Neutral Citation Number: [2005] EWHC 1162 (QB)

Case No: HQ04X03063

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2005

**Before** :

**THE HON. MR JUSTICE EADY**

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**Between :**

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|---|---|
| **Gillian McKeith** | **Claimant** |
| **- and -** | |
| **News Group Newspapers Ltd** | **Defendant** |

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**Desmond Browne QC and David Sherborne** (instructed by **Campbell Hooper**) for the Claimant
**Joanne Cash** (instructed by **Farrer & Co**) for the Defendant

Hearing dates: 6th and 11th May 2005

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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 HON. MR JUSTICE EADY

**Mr Justice Eady :**

1. This application raises issues very similar to those in *US Tobacco v BBC* [1998] EMLR 816 and *Cruise v Express Newspapers plc* [1999] QB 931, although in the very different climatic conditions brought about by the more rigorous case management regime of the CPR.

2. In 1988 when *US Tobacco* was actually decided, it may have seemed odd that a defendant should be prevented from pleading justification in respect of a defamatory meaning which the words complained of were capable of bearing: see e.g. *Waters v Sunday Pictorial Newspapers Ltd* [1961] 1 WLR 967 (where Willmer LJ stated that particulars could not be struck out unless they "can be no answer to *any conceivable meaning* which a jury might find"). It was an approach which also lay at odds with the principle that a claimant was entitled at trial to rely on a presumption that defamatory words are false unless and until the defendant has pleaded and proved them to be true. How were the jury to approach defamatory allegations which the defendant had not been permitted to justify? Should they treat them as false or simply try to ignore them? That presented certain practical problems, which did not have to be faced in *US Tobacco* itself because the claim was not pressed to trial.

3. In the light of the principles expounded in *Polly Peck v Trelford* [1986] QB 1000, a claimant would be entitled to select one or more defamatory meanings for complaint and leave others out of contention, even though the defendant might be willing and able to justify them. It was necessary, however, for it to be demonstrated that such meanings were "separate and distinct". If the several defamatory allegations had a common sting, then the defendant would be entitled to justify that sting. One way of explaining that principle is that the truth of the common sting would be relevant to the "real issue" between the parties.

4. Now the court has even greater flexibility in order to achieve the objectives underlying the CPR. Even matters which would be strictly relevant and admissible can be excluded in the interests of proportionality. The facts in the present case are comparable to those in *US Tobacco*. In that case, the BBC had broadcast allegations to the effect that the plaintiff corporation had breached its agreement with the Department of Health not to market a product called Skoal Bandits to young people. That is because they were potentially carcinogenic. The pleading set out large parts of the transcript which included the more general allegation that, irrespective of the agreement, the product did indeed pose a risk to health. Whereas the breach of agreement was readily justiciable on a manageable basis, the wider charges could range over vast areas of contested expert opinion from a multiplicity of disciplines – at huge cost to the parties and involving a correspondingly large allocation of court resources. The court ruled that the BBC should only be permitted to justify the breach of agreement and not to embark upon the time-consuming and expensive scientific issues.

5. To try and avoid injustice to the BBC, US Tobacco was encouraged to make admissions to the general effect that many experts were of the opinion that the products were damaging to health. This is not entirely logical, since if health risks were not an issue in the case, what would be the point of the admissions? It was nevertheless perceived as an expedient way of cutting the Gordian knot – what would nowadays be described as "novel and imaginative case management" to prevent a

libel action getting out of hand: cf. *GKR Karate v Yorkshire Post (No. 1)* [2000] EMLR 396, 404, *per* May LJ.

6. Since, as I have said, the circumstances are comparable to those in *US Tobacco*, the steps which the Claimant now invites the court to take are less novel and therefore require less imagination. Dr Gillian McKeith sues News Group Newspapers Ltd over an article published in *The Sun* on 3rd August 2004 under the heading "DR? NO - TV You Are What You Eat expert Gillian has dodgy nutrition degree … via post from a small US college".

