Neutral Citation Number: [2011] EWHC 3444 (QB)

Case No: HQ09D05424

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2011

Before :

HIS HONOUR JUDGE RICHARD PARKES QC
(Sitting as a Judge of the High Court)

- -

Between :

JANET MORRISON — **Claimant**

- and -

(1) BUCKINGHAMSHIRE COUNTY COUNCIL
(2) STEVE EDGAR — **Defendants**

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- -

Hugh Tomlinson QC and **Caroline Addy** (instructed by **Withers LLP**) for the **Claimant**
Adrienne Page QC (instructed by the **Legal Department of Buckinghamshire County Council**) for the **Defendants**

Hearing dates: 20-21 July 2011

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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.

.....

HIS HONOUR JUDGE RICHARD PARKES QC

HHJ Richard Parkes QC :

THE APPLICATIONS

1. In this libel action, the claimant sues on two letters published to a small group of individuals. The first was published to three people; the second to two of those three and a further two, not including the claimant herself. So total publication of both letters was to five individuals. By her claim form, which was issued almost at the end of the relevant limitation period, she sets the value of her claim at a maximum of £15,000. As at 28th July 2010, she had incurred costs of £80,000 and her estimate of overall costs was £230,000. On 19th January 2011, by which time her costs totalled £103,000, the case came under close costs management under the Defamation Costs Management Scheme. A budget of just under £80,000 was approved for her future costs, bringing her likely total costs to a little under £200,000. Neither her current application, nor the defendants' cross-application, nor even the defendants' earlier application (issued on 24th February 2011) for summary judgment on the issue of qualified privilege, were foreshadowed in the costs budget submitted to the court in January. On the face of it, there is huge disproportion between the value which the claimant sets on her own claim and the sums spent in pursuing and, no doubt, defending it.

2. I have to decide two applications. The first in time is the claimant's application by notice dated 28th April 2011 for permission to amend her Reply. This was prompted by the defendants' application dated 24th February 2011 (now superseded) for summary judgment on the issue of qualified privilege, subject to malice. It raises difficult questions about the availability of qualified privilege as a defence to defamation claims against public authorities.

3. The second is the defendants' cross-application by notice dated 17th May 2011. By that application, the defendants seek summary judgment on the whole claim, or alternatively on the issue of malice, on the grounds that the claimant has no real prospect of succeeding on the claim or on the issue of malice, and that there is no other compelling reason why the case or the issue of malice should be disposed of at trial. Alternatively, the defendants seek an order that if the claimant succeeds in her application for permission to amend her Reply, the issues introduced by paragraph 27 of the draft amendment, and/or the issue of malice, should be tried as preliminary issues by judge alone. I should mention that the court has, on the claimant's application, ordered trial by jury. However, the claimant does not oppose trial of the issues raised by paragraph 27 as a preliminary issue by judge alone.

THE FACTUAL BACKGROUND

4. There is not a great deal of dispute about the facts. Just how much dispute there is, and how significant it may be, I consider below. However, there has been a considerable amount of change in the educational world since the relevant period (late 2008), and the facts set out below may well be, and I believe to a considerable extent are, out of date. In particular, I believe that the SIP and NCA programmes may now have come to an end. However, for the purposes of this action that does not matter: what matters is how the facts stood at the end of 2008.

5. The claimant ('Mrs Morrison') is a former head teacher and an OFSTED inspector. She was accredited as a 'School Improvement Partner', or 'SIP'. By s5(1) of the Education and Inspections Act 2006, each local authority was obliged to appoint a SIP to provide advice to the governing body and head teacher of each maintained school, with a view to improving standards at the school. The functions of SIPs were stated by the Department for Children, Schools and Families ('DCSF', later the Department for Education) as being "to challenge and support school leaders as they assess how well their schools are performing, plan for the future and identify the support their school needs to raise levels of achievement for all learners". In doing that, they were expected to "interrogate the school's performance and other data; challenge and support the school on its self-evaluation; identify a small number of key priorities for improvement from the self-evaluation; ensure the school adopts high-impact strategies to improve its priorities; broker support to assist the school in its improvement; and help the school monitor and evaluate the impact of its actions and the support it has engaged, or that has been engaged on its behalf by the local authority".

6. The first defendant ('the Council') is the local education authority for Buckinghamshire, and has an overriding statutory duty to promote high standards within its schools. It administers 234 schools, to each of which it was obliged to appoint a SIP.

7. The National Challenge Initiative was launched in 2008 under the aegis of a DCSF body called The National Strategies ('NS'), to assist schools which fell below a specified floor of examination performance. It required the appointment (supposedly by 1st November 2008) of an experienced SIP, known in this context as a National Challenge Adviser ('NCA'), to each secondary school in which fewer than 30% of the pupils achieved 5 'good' GCSEs (down to and including a 'C' grade) in subjects which included mathematics and English. The NCAs were to work with the school to which they were appointed to help improve performance, so that at least 30% of pupils would achieve the target results by 2011. They were in addition to perform the usual functions of a SIP. They were required to help the school "diagnose the causes of low performance, identify the key priorities for improvement, identify key high impact strategies to bring about improvement, (and) broker support to successfully achieve the improvement plan". They were to provide up to twenty days of support for each school (fifteen extra days on top of five SIP days already allocated) and conduct regular formal reviews with the local authority and NS about the progress of each school.

8. The NCA programme was funded by central government (formerly the DCSF, then the Department for Education) but local authorities selected their NCAs and paid them. The programme was directed by NS, which was headed in the region covering Buckinghamshire by Mr Jeff Lord, Senior School Improvement Adviser for the south-east. Its National Director, School Improvement, was Mr Adrian Percival. Its policy was that each NCA should normally work with at least three schools. NS held NCAs and local authorities to account by monitoring progress and reports and by holding termly meetings of the local National Challenge Board, which Mr Lord chaired. Each NCA reported on his or her work, as did each local authority. The local Board meetings were attended by DCSF officials, by Ms Louise Goll as the Council's senior representative, and by the second defendant ('Mr Edgar'), who was the Council's

divisional manager for school improvement, and who seems to have been responsible for appointing the NCAs for Buckinghamshire.

9. Each SIP needed external accreditation. To that end, NS maintained a national database which contained the name, contact details and 'pen portrait' (in effect a brief *curriculum vitae* setting out relevant experience and achievements) of each SIP. Inclusion on the database showed that the SIP was accredited. The 'pen portrait' assumed particular importance in the selection and appointment of SIPs and NCAs: according to NS, "The application form for assessment to be a SIP and the pen portrait supplied to the National Strategies are key documents in the appointment of SIPs. Withholding or misrepresenting any information on either document in such a way that it materially affects decisions taken to appoint a SIP will be taken as misconduct and will result in removal of accreditation".

