Neutral Citation Number: [2010] EWHC 3239 (QB)

Case No: HQ09D05634

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 December 2010

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

JACQUI LAIT	**Claimant**
- and -	
EVENING STANDARD LIMITED	**Defendant**

- -
- -

Richard Rampton QC and **Ian Helme** (instructed by **Carter-Ruck**) for the **Claimant**
Mark Warby QC and **Victoria Jolliffe** (instructed by **Taylor Wessing LLP**) for the **Defendant**

Hearing date: 22 November 2010

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

1. The Claimant in these proceedings is Mrs Jacqui Lait, who was the Member of Parliament for the Beckenham constituency between 1997 and 2010. Prior to that, between 1992 and 1997, she was the Member of Parliament for Hastings and Rye. She had decided some time in early 2009 that she would not stand in the 2010 election, as she felt that the time had come to make way for a younger candidate. It was not announced, however, that she would be standing down until 20 September 2009.

2. It will be recalled that from May 2009 onwards, for many months, there was a continuing flow of revelations about the expenses available to members of Parliament and, in particular, the sums which had been claimed by individual members under the system then prevailing. This very soon became known as the "expenses scandal". Various reforms were proposed and discussed, including those contained in the Twelfth Report of the Committee on Standards in Public Life, which was published on 4 November 2009. This was the "Kelly Report". It contained many recommendations, although for the purposes of this litigation the one that is central is Recommendation 7:

> "The recent removal of the right to claim additional accommodation expenses from MPs with constituencies wholly within 20 miles of Westminster should be extended to those whose constituency homes fall within a reasonable commuting distance. The independent regulator should draw up a revised list of constituencies to which this principle applies."

3. On 9 November 2009, the Claimant put her name to a letter published in *The Times* newspaper, along with three other female members of Parliament, expressing concerns about the possible consequences of this proposal. It was published under the headings "Kelly Report threatens the future of women in the House" and "The Kelly report does not address the fact that MPs are, in effect, shift workers". It was in these terms:

> "Sir, There is cross-party consensus about the need to get more women into the House of Commons, and to encourage women with young families to stand for Parliament. As serving MPs, we are concerned that aspects of Sir Christopher Kelly's proposals will discourage women who might otherwise seek their party's nomination as well as exposing existing MPs to unnecessary risk.
>
> The Kelly report does not address the fact that MPs are, in effect, shift workers. On Mondays and Tuesdays, we are expected to remain at the House of Commons for 10pm votes. The voting process is slow, and means that we are often unable to leave Westminster until 10.45pm. Under Kelly's proposed regime, MPs whose constituencies are within an hour's train journey of London will receive no financial assistance to rent accommodation and will have to return home each evening.

> Trains are slower and less frequent at night, and some MPs will not be able to reach their home stations until after midnight. In some cases, they will have to alight at unstaffed stations and walk to their cars through car parks or wait for taxis. The risk of mugging or sexual assault is obvious, and is likely to deter women who currently have jobs where the safety of employees is treated with the seriousness it deserves. We cannot believe that Sir Christopher Kelly seriously intends that his proposals should put female MPs at unnecessary risk, but in the light of his report we call on the leaders of our parties to reaffirm their commitment to making Parliament a friendlier place for women. We also call on the Independent Parliamentary Standards Authority to ensure that the safety of current and future MPs is a guiding principle in its deliberations.
>
> Claire Curtis-Thomas, MP, Kali Mountford, MP, Jacqui Lait, MP, Phyllis Starkey, MP
>
> House of Commons, SW1"

4. This letter appears to have prompted, the very same day, the appearance of an article in the *Evening Standard* newspaper, which is published by the Defendant. It is part of that article which forms the subject of the Claimant's complaint in this case. It contained the following passage:

> "But today women MPs attacked one of the Kelly Report's key proposals – a ban on second homes for those who live within an hour of Westminster.
>
> Labour's Claire Curtis-Thomas, Kali Mountford and Phyllis Starkey, as well as Tory MPs Jacqui Lait and Eleanor Laing, said that the proposals 'will discourage women who might otherwise seek their party's nomination, as well as exposing MPs to unnecessary risk'.
>
> [*The article goes on to quote further from the letter*]
>
> However, the criticism may risk the ire of some. Ms Lait claimed large sums to travel to her family home in Sussex, even though her constituency home was 11 miles from Westminster. She was forced to pay back nearly £25,000 after it emerged she had made a major capital gain on the sale of a home funded by the taxpayer."

