Neutral Citation Number: [2011] EWHC 763 (QB)

Case No: HQ10D01492

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/2011

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

FRANK COOK	**Claimant**
- and -	
TELEGRAPH MEDIA GROUP LIMITED	**Defendant**

- -
- -

Mr Jonathan Crystal (instructed by **Hill Dickinson LLP**) for the Claimant
Mr David Price (of David Price Solicitors and Advocates) for the Defendant

Hearing dates: 25 February 2011

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Judgment

Mr Justice Tugendhat :

1. On 17 September 2006 an MP's assistant made a £5 offertory donation at a Battle of Britain church service in Stockton. That simple act has led to this libel action.

2. The Claimant ("Mr Cook") was the Member of Parliament for Stockton North from 1983 until May 2010. He reimbursed his assistant. He then included the £5 in his own claim for reimbursement of his expenses as an MP. His claim was rejected. At the time that appeared to be the end of the matter. But it became an issue in 2009 when the Defendant ("the Telegraph") published its series of articles on MPs'expenses. They attracted very wide publicity at that time, and have been much discussed subsequently. In the case of a number of MPs the Telegraph and others alleged that they had acted dishonestly. In the present case there is no allegation that Mr Cook acted dishonestly.

3. In the issue of the Sunday Telegraph dated 31 May 2009 the Telegraph published three articles, on three separate pages, each of which Mr Cook claims was defamatory of him. Mr Cook sued for libel, issuing his Claim Form nearly one year later on 20 April 2010. The Defence and Reply are dated respectively 16 July 2010 and 28 September 2010. However, the case has not proceeded to trial, as it might have done.

4. On 18 November 2010 the Telegraph issued the Application Notice now before me. The Telegraph asks for summary judgment on the ground that Mr Cook has no real prospect of rebutting the three defences it has raised. They are justification (or truth),

honest comment, and the public interest defence generally referred to as a *Reynolds* defence (*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127).

THE THREE ARTICLES COMPLAINED OF

5. The first of the three articles is headed "*MP claimed £5 for church collection*" ("the front page article"). The second is under the title "*I'm sorry, church claim was unfair*" ("the page 2 article"). The third is under the title "*COMMENT AND ANALYSIS - Now it is the people's turn to be heard*" ("the Leader").

6. The words complained of and the meanings which Mr Cook attributes to them are set out in paras 3 to 8 of the Particulars of Claim. They are as follows.

7. The front page article reads:

> "*MP claimed £5 for church collection*
>
> An M.P. used his expenses to claim for a £5 donation he made during a church service to commemorate the Battle of Britain.
>
> Frank Cook a Labour backbencher sought reimbursement on his office expenses after the memorial service in his constituency town of Stockton On Tees. It was rejected by the parliamentary fees Office.
>
> The controversial claim was one of a series made by M.Ps that can be disclosed today, including reimbursement for carpets bought in India, sweets bought by a former party leader and office expenses used for household items ...
>
> Today the Sunday Telegraph discloses the expense claims of members of parliament who represent low "value-for-money" when their voting records, participation in parliamentary debates and number of questions they ask are compared to their total level of expenses.
>
> The most extraordinary was made by Mr Cook who tried to claim for £5 he gave at a Battle of Britain memorial service. A handwritten note attached to the claim by way of a receipt stated "Battle of Britain church service, Sunday 17.09.06. £5 contribution to offertory on behalf of Frank Cook M.P."
>
> The fees office wrote on his claim "Not Allowed" and refused to pay out on the claim ....
>
> It is particularly embarrassing because Mr Cook is an official supporter of the campaign to commemorate Air Chief Marshall Sir Keith Park who commanded the RAF's 11 Group Fighter Command during the Battle of Britain".

8. The front page article was accompanied by a photograph of the Claimant, with a reproduction of an extract from the Claimant's member's reimbursement form and of the receipt for £5 with the caption:

> "Frank Cook, the Labour M.P., in flight gear. Despite campaigning for the RAF he tried to claim on expenses £5 that he donated at a church service commemorating the Battle of Britain".

9. The page 2 article reads:

> "*I'm sorry, church claim was unfair*
>
> Mr Cook last night said he could not remember making the claim but apologised for doing so. His claim for the donation is particularly embarrassing because he is an official supporter of the campaign to commemorate Air Chief Marshall Sir Keith Park who commanded 11 Group Fighter Command RAF at the Battle of Britain.
>
> He is also a former member of the Commons Defence select committee and his son Andrew is a serving soldier with the Royal Electrical and Mechanical Engineers.
>
> Mr Cook who was deselected as a candidate for the next general election by his local constituency party in 2008 after more than 24 years representing Stockton North is among the 20 MPs who represent poor value for money to taxpayers.
>
> Despite claiming total expenses last year of £153,902 which included travel, home office and staffing costs Mr Cook turned up to just 44% of votes in Parliament, spoke 11 times and submitted four questions to ministers ...
>
> Last year Mr Cook a former gravedigger, Butlins Redcoat and special needs teacher received £23,083 of taxpayers' money to run his second home in Camberwell, south London ... "

10. The page 2 article was accompanied by a photograph of the Claimant with the caption:

> "Worthy causes: Frank Cook at Westminster before a charity run. The former gravedigger said claiming for a £5 church collection was 'unjustified'".

11. The part of the Leader which is complained of reads:

> "*COMMENT AND ANALYSIS*
>
> *Now it is the people's turn to be heard*

> When, as we report today, one Labour MP thinks it is appropriate to claim back from taxpayers the £5 he put in a church collection for an RAF charity, the most obvious conclusion that Labour is made up of people who will destroy the ethic of selfless public service.
>
> If the expenses scandal had revealed flaws of character and judgement in individual MPs, it has not revealed a fundamental flaw with Britain's basic system of representative democracy. None of those who made disgraceful claims were forced to do so by "the system", for there were plenty of MPs who only made claims that are beyond reproach. The difference between those who put their snouts in the trough, and those who did not, is that the individual who make up the first group decided to claim what they thought they could get away with, rather than what they could justify to their constituents".

12. The meanings attributed by Mr Cook to the front page article and the page 2 article are the same, namely:

> "(i) the Claimant represented low "value-for-money" as a parliamentarian;
>
> (ii) the Claimant's claim for £5 was an extraordinary abuse of M.Ps' expenses and was particularly embarrassing and hypocritical having regard to his official support of the campaign to commemorate a Battle of Britain hero."

13. The meaning attributed by Mr Cook to the Leader is:

> "(i) the Claimant thought it appropriate to claim back from taxpayers the £5 he put in a church collection for an RAF charity;
>
> (ii) the Claimant set out to exploit the expenses system for his own gain in disregard of his constituents' views."

14. The meaning in which the Telegraph pleads that each of the front page article and the page 2 article is true is:

> "10.1 The Claimant claimed on expenses a £5 offertory donation for an RAF charity made during a memorial service to commemorate the Battle of Britain.
>
> 10.2 The claim was an extraordinary abuse of the expense system.
>
> 10.3 It was particularly embarrassing to the Claimant.
>
> 10.4 It was inconsistent with the nature of a church offertory and the Claimant's support of the armed forces.

> 10.5 It was justifiable to describe the Claimant as a low value for money MP."

15. The meaning in which the Telegraph pleads that the Leader is true is in part the same, namely as in paras 10.1 and 10.2 of the Particulars of Claim cited above, with the following additional meanings:

> "17.2 The donation claim is a prime example of an MP claiming what he thought he could get away with, rather than what he could justify to his constituents.
>
> 17.3 … the [Telegraph] will, if necessary, allege that the Claimant set out to exploit the expenses system for his own gain in disregard of his constituents' views".