10. That warning reflects the fact that SIPs, once accredited, were liable to lose their accreditation if certain criteria were met, which included a criterion of conduct inappropriate for a SIP. There were elaborate procedures for their removal from the register in such circumstances. Those procedures entailed (at step 1) the raising of concerns about the SIP's work by (among others) one of the SIP's schools or the local authority; discussion of those concerns by the local authority and the regional SIP co-ordinator, who in Buckinghamshire's case would have been Mr Lord (step 2), followed (if they agreed that the concerns were sufficient to warrant removal of accreditation) by the individual ceasing work for the authority; the assembly of evidence by the local authority and the regional SIP co-ordinator and its production to a national official (Mr Adrian Percival); a review of the evidence by that official, and a decision whether or not to recommend removal of accreditation; and so on.

11. The Council, through Mr Edgar's PA, contacted Mrs Morrison on 6th October 2008, to ask if she was interested in working as an NCA for Buckinghamshire. It maintains (this is not admitted, but it can hardly be contentious) that it sought NCAs with a track record of improving weak schools into strong ones, and that it identified Mrs Morrison as a suitable candidate on the basis of her database pen portrait. It would be surprising if it were otherwise, given the importance of the pen portrait as a 'key document' in the appointment of SIPs. It is common ground that, so far as is material, her pen portrait read as follows:

> "Amongst other senior posts I was Headteacher of Parkstone Grammar School 1997-2000, moving the school from serious weaknesses (Ofsted 1997) to 'a very good school' (Ofsted 2000)."

12. Mrs Morrison expressed interest in being appointed. There seems to have been a delay in approval by the DCSF and NS of the NCA allocations in Buckinghamshire, for it was not until 11th November 2008 that Mr Edgar was able to notify his chosen NCAs of their selection. By email of that date, he offered the claimant appointment as NCA at Cressex Community School ('Cressex') and Highcrest Community School ('Highcrest'). On the same day, he invited the new NCAs to the first local National Challenge board meeting to be held on 4th December at which he, Louise Goll, Mr David Preston and one other Council officer were to be present, and which Mr Lord was to chair. Six days later, on 17th November, Mr Preston, the Council's area manager for south Buckinghamshire, who was responsible for the School

Improvement Service and reported to Mr Edgar on matters of supporting SIPs and NCAs, contacted Mrs Morrison asking for a meeting (held on 28th November) in order to brief her and to assist in preparation for the local National Challenge board meeting on 4th December.

13. It is then the defendants' case (not admitted by the claimant) that on 2nd December, Ms Sheena Moynihan, head teacher of Hillcrest, rang Mr Edgar and raised concerns about Mrs Morrison's appointment as NCA to her school. She reported that at least one member of staff had raised unspecified reservations about Mrs Morrison's appointment as NCA, and she said that she had done a Google search which produced a newspaper article showing that Mrs Morrison had been suspended from Parkstone Grammar School, where she had been head teacher. Ms Moynihan queried whether in the circumstances Mrs Morrison's claims in her pen portrait about her time at Parkstone were accurate: she herself believed that they were inaccurate and had telephoned Parkstone GS, which appears to have told her that the school had never had (or, to use the jargon, 'been in') 'serious weaknesses'.

14. The newspaper article which Ms Moynihan found via Google seems to have been published in the Daily Telegraph on 19th June 2000 and on the Telegraph website. It reported that Mrs Morrison had a 'stormy' relationship with the chairman of governors, who accused her of 'bugging' a conversation with him, and that she was suspended when she returned to collect some papers from the school, allegedly in breach of an agreement with the chairman to stay at home. She was later re-instated, but had already resigned for a new post at Bromley High, a post which she was reported in the event to have lost because the Girls' Day School Trust was concerned about the publicity which she had attracted.

15. Mrs Morrison admits that she was suspended, although she contends that the suspension, which she says was unfair and unmerited, indicated no more than that the governors considered that a matter needed to be investigated. In proceedings against Parkstone GS in an Employment Tribunal, the actions of the chairman of the governors were found to have seriously breached the implied term of trust and confidence that she was entitled to expect from him. She also maintains that the Telegraph article formed no proper basis for any concerns about her and certainly not for her dismissal as an NCA.

16. Ms Moynihan's telephone call seems to have prompted Mr Edgar to make some enquiries. He found that the website of Parkstone GS did not credit Mrs Morrison with having made any improvements to the school, so he telephoned the school and obtained a copy of its Ofsted report for 1996 (there was in fact no inspection and no report for 1997). He obtained a copy of the 2000 Ofsted report from the Ofsted website, and a copy of the Telegraph article about Mrs Morrison's suspension.

17. According to the defendants, on 4th December 2008 Mr Edgar met Jeff Lord informally after the National Challenge board meeting, to mention his concerns about the pen portrait. He sought guidance from Mr Lord as to process and the next steps that he should take. Mr Lord advised him to inform Adrian Percival. Louise Goll was also present. Mrs Morrison was not at the meeting: she maintains that when she telephoned to say that she was running late, she was told by Mr Edgar's PA and then by Mr Edgar himself that she did not need to attend.

18. On 5th December, Mrs Morrison visited Cressex, and on the same day Mr David Hood, the head teacher, raised some concerns about her by email. He asked David Preston to reconsider her allocation to his school, because he was concerned about her "personal approach and style". He referred to what he said was her tendency to volunteer opinions without knowledge or discussion of the facts, to what he described as her lack of "homework" on the school, and her style of questioning, which was "at best provocative and at worst potentially antagonistic". Mr Preston told Mr Edgar about this. Mrs Morrison maintains that Mr Hood's complaints disclosed no impropriety or failing on her part, and indicated very little more than that the two of them had not seen eye to eye on certain matters and that he disagreed with her preliminary conclusions.