5. The Claimant complains that the article is defamatory of her. The case came before me in March of this year, when I ruled that the words complained of were incapable of bearing certain defamatory meanings and gave an opportunity for matters to be re-pleaded. In the amended particulars of claim served on 15 April the natural and ordinary meanings relied upon are as follows:

> "(1) The Claimant milked the parliamentary expenses system by buying a second (constituency) home with taxpayers' money and in due course selling it and making a large capital gain on the sale. In those circumstances, she had a moral obligation both to disclose this gain and to repay or all or some of it. But she did neither, choosing instead to conceal it for as long as she could. In consequence, when it was eventually discovered, she was forced to repay nearly £25,000 of it to the taxpayer.
>
> (2) In consequence, the Claimant's publicly stated opposition to proposed reforms, whose effect would be to prevent her from claiming expenses on her constituency home because it was within an hour (11 miles) of Westminster, could legitimately be regarded as insincere and hypocritical, being motivated not, as she had claimed, by concern that the reforms might discourage women from standing for Parliament and present a risk to the personal safety of women MPs, but by a desire not to lose the benefit of public funding for her constituency home.
>
> (3) The Claimant's conduct in both the foregoing respects was disreputable, underhanded and dishonourable, with the result that her criticism of the proposed reforms was apt, rightly, to provoke public anger."

6. The Defendant has raised pleas of both justification and fair comment. The matter now comes before me by reason of two applications. The Claimant seeks to persuade the court that both defences are bound to fail and that she should therefore have summary judgment under the CPR Part 24 jurisdiction. On the other hand, the Defendant argues that the defence of fair comment is bound to succeed and that it should have summary judgment accordingly. (It is suggested that any defamatory residue, outside the scope of fair comment, would not be "worth the candle", in the phrase adopted by the Court of Appeal in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946.)

7. Not surprisingly perhaps, when her solicitors first complained of the article, emphasis was placed on the allegation about being forced to repay £25,000. That is simply not true. The Defendant made a mistake, in that it was a different MP who had to repay that sum. That has been acknowledged in the newspaper. Later, it became more central to the Claimant's case that she was being accused, at least by implication, of hypocrisy. The Defendant appears ready to address this on the basis of its solicitor's witness statement of 7 September 2010:

> "Hypocrisy, in my understanding, is a false assumption of virtue, or the profession of a viewpoint or argument in which an individual does not sincerely believe. Providing the facts relied on would entitle an honest person to comment that such was the

> case in respect of the Claimant, I believe that would be sufficient."

8. It is, however, not easy to understand the Defendant's case on hypocrisy. There are possible arguments as to whether a charge of hypocrisy is factual in character or a matter of comment. It probably depends on context. But, either way, it is not clear to me how it could be said that in appending her name to the letter the Claimant had either made a "false assumption of virtue" or been prompted by a self-serving or other hidden motive. Mr Rampton QC, on her behalf, submits that one will look in vain through the newly re-amended defence to find any facts to support that charge.

9. It is important to note that not only would the Claimant be standing down before the next general election, but Recommendation 7 of the Kelly Report did not touch on her circumstances in any event. As early as July 2009, it had been decided that MPs with a constituency within 20 miles of Westminster would no longer be able to claim for the funding of a second home. Beckenham is well within that distance. The Claimant had voiced no criticism or complaint about *that* reform. What was proposed in Recommendation 7 was that this principle should extend to those constituencies within an hour's journey time of London, even though further than 20 miles away. I understand that this proposal would only affect about 12 parliamentary seats. Even if the Claimant had been standing in the 2010 election, it could have had no bearing on her circumstances.

10. I therefore see the force of Mr Rampton's argument that the factual substratum for hypocrisy is nowhere to be found.

11. As I recognised in paragraph [8] of my ruling on 25 March this year, it would be possible for people to disapprove of or criticise MPs who had "milked" the expenses system or had their "snouts in the trough" (as it was often put in media coverage), even though they were fully complying with the letter of the rules as operated under the prevailing system. The Defendant seeks in its re-amended defence to rely upon a number of aspects of the Claimant's expenses. Moreover, in the article itself, reference was made to her travel expenses. On the other hand, that is not what the article appears to be about. The suggestion was that the "ire" might legitimately be provoked by the Claimant's putting her name to the letter in *The Times*. Accordingly, Mr Rampton suggests that this is an example of a media defendant seeking to construct a defence in relation to a different article from that which was published. It is fair to say, however, that the Claimant's expenses were mentioned as part of the context so as to explain *why* her signing of the letter might provoke anger.

