Neutral Citation Number: [2004] EWCA (Civ) 664

Case No: A2/2003/1735/1822

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
THE HON. MR JUSTICE EADY
HQ02X00903

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2004

Before :

THE RIGHT HONOURABLE LORD JUSTICE MAY
THE RIGHT HONOURABLE LORD JUSTICE TUCKEY
and
THE RIGHT HONOURABLE LORD JUSTICE LAWS

- -

Between :

ANDREW MILNE	**Appellant**
- and -	
EXPRESS NEWSPAPERS	**Respondent**

- -
- -

Richard Parkes QC and William Bennett (instructed by **Andrew Milne & Co**) for the **Appellant**
Geoffrey Shaw QC and Caroline Addy (instructed by **Davenport Lyons**) for the **Respondent**

Hearing dates : 26th April 2004

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice May:

Introduction

1. This is the judgment of the court on two applications by the claimant, Andrew Milne, for permission to appeal against judgments of Eady J of 29th November 2002 and 10th July 2003 in Mr Milne's defamation action against Express Newspapers. Brooke LJ considered the applications on paper. He adjourned them for consideration by the full court with the appeals to follow if the court grants permission.

2. The defendants say that the first application needs a very long extension of time. The claimant says that the judge informally extended time for appealing against his first decision until after he had made his second decision. This is not supported by the transcript of what was said at the conclusion of the first hearing. In our view, however, any formal need for an extension of time should not prevent us from examining the merits of the first application.

3. Eady J's first judgment is an important one. It is reported at [2003] 1 WLR 927 and is the leading case which considers section 4(3) of the Defamation Act 1996. These applications are the first opportunity for this court to consider the statutory provisions, introduced by sections 2 to 4 of the 1996 Act, as to offers to make amends by a person who has published a statement alleged to be defamatory.

The publication

4. The proceedings concern an article in the Sunday Express of 25th March 2001. There was at the time political controversy relating to Mr Keith Vaz, a Member of Parliament and Minister for Europe, and Mr Zaiwalla, the senior partner of a firm of solicitors, Zaiwalla & Co. There had been an inquiry and report by Dame Elizabeth Filkin, the Parliamentary Standards Commissioner. The claimant was a former salaried partner of Zaiwalla & Co. He had given evidence to the Filkin inquiry.

5. The Sunday Express article was written by Tim Shipman as "Political Correspondent". It had the headline "PM told sleaze report is not worth the paper it's printed on". The words of the article of which the claimant complained, following the headline, were

> "Tony Blair had a face-to-face meeting with the Asian lawyer at the centre of the Keith Vaz sleaze scandal.
>
> He met City solicitor Sarosh Zaiwalla after Mr Vaz, Minister for Europe, was condemned by a watchdog for recommending him for a peerage.
>
> At the meeting Mr Zaiwalla, whose company paid Vaz two sums totalling £450, told the Prime Minister that key evidence had been ignored by the inquiry, and the subsequent report by the parliamentary sleaze buster Dame

> Elizabeth Filkin was "not worth the paper it was printed on".
>
> His intervention may have helped to solidify Mr Blair's resolve to back Mr Vaz and allow him to travel to this weekend's European summit in Stockholm with Foreign Secretary, Robin Cook. Mr Zaiwalla also told the Sunday Express that Mr Vaz told him last year that he had previously recommended Dame Elizabeth's first husband for a peerage. David Filkin was made a Life Peer in 1999.
>
> Mr Zaiwalla, who runs an international law firm in London's Chancery Lane, spoke to the Prime Minister for more than five minutes at a Labour Gala dinner on March 15.
>
> He took Mr Blair aside at the Hilton Hotel bash and impressed on him the view that the evidence against Mr Vaz proffered by one of his former employees was tainted. Mr Zaiwalla, whose firm of solicitors once hired Mr Blair when he was a junior barrister, said: "I wanted to set the record straight. He did not say much, but he listened to what I had to say.
>
> A leading figure in London's Asian community, Mr Zaiwalla said he "can't vouch" for whether Mr Blair agreed with him. But he added: "He has to listen to everybody. Mr Blair acted for my firm in 1983. He was a very competent barrister. I hope he has respect for me and respects my integrity.
>
> Mr Vaz was first investigated last February after Andrew Milne, a former salaried partner at Zaiwalla & Co., alleged £2,000 had been given to him by Mr Zaiwalla. The Filkin inquiry found that Mr Vaz failed to declare two payments totalling £450 from the company. Dame Elizabeth had to drop an investigation into eight other charges after Mr Vaz refused to answer further questions. But Mr Zaiwalla said he believes that the minister's only fault is that he is "overly enthusiastic" to help people …"

6. A subsequent paragraph of the article stated that a Downing Street spokeswoman had said on the previous evening that there were over 500 people at the dinner and the Prime Minister had no conversations of substance with anyone.

7. The judge said that unusually there was no dispute between the parties as to the natural and ordinary meaning to be attributed to the passages in the article complained of. Both sides accepted that they convey the meaning that "the claimant is reasonably suspected of giving false evidence to the Filkin inquiry".

The offer to make amends

8. By a letter dated 13th May 2002, the defendants by their solicitors made an unqualified offer to make amends under section 2 of the 1996 Act. In a separate second letter, they made proposals to implement the offer. The claimant wrote rejecting the offer and giving reasons for doing so. There was correspondence in which the defendants' solicitors suggested to him that he may have misunderstood the effect of the statutory procedure. He maintained his rejection of the offer. The defendants accordingly had a statutory defence to the claim under section 4 of the 1996 Act which they duly pleaded. In his reply, the claimant sought to rebut this defence by relying on section 4(3) of the 1996 Act. He gave particulars of the facts on which he relied.