19. On 8th December 2008, Mr Edgar received the 1996 Ofsted report on Parkstone GS. He found that the report had not criticised the school as being overall "a school in serious weaknesses". That, Mrs Morrison maintains, is true but irrelevant: the expression "serious weaknesses" did not refer to a school's overall performance but to a problem with one or more areas of its activities, and Parkstone, although a "very good school with some excellent features", was found in 1996 to have serious weaknesses in its senior management, which adversely affected relationships with some staff, pupils and parents and was leading to high staff turnover. By contrast, in 2000, Ofsted reported that "the quality of relationships between senior staff and teachers, severely criticised in the last report (was) now excellent". On her case, she had been head of Parkstone between September 1997 and August 2000, and had carried through a restructuring of the school's management to address the weaknesses referred to in 1996: the 2000 Ofsted report had assessed the school's performance over the past four years, and found that the school had improved well since its last inspection, was now a "very effective school", and "the quality of relationships between senior staff and teachers, severely criticised in the last report, (was) now excellent". That improvement, she maintains, was mostly the result of her leadership and the decisions which she had made.

20. Cressex received Mrs Morrison's draft report on 9th December, and the following day David Hood responded to Mrs Morrison by email. He thanked her for her draft report, explained the concerns that he had with her approach, and told her that he had asked the Council to consider allocating him a different NCA. She replied courteously, accepting that he might well request another NCA but expressing the hope that Mr Hood would find that she would have value. Mr Hood copied his email to Mr Edgar and Mr Preston.

21. Mr Edgar emailed Mr Hood and Mr Preston on 10th December to inform them that he was taking steps to question Mrs Morrison's accreditation, to seek to break the Council's commitment to use her as an NCA, and then to search for an alternative NCA. He added that he had received "hard evidence" from one of her previous schools (it appears that he meant the 1996 Ofsted report which he had received from Parkstone) that called into question the accuracy of her pen portrait, and would be sending it to NS. He was also consulting Human Resources about withdrawing the offer of employment to Mrs Morrison.

22. It is in that context that Mr Edgar sent the two letters complained of. The first, dated 11th December 2008, was sent to Adrian Percival, National Director of National

Strategies, and copied to Louise Goll and Jeff Lord. This, so far as relevant, is what Mr Edgar said:

> "I am writing as the Divisional Manager for School Improvement in Buckinghamshire to raise a concern relating to a National Challenge Adviser.
>
> Buckinghamshire experienced significant difficulties in identifying appropriate NCAs, but after extensive searching identified a total of 4 NCAs. I already knew three of them professionally from work in this and another Local Authority.
>
> The fourth person to be identified and approached was Janet Morrison as a potential National Challenge Adviser for two schools in High Wycombe. Buckinghamshire had not worked with Janet Morrison before but thought her experience as outlined in her pen-portrait provided an appropriate profile based on her stated record of school improvement.
>
> Concerns first arose when her appointment was announced in one of the NC schools (Highcrest Community School) and some staff members with experience of working in London alerted the Headteacher to reservations based on Janet Morrison's record. It was suggested to the Headteacher that she did a web-search on Janet Morrison.
>
> We have sought to explore and check her track record and have identified some significant errors in her SIP/NCA pen portrait.
>
> The Pen Portrait indicates:
>
> > *'Amongst other senior posts I was Headteacher of Parkstone Grammar School 1997-2000, moving the school from serious weaknesses (Ofsted 1997) to a 'very good school' (Ofsted 2000).'*
>
> I have obtained a copy of the Inspection Report 5-9 February 1996 when the Headteacher was Dr Paula Haes. The main findings state:
>
> > *'Parkstone Grammar School is a very good school with some excellent features and some aspects which need further development.'*
>
> This is far from a school in 'Serious Weaknesses'.
>
> Janet Morrison was appointed Headteacher following this Inspection and the next Inspection on ... 4-7 December 2000 states that *'Parkstone Grammar School is a very effective school'*. However at the time of this Inspection the Acting Headteacher is Mr D Triplow and not Janet Morrison.

Therefore whilst she clearly has been the Headteacher for a period between these Inspections, she was not actually in a leadership role at either Ofsted Inspection and the implied progress from 'Serious Weaknesses' to a 'Very Good School' is a clear misrepresentation, given that the school was already at a high level of performance in 1996.

The reason that the School had an acting Headteacher in December 2000 was in fact because Janet Morrison was suspended after a dispute with the Chairman of Governors. Further to this she breached an agreement to stay at home. *(The letter then gives the URL of the Telegraph article.)*

She was later re-instated by the Governing Body, but Mrs Morrison had already resigned for a new post. However, Mrs Morrison lost her new job at Bromley High, the independent girls' school in Kent as the Girls' Day School Trust, (sic) told her that it was concerned over the publicity she had attracted.

Buckinghamshire now has serious concerns regarding her track record and her professional credibility is minimal given these discoveries and the misrepresentation that has taken place.

Given these revelations, I raised concerns initially with Jeff Lord last week, and I was asked to put some details in writing to you.

Buckinghamshire County Council as the employer of NCAs has lost confidence in Janet Morrison and does not wish to employ her as a National Challenge Adviser. We will be making Janet Morrison aware of this and the reasons why in the very near future. We would welcome support from National Strategy in facilitating the appointment of alternative NCA provision for two schools.

Given the importance of the National Challenge Initiative and the need to ensure vulnerable schools receive high quality support from professionals who model good practice and have a proven track record, I ask that you investigate Janet Morrison fully and consider whether the National Strategy wishes to maintain her accreditation as a SIP and NCA.

The following people have been extremely helpful in this investigation and could be approached if further details are required:

Sheena Moynihan, Headteacher, Hillcrest Community School.... National Challenge School Headteacher who undertook initial investigation.

> Anne Shinwell, Headteacher Parkstone Grammar School.... Spoke openly to Sheena Moynihan and then contacted me and has provided the 1996 Ofsted report...."

23. The pleaded meanings, which appear to be in issue except for the fourth, are that the claimant

    i) lied in her 'pen portrait' CV by claiming to have brought about improvements at Parkstone Grammar School when this was not the case;

    ii) while on suspension at Parkstone, had breached an agreement with Governors to stay at home;

    iii) lost a post as Head Teacher at Bromley High School because she brought unseemly attention to herself; and

    iv) deserved to be investigated because her conduct was of such concern that the First Defendant had quite properly declined to employ her any longer, and she was probably unsuitable to be a National Challenge Adviser.

