Approved Judgment

Neutral Citation Number: [2010] EWHC 924 (QB)

Case No: HQ09X01648

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2010

Before :

Mrs Justice Sharp DBE

- -

Between :

ROBERT DEE	**Claimant**
- and -	
TELEGRAPH MEDIA GROUP LIMITED	**Defendant**

- -
- -

Andrew Caldecott QC and David Sherborne (instructed by **Addleshaw Goddard**) for the **Claimant**
David Price (instructed by **David Price Solicitors & Advocates**) for the **Defendant**

Hearing dates: 25 – 26 February 2010

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Judgment

Mrs Justice Sharp:

Introduction

1. This is an application by the Defendant, the publisher of the *Daily Telegraph* newspaper, for summary judgment under CPR Part 24, in an action for libel brought against it by Mr Robert Dee, the Claimant. He sues in respect of an article published on the bottom left hand corner of the front page of the *Daily Telegraph* on 23 April 2008 under the heading "World's worst tennis pro wins at last".

2. The Defendant's argument in summary is this. It is said I should rule now that the words complained of must be read together with an associated article in the same edition of the newspaper which is not sued on but to which express reference was made in the article of which Mr Dee complains. When read together, it is said the articles are not arguably defamatory of the Claimant. In addition, it is said the Claimant has no real prospect of rebutting the justification and/or fair comment defences upon which the Defendant relies. On either basis it is said that no tribunal of fact could rationally conclude that the Claimant had been libelled.

Background

3. Mr Dee is a 23 year old tennis professional. The front page article of which he complains said this:

> "A BRITON ranked as the worst professional tennis player in the world after 54 defeats in a row has won his first match.Robert Dee, 21, of Bexley, Kent, did not win a single match during his first three years on the circuit, touring at an estimated cost of £200,000.But his dismal run ended at the Reus tournament near Barcelona as he beat an unranked 17-year-old, Arzhang Derakshani, 6-4, 6-3. Dee, below, lost in the second round."

4. Underneath the front page article, are the words in bold, "**Full story: S20"** and below those words is a photograph of the Claimant apparently playing tennis.

5. The "**Full story**" to which reference is made appears on the back page of the Sports supplement of the same edition of the *Daily Telegraph* on 23 April 2008 (I shall refer to this as the S20 article)**.** The Claimant does not complain of it. It says this:

> "A British tennis sensation – the world's worst
>
> British globetrotter Dee ends his losing streak at the 55th time of asking writes Mark Hodgkinson IN the history of British tennis failures, and it's been a long and rich history, no one had previously come close to the serial defeats that have flowed from the racket of Robert Dee, a 21-year-old from Bexley, Kent. Perhaps Dee has earned the right to be bracketed with such global sporting icons as ski-

> jumping's Eddie the Eagle or swimming's Eric the Eel.Dee said last night he had found his new fame 'a bit odd', but raise a glass of Pimm's to him, as when it comes to losing, he's absolutely world class.Dee equalled the world record for the longest run of consecutive defeats, after his first three years on the international professional circuit saw him lose 54 matches in a row, and all of them in straight sets. That's 108 lost sets in succession.But he even failed in his efforts to make the record his own, after he last week won a first-round match in qualifying at a lowly Futures tournament in Spain. He soon returned to form, losing in the next round … and in straight sets.Dee sounded baffled yesterday as he reacted to claims that he might just be the world's worst professional tennis player. 'I honestly didn't know about the record so all the attention is a bit odd,' he said. 'Obviously it was great to get my first win but I can't believe that people don't have anything better to write about. I'm just going to keep on playing and improving and working hard with my coaches. Hopefully that will mean more wins at these sorts of tournaments'.His father, Alan, said that describing him as a total no-hoper 'was laughable and incorrect', adding: 'The Lawn Tennis Association have given him a rating of 4.2 and that is very impressive.'Paul Henderson, his former head teacher at Eltham College, said: 'Rob was never the school champion but he was very methodical about his tennis. We often wondered if we would hear of him again.'Dee has lost around the planet, in Iran, Senegal, Colombia, Botswana, Venezuela, Rwanda, Kenya, Sudan, Mexico, the United States, Norway, Holland and Spain. Almost all of his tennis has been played at Futures tournaments, which are the lowest rung of the proper professional circuit. Dee's travel expenses must run to hundreds of thousands of pounds. And yet he has won a fraction of that back in prize-money.Why didn't he just give up, you might ask. But you also have to admire Dee's perseverance as his losing record went on and on and expensively on. A spokeswoman for the LTA confirmed yesterday that Dee had not received any official funding, and instead received money from his parents, with his father a managing director of a shipping firm. Dee's lack of success means that he doesn't have a proper world ranking, and until this week the LTA knew next to nothing about him. Even the Kent county office were largely in the dark, regarding Dee as something of a jet-setting man of mystery, whose long-awaited win came in Spain last week when he beat American Arzhang Derakshani 6-4, 6-3. But he was brought down to earth when he immediately lost 6-3, 6-1 to Poland's Artur Romanowski.Dee is now living and training in La Manga, Spain, and in recent months has been playing tournaments on Spain's national tour. Apparently, he's even threatening to break into the top 500 of players based there. Roger Federer, beware."

6. There is also a box alongside these words headed "National failings". Four are identified. Eddie "the Eagle" Edwards, the England cricket team of 2006-2007,

Devon Loch (the Queen Mother's horse which slipped and collapsed yards from the winning line in the 1956 Grand National) and England's Euro 2008 squad. Short details are given in each case of their respective and notable sporting failures.

7. It might be thought, as Eady J said at an earlier hearing in this matter, that the *Daily Telegraph* was having a laugh at Mr Dee's expense, but the Claimant and his father have taken very great offence at what the *Daily Telegraph* published. It is said by the Claimant that certainly the front page item is offensive and highly defamatory, and quite apart from the hurt and distress he has been caused, unless the matter is put right, his potential future career as a tennis coach will be blighted.

8. A letter of claim was sent to the editor of the *Daily Telegraph* on 30 April 2008, from the Claimant's solicitors. It said the Claimant had been advised he had a cause of action in defamation and/or malicious falsehood. The letter complained of both articles. It said:

> "The thrust of the articles is that the Claimant is "the world's worst tennis professional tennis player" who "did not win a single match during his first three years on the circuit" and suffered "54 defeats in a row"

9. The letter set out parts of both articles and then continued:

> "Their natural and ordinary meaning is that during his first three years as a professional tennis player, our client did not win a single professional match; that his victory over Arzhang Derakshani should be disregarded because Mr Derakshani is only 17 years old and a weak player; that until that recent victory, [the Claimant] had lost 54 professional matches in a row, all of them in straight sets; that all of these matches were – and almost all of his tennis is – played at the lowest grade of professional tournaments; that he unreasonably and unrealistically persists in a career as a professional tennis player which is an expensive waste of money and doomed to failure; that because of [the Claimant's] lack of success he is virtually unknown to the LTA" (that is, the Lawn Tennis Association); and that by reason of all the foregoing he is the world's worst professional tennis player. "

10. The *Daily Telegraph* was one of a very large number of media outlets that covered the story. Settlements and apologies I am told have been achieved by the Claimant from a very large number of them, including the BBC and Reuters.

11. Proceedings were eventually issued against the Defendant on 21 April 2009 (that is, 2 days before the expiry of the one year limitation period for libel). In the Particulars of Claim, no mention is made of the S20 article at all.

12. The meaning attributed to the front page article on its own is much more limited than the meaning complained of in the letter of claim. It is this:

> " … until his win at the Reus tournament near Barcelona, the Claimant had lost 54 consecutive professional tennis matches during his three years on the professional tennis circuit, and had therefore proved himself to be the worst professional tennis player in the world".

13. The Defence denies the front page article is defamatory and says in the alternative that the words complained of read in their proper context (that is, the S20 article) are true. The meanings justified are:

> "5.1 The Claimant lost 54 consecutive matches in straight sets in tournaments on the international professional tennis circuit; and/or5.2 The Claimant lost 54 consecutive matches in straight sets in tournaments that contribute to a player's world ranking; 5.3 In consequence, he merited being ranked or described as the world's worst tennis professional player"

14. It also relies on a defence of fair comment. The comment defended is that "the Claimant merited being described as the world's worst tennis professional." The same facts are relied on as for the defence of justification.