7. The article itself is in these terms:

> "**Television health expert Gillian McKeith is today accused of exaggerating her professional qualifications and misleading the public.**
>
> The 45-year-old host of hit diet show You Are What You Eat uses the title *Doctor* Gillian McKeith and describes herself as the 'world's top nutritionist'.
>
> But The Sun can reveal she has **NO** medical background. She holds a 'worthless' PhD in holistic nutrition gained via a postal course at a backwater US college.
>
> Last night Channel 4 chiefs stood by McKeith, *top right*, who has earned a fortune advising stars like Demi Moore and selling health products. Her book from the series is a No1 bestseller.
>
> But as they vowed to continue with a second series, health experts dismissed her theories and warned her 'advice' could put fans at risk.
>
> **Rubbish**
>
> Dr Edzard Ernst, professor of complimentary (*sic*) medicine at Exeter University, blasted McKeith – often seen 'examining' patients and performing medical procedures like colonic irrigation. He said: 'In the show I saw there was a total lack of real medical issues. Her theories on food-combining are perfect rubbish.'
>
> Amanda Wynne, senior dietician at the British Dietetic Association said: 'We're concerned. Some of the things she says just aren't true.'
>
> Management for Scots-born McKeith, who lives in Hampstead, North London, claim she has a PhD and MSc from the American College of Nutrition, among other qualifications.
>
> In fact, her primary nutrition-based PhD is from Alabama's Clayton College of Natural Health. A spokesman admitted: 'This PhD is not comparable to those from other colleges'.

> However, the General Medical Council said **ANYONE** with a PhD can call themselves a doctor – because the title is not protected.
>
> McKeith last night said her management team had supplied an incorrect list of qualifications. She said: 'I think I know who sent this. There was a Spanish guy on work assignment over summer, it must have been him'. She expressed surprise that anyone thought she was a medical doctor, adding: 'I've never claimed to be'.
>
> **Doctorate?**
> **Yes**
>
> **DEGREES in a variety of subjects – including those in which McKeith was said to have qualified – can easily be bought on the internet. An MSc in Nutrition from top US college Belford University costs less than £250.**

"

8. The Claimant pleads that the words convey the following meanings:

> " … that [she] is a charlatan since she dishonestly claimed to have a genuine nutritionist degree from a respectable American college, when in truth she has only a highly dubious and inferior nutritional degree that she simply purchased off-the-shelf by post from a worthless US college, and has thereby made a fortune by deliberately deceiving the general public in this way".

9. It is fair to say that the initial letter from the Claimant's solicitors, dated 17th August 2004, also focussed on what has been called, by way of shorthand, "the deceitful doctorate allegation".

10. The case was argued by Mr Desmond Browne QC for the Claimant, who submitted that the real issue between the parties is whether his client has made bogus claims and deliberately misled the public *about her qualifications*. Taking his cue from the Court of Appeal in *US Tobacco*, he is quite prepared to make admissions to the effect that many experts in the field "disagree with her advice" and that there is "room for debate in relation to nutritional issues". He argues that there is no point in turning the libel action into a quasi-public inquiry about the merits of various schools of thought on such matters. Libel actions "… should not descend into uncontrolled and wide-ranging investigations akin to public inquiries, where that is not necessary to determine the real issues between the parties" : see e.g. *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775, 791, *per* May LJ.

11. Mr Browne founds his submissions on two alternative bases. First, there is no "common sting" of the kind contemplated in *Polly Peck v Trelford*. The Defendant originally pleaded four *Lucas-Box* meanings; namely, that the Claimant has misled the public by:

    i) misrepresenting and exaggerating her qualifications,

    ii) performing the diagnosis and treatment of individuals which she is not qualified to do,

    iii) recommending self-diagnosis and self-treatment by individuals at home,

    iv) making claims about food and nutrition which have no scientific or medical basis.

    Mr Browne submits that the first two of these meanings are severable and distinct. First, they both relate to the Claimant's qualifications and, secondly, on one interpretation they concern allegedly dishonest misrepresentations. By contrast, the third and fourth paragraphs are concerned, in a general and unlimited way, with the merits of her nutritional advice. It is not pleaded even by implication that she has been dishonest in those respects.

12. He argues that the "real issue" between the parties is, or should be, whether the Defendant can prove that she is a charlatan in making false claims as to her qualifications. The action should not be tied up with a wide-ranging debate on different schools of thought about nutrition.

13. Alternatively, even if the court were to take the view that there was a common sting, Mr Browne submits that sensible case management requires that the action should be confined to the "deceitful doctorate" allegation. It would not be necessary or proportionate to achieving a just result to go into the more general debate.

14. That is the general nature of his criticisms of the defence of justification. More specifically, what he sought to do was to strike out the third and fourth *Lucas-Box* meanings. By the time of the hearing, it was actually conceded that the third one should go and the debate was therefore confined to the fourth.