12. Mr Warby QC, for the Defendant, has submitted that, even assuming that the charge of hypocrisy is capable of being inferred by reasonable readers, it is by no means essential to the Defendant's case.

13. Even if the reference to the Claimant having to pay back £25,000 was wrong, and even though there is no basis for attributing an insincere motive to the Claimant in putting her name to the letter, he argues that there is still a possible defamatory meaning which the Defendant should be allowed to defend by way of fair comment. His case is that right-thinking members of the public would be fully entitled to feel angry at the Claimant (and, I assume, at the other signatories) purely because they should simply "shut up" and not hold forth at all on the subject of expenses. In

particular, people are entitled to be cross at their opposing or criticising *any* of the recommendations to be found in the Kelly Report. This may seem a little harsh. The question is, however, whether the article is capable of bearing that meaning and, if it is, whether there is a viable defence of fair comment in respect of it.

14. It is always to be remembered that the defence is available in respect of unreasonable, offensive and prejudiced viewpoints and that it is not necessary for a defendant to persuade a judge or jury to agree with them. All that is required, for a defence of fair comment to survive at this stage, is that the relevant opinion, comment or inference should be one it is possible to express honestly in the light of the facts. (That is why the defence tends increasingly to have the label "honest comment".)

15. Mr Rampton began his submissions by criticising a paragraph in Mr Warby's skeleton argument, in which he was attempting to summarise the Claimant's case:

> "C argues that nobody could honestly make the comment which D published, to the effect that C's conduct in respect of expenses might cause justifiable anger. She contends that no jury could possibly agree with D that C 'milked' the expenses system. She asks the court to rule that it is impossible to criticise her for publicly defending the continuation of generous expenses for MPs, when she had herself profited so much from the existing system."

Mr Rampton characterises this as a misrepresentation of her case.

16. Mr Rampton's criticisms of that passage can, I believe, be summarised as follows:

i) The *Evening Standard* article did not allege that justifiable anger might be caused in respect of the Claimant's "conduct in respect of expenses": what was said to give rise to potential "ire" was the fact that she had signed the letter in *The Times*.

ii) She was not being criticised "for publicly defending the continuation of generous expenses for MPs". She was rather being attacked for having pointed out the consequences of one, and one only, of the Kelly Report recommendations.

iii) She was not in the letter advocating the continuation of a "system" or indeed any part of the system from which she had herself "profited".

17. Mr Rampton went on to identify two legal principles said to be of particular relevance in support of his application. First, he cited *Gatley on Libel and Slander* (11th edn) at paragraph 12.14:

> "Facts upon which comment is based must be true.
>
> If the facts stated in the publication as a basis for comment are themselves defamatory, the defendant must plead justification or privilege in relation to them, and fair comment will be no defence. However, even if they are not defamatory they must,

> subject now to s.6 of the Defamation Act 1952 (and again putting aside cases of comment on facts stated on a privileged occasion) be shown to be true: a writer may not suggest or invent facts, or treat as true the untrue statements of fact made by others, and then comment on them on the assumption that they are true. If the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail. Comment based on matters of opinion only, which may or may not be true, equally affords no defence."

In the light of these principles, it seems clear at least that the Defendant cannot in this case rely upon the false statement, to the effect that the Claimant had been "forced" to pay back £25,000, in support of its plea of fair comment. That passage, as a defamatory allegation of fact, would have to be justified and, as Mr Warby obviously concedes, that is not possible – at least to the extent that she was not "forced" to pay anything back. It has long been recognised that "the comment must not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated": see *Joynt v Cycle Trade Co* [1904] 2 KB 292, 294, *per* Kennedy J, and *Hunt v Star Newspaper* [1908] 2 KB 309, 317, 320, CA.

18. On the other hand, Mr Rampton acknowledges (as do the learned editors of *Gatley* in the passage cited above) the relevance of s.6 of the Defamation Act 1952:

> "In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression 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."