15. On 8 October 2009 this case came before Eady J on an application by the Defendant for further information, the purpose of which was to ask the court to order the Claimant to state in clear terms his case as to the meaning of the words "circuit", "world circuit" and "international professional circuit". Eady J acceded to the application, and said this:

> "Perhaps unsurprisingly, the Defendant denies that the words complained of are defamatory and also disputes the pleaded meaning. It is an important part of the Defendant's case that the short front page article should be read together with the longer article appearing in the Sport supplement (the "full story") as part of its context…. The claim is confined to defamation and no reliance is placed on the tort of injurious falsehood. The object of any libel action is to restore reputation. It is difficult to see what the Claimant hopes to gain from this litigation. It may be true that the newspaper was "having a laugh" at his expense, but it is not immediately apparent how the claim is likely to restore or enhance his reputation. Nonetheless, the solicitors have lodged a costs estimate of over £500,000 (not including success fee or ATE premium). To an outside observer, it may seem difficult to understand how the case could give rise to such expenditure. Nevertheless, against that background, it is especially important to see to what extent the issues can be effectively narrowed and both sides' cards placed on the table as soon as possible."

16. On 17 December 2009, the Defendant's Application Notice was issued: 7 witness statements each are now relied on by the Claimant and the Defendant (two of those giving statements for the Defendant, had already given statements for the Claimant).

Issue one: should the two articles be read together for the purpose of determining meaning?

17. Mr David Price, who appears for the Defendant submits that what constitutes the entire publication for the purpose of determining meaning must be a question of law for the Judge in accordance with principle and established precedent. He says in the context of a newspaper, it is well-established that where an article refers to another article in the same issue either party is entitled to have both articles read for the purpose of determining meaning. This principle is of direct relevance to this case, and is binding on the Court. He refers to *Gatley on Libel and Slander*, Eleventh edition, paragraph 3.2 which says this (in part):

> "Where a newspaper article refers to another report in the same issue either party is entitled to have that read as part of the context in which the meaning of the words complained of is to be determined…"

18. Mr Andrew Caldecott QC, who appears for the Claimant, submits unless there is a rule of law that it is to be presumed that all readers would have read the front page article and the S20 article because they were given the option of doing so, this is a question of fact for the jury, not a judge on a Part 24 application. There is no rule of law that it is to be presumed that all readers will read all articles in all parts of the newspaper. The position might be different in relation to indicated continuation pages – especially in the same section. However that is not the case here. The rule in *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 does not impact at all on the question of whether two quite separate articles in physically different parts of the same issue (as distinct from a continuation page) must be treated as having both been read by all readers for all purposes of meaning. Hundreds of thousands of readers – and probably the majority – will have read the front page article without reading the Sports supplement at all (let alone the piece about the Claimant) and that this reality should be reflected in the Court's approach. He accepted in argument that the S20 article should go before the jury, but only on the question of damages.

19. In *Charleston* the House of Lords held a claim for libel could not be founded on a headline or photograph in isolation from the related text, and rejected the appellants' contention that a different view could be taken where part of an article would only be read by a body of readers. Lord Bridge said this at page 69H :

> "[t]he essential basis on which Mr. Craig's argument in support of the appeal rests is that, in appropriate circumstances, it is possible and legitimate to identify a particular group of readers who read only part of a publication which conveys to them a meaning injurious to the reputation of a plaintiff and that in principle the plaintiff should be entitled to damages for the consequent injury he suffers in the estimation of this group."

20. Lord Bridge went on to say this at page 70E to 71C:

> "The first formidable obstacle which Mr. Craig's argument encounters is a long and unbroken line of authority the effect of which is accurately summarised in *Duncan & Neill on Defamation,* 2nd ed. (1983), p. 13, para. 4.11 as follows:
>
> > "In order to determine the natural and ordinary meaning of the words of which the plaintiff complains it is necessary to take into account the context in which the words were used and the mode of publication. Thus a plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage."
>
> The locus classicus is a passage from the judgment of Alderson B. in *Chalmers v. Payne* (1835) 2 C.M.& R.156, 159, who said:
>
> > "But the question here is, whether the matter be slanderous or not, which is a question for the jury; who are to take the whole together, and say whether the result of the whole is calculated to injure the plaintiff's character. In one part of this publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and antidote must be taken together."
>
> This passage has been so often quoted that it has become almost conventional jargon among libel lawyers to speak of the bane and the antidote. It is often a debatable question which the jury must resolve whether the antidote is effective to neutralise the bane and in determining this question the jury may certainly consider the mode of publication and the relative prominence given to different parts of it. I can well envisage also that questions might arise in some circumstances as to whether different items of published material relating to the same subject matter were sufficiently closely connected as to be regarded as a single publication. But no such questions arise in the instant case. There is no dispute that the headlines, photographs and article relating to these plaintiffs constituted a single publication nor that the antidote in the article was sufficient to neutralise any bane in the headlines and photographs. Thus it is essential to the success of Mr. Craig's argument that he establish the legitimacy in the law of libel of severance to permit a plaintiff to rely on a defamatory meaning conveyed only to the category of limited readers…."

21. Lord Bridge did not accept the legitimacy of the severance argument, and said this at page 72E to 73A:

> "Whether the text of a newspaper article will, in any particular case, be sufficient to neutralise the defamatory implication of a prominent headline will sometimes be a nicely balanced question for the jury to decide and will depend not only on the nature of the libel which the headline conveys and the language of the text which is relied on to neutralise it but also on the manner in which the whole of the relevant material is set out and presented. But the proposition that the prominent headline, or as here the headlines plus photographs, may found a claim in libel in isolation from its related text, because some readers only read headlines, is to my mind quite unacceptable in the light of the principles discussed above."

22. Lord Nicholls said this at page 74B :

> "I do not see how, consistently with this single standard, it is possible to carve the readership of one article into different groups: those who will have read only the headlines, and those who will have read further. The question, defamatory or no, must always be answered by reference to the response of the ordinary reader to the publication. This is not to say that words in the text of an article will always be efficacious to cure a defamatory headline. It all depends on the context, one element in which is the lay-out of the article. Those who print defamatory headlines are playing with fire. The ordinary reader might not be expected to notice curative words tucked away further down in the article. The more so, if the words are on a continuation page to which a reader is directed. The standard of the ordinary reader gives a jury adequate scope to return a verdict meeting the justice of the case. "

23. I should also refer to a number of cases which are cited as support for what is said in paragraph 3.2 of *Gatley*. In *Bolton v O'Brien* (1885) Q.B. Div, vol XVI L.R. Ir, 97 on a motion for a new trial, a majority of the court held that passages in the same newspaper which were not complained of might be adduced in evidence to illustrate the meaning of the passages complained of. At the trial, both counsel had read and commented on the various passages without objection. May CJ said this at 109:

> "I have reason to think that Mr. JUSTICE O'BRIEN entertains doubts as to the legal propriety of adducing in evidence other passages in the same newspaper in order to illustrate the meaning of the passages charged to be libellous. I cannot say that I concur in those doubts. If the language be ambiguous as to the nature of the felony imputed in this particular passage, it

> appears to me that other passages in the same newspaper, by the same person, dealing with these matters are properly admissible in order to remove such ambiguity."

24. Mr Justice O'Brien, dissenting, said (at 117) that such passages other than those complained of were not evidence to affect the defamatory sense unless "*directly referred to, and in that way virtually made part of the libel*."

25. *Hedley v Barlow* 4F &F 225, (1865) 4F & F 224 concerned the right of free discussion on a subject of public interest. The plaintiff complained of an article commenting on his evidence before a select committee. The issue before the court was whether the plaintiff could be compelled to put in evidence the whole of the newspaper, which contained a full report of the plaintiff's evidence. Counsel for the plaintiff did not appear to dispute the defendant's entitlement to put in such evidence. In the opinion of Cockburn C.J and Blackburn J "*the articles in question referred sufficiently to the proceedings before the committee to make the whole of the publication the plaintiff's evidence*." A similar point arose in *Thornton v Stephen* (1824) 2 M &Rob 45, 209.

26. In *McCann v Scottish Media Newspapers Ltd* 18 February 1999, 2000 SLT 256, Lord MacFadyen held that three articles which appeared in one edition of a newspaper had to be read together and treated as "constituting a whole" for the purposes of determining meaning, where the first ended with a cross-reference to the second, and the second ended with a cross-reference to the third. See also *Beran v John Fairfax Publications Pty* [2004] NSWCA 107, at para 56, where it was held that two articles in the same newspaper were so interlinked the ordinary reader would have read them as one publication. In *Galloway v Telegraph Group Ltd* [2004] EWHC 2786, [2005] EMLR 7, [48] and [49] Eady J (sitting alone as the trial judge) took account of the context of other coverage in the same edition as the words complained of and also of coverage in the previous day's edition when determining meaning.

Discussion

27. When one is considering a single article the ordinary reasonable reader is taken to read the whole article before reaching a conclusion on meaning, even though, as the courts have readily recognised, many readers will not in fact have read the whole article. So too, where one article is spread over a number of pages, presumably for space or other editorial reasons, the ordinary reasonable reader is to be taken to have turned over the pages and found and read what he or she is directed to, on the continuation pages.