The applications to the judge and Court of Appeal

9. By application notice dated 19th September 2002, the defendants applied to strike out the three paragraphs of the Reply which relied on section 4(3). They contended that the matters relied on in those paragraphs were insufficient in law to rebut the defence. This was the application which the judge decided in favour of the defendants on 29th November 2002. He ordered that the three paragraphs of the reply should be struck out under rule 3.4 of the Civil Procedure Rules. He also ordered that judgment should be entered for the defendants unless the claimant applied within 14 days for permission to amend his reply. The claimant did so apply by application notice dated 19th December 2002. The defendants opposed this application, contending that the proposed second version of the pleading still failed to measure up to the requirements of section 4(3) of the 1996 Act. On 10th July 2003, the judge upheld the defendants' contentions, refused the claimant permission to amend his reply and ordered that judgment should be entered for the defendants in the action. He ordered the claimant to pay the defendants' costs of the action and of the application.

10. The claimant applied for permission to appeal against the judge's decisions and orders of 29th November 2002 and 10th July 2003. The claimant's contentions which survived as submissions advanced orally by Mr Richard Parkes QC on behalf of the claimant at the hearing before this court were:

    a) that the judge's construction in his first judgment of section 4(3) of the 1996 Act was to an extent erroneous; and that upon a correct construction he should have permitted the claimant to amend his reply in the terms considered on 10th July 2003.

    b) alternatively, even if the judge's construction of section 4(3) was correct, he should have permitted the claimant to amend his reply in the terms proposed.

11. We use the expression "to an extent" in paragraph 7(a), because the claimant's original grounds of appeal and skeleton arguments, drafted on his behalf before Mr Parkes was instructed, contended for a construction of section 4(3) much further removed from that adopted by the judge than the construction advanced by Mr Parkes.

12. The claimant through Mr Parkes does not now contend that the paragraphs of the reply which the judge ordered to be struck out in his first judgment should be reinstated. This appeal is limited to the contention that the particulars which the judge rejected on 10th July 2003 should have been permitted. There is therefore in form no surviving appeal against the order which the judge made on 29th November 2002. His construction of section 4(3) and his reasoning in support of that construction is challenged. The judge carried that construction and reasoning through into his decision on 10th July 2003 and the claimant is entitled to challenge this in advancing his second application. There is therefore nothing left of the first application nor any surviving basis for extending time to make it. We therefore refuse the application to extend time and the first application for permission to appeal, which is dismissed.

Sections 2 to 4 of the Defamation Act 1996

13. Section 2 of the 1996 Act provides that a person who has published a statement alleged to be defamatory may offer to make amends under the section. The offer may be in relation to the defamatory statement generally or in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys. The defendants' offer in the present case was unqualified. An offer to make amends is an offer to make and publish a suitable correction and a sufficient apology, and to pay such compensation and costs as may be agreed or determined. An offer to make amends may not be made after a person has served a defence in defamation proceedings brought against him in respect of the publication in question.

14. Section 3 provides that, if an offer to make amends is accepted, the party accepting the offer may not bring or continue defamation proceedings against the person making the offer in respect of the publication, but he is entitled to enforce the offer. The parties can agree the steps to be taken. If they do not agree, the party who made the offer may take such steps as he thinks appropriate. He may make the correction and apology by a statement in open court in terms approved by the court. He may give an undertaking to the court as to the manner of publication. If the parties do not agree the amount to be paid by way of compensation, it is to be determined by the court on the same principles as damages in defamation proceedings. Proceedings under the section are to be heard and determined without a jury. The court is to take account of any steps taken in fulfilment of the offer, including the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances: and the court may reduce or increase the amount of compensation accordingly. Thus, if in an ordinary case a claimant in defamation proceedings accepts an offer to make amends, he becomes entitled either by agreement or by determination of the court to full proper compensation for the defamatory publication. The defendant has capitulated at an early stage and before serving a defence on all issues except the amount of damages, if this is not agreed. The claimant can bring or continue the proceedings to determine the compensation. It is to be expected that most sensible claimants will accept unqualified offers to make amends. The main purpose of the statutory provisions is plain. It is to encourage the sensible compromise of defamation proceedings without the need for an expensive jury trial.

15. Section 4 of the 1996 Act applies if an offer to make amends under section 2 is not accepted. The fact that the offer was made is a defence to the defamation proceedings. A qualified offer is only a defence in respect of the meaning to which the offer related. Section 4(3) however provides:

> "There is no such defence if the person by whom the offer was made knew or had reason to believe that the statement complained of –
>
> (a) referred to the aggrieved party or was likely to be understood as referring to him, and
>
> (b) was both false and defamatory of that party;
>
> but it shall be presumed until the contrary is shown that he did not know and had no reason to believe that was the case."

The person who made the offer does not have to rely on it by way of defence. If he does, he may not rely on any other defence. The offer may be relied on in mitigation of damages whether or not it was relied on as a defence.

16. Eady J's first judgment and this application concern the proper construction of the words "… or had reason to believe that the statement complained of … was … false …". The claimant does not contend that the defendants knew that the statement complained of was false. He does, however, wish to be permitted by amending his reply to contend that the defendants, in the person of Mr Shipman, "had reason to believe" that the statement complained of was false.

The Defamation Act 1952 and the Neill Committee

17. Sections 2 to 4 of the 1996 Act derive from recommendations of Sir Brian Neill's Committee on Practice and Procedure in Defamation in their report of July 1991. Eady J, then in practice at the Bar, was a member of the committee. He explained in his first judgment that he was the draughtsman of the relevant passages in the report and that he had meetings with the parliamentary draughtsman and Sir Brian Neill when the bill was going through its various stages. He warned himself that he must take scrupulous care to set aside any personal preconceptions and also the subjective intentions of those who conceived the defence. He had to ensure that he approached the matter in accordance with the usual principles of statutory construction. That might be an unusual mental exercise to have to perform, but he did not find it difficult. There has been no suggestion that the judge's membership of the committee in any way disabled him from making the decisions which the claimant now wishes to challenged.