16. In relation to the first two articles complained of, the words relied on by the Telegraph as comment are "controversial", "the most extraordinary" claim, "particularly embarrassing" and low "value for money" MP. In relation to the leader, the Telegraph identifies as comment the following:

> "16.1 The Claimant thought it appropriate to make the donation.
>
> 16.2 Such conduct is destructive of the ethic of selfless public service.
>
> 16.3 The donation claim is a prime example of an MP claiming what he thought he could get away with, rather than what he could justify to his constituents."

MATTERS NOT IN DISPUTE

17. Mr Cook admits that he made the claim for reimbursement of £5, but he states that he did so by mistake.

18. There is no dispute that on 17 September 2006 Mr Cook's assistant attended the Battle of Britain Church Service in Stockton. He made a donation of £5 on behalf of Mr Cook and provided Mr Cook with a receipt. Mr Cook reimbursed him that sum the next day. On 30 September 2006 Mr Cook submitted a form C1 headed "Incidental Expenses Provision: Member's reimbursement form" to the Parliamentary Fees Office.

19. At the head of the form there is an instruction "When to use this form". It states "Use this form to ask us to reimburse you for costs you have incurred on your Parliamentary duties". Above the signature, which in this case is that of Mr Cook personally, are the words "I claim reimbursement of these costs which I incurred wholly exclusively and necessarily in the performance of my Parliamentary duties". There are eleven items on the form as completed, and the total is £1,195.44. It is the last item that is in question. It reads "RAF offertory £5". Attached is the receipt which reads "Battle of Britain church service Sunday 17.09.06 £5 contribution to

offertory on behalf of Frank Cook MP received 18.09.06" and signed by Mr Cook's assistant. Written against that item are the words "Not allowed".

20. On Saturday 30 May 2009 at 09.15 Mr Sawer on behalf of the Telegraph wrote to Mr Cook an email with a letter attached. It required a response by 12 noon on the Saturday. The letter stated that the Telegraph was investigating the expense claims made by MPs under the House of Commons Additional Costs Allowance, IEP and Communications Allowance System since the 2004/2005 financial year. It went on as follows:

> "We are considering publishing an article in tomorrow's Sunday Telegraph (May 31, 2009) which will contain details of your expenses claim. …
>
> However, as a matter of legitimate public interest and concern, we intend to publish the following details about your expense. We would invite you to respond to the following points.
>
> 1. We note that in September 2006 you claimed £5 as reimbursement for a donation to the offertory made during a Battle of Britain Day church service.
>
>   Why did you feel it justified to claim back from the public purse the cost of a personal donation to such a cause? …
>
> 3. An analysis by the Sunday Telegraph has shown that you are one of the MPs that offers the least value for money.
>
>   Given that last year you only voted in 44 per cent of votes, asked 4 questions and spoke in 11 debates and yet claimed for £153,902 in expenses, do you think your work as a Member of Parliament constitutes value –for- money? … "

21. As pleaded in the Defence, the Telegraph's case was that an email was sent at 19.58 on Friday 29 May 2009. No copy of an e-mail of that date or time has been produced. For the purposes of the application before me, it is accepted for the Telegraph that I should proceed on the basis that it was sent on the Saturday morning.

22. The letter from Mr Sawer was followed by a conversation between Mr Sawer and the Claimant. Mr Cook accepts that he did speak to Mr Sawer, but when he did so he had not seen the email. In his witness statement Mr Cook states:

> "I told Mr Sawer on the Saturday evening prior to publication that 'if this had happened it was unjustified and unjustifiable'."

23. The first article explains what is meant by "value for money" as appears from the extract complained of and set out in para 3 of the Particulars of Claim:

> " … the Sunday Telegraph discloses the expense claims of Members of Parliament who represent low 'value for money' when their voting records, participation in parliamentary

> debates and number of questions they ask are compared to their total level of expenses."

24. Mr Sawer's report of the fact that Mr Cook had apologised before publication of the articles on 31 May is given in the second article:

> "Mr Cook last night said he could not remember making the claim but apologised for doing so."

25. The fact that he had apologised also appears in the large letters used for the title "I'm sorry, church claim was unfair". That also appears in the caption to the photograph published on the same page, which includes the words:

> " … Frank Cook … said claiming for a £5 church collection was 'unjustified'".

26. Following publication of the words complained of, in an interview on Sunday 31 May, Mr Cook further explained his position in the following remarks:

> "My reaction at the moment given the story in the Sunday Telegraph this morning is one of acute embarrassment … acute annoyance and I just couldn't … until the middle of the day figure out how it could have happened and it's only now I am beginning to get some idea of how it could have occurred. Let me make it plain that the editorial of the Sunday Telegraph makes some suggestion that I thought it was justified to make this claim, I think nothing of the kind. I have already gone on record by saying that it is totally unjustified and unjustifiable. It was wrong that should have happened and it was … some people would call it unfair. It [is] a bit more than that. I think how it came about … I deputise a member of my team to stand in for me at this event because I was elsewhere and when I came back after … it was in the middle of August as I remember … as far as I remember and when I got back there was what we call a work note one of the team had done … registering the fact that he had made a £5 donation in my absence, on my behalf which is entirely proper that he should do that and I paid him that immediately and my mistake was I should have taken that paper that work note and crumpled it up and thrown it in the bin … because of pressure of work I can't think of any other reason I didn't. Somehow or other it got scooped up in numerous other receipts and the like and got included inadvertently in the claim that I submitted for that month's activity. That's the best explanation I can offer at the moment until I look further into it, I regret that … it has been a serious error and I am sorry for it."

27. The next day, 1 June 2009, Mr Cook further stated his position in a letter he personally wrote to the Telegraph. It is addressed to "Letters to the Editor" under the title "For consideration for publication", but it was not published. It includes the following:

> "Whilst I fully accept that the issue of payments to Members of Parliament is a matter of major media interest and real public concern, I would ask that coverage of the issue is fair and balanced. In my own case, when questioned by the Sunday Telegraph on a claim relating to a church service donation, I made it very clear that I regarded the claim as unacceptable and one that should never have been submitted.
>
> Yet in your Leader column (Sunday Telegraph May 31st) you alleged that I regarded the claim as 'appropriate'. That is exactly the opposite of what I said to your newspaper – and indeed every other media and public query I have received on this matter."

ISSUES BETWEEN THE PARTIES

28. As far as the *Reynolds* defence is concerned, Mr Cook accepts that the subject matter of the words complained of was a matter of public interest. The issue he raises is that the Telegraph has not acted responsibly in publishing what it did, for three reasons. First, the e-mail inviting him to comment was sent less than three hours before the deadline of noon, and that was on a Saturday. Second, although the Telegraph printed his acceptance that the claim had been unjustified on the other two pages, in the Leader it falsely asserted that he thought that the claim was justified. Thirdly, its "value for money" calculation is misleading. It omits many things which Mr Cook says that MPs in general, and he in particular, do in the course of duty. Moreover, even in so far as it is based on voting records it is misleading because in his case it omits to take into account specific reasons why on certain occasions he was precluded from voting.