28. Mr Caldecott submits there is a real distinction between cases where an article is "free standing" so that some readers will have read it on its own, and cases where there is a continuation page. In the latter case he submits, it is to be presumed the reasonably careful reader will not ignore a continuation page, whereas no such presumption can arise in respect of the former.

29. However, in my view the key question in this context is whether the various items under consideration "*were sufficiently closely connected as to be regarded as a single publication*" – and this is so whether or not the items in the same publication are continuation pages or different items of published material relating to the same subject matter. It seems to me this approach is consistent with the flexibility as to the manner and form in which information and ideas may be expressed and imparted protected by the right to freedom of expression under Article 10 of the European Convention on Human Rights, and with the relevant Strasbourg jurisprudence.

30. This will be the case even though the reality is that many people will have read one of the relevant articles only. That is not to say however, that the separation of the relevant articles, or the way they are presented may not be relevant on meaning, since meaning is affected by the mode of publication (that is, the relative prominence or emphasis given to what is published) as well as by context, as Lord Nicholls emphasised in *Charleston*.

31. Ordinarily it is not controversial that articles appearing in the same publication relating to the same subject matter are to be read together for the purposes of determining meaning. But if the matter is controversial, in my view there is no reason why such a question should not be determined, in an appropriate case, on a CPR Part 24 application. I do not accept Mr Caldecott's submission that the matter must be left to trial. Indeed it is obviously proportionate and sensible for the matter to be determined before trial given the potential importance of the issue to the parties for the future course of the litigation (for example, in determining their respective prospects of success and the legitimate ambit of the issues to be tried).

32. In this case the front page article was a limited one of a kind known as "the write off" commonly put on a front page to invite attention to the "full story". There was a very clear cross reference in the front page article itself in bold type to the "full story" and the reader was told where to find it. There was an obvious and clear link between the two. It would also have been obvious to all readers of the front page article, that read alone, it did not constitute or purport to be the full story. In my view in the light of the clear and close connection between them the two articles must be read together for the purpose of determining meaning; and the contrary is not arguable. There is no other compelling reason why this issue should be left to trial. Accordingly, the Defendant succeeds on this part of its application.

Issue two: whether the Articles are arguably defamatory of the Claimant

33. Mr Price submits the articles are not arguably defamatory of the Claimant, even if they are capable of bearing the meaning complained of. He submits there is under English law no general cause of action for the publication of false statements in the media or elsewhere. Where the statement is calculated to cause financial loss and published maliciously a claim in malicious falsehood will be available. However, it is an unavoidable requirement for a claimant in a defamation claim to demonstrate that

the statement in question is defamatory of him; and in the modern era, the appropriate threshold must be interpreted consistently with the requirement of "necessity".

34. Mr Price points out that the Claimant does not attempt to allege that the arguably humorous parts of the S20 article expose him to ridicule. Ridicule is only mentioned in support of his claim to general and aggravated damages, and then by reference only to the front page article. The complaint is limited to the run of 54 defeats and the suggestion that it ranks as the world's worst. The risk of defeat is an inevitable part of sporting competition, particularly for a young player in the first years of competition. It cannot be defamatory he submits, to state that a player has lost a tennis match. If it cannot be defamatory to state he has lost one match, why should it be defamatory to state that he has lost a large number on the trot? The risk of consecutive defeats is an equally inevitable part of sporting competition, as is the fact that someone has to have the worst playing record over a particular period. He also points out that there appears to be no previous case in which a sportsman has sued in defamation in relation to a statement concerning his playing record. The limited part of the article of which the Claimant complains says nothing about his character and is incapable of lowering him in the estimation in the mind of a right-thinking person.

35. Mr Caldecott characterises the Defendant's submissions on this issue as "hopeless" whether they relate to the front page article alone or to both articles. He submits historically, the early definitions of defamatory incorporate the formula "hatred, ridicule or contempt" as per Parke B in *Parmiter v Coupland* (1840) 6 M. &W. 105 at 108. Ridicule, he suggests is a striking feature of the allegation in this case: it is only because the Claimant's performance of unrelieved professional defeat is so ridiculously bad that it appears on the front page. But in this case, ridicule is only "an aggravating feature – the primary allegation he submits is want of skill. Parke B's definition was later thought to be too narrow – hence Lord Atkin's well-known reformulation in *Sim v Stretch* [1936] 2 All E.R. 1237 at 1240 "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"

36. He submits professional respect is a keystone of reputation as is clear from Lord Pearson's statement of principle in *Drummond –Jackson v BMA* [1970] 1WLR 688 at 689 where he says:

> "…Words may be defamatory of a trader or business man or professional man, though they do not impute any moral fault or defect of personal character. They can be defamatory of him if they impute lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade or business or professional activity…"

37. Further, it has long been held that it is defamatory of an individual to impute incompetence in their profession: see for example, what is said in *Gatley* at para 2.27, which cites *Hackenschmidt v Odhams Press*, The Times, October 23, 24 1950, and at para 2.35 which cites *Hoeppner v Dunkirk Printing* 227 NYAD 130 (1929) where it

was held defamatory to impute incompetence to a football coach. Leaving aside the question of ridicule, he submits the concept of avoidance clearly applies to avoiding business with the Claimant – in this case deterring people from using him as a coach. He says the Claimant's case that the *Daily Telegraph* made him look absurdly bad at his chosen profession and ridiculous cannot conceivably be dismissed as unarguable.

Discussion

38. I have no trouble in concluding that the words complained of when read in their context (as identified above) are capable of bearing *a* meaning defamatory of the Claimant: for example, that he lacks insight into his own lack of talent, and unreasonably persists in pursuing a career to which he is not suited; or – as it was put in the letter of claim but not in the Particulars of Claim – that he unreasonably and unrealistically persists in a career as a professional tennis player which is an expensive waste of money and doomed to failure. That meaning says something about him and his character; and people might think the less of him, if that is what the words complained of did mean. But this is not the meaning of which the Claimant complains.

39. As for incompetence or "want of skill", such an allegation is not (as Mr Price emphasises) distinctly pleaded. Indeed, the way in which Mr Caldecott characterises the Claimant's case for the purposes of this application, so it seems to me, does not really match, at least with sufficient clarity, the meaning attributed to the words by the Claimant. The meaning complained of is a narrow one, confined on the face of it to highlighting what the Claimant alleges is a purely factual error (i.e. that he had lost 54 professional matches on the trot (and these were the only professional matches he had played) rather than 54 professional matches on the trot *when playing on the international tennis circuit*) which is suggested results in the characterisation – baldly so it is said - of the Claimant as the world's worst tennis professional. Nor is it distinctly alleged that the words meant these losses comprised the whole of the Claimant's professional playing record – an issue which appears to lie at the heart of the Claimant's complaint. The pleaded meaning strongly suggests this case has more in common with an action for malicious falsehood, than an action for defamation - although it is of course the case that some claims may give rise to both causes of action. Whether, as Mr Price suggests, the meaning pleaded has been narrowed for tactical reasons, the effect of the pleading may be said to circumscribe the ability of the Defendant to defend itself by reference to the Claimant's lack of skill or incompetence.

40. In addition, Mr Caldecott's submissions clearly suggest in my view that the articles are defamatory of the Claimant because they ridicule him by suggesting he was absurdly bad at tennis. Mr Caldecott said at one point for example, that the Claimant was made to look like the "Inspector Clouseau" of the tennis world. I note also that the Claimant's solicitor, Mr Engel, states in his witness statement that: "*This [case] is about a decent and hard working young British tennis player who has been held up to ridicule and contempt on the basis of a false version of events…*".

41. I find it difficult to regard this as a case where the allegation complained of is arguably defamatory of the Claimant because it causes him to be shunned and avoided. Cases of this nature are normally (though I accept, not exclusively) those where a claimant through no fault of his own, has some physical attribute or condition, which would tend to cause ordinary members of the public to "shun and avoid" him.

42. Moreover, even assuming in the Claimant's favour, that the allegation made, and/or specifically complained of, is one of "want of skill" by a professional person, cases of this kind or in this category often concern allegations which are defamatory in the conventional sense because of the adverse consequences that lack of skill or competence might have for others. Ordinary members of society would therefore think the less of the professional person who provided such unsatisfactory services as a result. This is so whether one looks at cases of libel or slander. In slander the question may arise when considering whether words are actionable without proof of special damage in accordance with section 2 of the Defamation Act 1952, or in earlier cases, at common law.