15. The next stage is that, correspondingly, certain of the particulars of justification should be jettisoned by a parity of reasoning. Those are to be found in paragraphs 7(r) and 7(s) of the defence:

> "r. The Press Pack for the Channel 4 series of '*You Are What You Eat*', states '… Through a series of sometimes shocking tests YOU ARE WHAT YOU EAT will reveal exactly how a poor diet and obesity lead to health problems, and give practical advice on changing a lifetime of bad habits …'
>
> s. The Claimant advocates and encourages reliance on her theories and advice, some of which are at the very least questionable and some of which scientifically discredited.

Some of her advice and products which are unsafe and unreliable include the following (the Defendant reserves the right to rely on any other procedures, statements or products of the Claimant which may be raised by expert witnesses in the course of this action): -

i. The assertion that foods of the same colour have similar vibrational energies and similar nutrient content.

ii. The assertion that dairy products are toxic and should be avoided.

iii. The claim that each area of the tongue correlates to a different organ.

iv. The recommendation that people assess their health and adjust their diets based on self-assessment of their tongues and faeces.

v. The recommendation and routine use of colonic irrigation.

vi. The elimination of whole food groups from the diet of some people.

vii. The advice that it is necessary to 'food combine' to prevent the destruction of digestive enzymes, attain complete digestion and ensure nutrient uptake.

viii. The diagnosis of enzyme deficiency without specific scientific tests.

ix. The promotion of Living Food Energy Powder retailing at £19.95 in the absence of proper diagnosis of enzyme deficiency.

x. The promotion of the ineffective 'Living Food Love Bar' which lists as one of its ingredients 'unconditional love and light'.

xi. The provision of allergy diagnosis by post.

xii. False claims about the nutritional content and effects of certain foods, for example: -

a. Parsley is a good source of vitamin B12. It contains none.

b. Grapes are high in magnesium. They are not.

> c. Berries are high in manganese. They are not.
>
> d. Cabbage is a good source of vitamin E. It is not.
>
> e. Cow's milk is high in fat. It is not.
>
> f. The claim that eating large amounts of meat inflames the stomach lining. "

16. I regard both Mr Browne's principal arguments as valid. There is no common sting. The only implicit allegation of dishonesty relates to the qualifications and is reflected in the first two *Lucas-Box* meanings. A reasonable construction of the defence would be that the pleader was intending to accuse the Claimant of being a charlatan in those respects. Miss Cash, appearing for the Defendant, was prepared to recognise what she described as defects in wording as to the third and fourth meanings, although she did not spell out what they were. Yet the problem seems to me to go to substance rather than merely formulation. No revised draft was placed before me at the first hearing, and I thought that I should accordingly deal with the pleading as it stood in the form to which the criticisms were directed. On that basis, the Defendant should be permitted to justify the allegation about "bogus" qualifications, if it can, and introduce evidence in support of the relevant particulars of justification. But a wide-ranging inquiry into the validity of her "theories and advice" should not be allowed. Moreover, it would not be necessary or proportionate to permit such an inquiry for the purpose of resolving the "real issue" and should be precluded on case management grounds in any event. This is in the particular context of a case in which the Claimant is complaining of allegations of dishonesty or "charlatanism" (about qualifications) and the Defendant's pleading alleges dishonesty (if at all) only in relation to qualifications.

17. For the purpose of defining what is the "real issue", one is not confined to that which is pleaded. It is necessary to stand back from the formulation of the case by the parties' counsel and to take a broad and non-technical approach. That would plainly follow from such cases as *Polly Peck* and *Rechem International Ltd v Express Newspapers, The Times,* 18th June 1992. In that case Neill LJ referred to the need to reduce the "expense and complexity" of libel actions and stated that:

> "A balance has to be struck between the legitimate defence of free speech and free comment on the one hand and on the other hand the costs which may be involved if every peripheral issue is examined and debated at the trial".

What is or is not "peripheral" must be judged objectively, on the facts of the individual case, having regard to both of those considerations.

18. It is of some interest, in this context, to note how the complaint was addressed on the Defendant's behalf in correspondence. There was no pursuit of the arguments about the Claimant's "theories and advice".

19. Moreover, this is consistent with the Defendant's follow up coverage in an article in *The Sun* on 4th August 2004. It too focussed on the subject of "bogus" qualifications. I

have not lost sight of the rule which requires me to exclude the content of the second article when construing the first. I am referring to the 4th August article solely for the purpose of showing what the Defendant clearly thought at the time was the real focus of its attack on the Claimant. This is further borne out by the fact that, when contact was made with the Claimant prior to publication, she was only asked about her qualifications. There was no discussion about the validity or otherwise of her nutritional and health recommendations. That must be relevant to a practical assessment of the "real issue" between the parties.