29. As to the comment defence, Mr Cook raises two issues. First, he denies that any of the words are comment as opposed to statements of fact. And if it was a comment it was not on facts truly stated, since he contends that the "value for money" rating used by the Telegraph is unreliable for the purpose for which it is used. Second, he also alleges malice against the Telegraph. The basis for this allegation is that Mr Cook contends that before publication of the words complained of he informed Mr Sawer of the Telegraph that he (Mr Cook) did not consider it appropriate to claim the £5. He also informed Mr Sawer, before publication of the words complained of, of reasons why the "value for money" indicator was unreliable, identifying two reasons in particular. Accordingly, Mr Cook contends that the Telegraph published what it did knowing that what it published was untrue.

30. In support of this application, seven witness statements were served for Mr Cook and three by the Telegraph, two of them from the same witness, Mr Leapman. He is the Deputy News Editor of the Sunday Telegraph and it is he who devised the "value for money" system referred to in the words complained of. Most of the evidence is directed to the scope and value of the "value for money" system, and to reasons why Mr Cook did not vote when he otherwise might have been expected to do so, and as to the work that he did as an MP which is not reflected in the "value for money" system.

31. As to justification, Mr Cook raises the following issues. First he contends that the "value for money" allegation is a statement of fact, and is false for the reasons stated

above. Second, he contends that the allegations that he was hypocritical, that he thought it appropriate to claim the £5 on expenses, and that he set out to exploit the system are all false statements of fact. His claim for reimbursement was just a mistake.

PRINCIPLES APPLICABLE TO SUMMARY JUDGMENT

32. So far as material, CPR 24.2 provides:

> "The court may give summary judgment against a Claimant … on the whole of a claim… if – (a) it considers that (1) that Claimant has no real prospect of succeeding on the claim…."

33. As stated in the note to the White Book 2010 note 24.2.3, the hearing for an application for summary judgment is not a summary trial. The court will consider the merits of the Claimant's case (in such an application as this) only to the extent necessary to determine whether it has sufficient merit to proceed to trial. The proper disposal of such an application does not involve the court conducting a mini trial (*Swain v Hillman* [2001] 1 All ER 91; *Three Rivers D C v The Bank of England (No 3)* [2001] 2 All ER 513 HL). The criterion which the judge has to apply is not one of probability, it is absence of reality: see Lord Hobhouse in *Three Rivers*.

34. However, as Lord Woolf said in *Swain* at para 94:

> "It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a Claimant has a case which is bound to fail, then it is in the Claimant's interests to know as soon as possible that that is the position."

35. The proper approach by a judge to an application for summary judgment depends in part upon whether the trial is to be by judge alone, or with a jury. If the trial is to be with a jury, then in all interlocutory applications the judge must be conscious of the division of responsibilities between judge and the jury, and must not usurp the functions of the jury.

36. At the start of the hearing it was clear that both parties expected that, if there were to be a trial, it would be by a judge sitting with a jury. But there is no order of the court as to the mode of trial (ie whether the trial should be with a jury, or by judge alone), nor any order for directions. There should have been such an order months ago. Libel actions must be brought to court expeditiously.

37. As is well known, the right to trial by jury in civil disputes was preserved for libel actions after it was abolished for most other actions in 1933. But by s.69 of the Senior Courts Act 1981, a party wishing to claim that right has to apply for it, and the application has to be made (pursuant to CPR Part 26.11) within 28 days of the service of the Defence. No such application was made in this case. So the question whether

the trial should be by judge alone, or by a judge with a jury, is in the discretion of the court: s.69(3). That provides that in such a case the action "shall be tried without a jury unless the court in its discretion orders it to be tried with a jury".

38. Mr Crystal told me that his client wished to make an application for the trial to be with a jury. Accordingly I invited him to do so at the hearing, which he did. This application was not contested by Mr Price, although he neither consented to it nor supported it. The parties were taken by surprise by my raising the question of mode of trial and inviting submissions as to how I should exercise my discretion. I indicated that I would give my decision in this judgment on the mode of trial.

39. I shall in the first instance approach the Telegraph's application for summary judgment on the basis that, if there were to be a trial, then that trial would be with a jury. But I shall return to the question of mode of trial below.

MEANING

40. There is no application before me under CPR Practice Direction 53 para 4.1. Mr Price does not ask me to find that the words complained of are incapable of bearing the meanings Mr Cook attributes to them. It follows that I proceed on the assumption that the words complained of may be found by a jury to bear Mr Cook's meanings. I stress that this is only an assumption, which I make for the purposes of the applications before me. It follows that I do not need to consider further the meanings pleaded by the Telegraph as set out in paras 14 to 16 above, but I will hear argument on them at a later stage, as explained below.

41. There was no dispute before me that the words complained of are capable of being defamatory. Whether they are or not would be a matter for the jury, if there is to be one.

42. A further question related to meaning is whether the words complained of are fact or comment. It is not in dispute that if there is an issue of whether words are fact or comment, this is a matter for the jury, if there is to be one. This is again subject to a judge being able to rule that the words are not capable of being one or the other.

THE DEFENCE OF HONEST COMMENT

43. The elements of the defence of honest comment are authoritatively set out in the judgment of the Supreme Court in *Spiller v Joseph* [2010] UKSC 53 [2010] 3 WLR 1791 at paras [3], [4] and [105] as follows:

> " [i] … First, the comment must be on a matter of public interest. ….
>
> [ii] 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* (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.'
>
> [iii] Third, the comment must be based on facts which are true or protected by privilege: see, for instance, *London Artists Ltd v Littler* [1969] 2 QB 375, 395. If the facts on which the comment purports to be founded are not proved to be true or published on a privilege occasion, the defence of fair comment is not available.
>
> [iv] Next the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based.
>
> [v] 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: see Lord Porter in *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449, 461, commenting on an observation of Lord Esher MR in *Merivale v Carson* (1888) 20 QBD 275, 281. It must be germane to the subject-matter criticised. Dislike of an artist's style would not justify an attack upon his morals or manners. But a critic need not be mealy-mouthed in denouncing what he disagrees with. He is entitled to dip his pen in gall for the purposes of legitimate criticism: see Jordan CJ in *Gardiner v Fairfax* (1942) 42 SR (NSW) 171, 174.
>
> 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..
>
> [vi] A Defendant is not entitled to rely on the defence of fair comment if the comment was made maliciously".

44. As to malice, at paras [68], [69] and [108] the Supreme Court concluded (adopting the view of Lord Nicholls expressed in *Tse Wai Chun Paul v Albert Cheng* [2001] EMLR 777, [2000] HKCFA 35 para [75]) that:

> "the scope of malice has been significantly narrowed. The fact that the Defendant may have been motivated by spite or ill-will is no longer material. The only issue is whether he believed that his comment was justified."

45. The criticisms that Mr Crystal makes of the basis on which the Telegraph calculated the value for money of Mr Cook (and other MPs) raises a further point. In substance the point is that Mr Cook wishes to prove facts not relied upon by the Telegraph,

namely aspects of his work as an MP not taken into account in the value for money calculation.

