the absence of quotation marks as an indicator that what was being said was to be understood as fact rather than opinion. He placed emphasis on the references in the first publication to the "expenses scandal", submitting that the suggestion being made was that Mr Waterson's own expenses claims had been improper as a matter of fact. As to the second publication, the complaint derived from the reference in the "Courier comment" on page 2 to "the scandal of MPs abusing their expenses": the constant theme, highlighted by the page 4 reference to Mr Waterson as "our expenses scandal MP", was that Mr Waterson was the Eastbourne exemplar of the national scandal of MPs' abuse of the expenses system. It would have been possible to state that Mr Waterson had made lawful and proper claims under the expenses system but to express the opinion that it was wrong for him to have made the claims, or that the system under which the claims were made was a scandalous one. That, however, is clearly not what was being stated in these publications.

Discussion and conclusion

40. It should be straightforward to determine how the hypothetical reasonable reader would understand the words complained of. The dispute centres on a relatively small number of words in two short publications. Over-elaborate analysis is to be avoided (see principle (3) in *Jeynes*, at [17] above). The matter is to some extent one of impression, though I prefer not to treat it as one of "first impression" (per Diplock LJ

in *Slim*; see [25] above). Nevertheless, I confess that I have not found the exercise free from difficulty.

41. I accept that we are in as good a position as the first instance judge to determine the meaning; and whilst his view, as a highly experienced judge in this field, deserves very considerable respect, I have endeavoured to put it to one side in forming my own judgment on meaning.

42. I do not think that the format of the two publications, that is to say their appearance as free local newspapers (indeed, in the case of the first publication, its express description as "Your free local newspaper"), has any material bearing on the meaning of the words complained of. The hypothetical reasonable reader would readily appreciate from their overall content that each publication was a Liberal Democrat pamphlet, replete with party-political propaganda, and not a genuine newspaper. I do not therefore attach any significance to whether the words complained of appear in what is presented as a "Comment" column or as a news article, or to whether or not the words are in quotation marks.

43. The references in the publications to "the MPs' expenses scandal" (the first publication) and to "the scandal of MPs abusing their expenses" (the second publication) are in my view clearly to be understood as references to facts of the kind set out in the particulars of innuendo, concerning the large number of MPs who had made expenses claims that were unlawful, in breach of the rules or essentially improper: they go beyond mere comment. At the date of the publications such facts were common knowledge ("Everybody knows …", as Eady J said in *Lait v Evening Standard Limited*: see [38] above).

44. It is against that background that I turn to consider the meaning of the words complained of, and in particular the descriptions of Mr Waterson as an "expenses scandal MP" and of his expenses claims as "scandalous".

45. The words complained of in the first publication consist to a very large extent of non-defamatory factual statements about Mr Waterson's expenses claims – that they related to a home in Kent over 60 miles away from his constituency, and so forth. At the heart of the matter, however, is the description (in the article on the second page) of his expenses claims as "scandalous". There is, I acknowledge, a degree of attraction to the argument that that is to be read as a mere comment based on the non-defamatory factual statements about his expenses claims, and that what is being described as scandalous is essentially the fact that expenses were claimed for a home a long way from the constituency. The argument derives some support from the letters that are quoted below the article, which voice complaints relating to the location of the home and the fact that the system allows expenses to be claimed in respect of that home.