20. It is important to remember, if there is to be a jury trial, that the jurors will see the whole article. They will also be told of the admissions (the precise terms of which may yet be open for debate) to the effect that there is controversy among experts and that some consider the Claimant's advice to be without foundation and/or "rubbish". They will no doubt be told by the trial judge that they are not concerned with, still less called upon to decide, the merits of those expert arguments.

21. Against this background, the Claimant is entitled to confine the dispute to whether she has made false claims as to her qualifications. That is an important and serious charge. She should not be saddled with having also to enter into an expensive open-ended inquiry about the merits of various nutritional theories. I apprehend that if the Defendant's allegations in the newspaper had been addressed solely to those the Claimant would not be litigating on the subject. If such an inquiry were permitted, the wealthy Defendant with all its resources will be placed in a position of unacceptable tactical and financial advantage over an individual litigant. In any event, these scientific issues may not all be capable of a definitive resolution through the judicial process. I was therefore disposed at the end of the hearing to accede to Mr Browne's applications.

22. After the hearing Ms Cash proposed some other wording to try and save the fourth *Lucas-Box* meaning. She sent it in the form of a letter to the court with a copy to Mr Browne. To the introductory rubric she sought to add the word "knowingly", so that it was intended to apply to all the three surviving *Lucas-Box* meanings. That presented no problems so far as the first two were concerned because I (if not Mr Browne) had proceeded on the basis that a charge of dishonesty was at least implicit. That was indeed one of the factors which had from the outset rendered meanings (1) and (2) distinct from the other two. The difficulty is over what had been the fourth meaning (now becoming the third). This would now read as follows:

> "The Claimant has knowingly misled the public by: … (3) making claims about food and nutrition which have no scientific or medical basis and which she is not qualified to make."

23. Mr Browne felt that this raised a new case on which he had not so far addressed the court, and he wished to have the opportunity. He was plainly entitled to do so, and we therefore re-assembled on 11th May for further submissions.

24. I find the new formulation confusing. There are two aspects to it. First, it seems to be suggested that the Claimant made claims about food and nutrition which were not only objectively false but also known by her at the time she made them to be false (i.e. as having "no scientific or medical basis"). That was never alleged prior to 9th

May, whether expressly or impliedly. Secondly, it would appear that she is also being accused of pretending to have whatever (unspecified) qualifications may be required for the making of claims about food and/or nutrition. In virtually every newspaper or "lifestyle" magazine one picks up someone is making claims about food. I am not clear what qualifications are said to be necessary for that purpose – still less what it is that the Claimant *knew* to be false. Moreover, there is a distinct lack of pleaded facts from which that knowledge is to be inferred.

25. This amendment is clearly introduced to provide a hook on which to hang the wide-ranging investigation into rival theories about food and nutrition. Having introduced it, what would then be proposed is to assert, like a cherry on the top, the proposition "… and, what is more, that Claimant knew at the time(s) she made her claims that there was no scientific or medical basis for them".

26. This is plainly unsatisfactory. Although it was suggested by Ms Cash that it was just a question of wording and that no different plea was being put forward, I accept Mr Browne's submission that there has been a change of substance. If it had truly been intended earlier to accuse the Claimant of dishonesty in respect of her theories and nutritional advice, it would surely have been spelt out as such a serious accusation requires. Even on the first day of the hearing this was not made express. All Ms Cash said on that occasion was that the Defendant was alleging that she had "misled" the public. It is, of course, elementary that a person can mislead innocently or negligently or dishonestly. If such an allegation is to be made in a plea of justification, it behoves the pleader to identify whether a culpable state of mind is said to be applicable to the instant case.

27. Moreover, if there is to be an allegation that misleading statements or representations had been made dishonestly, it would be necessary to set out the facts from which that state of mind is to be inferred. What clearly determines the question of whether this charge of dishonesty represents a substantive change, if there were any doubt about it, is that no such facts were pleaded to put Mr Browne on notice that his client was supposed to be facing an allegation of dishonesty in relation to her nutritional recommendations. What is more, none have been added *even now*. That tends to confirm that the introduction of dishonesty on 9th May was a matter of tactics rather than a change of substance based on new information. Partly, no doubt, the purpose was to bring the third *Lucas-Box* meaning into line with the first two, so that it could no longer be said that it was severable and distinct. If it could (legitimately) be framed in such a way as (a) to include a charge of dishonesty and (b) to bring in the subject of qualifications, then it might be easier to assert forensically a "common sting" within the meaning of *Polly Peck* and thus avoid an order in the *US Tobacco* mould.

