Neutral Citation Number: [2011] EWHC 1710 (QB)

Case No: HQ09D05481

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 July 2011

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

LORD ASHCROFT KCMG **Claimant**

- and -

(1) STEPHEN FOLEY
(2) INDEPENDENT NEWS & MEDIA LIMITED
(3) ROGER ALTON **Defendants**

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Mark Warby QC and **Adam Speker** (instructed by **Davenport Lyons**) for the **Claimant**
Paul Epstein QC (instructed by **David Price Solicitors & Advocates**) and **David Price QC** (of **David Price Solicitors & Advocates**) for the **Defendants**

Hearing dates: 7-8 June 2011

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

1. I made an order on 17 March, striking out the defences of justification and fair comment for the reasons set out in my judgment of 18 February: [2011] EWHC 292 (QB). The Defendants have now adopted a two-pronged approach, in that they wish to apply to the Court of Appeal for permission to appeal those rulings while seeking, in parallel, to put forward a different version of the defence ("the March draft"). I understand that the Court of Appeal has indicated that the application for permission will not be dealt with until the present application has been resolved. In these circumstances, I am asked to grant permission for defences of justification and fair comment to be reinstated on the basis of new wording, which is intended to deal with the grounds on which I made the striking out order. Naturally, both parties wished to avoid appearing to reargue issues resolved on the previous occasion. I need not set out the background to the dispute in detail, as it is described in my earlier judgment.

2. Unusually, there was a considerable debate between counsel as to the principles to be applied on such an application. Mr Epstein QC for the Defendants relied *inter alia* upon certain principles derived, in particular, from *McDonald's Corporation v Steel* [1995] 3 All ER 615 and *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1. They overlap to a considerable extent:

   i) The test to be applied on such an application is whether any given allegation contained in the defence is incapable of being proved.

   ii) The court should avoid conducting a mini-trial.

   iii) Once a defence of justification has been served, it may in rare circumstances be appropriate for a claimant to suggest that the defence, or any of its supporting facts, is demonstrably untrue. Such an application would be required to be supported by irrebuttable evidence.

   iv) Where dishonesty is alleged, it is not necessary as a matter of law for the particulars pleaded to be themselves only consistent with dishonesty.

   v) A defendant may only be prevented from inviting an inference from pleaded primary facts if it is plain to the court that such an inference would be perverse (see *Gatley on Libel and Slander* (11th edn) at para 33.32).

   vi) It is legitimate to invite the court (whether judge or jury) to infer a claimant's dishonesty from certain pleaded primary facts even where it would be reasonably possible to draw a different inference (i.e. one that is consistent with honesty).

   vii) In such circumstances, it is not necessary for a defendant to plead facts that are more consistent, as a matter of probability, with the presence of dishonesty than with its absence.

   viii) It is not necessary for a defendant to show that the inference of dishonesty which he invites the court to make is "inescapable".

ix) Provided the defendant's allegation of dishonesty is clearly pleaded, the facts pleaded in support of that can be in themselves consistent with the absence of dishonesty.

x) It is not necessary for a defendant at the stage of putting forward a plea of justification to identify the evidence upon which he relies to support that plea.

3. Mr Epstein invited my attention, first, to a number of passages in *Three Rivers*.

4. Lord Hope made the following points at [55]:

> " … As the Earl of Halsbury LC said in *Bullivant v Attorney General for Victoria* [1901] AC 196, 202, where it is intended that there be an allegation that a fraud has been committed, you must allege it and you must prove it. We are concerned at this stage with what must be alleged. A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific allegation of dishonesty, it is not open to the court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence. As Millett LJ said in *Armitage v Nurse* [1998] Ch 241, 256G, it is not necessary to use the word 'fraud' or 'dishonesty' if the facts which make the conduct fraudulent are pleaded. But this will not do if language used is equivocal: *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250, 268 *per* Buckley LJ. In that case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, it was not to be presumed that the defendant had been dishonest. Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out. But it is not a proper ground for striking out the allegation that the particulars may be found, after trial, to amount not to fraud, dishonesty or bad faith but to negligence."