Thus, on the facts of the present case, the inclusion of the false allegation about the £25,000 would not preclude the Defendant from succeeding in a defence of fair comment provided that the comment was "fair" in relation to the facts which were accurately stated.

19. Mr Rampton's second point of law was cited by reference to paragraph 13.39 in *Duncan & Neill on Defamation* (3rd edn):

> "It appears that, where a defendant has pleaded and proved true facts, a claimant may, by way of rebuttal, establish further facts which were in existence at the time of publication in order to argue that, when the full factual picture is taken into account, no hypothetical commentator could honestly have expressed the opinion which is the subject of the claim."

Once the whole picture is revealed, submits Mr Rampton, it can be seen by any honest commentator that it is simply not tenable to conclude that the Claimant's signing of the letter would or might provoke justifiable anger.

20. It is quite clear, as Mr Rampton emphasises, that the only opinion being expressed by the Claimant (and her co-signatories) is that Recommendation 7 of the Kelly Report, if implemented, might create physical risks for female members of Parliament and/or discourage some women from coming forward as parliamentary candidates. The provision only affects a limited number of seats and the removal of the right to claim expenses in respect of a second home in respect of constituencies more than 20 miles from Westminster could not possibly have affected her position – either in the past or, had she been standing again, in the future. Therefore, concludes Mr Rampton, there cannot have been any conceivable motive on the Claimant's part other than an altruistic or impartial one.

21. Mr Rampton accordingly criticises paragraph 12.1 of the re-amended defence, which purports to identify the comment made in the *Evening Standard*, for having "glossed" the true effect of Recommendation 7 of the Kelly Report. It is expressed in these terms:

> "By signing a letter to *The Times* attacking a key reform proposal of the Kelly Report which would ban second home expenses for MPs within an hour of Westminster the Claimant had exposed herself to legitimate criticism and/or behaved in a way which
>
> 12.1.1 was apt to provoke justified anger, and/or
>
> 12.1.2 could legitimately be regarded as hypocritical and not motivated by the concerns she had expressed for the safety of women MPs,
>
> having regard to her own exploitation of the parliamentary Expenses System which included milking the system, and was disreputable, or dishonourable, or morally wrong."

22. The nature of the "gloss" or misrepresentation of the effect of Recommendation 7 is obvious. The Claimant's constituency of Beckenham was indeed "within an hour of Westminster", but it has no relevance to Recommendation 7 which, as I have already explained, was concerned with only those constituencies that were beyond the 20 mile limit but still reachable from Westminster within the hour. The right to claim second home expenses within the 20 mile boundary had already been removed. Mr Rampton also made the subsidiary point that Recommendation 7 could hardly be described as "a key reform", since it would only affect potentially 12 parliamentary seats.

23. These criticisms of paragraph 12.1 are important, says Mr Rampton, because that is where the Defendant itself sets out the comment it is seeking to defend. On the facts it can be seen to be unsustainable. Yet it is clear that subparagraphs 12.1.1 and 12.1.2 are expressed as alternatives. The former contemplates, in accordance with Mr Warby's argument, the provocation of "justified anger" even without hypocrisy.

24. Mr Rampton also criticised paragraph 12.24, which makes the following rather jumbled allegations about the Claimant's endorsement of the *Times* letter:

> "The Claimant was thereby arguing against a key reform of a system which was widely seen as having been overly-generous to MPs, which had caused the crisis of public confidence and the public anger referred to above, and which had been examined and found wanting by the Kelly Committee. She was arguing for the retention, contrary to [the] committee's recommendations, of an extremely generous second home allowance system, from which she had benefited very substantially. She was also advancing that argument on the basis that without funding for a second home female MPs might have to take late trains to unmanned stations, when she herself had always travelled by car, and the removal of the second home allowance would not prevent any female MP from doing the same."

Again, Mr Rampton makes the point that the Claimant had not been arguing against reforming the "system". Nor was she arguing for the retention of the second home allowance "system". Furthermore, logically, the fact that she had driven home had nothing to do with the argument contained in the letter and provided no evidence of hypocrisy whatever.

25. There is a tendency perhaps to think in the light of the long media campaign last year that "anything goes" so far as MPs and expenses are concerned. So much has been published about them, both collectively and in relation to many individuals, that it is tempting to conclude that nothing could be actionable. Furthermore, Mr Warby submits that when confronted with invective against politicians, in general, the court should not follow too closely the traditional distinction, still acknowledged in Strasbourg, between fact and comment. It should rather be inclined to classify everything that falls within the category of such invective as comment – without looking too closely at what it actually means.

