Neutral Citation Number: [2009] EWCA Civ 1075

Case Nos: A2/2009/1130 & A2/2009/1130(A)

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR JUSTICE EADY
[2009] EWHC 1152 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2009

Before :

LORD JUSTICE PILL
LORD JUSTICE HOOPER
and
LORD JUSTICE WILSON

- -

Between :

Craig Joseph & Ors	**Claimants**
- and -	
Jason Spiller and 1311 Events Limited	**Defendants**

- -
- -

William Bennett (instructed by **Howard Kennedy**) for the Claimants
Paul Epstein QC and **David Price** (instructed by **David Price Solicitors & Advocates**) for the Defendants

Hearing date : 30th July 2009

- -

Judgment

Lord Justice Pill :

1. This is an appeal against an interlocutory judgment of Eady J dated 22 May 2009. The claimants are members of a musical group and the first defendant is one of two directors of the second defendant, 1311 Events Limited, which provides entertainment booking services. The claimants allege that words published on the defendants' website for several weeks up to June 2007 were defamatory of them. They claim general damages and also special damages in respect of two engagements said to have been cancelled by hirers of their services who had read the words complained of.

2. In their interlocutory application, the claimants sought to strike out all three substantive defences pleaded, that is, justification, fair comment and qualified privilege. In a reserved judgment, the judge struck out the defences of fair comment and qualified privilege. He also ordered that those parts of the amended defence of justification which rely on a breach of the re-engagement term alleged to be a part of the contract between the parties be struck out. Permission was granted to the defendants to add a new paragraph to the amended defence. The appeal is against the findings in relation to justification and fair comment. The trial of the action, formerly fixed for 8 June 2009, has been adjourned until February 2010.

3. The words on the website complained of are:

> "1311 Events is no longer able to accept bookings for this artist as The Gillettes c/o Craig Joseph are not professional enough to feature in our portfolio and have not been able to abide by the terms of their contract.
>
> …
>
> What we say:
>
> The show is an enjoyable soul and Motown experience which is popular for many events throughout the UK. However, following a breach of contract, Craig Joseph who runs The Gillettes and Saturday Night At The Movies has advised 1311 Events that the terms and conditions of '… contracts hold no water in legal terms' (27.03.07). For this reason, it may follow that the artists' obligations for your booking may also not be met. In essence, Craig Joseph who performs with/arranges bookings for The Gillettes and Saturday Night At The Movies may sign a contract for your booking but will not necessarily adhere to it. We would recommend that you take legal advice before booking this artist to avoid any possible difficulties.
>
> Instead, we recommend any of the following **professional** bands and artists …"

4. The judge set out the background facts at paragraphs 4 to 10 of his judgment:

> "4. It is pleaded that the Claimants would all have been identifiable by "a large but unquantifiable number of readers of

the words complained of". The meaning relied upon in the particulars of claim is that:

> "… the Claimants are grossly unprofessional and untrustworthy and will not, and/or are unlikely to, honour any bookings made for them to perform either as The Gillettes or as Saturday Night at the Movies."

There is a claim for general damages and also for special damages in respect of two engagements said to have been cancelled by hirers of their services who had read the words complained of.

5. Before I turn to the defences now under challenge, it is appropriate to set out the background, much of which is in itself uncontroversial.

6. On 13 October 2004 the Claimants entered into a contract with the Second Defendant. Its function was to find hirers for the Claimants' services, but it did not become the Claimants' exclusive agent. They remained on the books of a number of other agents.

7. In April 2006 it was agreed that the Claimants (as The Gillettes) were to perform on 31 December 2006 at a restaurant in Leeds called Bibis. The concert went ahead but the First Claimant describes in his witness statement how the marketing manager of the restaurant, Tracy Dawes, presented herself before they had even got into the building and said, "Whoever your agent is, he is a total tosser, ignorant, rude and aloof". She said that when she had asked the First Defendant, Mr Spiller, for publicity material about The Gillettes for promotional purposes, he replied, "You have already received the marketing material, and can I suggest you go back to your office and have a look for it". This apparently prompted Ms Dawes to say that she would never use 1311 Events again.

8. It appears that the concert went satisfactorily and, in February 2007, Ms Dawes contacted the First Claimant in order to book The Gillettes for a further performance in May of that year. This was done without reference to the Second Defendant, but the Claimants agreed to perform. This is said by the Defendants to be in breach of a "re-engagement clause" in their contract with the Claimants. I shall return to this shortly.