18. The Neill Committee Report noted that section 4 of the Defamation Act 1952 provided for a form of offer of amends. This was available to a person who claimed that the words alleged to be defamatory were published by him "innocently". An offer of amends under the section was to be understood as an offer to publish a suitable correction and a sufficient apology and to take reasonably practicable steps to notify persons to whom a publication had been

distributed that the words were alleged to be defamatory of the aggrieved party. If the offer was accepted and duly performed, no proceedings for libel or slander might be taken or continued against the person making the offer in respect of the publication. If the offer was not accepted, it was to be a defence to prove in libel or slander proceedings against the person making the offer "that the words complained of were published by the defendant innocently in relation to the plaintiff and that the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff, and has not been withdrawn." An offer of amends under the 1952 Act had to be accompanied by an affidavit specifying the facts relied on to show that the words in question were published innocently. No evidence other than evidence of facts specified in the affidavit was admissible on behalf of the person making the offer for the purposes of the defence which depended on it. Section 4(5) of the 1952 Act provided:

> "For the purposes of this section words shall be treated as published by one person (in this sub-section referred to as the publisher) innocently in relation to another person if and only if the following conditions are satisfied, that is to say –
>
> (a) that the publisher did not intend to publish them of and concerning that other person, and did not know of circumstances by virtue of which they might be understood to refer to him; or
>
> (b) that the words were not defamatory on the face of them, and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that other person;
>
> and in either case that the publisher exercised all reasonable care in relation to the publication; and any reference in this sub-section to the publisher should be construed as including a reference to any servant or agent of his who was concerned with the contents of the publication."

19. Section 4 of the 1952 Act put such a heavy burden on defendants that it was never used. In retrospect, the reasons are obvious. They are explained in paragraphs VII. 3 to 10 of the Neill Report, parts of which are quoted in the judge's first judgment in the present case.

20. The Neill Committee's conclusions are in their paragraphs VII. 11 and following, parts of which are reproduced in the judge's judgment. The committee considered it to be desirable to have some more streamlined defence available where a defendant had behaved fairly and reasonably after the tort had been committed. There was a need to discourage a small minority of plaintiffs who wished to proceed to trial for purely financial motives, rather than being motivated by a desire for vindication. It was impossible to produce a perfect solution, but a streamlining of the procedure with certain changes could redress the balance between the parties by removing some of the hurdles presently confronting defendants. The committee considered that the basic procedural structure could

be retained including the provision for setting out the defendants' case by way of affidavit. In paragraph VII. 14, they said:

> "We have in mind the following proposals for change:
>
> (i) We would remove the obligation on the defendant to prove the absence of malice on the part of the author.
>
> (ii) We think that the time limit should be changed, so as to permit the defendants to avail themselves of the defence if the offer is made prior to, or at the time of, serving the defence.
>
> This would provide a reasonable period in which to carry out the necessary enquiries, and would make it less unfairly onerous to make the affidavit exhaustive. It would also encourage plaintiffs not to dally in issuing a writ and serving a statement of claim.
>
> iii) As to 'innocence', we think the defence should be available to defendants unless the plaintiff is able to plead and prove that the relevant defendant knew or was reckless as to the following matters:-
>
> (a) that the words referred to the plaintiff or would be likely to be understood as referring to some identifiable person;
>
> (b) that they were defamatory; and
>
> (c) that they were false.
>
> We would use the same definition of "recklessness" in this context as that of Lord Diplock in Horrocks v. Lowe [1975] AC 135, namely a genuine indifference as to truth or falsity."

21. The Committee considered that the presumption of guilt on the part of defendants, inherent in the structure of section 4 of the 1952 Act, was unacceptable. They could not see why a guilty state of mind should be presumed against the defendants. It seemed to them to be contrary to principle, and it lay uncomfortably with the general principle in defamation, whereby it is for the plaintiff to prove malice in that minority of cases where state of mind becomes relevant. In paragraph VII.16, they said:

> "Where a "guilty" state of mind, in the more stringent sense, can be demonstrated we think it right that the defence should not be available. Otherwise the offer of amends would be too readily at hand to aid the cynical exploitation of personal reputation."

22. The committee considered whether an offer of amends should generally be accompanied by a willingness to pay damages, acknowledging that this was a difficult point. They concluded after careful consideration that it would be unsatisfactory for defendants to have a defence based on their reasonable behaviour after publication which would leave the plaintiff with no compensation at all. The committee concluded that it would be reasonable for a defendant to include within an offer of amends an expression of his willingness to pay such general or special damages as might be fixed by a judge sitting in open court. The judge would clearly take into account such mitigating factors as the defendant's willingness to restore the plaintiff's reputation fully and promptly. The proposal would deprive some plaintiffs of their present right to a jury trial. But it would represent a considerable advance on the structure under the 1952 Act which permitted no damages at all. For defendants, there would be the advantage that they would avoid the costs of preparation for trial and of the hearing itself, and the lottery of assessment by a jury. The committee thought that this was a practical compromise which was fair to both sides. It would also achieve a relatively quick and cheap vindication and discourage unreasonably high demands for damages. This corresponded with the then recommendation of Mr Justice Hoffmann (as he then was) for what subsequently became the provisions for summary disposal of defamation claims in sections 8 to 11 of the 1996 Act.