28. As I have already indicated, not only do the existing particulars not sustain the introduction of dishonesty into the third *Lucas-Box* meaning; they do not legitimise the introduction of qualifications in that context either. There is no indication what qualifications the Claimant should have had before carrying out any one or more of her activities, or why. Nor do they support the proposition that she *knew* she lacked a necessary qualification. I propose therefore to disallow the third meaning in either form. The proposed amendment does not retrieve the position.

29. I must next address the defence of qualified privilege. The proposed amendment also has implications for this defence, which I must shortly address, but in any event Mr

Browne submits that it has no real prospect of success in accordance with the test applicable under CPR Part 24.

30. Potential problems arise in a case where the court is invited to narrow the issues in the light of the principles applied in *US Tobacco* and there is also a plea of *Reynolds* privilege. So far as I am aware, this particular difficulty has not been considered hitherto. It seems to be clear from *Bonnick v Morris* [2003] 1 AC 300 that the "single meaning doctrine" does not apply when this form of privilege is relied upon. Where the court is inclined to permit a plea of justification only with regard to one of the meanings which the words are capable of bearing, what is to happen so far as the defence of privilege is concerned? Counsel did not address me on this specific question.

31. In judging issues of privilege, such as whether there was a social or moral duty to publish, or whether the public had an entitlement to receive the information about the claimant irrespective of its truth or falsity, it would hardly be fair to the relevant defendant to apply a blue pencil in the way the Court of Appeal permitted, in the context of justification, in *US Tobacco*. To take the facts now before the court, if I accede to Mr Browne's submission on justification, it would not seem to be right to ignore the journalists' belief (if such it was) as to the deficiencies of the Claimant's nutritional advice and theories when it comes to assessing *Reynolds* privilege and applying Lord Nicholls' listed criteria. There is no doubt that the article complained of is capable of bearing the wider meaning as well as the suggestion that false claims have been made about the Claimant's academic qualifications. It is said, for example, that some of her theories are "perfect rubbish". In such circumstances, the Claimant can no doubt choose to limit her claim to one of the meanings, provided it is truly severable, and the court will permit this for reasons of case management, but I doubt whether it can be right to circumscribe the grounds the Defendant may rely upon for *Reynolds* privilege. That is not an exercise to be properly characterised as case management; moreover, it concerns an important aspect of the Defendant's Article 10 rights.

32. The question next arises whether the inability to limit the inquiry for privilege purposes necessarily means that the *US Tobacco* case management option is closed off for justification too. Probably not as a matter of logic, but there *could* be difficulties in shutting out the expert nutrition evidence for justification purposes while, at the same time, permitting evidence to be led as to the relevant journalists' beliefs about those matters and whether or not such beliefs were reasonable. It may be possible to solve this apparent dilemma by admitting the subjective beliefs, and evidence as to their reasonableness in the light of the information available to the journalists prior to publication, *without* admitting expert evidence as to their objective validity - unless this was taken into account prior to that point.

33. I have come to the conclusion that the particular rules and difficulties of *Reynolds* privilege do not inevitably mean that the court is prevented from narrowing issues and bringing case management generally to bear for an alternative plea of justification. Each case has to be assessed on its own facts. I see no reason not to implement a *US Tobacco* solution in that context, if it would otherwise make sense for sound case management reasons, purely because there is also pleaded a *Reynolds* privilege defence. For that purpose, however, such questions as to whether there was a duty to publish, and a right on the part of readers to be informed, need to be assessed in the

light of the words complained of as a whole, rather than artificially confining the court's attention to one particular meaning. It is with this in mind that I should make the preliminary judgment as to whether the defence has a realistic prospect of success in the circumstances of this case.

34. It seems that I should ask the question whether, if the facts pleaded in support of privilege are taken to be correct, the privilege defence has a realistic prospect of success. It is because the court proceeds on those factual assumptions that the exercise will not involve any trespass upon the jury's functions. This general approach must be subject to the qualification that factual assumptions do not need to be made, indeed should not be made, in respect of any pleaded assertions that have been convincingly demonstrated to be unfounded. Where there remains, on the other hand, a genuine dispute of fact, it will be left to the jury to resolve.

35. Having addressed these general points of principle, I now need to focus on the specific plea of privilege in this defence and the question of whether it can survive.

