Neutral Citation Number: [2013] EWHC 1791 (QB)

Case No: HQ12D03024

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2013

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

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

- -
- -

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

Hearing date: 24 June 2013

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. By letter dated 21 June 2013 the Defendants suggested that I should consider recusing myself from hearing the trial of this action. They also object to my hearing the application which the Defendants will make (if there is no agreement between the parties) to re-amend their Defence pursuant to para 6 of the Order of the Court of Appeal dated 21 June 2013 (that is last Friday). In addition to the matter of recusal, I have also to set a timetable for the further hearings in this case (the Defendants do not object to my setting a timetable).

THE PROCEEDINGS

2. This is a claim for libel and malicious falsehood. Pursuant to the order of the Master dated 1 November 2012 it was ordered to be tried by a Judge with a jury with an estimate of 7-10 days, and thereafter listed for a trial to start on 17 June. By application notice dated 27 March 2013 the Claimant sought a number of orders, including that the mode of trial be varied to trial by judge alone. On Friday 17 May the Defendants agreed that the trial be by judge alone. That made possible the trial of a preliminary issue to determine the actual meaning of the words complained of. And the determination of meaning was the principal issue when the case came before me on 21-22 May. I circulated my decision in draft on 24 May (the last day of term). I heard further submissions on 5 June and then handed down my judgment [2013] EWHC 1427 (QB).

3. Mr Cruddas had pleaded (in para 6 of his Amended Particulars of Claim) that the natural and ordinary meaning of the words complained of was:

> "(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 Liechtenstein 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."

4. In my judgment I decided the actual meaning of the words complained of, both for the claim in libel and for the claim in malicious falsehood. I held that for libel Mr Cruddas' meanings were the relevant single meanings, and I held that for malicious falsehood they were possible meanings (together with the less serious meaning contended for by the Defendants, which did not impute criminal corruption). I explained that I considered "corruptly" in the first meaning to mean (inter alia) that Mr Cruddas was guilty of a criminal offence and that that was what the Defendants were alleging.

5. I also made a decision (para 111), accepting a submission of the Defendants, namely that:

> "If I had not reached the decision which I have reached on the meaning in defamation, I would not admit the evidence the Claimant seeks to rely on in support of my finding that meaning as one of a range of permissible meanings for the purposes of malicious falsehood."

6. On the hand down of that judgment I struck out paras 7 and 8 of the Amended Defence. The Defendants pleaded justification to *Lucas-Box* meanings which were less serious than the meanings attributed to the words by the Claimant (and found by me to the actual meanings), and they had not pleaded justification to the actual meanings which I had found the words complained of did bear. Accordingly, I entered judgment for the Claimant with damages to be assessed.

7. Before I decided to enter judgment for the Claimant, Ms Rogers asked me for time to formulate a draft re-amendment to the Defence. The re-amendments she contemplated were to put in what is called a *Burstein* plea (to rely in mitigation of damage on the conduct of the Claimant), and to formulate a new plea of justification. As to the proposed (but as yet unformulated) new plea of justification I said (transcript p43 lines 20-28):

> "I am not going to give an opportunity, which I would undoubtedly have given at an earlier stage of the proceedings, that the entry of judgment be suspended for a specific time in order to enable the defendants, if so advised, to advance a new case on justification. I am not going to give that opportunity because, for case management reasons, I consider that at this stage it would be inconsistent with the overriding objective to do so. It is 5th June. The trial date is 17th June. The claimant is entitled to know the case he has to meet from the defendant and, in my judgement, it is too late".

8. The Defendants sought permission to appeal to the Court of Appeal against my decisions on the actual meanings of the words complained of in relation both to libel and to malicious falsehood and my decision to strike out their pleas of justification in paras 7 and 8 of the Amended Defence. It is clear from the order of the Court of Appeal that no draft re-amendment was submitted to the Court of Appeal.

9. The Court of Appeal directed that the oral hearing of the Defendants' renewed application for permission to appeal be expedited and heard on Friday 14 June, when, if permission were granted, the appeal would also be heard. At the end of the argument on 14 June, the Court of Appeal granted permission to appeal against my decisions on meaning, and reserved judgment.

10. On Wednesday 19 June the Claimant's solicitors wrote to my clerk stating that the Court of Appeal had circulated their judgment in draft. I did not understand from that letter what that draft judgment contained. They asked that the trial commence on Monday 24 June. I requested that by 2pm on 20 June the Defendants give their response to the Claimant's letter. The Defendants' solicitors wrote on 20 June that

they could not give a response until the Court of Appeal had handed down their judgment and made an order.