5. At [124] Lord Hutton addressed the matter in these terms:

> "In *Armitage v Nurse* [1998] Ch 241, 256G Millett LJ said: 'It is not necessary to use the word 'fraud' or 'dishonesty' if the facts which make the conduct complained of fraudulent are pleaded; but, if the facts pleaded are consistent with innocence, then it is not open to the court to find fraud'. Later in his judgment, at p259G, he said: 'I am of opinion that, as at present drawn, the amended statement of claim does not allege dishonesty or any breach of trust for which the trustees are not

> absolved from liability by clause 15'. In *Taylor v Midland Bank Trust Co Ltd* (unreported) 21 July 1999 Buxton LJ referred to the first observation of Millett LJ, at p256G, and said:
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> > 'That, however, was an observation about pleading, not about substance. If (unlike the pleader in our case) the claim does not expressly allege dishonesty, but stands on facts alone, those facts on their face will meet the requirement of a specific allegation of dishonesty only if they can bear no other meaning.'
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> But in the present case, unlike in *Armitage v Nurse*, the pleader does expressly allege bad faith because paragraph 37 pleads that 'the motives of the Bank in acting as pleaded above were improper and unlawful and in the premises the Bank acted in bad faith' and the paragraph sets out particulars in support of that allegation. In my opinion those particulars are not consistent with mere negligence."

6. A little later, at [148], Lord Hutton continued:

> "The fact that a plaintiff does not have direct evidence as to the belief or foresight or motives of the defendant is not in itself a reason to strike out the action. In *Taylor v Midland Bank Trust Co Ltd* … the plaintiff alleged dishonest breach of trust and the defendant applied for the dismissal of the claim without trial under rule 24.2(a)(i). Upholding the decision of Carnwath J to dismiss the application Buxton LJ stated:
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> > '[Counsel for the defendant] appeared at one stage to argue that the case must be made good by direct evidence, and could not rely, as it does, on inference. If that was the submission, I cannot agree with it. Where the motives or knowledge of a party is in issue, it may often be necessary to rely on inference rather than direct statements or admissions by that party. There is nothing objectionable in principle in that, however much an inference may be less cogent than an admission. Nor is it right that, in drawing inferences, a court can only infer this form of dishonesty if the primary evidence admits of no other explanation. That puts the test too high. The process of reasoning should be constrained only by the court's appreciation of the seriousness of the charge and the substantiality of the evidence therefore necessary to make it good.' "

It is to be noted that at [1] Lord Steyn agreed with the reasoning of both Lord Hope and Lord Hutton.

7. Mr Epstein also invited my attention to certain passages in the judgment of Neill LJ in the *McDonald's* case, cited above, at pp.618-622. This is the classic exposition as to what a pleader needs before entering a plea of justification (including one alleging a claimant's dishonesty). It is perhaps unnecessary for present purposes that I should quote anything other than the well known passage at p.621-2 (part of which was relied upon by Lord Hope in *Three Rivers* at [47]):

> "In the light of these arguments and as a matter of principle I am satisfied that the suggested test of 'clear and sufficient evidence' cannot be accepted. If applied literally, it would impose an unfair and unrealistic burden on a defendant. Furthermore, it does not appear to be supported by what Darling J said [in *Mangena v Edward Lloyd Ltd* (1908) 98 LT 640 at 643]. It is true that a pleader must not put a plea of justification (or indeed a plea of fraud) on the record lightly or without careful consideration of the evidence available or likely to become available. But, as counsel for the plaintiffs recognised in the course of the argument, there will be cases where, provided a plea of justification is properly particularised, a defendant will be entitled to seek support for his case from documents revealed in the course of discovery or from answers to interrogatories.
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> In recent times there has been what I regard as a sensible development whereby pleadings in libel actions are treated in the same way as pleadings in other types of litigation. It is therefore instructive to refer to a short passage in the judgment of May LJ in *Steamship Mutual Underwriting Association Ltd v Trollope & Colls Ltd* (1986) 6 Con LR 11 at 27, where, on an application by a firm of structural engineers that the claim against them should be struck out, he said:
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> > 'In my opinion, to issue a writ against a party … when it is not intended to serve a statement of claim, and where one has no reasonable evidence or grounds on which to serve a statement of claim against that particular party, is an abuse of the process of the court.'
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> Actions for defamation take many forms. The allegations complained about may vary from the moderately serious to the very grave. It may therefore be unwise to put forward a formula which will match all occasions. Nevertheless I am satisfied that before a plea of justification is included in a defence the following criteria should normally be satisfied: (a) the defendant should believe the words complained of to be true; (b) the defendant should intend to support the defence of justification at the trial; and (c) the defendant should have reasonable evidence to support the plea or reasonable grounds