46. It is necessary to consider the law as to the relevance of such facts. In *Branson v Bower (No 2)* [2002] QB 737 Eady J considered this point at paras [36] to [39] as follows:

> "36 Mr Price argues that the objective test for fair comment cannot be fulfilled (at any point) if the facts pleaded by the Defendant might take on a different significance when set against other facts not referred to in the words complained of—at least if the Defendant either knew about or could have discovered them. This raises a new clutch of problems for analysis.
>
> 37 The simplest example would be where a man has been charged with child abuse and a newspaper article calls for him to be suspended from his teaching post for so long as this question mark remains over him. On the face of it, that would be a legitimate instance of fair comment if those facts stood alone. Suppose, however, that there are facts, not mentioned by the Defendant, which throw a different light on matters. For example, the proceedings had been dropped by the Crown Prosecution Service, or he has been acquitted at trial, because it transpired that it was a case of mistaken identity, or because he had an alibi, or because DNA testing excluded him as the culprit. In those circumstances, the underlying factual substratum of the comment (viz there are reasonable grounds to suspect that he may be guilty of child abuse) would have collapsed.
>
> 38 The existence of such extraneous circumstances would be relevant in dealing with the question of whether the facts were truly stated (question … [para 43 [iii] above]). They would also be relevant if it turned out that the Defendant had suppressed the exculpatory evidence deliberately. That would be evidence of malice—if the case ever got that far (question … [para 43 [vi] above]). Where I would part company with Mr Price is over the question of whether such extraneous facts could also be relevant for answering question … [para 43 [v] above]. The question would simply be "Could someone honestly express the opinion that the Claimant should be suspended on the footing that he was currently facing charges of child abuse?" The answer to that would almost certainly be in the affirmative. It does not need to be confused with the other two questions I have identified. This is because the objective test for fair comment is concerned with whether the Defendant is able to show that a hypothetical person could honestly express the relevant comment on the facts pleaded and/or proved by the Defendant. I do not understand Mr Price to challenge that as a proposition of law.

> 39 If the Claimant, by way of rebuttal, proves truly exculpatory circumstances which negate the suspicious circumstances raised by the Defendant, that will undermine the accuracy of the factual substratum for the comment. The Defendant would therefore fail at question 1 [para [iii] above]."

47. It follows that, if the defence of honest comment is available to the Telegraph at all, then the additional facts which Mr Cook wishes to prove will be relevant to that defence, if at all, in relation to the two questions, (1) whether the facts in the words complained of are truly stated, and (2) whether the defence is defeated by malice.

48. Further, it has long been recognised (as Eady J put it in a passage quoted in *Spiller* at para [26]) that:

> "the defence is wide enough to embrace not only expressions of opinion in the more common sense but also, in some cases, inferences of fact where it is clear they are not objectively verifiable: see eg *Gatley on Libel and Slander*, 11th ed (2008), at para 12.7. For example, where a conclusion is expressed by the commentator in circumstances where it is obvious to the reader that he cannot *know* the answer (eg in relation to someone's secret motives), it would be taken as comment rather than fact."

49. This proposition has not been disapproved in *Spiller*, although Lord Phillips made the following cautionary observations about it at [114]:

> "Careful consideration needs to be given to [the] proposition that the defence of fair comment should extend to inferences of fact. Jurisprudence both in this jurisdiction and at Strasbourg – see *Nilsen and Johnsen v Norway* (1999) 30 EHRR 878, para 50 - has held that allegations of motive, which is inherently incapable of verification, can constitute comment. Some decisions have gone further and treated allegations of verifiable fact as comment, see for instance the Privy Council in *Jeyaretnam v Goh Chok Tong* [1989] 1 WLR 1109. It is questionable whether this is satisfactory. Prejudiced commentators can draw honest inferences of fact, such as that a man charged with fraud is guilty of fraud. Should the defence of fair comment apply to such inferences? Allegations of fact can be far more damaging, even if plainly based on inference, than comments on true facts. Eady J has twice held that the defence of fair comment cannot apply where the defamatory sting is a matter of verifiable fact – *Hamilton v Clifford* [2004] EWHC 1542 (QB) and *British Chiropractic Association v Singh* [2009] EWHC 1101 (subsequently reversed by the Court of Appeal)."

HONEST COMMENT APPLIED TO THIS CASE

50. There are two points which Mr Cook contends the Telegraph omitted from the articles containing the words complained of, as pleaded in the Particulars of Claim para 10 and the Reply para 15:

    i) Mr Cook told Mr Sawer in their conversation on Saturday 30 May that he was a members of the Speaker's Panel, and as such he was not allowed to vote on Bills which he had chaired at any stage, and by omitting to report this the Telegraph gave its readers a false impression as to Mr Cook's voting record;

    ii) Mr Cook told Mr Sawer in their conversation on Saturday 30 May that he did not consider it appropriate to claim the £5.

51. In my judgment the following meanings pleaded by Mr Cook are comment, and no jury properly directed could find otherwise:

> "(i) the Claimant represented low "value-for-money" as a parliamentarian;
>
> (ii) the Claimant's claim for £5 … was particularly embarrassing … having regard to his official support of the campaign to commemorate a Battle of Britain hero."

52. In my judgment the following meanings pleaded by Mr Cook are arguably either comment or statements of fact, and the question whether they are comment or statement of fact could not be withdrawn from the jury, if there is to be one:

> "(i) the Claimant thought it appropriate to claim back from taxpayers the £5 he put in a church collection for an RAF charity;
>
> (ii) the Claimant set out to exploit the expenses system for his own gain in disregard of his constituents' views.
>
> (iii) the Claimant's claim for £5 was an extraordinary abuse of M.Ps' expenses and was … hypocritical having regard to his official support of the campaign to commemorate a Battle of Britain hero.."

53. These meanings relate to the state of mind of Mr Cook. The state of mind of a person may be treated as a question of fact (as intention is treated in criminal cases) or as a matter opinion (for example motivation, as discussed in the cases referred to in *Spiller* at para [114]).

54. In my judgment, an honest person can plainly hold an opinion as to whether or not an MP is good value for money, even though other people might dispute that this is a sensible criterion by which to judge MPs, or hold any other different view. No properly directed jury could find otherwise.

55. And if an honest person does choose to express a view as to whether or not an MP is good value for money, it seems to me equally plain and obvious that he can choose his own tests for assessing that value. If he omits matters which the MP in question thinks he should have taken into account, then those omitted facts can only be

relevant to two questions, namely (1) whether the facts in the words complained of are truly stated, and (2) whether the defence is defeated by the Claimant proving that the Defendant did not believe the comment was justified.

56. In the present case, it is in my judgment not arguable (or at least there is no real prospect of persuading a jury) that the omission of the two matters referred to in para 50 above is capable of leading to the conclusion that the facts were not truly stated (if the meanings which I have held to be capable of being comment are held to be comment). It is not disputed by Mr Cook that the Telegraphs' journalists did the calculation that they purported to do, and did it correctly according to their own rules.

57. The defence of honest comment could not therefore fail on this point. But whether there is a real prospect that it might fail on the issue of whether the Defendant did not believe the comment was justified is a separate question.

58. These same two points are pleaded as particulars showing that the Defendant did not believe the comment was justified. It is pleaded that Mr Sawer knew it was untrue to assert that Mr Cook was a "low value" MP. There is in my judgment no real prospect of Mr Cook proving this. I reach this conclusion on the footing that for a journalist to be told something by a person who he is proposing to criticise is not at all the same thing as for that journalist to know that what he is told is either true, or relevant. In the present case, assuming in Mr Cook's favour that Mr Sawer did believe that he was on the Speaker's Panel and did work as an MP other than voting, I still see no real prospect of Mr Cook persuading a jury that Mr Sawer knew that it was untrue to assert that Mr Cook was a low value MP. There is also evidence served on behalf of the Telegraph to the effect that even if the fact that Mr Cook was on the Speaker's Panel had been included in their calculation (thus increasing the proportion of debates at which he had voted) that would make no material difference to the outcome. I do not know if that calculation was done on 30 May. I assume (in Mr Cook's favour) that it was not done that day. So I disregard that evidence for the purposes of the present application.