11. On 21 June the Court of Appeal handed down their judgment. They allowed the appeal in part.

12. In relation to paragraph 6 of the Amended Particulars of Claim and paragraph 7 of the Amended Defence the Court of Appeal said, in the words of Longmore LJ:

> "15. For my part I have no difficulty in agreeing with the judge that the meaning of the words in the articles is the meaning attributed to them by Mr Cruddas but I do have difficulty in agreeing that the word "corruptly" necessarily (or on the facts of this case) connotes that a criminal offence has been committed….
>
> 16. … I would conclude that the defendants are not asserting that Mr Cruddas was criminally corrupt in offering access to Minister for cash. They are asserting that Mr Cruddas' conduct was "inappropriate", "unacceptable" and "wrong". To some people that may indicate "corruption" but it is not explicitly or implicitly an assertion of any criminal offence. It overeggs the pudding to say that the natural and ordinary meaning of the words used is that offering access to Ministers for cash is to commit a criminal offence and I do not think (particularly in the light of the second of Sir Thomas [Bingham MR]'s principles [set out in *Skuse v Granada Television Ltd* [1996] E.M.L.R 279, 285]) that the ordinary reader would so understand it, even if he thought that the conduct was morally unacceptable because it tended to impropriety."

13. In relation to paragraph 8 of the Amended Defence Longmore LJ said:

> "24 If the defendants are not alleging criminality in the first of the meanings on which Mr Cruddas relies, must the defence of justification in paragraph 8 of the amended defence nevertheless be struck out?
>
> 25 In my view the answer is No. The case should go to trial so that the defendants have the opportunity to justify the lesser meaning which they attribute to their articles.
>
> 26 Part of the difficulty is, of course, that the natural and ordinary meaning of the words used on which Mr Cruddas relies which the judge has upheld and with which I agree (subject to the qualification that they do not connote a criminal offence) itself carries an ambiguity in its use of the word "corruptly". Mr Browne in a somewhat over-elaborate submission said that the articles emphasised that there would be secret meetings with the Prime Minister, that such secret meetings would produce awesome advantages for the donors

and that such advantages provided a secret opportunity to exert influence over government policy which other less advantaged people would not have. He then submitted that that constituted "corruption" on any view and that the defendants had no defence to the claim that the articles were defamatory. But if Mr Cruddas chooses to interpret "corruptly" in that sense, the defendants should be allowed to say not only that they have accurately reported his statement and that the report does not amount to an allegation of corruption but also that, if it does, they can justify that allegation.

27 The judge thought that because the articles contained more than quotations from Mr Cruddas and did not, in any event, set out all that he said to the reporters, they could not establish that the articles were a true and accurate report. He said the defence contained in paragraph 8.2 was logically defective because the articles contained both more than what Mr Cruddas has said and less than the totality of what he said. I find it difficult to see how professional journalism could survive if undercover reporters, exposing what they consider to be scandalous, had to report the totality of what the person under investigation had said and no more. The question is whether the report as a whole is a fair and accurate summary of what has been said. If a judge is satisfied that secret meetings were not offered or awesome advantages had not been on offer or secret opportunities to influence government policy were not promised, he will draw his own conclusion. But it cannot be right to strike out the defence of justification merely because the exchanges with Mr Cruddas were summarised and not set out in full.

28 To be fair, I doubt that the judge really contemplated that he could strike out the defence merely for this reason. He had already held that the meaning of the articles was that Mr Cruddas had committed the criminal offence of corruption and that, since the defendants could not justify that imputation, there was nothing left in the case. If one accepts that premise, the order striking out paragraph 8 of the defence is entirely understandable. Once one does not accept that premise, there must be a trial and it would be wrong now to say that the plea of justification must necessarily fail. I do not consider that Mr Witherow's apparent denial that the articles were alleging corruption takes the case anywhere. What the articles mean is for the court to decide not Mr Witherow.

29 There will therefore have to be a trial of the first libel claim. That being so, it would be inappropriate to say that there should be no trial of the second and third libel claims since they are intimately bound up with the more serious first claim. In any event the imputation of countenancing an offence under the 2000 Act is an imputation that is capable of being justified."