> for supposing that sufficient evidence to prove the allegations will be available at the trial.
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> A similar approach should be adopted towards facts which are relied upon in support of a plea of fair comment.
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> It is to be remembered that the defences of justification and fair comment form part of the framework by which free speech is protected. It is therefore important that no unnecessary barriers to the use of these defences are erected, while at the same time the court is able to ensure that its processes are not abused by irresponsible and unsupported pleadings."

8. This passage, of course, provides useful guidance for judges hearing applications of this kind and has been followed many times over the intervening years. I would underline the effect of the proviso in the first paragraph (" … provided a plea of justification is properly particularised").

9. Mr Warby QC, for the Claimant, suggested that the final passage in the above citation might have lost some of its force since the introduction of the so called *Reynolds* defence in 1999. That is a defence which is relied upon in this case, although it does not fall to be considered at this stage. I take him to be submitting that one need not be so generous to defendants in the context of justification and/or fair comment, now that this form of privilege looms larger in "the framework by which free speech is protected". I see no reason to adopt that approach, nor indeed am I aware of any authority to support it. I regard the passage as being useful and authoritative so far as the current application is concerned. It is to be noted, in any event, that the approval of it by Lord Hope in *Three Rivers* postdates their Lordships' decision in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

10. Mr Warby based himself, as on the previous occasion, upon what he identified as five fundamental principles of pleading in this context:

    i) Any allegation of dishonesty in a plea of justification must be clear and comprehensible.

    ii) A plea of justification must be properly particularised so that the claimant knows the case he has to meet and those particulars must be capable of supporting the relevant *Lucas-Box* meaning.

    iii) Mr Warby contends also that facts pleaded in support of such a plea must be more consistent with dishonesty than with its absence.

    iv) Allegations supporting a plea of dishonesty must be supported either by evidence or by material that is likely to lead to admissible evidence by the time of the trial.

    v) It is not legitimate for a defendant to seek to reverse the burden of proof.

So far as I could detect, it is only the proposition in sub-paragraph (iii) above (my numbering) that is contentious.

11. Mr Warby also submitted that where a defendant seeks the court's permission to amend, it is necessary to adduce evidence to show that the plea proposed has a reasonable prospect of success. Mr Epstein argued that this would be rather artificial in circumstances where they are essentially relying on the same factual allegations, but reformulating the *Lucas-Box* meanings which they are supposed to support.

12. Reference was made to the judgment of Tugendhat J in *Bray v Deutsche Bank AG* [2009] EMLR 12 at [32]-[35]. The judge was there considering a plea of malice, which he equated with a plea of dishonesty and he therefore made reference, in that context, to a number of passages about pleading dishonesty from the speeches in *Three Rivers*. At [35], he made the following observations:

> "The particular principle applicable to an allegation of malice in libel (which is equivalent to dishonesty) requires the claimant to pass a much higher threshold. A pleaded case in malice must be more consistent with the existence of malice than with its non-existence. In libel the principle is now generally taken from *Telnikoff v Matusevitch* [1991] 1 QB 102 CA (Civ Div). The principle is of general application and was set out by Lord Hobhouse in *Three Rivers*, when he said:
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> > '160 … Where an allegation of dishonesty is being made … the [claimant] must have a proper basis for making an allegation of dishonesty in his pleading. The hope that something may turn up during the cross-examination of a witness at the trial does not suffice.
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> > 161 … The law quite rightly requires that questions of dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden – the balance of probabilities – but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence. At the pleading stage the party making the allegation of dishonesty has to be prepared to particularise it and, if he is unable to do so, his allegation will be struck out. The allegation must be made upon the basis of evidence which will be admissible at the trial.' "