36. The first point taken is that the formulation of this defence, which is based on *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, fails to make clear what was the state of knowledge of the relevant journalists (Mr Kennedy and Ms Symons) at the time of publication. A defendant is not permitted to pray in aid, for the purposes of such a plea, information which only came to his or her attention subsequent to publication. All of Lord Nicholls' ten non-exhaustive criteria are predicated upon that assumption: see also *Loutchansky v Times Newspapers Ltd (No. 1)* [2002] QB 783 at [41] and [85].

37. Mr Browne also submitted that the plea was "fundamentally flawed", in the light of the fact that this is not a defence based upon the notion of *reportage*, because it does not identify the nature of the subjective belief of the relevant journalists in the truth of what was published about the Claimant. Mr Browne argues that this is now a requirement for such a pleading in the light of certain passages in the Court of Appeal judgment in *Jameel v Wall Street Journal Europe (No.2)* [2005] EWCA Civ 74. Particular passages drawn to my attention were as follows:

> "29. These statements suggest that it may be necessary or at least admissible for a defendant to allege and prove subjective belief in order to establish a defence of *Reynolds* privilege. …
>
> 31. It is important that the pleadings should make clear where a defendant is relying on reasonable belief in the truth of matters published, or their implications, and where he is not. It is also important that the claimant should make clear whether or not he denies that the belief was held, or whether he contends that the belief was not reasonable. …"

38. More clearly targeted pleadings in these respects would, apart from anything else, assist the parties in identifying individual issues of fact requiring an answer from the jury. It became apparent in *Jameel* itself and in *Galloway v Telegraph Group* [2005] EMLR 7 how difficult, albeit important, it is to pinpoint all the factual assertions (sometimes inevitably numerous) which require to be individually addressed by the jury in order for the judge to be able to tick off Lord Nicholls' criteria.

39. In fairness to the pleader, it should be made clear that this guidance from the Court of Appeal was not available at the time the defence was originally drafted in November 2004, since the judgment was only handed down on 3rd February 2005. Nevertheless, there seems to be force in the submission that a defendant's advisers need to comply with these disciplines in order to set up a defence of *Reynolds* privilege, the pleading of which can so often descend into woolly generalities.

40. More specifically, Mr Browne argues that the defence fails in three respects:

    i) not making clear whether the Defendant is relying upon anyone's "reasonable belief" in the truth of the defamatory allegations;

    ii) not identifying the shade of defamatory meaning which was believed to be true (e.g. is it the Defendant's case that there was a reasonable belief that the Claimant had *knowingly* misled the public and, if so, in what respects?);

    iii) the factual basis, if any, supporting the reasonableness of the relevant belief on the part of the journalists.

41. Moreover, the judgment in *Jameel* was available by the time the amendment was formulated for the first time on 9th May. Yet it was still put forward as a pure matter of pleading without taking the opportunity to introduce any statement as to whether the new allegations of dishonesty corresponded to any belief on the part of the journalists prior to publication. In other words, these statements of principle in *Jameel* were not taken on board.

42. Mr Browne then went on to make a number of miscellaneous points.

43. He criticised sub-paragraph (x), which included the sentence "Indeed shortly after the article complained of [the Claimant] published an article in *London Metro* Newspaper". It is obviously not permitted, for the purposes of *Reynolds* privilege, to rely upon matters occurring after publication.

44. In paragraph (xi) it was said that there "… *continue to be* serious concerns about the Claimant's training, qualifications and experience and her representation of them". Again, clearly it cannot be right to refer to "serious concerns" after the date of publication. There may be questions about the appropriateness of pleading the vague formula "serious concerns" even prior to publication, but it certainly cannot be right to refer to such "concerns" thereafter. Mr Browne suggests that this was merely a device to introduce, in the same sub-paragraph, the whole of the particulars of justification. It is simply asserted that "Paragraph 7 above is repeated". This is hardly a satisfactory approach to pleading qualified privilege. Mr Browne reminded me of some words in *Armstrong v Times Newspapers* [2004] EWHC 2928 at [94], where it was said that it was "… a somewhat sloppy approach to use this cross-over technique as though particulars of justification were simply interchangeable with a case on *Reynolds* privilege". That would, in general terms, seem to be correct.