26. For the moment, however, it seems that there is much to be said for sticking to the rules rather than succumbing to the seductive notion that character assassination of politicians is fair game. I was reminded in argument of a passage from the 4th edition of *Gatley on Libel & Slander* (1953), to which attention was drawn in Canadian cases such as *Globe & Mail Ltd v Boland* [1960] SCR 203, 208-9 and *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130, and which helps to explain why the Canadians were resistant to extending qualified privilege to allegations about public office holders and candidates for election:

> "It would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility, and leave them open to others who have no respect for their reputation."

27. Contrary to Mr Warby's submission, the Court of Appeal in *Burstein v Associated Newspapers Ltd* [2007] 4 All ER 319 at [7]-[8] re-emphasised that the first step, logically, is to decide the meaning. "Where more than one meaning of words is in play in libel proceedings, it is necessary to know to which meaning any defence of fair comment is being alleged to apply": *per* Keene LJ.

28. The meanings relied upon here are the alternatives identified in paragraph 12.1 of the defence. Those seem to me to be comment, when read in context, rather than fact. The next question is whether either of them could honestly be made in the light of the facts. In this case specific reliance is placed on the available facts about the Claimant's expenses. It is pointed out that she made a capital gain on her Beckenham flat and, despite having had substantial contributions to her mortgage interest payments, she has not volunteered to make over any of the gain to the taxpayer (except, of course, through capital gains tax following disposal). It so happens that she was not "forced" to do so. While it is accepted that she is under no legal obligation to do this, the retention of the capital gain is nevertheless characterised as "milking" the system in an unacceptable (or "disreputable") way. This seems to me to be the real sting of the mistaken allegation of fact (i.e. being "forced" to pay back £25,000). It is not so much that the MP in question was forced to pay the money over – rather that the profit had been made with the taxpayers' help and not voluntarily disgorged.

29. It is further said that for a time she was overpaid in respect of mortgage payments between October 2003 and December 2006. This arose because she remortgaged at one point in such a way that her monthly contributions thereafter contained a larger proportion of capital repayments over interest. For this reason, she was entitled to correspondingly less by way of allowance. She did not spot the change at first and, when it was pointed out, she repaid the monies which by that time amounted to over £7,000 (although without interest on that debt). There is no suggestion that these overpayments were made other than by way of oversight. There is no allegation of dishonesty on the Claimant's part.

30. Attention is also drawn in detail to various furnishings and other household items at the constituency flat for which she had been reimbursed. There is no need to list them in this judgment but the sum involved was about £5,000.

31. Another line of attack in the defence is that she recovered large amounts of travelling expenses, mostly through permitted mileage allowances rather than rail fares. Much of it will have related to driving to and from her home in Rye. Of course, it is true that very few other salaried workers are reimbursed their travel costs between home and their regular place of employment, but that is how the system worked. Many people no doubt think it was ripe for change, but can it be said that her behaviour was "dishonourable, disreputable and morally wrong" in making the claims? Mr Warby says that many reasonable people consider the system, as it previously operated, morally indefensible and that no MP was compelled to take advantage of it. Those who did so cannot, therefore, be heard to complain if they are accused of feathering their nests at the taxpayers' expense.

32. Again, however, Mr Rampton comes back to his point that this was not what the article was primarily about. It did not make the comment that, on undisputed facts, her behaviour should be classified as dishonest or dishonourable or morally wrong. What they did was to criticise her for having signed the letter. *That*, it was claimed, could cause justifiable anger. Mr Rampton argues that it is difficult to see how – unless the implication is hypocrisy. Moreover, that seems to be a meaning which the Defendant is attempting to meet in the defence. Yet one cannot identify what her hidden agenda or non-altruistic motive is supposed to have been.

33. Since, as I ruled last March, "hypocrisy" is a defamatory meaning of which the words are capable, one might well think it should be left to a jury to rule at trial whether in fact they do bear that meaning. If it is upheld, then on the present pleading it seems to me that the Defendant would be unlikely to make good that specific charge. It might thus seem to follow that it cannot succeed in its submission that the defence is bound to be upheld. Its fate could depend on the meaning the words are ultimately held to bear.