In relation to that passage, Mr Epstein submits that there is a distinction between a plea of malice made by a claimant in a libel action and a plea of justification, involving dishonesty, put forward by a defendant. Moreover, he argues that the passage from Lord Hobhouse's speech is not consistent with those cited above from Lord Hope and Lord Hutton (with whom Lord Steyn agreed) and that accordingly, if there is an inconsistency, preference should be given to the reasoning of the majority.

13. Mr Price QC, for the Defendants, returned to this point and submitted that there is a material distinction between malice pleaded by a claimant and dishonesty pleaded by a defendant, to the extent that a defendant may obtain some admission in cross-examination of the claimant in a libel action (who normally goes first), whereas the claimant seeking to prove malice has to set up his case in advance of any opportunity to cross-examine the defendant. Furthermore, different public policy considerations come into play. The restrictions generally imposed in relation to pleading malice are directed towards the protection of free speech and ensuring, in that context, that pleas of malice are not made routinely on a formulaic basis. On the other hand, so far as pleas of justification are concerned, the court should be concerned with guarding against unjustified vindication of character and also with the need to ensure that a defendant pleading justification should not have artificial or academic restrictions imposed upon him. Also, such a defendant is entitled to succeed if he proves his defamatory allegations to be *substantially* correct.

14. After oral argument was concluded Mr Warby drew to my attention a case in which reference had been made to the fact that defendants who are relying on a defence of justification are sometimes required to go first (especially where they may regarded as fulfilling a role analogous to a prosecutor): *Purnell v Business F1 Magazine Ltd*, 14 March 2006. That does occasionally happen. When appearing for the defendant in June 1985 in a case called *Blackmore v BBC*, I was called upon by Pain J on the first morning of the trial to open the case to the jury and to call my evidence first. Such a course would be less likely where the defendant was relying on a number of defences, including privilege. It is also significant that the claimant in that case was a litigant in person. I do not believe that any of this has a bearing on the present litigation. It is most unlikely that the Defendants would be directed to go first at trial, not least because Mr Warby would surely be unwilling to relinquish the opportunity of doing so on behalf of his client.

15. It is fair to say that the principle referred to by Tugendhat J in *Bray v Deutsche Bank*, by reference particularly to the Court of Appeal decision in *Telnikoff v Matusevitch*, goes back at least as far as *Somerville v Hawkins* (1851) 10 CB 583 in the middle of the nineteenth century. But it is generally linked specifically to the requirements for pleading malice (albeit nowadays often equated to dishonesty). I do not believe that I have hitherto encountered a corresponding rule applied to pleading justification. I will proceed, therefore, on the assumption that particulars of justification, for an inference of dishonesty to be based upon them, do not need to be in themselves consistent *only* with such a conclusion – at least in a case where dishonesty is expressly pleaded. That would seem to accord with the majority in *Three Rivers*.

16. In general terms, Mr Warby makes the following points. In so far as the Defendants are relying upon inferences from their "primary facts", as pleaded, no reasonable jury

could draw the necessary inferences from those facts. Many of them are said, in any event, to consist of bare assertion and/or speculation. In a sense, allegations of this kind could always be defended on the basis that they put the particular claimant in no embarrassment: he or she can simply go into the witness box and deny them. But the court should guard against a plea which gives no information and is merely aimed at putting the Claimant in the witness box: the impression is given of trying to reverse the burden of proof. In any such cases, the whole point of such a plea is to invite the jury to draw the inference. It is, therefore, important that the inference should be properly pleaded in the first place. There must be a rational nexus between the fact and the inference. Moreover, the relevant claimant should have particularity and clarity, so that he can address the "primary facts" or assertions and prepare to test them. Otherwise, there is a risk the case against him will consist of no more than winks and nudges.