24. The second letter was dated the following day, 12th December 2008. It was sent to Mrs Morrison herself but was copied to Jeff Lord and Louise Goll, as before, and also to the heads of Highcrest and Cressex, Sheena Moynihan and David Hood. So far as material, it reads as follows:

> "I am writing as the Divisional Manager for School Improvement in Buckinghamshire to raise concerns relating to the accuracy of your National Challenge pen portrait.
>
> We were initially pleased when you agreed to work with two schools in Buckinghamshire as a National Challenge Adviser and we thought your experience as outlined in your pen portrait provided an appropriate profile based on a proven record of school improvement.
>
> However a number of concerns have arisen during your initial contacts with and/or visits to the Southern Area Office, Highcrest Community School and Cressex Community School.
>
> Inaccuracies were subsequently identified in respect to your pen portrait and these have been thoroughly investigated. The findings, being significant, have been shared with the National Strategy.
>
> I refer specifically to the stated details relating to Parkstone Grammar School were (sic) your Pen Portrait indicates:
>
> '*Amongst other senior posts I was Headteacher of Parkstone Grammar School 1997-2000, moving the school from serious weaknesses (Ofsted 1997) to 'a very good school' (Ofsted 2000).'*

> There was no inspection in 1997. However, I have obtained a copy of the Inspection Report 5-9 February 1996 when the Headteacher was Dr Paula Haes. The main findings state: '*Parkstone Grammar School is a very good school with some excellent features and some aspects which need further development'.*
>
> This is far from a school in 'Serious Weaknesses'.
>
> We have also identified that whilst you had some time in post between the two Inspections in 1996 and 2000, Mr D Triplow was in fact in post as the Acting Headteacher at the time of the 2000 Inspection.
>
> Therefore while you clearly were the Headteacher for a period between these inspections, you were not actually in an active leadership role at the time of the second Ofsted Inspection and the implied progress from 'Serious Weaknesses' to a 'Very Good School' is a misrepresentation, given that you were appointed to an already high performing school.
>
> I regrettably (sic) therefore have to inform you that Buckinghamshire County Council has lost confidence in your credibility and we do not intend to give you any further National Challenge work with immediate effect from the date of this letter....”

25. The pleaded meanings of the second letter, the first two of which are in issue, are that the claimant

    i) had acted in a manner which gave cause for real concern while in contact with or visiting the Southern Area office, Highcrest and Cressex;

    ii) lied in her 'pen portrait' CV by claiming to have brought about improvements at Parkstone, when this was not the case; and

    iii) deserved to be investigated because her conduct was of such concern that the first defendant had quite properly declined to employ her any longer, and she was probably unsuitable to be a National Challenge Adviser.

QUALIFIED PRIVILEGE AND MALICE

26. The Defence pleads qualified privilege for both letters. This is put on the basis that Mr Edgar had a duty or interest to convey the contents of his letters to the publishees, by virtue of their positions, and they had a corresponding duty or interest to receive that information. There is also a partial plea of justification.

27. In her Reply as it currently stands, Mrs Morrison denies that the letters were published on occasions of qualified privilege, on the footing that the publishees had no interest in receiving partial and misleading information, and she pleads express

malice. However, the defendants' existing case on qualified privilege is now conceded by the claimant, subject to malice.

28. The claimant's existing case on malice (Reply paragraph 27) is as follows. It is divided into three main heads.

29. Firstly, it is said that Mr Edgar's reaction to any concerns expressed about the claimant by the two head teachers was rushed and unfair: he relied on the fact of allegations being made or concerns expressed to condemn and dismiss Mrs Morrison. In particular, he did not properly establish the nature of those concerns or their validity (eliciting little or no information from Sheena Moynihan about the members of staff who had expressed reservations about Mrs Morrison and why, and not discussing David Hood's concerns with him); he did not properly investigate the concerns expressed (not obtaining corroboration of the central allegation that the pen portrait was misleading beyond a single newspaper article, which he relied on for the truth of its contents and which in any event only reported a dispute with the chairman of governors and her suspension, not any misconduct on her part, and the 1996 Ofsted report, the effect of which he distorted, since he knew that "in serious weaknesses" was not a term used to indicate the overall state of a school); he ignored the true import of the 2000 Ofsted Report, which showed that Parkstone GS had improved considerably under the claimant's leadership, and sought to imply that it did not reflect favourably on her because she was not in post at the time it was written; and in the second letter he concealed from the claimant that he had relied on the newspaper article as part of the reason for dismissing her.

30. Secondly, it is said that Mr Edgar treated the claimant in a manner which was unpleasant, unfair and calculated to prejudice any investigation by failing to contact her before reaching any conclusion (which would have enabled her to explain and justify her summary of the effect of the Ofsted reports), by blocking her email so that she could not contact him or others to participate in the investigation or defend herself, and by preventing her from attending the 4th December NS local board meeting, by telling her, when she telephoned to say that she would be late, that she did not need to attend. Had she attended, he could have questioned her about the allegations, and the claimant invites the inference that he was determined to keep from her the fact that she was under investigation and not to allow her to defend herself.

31. Thirdly, the claimant pleads that Mr Edgar misled NS, the two schools and the claimant by implying that he had concluded after a full and proper investigation that the claimant must be dismissed, he unjustifiably invited NS to consider whether it wished her to remain as a SIP and NCA, and by copying the 12th December letter to the two head teachers he ensured that it would be published to staff members at each school.

32. In summary, it is alleged that Mr Edgar sent the letters complained of knowing them to be untrue or with a reckless indifference as to whether they were true or false, and that he did so not in furtherance of a duty or legitimate interest but because he had decided to dispense with the claimant's services whether this was justified or not, and sought to bolster the decision by destroying her professional standing.

THE CLAIMANT'S APPLICATION FOR LEAVE TO AMEND HER REPLY

33. The claimant notified her intention to apply for permission to amend by letter dated 27th April 2011, sent about a week before the intended hearing of the defendants' application for summary judgment on the issue of qualified privilege. Her solicitors' letter stated that the purpose of the amendment was (1) to contend (relying on *Clift v Slough Borough Council* [2010] EWCA Civ 1171, [2011]1 WLR 1174) that the defence of qualified privilege was not available because the defendants had acted in a way which was disproportionate and in breach of her rights, and (2) to admit that (if the *Clift* doctrine had no application) the words complained of were indeed published on an occasion of qualified privilege. The defendants' summary judgment application was conceded (and the costs of that application were paid accordingly), subject to the argument based on *Clift*.

34. The principles to be applied on an application for leave to amend are uncontentious. Amendments ought to be allowed so that the real dispute between the parties can be adjudicated upon, as long as any prejudice to the other party caused by the amendment can be compensated for in costs, and as long as the public interest in the administration of justice is not significantly harmed (*Cobbold v Greenwich LBC* [1999] EWCA Civ 2074, per Peter Gibson LJ). Different considerations may apply where the application is made at the last minute, but that is not a factor here. Both parties agree that the test is whether the proposed amendments have a reasonable prospect of success, which is the mirror image of the summary judgment test. It is a higher test than simple arguability.