23. The committee's summary of its conclusions was:

> "Section 4 of the Defamation Act 1952 should be repealed and a new "Offer of Amends" defence enacted for the purpose of enabling defendants, where they recognise that the plaintiff has been defamed, to curtail proceedings by making such an offer, which would now have to include the expression of a willingness to pay damages to be assessed by a judge.
>
> In order for the new "Offer of Amends" defence to succeed it should not be necessary for the defendants to prove "innocence" or lack of negligence, and the defence could only be defeated in circumstances where the plaintiff could show the defendant to have published the words either knowing them to be false and defamatory or recklessly, in the sense of being genuinely indifferent to those matters."

24. The committee had made clear, by its reference to *Horrocks v Lowe* [1975] AC 135, that its reference to recklessness was to the concept defined by Lord Diplock at page 150 in that case. Lord Diplock had referred at page 149 to "express malice" as a term of art descriptive of a dominant and improper motive on the part of a defendant who claimed that he had published a defamatory statement on a privileged occasion. This was malice in the popular sense of a desire to injure the person who is defamed which, if it is the dominant motive for the defamatory publication, destroys the privilege. In exceptional cases, a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person. But -

> "Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief". If he publishes untrue defamatory material recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed by all sorts and conditions of men. In affording them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest, the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest," that is, a positive belief that the conclusions they have reached are true. The law demands no more."

25. In July 1995, the Lord Chancellor's Department issued a consultation paper on a draft Bill to reform defamation law and practice. The consultation paper explained the recommendations of the Neill Committee in relation to offers to make amends. The text of the paper retained the word "recklessly" in relation to provisions which in changed form became section 4(3) of the 1996 Act. The draft Bill was in terms which would have enabled a person who had published a statement alleged to be defamatory to make an offer of amends "if he claims that he did not do so intentionally". It was to be presumed until the contrary was shown that a person publishing a defamatory statement did so unintentionally. The person was to be regarded as publishing the defamatory statement intentionally if he knew that the statement referred to the party aggrieved or was likely to be understood as referring to him and that it was both false and defamatory of that party, "or if he was reckless as to those matters". The requirement for a defendant making an offer of amends to support it by making an affidavit, whose retention from the 1952 Act the Neill Committee had recommended, did not find its way into the draft Bill.

26. Changes were made to the draft Bill before it was enacted as the 1996 Act. We have already referred to its relevant terms and set out section 4(3). The word "reckless" was not retained. Instead section 4(3) uses the expression "knew or

had reason to believe" that the statement complained of was, among other things, false. Mr Parkes invites us to suppose that this change shows a parliamentary intention to moderate in favour of claimants the Neill Committee recommendation as to recklessness. He points to the compensating omission of the recommended requirement for defendants to make an affidavit. We do not consider that this difference of expression between the draft Bill and the statute by itself carries any implication of parliamentary intention. The court's task nevertheless remains to construe the words of the statute.

The judge's first judgment

27. As will be seen, this court considers that Eady J's construction of section 4(3) of the 1996 Act in his first judgment was entirely correct for the reasons which he gave. It is necessary to summarise his reasons in this judgment in order to address Mr Parkes' more limited submission. We shall do so briefly without intending to detract from or modify the judge's judgment, which may be referred to in full.

28. Mr Shaw's first submission to the judge was that, although the draughtsman did not adopt the language of Lord Diplock by incorporating into the statute the phrase "genuine indifference as to truth or falsity" (nor adopt the committee's reference to recklessness), what the draughtsman was doing was simply implementing the committee's recommendation. There was no indication either in the parliamentary debates or in the context of the statute itself that he was intending to introduce a different or lower test.

29. Mr Shaw referred to a passage in the speech of Lord Kilbrandon in *Broome v Cassell* [1972] AC 1027 at 1133 in which, in the context of exemplary damages, he equates a publisher who "either knows that, or does not care whether, his material is libellous" with a publisher who "knows, or has reason to believe" that the act of publication will subject him to compensatory damages.

30. Mr Shaw had developed in the alternative a more limited submission of law. Whether or not "reason to believe" was to be equated with "recklessness" in Lord Diplock's sense, it was clear that the 1996 Act was contemplating an investigation into facts actually known by the defendant. It was not permissible to investigate what knowledge he might have acquired or even knowledge he ought to have acquired. Mr Shaw supported this submission with reference to section 1(3) of the Occupiers' Liability Act 1984 and the decision of this court in *Swain v Matui Ram Puri* [1996] PIQR 442. Section 1(3) of the 1984 Act imposes on an occupier of premises a duty to trespassers if "he knows or has reasonable grounds to believe" that the trespasser is in the vicinity of the danger concerned or that he may come into the vicinity of the danger. In *Swain*, the Court of Appeal held that the statutory expression did not include constructive knowledge. It was necessary to establish actual knowledge, including "shut-eye" knowledge, either of the actual risk or of primary facts which, in the opinion of the court, provided reasonable grounds for believing that the relevant risk existed. Mr Shaw referred to the judgment of Evans LJ at page 448. The judge quoted the relevant passage in paragraph 24 of his first judgment.

31. Mr Shaw had submitted that the three paragraphs of the reply should be struck out because they were directed, not towards what the defendants and Mr Shipman knew, but towards what they reasonably should have known.