17. The matter can be tested, on the facts of the present case, by considering one of the Defendants' basic and most pervasive assertions. This is to the effect that the Claimant "controls" the bank ("BCB") – not merely in the sense of owning a controlling interest in the relevant company, but also in the sense that he must take direct responsibility for its day to day running and the individual decisions taken by its officers (who, it is said, merely do his bidding). Thus, if a particular loan is made by the bank to one of its customers, it must be taken to have been authorised, approved or acquiesced in by the Claimant; what is more, for the purpose of gaining some improper advantage.

18. Mr Warby submits that the Defendants' particulars only form a coherent structure from which to draw the relevant inferences if they are construed on the unspoken premise that the Claimant is "a crook". Be that as it may, is it a sufficient answer to say that the Claimant can simply go into the witness box and deny the allegations – however vague and unspecific they may be? Not entirely, it seems to me, because the jury would be invited to reject the denials and draw the inference nonetheless. Since it is elementary that serious allegations cannot be established in court by a mere nudge and wink, it is appropriate for the legitimacy of any such inference to be scrutinised with care at this early stage.

19. It would not be enough in a criminal case for the Crown merely to assert that the defendant controls certain entities, that he must take responsibility for them, and that a corrupt self-interest is the mainspring for what he does. It would be for the Crown to prove it. It has always been recognised that a libel claimant is entitled to "the same precision as an indictment": *Hickinbotham v Leach* (1842) 10 M&W 361, 363. That is a proposition which naturally has a particular resonance when the defamatory allegation is itself tantamount to one of criminal misconduct.

20. An important element in the Defendants' case is that Mr Misick was given a loan by BCB on the basis that he was not obliged to repay interest (or even possibly any of the capital either, although that remains obscure) *or* that there was an agreement imposing repayment obligations which were never to be enforced (as tacitly understood from the beginning) *or* that it was decided *ex post facto* that the bank would not enforce some (or all) of those obligations. This will not do. Not surprisingly, the Claimant's advisers called for the agreement in question, which is actually referred to in the

Defendants' pleading, but this was refused. Mr Warby, until part way through the most recent hearing, understood this to be on the basis that the Defendants did not have it. It then emerged that they had at least seen a copy, but they still refused to disclose it. If they have it still in their possession, there would be a strong argument for their having to disclose it (as a document referred to in a pleading). Further, submits Mr Warby, in so far as it forms the basis of anything asserted in the witness statement of Mr David Price, it should be identified as the source of his information, in accordance with ordinary principles. At all events, if the document has been inspected, it should enable the Defendants, at least, to dispel the uncertainty surrounding their case against Lord Ashcroft.

21. In the light of these general submissions, I shall now turn to the new wording in the March draft, in order to see whether it is capable of curing the problems I perceived with the earlier version. The new formulation of the *Lucas-Box* meaning contained in paragraph 7.1 of the proposed pleading is as follows:

> "The Claimant authorised his bank to lend millions of dollars to Mr Misick without seeking commercial repayment, thereby helping him to pursue his lavish lifestyle, knowing him to be corrupt and motivated by a desire on the part of the Claimant to obtain influence and benefit."

It is obvious that this admits of a range of possible hypotheses. Mr Warby has described it as "unclear and inherently ambiguous". Is it said, for example, that the Claimant was directly involved at the time the loan was being made? Is it said that Mr Misick was given the money effectively as a gift or, rather, that he was to return the capital but not required to pay any interest? If he was required to pay interest, was the rate not a commercial one? In either event, is it being suggested that Mr Misick was told (expressly or by means of an understanding of some kind) that those terms would not be enforced? If so, was he to pay nothing or only a part of the interest due? If so, was that known, authorised or acquiesced in by the Claimant (and, if so, which)? Or is it said that Mr Misick fell into arrears at some point and that, then and only then, BCB decided (with or without the Claimant's authorisation) to waive or not press for the outstanding payments? Is it said that future payments were also to be waived? There is a myriad of uncertainties.

22. It is obvious that the present wording is a fudge. The phrase "without seeking commercial repayment" blurs all the questions posed above and plainly, as it stands, it will not suffice. It is obvious that whatever is being alleged amounts to serious misconduct on the Claimant's part and, if it were reproduced in an indictment, it would plainly not pass muster. It does not even identify the "offence" alleged.