45. He also took issue with sub-paragraph (xii), which is in these terms: "The Claimant is listed as a nutritionist to be avoided on a respected US website called *QuackWatch*". Mr Browne took the point that it was not pleaded that the Claimant was so listed *at the time of publication*, still less that the relevant journalists knew it at the material

time. I would go further, since appearing on *QuackWatch* in itself proves nothing. Something at least ought to be pleaded as to the supposed significance of this website and of appearing on it. To understand the nature of the allegations, one requires further information.

46. He also drew attention to sub-paragraph (xiv), which relates to a complaint to Channel 4 by the British Dietetic Association about the possibility that viewers of "You Are What You Eat" might have been misled into believing that the Claimant was a "real doctor". In particular, no date is given for the alleged complaint.

47. Next there was a criticism of sub-paragraph (xvi):

> "The safety of some of the advice and information imparted by the Claimant to the public at large was and remains of real concern. Some of the Claimant's advice and products which are unsafe and unreliable include the following … [there then follows a list of claims or recommendations (a)-(m)]".

Mr Browne complains that this simply provides an excuse to repeat verbatim 12 paragraphs contained in paragraph 7(s) of the particulars of justification. There is no suggestion that these were matters known to either of the relevant journalists at the material time. Jane Symons stated in evidence that "… it is difficult to be precise about exactly when I was aware of each of the examples listed in the sub-paragraph". Once again, the use of the present tense in the pleading is inappropriate. In any event, none of these topics was put to the Claimant prior to publication.

48. It is probably sensible to go through each of Lord Nicholls' ten non-exhaustive criteria, in order to see how this plea measures up:

i) Obviously the allegation of misleading the public was serious.

ii) The subject matter of the allegations was a matter of public concern, because the Claimant was making representations in relation to nutrition and health via television broadcasts and published works.

iii) As to sources, this point does not appear to have much relevance in the present case because the article purports to be the product of the Defendant's own investigations.

iv) It seems from the evidence that some steps were taken to verify the information, both as to the Claimant's qualifications and as to the validity of the Claimant's nutritional theories and advice.

v) There is no question of the "deceitful doctorate allegation" or the nutritional theories having been the subject of any investigation or findings on the part of "an investigation which commands respect".

vi) There was no urgency, submitted Mr Browne, from the point of view of the public, requiring these allegations to be published forthwith and without a proper opportunity to inquire into and verify them.

vii) No comment was sought from the Claimant in relation to her nutritional theories or advice. As the Defendant's solicitor, Mr Pike, put it in his witness statement: "It is not disputed … that the specific allegations contained in this article in so far as they relate to the Claimant's advice were not put to her prior to publication". Nor indeed was it put to her that her qualifications were "worthless".

viii) The article inevitably did not contain, therefore, the gist of the Claimant's side of the story in relation either to her nutritional theories and advice or to the "worthlessness" of her doctorate.

ix) As to the "tone of the article", Mr Browne submitted that it was "stridently sensational and emotive". There was no question of neutral or impartial *reportage*, but rather the Defendant chose to make outright assertions. This was so not only in relation to the "deceitful doctorate allegation" but also, by virtue of the comments of Doctor Ernst and Ms Wynne, the nutritional theories.

x) Mr Browne drew attention to the timing of the publication, in the context of the Claimant's relationship with Channel Four and the prospect of a second series of "You Are What You Eat". It was from her point of view critical.

49. The approach to be applied to striking out pleas of *Reynolds* privilege was considered in *Miller v Associated Newspapers Ltd* [2004] EMLR 33. I propose to adopt a similar course. I should not attempt to conduct a mini-trial by trying to resolve genuinely disputed questions of fact. I should ask whether the defence, as pleaded, has a realistic chance of success rather than one which is merely fanciful.

50. Where there is, as here, a right to jury trial, it would not be appropriate to deprive the parties of a jury decision if the defence in question may depend, at least in part, on a finding of fact which would be properly open to that tribunal: see e.g. *Wallis v Valentine* [2003] EMLR 8 at [13] and *Branson v Bower* [2002] 2 QB 737, 744. If the judge thinks that a particular factual conclusion is somewhat far-fetched, it is the jury's credulity rather than the judge's that needs to be kept in mind: see e.g. *Spencer v Sillitoe* [2003] EMLR 10 at [31]. Having said that, I must also remember the particular problems of dealing with *Reynolds* privilege in a case to be tried by jury and, in particular, the extent to which it is necessary to identify the matters believed by the journalist(s) to be true and, in turn, the reasonableness of those beliefs: see e.g. *Jameel v Wall Street Journal (No. 2)* [2005] EWCA Civ 74 at [28]-[31].