32. Mr James Price QC, then appearing for the claimant, had submitted that it would be inappropriate to strike out these paragraphs and that the allegations needed to be tested in the light of disclosure of documents and the content of witness statements. He was at the time unable to name any relevant person to whom he would wish to attribute "grounds to believe" apart from Mr Shipman, but he hoped to find out more after disclosure. Mr Price had referred to paragraph 18.7 in the 9th edition of *Gatley on Libel and Slander*. The editors had suggested that whether or not failure to take steps to check a story amounted to "reason to believe" that it was false was likely to be a question which turned on the facts. It was suggested that you cannot determine the merits of a defence under section 4 of the 1996 Act until the facts have been established. The judge said that, if this approach were adopted, hardly anyone would rely on the new defence. The judge considered that Mr Price's submissions tended to suggest that he was applying too low a threshold. Some of his submissions came very close to equating "grounds to believe" with "grounds to suspect"; and the statute was not concerned with reason to "doubt", but with reason to believe positively that the published words were false. It was submitted that the Filkin Report itself showed "cogent reasons for doubting" Mr Zaiwalla's self serving allegation against the claimant. If members of the Sunday Express staff did not know the content of the Filkin Report, this would be cogent evidence in support of the claimant's case. That was because there was quite enough material known to them "to cause alarm bells to ring". The judge regarded these submissions as applying the wrong test.

33. In paragraph 28 of his first judgment, the judge had said, in relation to the submission that the claimant's allegations needed to be tested in the light of disclosure of documents and the contents of witness statements;

> "It is necessary to remember, however, that the legislature intended that those who make offers of amends should only be deprived of the defence in the event of bad faith or (if it is different) if they had positive grounds to believe the falsity of what they asserted. That is a serious matter and it cannot, as a matter of general principle, be permitted to enter a pleading on a purely formulaic basis in the hope that something further may be "fished" up in the course of disclosure."

34. In making his ruling, the judge said at paragraph 36

> "Parliament intended that a defendant whose offer of amends is turned down should have a statutory defence for that very reason – save in exceptional circumstances. I use the word "exceptional" advisedly. Of course, it is not to be found in the statute. On the other hand the formulation of the Committee and of the legislature was obviously reflecting Lord Diplock's analysis of "malice". It could hardly be denied that findings of malice are exceptional.

> Those exceptional circumstances could not arise simply in cases where a journalist or editor could be criticised for not taking further steps to research or check an article prior to publication. It is not a defence based on the absence of negligence (as it could have been)."

35. The judge said, in paragraph 38, that the approach of the 1952 Act was discarded because it was not effective. If the new defence were also rendered unavailable because an argument could be raised to the effect that greater care might have been taken, the new regime would also fall into disuse. This would be so "if the defence were lost because some relevant person knew of some information giving grounds to *suspect* that the information *might* be false". He said, in paragraph 40 that if claimants were able to challenge a section 4 defence routinely in the absence of bad faith, the whole offer of amends regime would be rendered ineffective. A court construing parliament's intention should strive to give the section an interpretation which would make it workable rather than useless. It was questionable whether it was necessary to construe the defence in such a way that would penalise journalists who got their facts wrong but acted in good faith. The judge then said at paragraph 41:

> "The answer to such a question is surely obvious. The main purpose of the statutory regime is to provide an exit route for journalists who have made a mistake and are willing to put their hands up and make amends. In the absence of agreement, the offer of amends also signifies a willingness to place oneself in the hands of the court for assessing the appropriate steps to be taken by way of vindication and compensation. It would thus make no sense at all to interpret the wording to mean that journalists would be deprived of the defence if they had been negligent – or behaved in such a way that a jury might have perceived them to be negligent. It would be self-defeating. It was only intended to shut out those who have acted in bad faith; that is to say where a defendant knows that what he is alleging is untrue (not, of course, suggested as applying in this case) or where he has reason to believe that the words are false. What this means is that he has chosen to ignore or shut his mind to information which should have led him to *believe* (not merely suspect) that the allegation is false."

36. Then at paragraph 44 the judge said:

> "I am quite satisfied that "reasonable grounds to believe" is not to be equated with either "reasonable grounds to suspect" or with constructive knowledge. Of course, it is right to say that the use of the phrase imports an objective element. In this context, as in *Swain v Matui Ram Puri*, what is required first is to demonstrate that the identifiable individual responsible for the article knew of a relevant fact or facts. The objective test then comes into play when the court decides, in applying the section 4 defence provision,

> whether such knowledge provided reasonable grounds to believe positively that the words complained of were false. Here there is nothing of the kind."

There is a minor slip in this paragraph of the judge's judgment. The statutory words in section 4(3) are not that the defendant had "reasonable grounds to believe" but that he had "reason to believe". The first of these expressions is that used in section 1(3)(b) of the Occupiers' Liability Act 1984. In our view, the expression in section 4(3) of the 1996 Act, which is the expression used by Lord Kilbrandon in the passage from *Broome v Cassell* to which we have referred, more strongly favours the judge's conclusion in the present case. The expression used also more strongly favours Mr Shaw's first submission, that parliament intended to implement without modification the recommendation of the Neill Committee. Where a journalist does not know that what he publishes is false, he might arguably have "reasonable grounds to believe" that it was false if he ought reasonably so to have believed from what he did know. As we explain below, "reason to believe", in our judgment, does not in this statute apply to anything short of recklessness.

37. The judge examined the particulars then relied on, concluding that they fell woefully short of undermining the section 4 defence. He said that the whole exercise seemed designed to achieve the claimant's strategy of having his compensation assessed by a jury rather than by a judge under the section 3 procedure. The reason the claimant turned down the offer in the first place was, not because he had any genuine evidence of bad faith on Mr Shipman's part, but simply because he did not think he had been offered enough money.

The judge's second decision

38. As we have said, following the first judgment, the claimant applied for permission to amend his reply. The proposed amendments were in substitution for the paragraphs which the judge's first order had struck out. The application was made on the basis that the judge's construction of section 4(3) in his first judgment was correct. The judge applied the same criteria as he had articulated in his first judgment. He concluded (in paragraph 21 of his second judgment) that "this second attempt to muster a case of bad faith against the defendant, or "recklessness" (in the sense explained in the previous judgment at paragraphs 15 to 20), does not meet the rigorous criteria which must always be applied to such an allegation". He refused permission to amend and refused permission to appeal.