43. Of the cases cited by Pearson LJ in ***Drummond*** in support of the principle on which Mr Caldecott relies, three concerned "a professional man's technique" (as opposed to a trader's goods). They related to words spoken of an apothecary, an architect, and a solicitor:

    i) *Edsall v Russell*, 4 Man. & G. 1090 was a case of slander brought by an apothecary. The first slander alleged was "He killed my child; it was the saline injection that did it." The innuendo meaning relied on was that the plaintiff had been guilty of feloniously killing the child by improperly and with gross ignorance and with gross and culpable want of caution administering the injection. No objection to the first slander was pursued by the defendant. The court held the defendant was entitled to judgment on another slander consisting of these words: "he made up his own medicines wrong through jealousy, because I would not allow him to use his judgment" because they did not impute a criminal offence, and whether the medicines were noxious or innocent, was left in doubt.

    ii) In *Botterill v Whytehead*, (1879) 41 L.T.N.S. 588 Kelly C.B. said at page 589:

> "[t]o impute to an architect employed in the restoration of an ancient church that he has no experience in the work in which he has been employed is itself a libel upon the architect in the way of his profession or calling…and further to write of an architect that by his acting in the work in question the masonry of an ancient gem of art will be ignorantly tampered with is in itself libellous…"

    iii) In *Dauncey v Holloway* [1901] 2 KB 441 at 447, the question was whether a slander conveyed an imputation on the plaintiff in his business as a solicitor

and was therefore actionable in the absence of proof of special damage. A.L Smith M.R. (with whom the other members of the court agreed) said this:

> "The words do not, in my opinion, reasonably convey any imputation of impropriety or misconduct on the part of the plaintiff in relation to or in connection with his profession or business, or of unfitness to carry on his business in a proper and satisfactory manner. To my mind the two expressions – that the plaintiff has gone for thousands or has lost thousands – mean very much the same thing, namely, that the plaintiff has lost a considerable sum of money. It would not be reasonable to say that they [the words complained of] impute to him any want of capacity to carry on the business or profession of a solicitor…"

44. *Drummond* itself, concerned words written about a dentist. Pearson LJ said this at 698H:

> " I doubt whether the analogy sought to be drawn in the present case between a trader's goods and a professional man's technique is sound. Goods are impersonal and transient. A professional man's technique is at least relatively permanent, and it belongs to him: it may be considered to be an essential part of his professional activity and of him as a professional man. In the case of a dentist it may be said: if he uses a bad technique he is a bad dentist and person needing dental treatment should not go to him. "

45. This may be said to provide support to Mr Caldecott's argument. However it is also apparent from what was said by their Lordships in *Drummond* that the words complained of were capable of giving rise to an allegation that was defamatory of the plaintiff by lowering him in the estimation of right-thinking members of society generally. Pearson LJ said this at page 699C:

> "It can be suggested that the article complained of impliedly imputes to the plaintiff lack of judgment and lack of efficiency in the conduct of his professional activity in as much as he has adopted and practised and recommended a method of anaesthetising patients which (as the article suggests) is dangerous for the patients and may impede good dentistry…"

46. Sir Gordon Wilmer characterised the allegation the plaintiff complained of in this way at 701F-G:

> "The case which the plaintiff seeks to set up as I understand it, is that he is attacked in the way of his profession, in that without any proper prior investigation, he is alleged to have been preaching and practising

> a dangerous technique, found in a number of instances to produce deleterious effects, and possibly resulting in death in several cases."

47. So far as the cases cited by Mr Caldecott on incompetence are concerned, the only report available to me of ***Hackenschmidt*** is an abstract which does not explain why Prichard J left to the jury as capable of being defamatory of the plaintiff, an allegation that he had been defeated by another wrestler. The relevant passage from ***Hoeppner*** is cited in ***Drummond*** by Pearson LJ at 699D-E:

> "While the articles complained of fail to charge the plaintiff with the commission of any crime, or to attack his moral character, the fair inference to be drawn from the language used is that the plaintiff is an inefficient coach, and has failed to properly instruct the team in modern play and in the technique of the game, so that they could successfully meet and compete with other teams in their class…The law recognises one's right to live and that the majority of people are compelled to earn a living."

48. Incompetence or 'want of skill' by those who hire out their professional or personal skills for a living often involves as I have said, consequences for those who hire them and/or pay for their services - and who get less than they might be entitled to expect. In addition, the tendency of such words might be to suggest a claimant's fitness or competence falls below the standard generally required for his business or profession (see *Radio 2UE Sydney Pty Ltd v Chesterton* [2008] NSWCA 66 where the court affirmed that the general test for defamation, namely whether an ordinary reasonable person would think less of the plaintiff because of what was said about him or her, applied to imputations regarding all aspects of a person's reputation, including business reputation).

49. In my view, it is not easy to translate those principles to the sporting arena, even though I entirely accept that many sportsmen and sportswomen, and the Claimant is one of them, are professionals who earn their living through their sporting skill, or endeavour to do so. It is difficult to characterise an allegation of relative lack of sporting skill, even if it leads to the bottom of whichever league the person or team participates in as necessarily imputing incompetence, quite apart from the question which could plainly arise as to whether such a suggestion is purely a value judgment. Such an allegation might be said to dent someone's pride rather than their personal reputation, depending of course on the context. In every race, match or other sporting event, someone has to come last: that is the nature of competitive sport. Losing in sport is, as Mr Price submits, an occupational hazard. Shaky hands for a surgeon, or endangering the lives of your dental patients through an unproven anaesthetic cannot be so characterised.

50. A sportsman on a losing streak might be unlucky, inexperienced, playing out of his league, lacking proper management, out of form, injured or simply not as good as the others against whom he is measured. A bad run of defeats may be followed by a famous victory. Sportsmen or women may not fail either from want of trying, and a

brave failure, depending on the context, might be regarded as creditworthy rather than the reverse.

51. Moreover, an innate lack of talent – even for professional sportsmen – particularly where they play on their own, and do not hire out their services as such, might be said to be a misfortune but no more.

52. Nor is it the case that allegations of this nature necessarily affect a person's opportunity to earn a living. The Claimant's opportunity to play tennis at any particular level depends on his own record of results, not on what people think of him as a tennis player.

53. As for the suggestion that what was published may affect his future career as a coach, if an allegation is not otherwise defamatory of the Claimant as a tennis player, it is difficult to see how it can become so, because of his (subjective and private) aspiration, potentially, at some unspecified time in the future, to pursue a different career in coaching.

54. As Mr Price points out, the cases grouped together in *Gatley* at paragraph 2.35 under the heading "Entertainment" and which deal with "sporting libels" (save possibly so it seems to me for ***Hoeppner*** and ***Hackenschmidt***) come nowhere near this case on the facts, concerning for example the throwing of matches, or the taking of performance enhancing drugs. It is of course possible that one of the reasons that the libel courts are not normally troubled by sportsmen or women complaining that they have been defamed by an allegation of want of skill, is that such an allegation might be an obvious value judgment as I have said. Alternatively, they might think their efforts were better spent elsewhere.

55. It seems to me, despite the way the matter has been pleaded, that the real complaint here is one of ridicule: that is, not merely of incompetence or lack of skill, but that the Claimant was made to look "absurdly bad at tennis" as Mr Caldecott puts it.

56. *Berkoff v Burchill and Times Newspapers Ltd* [1996] 4 All ER 1008 was a case where the Court of Appeal by a majority decided that an allegation that an actor was hideously ugly was capable of being defamatory of him on the grounds it exposed him to ridicule. The passage from Pearson LJ's judgment at 689 in ***Drummond*** was considered by Neill LJ at 1011 in the course of an extensive review of the various definitions of the word "defamatory" in previous cases. After citing the passage from ***Drummond*** Neill LJ said "*It is necessary in some cases to consider the occupation of the plaintiff*." Neill LJ went on to say this at 1018:

> "It will be seen from this collection of definitions that words may be defamatory, even though they neither impute disgraceful conduct to the plaintiff nor any lack of skill or efficiency in the conduct of his trade or business or professional activity, if they hold him up to contempt scorn or ridicule or tend to exclude him from society. On the other hand insults which do not diminish a man's standing among other people do not found an action

> or libel or slander. The exact borderline may often be difficult to define……...the word "reputation", by its association with phrases such as "business reputation", "professional reputation" or "reputation for honesty", may obscure the fact that in this context the word is to be interpreted in a broad sense as comprehending all aspects of a person's standing in the community. A man who is held up as a figure of fun may be defeated in his claim for damages, for example, by a plea of fair comment, or, if he succeeds on liability, the compensation which he receives from a jury may be very small. But nevertheless the publication of which he complains may be defamatory of him because it affects in an adverse manner the attitude of other people towards him……one has to consider the words in the surroundings in which they appear…
>
> It is trite law that the meaning of words in a libel action is determined by the reaction of the ordinary reader and not by the intention of the publisher, but the perceived intention of the publisher may colour the meaning. In the present case it would, in my view, be open to a jury to conclude that in the context the remarks about Mr Berkoff gave the impression that he was not merely physically unattractive in appearance but actually repulsive. It seems to me that to say this of someone in the public eye who makes his living, in part at least, as an actor, is capable of lowering his standing in the estimation of the public and of making him an object of ridicule".