59. It is also pleaded that Mr Sawer knew it was untrue to state, as was written in the Leader, that Mr Cook "thinks it appropriate to claim back from taxpayers the £5…", and, submits Mr Cook, that is so whether "thinks" refers to the time when he made the claim, or the time when the Leader was published.

60. There is no dispute that Mr Cook did say this to Mr Sawer, because the fact that he said it is included in the articles complained of, and forms the title and the caption to the photo on page 2.

61. It is a question of fact what Mr Sawer believed, after the conversation that Saturday with Mr Cook. In my judgment it is not possible to say that Mr Cook has no real prospect of persuading a jury that Mr Sawer believed what Mr Cook had said on the telephone, and therefore did not believe that Mr Cook ever thought it appropriate to claim back from taxpayers the £5. Accordingly, the defence of comment could fail on this point, and I could not withdraw this part of the case of malice from a jury.

THE DEFENCE OF JUSTIFICATION

62. I have held that the meanings set out in para 52 above are meanings which the words complained of are capable of bearing, and that they are capable of being statements of fact.

63. Mr Price submits that on this basis, nevertheless the defence of justification is bound to succeed, having regard to the undisputed facts which are set out above. He submits that in the light of the undisputed facts set out in paras 18 and 19 above, it added nothing for the Telegraph to say that Mr Cook thought it appropriate to claim the £5.

64. Mr Crystal submits that at the heart of Mr Cook's complaint in this action there is a clear conflict of evidence. The Telegraph are in effect accusing Mr Cook of lying when he says, as he does, that the claim for reimbursement was a mistake, and that he did not think that that claim was justified or appropriate.

65. I have held that the Leader is capable of bearing the meanings set out in para 52, which includes the meaning that Mr Cook set out to exploit the expenses system for his own gain in disregard of his constituents' views. In my judgment I cannot say that Mr Cook has no real prospect of succeeding in defeating the defence of justification on this point.

THE REYNOLDS DEFENCE

66. The *Reynolds* defence is available where two conditions are satisfied: (1) the publication concerned a matter of public interest and (2) the steps taken by the Defendant to gather, verify and publish the information were responsible and fair. The first of these conditions is not in dispute, As to the second, in *Reynolds* [2001] 2 AC 127, at pp 205 Lord Nicholls set out his well known list of matters which he considered could usefully be taken into account:

> "Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.

> This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case".

67. Immediately after that passage he set out the division of responsibilities between a judge and a jury as follows:

> "Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury".

68. Unfortunately the division of responsibilities has not proved as easy to determine as Lord Nicholls contemplated. The reasons for this are given in Gatley on Libel and Slander 11th ed at para 36.1. Some issues are really ones of mixed law and fact. In *Jameel v Wall Street Journal Europe Sprl (No.2)* [2005] EWCA Civ 74 [2005] QB 904 at para [30] Lord Phillips MR had referred to the complexity of attempting to deal with issues that arise in a *Reynolds* defence in a jury trial. One of the questions left to the jury in that case had concerned the content of a telephone conversation between the journalist and a person he had contacted (para [4] question (7)). In *Spiller* the Lord Phillips said this:

> "23. On 27 April 2009, just over one month before the date fixed for the trial, the Claimants issued an application for summary judgment, alternatively for an order striking out the defences, on the basis that there were no issues to go to the jury. Thus began the tortuous interlocutory proceedings that have culminated in this appeal. With hindsight it is apparent, and with a little foresight it should have been apparent at the time, that this relatively modest dispute raised issues of complexity, some of which might not prove decisive, and that the best course would be to proceed with the substantive hearing before a judge alone. ….
>
> 116. Finally, and fundamentally, has not the time come to recognise that defamation is no longer a field in which trial by jury is desirable? The issues are often complex and jury trial simply invites expensive interlocutory battles, such as the one before this court, which attempt to pre-empt issues from going before the jury."

69. Mr Price also accepts that it is not yet established whether a defence of *Reynolds* privilege can be a defence to a comment. That was left open in *British Chiropractic Association v Singh* [2010] EWCA Civ 350 [2011] 1 WLR 133 at para 31.

70. But a *Reynolds* defence could also fail for the reason I have given in reaching the conclusion on malice in para 61 above. It is not a defence which is available for the publication of statements which a journalist does not believe to be true, at least in circumstances such as those in the present case.

71. There is a further issue on *Reynolds* on which Mr Crystal relies. He submits that the time afforded to Mr Cook that Saturday morning was less than three hours, even assuming that Mr Cook read the e-mail at the time when it was received. Mr Crystal submits that that is a matter upon which the court could find that this was not a case of responsible journalism.

72. Mr Price submits that there is no real dispute of fact, and that I am as well placed as a trial judge would be to resolve this issue. But the issue of timing, and what was said in the conversation, and what Mr Sawer believed at the end of the conversation, are all questions of fact, or they may possibly give rise to questions of mixed law and fact.

73. So I cannot say that Mr Cook has no real prospect of defeating the *Reynolds* defences, assuming it is available. For the reasons given by Lord Phillips in para [23] of *Spiller*, I also consider that the best course would be to proceed with the substantive hearing, rather than to seek to determine the applicability of *Reynolds* to comment on assumed facts.

74. That raises the question whether the hearing should be before a judge alone (as Lord Phillips contemplated in *Spiller*) or with a jury.

MODE OF TRIAL

75. Section 69 of the Senior Courts Act 1981 regulates civil cases in which there may be, in whole or in part, trial by a jury. Section 69 of the 1981 Act provides:

> "(1) Where on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue-
>
> (a) a charge of fraud against that party; or
>
> (b) a claim in respect of libel, slander, malicious prosecution or false imprisonment; or
>
> (c) any question or issue of a kind prescribed for the purposes of this para,
>
> the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.
>
> (2) An application under subsection (1) must be made not later than such time before the trial as may be prescribed.
>
> (3) An action to be tried in the Queen's Bench Division which does not by virtue of subsection (1) fall to be tried with a jury shall be tried without a jury unless the court in its discretion orders it to be tried with a jury.
>
> (4) Nothing in subsections (1) to (3) shall affect the power of the court to order, in accordance with rules of court, that

> different questions of fact arising in any action be tried by different modes of trial; and where any such order is made, subsection (1) shall have effect only as respects questions relating to any such charge, claim, question or issue as is mentioned in that subsection."

76. CPR Part 26.11 prescribes that an application for a claim to be tried with a jury must be made within 28 days of service of the defence.

77. As May LJ noted in *Times Newspapers Ltd v Armstrong* [2006] EWCA Civ 519, [2006] 1 WLR 2462 at para 15:

> "… an action which does not come within section 69(1) has to be tried without a jury, unless the court in its discretion orders it to be tried with a jury. The discretion is now very rarely exercised, reflecting contemporary practice. Contemporary practice has an eye, among other things, to proportionality; the greater predictability of the decision of a professional judge; and the fact that a judge gives reasons".

78. At para 19 May LJ also remarked in relation to section 69(4) that "The overriding objective in rule 1.1 and rule 3.1(2)(m) are there for general case management purposes." In my judgment, that must apply equally to the discretion to be exercised under section 69(3).

79. At para [30] May LJ approved the approach of Eady J in that case, which included the statement (quoted at para 28) that he "should assess the relative advantages and disadvantages dispassionately from a case management point of view".