Grounds of appeal

39. The claimant applied for permission to appeal against both judgments. The original grounds of appeal, with a skeleton argument in support extending to 71 paragraphs, contended that the judge's construction of section 4(3) of the 1996 Act in his first judgment was wrong. The grounds of appeal contended that, in order to establish that the defendants "had reason to believe" that the defamatory publication was false, the claimant had to prove:

    a) that the journalist had actual or constructive knowledge which a reasonable person in the position of the journalist at the time of

publication would have had if he had made such enquiries as were reasonably expected of him; and

b) that this knowledge would have caused him to have reason to believe that the words complained of were false.

40. We understand that Mr Parkes was instructed shortly before the hearing of these applications. He prepared a short supplemental skeleton argument to inform the court that the claimant would not seek to argue that section 4(3) of the 1996 Act imports a negligence test or a requirement that the claimant should prove constructive knowledge. He would seek to argue the applications in a narrower way. The main submission was that the judge wrongly assimilated the words of section 4(3) with the recommendations of the Neill Committee. In consequence he decided that section 4(3) imports a concept of bad faith in the sense of malice, that is to say a lack of belief in the truth, or a reckless indifference to the truth or falsity of the publication. It was accepted that section 4(3) requires the court to focus on what the journalist actually knew, rather than on what he ought to have known had he made further inquiries. However, the words "reason to believe" require the court to ask itself whether, in the light of that knowledge, the journalist had reason to believe that the words were false. That is an objective question which must entitle the court to take into account the full range of the journalist's knowledge. In particular the court has to consider what information the journalist had and whether it was credible, and whether he shut his eyes to matters which were obvious and which must have led to the conclusion that the statement complained of was false. It was submitted that the judge's construction placed a barrier in the way of claimants which was too high. It needed to be restated in workable terms.

41. This supplemental skeleton was a substantial and, if we may say so, last minute retreat from the position taken in the original grounds of appeal. The court required Mr Parkes to formulate written amended grounds of appeal, which he did over the short adjournment. The proposed amended grounds of appeal are confined to the contention that the judge misconstrued section 4(3) of the 1996 Act as importing a wholly subjective recklessness or "bad faith" test of the kind required for the proof of malice in defamation, that is to say lack of belief in the truth or a reckless indifference as to the truth or falsity of the words complained of. He ought to have confined his construction to a partly subjective and partly objective test, such as he expressed in paragraph 44 of his judgment, which we have quoted. That test requires an assessment of whether the facts gave rise to reasonable grounds for the belief. "Reason to believe" embraces knowledge of facts from which a reasonable man would arrive at the relevant belief.

Submissions

42. It is difficult, to say the least, to submit that the judge's construction of section 4(3) was wrong, but at the same time to point to a considered paragraph in the judge's own judgment as expressing the correct construction. However that may be, the essence of Mr Parkes' submission was that the judge's judgment read as a whole construes the relevant words as importing bad faith, malice or recklessness; whereas a proper construction would not go quite that far. The defence is not available if the court or jury judges that, upon facts known to the journalist, he had

reason to believe that his defamatory publication was false. That formulation does not construe the critical words in the statute: it simply reuses them. However, we understand the submission to be that, however the words are construed, they do not extend to import bad faith, malice or recklessness. The difficulty with the submission is that it is accepted that the words do not import negligence or constructive knowledge either, and the submission needs an intermediate construction.

43. Mr Shaw accepted that he had advanced alternative submissions before the judge. His first submission was that the statute had adopted the Neill Committee recommendations. His second submission was that explained by the judge in paragraphs 21 to 24 of his judgment, which included reference to section 1(3)(b) of the Occupiers' Liability Act 1984 and the judgment of Evans LJ in *Swain v Matui Ram Puri*. We have already observed that that section contains the words "reasonable grounds to believe" not "reason to believe". There is the further distinction that turning a blind eye to known facts relating to dangers for trespassers might possibly be termed recklessness, but scarcely malice or bad faith.

44. Mr Parkes made a number of general points. He accepted that parliament must have intended to shift the balance to enable defendants in defamation proceedings to make effective offers of amends. But the intention must also have been to retain a claimant's right to a jury trial in appropriate circumstances. Claimants may wish to expose bad conduct of newspapers in the more public forum of a jury trial. Vindication from a jury is likely to be better publicised than a relatively low key determination of compensation by a judge alone. Parliament cannot have intended that the defence based upon a rejected offer of amends should be unanswerable. The judge's construction effectively makes it so. The offer has to be made before a defence has been served. There is no deadline for its acceptance or rejection, but this obviously has to be done quickly. It would be rare for a claimant to have knowledge of the subjective state of mind of those responsible for a newspaper article. He may not even know who the author was. Other than in exceptional circumstances, there will be no opportunity of obtaining disclosure of documents – see *Dame Diana Rigg v Associated Newspapers Limited* [2003] EWHC 710 (QB) at paragraph 25. A construction importing malice sets the hurdle for claimants too high. It would be a charter for irresponsibility by newspapers. They could publish irresponsible defamatory statements in the knowledge that they could, if necessary, make an offer of amends and, in Mr Parkes' words, "get out cheaply in all cases".