9. When the First Defendant found out about Ms Dawes' second booking, he sent an email to the First Claimant on 27 March 2007, claiming that legal proceedings would be taken against them and that he would report the Claimants to the Musicians' Union because of a breach of a contractual obligation to the following effect:

> "The client and artist agree that subsequent bookings within a 12 month period, from any artist provided by 1311 Events can only be booked directly with 1311 Events."

He added that the Defendants would not be representing the Claimants any longer, "as we can only work with professional artists who can accept our terms and conditions".

10. The First Claimant responded the same day in these terms:

> "Hi Jason
>
> It appears you do not know the meaning of freelance, that is what all my shows are. You are part of a cog which supplies all agents and artitses [*sic*] alike with work, one does not work without the other.
>
> You came to me Jason after viewing the quality of our show, your contract is mearly [*sic*] a formality and holds no water in legal terms. You should consider looking after your clients/ venueus [*sic*] better then maybe you would not lose them. Do not be fooled into thinking you can lose venues and reep [*sic*] the benefits from others hard work, that does not hold any legal value any more. You [*sic*] offer of work to my shows over the years was minimal and neither helped nor hindered our diary.
>
> I am not performing in the show, and since your agreement and terms was with me there are no grounds for your terms or conditions.
>
> Thers [*sic*] is one outstanding show with you guys Aug 4th o7 we will honour the show as we have all the other shows through your agency, providing you make sure the balance fee £900.00 + vat. TOTAL = £1057.50 is in our account 2 weeks prior to the show date, thus avoiding any cancelation [*sic*] of the show. Please confirm this can be organized within 7 days or I will cancel the date.
>
> I look forward to any legal trysts.
>
> Kind regards
>
> Craig (On behalf of The Gillettes)."

5. The contract of 13 October 2004 was made on line. On the second defendant's website is a proforma with a series of boxes to be filled in and questions. It is in four parts and is introduced by this statement:

> "This 4 Part form relates to important information about how 1311 Events operates and we ask that you read all of the

> following information. Some of these details affect the way 1311 Events will operate in the future and, by law, we now require signed confirmation that 1311 Events Ltd can represent your act and use the information provided by you. You can either complete this form online or print it and return via post to the address above."

6. In an email to the second defendant on 13 October 2004, the claimants described the subject as "artist agreement form" and added "below is the result of your feedback form". All questions were answered and the appropriate consent was given to the second defendant acting on the claimants' behalf.

7. Part 3 of the proforma is headed 'Events Procedure' and, as would be expected, provides a procedure for dealing with enquiries, bookings, feedback, commission and payment. It includes this underlined sentence:

> "1311 Events full Terms & Conditions can be found here >>> "

8. The document to which reference is made purports to set out terms and conditions as between the second defendant and hirers of the artists' services. It is stated:

> "These terms and conditions constitute our agreement with you for the hire of artists featured on the 1311 Events portfolio. These are referred to as our 'terms'. It does, however, refer to 'performance contracts' between the client and the band, sets our their respective responsibilities and provides for a possible action 'by the client against the artist for non-fulfilment of their contract'"

The provision relied on by the second defendant, which appears on the third page of the document provides:

> "RE-ENGAGEMENT
>
> The client and artist agree that subsequent books within a 12 month period, from any artist provided by 1311 Events will be booked directly with 1311 Events and not with the artist directly."

9. The defendants claim that the "re-engagement clause" is a term of the contract between them and the claimants and that, by agreeing to perform at Bibis in May 2007 without reference to the defendants, the claimants were in breach of contract. That breach is relied on in support of the defence that the words complained of were justified.

10. Before the judge, the claimants argued, first, that as a matter of ordinary construction they were not bound by the re-engagement provision and, second, that, by reason of the contents of the Employment Agencies & Employment Business Regulations 2003 (SI 2003 No. 3319) ("the 2003 Regulations"), the defendants cannot rely on the provision. On the first issue, the judge found for the defendants relying on the express reference to "artist" in the re-engagement provision. Only in the course of the

hearing before this court did Mr Bennett, for the claimants, seek permission to appeal against that finding. The first of the claimants' arguments before the judge in my view has force, against the background of the 2003 Regulations and where the restrictive provision relied on was set out not in what was clearly the main contractual document between the parties but in a document purporting to set out terms and conditions as between the second defendant and the hirers. The court, however, took the view that it would not be just to allow an additional ground of appeal in an interlocutory appeal at such a late stage.