35. Mr Tomlinson's proposed amendments, which I set out in full below, are predicated on the status of the Council as a public authority within s6, Human Rights Act 1998, and echo his successful arguments in *Clift v Slough BC*. The gist of the proposed new plea is that Mr Tomlinson argues, following *Clift*, that a public authority can only rely on qualified privilege if it can show that it has acted compatibly with the Article 8 rights of those to whom the published information relates.

36. That being so, sub-paragraphs 15.6 and 15.7 of the draft Amended Reply now respond to paragraph 20 of the Defence, which relies on a traditional duty-interest qualified privilege for the publication of the first letter (11th December 2008), in the following manner:

> "Draft amended Reply paragraphs 15.6, 15.7
>
> 15.6 Sub-paragraph 20.6 is denied for the following reasons: ~~It is denied that the words complained of were published on an occasion of qualified privilege. In fact, Mr Edgar's actions in publishing his letter were premature, unnecessary and ill-judged. The recipients had neither the pleaded nor any interest in receiving such partial and misleading information. Save that it is admitted and averred that the Second Defendant had by now seen the 1996 Ofsted report, paragraph 10.2 above is repeated.~~

(1) At all relevant times the Second Defendant was acting in the course of his employment by the First Defendant. The Second Defendant wrote and published the letter of 11 December whilst so acting.

(2) The First Defendant is a public authority within the meaning of section 6 of the Human Rights Act 1998 and bound to act in a way compatible with the Claimant's rights under the European Convention on Human Rights ("the Convention").

(3) It is unlawful for the First Defendant (or anyone acting on its behalf) to publish information relating to the Claimant which interferes with her right to reputation under Article 8(1) of the Convention unless the publication of such information is in accordance with law and is necessary for a legitimate aim as set out in Article 8(2) and must be proportionate to that aim. In particular:

(i) the legitimate aim in question must be sufficiently important to justify the interference;

(ii) the measures taken to achieve the legitimate aim must be rationally connected to it;

(iii) the means used to impair the right must be no more than is necessary to accomplish the objective; and

(iv) a fair balance must be struck between the rights of the individual and the interests of the community.

(4) For the reasons set out in paragraph 27 below, the publication of the letter of 11 December 2008 was not, in the circumstances, necessary or proportionate to any legitimate aim under Article 8(2).

(5) For these reasons, it is denied that the letter of 11 December was published on an occasion of qualified privilege.

15.7 If, contrary to the Claimant's primary case, Mr Edgar has a duty to convey the contents of the letter of 11 December 2008 to the individuals named in paragraph

> 20.6, it is admitted that the letter was published on an occasion of qualified privilege. The Claimant will contend that the letter was published maliciously and will rely on the matters pleaded at paragraph 27 below."

Those sub-paragraphs are repeated, *mutatis mutandis*, at paragraph 18.5 of the draft, in answer to paragraph 23 of the Defence, which pleads the same privilege for the second letter (12th December 2008).

37. There is a proposed alteration to the summary of the plea of malice at paragraph 27 of the draft:

> "~~Further or alternatively the~~ The words complained of were defamatory and thus interfered with the Claimant's rights under Article 8 of the Convention and were published ~~maliciously~~ in circumstances in which their publication was not necessary or proportionate to any legitimate aim. As a result, the defendants were not under a duty to publish them and they were not published on occasions of qualified privilege. In the alternative, the said words were published maliciously. "

38. Finally, there is a proposed amendment to the particulars of malice at paragraph 27.3A, which reads as follows:

> "For the above reasons, if (which is not admitted) the publication of the words served a legitimate aim, the means used to impair the Claimant's Article 8 rights were more than was necessary to accomplish any legitimate aim and a fair balance was not struck between the Claimant's rights and the interests of the First Defendant. Such a balance would have been properly struck if and only if the Defendants had:
>
> (a) properly investigated the concerns expressed, seeking proper corroboration of the allegation that the pen portrait was misleading;
>
> (b) put the allegations to the Claimant and given her a proper opportunity to respond;
>
> (c) after making such an investigation and taking the Claimant's response into account, and having decided to write the words complained of, written in qualified terms, making clear the low status of the evidence relied on and the unverified nature of the conclusions."

39. Miss Page makes the preliminary complaint that the proposed amendment of the Reply intertwines the particulars of malice with particulars which support the challenge to proportionality. That is a fair complaint, and matters are further complicated by the incorporation into the plea of malice of paragraphs which seem to have little if anything to do with the defendants' state of mind but rather more to do

with the fairness of her dismissal (paragraphs 8, 9, 10.3, 11 and 22.1). The proposed amendments do not add to the existing particulars of malice at paragraph 27 of the Reply; they adopt them (as the new paragraph 27.3A shows) in support of the plea that publication was neither necessary nor proportionate. But the conflation of particulars of malice with particulars relevant to questions of proportionality does raise some difficult questions as to which particulars go to which contention. Those questions were largely resolved in the course of argument, but it is not satisfactory to put a pleading on the record with ambiguities which have to be resolved by skeleton argument or oral explanation.

40. This application concerns the common law of qualified privilege as it relates to public bodies. A classic statement of the law on common law qualified privilege is found in Lord Atkinson's speech in *Adam v Ward* [1917] AC 309 at 334:

> "A privileged occasion is … an occasion where the person who makes the communication has an interest or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. The reciprocity is essential."

41. Common law qualified privilege has long been described as arising in one of two ways, although they are not entirely distinct categories. One is where the publisher is under a duty to communicate the defamatory information, and the publishee has had a reciprocal duty or interest in receiving it (eg *Stuart v Bell* [1891] 2 QB 341); and the other is where publisher and publishee share a common interest in communicating and receiving the information (eg *Hunt v Great Northern Railway* [1891] 2 QB 189, and the modern case of *Kearns v General Council of the Bar* [2003] 1 WLR 1357).

42. However, in *Kearns*, where the Bar Council was sued for circulating to barristers a letter concerning the claimant solicitors, Simon Brown LJ observed at [30] that "the argument … (had) been much bedevilled by the use of the terms 'common interest' and 'duty-interest' for all the world as if these (were) clear-cut categories...". The Court preferred the "altogether more helpful categorisation" obtained by

> " .... distinguishing between, on the one hand, cases where the communicator and the communicatee are in an existing and established relationship (irrespective of whether within that relationship the communications between them relate to reciprocal interests or reciprocal duties or a mixture of both) and, on the other hand, cases where no such relationship has been established and the communication is between strangers (or at any rate is volunteered otherwise than by reference to their relationship)." [30]

43. In *Kearns*, there was an existing relationship between the Bar Council and its barrister subscribers, which required the flow of free and frank communications in both directions. The Court of Appeal held that in such a case, as long as the statement was fairly warranted by the occasion and was made in the absence of malice, it would be protected by qualified privilege irrespective of the degree of investigation or verification carried out by the publisher and irrespective of whether the situation was

categorised in terms of common interest or duty and interest: any failure of investigation or verification went only to malice.