57. In the light of the decided cases, and in particular, what is said by Pearson LJ in *Drummond* and by Neill LJ in *Berkoff* and despite the reservations I have expressed, it is arguable in my view that the words in issue are defamatory of the Claimant on the grounds they are capable of suggesting "want of skill", incompetence and/or on the ground that he is ridiculed by the suggestion he is absurdly bad at tennis. Subject to my finding on issue three, whether the words are in fact defamatory of the Claimant is a matter which must be left therefore to the good sense of a jury properly directed, but with this important caveat.

58. It would not be right in my judgment to permit a claimant generally (and this Claimant in particular) to contend that the words complained of are defamatory on grounds which do not emerge clearly from the pleaded meanings. It would certainly not be necessary for such matters to be spelled out in every case. But if there is any doubt about it, as in my judgment there is here, then a claimant must state clearly what his case is so the relevant issues are properly delineated in advance of trial and so the defendant has a proper opportunity to defend itself against what the claimant is really complaining about.

59. If the case were to proceed therefore, it would be necessary for the Claimant to formulate a meaning which more precisely reflects the nature of his complaint as set out in argument as to why the words are said to be defamatory of him; that is because they suggest that he "wants skill", is incompetent, and/or is ridiculed by the suggestion he is absurdly bad at tennis. This would also avoid the risk of confusion between arguments advanced in support of the claim for damages on the one hand, and on why it is said the words are defamatory of the Claimant on the other. This is

not just a question of clarification. Mr Caldecott's reliance on these imputations is in my view, an implicit recognition that they are a necessary part of what makes the pleaded meaning arguably defamatory of the Claimant.

Issue three: is the plea of justification/fair comment bound to succeed?

60. The test overall that a defendant must satisfy is a high one, that is whether a jury would be perverse other than to conclude that the allegations the words were capable of bearing are substantially true: see *Azad Ali v Associated Newspapers Limited* [2010] EWHC 100 (QB) at [8], [10] and [13] citing *Alexander v Arts Council of Wales* [2001] 1 WLR 1840, *Jameel v Wall Street Journal Europe* [2003] EWCA Civ 1694 [2004] EMLR 6 at [14] and *Spencer v Sillitoe* [2003] EMLR 10 at [23]-[24].

61. Mr Caldecott refers me to what was said by Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91 at 94 and 95 (approved by Lord Hope at para 93, Lord Hutton at 134 – with whom Lord Steyn agreed at 1 – in *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1):

> " Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues that should be investigated at the trial. …the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

62. Mr Price on the other hand refers me to what was said by Lord Hobhouse in *Three Rivers* at [158]:

> "The judge is making an assessment, not conducting a trial or fact-finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the 'bottom line' is what ultimately matters. The criterion which the judge has to apply under Part 24 is not one of probability, it is the absence of reality."

63. I should also bear in mind as Eady J said in *Bataille v Newman* [2002] EWHC 1692 (QB) at pp6-7:

> "If the defendant's case is so clear that it cannot be disputed, there would be nothing left for the jury to determine. If however, there is room for legitimate argument, either on the primary facts or as to the feasibility of the inference being drawn, then a judge should not prevent the claimant having the issue or issues resolved by a jury. I should not conduct a mini

> trial or attempt to decide the factual dispute [of first appearances] when there is the possibility that cross-examination might undermine the case that the defendant is putting forward."

64. However, it remains the case that where appropriate, the court must "grasp the nettle" and reject any unreasonable conclusion contended for by the respondent. If not, as Tugendhat J said in *John v Guardian News Media Ltd* [2008] EWHC 3066 (QB) at [16] the applicant will be "*wrongly burdened with defending libel proceedings [which] …can be a very onerous burden and one which interferes with the right of freedom of expression."*

65. Mr Price's argument on this issue is as follows. First, and generally, the Claimant does not dispute that he had a run of 54 consecutive losses playing on the international professional circuit, or that it was a world-record equalling worst run. However, over this period he was also participating in domestic tournaments in Spain, they were professional tournaments, and he secured some modest victories in them. It is also the case however that these domestic Spanish tournaments are outside the jurisdiction of the International Tennis Federation (the 'ITF') or the ATP (the ATP was referred to by the Defendant as the Association of Tennis Professionals and by the Claimant, by reference to the ATP's own handbook, as "the official international circuit of men's tennis professional tennis tournaments governed by ATP Tour Inc").

66. The domestic Spanish tournaments do not give rise to any world ranking points, nor are they part of the "circuit" or the "international professional circuit" as these terms are commonly used in the tennis world.

67. As is clear from the meaning pleaded by the Claimant, his complaint is entirely dependent on his contention that the 54 consecutive defeats failed to take account of the domestic Spanish tournaments. Hence the phrase "*54 consecutive professional matches"* – and indeed the attempt to isolate the front page article from the S20 article where the reader is told the Claimant has been playing in tournaments on the "*Spanish national tour"*.

68. Mr Price submits that where the facts on which the defendant relies are uncontested and/or clearly true, but the claimant relies on other facts which he contends bear on the substantial truth of the publication, the court must ask whether the tribunal of fact could rationally conclude that the facts relied on by the claimant make any difference to the court's conclusion on the basis of the uncontested facts relied on by the defendant. Putting it another way, looking at the defamatory publication complained of, do the facts advanced by the claimant (even assuming them to be true) materially affect any defamatory impression conveyed by the "true" facts relied on by the defendant?

69. The incontestably true facts are that the Claimant did lose 54 matches in a row in straight sets in his first three years in the world ranking ITF/ATP tournaments in the international professional tennis circuit, and that this was the worst ever run. These

are on any rational basis he submits sufficient to justify any defamatory impression arising from anything said in the articles about the Claimant's playing record.

70. There is no additional obligation to prove that the Claimant is objectively the worst professional tennis player in the world, in terms of his playing skills. The article is not capable of bearing such a meaning. It is clear to the reader that the characterisation of the Claimant as the world's worst tennis player is simply a consequence of his unprecedented record of defeats. Moreover it is clear that the Claimant himself also links the "world's worst" allegation to the playing record. To require the Defendant to prove "objectively" that the Claimant was "the world's worst" would be to ask the impossible if it was a factual allegation, and would be contrary to the protection of freedom of expression given by Article 10 of the European Convention on Human Rights: how in any event, could a jury sensibly and objectively make such an assessment? Alternatively, insofar as it was a value judgment, it is clearly fair comment.

71. He further submits that the fact that the Claimant won matches in domestic Spanish tournaments during the same period cannot, rationally, make a difference. In any event, the S20 article explicitly refers to the domestic Spanish tournaments and draws a distinction between them and those on the international circuit. In this context, Mr Price drew attention in particular, to the following sentences in the S20 article (emphasis added): "*Dee recently equalled the world record for the longest run of consecutive defeats, after his first three years on the international tennis circuit saw him lose 54 matches in a row, and all of them in straight sets.*" And that after his "*first win"* he hopes to achieve *"more wins at these sorts of tournaments."* And *"Dee is now living and training in La Manga, Spain, and in recent months has been playing tournaments on Spain's national tour. Apparently, he's even threatening to break into the top 500 of players based there."*

72. He submits a clear distinction is therefore drawn between the domestic Spanish tournaments, and those on the international professional circuit and readers do not have to know anything about tennis to understand that. It is also clear that the Claimant's run of 54 defeats was suffered on the international tennis circuit and not in the national Spanish tournaments; and there is no suggestion that his losses were in all the matches he played or all his professional matches. This, Mr Price, submits destroys the only point to which the Claimant attaches significance in this claim, namely his contention that the 54 consecutive defeats, and the characterisation of him as the world's worst, fails to take account of his performance on the Spanish domestic tournaments. If therefore the two articles are read together, the Claimant's central argument on meaning (i.e. that the Defendant had alleged that he had lost 54 consecutive professional matches, and that this represented the whole of his professional record) is clearly unsustainable.

73. But even if the reasonable reader could understand the articles to mean that the Claimant had lost 54 consecutive professional matches, there is no material distinction between the defamatory imputation drawn from such an allegation, and the defamatory imputation relating to his playing record, drawn from the *true facts*. The

only defamatory sting if there is one, is that the Claimant has lost a very large number of tennis matches. The fact that he won some matches in lesser status tournaments in Spain during the same period does not detract from the fact that he holds the longest record for consecutive defeats based on the official world ranking system. The response of any reasonable reader, informed of what the Claimant was complaining about on the one hand, and the true facts on the other, would be – *"So what? What matters is that you lost 54 matches in ITF or ATP tournaments, on the international tennis circuit in a row and in straight sets and that is the worst ever run of defeats. The Spanish tournaments are not ITF or ATP tournaments, they are not world ranking or part of the circuit."*

74. Mr Caldecott submits the starting point must be that it is not alleged that the Claimant's meaning is one the words are incapable of bearing, and accordingly the sting should be assumed to be that the Claimant's record of 54 consecutive defeats shows he is the world's worst. In any event, this is the clear meaning of the front page article (with or without the S20 piece). It is striking he says that this is conceded in correspondence from the *Daily Telegraph's* consulting editor in response to the letter before claim. The reason for the *Daily Telegraph's* subsequent *volte face* is obvious: there is unchallenged evidence that the Spanish matches were professional matches, and that the Spanish professional circuit is one of the strongest national circuits in the world.