14. The Order of the Court of Appeal includes:

> "6. The Defendants have permission, (if so advised) to amend paragraph 7(2) of the Amended Defence and the particulars thereunder to justify the allegation that the Claimant had countenanced an offence under the Political Parties, Elections and Referendums Act 2000, the wording of such amendment (which is to be submitted forthwith) and the terms on which such amendment is to be granted to be determined by the trial judge."

15. The Defendants failed on their appeal in relation to meanings (2) and (3) alleged by Mr Cruddas, and found by me to be actual meanings of the words complained of. Longmore LJ said:

> "23. As far as the second and third single meanings in relation to UK electoral law are concerned, the position is simpler. I have no doubt that the judge was correct to say (para 39) that the allegation of being prepared to countenance a "loophole in electoral law" does not amount to an imputation of criminality but (para 40) that the allegation of countenancing the funnelling of money through a third party is an imputation of countenancing a breach of section 61 of the 2000 Act already mentioned."

16. The Defendants also failed on their appeal in relation to malicious falsehood. Longmore LJ said:

> "31. The first question therefore is whether the imputation of criminal corruption is a meaning which reasonable persons could read into the articles. Although I feel certain that the single meaning required by the law of libel does not carry that imputation, I cannot feel certain that a number of reasonable people would not have understood the articles as making an imputation of criminal corruption. I would therefore reject Mr Rampton's invitation that we should declare that, for the purpose of the malicious falsehood claim, the imputation of criminal corruption is a meaning which is not available for the purposes of malicious falsehood.
>
> 32. It might appear that there is a tension, even an incompatibility, between the proposition that a particular meaning is plainly wrong and the proposition that it is nevertheless a possible meaning. The reason why it is not necessarily so lies in the difference between libel and malicious falsehood. In malicious falsehood every reasonably available meaning, damaging or not, has to be considered. In libel, the artifice of a putative single meaning requires the court to find an approximate centre-point in the range of possible meanings. If, instead, a court of first instance selects as the single meaning for libel purposes one of the peripheral meanings in the range

> relevant to malicious falsehood, an appellate court may very well be satisfied that it has erred, because the single meaning has, generally speaking, to be the (or a) dominant one.
>
> 33. As far as the second and third claims are concerned the pleaded meanings are reasonably available meanings. I would moreover agree with the judge (para 113) when he says that the articles allege that the claimant was suggesting a breach of electoral law, in respect of the channelling of client funds through the reporters, not just a breach of its spirit. I would therefore reject Mr Rampton's invitation to allow breach of the spirit of the law to be included as a reasonably available meaning. Whether the imputation was false and whether it was malicious must await a trial of those issues."

17. Since the Court of Appeal reserved judgment on 14 June, they had at the same time ordered that the case to be taken out of the list from Monday 17 June.

18. However, I do not understand that the Court of Appeal expected that the start of the trial would be delayed significantly beyond the date on which they handed down their judgment. I say this for two reasons. First, that court would not have expedited the appeal if it had been envisaging that the trial would be delayed for a period significantly longer than was necessary to dispose of the appeal. Expediting one case leads to delay in other cases, and it is a justification for expediting a case that there is a trial which is due to start imminently. Secondly, in para 6 of their order the court required the Defendants to submit any draft re-amendment to the Defence "forthwith".

19. On 21 June solicitors for the Claimant again wrote to my clerk enclosing a copy of the order of the Court of Appeal and other documents. They recorded, as was the case, that I had stated that I would be able to sit from 2pm on Monday 24 June. They asked that I sit at that time, initially to consider any draft re-amendment produced pursuant to para 6 of the order of the Court of Appeal, and thereafter any other directions arising from the judgment of the Court of Appeal, and then the action itself. For the trial they gave an estimate of 5 days, which Mr Browne repeated at the oral hearing before me.

20. On the same day solicitors for the Defendants wrote to the court stating that it would not be possible for the trial to start on 24 June. They said that they were reviewing the position of the Defendants in the light of para 6 of the order of the Court of Appeal. They stated that their estimate for the trial, which had been 7-10 days, was reduced in the light of the change of mode to judge alone to 7 days. They wrote that their trial counsel Mr Kelsey-Fry QC was available in the week beginning 24 June, but not in the week beginning 1 July. They also wrote that it would not be practicable for the trial to commence on 24 June, before the parties had filed Skeleton arguments for a full trial. The Skeleton arguments that had been filed were for an assessment of damages, in accordance with the order that I had made on 5 June, but which the Court of Appeal had reversed. Neither Skeleton dealt with a contested trial of liability in the libel claim. They asked the court to consider whether it would be possible to re-fix the case for Monay 22 July.