11. I turn to the second submission. The 2003 Regulations were made under powers conferred by the Employment Agencies Act 1973 ("the 1973 Act") and, as stated by the judge, the Secretary of State's power to make regulations was conferred "to secure the proper conduct of employment agencies and to protect the interests of persons availing themselves of their services". Both section 5(1) of the 1973 Act and the explanatory note to the 2003 Regulations refer to securing the protection of the interests of persons using the services of employment agencies.

12. Regulation 14(2) provides:

> "Subject to paragraph (3), an agency or employment business shall ensure that –
>
> (a) all terms in respect of which the agency or employment business has obtained a work-seeker's agreement are recorded in a single document, or where this is not possible, in more than one document; and
>
> (b) copies of all such documents are given at the same time as each other by the agency or employment business to the work-seeker with whom they are agreed before the agency or employment business provides any services to the work-seeker to which the terms contained in such documents relate."

Mr Bennett submitted to the judge, and to this court, that the term relied on is not enforceable because it was contained in a document separate from the contractual document to which the claimant agreed on 13 October 2004. Moreover, as a term imposing restrictions on artists, regulation 14(2) was intended to prevent it being introduced by a side-wind in a separate document. Neither party was aware of regulation 14(2) at the time the contract was made though it is clear from their pro-forma that the defendants were aware that there were formal obligations with which the second defendant was required to comply.

13. The judge referred, at paragraph 51, to the principle identified by Scrutton LJ in *Anderson Ltd v Daniel* [1924] 1 KB 138 at 147:

> "There have been a large number of cases decided on various statutes dealing with the circumstances in which a breach of a statutory provision renders illegal, or incapable of suit, a contract to which it applies; but the general result of them is, I think, fairly clear. When the policy of the Act in question is to

> protect the general public or a class of persons by requiring that a contract shall be accompanied by certain formalities or conditions, and a penalty is imposed on the person omitting those formalities or conditions, the contract and its performance without those formalities or conditions is illegal, and cannot be sued upon by the person liable to the penalties. A case which affords a forcible illustration of that principle is *Little v Poole 9 B & C* 192, 201, where a statute provided that a vendor of coal should at the time of the delivery of it deliver also a signed certificate as to the quality of the coal, and the vendor, who had neglected to deliver the certificate, was held disentitled to recover the price."

14. The judge commented:

> "It would thus appear to follow that, as between the Claimants and the Second Defendant, the re-engagement term would be unenforceable and, accordingly, the conduct of the Claimants in contracting with Ms Dawes directly would not represent an actionable breach."

15. Having reached that conclusion, the judge declined to strike out the defence of justification altogether. The defence was also based on the claimants' conduct in relation to the Landmarc contract and that would be a matter for resolution at trial (paragraph 53).

16. For the defendants, Mr Epstein QC submitted that regulation 14(2) did not operate to render the entire contract unenforceable or the re-engagement term unenforceable. The principle to be applied, he submitted, is accurately stated in Chitty on Contract, 30th Edition, paragraph 16-146:

> "However, it is important to note that where a contract or its performance is implicated with breach of a statute this does not entail that the contract is avoided. Where the Act does not expressly deprive the plaintiff of his civil remedies under the contract the appropriate question to ask is whether, having regard to the Act and the evils against which it was intended to guard and the circumstances in which the contract was made and to be performed, it would in fact be against public policy to enforce it."

17. Mr Epstein submitted that the parties are in an all or nothing situation. If the claimants' argument is correct, the entire agreement is unenforceable, a situation which, on a construction of the Regulations, does not follow from a failure to comply with regulation 14(2). In response, Mr Bennett submitted that it is only the re-engagement provision, which is the only fresh obligation imposed on the claimants in the subsidiary document, which cannot be enforced. The terms contained in the main document, the pro-forma accepted by the claimants, can be enforced.

18. Mr Epstein relied on the analysis in this court of the principle stated in *Anderson* in *Shaw v Groom* [1972] QB 504, citing the judgment of Devlin J in *St John Shipping*

Corporation v Joseph Rank Ltd [1957] 1 QB 267. The *St John Shipping* case was concerned with a refusal by cargo owners to pay the balance claimed for cargo carried in a ship that had been loaded below its load line, in breach of statute, and for which a criminal sanction was prescribed. The defendants relied on the *Anderson* principle including the defendants' membership of the class of person the legislation was designed to protect. Devlin J stated, at page 287:

> "The fundamental question is whether the statute means to prohibit the contract. The statute is to be construed in the ordinary way; one must have regard to all relevant considerations and no single consideration, however important, is inclusive."