80. This is similar to the statement made by Lord Phillips MR in *Dow Jones & Co Inc v Jameel* [2005] EWCA Civ 75[2005] QB 946 at para [54]:

> "It is no longer the role of the court simply to provide a level playing-field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice."

81. CPR Part 1 includes:

> "1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

1.3 The parties are required to help the court to further the overriding objective.

1.4 (1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes –

(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;

(b) identifying the issues at an early stage;

(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

(d) deciding the order in which issues are to be resolved; …

(g) fixing timetables or otherwise controlling the progress of the case;

(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;

(i) dealing with as many aspects of the case as it can on the same occasion;

(j) dealing with the case without the parties needing to attend at court;…

(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently".

82. CPR 3.1 provides:

> "(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.
>
> (2) Except where these Rules provide otherwise, the court may – …
>
> (m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective".

83. The implications of this for the exercise of the court's discretion under section 69(3) may not hitherto have been fully appreciated. The implication is that, once the 28 days provided for in CPR 26.11 have expired, it is for the court to decide the mode of trial, and the court must do so starting with the predisposition in favour of a trial without a jury. And this is so whatever the parties may have agreed or may wish. The wishes of the parties are of course a factor. But the court should not abstain from addressing its mind to all the relevant factors, including in particular those of case management, simply because the parties agree between themselves.

84. It may be, as Mr Crystal submits, that the time for compliance with CPR 26.11 may be extended under CPR Part 3.1(2)(a), and that it may be so extended even after the time for compliance has expired. The editors of Duncan & Neill on Defamation 3rd ed state in para 28.41, footnote 2 that "in practice the determination of the application is often deferred until the likely scope of the issues in the case is clearer". They do not say that the making of the application is often deferred, but they do submit that there is power to grant an extension of time under CPR 3.1(2)(a). They also refer in the next footnote to the discretion under s.69(3).

85. Any application under CPR 3.1(2)(a) would be a matter for the court's discretion, to be exercised judicially and in accordance with the overriding objective. Whether the court would approach the matter any differently if it was considering the exercise of a discretion arising directly under s.69(3), or one arising under CPR 3.1(2)(a) is a separate point.

86. Mr Crystal submits that the court should approach the matter differently, in that under CPR 3.1(2)(a) the court should approach the issue on the basis that the exercise of the discretion in a party's favour would have the effect of giving that party the rights that he would have had under s.69(1) if he had made an application within the prescribed 28 days. Mr Crystal also submits that the position is analogous to an application for relief from a sanction, for which provision is made in CPR 3.9(1), and which requires the court to have regard to all the circumstances, including the nine which are listed.

87. In my judgment in the circumstances of this case it would not make any difference under which of s.69 (3) or CPR 31.1 (2)(a) the discretion arose. No reason is given for the omission to make the application within the 28 days. And CPR 3.9(1) does not assist. The loss of the right to trial by jury under s.69(1) is not a sanction. But even if it were, no good reason has been advanced in this case for the omission to make the application.

88. Factors relevant to the exercise of the court's discretion (other than the overriding objective) have been identified in cases decided before the CPR came into force. They

were summarised by Bingham LJ in *Aitken v* Preston [1997] EMLR 415, 419, and recently re-iterated by Lord Neuberger MR in *Fiddes v Channel Four Television Corporation* [2010] EWCA Civ 730, [2010] 1 WLR 2245. *Armstrong* was not cited to the court in *Fiddes*, no doubt because the issue in *Fiddes* arose only a few days before the trial, so that the potential of advantages by way of case management had long since ceased to apply in that case.

89. In *Fiddes* Lord Neuberger MR said this at paras 15 and 16:

> "There are, however, four factors which have been identified in the earlier cases, which have some general application and which are presently relevant, as the judge recognised:
>
> (1) The emphasis now is against trial by juries, and this should be taken into account by the court when exercising its discretion (*Goldsmith v Pressdram* [[1988] 1 WLR 64] at page 68 per Lawton LJ with whom Slade LJ expressly agreed). This conclusion is based on section 69(3), which was a new section appearing for the first time in the 1981 Act to replace section 6(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933, the provision in force at the date when *Rothermere v Times Newspapers* was decided.
>
> (2) An important consideration in favour of a jury arises where, as here, the case involves prominent figures in public life and questions of great national interest (*Rothermere v Times* [[1973] 1 WLR 448]).
>
> (3) The fact that the case involves issues of credibility, and that a party's honour and integrity are under attack is a factor which should properly be taken into account but is not an overriding factor in favour of trial by jury (*Goldsmith v Pressdram* [[1988] 1 WLR 64, 68E] at page 71H per Lawton LJ).
>
> (4) The advantage of a reasoned judgment is a factor properly to be taken into account (*Beta Construction v Channel Four Television* [[1999] 1 WLR 1042, 1056B])."

90. Mr Crystal submitted that there is a further factor, namely that judges should be reluctant to try issues which involve political matters. The Faulks Committee, which considered this question in 1975, agreed that this was a relevant factor (Cmnd 5909 Ch 17 para 469). But this view has not been repeated in recent authorities, and for good reason. The development of administrative law (which had hardly begun in 1975) and the passing of the Human Rights Act 1998 have meant that judges are now constantly required to judge issues involving political, religious and other controversial matters.

91. Mr Crystal very properly raised the question: if the court is not to order a trial with a jury in this case, then in what case would the court order a trial by jury? The answer is that there is a further consideration, which may be embraced in para (2) of the list in

para 88. It is a factor on which Mr Crystal could not rely on in the present case, and which did not arise in either *Rothermere* or *Fiddes*: it is where one party to the action (almost inevitably the Defendant) is the state or a public authority. The words of Lord Bingham in *Rothermere* are not in a statute, and they must not be construed as if they were. In order to understand what they mean it is helpful to go back to the judgments in *Rothermere*.

92. Lord Denning MR in *Rothermere* said at p452G:

> "… the right given by our constitution to a Defendant who is charged with libel, either in criminal or civil proceedings. Every Defendant has a constitutional right to have his guilt or innocence determined by a jury. This right is of the highest importance, especially when the Defendant has ventured to criticise the government of the day, or those who hold authority or power in the state".

93. Lord Denning then recited the history of how the right of juries in trials on indictment to give a general verdict was the subject of conflicting decisions in the eighteenth century. The alternative view had been that the jury could give only a special verdict confined to the issue of whether the accused had published the words in the indictment. This conflict was resolved by Fox's Libel Act 1792 (the closeness of this date to the dates of the French Declaration of Human Rights and the American Bill of Rights is an indication of the political context in which this legislation was passed). The trials on indictment were not civil libel claims for damages, but criminal prosecutions. These were any of four common law public order offences, then known as libels (defamatory, seditious, blasphemous and obscene libels). What remained of these common law offences was abolished by the Coroners and Justice Act 2009, which repealed the 1792 Act at the same time (Sch 23 Part 2).

94. Of course, in the 1790s, all cases in the common law courts were tried with a jury (see the history of the right to trial by jury in civil cases set out by Neill LJ in *Beta Construction* p1052). Whether Fox's Libel Act affected the division of responsibility between judge and jury in civil cases has been a matter of debate. It is unlikely that that Act had any impact on civil cases. In civil cases juries had always determined not only the fact of publication, but also the meaning of the matter published. See the speech which Lord Erskine made in Parliament in support of the Mr Fox's Bill on 20 May 1791 (*Speeches of Lord Erskine while at the Bar* (J L High ed) Chicago Callaghan and Cockfroft 1870 p443). Fox's Libel Act 1792 was correcting an anomaly which Erskine said "destroys the liberty of the press": but it was an anomaly in the criminal law and that Act was not concerned with civil claims for what we now call libel.