21. It was in this letter that the solicitors for the Defendants then went on to suggest that I should consider recusing myself.

22. In the light of this correspondence, which reached me late on that Friday, that I directed that there be a hearing for directions at 2pm on Monday 24 June. The Defendants received notice of that direction at about 10.30am, and Ms Rogers conducted that hearing. She apologised for the absence of Mr Kelsey-Fry, explaining that he was working from home and had not been able to attend by 2pm, in the time available after the Defendants learnt that I would hold a hearing at that time.

23. Before the hearing at 2pm on Monday 24 June the Defendants submitted to the Claimant a draft pursuant to para 6 of the Court of Appeal's order. It is not agreed.

24. At that hearing, and in the light of the short notice she had received, Ms Rogers invited me not to consider until Tuesday her submissions as to why I should recuse myself. But when pressed by me, she did not formally object to my considering that question. By the time of the hearing, in addition to the Defendant's letter of 21 June setting out reasons why I should recuse myself, there were also a note prepared by the Claimant's counsel in response (dated Saturday 22 June) and a note prepared by the Defendants' counsel (dated 24 June). I did hear argument on whether I should recuse myself, together with the question when the trial should now be directed to commence. I had already made enquiries as to what other judges might be available if I were to recuse myself, and I considered it urgent that the issue of who was to be the trial judge be resolved, if there were not to be unacceptable risks of delay to this and other cases. I reserved my judgment on these two matters. I also fixed 2pm on Wednesday 26 June for the hearing of the Defendants' application to re-amend their Defence.

PRINCIPLES APPLICABLE TO RECUSAL

25. The Defendants' case, in the words of the letter of 21 June, is that:

> "a reasonable and fair minded observer apprised of all the relevant facts would have a reasonable suspicion that a fair trial before [myself] is not possible. There is no suggestion of actual bias".

26. There was no dispute as to the principles to be applied where there is an application that a judge recuse himself on that basis. They are set out in the note prepared by the Claimant's counsel as follows.

27. In *Magill v Porter* [2001] UKHL 67; [2002] 2 AC 357 at para 102 the test is stated to be:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

28. The further principles to be applied are conveniently to be found in *JSC BTA Bank v Ablyazov (Recusal)* [2012] EWCA Civ 1551. At para 58 Rix LJ said::

> "58. Yet another aspect of the problem of pre-judgment can in theory arise in circumstances where, following an appeal, a matter is remitted to a court or tribunal for reconsideration. This can happen not infrequently, either where a retrial is necessary, or where an arbitration award may have to be remitted to the arbitrators, or where the appeal court has to remit a matter to an expert tribunal. On occasions the appeal court is asked to say whether the matter should return to the same judge or tribunal, and sometimes the appeal court says that it should not. It often does so on no articulated principle, but guided by a sense that, if the judge or tribunal has erred sufficiently, the matter should be revisited afresh by a new judge or tribunal. One case in which the question was debated by reference to the principles of apparent bias and led to a developed judgment was *Secretary of State for the Home Department v. AF (No 2)* [2008] 1 WLR 2528, see at paras [52]ff. Sir Anthony Clarke MR referred to *Sengupta v. Holmes* and other authorities mentioned herein and said:
>
> > "[53] The general principle is not in dispute…The court must first ascertain all the circumstances which bear on the suggestion that the judge was (or would be) biased. It must then ask itself whether those circumstances would lead a fair-minded and informed observer to conclude that there was (or would be) a real possibility that the judge was (or would be) subject to bias; that is that the judge might have been (or be) influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case…
> >
> > [55] However, as I read the authorities, it all depends on the facts. I do not think that the mere circumstance that the judge has reached conclusions which are adverse to a party of itself leads to the conclusion that there is an appearance of bias…
> >
> > [56] However there are many cases in which issues of fact are remitted to the trial judge to consider or reconsider in the light of, say, a decision of an appellate court. It is a matter for judgment in each case whether the test identified above is satisfied…
> >
> > [57] That is not to say that there might not be particular circumstances which might lead to the conclusion that that was not so. Whether there are or not will depend on the circumstances of the case concerned.