45. We see the general force of a number of these submissions, but do not accept all of them. We see the main parliamentary intention as promoting machinery to enable defamation proceedings to be compromised at an early stage without the expense of a jury trial. If there is no issue as to the defamatory meaning of the statement published, an offer to make amends tenders to the claimant appropriate vindication and proper compensation. The defendant does not get out cheaply. If compensation is not agreed, it is determined by the court on the same principles as damages in defamation proceedings. As Eady J said in *Abu v. MGM Limited* [2003] 1 WLR 2201, the procedure is not to be confused with summary disposal

under sections 8-10 of the 1996 Act. There is no artificial cap on the level of compensation. He went on to say at paragraph 22:

> "Even very serious allegations may fall to be dealt with under this regime, but the claimant has in practical terms been deprived by the legislature of jury trial, once an offer has been made under section 2 (save where he can prove bad faith). There should be thus nothing in any sense "rough and ready" about the assessment of the claimant's reputation under the offer of amends procedure. It would clearly be inappropriate to deprive either party of a proper analysis of his case. Naturally, due regard to case management considerations will generally ensure that time and money is not wasted, but proportionality does not always mean that corners need to be cut. In the case of grave allegations, where the defendant has recognised that he has made a serious error, it may be that justice requires that significant time and money be spent in arriving at the right answer."

46. It is obviously correct that parliament intended to and did shift the balance in favour of the making of offers to make amends. This is not perhaps to say that the balance is shifted in favour of defendants, since claimants also benefit. Since the offer tenders appropriate vindication and proper compensation, it is not surprising that section 4(3) sets a high hurdle and places the burden of surmounting it squarely on the claimant. We are not persuaded that the judge's construction, if it is correct, places the hurdle insurmountably high. There may be cases where a claimant can establish that a defendant knew that his defamatory publication was false. It may also be possible to establish that he "had reason to believe" that it was false in the sense of the judge's construction. We do not consider that a mechanism which offers appropriate vindication and proper compensation is a recipe for irresponsible journalism. Further, the legislation does not apply only to journalists.

Discussion and decision

47. The question remains whether the judge's construction was correct. We are not persuaded by Mr Parkes' submission that there is a proper distinction to be drawn between paragraph 44 of the judge's first judgment and the rest of it; nor that paragraph 44 gives a correct construction, but the rest of the judgment goes too far. There is no doubt but that the judge decided that section 4(3) of the 1996 Act was to be construed as an unmodified implementation of the recommendations of the Neill Committee and that the words "had reason to believe that the statement complained of … was … false" import the concept of recklessness from Lord Diplock's judgment in *Horrocks v. Lowe*. This may be seen from his references to malice or bad faith in paragraphs 36, 40 and 41 of his first judgment. It is put beyond doubt by paragraph 21 of his second judgment, in which he said:

> "I have come to the conclusion that this second attempt to muster a case of bad faith against the defendant, or "recklessness" (in the sense explained in the previous

> judgment at paragraphs 15 to 20), does not meet the rigorous criteria which must always be applied to such an allegation."

Paragraphs 15 to 20 of the first judgment were those in which the judge summarised Mr Shaw's first submission.

48. There is no indication that parliament intended to do other than implement the recommendations of the Neill Committee. We find no such indication in the change of wording between the draft Bill and the statute. The words in the statute correspond with those of Lord Kilbrandon in *Broome v Cassell* that the publisher does not care whether the material is libellous.

49. There is, in our judgment, a powerful reason why the words in question should be construed as importing recklessness in Lord Diplock's sense. If a claimant establishes malice on the part of a person who publishes a defamatory statement, he has the basis for a claim of aggravated, and possibly exemplary, damages. Mr Parkes accepted that, malice apart, compensation can be fully assessed and awarded under section 3(5). There would be little point therefore in relying on section 4(3), unless the requirement there was to establish malice. Recognising that some claimants might prefer a jury trial cannot alone have been the parliamentary purpose.

50. Although Mr Shaw advanced and the judge summarised an alternative lesser submission, sufficient for Mr Shaw's purposes at the first hearing, we do not consider that, in the context of section 4(3) of the 1996 Act, there is a distinct possible meaning of the words "had reason to believe" lying between recklessness on the one hand and constructive or imputed knowledge based on negligence on the other. Mr Shaw drew our attention to other statutes in which the expression had or has "reason to believe" is or was used. These were section 1(3) of the Law Reform (Miscellaneous Provisions) Act 1949 (now repealed); section 22 of the Copyright, Designs and Patents Act 1988; section 143(3) of the Road Traffic Act 1988; section 3 of the Sludge (Use in Agriculture) Regulations 1989; and paragraph 12(2) of the Genetically Modified Organisms (Northern Ireland) Order 1991. We accept Mr Shaw's general submission with particular reference to the 1996 Act that the phrase "knew or had reason to believe" requires an inquiry into what facts were in a person's head, not into what facts ought to have been in his head. Mr Parkes rightly disclaims the second of these, but seeks to find room for a state of mind objectively deduced from facts known to the defendant which is neither actual knowledge nor reckless indifference to the truth. We do not think that there is such an intermediate state of mind in the context of a defamatory publication. In that context, shutting your eyes to an obvious truth is the same as reckless indifference to that truth. Move away from that, and you immediately arrive at constructive knowledge.

51. In our judgment, therefore, Eady J's first judgment contains a correct construction of section 4(3) of the 1996 Act for the reasons which he gave. There is no difference to be found between paragraph 44 of his judgment and the rest, although paragraph 44 needs to be amended to use the words "reason to believe", as in the statute, instead of "reasonable grounds to believe".

52. In formal terms, we give permission to amend the grounds of appeal for the second application in the terms presented in writing by Mr Parkes. We give permission to appeal on those grounds, but dismiss the appeal for the reasons that we have given – see paragraphs 53 to 59 below for other proposed grounds of appeal.