23. I put to Mr Epstein in argument that offering special favours to any individual would involve *inter alia* cheating the shareholders and constitute misconduct on the part of any corporate officer or director. He suggested, however, that it might actually benefit the shareholders through long term commercial advantages offered (corruptly) by Mr Misick, and/or his associates, in return for the favourable treatment he had supposedly been given.

24. The report of Sir Robin Auld into the governance of the Turks & Caicos Islands ("TCI") appears on a number of occasions in the defence. It is probably right to say that the contents of an official report, such as that of Sir Robin Auld following his Inquiry, could provide a pleader with sufficient grounds to make allegations against the relevant claimant, even in respect of serious misconduct, despite the fact that his solicitors had no corresponding evidence in their possession in an admissible form. That would appear to be consistent with the judgment of Neill LJ in *McDonald's*, cited above. It is important to note, however, that Sir Robin said nothing about the Claimant or about any corrupt activity on the part of BCB: see paragraphs [43]-[46] of my earlier judgment. It is suggested by the Defendants in this case that they should, therefore, be permitted to rely on what Sir Robin did *not* say; or that the jury should be invited to read between the lines. I cannot believe that the *McDonald's* decision goes that far. If Sir Robin had no evidence before him to support any such serious conclusions, I find it difficult to believe that the Defendants were entitled to infer from the report that he must have done. Accordingly, they need to support the pleaded allegations by some other means.

25. I would agree with Mr Epstein and Mr Price that they cannot be compelled to reveal what evidence they have at this stage and, if they have material which is from a confidential source, they could probably rely upon it for pleading purposes without revealing the source at this stage. That does not seem to be their stance, however, as it has not been said that they have any such confidential material. I should assume, in any event, they say, that they have sufficient material to support their pleaded case on justification (in accordance with *McDonald's*). I will proceed on that basis. Also, I bear in mind the general principle that the court should assume on an interlocutory application of this kind that any properly pleaded allegations of fact will be proved at trial.

26. On the other hand, Mr Warby's criticisms are not disposed of by reciting general principles. They are focused on the particular circumstances of this case. First, the Defendants' ability to withhold their information does not address his complaint of obscurity. His client is entitled to know, clearly and unequivocally, the case he has to meet – however confidential any information in the Defendants' possession might be. Secondly, if they do have information or evidence in their possession, it should enable them to plead a clear case against the Claimant. At the moment paragraph 7.1 is so unclear, and appears to be so designed as to embrace all possible permutations, that the impression is given of speculation rather than evidence. If I proceed on the basis, however, that the Defendants do have at any rate some evidence of misconduct on the Claimant's part, then it follows that they must spell out what it was. They need not identify any confidential source (assuming that to be a problem).

27. The case must pass muster as a pleading now. It is no answer to say that the Claimant can deal with it by way of disclosure or in the witness box. That is only to postpone the reckoning. In the first place, it may well be, for all I know, that he does not have any BCB or other relevant documents in his possession. Secondly, and more importantly, he must even now have a case to answer. The position cannot be allowed to come about whereby, at trial, the Claimant denies any wrongdoing (of the general and vague nature currently pleaded) and the Defendants are simply reduced to saying, in effect, "Come off it, Lord Ashcroft. Pull the other one". Why not? For the simple

reason that the Defendants would be left only with what material they now have. The jury could then only be invited to draw an inference, of some sort of unspecified misconduct, on the basis of what is so far pleaded. That is why it is important to impose discipline now on the case they wish to make against the Claimant. The jury should only be asked to draw the necessary inference from facts which are either admitted or capable of proof. They cannot be asked to assume that the Claimant is corrupt and/or that the Defendants' general assertions are true, or to make some other leap of faith. If there is to be evidence to put flesh on the bones, then the Claimant is entitled to know what the flesh is (even if he does not have access to the evidence).