46. The main difficulty I have with the argument, however, is that the description of Mr Waterson's expenses claims as "scandalous" comes in the sentence immediately following the statement that "Local residents have delivered their verdict on the MPs' expenses scandal", and under the headline "Expenses scandal: Eastbourne residents speak out". The article is reasonably to be understood, in my view, as suggesting a link between "the MPs' expenses scandal" and the "scandalous" expenses claims of Mr Waterson, insinuating (either as a matter of natural and ordinary meaning or at

least as matter of innuendo meaning) that Mr Waterson is one of those MPs who have behaved unlawfully, in breach of the rules or improperly in relation to the claiming of expenses. The suggested link with the "MPs' expenses scandal" is reinforced by the front page headline, "Expenses scandal MP faces defeat". The effect of all this is to tar Mr Waterson with the broader brush of the MPs' expenses scandal rather than to make a mere comment about, and based on, the particular facts set out in respect of his expenses claims. As Mr Browne submitted, the publication presents Mr Waterson as the Eastbourne exemplar of the national scandal of MPs' abuse of the expenses system; and if that is how it is to be read, it plainly involves defamatory statements of fact. In any event, there is at the very least a failure to make clear that the use of the words "scandal" and "scandalous" in relation to Mr Waterson is intended to be a mere comment about, and based, on the particular facts set out in respect of his expenses claims.

47. Much the same reasoning applies to the second publication. The "Comment" column on the second page refers to "the scandal of MPs abusing their expenses". The rest of the relevant material on the second page consists of non-defamatory factual statements about Mr Waterson's expenses claims (I include within that the words that appear under the heading "Nigel Waterson's Roll of Shame"). But the description of Mr Waterson on the fourth page as "our expenses scandal MP" is again reasonably to be understood, in my view, as suggesting a link with "the scandal of MPs abusing their expenses", insinuating that Mr Waterson is one of the MPs who have abused their expenses. I do not think that it would reasonably be read as a mere comment that the fact that he claimed expenses for a home a long way from the constituency was scandalous. In any event, there is once again at the very least a failure to make clear that it is intended to be a mere comment about that fact.

48. As Tugendhat J observed, it would have been possible for the publications to be expressed in a way that accorded with the appellants' case as to the meaning of the words complained of. I agree with him, however, that that is not how they are expressed and I share his conclusion as to how the hypothetical reasonable reader would understand them. I have reached that conclusion with much greater hesitation than did the judge, but that is still a long way from persuading me that he was wrong.

49. I would therefore dismiss the first appeal.

Lord Justice McCombe:

50. I am very conscious that we are considering an appeal from one of our most experienced defamation judges, for whom I have long had the greatest respect. However, after careful consideration of his judgment and the judgment of my Lord, Richards LJ, in draft, I fear that I have reached a different conclusion from them and I consider that the first appeal should be allowed. I am grateful to my Lord for his recitation of the facts and of the issues arising and I need add little, if anything, in that respect.

51. I have borne in mind the caution to be exercised in disturbing findings of fact by judges at first instance (as this technically is) in defamation cases (e.g. per Sir Thomas Bingham MR (as he then was) in *Skuse v Granada Television* [1996] EMLR 278). However, in an endeavour to apply the proper approach towards determining the meaning of a publication, I have found myself convinced in the end that the meaning

of the words in question in each of these publications advanced by the respondent pays insufficient regard to the second and third principles stated in *Jeynes v News Magazines Ltd*. [2008] EWCA Civ 140 at [14]. It seems to me that the process of identification of that meaning departs from the approach requiring that the hypothetical "reasonable reader",

> "(2)…must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over elaborate analysis is best avoided…"

52. Like Salmon LJ (as he then was) in *Slim v Daily Telegraph* [1968] 2 QB 157, at 186G to 187C, "I am as satisfied as I can be that the judge's decision was wrong…" Like the learned Lord Justice in that case, I say "as I can be",

> "…because I am very conscious of the difficulty which a judge faces in trying to ascertain the meaning which the ordinary layman would attribute to words which he reads in a newspaper. Much of a judge's time is spent in construing statutes and legal documents – an apparently similar task to the one which now confronts us, but a task which, in reality, requires a different technique."