> 65. … it is relevant to consider, through the eyes of the fair-minded and informed observer, that there is not only convenience but also justice to be found in the efficient conduct of complex civil claims with the help of the designated judge.
>
> 66. … there must also have been cases where a judge has given summary judgment, has been reversed on appeal, and has continued to try the case, without objection, as occurred in *Equitable Life Assurance Society v. Ernst &* Young [2003] EWCA Civ 1114, [2003] 2 BCLC 603, [2005] EWHC 722 (Comm) (Langley J)"

29. In para 46 of his judgment Rix LJ quoted Mason J, *In re J.R.L., Ex parte C.J.L.* (1986) 161 CLR 342 at 352 (HCA, cited at para 22)

> "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

SUBMISSIONS OF THE PARTIES

30. I read the Defendants' case in the letter of 21 June, as Ms Rogers submitted I should read it, namely as applying the test in *Porter v Magill* and *JSC BTA Bank v Ablyazov*.

31. The reasons given by the Defendants in their letter of 21 June can be summarised as follows:

    i) The Court of Appeal considered (at para 16) that there was an important distinction, which I had failed to appreciate, between an allegation that behaviour was wrong and morally unacceptable, which some might describe as corrupt, and the assertion of a criminal offence. The Court of Appeal criticised me (at para 17) for failing to appreciate the substantial difference between the countenancing of an offence under s.61 of the Political Parties, Elections and Referendums Act 2000 and the commission of a criminal offence of corruption.

    ii) The Court of Appeal commented (at paras 26-27), in respect of my decision to strike out para 8 of the Amended Defence, that they found it "'difficult to see how professional journalism could survive' (where undercover reporting is concerned) … fair minded observer would reasonably suspect that a judge who regard a defence as logically defective could not conduct a fair trial of it". (the quotation is from the Defendants' solicitors letter)

    iii) "The Judge will also have to hear the evidence of Mr Witherow…, having already accepted the submission by the Claimant (though it was in fact irrelevant) that the Editor's view of the case is somehow at odds with the Defence his own newspaper and other Defendants are advancing".

32. Ms Rogers emphasises that in coming to my decision on meaning I used the word "clearly". I said at para 41 of my judgment

> "41. In my judgment the single meaning of the Articles is clearly one of corruption…
>
> 47. In the present case the meaning I have found the words complained of to bear is expressed in ordinary language, and connotes conduct which is criminal in England and Wales".

33. She recalled that I had struck out the plea of justification and entered judgment for the Claimant (as described in para 6 above, and in para 27 of the judgment of the Court of Appeal set out in para 13 above). She cited from a post judgment discussion of a hearing before Eady J in *Armstrong v Times Newspapers Ltd* on 7 December 2005 in which it appears that he recused himself after the Court of Appeal had reversed a decision of his that a *Reynolds* defence was "hopeless". Eady J explained that "a casual objective observer might think 'well, it's very difficult to see how he's going to change his mind'". She submits that if the Defendants lose the action, then (for the reasons set out in the Defendants' solicitors' letter of 21 June, and in the oral submissions of Ms Rogers) a fair minded person who had read my judgment would say that that is what you would expect.

34. In the course of Ms Rogers's submissions I stated that I had not intended to suggest in my judgment that "undercover reporters, exposing what they consider to be scandalous, had to report the totality of what the person under investigation had said and no more". That the Court of Appeal understood that that was the implication of my judgment is undoubtedly due to my own poor drafting. (It would not be appropriate for me to seek to redraft the section of my judgment on the application to strike out para 8 of the Defence so as to make clear that that is not what I was intending to suggest).

35. Ms Rogers further submitted that I had already expressed a view of the evidence in paras 119-120 of my judgment where I said:

> "119. In a witness statement made on 15 May 2013 Mr John Witherow who was the Editor of the Sunday Times when the Articles were published, wrote:
>
> > "In my view, blatantly selling access was not corrupt, but unethical. I did not take the view, and still do not, that the articles suggested that Mr Cruddas had acted illegally".
>
> 120. Mr Browne submits in the light of that passage that by para 8 of the Amended Defence the Defendants are trying to achieve what the Editor has said is not the Defendants' case."