75. He submits the *Daily Telegraph* attempts to get round the problem by a convoluted attempt to confine meaning to matches on the international professional circuit, and to matches which contribute to a world ranking. In support of that it seeks, impermissibly, to rely on evidence from eminent people in the tennis world as to the natural and ordinary meaning of the terms "circuit" and "international professional circuit" and that they are in common usage. In any event, there is potent contradictory evidence from the Claimant's side on those points. The issue on meaning is clearly triable, and inappropriate for determination on a Part 24 application.

76. But even if the reader would understand the 54 defeats to refer to the international professional circuit, the implication is that this is the Claimant's *entire* professional record – hence the label, *"the world's worst"*. He submits that the Claimant is portrayed in the article as a young man who chooses only to play his professional tennis at the highest level where world ranking points are obtained, who loses 54 matches at that level between the ages of 18 to 21 and, critically, whose professional record consists only of those defeats. Having chosen to take that course, his record could not be worse, and there is nothing in the article(s) to refute it. If, he asks rhetorically the articles are suggesting the Claimant has a professional record at another level, why is he described as the world's worst? This underlines the fact that (implicitly) there is no lower rung, professionally, where he had any other success. This is also underlined by the reference to him as a no hoper and a non entity.

77. He submits, even when the first article is read with the second, no reasonable reader is given any reason to think that the Spanish games he has played are professional ones – or that they invalidate the description of him as the world's worst tennis

professional – even though there is some slight implication of success in the last paragraph of the S20 article. The headline label attached to him in both articles, sits entirely logically with the clear message about his professional record. There are he submits, all manner of reasons why the first line in the last paragraph of the S20 article which makes reference to his Spanish record, but which does not state explicitly that it relates to professional tennis, would be dismissed by the reader who had gone through two articles which suggested – in effect - that he should give up because he was the world's worst tennis professional.

78. There is, Mr Caldecott also submits a non sequitur (repeated in the plea of justification) in the suggestion that the Claimant is the world's worst tennis professional because he had lost these particular 54 matches. On meaning, this is a "bane and antidote" case; and there is value in a jury, in particular where (as Lord Nicholls pointed out in *Charleston*) there are real issues about prominence which may affect an ordinary reasonable reader's approach to the words complained of; in particular, having regard to the unqualified assertion in the headlines to both articles that the Claimant was the world's worst tennis professional, and (as he submits) the clear message in the front page article which readers would have read first. The front page article also alleges that the Claimant is "ranked" the worst: and that allegation is simply untrue, since he does not have a world ranking.

79. Mr Caldecott readily accepts the Claimant can be robustly criticised for being "not ready" to play in the international level, and that he has to live with. But he has been playing on a strong and respected national tour; and in the months leading up to the publication complained of had won "significant victories" against professional players; he was making progress, his record was improving, as was his ranking in Spain and in England.

80. Against the background of those submissions, I should refer to the factual evidence which has been put before the court by both sides.

81. The following facts are uncontroversial:

i) The Claimant is a professional tennis player who had a run of 54 consecutive defeats during which he did not win one set, in tournaments which are under the jurisdiction of the ITF and the ATP;

ii) The tournaments in which the Claimant lost his 54 consecutive matches are all world ranking tournaments – that is the tournaments which are capable of giving rise to world ranking points to the tennis professionals playing in them;

iii) The Claimant's consecutive run of defeats is a record equalling worst ever run of defeats in such tournaments;

iv) During some of that period, the Claimant was also playing in domestic Spanish tournaments;

v) The domestic Spanish tournaments in which the Claimant played, and continues to play, are not under the jurisdiction of the ITF or ATP. They are not world ranking tournaments, and players cannot be awarded world ranking points for playing in them;

82. Two further factual matters are or may be relevant to the Defendant's application relating to what I shall call "the circuit issue". Mr Price submits it is incontestable on the evidence before the court, adduced as relevant to *justification*, not *meaning*:

i) That the Claimant's run of 54 defeats was in tournaments on "the circuit" "the world circuit" and/or the "international professional circuit" as such terms are commonly used in the tennis world; and

ii) That the domestic Spanish tournaments were not part of the "circuit, "the world circuit", or "the international professional circuit".

83. Taken together, these facts Mr Price submits are sufficient to justify any defamatory meaning that the words complained of are capable of bearing, including that relied on by the Claimant.

84. In this context I should mention one further matter. It might have been thought from the Claimant's pleaded case that he sought to draw a distinction between his performance in what are called "Futures Tournaments" which could result in world ranking points, and "Qualifying Draws" which could not (at least directly): see for example, answer 13, of the Claimant's Response to the Defendant's Further Part 18 Request dated 6 November 2009. However Mr Caldecott made it clear during the course of argument that no reliance for present purposes is placed on the distinction between the two.

85. As to the circuit issue, Mr Price submits that even if the court were not to grant summary judgment in respect of the whole action, the evidence on this discrete point is such that the court should determine it now, and save the costs of dealing with it at trial. In this context Mr Price submits the Claimant has chosen not to put his cards on the table about what his case is on the meaning of the "circuit" or "the international professional circuit" or "the world circuit", despite the ruling by Eady J, that he should do so. It is not necessary for me to go through the various points about this made in the pleadings, which have become somewhat convoluted, but Mr Price draws attention in particular, to the fact that though the Claimant admits these phrases are in common use, he has chosen not to elucidate what their various meanings are, and in what context they are used.

86. On the circuit issue, the Defendant relies on the evidence of Chris Kermode, Mr Barry Cowan, Boris Becker and John Lloyd (both very well-known former professional tennis players) and Mr Bruce Philipps.

87. The Barclays ATP World Tour Finals is an annual end of year championship tournament between the top eight ranking players in the world. Mr Kermode is the Managing Director of the Barclays ATP World Tour Finals and is also the

tournament director of what was the Stella Artois Championships (now called the AEGON Championships) at the Queen's Club. He says:

> "The phrase "international professional circuit" is not defined in any rules but is commonly used to describe tournaments giving rise to world ranking points. Another way of looking at it is that the tournaments are all administered by the ITF and the ATP.
>
> The relevant domestic associations hold their own tournaments where players can potentially win prize money. These are not administered by the ITF or the ATP. They do not give rise to any world ranking points and are not understood to be part of the international professional circuit.
>
> If a player entered a prize money tournament in France, of which there are many, it would not be regarded as part of the international professional circuit.
>
> I am aware that the RFET, the Spanish domestic association, also organises its own tournaments. These do not contribute to any world ranking. They are definitely not part of the international professional circuit. I have never heard it suggested that they are.
>
> The phrase "world circuit" would be understood as a shortened version of the international professional circuit.
>
> The phrase "the circuit" is also understood as a shortened version of the international professional circuit and is a commonly used expression in the tennis world. It would definitely not be understood to refer to domestic tournaments. I have never heard it suggested that it would."

88. Mr Barry Cowan, a former professional tennis player, and a regular commentator for Sky Sports on tennis, says:

> "The phrase "international professional circuit" is commonly used to describe tournaments where players can obtain world ranking points. This includes Futures tournaments, Challenger tournaments and tournaments on the ATP World Tour. Another way of looking at it is that the tournaments are all administered by the ITF and ATP.
>
> The relevant domestic associations, such as the Spanish Federation, hold their own tournaments where players can win prize money. In the tennis world these tournaments are commonly referred to as "money tournaments". They are not

> administered by the ITF or the ATP. They are not part of the international professional circuit.
>
> If someone is said to be playing on "the circuit" it would be understood as a shortened version of the international professional circuit. It is a commonly used expression in the tennis world. It would not be understood to refer to money tournaments.

89. Their evidence is confirmed by that from Mr Becker and Mr Lloyd, both of whom have vast experience and international success in the tennis world. Mr Becker says:

> "The phrase "international tennis circuit" is commonly used in the tennis world. It is understood to describe tournaments administered by the ITF and the ATP that gives rise to world ranking points.
>
> The phrase "the circuit" is understood as a shortened version of the international professional circuit and is a commonly used expression in the tennis world.

90. Mr Lloyd says this:

> "The phrase "international professional circuit" is understood to describe tournaments where players can obtain ATP world ranking points.
>
> I am aware that various domestic tournaments hold their own tournaments. These tournaments are not administered by the ITF or the ATP. They are exhibition events that do not form part of the international professional circuit because there are no world ranking points available.
>
> The phrase "the circuit" is a commonly used shortened version of "the international professional circuit" and "means the same thing."