28. As I have already acknowledged in my earlier judgment, if there is any solid material involving bribery or corruption on the Claimant's part, it is clearly in the interests of everyone that it should be properly investigated at trial and a fair conclusion reached. That is why he must know the case he has to meet.

29. If the Defendants have seen a loan agreement between BCB and Mr Misick, they can presumably say what the repayment terms were and whether it is part of their case that they were tacitly acknowledged to be a sham at that stage (and, if so, whether the Claimant was consulted about it). According to his evidence before Sir Robin, Mr Misick had repaid some of the loan. If that is true, it would not be consistent with an allegation (which the Defendants do not yet make) that the contractual repayment terms were a sham from the start. If a decision was subsequently made not to enforce the terms originally agreed, and the Claimant was a party to that decision, it represents a different case. The Claimant is entitled to attempt to collect evidence with a view to rebuttal of the Defendants' charges. He cannot do so unless he is told with whom he conspired and when he gave his agreement to whatever impropriety is alleged. At the moment, all he can do is to deny the general allegations in correspondingly general terms (apart, perhaps, from calling his son – in so far as he is said to have been involved).

30. Rather curiously, after oral submissions were concluded and when this judgment was in draft, an attempt was made on behalf of the Defendants to present yet another version of the defence, which this time included (at paragraphs 7.43 and 7.47) allegations that the Claimant "knew from the outset" that Mr Misick would not pay interest or capital "on commercial" terms – whether in relation to the Coral Square loan of February 2004 or the $5m loan of March 2007. I say that this is curious for the reason that Mr Misick claimed to have repaid some of this later loan at least. Nevertheless, Mr Warby objects to this further tinkering, claiming with good reason that nothing in the pleading could support any such inference.

31. Furthermore, Mr Price and Mr Epstein sought to add to paragraph 7.46 the words " … to the extent that any primary fact post-dates the inference to which it is directed". Mr Warby says that this only "serves to add complexity and confusion". The purpose of this part of the pleading is to invite an inference, in relation to the Coral Square loan, that the Claimant authorised the sale of the land at Leeward on which Mr Misick's Belview Villa was built (at around the beginning of 2004). The facts relied upon to found the inference are the same as those from which a similar inference is to be drawn in relation to the $5m loan three years later – to the extent that those facts were already in existence at the beginning of 2004. That in itself seems

unobjectionable. The essential question is whether the pleaded facts are capable of supporting a clear inferential *Lucas-Box* meaning.

32. Mr Price has put in a witness statement in support of his clients' case. This makes reference to detail, so far unpleaded, which is said to come from the contract in question. He refers (a) to an interest rate of 10.9% and (b) to a requirement of monthly repayments. At the very least, therefore, it could be said that the March draft needs updating to that extent. It would seem to narrow the range of possible corrupt permutations and the case against the Claimant needs to be reformulated in the light of that data (assuming obviously that it is accurate). It would tend to suggest, for example, that any indulgence given to Mr Misick came at a later point than when the agreement was signed – perhaps when he began to fall into arrears. If it is to be alleged that this is when the corrupt favours were offered, then it should be spelt out. It would enable the Claimant to have more knowledge of what he is supposed to have done and to prepare to meet it.

33. An alternative meaning is pleaded in paragraph 7.1.1 of the March draft (what Mr Warby calls the "fall back" meaning):

> " … the Claimant knew that his bank was lending substantial sums to Mr Misick without seeking commercial repayment, knowing or strongly suspecting that he was corrupt and acquiesced because he was motivated by the desire to obtain influence and benefit."

This corresponds to particulars pleaded at paragraphs 7.49 and 7.50. Mr Warby's primary criticism of this wording is that the first article complained of is not capable of bearing the meaning (although, of course, he also makes parallel criticisms to those already levelled at paragraph 7.1). He says that the notion of "acquiescence" simply pitches the sting of the libel too low. The article puts the Claimant in the forefront of its attack and does not portray him simply as acquiescing in the wrongdoing of others. That seems to me to be right. If the Defendants are unable to bring home direct authorisation, acquiescence is unlikely to make up the deficit.