36. She refers to the judgment of Longmore LJ where he said:

> "10. … As to paragraph 8.2 the judge referred to the witness statement of Mr Witherow, the Editor of the Sunday Times when the articles were published, that in his view blatantly

> selling access was not corrupt but unethical. The judge seems to have accepted the argument for Mr Cruddas that this showed that by paragraph 8 of the defence the defendants were trying to achieve what the Editor had said was not the defendants' case. In other words the Sunday Times was trying to justify an allegation of corruption when its own editor was saying that he did not think blatantly selling access was corrupt at all…
>
> 28. I do not consider that Mr Witherow's apparent denial that the articles were alleging corruption takes the case anywhere. What the articles mean is for the court to decide not Mr Witherow."

37. Mr Browne submitted that:

    i) The Court of Appeal had upheld my decision that the imputation of criminal corruption was a meaning which a substantial number of reasonable persons could read into the articles (paras 30 and 31). They also upheld my decision on meanings (2) and (3) pleaded by Mr Cruddas (para 33) and "agree[d] with the judge (para 113) when he says that the articles allege that the claimant was suggesting a breach of electoral law, in respect of the channelling of client funds through the reporters, not just a breach of its spirit". The Court of Appeal did not suggest that I "failed to appreciate" the distinctions referred to: that court merely differed with me as to whether that was the meaning for the purposes of defamation (but did not differ with me that that was a meaning for the purposes of malicious falsehood).

    ii) The Court of Appeal was not implying that I expected the totality of the discussion on 15 March to have been published, and in any event the Court of Appeal has now restored the defence of justification (to a meaning which does not include criminal corruption), I have heard no evidence on the issue, and have not pre-judged the matter in the form in which it is now to be heard.

    iii) Mr Witherow's statement did not support a case on meaning, as the Court of Appeal observed. What Mr Witherow said was relied on by the Claimant, not to support the Claimant's case on meaning, but as showing that he was not alleging that what the Claimant was doing was corrupt.

    iv) The Court of Appeal remitted the case to me as the trial judge. They would have said so if they had considered that the case should be tried by another judge, but they were not asked to say that and did not.

38. As to the last point Ms Rogers replies that in remitting the case to "the trial judge" the Court of Appeal was saying nothing as to who the trial judge should be.

DISCUSSION

39. As to the Defendants' first reason (see para 31.i) above), their case is based on a misunderstanding of the task that the court undertakes in a determination of actual meaning. As the Court of Appeal made clear (in para 15 of their judgment), and as I too made clear (in para 21 of my judgment), the court is not deciding what the court

understands the words complained of to mean. The court is deciding what the hypothetical reasonable reader (who is not a lawyer) would understand. The Court of Appeal was therefore not saying that I had failed to appreciate the differences the Defendants point to. What the Court of Appeal was saying was that (for the purpose of the libel claim only) I was mistaken as to what the hypothetical reasonable reader would understand.

40. As to the Defendants' second reason (see para 31.ii) above), I have already noted that in the course of submissions I made the intervention set out in para 34 above. Moreover, after the words which the Defendants cite from para 27 of the Court of Appeal's judgment, the Court of Appeal added what Longmore LJ said in para 28 (as set out in para 13 above).

41. As to the Defendants' third reason (para 31.iii) above), there is again a misunderstanding on the part of the Defendants. The submission of Mr Browne which I cited in paras 119 and 120 of my judgment was that there was an inconsistency between what Mr Witherow said about what the Claimant did ("blatantly selling access was not corrupt but unethical") and the defence of justification, and so by the second and third sentences of para 8.2 of the Amended Defence "the Defendants are trying to achieve what the Editor has said is not the Defendants' case". Since the Court of Appeal has held that the meaning does not impute criminal corruption, the inconsistency suggested by Mr Browne appears to me to have fallen away. Mr Browne's submission is not that the statement of Mr Witherow is inconsistent with the defence of justification which the Court of Appeal has re-instated, that is to say, a plea of justification to a meaning that does not impute criminal corruption, but corruption in the sense of conduct that is "inappropriate", "unacceptable" and "wrong".

42. As to Mr Browne's fourth point, I accept Ms Rogers's submission that the words "the trial judge" in the order of the Court of Appeal are neutral as to who the trial judge is to be. The Court of Appeal was not making an order that I be the trial judge. However, I accept Mr Browne's submission that if the Court of Appeal had considered that the effect of their judgment was that I could not continue as the trial judge, they would have said so. That does not determine the issue one way or the other, but it is a pointer towards what the outcome should be. The Court of Appeal is very experienced in reversing judges at first instance (that is part of the role of that Court). I would not expect that Court to overlook the point if they thought that there needed to be a different trial judge.