91. Mr Bruce Philipps, the Director of Communications for the Lawn Tennis Association (the LTA) gave a witness statement for the Claimant, and then one for the Defendant. In his first witness statement for the Claimant, he explains that the domestic tennis organisations (such as the LTA and its Spanish equivalent the Real Federacion Espanola de Tenis ("the RFET") organise tournaments domestically, only some of which are sanctioned by the ITF, including ITF Futures Tournaments and Challenger tournaments; and that it is only in respect of tournaments which are so sanctioned, that ATP world ranking points can be awarded. In his second witness statement, he says this:

> "I confirm that the phrases "the circuit", "the world circuit" and "the international professional circuit" are commonly used in the tennis world to describe those tournaments which are sanctioned by the ITF.
>
> In paragraph 7 of my [first witness] statement I refer to tournaments organised by the RFET, some of which are sanctioned by the ITF. Those that are not sanctioned by the ITF are not part of "the circuit", "the world circuit" and/or "the international professional circuit."

92. The Claimant's evidence on this issue is very much more limited. In his witness statement, the Claimant says this:

> " …there is no particular word or phrase which I would use, or which I think is generally used in tennis, to distinguish ITF sanctioned tournaments from other professional tournaments organised by the RFET or, for example, by the LTA in Great Britain. The Defendant says the phrase "international professional circuit" is in common usage to distinguish ITF sanctioned tournaments from other professional tournaments and circuits, but I have never heard the term being used."

93. The Claimant's coach, Mr Daniel Jorge Dios-Zetterlind is a professional tennis player. He is Spanish, and runs a tennis academy, founded with his brother near La Manga in Spain. He says this:

> "In the course of work, I often speak English with the players and other coaches. I have never heard the term "international professional circuit" used in the sport. Nor, in my experience do the terms, "the circuit" or "the world circuit" have any special meaning.

94. Finally, on this topic, Mr David Engel, the Claimant's solicitor, sets out in his witness statement the result of a word search, conducted by his firm of articles published by the Defendant between April 2005 and April 2008 using the words/phrases "circuit", "world circuit" and "international professional circuit". The word search showed that the writer of the articles, Mr Hodgkinson, had not used the phrase "international professional circuit" in print during that period, had used the phrase "world circuit" three times, and the term "the circuit" twenty five times. In that context, it is suggested by Mr Engel (in para 40 of his witness statement) that the result of the word searches show that the Defendant's assertions these terms are in common usage and/or have a particular meaning that would have been uppermost in the minds of the readers of the *Daily Telegraph* should not be taken "at face value". However this evidence does not take the matter further in my view. It is directed to a suggestion

that the Defendant wants to rely on its evidence on this application on the issue of meaning, whereas in fact, as I have already said, it is relied on for the purpose of the plea of justification.

95. Overall Mr Price submits the Claimant's evidence on this topic, amounts to an attempt to obfuscate, not elucidate. He points out that the Claimant himself uses the phrase "world circuit" on his own website as a means of distinguishing the world ranking tournaments he played in (and where he lost his 54 matches) from other tournaments; and he submits what the Claimant and Mr Dios say is no answer to the clear evidence from the Defendant's witnesses first that these phrases are in common use in the tennis world, and second, as to what they mean in that arena.

96. The Claimant has put in evidence relating to Spanish tennis, and in particular the tournaments in which he has played which it is said is relevant to his standing as a professional player. It is said that the Spanish national tournaments are of an exceptionally high standard, RFET ranks its tournaments by stars, and the Claimant has won in highly starred tournaments. Between 80 to 90 per cent of those playing in RFET tournaments are professional, RFET rankings are material to LTA ranking and as a result of his Spanish results, in March 2008 the Claimant's LTA "rating" was adjusted upwards; he had in 2007-8 before publication beaten players with a high RFET ranking and his own ranking had improved to being close to the top 500.

97. Mr Price submits this evidence relates to issues on the pleadings which it is not necessary for present purposes for the court to resolve that is, (i) the standard of the Spanish tournaments; and (ii) whether those Spanish tournaments are professional or not. The answer to the second question Mr Price submits is not clear, but all that matters for the purpose of the Defendant's application is that the Spanish tournaments do not give rise to world ranking points, and are not a part of the international tennis circuit, a matter which is not in dispute.

Discussion

98. Before the court can determine whether a plea of justification is bound to succeed it is obviously the case that the question of meaning must be addressed. In *Azad Ali* for example, where such an application was made before service of the defence, the defendant accepted for the purposes of the application that the words were capable of bearing the claimant's pleaded meaning.

99. If the question of meaning is uncontroversial then no problem arises. If on the other hand, as here, the issue of meaning is controversial, then the court must consider whether a plea of justification is bound to succeed in respect of any defamatory meaning the words are capable of bearing in accordance with the well-settled principles in relation to such an issue (see *Gatley*, paragraph 32.5 for example) with the caveat that the court is entitled to ignore discrete matters neither complained of by a claimant nor addressed in a plea of justification. The resolution of this issue cannot logically be detached from my conclusion that for the purpose of establishing meaning the two articles must be read together.

100. I should add that although Mr Caldecott takes the point that there is no specific application made by the Defendant that the words are incapable of bearing the Claimant's pleaded meaning in the Application Notice itself, there was no suggestion before me that the Claimant was not able to deal with the meaning issue, or that he had been taken by surprise by the submissions made on behalf of the Defendant and did not have a proper opportunity to deal with them (see *Armstrong v Times Newspapers Ltd* [2005] EWCA Civ. 1007 where the Court of Appeal criticised summary applications expressed in general terms which "ambushed" the other side).

101. On the contrary, as will be clear from their submissions which I have set out above, both Mr Caldecott and Mr Price have addressed me on the assumption that it is necessary for the court to consider meaning on this part of the application (by reference, amongst other matters to whether the articles are read separately or together) because, as Mr Caldecott puts it, meaning and justification are "so bound together". I agree. I should add that it would hardly be satisfactory, on cost and proportionality grounds – if nothing else, if the court were to decline to deal with the issue now, and invite the parties to mount a separate application on meaning, when meaning is so obviously "in play" as a result of the applications already made, and when both sides have addressed themselves explicitly to the issue.

102. The differences between the parties on meaning are encapsulated in what is said in the Defence and the Reply. In the Defence it is admitted the words complained of bore the Claimant's pleaded meaning, save that:

> "4.1 As is explicitly stated in the Article [which includes the front page article and the S20 article] the consecutive defeats were on the international tennis circuit. It is denied that the Article is capable of being understood to refer to all professional matches played by the Claimant over the period in question. The Article refers to the Claimant playing other matches on the Spanish national tour, which is in obvious contrast to the international tennis circuit. "
>
> 4.2 Even if it is permissible for the Claimant to limit the Article to the words on the front page, which is denied, it is still apparent from the references to "ranked as the worst professional tennis player in the world", and the "circuit" that the consecutive defeats were not in every professional match played by the Claimant, but only those on the international professional circuit and/or capable of contributing to a world ranking.
>
> 4.3 It is denied that the Article conveys the impression that the Claimant is objectively the worst professional tennis player in the world in terms of his playing skills or that this can be "proved". It is obvious that the categorisation of the Claimant

> as the world's worst arises simply from his record of 54 consecutive defeats."

103. In his Reply, it is said by the Claimant first that the front page article and S20 article should be read separately, and the front page article makes no mention of "the Spanish tournaments" or "the international professional circuit". But that even if the articles are read together:

> "7… the use of those phrases ["the Spanish tournaments" or "the international professional circuit"] in the [S20 article] is not such as to neutralise or diminish the sting of the [front page article]
>
> 8. …It is not, as alleged, "apparent" that the [front page article] was referring only to matches played on the "international tennis circuit" or to those "capable of contributing to world ranking" whether those terms are given their natural and ordinary meanings or [a narrower, innuendo meaning]…
>
> 9…The phrase "world's worst" which appeared in the headline to the [front page article] (and also, should it be relevant, in the headline to the [S20 article]) was presented without qualification, or in quotation marks, or in any other way which might indicate to the reader that it was anything other than an objective fact. The [front page article] stated expressly that the Claimant was "ranked" as the worst professional tennis player in the world, thereby indicating an independent and objective assessment."

104. Whatever the precise words used to characterise the parties' respective cases, for the purpose of this application it seems to me to be important to focus on the *real* differences between the parties. When that is done it is quite plain in my view that there are in fact two essential and narrow points of difference between the Claimant and the Defendant which are central to the dispute between them (both on meaning and on justification).