34. Yet things cannot, in my view, be quite that simple. I need to consider whether the other pleaded meaning would have a better chance of success. Mr Warby seemed in argument to place most reliance on the alternative argument that people may well be angered by the Claimant's putting her signature to such a letter, not so much because of hypocrisy, but because MPs who had claimed expenses under the old system (i.e. virtually all of them) should slink away in shame and keep their mouths shut – at least in relation to proposals for reforming expenses.

35. Mr Warby likened this argument to the rather unfocussed mantra, so frequently chanted in the press last year, to the effect that "they just don't get it". It was never made quite clear what "it" was supposed to be. Nevertheless, the point was often made and interpreted to mean that politicians had not grasped how angry large sections of the populace had become over the generous expenses they had received, or how inappropriate it was now perceived to be for them to defend the old system; that they should just knuckle down and do what they were told by people such as Sir Thomas Legg (who had the unenviable task of going through all their expenses and recommending repayments where he thought appropriate) and Sir Christopher Kelly.

36. The factual basis for such a comment would not involve having to show that the Claimant had made claims of "virtue" or that she had a secret motive. It would simply consist of the bare fact that she had taken advantage of the expenses system (and, in particular, by making a capital gain on a subsidised constituency home and/or being reimbursed the cost of travel to and from her homes). It is said also that she received payments which fell foul even of the existing rules. These stipulated that one should only claim in respect of expenses incurred "wholly, exclusively and necessarily" in connection with parliamentary duties. That is the test members were required to satisfy by the 2006 Green Book ("Parliamentary salaries, allowances and pensions"). The scope of that classification is, no doubt, a matter for debate. People may take quite different views on the subject.

37. I see the force of Mr Rampton's submission that it would be unreasonable to be angry over the fact that the letter was sent, if taken in isolation, but that is not the point. Reasonableness is not the test. I do not believe I can hold that this viewpoint is one that no voter or taxpayer could honestly take – however prejudiced or unreasonable. "The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks as much as the reasonable man or woman who sits on a jury": *Silkin v Beaverbrook Newspapers* [1958] 1 WLR 743, 747. There has been over the last 18 months a widespread feeling of resentment and anger at the political class. Matters have to be judged against that background. The letter cannot thus be seen in isolation.

38. Mr Warby reminded me of what I said in the judgment last March at [8]-[9]:

> "In the light of all that has taken place over the past 12 months, it is in my judgment unreal to suggest that readers would not think the worse of a member of Parliament who had taken advantage of (or "milked") the expenses system simply because he or she had stayed within the letter of the law or of the rules. Everybody knows that some members of Parliament have been forced to "pay back" sums of money, either by party leaders or by media pressure, even though the payments had originally been made in accordance with the prevailing rules. That is because they are perceived now as having behaved disreputably.
>
> I have, therefore, come to the conclusion that the article is critical of the Claimant and that it is capable of bearing one or more defamatory meanings of her – although the overall message of the article is unclear and confusing."

39. Indeed, it was not just the general public who took this approach. Party leaders in the wake of the expenses "scandal" were effectively telling MPs to "shut up" on the subject and to take their medicine. Even though some suggested at the time that this may have been governed by electoral or public relations considerations, rather than by principle or natural justice, it illustrates how difficult it now is in this context to argue that no reasonable citizen could feel legitimate anger at the behaviour of their elected representatives. This is not, of course, specific to Mrs Lait. It would apply to each and every one of her co-signatories (as well as most other MPs). In the case of each MP, there will have been his or her own expenses claims, and they will no doubt differ considerably; yet the criticism is not based wholly on individual figures but largely upon the suggestion that, merely by taking advantage of the "overly-generous" system, they have forfeited the right to be heeded any longer on that topic.

40. For these reasons, a jury of 12 citizens, which would no doubt include voters and taxpayers, *could* (at the least) come to the conclusion that, notwithstanding the failure to establish hypocrisy, the rather ill-formulated observation about justifiable "ire" constitutes fair comment.