43. After considering the submissions of the parties on individual points, it is necessary to stand back and consider the question which is at issue, as set out in para 27 above: in the circumstances of this case, would a fair-minded and informed observer conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased?

44. In my judgment the answer is No. Judges in particular (but everyone else who holds any position of responsibility) regularly have to bring a fresh mind to questions that they have considered previously, and they regularly have to change their minds when faced with new arguments or new facts. Here the issues in the case have changed to the extent that the Court of Appeal upheld the Defendants' appeal. I have not yet heard any evidence, and I have not made any findings of fact (whether about Mr

Witherow or any other witness). I have made decisions in this case which are adverse to the Defendants, but also an important decision on which I accepted the Defendants' submissions. It is important that I do not accede too readily to suggestions of apparent bias.

45. Any judgment that a trial judge delivers at the end of a case is required to be fully reasoned. I reject Ms Rogers' submission that a fair minded and informed person would conclude that, if I were to make a finding adverse to the Defendants at trial, it would not be for the reasons I would set out in my judgment, but because there was a real possibility that I might be biased against the Defendants. Accordingly I decline to recuse myself.

DIRECTIONS FOR TRIAL

46. In the course of the exchange of correspondence part of which is set out above, the Defendants have suggested that the trial be re-listed to start on 22 July. Term ends on 31 July, so that would allow 8 working days.

47. Ms Rogers informs me that Mr Kelsey-Fry is not available before that date.

48. Mr Browne submitted that deferring the start of the trial until 22 July would result in an increase in costs. After the passage of a month, further reading and preparation would be required by trial counsel, as well as by the court.

49. The parties' estimates for the length of the trial when it was due to be tried with a jury included the time expected to be required for the jury to reach a verdict. As I understand it, the revised shorter estimates do not include the time required by the trial judge to read the documents outside court sitting hours, still less the time required to write a judgment.

50. The bundles of documents in this case fill 10 lever arch files. In most cases the court does not have to consider all the documents in the trial bundles, and I expect that will be so in this case too. Nevertheless, the basis on which the Claimant sought a variation of the mode of trial to judge alone was that the case would require the prolonged examination of documents. When a case is tried by judge alone the reading and examination of important documents is normally carried out by the judge in the judge's room outside court sitting hours. I infer that that is one reason why the estimates have been shortened following the change of mode of trial.

51. This case does in my view require prolonged examination of documents, and the viewing of the video recordings of the meeting of 15 March. The Claimant also relies on what he submits are significant changes in the various drafts of the words complained of. Whether there are real changes, and if so whether they are significant, will be an issue in the action.

52. Having read and heard what, so far, I have read and heard (and that is a lot), I am sceptical even as to the accuracy of the time estimate of 7 days put forward by the Defendants assuming that to be the time estimate for oral hearings in court. I consider there is a real possibility that oral hearings may take longer than that for one reason or another. This case is hard fought on both sides, and both sides appear willing to

devote to it substantial resources in time and money. The issues in the case are important not only to the parties but also to the public at large.

53. Following the adjournment on the afternoon of 24 June I reviewed the Court's commitments for the period between 25 June and the end of term. As is usual towards the end of a summer term, the Court has a number of cases listed, and I must bear in mind that there may be complications in these cases, and that there may be other cases, not yet listed, which require a decision of some kind before the long vacation.

54. In deciding when to re-list the trial, I must seek to give effect to the overriding objective. In doing this I do not overlook the importance to a party of having the counsel of their choice. But the availability of counsel cannot be the governing factor. Dealing with a case justly and proportionately includes allotting to the case an appropriate share of the court's resources and the need to allot resources to other cases.

55. Having considered the other cases in the list, and the resources required for this case as well as for other cases, I have no hesitation in rejecting 22 July as a suitable date to commence the trial. There is a real risk that the oral hearings would not be completed by the end of term on 31 July. And the setting aside of the last 8 days of term for this case would leave the court without the time that the court needs to set aside in order to deal with other cases already listed for July, still less for other cases not yet listed but for which the court must be able to make provision.

CONCLUSION

56. For these reasons I decided on the morning of 25 June that the trial of this case will be listed to start on Tuesday 2 July at 2pm before myself as trial judge. I asked that the court service so inform the parties before this judgment was available to be circulated in draft, as it was later on 25 June.