95. The Faulks Committee commented on the point as follows at para 476(c):

> "We do not deny that trial by jury in *criminal* cases is 'the lamp that shows that freedom lives' [Lord Devlin: Trial by Jury, 1971 ed, p164], … but it does seem to us incorrect to place crime and civil defamation in the same category. In criminal cases the jury as the judge of fact stands between … the state and the man in the street (the accused), while in

> actions for defamation, also as the judge of fact, it stands between one man in the street and another, although they may sometimes be of very different wealth and power. To us accordingly the description of the jury in a libel action as a 'constitutional bulwark' seems misconceived".

96. This observation may have been prompted by what Lord Denning had said in *Rothermere.* What emerges from the history recited by Lord Denning is the strong association which has in the past been held to exist between trial by jury and freedom of speech.

97. What Lord Denning and Lord Devlin were saying in the passages quoted above had been said by judges for centuries. Since in *Rothermere* at p453F Lord Denning based his judgment upon passages from Blackstone it is helpful to read those passages to understand the ratio of the principle now summarised in para (2) of the judgment in *Aitken* as set out in para 89 above.

98. As to criminal cases, Blackstone's Commentaries on the Laws of England Book IV (1769) p342-3 includes the following:

> "The trial by jury … is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by [Magna Carta]… in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject than, than in disputes between one individual and another …"

99. There may be an analogy with the cases on when a coroner should summon a jury. In *Paul v Deputy Coroner of the Queen's Household* [2007] EWHC 408 (Admin) ; [2007] 3 WLR 503 the Divisional Court said at para 46:

> "Sections 8(3)(a) and (b) [of the Coroners Act 1988] make it mandatory to summon a jury in cases where the death occurred in prison or while the deceased was in police custody or resulted from an injury caused by a police officer in the purported execution of his duty. The policy consideration behind these provisions is clear; in order that there should be public confidence in the outcome of the inquest, a jury should be summoned in cases where the state, by its agents, may have had some responsibility for the death."

100. In *Rothermere* at p452G Lord Denning refers to those who criticise "the government of the day or those who hold authority or power in the state". And the cases Lord Denning mentioned in *Rothermere* at p453A-C were criminal proceedings in which the state is a party. But as I understand it, what he was saying was that the most important consideration was that the state was a party, rather than that the cases were criminal. If so, the crucial distinction is not between civil and criminal cases, but between cases in which the state is opposed to the individual on the one hand, and, on the other hand, cases in which individuals or other non state parties are opposed to one another.

101. Blackstone discussed separately the merits of trial by jury in civil actions in which the state was not a party. Book III at p 379ff, is the passage cited by Lord Denning from which part of principle (2) in *Aitken* is derived ("prominent figures in public life"). It reads:

> "The impartial administration of justice … is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest office in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that *the few* should always be attentive to the interests and good of *the many*"… the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent [ie impartial] men not appointed till the hour of the trial".

102. This is the principle upon which Lord Denning said that he found compelling Mr Levin's application for a jury. Mr Levin was a journalist who had often in the past criticised the judiciary. Lord Denning did not wish there to be any disquiet as to whether a judge would give him a fair trial. But even on the facts in that case Lawton LJ disagreed with Lord Denning on this point: p458G-H.

103. The other part of principle (2) in *Aitken* ("questions of great national interest") is derived from both Lord Denning and Lawton LJ. Lord Denning referred to the newspaper having criticised "the great and powerful in the state on a matter of large public interest" (p453F-G and 454B). Lawton LJ gave a different emphasis to this reason for allowing the appeal. His focus was on likely affect on the public (p457C, 458H) rather than on the status of the person involved, although the two may be linked. Lawton LJ set out the effect on the public, explaining that the case raised the question whether the Times newspaper put profits before people, and "the reputation which The Times has enjoyed for so long around the whole world for responsible journalism" was such that "the destruction of its reputation would be the destruction of a national institution". Cairns LJ gave a dissenting judgment. In *Aitken* the Court of Appeal appears to have approved the reason which was common to both Lord Denning and Lawton LJ, namely that trial by jury is to be favoured where there is involved both prominent figures in public life and questions of great national interest. In other words the test is narrower than the reason put forward by Blackstone, who considered juries important by reason only of the involvement of a prominent figure.

104. The Faulks Committee did not comment upon the particular application of this principle to the case of Mr Levin. But the Committee did consider the general principle, and disagreed with the view that the judges in modern times are remote from the rest of the community (para 484). Moreover, things have changed since the Faulks Report and the decision in *Aitken.* Judges are not now "selected by the prince or such as enjoy the highest office in the state". They are selected through the independent procedures of the Judicial Appointments Commission, which makes recommendations on merit. And the existence of a right of appeal to the Court of Appeal, the passing of the Human Rights Act 1998 and and other measures introduced

since the eighteenth century, provide guarantees of judicial impartiality which did not exist in the time of Blackstone. In addition the CPR has introduced the overriding objective and related case management powers.

105. Moreover, as Blackstone warned (at p 383):

> "A jury … is often liable to strong objections … where a cry has been raised, and the passions of the multitude have been inflamed; or where one of the parties is popular, and the other a stranger or obnoxious … In all these cases, to summon a jury, labouring under … prejudices, is laying a snare for their consciences…"

106. The most notorious example of a jury labouring under prejudice is the first instance decision in Alabama in the case that was reported in the US Supreme Court as *New York Times Co v Sullivan* (1964) 376 U.S. 254. In that case the New York Times had published an advertisement which included statements, some of which were false, about police action in Alabama allegedly directed against students who participated in a civil rights demonstration and against a leader of the civil rights movement. The plaintiff was not named, but he claimed the statements referred to him because his duties included supervision of the police department. This was a case where "the passions of the multitude have been inflamed" and where the Defendant was "a stranger" from New York. The jury found for the plaintiff and awarded extravagant damages of $500,000. They thus wholly failed to fulfil their function as protector of freedom of expression, in spite of the fact that the plaintiff was an elected official, and so was close to being a representative of the state. It fell to the judges of the Supreme Court to vindicate the right to freedom of expression.

107. Excessive jury awards which interfered with freedom of expression have occurred in England too, and have been held to be an interference with freedom of expression: *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442. In England Parliament provided a remedy by putting the matter in the hands of judges. It gave judges in the Court of Appeal power to substitute a proper award for an excessive jury award: CPR r 52.10(3).

108. It follows that even in cases in which the state is opposed to the individual it may not always be appropriate to order trial by jury. But there may also be some cases where a judge might not appear to be as impartial as a jury. By this I am not referring to any apparent bias arising from a matter personal to a particular judge. Apparent bias of that kind is dealt with by recusal of the judge in question. I am referring to apparent bias of the kind referred to by Blackstone that would arise in the case of any judge: "involuntary bias towards those of their own rank and dignity". The case of Mr Levin in *Rothermere* is an example, albeit that that was a reason that found favour only with Lord Denning. Whether those words can in fact have any application in any other circumstances is not for me to decide now. But if they can, then a case in which they might apply might be one where the court should exercise its discretion to order trial with a jury.