19. Devlin J added, at page 288:

> "If a contract has as its whole object the doing of the very act to which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a Court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another, which may easily be broken without wicked intent."

20. In *Shaw*, a landlord sued for rent and the tenant pleaded illegality in that the landlord had failed to supply a rent book containing prescribed information, in breach of the requirements of the Landlord and Tenant Act 1962 and regulations made under it. Harman LJ, at page 518 stated:

> "The true test is whether the statute impliedly forbids the provision in the contract to be sued upon."

Sachs LJ stated, at page 523:

> "One must look at the relevant statute or series of statutes as a whole and then assess whether the legislature intended to preclude the Plaintiff recovering in the action, even when an essential act is under consideration. I am glad to come to a conclusion that accords with the normal rules for interpreting a statute and which avoids the courts being put into a strait-jacket such as that propounded on behalf of the tenant."

21. I would accept that regulation 14(2) was included primarily as a safeguard for artists against oppressive or obscure arrangements proposed by agents. A criminal sanction is contemplated. However, I find it difficult to attribute an intention to exclude civil remedies, for example, a claim for commission on a completed engagement, upon a breach of regulation 14(2) as such. I also find it difficult to extract an intention that a

contract may be enforceable in part, that is, the obligations in the principal document are enforceable but those in a document found to be subsidiary are not.

22. Provision is made in the Regulations for a contract being enforceable in part. Regulation 31 provides:

> "Where any term of a contract is prohibited or made unenforceable by these Regulations, the contract shall continue to bind the parties to it if it is capable of continuing in existence throughout that term."

23. There are regulations prohibiting specific terms in contracts between agencies and work-seekers, for example, regulation 5 (restriction on requiring work-seekers to use additional services), regulation 6 (restriction on detrimental action relating to work-seekers working elsewhere). Regulation 10(1) (restriction on charges to hirers) expressly makes such charges unenforceable in certain circumstances. Mr Bennett submitted that regulation 31 is concerned only with terms expressly prohibited or made unenforceable. The requirement in regulation 14(2) is fundamental and regulation 31 does not save it. Regulation 31 was required because, without it, the *Anderson* principle would apply to defeat the entire contract upon a breach, for example, of regulation 10.

24. I accept that Regulation 31 makes clear the effect of breaches of regulations such as regulation 10(1) but it does not, in my judgment, bear upon the quite separate question whether the re-engagement clause is unenforceable because it is contained in a separate document. That is to be determined upon the test expressed by Devlin J in the *St John Shipping Corporation* case. Applying that test, the failure to put the re-engagement clause in the principal document does not, in my view, render either it or the entire contract unenforceable, by reason of the breach as such. I am unable to read into the Regulations a clear implication that either the clause, or the contract as a whole, is unenforceable for a breach of Regulation 14(2). If it were to have the effect, I would have expected a specific provision in Regulation 14(2). As stated, the alternative case, based on ordinary contractual principles, has failed.

25. A draft re-re-amended defence has been prepared on behalf of the defendants to cover the situation which would apply if their appeal on the issue arising on the 2003 Regulations had been dismissed. That does not now arise.

Fair Comment

26. This defence must now be considered on the basis that the justification defence stands. The defendants submit that what was put in their email under the heading 'What we say' is comment upon facts they seek to justify, and is arguably within the ambit of permissible comment.

27. Paragraph 10.1 of the re-amended defence provides:

> "The comment
>
> The following passages of the page are comment:

> 'The Gillettes c/o Craig Joseph are not professional enough to feature in our portfolio. For this reason, it may follow that the artists' obligations for your booking may also not be met. In essence, Craig Joseph who performs with/arranges bookings for The Gillettes and Saturday Night at the Movies may sign a contract for your booking but will not necessarily adhere to it. We would recommend that you take legal advice before booking this artist to avoid any possible difficulties.'"

28. The judge found, at paragraph 59:

> "Here, the real sting of the libel (although this may well be for the jury to decide in due course) would appear to be the allegations that the Claimants take a generally cavalier attitude to contractual obligations and are not to be trusted in business dealings. It seems to me that they are factual in character rather than the expression of opinions. All that is specifically relied upon is the allegation of a breach, which forms the subject-matter of the justification defence. It may be thought, therefore, to add very little."

The judge also found that this was a private contractual dispute which could not be said to constitute a matter of public interest (paragraph 60). The judge commented, though it was not a final view, that the obligation of confidentiality imposed on employment agencies and businesses by regulation 28 of the 2003 Regulations meant that the blacklisting of the claimants in the email could not be regarded as a matter of public interest for the purpose of a fair comment defence.