105. First, do the articles suggest - or are they capable of suggesting at this stage - that the Claimant's run of 54 losses represented *the whole of his professional* record. Are they therefore capable of suggesting that the run of consecutive losses by the Claimant comprised the only professional matches he had ever played, and that he had never won any professional match until his victory against Arzhang Derakshani?

106. There is no doubt it seems to me that this is the <u>real</u> nub of the Claimant's complaint (even though, as I have already said, it is not very clear from the meaning formulated in paragraph 4 of the Particulars of Claim). Hence the repeated complaints made by or on behalf of the Claimant in the correspondence, the pleadings, in his evidence and

in the written and oral submissions that the Defendant failed to take account of his record of wins on the Spanish tour, and that these were professional matches.

107. Second, are the articles capable of suggesting that literally, objectively, and verifiably, the Claimant is the world's worst tennis professional?

108. In my view the ordinary sensible reader reading both articles could not draw the conclusion from what is said that the Claimant's run of 54 losses represented *the whole of his professional* record.

109. The Claimant is described in the words complained of as a tennis professional. The ordinary person may not know the finer points of any particular sport and its rules; and obviously one must be careful not to impute special knowledge to readers of daily newspapers, even to readers of their sports sections. On the other hand, it is important not to assume either that the ordinary reader of national newspapers lacks general knowledge, an appreciation of the world in which they live, a reasonable education or common sense. There is widespread (some might think saturation) coverage of professional sport of all kinds in the media. The distinction between professional sportsmen (i.e. those who play sports for a living) and the rest is well understood, and is a matter of common knowledge, as is the distinction between amateur and professional sports generally.

110. It is made plain that the Claimant's run of 54 defeats was suffered on the international tennis circuit. It is also made plain that the Claimant plays *in addition* and has been playing *recently, and training* in *the national Spanish tournaments*. - presumably because he has enjoyed some success, albeit modest. A clear distinction is drawn therefore between the national tours – where he has had some success, and the international tennis circuit – where he has not.

111. Specific reference is also made to the fact that he has won prize money. His "*travel expenses must run to hundreds of thousands of pounds. And yet he has won a fraction of that back in prize-money*." He is now, it is said, playing on the national Spanish tour, where his playing could lead to him breaking *into the top 500 of players* there (as even Mr Caldecott was constrained to accept, giving rise to an implication of some success). "*Roger Federer"*, it is said - albeit tongue in cheek - "*beware*".

112. While it is true to say that it is not explicitly said that the Spanish national tournaments are professional ones, against the background I have referred to, I think it would be wholly unreasonable to conclude that they are not, that the Claimant (a professional tennis player as I have said, who the reader has already been told has played all round the world as a tennis professional on the international professional circuit and who is in training with his coach) is not now playing in the Spanish tournaments as a professional, or in any professional tennis matches other than on the international professional circuit.

113. It inexorably follows the ordinary sensible reader of the articles could not think that the Claimant's run of 54 defeats on the international tennis circuit are the only

professional matches the Claimant has ever played during the whole of his professional life or that they represent the whole of his professional record, or that his professional record is one of unrelieved defeat.

114. If the front page article is read on its own, I think a reader might conclude that the Claimant had chosen to play all his matches on the "circuit"; and that his run of 54 consecutive losses, were the only professional matches he had ever played. But, if I am right in my conclusion that the two articles should be read together to determine meaning, I do not think it would be appropriate to give what is said in the front page article some sort of presumptive priority – in particular where what is written does not purport to be the "full story". It is of course the case as Lord Nicholls said in *Charleston*, that meaning may be affected by the mode of publication. There may be some cases where an allegation is so distinctly made that notwithstanding a refutation "tucked away" the words complained of bear the meaning complained of – perhaps because the strength of the message of the bane is such that the ordinary sensible reader, would discount the antidote. This is not such a case in my view. Both parties' arguments are more interpretative.

115. It might be said there is also an air of artificiality about the Claimant's argument on meaning. The meaning is said to be the same whether the two articles are read together or not, even though the Claimant selected the first article only for complaint – which makes no reference to his Spanish record at all - and resisted the application the articles should be read together. The obvious question is why, if reading the second article with the first made no difference?

116. Be that as it may however, the S20 article indisputably does refer to the fact that the Claimant also plays matches in Spain, and suggests that he has had some success apart from the 54 he has lost; thus the Claimant's case must be, at least in part, that insufficient significance is attached to them, because the reader is not told explicitly they are professional.

117. An element of confusion has arisen on this issue which has muddied the waters in relation to the argument on meaning. This is because there is a dispute for the purpose of the plea of justification over what are or are not recognised or regarded as "professional matches" by the sport itself. In this context, as I have indicated, Mr Caldecott invites me to consider what was said by the *Daily Telegraph* in correspondence – where it was suggested that the matches the Claimant had played in Spain were not *in fact* professional tennis matches. He also invites attention to the fact that, even now, for the purposes of justification, it is not admitted by the *Daily Telegraph* that the Spanish matches were professional ones. He submits it would be extraordinary in those circumstances if the court were to conclude (despite the intentions of the *Daily Telegraph)* that the words were incapable of conveying an impression that the Spanish matches were not professional ones – when that was the impression the *Daily Telegraph* apparently intended to convey.

118. Whether it would be extraordinary or not is beside the point in my view. The question is not what meaning the *Daily Telegraph* intended to convey, which is immaterial for

this purpose, but what meaning the articles would or could convey to the ordinary sensible reader without any special knowledge.

119. Nor do I consider a reasonable and sensible reader could really think that the suggestion that the Claimant was "the world's worst" or the "world's worst tennis professional" was a free standing and objectively verifiable allegation independent of his record of losses in the 54 matches played all around the world. In my view it is clear that it is being said, that the Claimant was the world's worst, in the sense that he had the world record for the longest losing streak of 54 matches on the international professional tennis circuit. The characterisation of the Claimant as the world's worst is therefore simply a consequence of his unprecedented record of defeats, and is "parasitic" upon it. Indeed, the run of 54 losses, and the characterisation of the Claimant as the world's worst, are clearly linked together in the Claimant's pleaded meaning, as Mr Price points out.

120. I turn next to the "circuit issue" evidence. I do not think it is realistically arguable that the jury will reject the clear and cogent evidence of the Defendant's witnesses as to the meaning and common use in the tennis world of the words/phrases "circuit", "world circuit" and "international professional circuit". The Claimant produces no evidence about the phrase "world circuit", perhaps unsurprisingly given his own use of that phrase on his website (a copy of the relevant page of which is in evidence before me) to describe the tournaments in which he lost 54 consecutive matches. He and his coach say they have never heard the term "international professional circuit" and his coach says in his experience, the phrases "circuit", and "world circuit" have no special meaning. That may be right or wrong, but their carefully worded evidence about their own experience does not in fact contradict the evidence of the Defendant's witnesses, on this point, or on the point that the domestic Spanish tournaments were not part of the international professional circuit, let alone amount to "potent contradictory evidence" as Mr Caldecott suggests. This is an issue to which the Defendant attaches significance in the context of its plea of justification, and even if I am wrong in the other conclusions I have reached, in my view, the Defendant is entitled to summary judgment on this issue in accordance with its application under paragraph 2 of the Application Notice: it will save time and costs to dispose of the issue now if there is a trial, and I can see no other reason why this issue should be tried.

121. The facts which are either admitted, not in dispute or incontestable therefore are these. The Claimant is a professional player who did indeed lose 54 consecutive matches in tournaments on the international professional circuit during which he did not win one set. His losses were in tournaments which are under the jurisdiction of the ITF and the ATP, they are world ranking tournaments and attract world ranking points. His record of consecutive losses was the world record equalling worst ever run of consecutive losses on the international professional circuit. These matches did not constitute the whole of his playing record during this time, because he was also playing in the Spanish domestic tournaments. The domestic Spanish tournaments in which the Claimant played, and continues to play, are not part of the circuit, or the world circuit or the international professional circuit. They are not under the

jurisdiction of the ITF or ATP. ATP ranking points are not available for them, and they are not world ranking.

122. My conclusions on the first issue on meaning and on the facts seem to me to remove the central plank of the Claimant's case. In light of those conclusions there is nothing, as a matter of reality, of which the Claimant actually complains that cannot be justified; and the facts are sufficient to justify any defamatory meaning the words complained of are capable of bearing. There can be no rational conclusion other than that the claim of justification must succeed. It is not necessary therefore for me to consider the various arguments advanced on the contingent footing that I have ruled against the Defendant on issue one; or indeed on the further issue canvassed briefly on fair comment.

123. I respectfully agree with Eady J's view expressed early on in these proceedings simply by reference to the different cases advanced on the pleadings, that it would not be immediately apparent how the claim would be likely to restore or enhance the Claimant's reputation in any event.

124. As it is however, there is no other compelling reason why the claim should be tried; and in my view for the reasons given, the Defendant is entitled to summary judgment against the Claimant.