41. Since malice has not been pleaded, it follows that I cannot uphold the Claimant's application.

42. This leads to the rather awkward question of how the two alternative meanings pleaded by the Defendant relate to one another. If the only meaning relied upon was that the Claimant had been a hypocrite, it would be possible to rule that neither justification nor fair comment could succeed, since the necessary factual substratum is missing. On the other hand, a jury could come to the conclusion that the words bore the alternative defamatory meaning along the lines of Mr Warby's argument. This would be to the effect, as I have said, that people might be understandably angry to see the Claimant (and her co-signatories) holding forth about resisting Recommendation 7 because of having ("disreputably") taken advantage of the previous more generous system (or, to put it in tabloid speak, "having had her snout in the trough"). Moreover, this could be held in itself to fall within the margin of robust fair comment on a matter of undoubted public interest; that is to say, it is a view which *could* honestly be held (even though there was a factual error in relation to the

supposed £25,000 repayment). There is a particular importance to be attached to the defence of fair (or honest) comment in the context of public affairs and in relation to those who hold a public office or position of public trust: see e.g. *Gatley on Libel & Slander* (11th edn) at para 12.30.

43. One possible approach would be to leave it to the jury to decide if the words bore the meaning of hypocrisy or not. This seems to me to be unduly theoretical. It is not a case in which "hypocrisy" could be held to be the only defamatory meaning. If the jury came to the conclusion that the words did carry that imputation, this would not of itself entail success for the Claimant, since the alternative defamatory meaning would survive. The words do plainly mean that people might react with anger to her public pronouncement and, as I have indicated, that is a view which *could* honestly be held by some people in the light of her having taken advantage of the old system. Indeed, I would go further. I cannot see that a jury could realistically come to any other conclusion about that.

44. These circumstances do not fall within the terms of s.5 or s.6 of the Defamation Act 1952. The situation I am positing here is that the jury holds that one of the two pleaded defamatory comments ("hypocrisy") cannot be defended but the other can. There is no statutory provision to the effect that "a defence of fair comment shall not fail by reason only that the defence is not available for all the defamatory comments made in the words complained of, provided that the Claimant's reputation is not materially injured by those in respect of which the defence is not upheld, having regard to the meanings in respect of which the defence has succeeded". The matter has, therefore, to be approached as one of principle and practicality.

45. Would it be realistic to suppose that a jury would conclude that the defence of fair comment succeeds in relation to Mr Warby's alternative meaning but decide, nevertheless, that the Claimant should be compensated for an additional unsubstantiated implication of hypocrisy? It seems to me that the answer must be in the negative. In any case, it would make no sense for further time and large sums of money to be spent on resolving that theoretical point.

46. Judges have traditionally been wary about taking issues away from the jury, but a more robust approach was rather encouraged in *Burstein v Associated Newspapers Ltd*, cited above. It was there said, at [27], in relation to the opera which had been the subject of the comment in question, that " … it deals with matters upon which strong opinions could legitimately be held and, more to the point, upon which any jury would expect strong opinions to be held without any scintilla of dishonesty on the part of those who hold them". The same could be said of the article in the *Evening Standard* dealing, as it does, with the different but "hot" topic of parliamentary expenses and the reaction of MPs to one of the proposals for reform. The court went on to conclude, at [29]:

> "These matters are generally for a jury to decide, so long as it is properly open to them as a matter of law to decide one way or the other. But if this court is firmly of the view that only one answer is available to any reasonable jury and that the defence of fair comment must succeed, then it is the court's duty so to rule. Anything else would not be judicial self-restraint but an abdication of judicial responsibility."

47. Applying that test, I have come to the conclusion that the defence of fair comment is bound to succeed and I rule accordingly. Moreover, there is nothing left in the complaint about the factual error over the £25,000, since the defamatory sting is that the Claimant made a profit on the sale of her flat with the aid of subsidised mortgage payments but had not been willing to forego it. That remains available to the Defendant as a factual substratum, even though the Claimant was not "forced" to refund the taxpayer either by her party leader or anyone else. Those basic facts go to support the defamatory comment identified above. They would also be available to support a plea of justification if "milking the system" is to be treated as an allegation of fact. On that hypothesis, the Defendant would be able to rely on s.5 of the Defamation Act 1952. If the system was "milked", there would be no need to compensate the Claimant for the (inaccurate) allegation that she was required to make recompense.

48. If the matter had proceeded towards trial, it would have been necessary in accordance with the pilot scheme now in operation for the parties to take part in a costs budgeting exercise (as I indicated following the hearing last March). Since that will not now happen, subject to any appeal, this would fall by the way. If an appeal succeeds, the matter would have to be reconsidered.