29. The claimants seek to distinguish between different sentences in the alleged comment but it seems to me that the material should be treated as a whole. The claimants seek to uphold the judge's view that the relevant remarks are factual in character rather than the expression of opinions, that the publication was not in the public interest and, in support of that, that regulation 28 confirms that they cannot be a matter of public interest. By a respondent's notice, the claimants also submit that the quotation attributed to the first claimant (". . . contracts hold no water in legal terms"), in the words complained of, is palpably false and, given that it is fundamental to the words complained of, renders the fair comment defence unsustainable.

30. I regret that I have concluded, contrary to the view of the judge, that the words are comment. As Lord Porter stated in *Kemsley v Foot* [1952] AC 345, at 356:

> "But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment."

31. I consider paragraph 10.1 of the re-amended defence. First, a value judgment is expressed as to whether the claimants are professional enough to feature in the second defendant's portfolio. The words preceded by the expression "for this reason", state the inferences which the reader is invited to draw from the facts stated and in my view amounts to a series of comments upon the facts. Similarly, the "recommendation" to

the reader is capable of being a comment upon the facts on the basis of which the recommendation is made.

32. The ingredients of the defence of fair comment were stated by Lord Nicholls of Birkenhead in *Tse Wai Chun Pau-v- Albert Cheng* [2001] EMLR 31, at paragraphs 16 to 21:

> "16. In order to identity the point in issue I must first set out some non-controversial matters about the ingredients of this defence. These are well established. They are fivefold. First, the comment must be on a matter of public interest. Public interests is not to be confined within narrow limits today: see Lord Denning in *London Artists ltd v Littler* [1969]] 2 QB 375 at 391.
>
> 17. Second, the comment must be recognisable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege. Much learning has grown up around the distinction between fact and comment. For present purposes it is sufficient to note that a statement may be one or the other, depending on the context. Ferguson J gave a simple example in the New South Wales case of *Myerson v Smith's Weekly* [1923] 24 SR (N.S.W.) 20 at 26:
>
> > To say that a man's conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment.
>
> 18. Third, the comment must be based on facts which are true or protected by privilege: see, for instance, *London Artists ltd v Littler* [1969] 2 QB 375 at 395. If the facts on which the comment purports to be founded are not proved to be true or published on a privilege occasion, the defence of fair comment is not available.
>
> 19. Next, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.
>
> 20. Finally, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views: see Lord Porter in *Turner v Metro-Goldwyn-Mayer Picture Ltd* [1950] 1 All ER 449 at 461, commenting on an observation of Lord Esher M.R. in *Merivale v Carson* [1888] 20 QBD 275 at 281. It must be germane to the subject-matter criticised. Dislike of an artist's style would not justify an attack upon his morals or manners. But a critic need not be mealy-mouthed in

> denouncing what he disagree with. He is entitled to dip his pen in gall for the purposes of legitimate criticism: see Jordan CJ in *Gardiner v Fairfax* [1942] 32 SR (N.S.W) 171 at 174.
>
> 21. These are the outer limits of the defence. The burden of establishing that a comment falls within these limits, and hence within the scope of the defence, lies upon the defendant who wishes to rely upon the defence."

33. At paragraph 46, Lord Nicholls stated:

> "Nor is it for the courts to chose between 'public' and 'private' purposes, or between purposes they regard as morally or socially or politically desirable and those they regard as undesirable. That would be a highly dangerous course. That way lies censorship. That would defeat the purpose for which the law accords the defence of freedom to make comments on matters of public interest. The objective safeguards, coupled with the need to have a genuine belief in what is said, are adequate to keep the ambit of permissible comment within reasonable bounds."

34. In *London Artists Ltd v Littler* 1969 2 QB 375, at page 391, Lord Denning MR had stated:

> "There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the judge and not for the jury. I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment."

35. In the present action, breach of confidence does not arise directly. Regulation 28 provides:

> "Confidentiality
>
> (1) Neither an agency nor an employment business may disclose information relating to a work-seeker, without the prior consent of that work-seeker, except -
>
> (a) for the purpose of providing work-finding services to that work-seeker;
>
> (b) for the purposes of any legal proceedings (including arbitration); or

> (c) in the case of a work-seeker who is a member of a professional body, to the professional body of which he is a member.
>
> (2) Without prejudice to the generality of paragraph (1), an agency shall not disclose information relating to a work-seeker to any current employer of that work-seeker without that work-seeker's prior consent, which has not by the time of such disclosure been withdrawn, and shall not make the provision of any services to that work-seeker conditional upon such consent being given or not withdrawn."