109. In the present case neither party is the state, or a public authority. A public authority is now disqualified from being a Claimant in a civil libel action: see *Derbyshire CC v Times Newspapers Ltd* [1993] AC 354. So the government of the day will not be a

Claimant, but public authorities are sometimes Defendants in libel actions, and in other actions regulated by s.69(1). And individuals "who hold authority or power in the state" may still be Claimants. The cases in which jury trial is ordered under s.69(1) are now most often claims against a public authority, usually the police, for false imprisonment. And there is nothing in the present case which could lead to an appearance of bias, however involuntary, on the part of a judge sitting alone.

110. In the present case the relevant factors all tend to favour a trial by judge alone. Although the expenses scandal, as it is known, is certainly a matter of great national interest, the particular incident of Mr Cook's claim to be reimbursed the sum of £5 (important as it is to Mr Cook) can hardly be said to be a question of national interest. Rather the contrary. The expenses scandal is also a topic on which "the passions of the multitude have been inflamed", although I note that it is Mr Cook who is asking for a jury. Further, Mr Cook is no longer an MP, and is not now a prominent figure in public life. There is an issue as to the propriety of his conduct and as to his credibility, but there is not an issue as to his integrity, in the sense that it is not alleged that he acted dishonestly.

111. The disadvantages of trial with a jury in cases where the law is complicated were noted as long ago as *Richards v Naum* [1967] 1 QB 620, 626 and 627. These disadvantages have increased in recent years with the increasing development and complexity of the law of defamation. This is in part due to the continuing need to develop the law to bring it into harmony with the European Convention on Human Rights. This has led to such major developments as the *Reynolds* defence, and the new understanding of malice for honest comment in *Cheng* (an improper purpose no longer counts as malice in honest comment). Where there is uncertainty as to the law, as there so often is today, a judge can formulate his reasons on alternative bases, and the Court of Appeal can substitute one disposal for another, according to the correct view of the law. It is less likely to be necessary to order a retrial, as may be inevitable if a jury has been misdirected as to the law.

112. There are very great case management advantages in trial by judge alone. Issues can be tried in a convenient order, for example in particular, the judge can rule on meaning in advance of a trial, and before much of the costs associated with a full trial have been incurred. If the judge rules on meaning shortly after the service of a defence, then there may be very large savings in costs indeed. If, as is commonly the case, and is the case here, the defence of justification or honest comment is to a meaning which is less serious than the meaning contended for by the Claimant, then if the judge upholds the Claimant's meaning, there may then be seen to be no defence at all. Correspondingly, if the judge were to uphold the Telegraph's meaning, then it may be argued that the Claimant has no real prospect of defeating the defence.

113. A trial by judge alone is in general, and is in this case, much more likely to satisfy the overriding objective, in every element of it listed in the CPR.

114. I refer at this point to the observations of Lord Phillips in *Spiller* at para 67. Trials by jury in libel cases now commonly involve the arguing of the same point at least twice and sometimes several times over. It is often not one trial by a judge with a jury, but one trial by a judge followed by another trial by a jury. Each party commonly seeks a ruling from the judge on as many issues as possible to the effect that the opponent's case on that issue should be withdrawn from the jury. That is what is happening in

this application that is now before me. If that application is unsuccessful (as this application has been in part), and there is a trial by jury, very similar arguments are redeployed before the jury. All too often there is a third or subsequent set to this match, when the same point is argued before the Court of Appeal, or even the Supreme Court as happened in *Spiller*. That is a real risk in the present case, where Mr Price wishes to argue the applicability of *Reynolds* to comments. There is not uncommonly a further set in the form of a retrial. There have been a worrying number of retrials in recent years where juries have been unable to agree. That is not a risk where trial is by judge alone.

115. This multiplicity of opportunities to argue the same point is one of the major reasons why the costs of libel actions have become so disproportionate as to risk condemnation as an interference with freedom of expression and the right of access to the court (see *MGN v UK* [2008] ECHR 1255). In these circumstances the effect of the Human Rights Act 1998 is to require judges and Parliament to continue to develop the law to make it Convention compliant. Trial with a jury makes such development more difficult.

116. Taking all these considerations into account, I see no reason to exercise my discretion in this case to order this action to be tried with a jury, and every reason to order trial by judge alone. I order that the trial shall be by judge alone.

THE NEXT STEP

117. Having decided that the mode of trial shall be by judge alone, the next step is for me to revisit the issues which I considered above, and, in so far as I left them undecided, to decide them. In particular, the next issue to decide is the actual meaning of the words complained of, and, if it is a defamatory meaning, whether it is comment or a statement of fact. At that stage I will consider the meanings pleaded by the Telegraph.

118. When I canvassed this possibility at the hearing Mr Crystal asked me not to proceed to do this at this hearing, because he had not come prepared to argue the case on that basis. Since I had by then required him to make his submissions on mode of trial, which he had not expected to have to do, I acceded to his request not to proceed further at this stage.

119. I will therefore hear further argument on those points on the handing down of this judgment, or so soon thereafter as the matter can be listed for that purpose.

120. I had reached my decisions as set out above, and largely completed the drafting of this judgment, before I heard, on the following Friday, applications in the case of *Lewis v Commissioner for the Police*. In that case I also heard arguments as to the effect of s.69(3) and (4), and the proper application of the overriding objective to the discretion to be exercised under those sub-sections. Nothing I heard in that case led me to alter in any way the decisions I had already reached in this case. But the further argument has helped me to refine the drafting of this judgment.

CONCLUSION

121. For the reasons given above, I have ordered that the trial of this action be by judge alone. I have also held that:

a) the following meanings pleaded by Mr Cook are all comment, and no jury properly directed could find otherwise:

> "(i) the Claimant represented low "value-for-money" as a parliamentarian;
>
> (ii) the Claimant's claim for £5 … was particularly embarrassing … having regard to his official support of the campaign to commemorate a Battle of Britain hero";

b) the following meanings pleaded by Mr Cook are arguably either comment or statements of fact, and the question whether they are comment or statement of fact could not be withdrawn from the jury (if the trial were to be by jury):

> "(i) the Claimant thought it appropriate to claim back from taxpayers the £5 he put in a church collection for an RAF charity;
>
> (ii) the Claimant set out to exploit the expenses system for his own gain in disregard of his constituents' views.
>
> (iii) the Claimant's claim for £5 was an extraordinary abuse of M.Ps' expenses and was … hypocritical having regard to his official support of the campaign to commemorate a Battle of Britain hero..";

c) it is in my judgment not arguable (or at least there is no real prospect of persuading a jury, if there is one) that the omission of the two matters referred to in para 50 above is capable of leading to the conclusion that the facts were not truly stated (if the meanings which I have held to be capable of being comment are held to be comment);

d) it is not possible to say that Mr Cook has no real prospect of persuading a jury (if there is one) that Mr Sawer believed what Mr Cook had said on the telephone, and therefore did not believe that Mr Cook ever thought it appropriate to claim back from taxpayers the £5. Accordingly, the defence of comment could fail on this point, and I could not withdraw this part of the case of malice from a jury.

e) if the meaning of the words complained of is that Mr Cook set out to exploit the expenses system for his own gain in disregard of his constituents' views, then I cannot say that Mr Cook has no real prospect of succeeding in defeating the defence of justification on this point;

f) the *Reynolds* defence could fail on the facts, if the publication included a meaning which the journalist does not believe to be true.

122. The Telegraph is accordingly entitled to summary judgment in respect of that part of its Defence that relates to the two meanings referred to in paragraph 121(a), but not otherwise.