53. The more that I have read the meanings sought to be extracted by the respondent from the words complained of in this case (both natural and innuendo meanings), the more it has seemed to me that it is the technique of the lawyer, rather than that of the layman, that is being applied. In essence, I am satisfied that the meaning of the words complained of here is quite simple, namely that stated by Mr Rampton QC and Mr Helme in paragraph 38 of their skeleton argument for the appellants, namely: "Mr Waterson has claimed nearly £70,000 from the taxpayer for a family home that is 60 miles from Eastbourne (fact). That is a scandal (comment)".

54. In my judgment, there is no statement (express or implied) to be identified in these so-called "newspapers" to the effect that the respondent has either broken the law of the land, or the Parliamentary rules governing expenses or has been required by Sir Thomas Legg (whose rulings – with respect to Sir Thomas – many average reasonable readers would have been unlikely to have had in mind) to repay sums previously claimed.

55. The reasonable reader would be well aware that there was significant criticism of the system of Parliamentary expenses (properly applied or not) and that some MPs (1) might have broken the law or (2) the House rules or (3) might merely have made substantial claims strictly within the rules of the criticised system (all in all "a scandal" in public parlance) within whatever category a particular MP might fall. However, all that was stated here was (a) what Mr Waterson had claimed and (b) the writers' view that that was "a scandal" or "scandalous". There was no more.

56. Such statements seem to me to fall squarely within the type of material identified by Ferguson J in *Myerson v Smith's Weekly Publishing Co. Ltd* (1923) 24 SR (NSW) 20, 26:

> "To say that a man's conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain things and that his conduct was dishonourable is a statement of fact coupled with a comment".

I recognise, of course, the qualification put on this dictum by Lord Phillips of Worth Matravers in *Joseph v Spiller* [2010] UKSC 53. The passage has already been cited by my Lord, Richards LJ at paragraph 20 of his judgment. As Lord Phillips pointed out, however, a comment that does not identify the conduct on which it is based is treated by the courts as if it were a statement of fact. Here the conduct, on which comment is advanced, *is* clearly identified.

57. The fact that the national scandal was considered, by some commentators, to be wide-ranging and differing between the claims of individual parliamentarians is, I think, nothing to the point. The articles, while referring to that broadly ranging "scandal", merely stated the undisputed facts and commented that the facts identified were, in the writers' opinion, a "scandal". I see in that no imputation of a breach of the law or of internal rules or any other improper conduct by Mr Waterson.

58. I agree with counsel for the appellants that the learned judge mischaracterised the matter when he said at paragraph 22 of the judgment below that,

> "…I found difficulty in following how a reasonable reader in the circumstances specified in *Jeynes* could be expected to understand the "scandal" in question to be confined to the mere fact that Mr Waterson made a claim in respect of a mortgage and decoration."

In the precise factual circumstances identified in the publications it was being said that it was "a scandal" that Mr Waterson could and did claim very substantial sums to maintain a family home at the stated distance from his constituency at the taxpayer's expense. There was, in my view, no allegation of scandal beyond the stated facts. The fact that there was thought to be a wider "scandal" does not alter the position.

59. Moreover, I have had difficulty in understanding how the passage from the judgment of Eady J in *Lait's* case [2010] EWHC 642 (QB) at [8], cited by Mr Browne QC for the respondent (and quoted in full at paragraph 39 of my Lord's judgment), assists Mr Browne's argument. The fact that some members of the public would think the worse of MPs who had taken advantage of the expenses system "simply because he or she had stayed within the letter of the law or of the rules" does not, I think, mean that, when it is said that such conduct is "scandalous", the person speaking/writing is straying beyond making a comment, provided he or she identifies the conduct upon which comment is being based.

60. With respect, I do not agree that "the scandal of MPs abusing their expenses" in a column expressly headed "comment" in the second publication, when read in context of the rest of the page, would be understood as references to facts of the kind set out in the respondent's particulars of innuendo. It is clear that, at the time, some did think that some claims to expenses, even within the law and the rules, were "scandalous". It does not seem to me that they would have strayed beyond comment if they identified the precise claims made and said that, in their view, they were scandalous. Surely, it

was not necessary to go so far as to say expressly, "X MP claimed £Y in expenses. Even though the claims were within the law and the rules, I still think the claims were scandalous".