36. The existence of that regulation and the prohibition it contains does not, in my judgment, prevent the words used from being in the public interest for present purposes. It could possibly provide, I express no view on the point, the basis for a separate action.

37. I see no merit in the argument that the comment cannot constitute a matter of public interest. Those in the business of entertaining the public, a business in which many people are engaged, will be concerned, when serving the public, to know which artists can be relied on to perform their contracts and which cannot. The comment is arguably in the public interest.

38. I have had more difficulty with an issue raised in the respondent's notice. The statement of fact in the words complained of, namely that the claimants had 'advised' the second defendant that ". . . contracts hold no water in legal terms" (20.03.07) is plainly false. The first claimant's email referred not to contracts in general but to a particular contract, that between the claimants and the second defendant. A jury could not properly hold that the statement was true.

39. As Lord Oaksey stated in *Kemsley*, at page 361:

> "What is meant in cases in which it has been said comment to be fair must be on facts truly stated is, I think, that the facts so far as they are stated in the libel must not be untruly stated."

40. The words complained of, however, do also allege that the claimants have "not been able to abide by the terms of their contract" and that the email was written "following a breach of contract", thus possibly attracting an application of section 6 of the Deformation Act 1952. Under the heading "Fair Comment", the section provides:

> "In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expressions of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

41. Mr Price, for the defendants, relied on the judgment of Tugendhat J in *Matthias Rath v Guardian News And Media Limited & Anr* [2008] EWHC 398. On the facts of that

case, the judge referred, at paragraph 81, to *Kemsley* having been "overtaken" by section 6 of the 1952 Act. He stated, at paragraph 88:

> "I cannot conclude that the Defendants have no real prospect of proving any of the statements of fact upon which they rely. . . . And in those circumstances, I cannot conclude that the Defendants have no real prospect of succeeding in their plea in reliance upon section 6: that is of failing to establish that the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges. That is an issue that, in the present case, cannot be disposed of at this interlocutory stage."

42. Clearly, the defendants' real complaint against the claimants was a breach by the claimants of the re-engagement clause in the contract between the claimants and the second defendant. There is no reference to that in the words complained of. The contract is not identified in the publication, still less the term allegedly breached. Moreover, the single specific allegation of fact in the words complained of is plainly untrue.

43. Mr Price relied, in a section 6 context, on the more general allegations repeated above. In paragraph 10.2 of the Re-Amended Defence, the defendants rely on the facts set out in paragraph 9, other than in paragraph 9.16. Paragraphs 9.1 to 9.12 refer to the contract between the claimants and the second defendant and to the re-engagement term. Paragraphs 9.13 and 9.14, however, refer to an alleged breach of a booking arrangement with Landmarc in Bournemouth in December 2005. That alleged breach was "sufficiently identified" in the words complained of, it was submitted.

44. As Lord Nicholls stated in *Tse Wai Chun Pau*, at paragraph 19, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. Does section 6 of the 1952 Act permit the defendants, in this context, to rely on the breach alleged in paragraphs 9.13 and 9.14?

45. I have come to the conclusion that the defence of fair comment should not be permitted to stand, on an application of section 6, on the strength of an alleged breach of contract with a hirer in December 2005. The dispute arose in March 2007 following an alleged breach by the claimants of the re-engagement term in their contract with the second defendant. That breach gave rise to the publication which led to the present action.

46. The breach of contract relied on for present purposes is of a contract with a hirer in 2005. As between the claimants and defendants, there were no repercussions in that contractual relations proceeded without complaint until March 2007. The words "following a breach of contract" in the words complained of cannot be taken as referring to the December 2005 breach. Nor, in my judgment, can the later words in the defendants' comments. In my judgment, a jury could not properly base a finding of fair comment against the claimants, given the nature of the comment, upon a breach of contract in December 2005 14 months before the breach which led to the publication. On this ground, the judge's decision to strike out the defence of fair comment is to be upheld.

47. It has not been argued in this court that, upon the appeal being dismissed on the fair comment issue but allowed on the effect of regulation 14(2), the defence of justification inevitably fails. Any further applications can be made to the trial judge.

48. I would allow the appeal on the regulation 14(2) issue and dismiss it on the fair comment issue.

Lord Justice Hooper :

49. I agree.

Lord Justice Wilson :

50. I also agree.