44. The Bar Council is not, of course, a public authority. By contrast, in *Wood v Chief Constable of the West Midlands Police* [2005] EMLR 20 the defendant was a public authority, and there was no existing relationship: the qualified privilege contended for arose out of an orthodox analysis of duty and interest. A police officer had written to three individuals involved in the insurance industry to warn them that H, who ran a vehicle salvage company, VSG, had been charged with stealing motor vehicles, and alleged that H had been disguising his criminal activities behind the veil of a legitimate business. H was later acquitted. The claimant worked for VSG and complained that he was the public face of VSG and that the letters meant that he had aided and abetted H in the commission of criminal offences. The Chief Constable pleaded qualified privilege, arguing that the police had a duty to give information to insurers who might be affected by it. The claimant obtained summary judgment on qualified privilege on the ground that the defence had no reasonable prospect of success, and the police appealed. The Court of Appeal held that the question was whether the police officer had a sufficient duty or interest to publish the defamatory letters. The police, as a public body, ought not to disclose damaging information about members of the public except for the purpose of and to the extent necessary for the performance of their public duty, a principle which was said to rest on a fundamental rule of good public administration which the law had to recognise. Disclosure of damaging information about individuals therefore required specific public interest justification, and ill-considered and indiscriminate disclosure was not likely to measure up to that standard. On the facts, there was no duty to make disclosure. As May LJ put it, "In so far as the requisite duty needed also to measure up to human rights considerations, Mr Mulligan's publications, defamatory of VSG and Mr Wood, were not in the circumstances proportionate to the legitimate aim (the officer) was pursuing. But I think that is really saying the same thing in different language" [64]. In fact, the Human Rights Act 1998 had not been in force when the letters were sent, so s6(1) and the Convention were not in play, and partly for that reason May LJ did not consider that the decision had implications of principle beyond the facts of the case.

45. In *Clift v Slough Borough Council* [2010] EWCA Civ 1171, [2011] 1 WLR 1774, s6(1) was directly in point, for the defendant was (like the Chief Constable in *Wood*) a public authority, so was obliged to act in a manner compatible with Convention rights. But it shared with the Bar Council in *Kearns* an existing relationship with at least some of the publishees, to whom it circulated information about the supposed risk which Ms Clift posed to employees with whom she came into contact. The council argued that it was in an existing relationship both with those publishees who were its own employees and with those who were employees of four 'partner' organisations, so that the court was bound by *Kearns* to find that the occasion of publication to every recipient, and certainly all its own employees, was protected by privilege. At first instance, Tugendhat J found that there was qualified privilege for publication to those employees who were 'customer-facing' staff with whom Ms Clift might have come into contact, and that publication was a rational and proportionate interference with her Art.8 right to reputation, but that publication to others (including council staff with whom there was not likely to be any contact and staff of 'partner organisations') was neither proportionate not fair.

46. The question therefore arose in *Clift*: was proof of an established, existing relationship of itself enough (absent malice) to justify a free flow of information between the parties (as in *Kearns*), or did the absence of duty to communicate with certain staff rob the defendant of its defence of qualified privilege (as in *Wood*)? The Court of Appeal concluded that *Kearns* was a case of what Eady J had referred to in *Howe v Burden* [2004] EWHC 196 (QB) as 'off the peg' privilege, where the issue could be resolved simply by considering the relationship between the publisher and publishees and the subject matter of the relevant communication. Ward LJ agreed with Eady J:

> "In particular I agree that it is 'sometimes' only that it is possible to look to the special relationship and no more, and, to coin (Eady J's) graphic phrase, to buy 'off the peg', noting as one does so the absence of any sign above the clothes' rail that 'One size fits all'. It does not. It is necessary to recall how in *Gerhold v Baker* [1918] WN 368, 369 ... Bankes LJ defined the public interest which underpins the defence as being the need to be 'allowed to speak freely on occasions when it is their duty to speak'. The private interest in one's reputation is to be preferred to the public convenience of unfettered communication where there is no duty to communicate at all. That was the case in *Wood* as a matter of public law. *Wood* is binding on us. Moreover it is rooted in established authority and is, if I may respectfully say so, clearly right. It is to be preferred to *Kearns* as the proper approach in this appeal because the defendant Bar Council was not a public authority and, as a result, no question arose as to the application of the fundamental rules of good public administration. The issues that arise in this case and in *Wood* arise precisely because the defendants are both public authorities with public duties to perform which was not the case in *Kearns*. It may well be that this public law duty not to disclose the information as widely as was done here is enough of itself to preclude the qualified privilege defence but I need not express a concluded view about that because we are being asked to rule upon the effect of the European Convention for the Protection of Human Rights and Fundamental Freedoms on this defence." [31]

47. In *Clift*, the Court of Appeal therefore concluded, distinguishing *Kearns* because Slough Borough Council was a public authority, that although there was a pre-existing relationship with all employee publishees, although the protection of the safety of all council employees and even the employees of its partner organisations was a legitimate aim sufficient to justify interference with Ms Clift's Art.8 rights, and although the publication was rationally connected to that legitimate aim, the judge's ruling on proportionality, which was essentially that publication to those employees who were not 'customer-facing' was disproportionate because they were not at risk of harm, was beyond challenge.

48. Moreover, the court accepted that the Human Rights Act did not impose a more onerous obligation on public authorities than they already bore in consequence of

their public law responsibilities or their duties under (inter alia) the Data Protection Act 1998. Ward LJ went on at [35] and [36]:

> "Ill-considered and indiscriminate disclosure is bound to be disproportionate and no plea of administrative difficulty in verifying the information and limiting publication to those who truly have the need to know or those reasonably thought to be at risk can outweigh the substantial interference with the right to protect reputations.... If the Council were in breach of Article 8, it would be unlawful to publish the information. If it was unlawful to publish, then the Council's duty was not to publish. If the duty was not to publish, the Council could no longer claim to be under a duty to impart the information to those who did not need to know it. Not being under a duty to publish, the foundation of the claim to qualified privilege falls away."