The second application

53. There remains the application for permission to appeal against the judge's refusal of permission to amend the reply. Section 4(3) of the 1996 Act is concerned with the defendants' knowledge in relation to the defamatory statement complained of. The parties were agreed that the natural and ordinary meaning of the passages complained of was that "the claimant is reasonably suspected of giving false evidence to the Filkin Inquiry". It is not contended that Mr Shipman knew that this statement was false. As the judge said in paragraph 10 of his first judgment:

> "In the context of this case, it must follow that the proposition of which the claimant hopes to persuade a jury is that the relevant person or persons "had reason to believe that it was false to say that there were reasonable grounds to suspect the claimant of giving false evidence to the Filkin Inquiry". This is a tortuous proposition and debating that issue, whether before a judge or a jury, would be somewhat reminiscent of medieval disputations about angels on pinheads."

54. The core of the proposed amended particulars was as follows. The basis of the findings of the Filkin Inquiry that Mr Vaz was guilty of a serious misdemeanour were the documented and admitted facts (1) that Mr Vaz had recommended Mr Zaiwalla for an honour; (2) that Zaiwalla and Co made two payments totalling £450 to Mr Vaz; and (3) that Mr Vaz had not declared these payments. Mr Shipman must have known these facts for reasons which are set out. These facts alone provided reason to believe that the core of what Mr Zaiwalla alleged to Mr Shipman or other reporters who interviewed Mr Zaiwalla could not be true. The core of what Mr Zaiwalla alleged was that the report, in particular its conclusions concerning Mr Vaz, was not worth the paper it was printed on, because the inquiry ignored unspecified key evidence and because for unspecified reasons evidence proffered against Mr Vaz by the claimant was tainted. The particulars contain further facts or contentions from which it is asserted that they provided reason to believe that Mr Zaiwalla's allegations to Mr Shipman or other reporters were false.

55. The judge in his second judgment summarised the proposed amendment in rather greater detail than we have. He said at paragraph 14 of this judgment:

> "Mr Shaw QC, for the defendant, emphasises … that the issue is not whether there was reason to believe that Mr Zaiwalla's allegations were false, but whether there was reason to believe that "the statement complained of" in its

> agreed defamatory meaning was false; in other words, grounds to believe that there were no reasonable grounds to suspect Mr Milne of having given false evidence. That is a much higher test and, in my judgment, these particulars fall well short of passing it. It would require the claimant to plead and prove that Mr Shipman had reason to believe that Mr Zaiwalla had made the whole thing up and that his statement should, without further ado, be wholly discounted."

56. The judge recorded a submission on behalf of the claimant that the proposed amendment at least contained pleadable facts from which a non-perverse jury could infer grounds to believe that the defamatory words were false. He also recorded a submission of Mr Shaw that Mr Zaiwalla's allegations might give rise to grounds to suspect in the different context of a proposed plea of justification. Of this the judge said in paragraph 19:

> "That is, however, a distraction in the present case. The defendant is not attempting to justify. Here, the court is rather concerned with whether grounds can be inferred from the pleaded facts for the journalist positively to believe that Mr Zaiwalla was a liar, such that his allegations should have been discounted altogether. As I ruled in the earlier judgment, that is a very high test and was intended by the legislature to be so. I have no doubt that some of the facts pleaded (assuming them to be correct, as I must) would give rise to a degree of puzzlement and, indeed, to suspicion that somebody was not telling the truth. Moreover, Mr Zaiwalla would be a candidate. Nevertheless, that is far from saying that the journalist was acting in bad faith in giving Mr Zaiwalla a platform to state his side of the story or shutting his eyes to the obvious."

57. The judge then recorded a further, somewhat dialectical, submission of Mr Shaw that, since the only source of the agreed defamatory meaning that there were reasonable grounds to suspect the claimant of giving false evidence to the inquiry was the statement of Mr Zaiwalla himself, it must be common ground that the fact that Mr Zaiwalla had made the statement gave rise to reasonable grounds for suspicion in the mind of a fair minded reader about the claimant's evidence.

58. Mr Parkes submits that the only relevant findings of the Filkin Inquiry was based on documented and undisputed facts. He accepted that the claimant would have to establish what the judge had referred to as the tortuous proposition, but the first stage was to show that what Mr Zaiwalla had said was untrue. Mr Shipman must have known the three core facts. He must therefore have known that Mr Zaiwalla's assertion that the report was not worth the paper it was written on was untrue. Mr Parkes accepts that the article did not tell the reader what evidence of the claimant was suspected of being tainted, but Mr Zaiwalla's assertions were so obviously untrue that Mr Shipman must have had reason to believe that the relevant defamatory statement about the claimant was also false.

59. In our judgment, Mr Parkes' attempt to elevate the proposed amended particulars to a case under section 4(3) fit to go to a jury fails for the reasons given by the judge. The central submission relies on far too brittle a chain of inferred or imputed reasoning on the part of Mr Shipman. The assertion that the conclusion of the Filkin Inquiry was not worth the paper it was written on may perhaps have been obviously wrong. But that was not the defamatory statement complained of. It was not, we think, necessarily even to be inferred that it was or may have been false to say that there were reasonable grounds to suspect the claimant of giving false evidence to the Filkin Inquiry from the fact that Mr Zaiwalla had challenged its conclusions on plainly unsustainable grounds. But even an inference of this kind would be insufficient for the purpose of section 4(3). The brittle chain of argument breaks completely when what is required, is not an inference, but reckless indifference to the truth. In agreement with the judge, we consider that there would be no proper basis for a jury to conclude from these particulars that Mr Shipman was recklessly indifferent to the truth of the relevant defamatory statement which he published. The judge was correct to refuse the claimant permission to amend. The second application for permission to appeal is refused in so far as it goes beyond the amended grounds of appeal for which we gave permission in paragraph 52 of this judgment.