34. Mr Price developed an argument contained in paragraphs 44-46 of his skeleton argument, to the effect that the ordinary reader would be focused on "culpability" or "moral responsibility" rather than legal responsibility. He said that the layman would conclude that "it was his bank and he knew what was going on". I am not sure I follow the distinction. What matters in any plea of justification is what the particular claimant did. Knowledge of wrongdoing does not in itself establish a defamatory meaning unless the claimant authorised the wrongdoing or was in a position to prevent it (and failed to do so). I do not believe that a distinction between moral and legal responsibility assists. If there was nothing a claimant could do to prevent wrongdoing on the part of others, then he would be neither legally nor morally responsible for it. The problem with the pleading, and with the particulars, is that it does not make clear to the Claimant, or the interested reader, what deeds or omissions are laid at his door.

35. The nub of the case, as both sides agree, is to be found in paragraphs 7.39 to 7.47 of the defence. An inference is invited that the Claimant authorised a loan by BCB evidenced by a document dated 14 March 2007 signed by his son Andrew Ashcroft. His authorisation is to be inferred from the size of the loan, that fact that Mr Misick was the Premier, the fact that earlier loans had been made to him in 2004, and the potential gains to be made by the Claimant's commercial interests in the TCI from supporting a corrupt Premier. But the key assertions underlying all this are the Claimant's "ownership and control" of BCB and the claim that his son was "in thrall" to him and "acts in accordance with his will".

36. It is said that the Claimant would have been likely to know of Mr Misick's tendency to corruption because this was notorious. Accordingly, granting him a large loan was likely to result in favours.

37. It seems to me that the key to establishing a case against the Claimant is to show that the loan was not at arm's length and on commercial terms *and* that the Claimant authorised it. If those elements are established, the rest falls into place. Accordingly, that is where the primary need for particularity arises. The Defendants need to give their best particulars of the Claimant's role in granting the loan and, specifically, of the nature of the favourable terms.

38. The conclusion, so far, is that I will not allow the new meaning at paragraph 7.1 for lack of clarity. The draftsmen are trying to make it wide enough to embrace a whole range of possible scenarios but, in their concern to leave nothing out, have presented the Claimant and his advisers with a moving and indistinct target. It cannot suffice to put forward a case to the effect that the Claimant simply *must* have been involved in some way or other. They need to come off the fence and decide exactly what the charge against the Claimant is. As to paragraph 7.1.1, that is unacceptable for a different reason; namely, that mere acquiescence is inadequate as a defence to the words complained of.

39. The next issue relates to the second of the published articles. The subject-matter is distinct from that so far addressed. It turns upon the passage hastily inserted at the last minute by way of response to the solicitors' letter received at *The Independent* immediately following the first article. As it happens, it did not quite reflect the nature of the complaint. Therefore the Claimant's pleading alleges that the complaint itself has been distorted in such a way as to convey a meaning that the Claimant had misrepresented the true position. The Defendants now wish to justify the meaning that the Claimant "lied" in certain respects. The allegation is broken down into four specific instances:

    i) the denial that the Claimant attempted to buy influence in the TCI by lending money;

    ii) the solicitors' claim that it was "completely unfounded" to suggest that the Claimant had indirectly funded and built Mr Misick's mansion;

    iii) the denial that any company associated with the Claimant had lent Mr Misick money to fund his lavish lifestyle;

iv) the denial that the Claimant had any economic interest in Johnston (the development company).

It is also said, in what is probably another "fall back" position, that the Claimant sought to obfuscate in relation to the BCB loan to Mr Misick and that he was economical with the truth (see paragraph 41 of my earlier judgment).

40. Inherent in these allegations is the need to prove the underlying factual position which the solicitors' letter denied. To that extent, if I understand correctly, this case is parasitic upon the primary case considered above. Essentially, if the Defendants are able to advance a properly pleaded case against the Claimant, to the effect that he did personally attempt to buy influence through authorising the $5m loan and/or the funding of Mr Misick's mansion and his "lavish lifestyle", and so on, then the Defendants should be able to plead that his denials of the relevant misconduct were dishonest. I would allow such a pleading to stand, subject to those primary charges themselves being properly formulated.