49. Even where the defendant is a public authority, the defence remains one of qualified privilege:

> "'To support the defence the defendant must first establish that it is under a duty to communicate the information to those who have a corresponding interest or duty to receive it. The issue is whether or not the council are under such a duty. Whilst they may, on the one hand, be entitled to say they are under a duty of care to their employees to alert them to risks, they are equally under a duty imposed upon them, it is true, by the Human Rights Act 1998 to respect Ms Clift's article 8 right to her reputation and thus under a duty to her not to publish the offending material. The court is equally under a duty to ensure that Convention rights are respected. It follows that the duty to Ms Clift not to publish trumps the duty to the supernumerary employees to distribute the entry on the violent persons register. In those circumstances the council cannot maintain its defence of qualified privilege." [39]

50. In the present case, the defendant Council is a public authority, bound by s6(1) Human Rights Act 1998 to respect the claimant's Convention rights, including any Art.8 right to her reputation.

51. It is common ground for present purposes that Article 8(1) is capable of encompassing a right to reputation. Mr Tomlinson accepts that the extent to which attacks on reputation engage Article 8 depends on the nature of the attack and the circumstances. However, he argues that where a professional person is accused of (as he puts it) lying in a CV presented to a prospective employer, and of other serious professional misconduct, the right is clearly engaged, and that for present purposes the point is seriously arguable. That is obviously right: see for instance *Karakó v Hungary* (2011) 52 EHRR 36 and *Re Guardian News & Media Ltd* [2010] 2 AC 697. Miss Page accepts that Art.8 is capable of being engaged here, and wishes to reserve for later argument the question of whether it is in fact engaged at all, which may depend to a degree on the meanings which the words complained of are found to bear.

52. Mr Tomlinson's argument starts from the undisputed proposition that a public authority, bound by s6(1) of the Human Rights Act 1998 to act in a way compatible with Convention rights, including the right to reputation, can only rely on qualified privilege to the extent that the defence is compatible with its duty to respect those rights. He submits, correctly in my judgment, that Mr Edgar's duty to act must have been co-extensive with the duty of the Council; that their duties fell to be exercised in accordance with s6(1) of the Human Rights Act; that disclosure of damaging information about the claimant, even if made in the course of carrying out those duties, required specific public interest justification; and that neither defendant (as a public authority or a person acting on behalf of a public authority) had any Art.10 rights to place in the balance (*W v Westminster City Council* [2004] EWHC 2866 (QB) at [39]).

53. The publishees of Mr Edgar's letters were all in an existing relationship with the defendants. As it happens, that is not quite how the defence (which was not settled by Miss Page) pleads it. The case seems to be put both in terms of duty/interest and of common interest. The concept of pre-existing relationship is not pleaded in terms, but it is implicit in the plea of common and corresponding interest at paragraphs 20 and 23 of the defence. Mr Tomlinson accepts the pre-existing relationship, but contends that it did not obviate the need for some verification of the information communicated. No proper verification was attempted, and in consequence the defendants' two letters did not accord with the 'fundamental rules of good public administration', as Ward LJ put it in *Clift* at [31]. Publication to the publishees was not necessary or proportionate for the reasons set out in the plea of malice (summarised at [28] – [32] above). Essentially, the information was unverified and uncorroborated, and Mrs Morrison had had no opportunity to respond to it. Moreover, the interest of the publishees – particularly the two head teachers - was limited to the fact that the defendants no longer wished to employ Mrs Morrison as an NCA.

54. For the defendants, Miss Page stresses that there must be a point of substance to the amendment: she suggests that the claimant's application does no more than invoke formulae which seek to impose a different legal framework on the existing facts, so that no matter of substance is raised. She points out that no new facts are relied on to explain why a defence of common law qualified privilege, conceded on the advice of leading Counsel, should be disapplied simply by re-defining the claim as an infringement of the claimant's Art.8 rights by the Council as a public authority. Had the defendants been – for example – providers of private education, there would have been no possible scope for the proposed amendment. Mr Tomlinson retorts that there is no surprise in that, since under the Human Rights Act public authorities are held to higher standards than others.

55. Miss Page also submits that the claimant's concession of common law privilege entails acceptance by the claimant that in the case of each letter the defendants had a duty to publish or a legitimate interest in publishing each letter, and each of the recipients had a corresponding duty to receive and/or an interest in receiving the information. This type of qualified privilege depends on the particular circumstances surrounding the individual publications, and is only established or conceded following a fact-sensitive exercise of balancing the competing rights involved. In the case of a public authority, the privilege will be established only when the public authority is acting in pursuance of its public duties and where the disclosure has a clear public

interest justification: see *Wood* at [63]. In other words, the privilege which has been conceded already involves a balancing of competing rights, and already takes account of the duties of public authorities, as demonstrated by *Wood*. So the concession necessarily recognises that these defendants (even though respectively a public authority and the servant of one) were under a duty, in accordance with a public interest justification, to publish the information to the publishees.

56. Mr Tomlinson accepts that, if there was a duty to publish, qualified privilege applies, but he insists that, following *Clift*, a public authority can only rely on qualified privilege if it can show that it has acted compatibly with the Art.8 rights of those to whom the information relates, and must satisfy a proportionality test: to that extent, he says, *Clift* changes the landscape. The claimant's concession was intended to do no more than indicate that the pleaded duty could not be attacked without that public law dimension: if the defendant had been a private body, the plea of common law qualified privilege would have been good.

57. It is not easy to understand what the concession entailed if it was not an acceptance that the Council, as a public body, with the duties explained in *Wood* and *Clift*, had a duty to publish the letters complained of to publishees who had a common and corresponding duty or interest to receive them. That said, Miss Page's clients can hardly have been deceived as to what the claimant's lawyers intended. It may have costs implications, but it cannot be determinative of this application.