61. In the *Slim* case, Diplock LJ (as he then was) took the view that the case then before the court could be decided in accordance with common sense and first impression ([1968] 2 QB 157, 179 C-D). My first impression, when reading the papers for this case, was that the matters complained of were comment, and I have remained of that view throughout. While perhaps not going so far as to identify "an evil day", I think that it would be unfortunate (paraphrasing Diplock LJ in *Slim's* case – loc. cit.),

> "…for free speech in this country if this kind of controversy on a matter of public though local interest were discouraged by the fear that every word written to be read in haste should be subjected in a court of law to minute linguistic analysis of the kind to which these [papers] have been subjected… "

62. For these reasons, I would allow the first appeal.

Lord Justice Laws:

63. I have had the advantage, and the pleasure, of reading the judgments of my Lords Richards and McCombe LJ in draft. The facts and issues in the case are described by Richards LJ with great clarity and I need give no separate account of them. I agree with McCombe LJ that the first appeal should be allowed essentially for the reasons given by him. But since he and I differ not only from Richards LJ but also from Tugendhat J below, who is as McCombe LJ says one of our most experienced defamation judges, I ought to give some account of my own approach to the case.

64. Like McCombe LJ I agree with the appellants' submission (counsel's skeleton, paragraph 38) that the meaning of the words complained of here is simply: "Mr Waterson has claimed nearly £70,000 from the taxpayer for a family home that is 60 miles from Eastbourne (fact). That is a scandal (comment)". As McCombe LJ puts it: "all that was stated here was (a) what Mr Waterson had claimed and (b) the writers' view that that was 'a scandal' or 'scandalous'. There was no more."

65. I have of course noted Richards LJ's view (paragraph 46) that "the publication presents Mr Waterson as the Eastbourne exemplar of the national scandal of MPs' abuse of the expenses system"; and with respect I see the force of the contextual points he makes. But I think we would be wrong to tease out of the words used an accusation that Mr Waterson has broken the law or the Parliamentary rules governing expenses, or been required by Sir Thomas Legg to repay sums he had claimed.

66. We are enjoined by *Jeynes v News Magazines Ltd* [2008] EWCA Civ 140 (paragraph 14) to avoid "over elaborate analysis". I think this *dictum* has a particular resonance in the context of political speech. While of course (as Mr Browne QC for the respondent submitted: see Richards LJ's judgment paragraph 28) politicians are entitled to be protected by the law of defamation, "the limits of acceptable criticism are wider in relation to politicians acting in their public capacity than in relation to private individuals – *Jerusalem v Austria* (2003) 37 EHRR 25, para 38": *Joseph v Spiller* [2011] 1 AC 852, [2010] UKSC 53, *per* Lord Phillips of Worth Matravers at

paragraph 78. (Richards LJ cites paragraphs 36 and 38 of the *Jerusalem* case at paragraph 27 of his judgment.) Lord Phillips also refers to the Strasbourg court's observation in *Hrico v Slovakia* (2005) 41 EHRR 18 (paragraph 40g) that "there was little scope under article 10(2) of the Convention for restrictions on political speech or on debate on questions of public interest".

67. At paragraph 79 in *Joseph v Spiller* Lord Phillips notes that "these expressions of principle are in general consonant with the English law of defamation". They exemplify, it seems to me, the common law's increasing focus in this area on the balance to be struck between public interest and individual right: between free speech and private claims, rather than on reputation as akin to a right of property. (See for example, in a different context, *Jameel v Dow Jones* [2005] QB 946 *per* Lord Phillips MR at paragraph 55). A political context – and especially at election time – surely informs this balance.

68. With those brief comments added I agree, as I have indicated, that the first appeal should be allowed for the reasons given by McCombe LJ.