51. In a *Reynolds* case, at the pre-trial stage, it is necessary to bear in mind not only the scope for dispute on questions of fact but also the ultimate question, to be answered by the judge rather than the jury, whether the pleaded facts would give rise to a social or moral duty to publish the defamatory allegation about the Claimant; or whether, to put it another way, the public would have a right to read those allegations irrespective of their truth or falsity: see e.g. *Loutchansky v Times Newspapers Ltd (Nos. 2-5)* [2002] QB 783, 809, at [41(iii)]. In carrying out the exercise at this pre-trial stage I should make all factual assumptions in the Defendant's favour: see e.g. *Gilbert v MGN Ltd* [2000] EMLR 680. If the facts pleaded here are taken as true, are the relevant criteria fulfilled?

52. I turn to the particulars pleaded in support of qualified privilege. It is fair to say that sub-paragraphs (i)-(x) merely attempt to set the scene. They do little more than set out the uncontroversial background that the Claimant regularly communicates her ideas on nutrition to the general public via television programmes and written words.

53. Sub-paragraph (xi) refers to "serious concerns about the Claimant's training, qualifications and experience". It then repeats wholesale paragraph 7 of the defence. That begins by incorporating s.5 of the Defamation Act, which plainly has nothing to do with qualified privilege. It then simply consists of the particulars of justification numbered (a)-(s). I mentioned earlier that this cross-over technique is unacceptable. The reason why is fairly obvious. Apart from questions of relevance, particulars of justification serve a different purpose and are governed by different rules. For example, one can often legitimately plead facts subsequent to publication in support of a plea of justification (in particular, to justify a defamatory allegation about general character traits); also, facts relied upon to support a plea of *Reynolds* privilege need to have been known to the relevant defendant or journalist prior to publication – which is not the case with a plea of justification. Pleaders need to be scrupulously careful not to muddle the two.

54. The question always to be borne in mind is whether the Defendant was under a duty, at the material time, to publish the words complained of by reason of the pleaded facts. In formulating the test in this way, I naturally have in mind the words of Lord Cooke in *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 300. He there made the point that what *Reynolds* had established was that the "classic interest/duty test" is adaptable to a great variety of circumstances.

55. It is argued for the Defendant that the public interest is central to the defence of qualified privilege and that "public health is a recognised exception to Articles 8 and 10 of the Human Rights Act (*sic*)". It is also said that "it has long been a recognised category of public interest which may justify breach of confidence". I naturally recognise that a social or moral duty *may* arise to communicate to the general public, irrespective of their truth or falsity, allegations intended to prevent the spread of disease or reduce a widespread risk to public health: see e.g. *Blackshaw v Lord* [1984] QB 1, 27A. I acknowledge too that such a duty could well arise in circumstances going beyond the narrow examples given by Stephenson LJ in that passage. That is a far cry, however, from accepting that one may publish anything under the cloak of privilege provided only that it is relevant to public health or that the subject-matter is of interest to the public in general terms. The question needs always to be more focussed.

56. In the present case, I need to ask whether there was a social or moral duty (or, alternatively, whether it was in the public interest) for *The Sun* on 3rd August 2004 to communicate to the world at large that, for example, the Claimant "… has a dodgy nutrition degree … via post from a small US college" or that a degree in her subjects "can easily be bought on the internet".

57. In this context, Mr Browne points out that it is clear from the first draft of the article that the journalists actually knew that the Claimant had put in two years of work to obtain the degree. It contains the words of Suzie Hale, a spokesperson from Clayton College, to the effect that "Gillian McKeith's PhD probably took two years". One could imagine a discussion as to the relative value of various academic qualifications

which would either not be defamatory at all of any individual or which might come within the defence of fair comment. That hypothesis is far removed from the present circumstances. Here, it is stated as a fact that her doctorate is "worthless". The defence I am currently addressing is that of qualified privilege. What I find difficult to comprehend is how the Defendant could have been under a duty (or how it could be "responsible journalism") to assert worthlessness when (a) it was known that it required two years of work and (b) the allegation had not been put to the Claimant in advance of publication. Correspondingly, there can have been no "right" on the part of readers to be so informed.

58. Turning to the distinct topic of the Claimant's "theories and advice", I do not see how there could be a positive duty to publish allegations to the effect that her advice "could put fans at risk" or that her theories, or some of them, were "perfect rubbish" when the elementary step had not been taken of putting these serious charges to her in advance or giving her a chance to respond.

59. I therefore grant the order Mr Browne seeks.