58. Miss Page also relies on the housing cases of *Kay v Lambeth Borough Council* [2006] UKHL 10, [2006] 2 AC 465 and *Manchester City Council v Pinnock* [2010] UKSC 45, [2010] 3 WLR 1441, as showing that the domestic courts, when dealing with an Art.8 challenge to a claim for possession of property, should assume that domestic law strikes the right balance of competing interests and needs and thus is compatible with Art.8 unless there is an express challenge to the contrary: see *Kay* per Lord Bingham at [29]-[39]. These cases offer an interesting analogy with the common law of qualified privilege, because (as Lord Bingham observed in *Kay* at [32]-[33]) there is a parallel between the Convention's search for balance between the rights of the individual and the wider rights of the society to which he belongs, and the development of domestic property law, which has over the centuries reconciled the rights and interests of those controlling and those occupying property. Nonetheless, it is clear from Lord Neuberger MR's explanation in *Pinnock* at [53]-[54] that the underlying rationale of an assumption of entitlement to possession, absent cogent evidence to the contrary, is that unencumbered property rights, whether enjoyed by a private landlord or by a public body such as a local authority, are of real weight when it comes to proportionality. In other words, such an assumption is strongly rooted in the domestic law of entitlement to possession, and in my judgment should not be taken to reflect a wider assumption in other areas of law that domestic law strikes the right balance between competing interests and needs.

59. Ultimately, this application has to be decided not on the basis of the implications of a concession, nor on assumptions drawn from housing law, but by consideration of the pleaded case which the claimant puts forward and its implications for the duties of the defendants as or as representing a public authority.

60. Miss Page argues that the decision in *Clift* is simply an instance of the application of *Wood.* In my judgment the case has rather more significance than that, because it

shows that it is not enough, even where there would, pre-Human Rights Act, have been an established relationship between publisher and publishee, for a defendant public body to rely on that relationship as necessarily establishing qualified privilege. It is important, of course, that in *Clift*, the dissemination of the words complained of, although not to the public at large, was nonetheless indiscriminate, whereas in the instant case publication of the two letters was narrow and selective, to a small number of people who, by their positions in local or national government, were directly involved in the matters to which the letters related. There is the further point that in *Clift* the claimant was an outsider, a member of the public, whereas in Mrs Morrison's case she had put herself forward for an important appointment and she and the Council shared what appears to have been a contractual commitment.

61. These are all matters that go to the question of whether the letters, assuming (as is conceded for present purposes) that they arguably interfered with Mrs Morrison's Art.8 right to reputation, were justifiable in terms of Art.8(2) as being necessary in a democratic society in one of the prescribed interests. In order to be justified under Art.8(2), such an interference must be necessary for a legitimate aim and proportionate to that aim. In other words (see per Ward LJ in *Clift* at [19], applying *Huang v Home Secretary* [2007] 2 AC 167 at [19]))

(a) the legitimate aim must be sufficiently important to justify the interference;

(b) the measures taken to achieve the aim must be rationally connected to it;

(c) the means used to impair the right must be no more than is necessary to accomplish the objective; and

(d) a fair balance must be struck between the rights of the individual and the interests of the community, which requires a careful assessment of the severity and consequences of the interference.

62. Miss Page argues that the assumed interference with Mrs Morrison's Art.8 rights had the legitimate aims of promoting higher standards of education through the appointment of the best available advisers to schools, which was necessary for the economic well-being of the country, and of protecting the rights of children to education. That must be right, and I do not think that Mr Tomlinson resists the submission very strenuously. Nor, I think, does Mr Tomlinson argue that the measures taken by the defendants to achieve their aim were not rationally connected to it.

63. Mr Tomlinson's essential case is that publication of the letters in the form in which they were written was neither necessary or proportionate – in other words, that the means used to impair Mrs Morrison's Art.8 right were in excess of what was necessary to accomplish the objective, and that a fair balance was not struck between Mrs Morrison's rights and the interests of the community. He argues that a fair balance required the defendants first to investigate properly the concerns expressed, to put the allegations to Mrs Morrison and to give her an opportunity to respond. The fact of an existing relationship did not obviate the need for some investigation. He concedes that the timetable was tight, but insists that there was no duty to write to anyone until those steps had been taken. It was not necessary or proportionate to write the letters in the form in which they were written to any of the publishees: their

interest (and in particular that of the head teachers) was limited to the fact that the defendants no longer wished to avail themselves of Mrs Morrison's services as an NCA. Therefore any letters written should have done no more than express unresolved concerns about Mr Morrison's suitability, and should not have reached any conclusions about Mrs Morrison's probity.

64. Miss Page responds that the purpose of the first letter was to refer 'concerns' about Mrs Morrison for investigation by NS, in accordance with the procedure for the removal of accreditation as a SIP (what Mr Tomlinson calls the 'nuclear weapon'). There were written procedures for such referrals and for NS to conduct a full investigation. One criterion, the conduct criterion, was arguably met, for the procedures provided that withholding or misrepresenting any information in the pen portrait supplied to NS 'in such a way that it materially affects decisions to appoint a SIP' would be taken as misconduct and would result in removal of accreditation. Miss Page relies on the steps envisaged by the procedure for removal of accreditation (see [10] above), and argues that it was simply not Mr Edgar's role to investigate the allegations, and not necessary for him to do so to protect Mrs Morrison's Art.8 rights, given that the written procedures for investigation by NS were a sufficient safeguard. Nor would there have been any purpose in Mr Edgar pre-empting the outcome of that process.

65. Mr Tomlinson contends that there are two, related, difficulties with that argument.

66. One is that it is not clear that Mr Edgar was in fact following the procedures for the removal of SIP accreditation. It is not pleaded that he was (understandably, since it is only now that the claimant has sought to take the point on s6 HRA), and the point was not raised until it appeared in Miss Page's skeleton argument for this application. All that is pleaded is (I gloss the Defence) that the publishees were all people who were intimately involved with Mrs Morrison's appointment and had a proper interest in knowing of her dismissal and the reasons for it. However, step 2 of the procedures for the removal of accreditation (see [10] above) envisages that the local authority and the regional SIP co-ordinator will have agreed that the concerns are sufficient to warrant removal of accreditation. It is not suggested in the defence or in the defendants' evidence that Mr Edgar and Mr Lord agreed at their 4th December meeting that Mr Edgar's concerns were sufficient to warrant removal of accreditation. It is only said that Mr Edgar told Mr Lord of his concerns, and that Mr Lord suggested he should inform Mr Percival of them, although of course in his email to Mr Hood and Mr Preston of 10th December he said that he was taking steps to question Mrs Morrison's accreditation, and in the first letter complained of Mr Edgar asked Mr Percival to investigate Mrs Morrison fully and consider whether her accreditation should be maintained. It may well be, therefore, that he intended to use the procedures for the removal of accreditation. However, Mr Tomlinson argues that the question of which procedure Mr Edgar was using is a matter that needs to be explored in evidence and cannot be determined on a summary basis.

67. The second, and related, difficulty which Mr Tomlinson raises is that Mr Edgar went further than just to refer 'concerns' to NS for investigation, and reached the conclusion that Mrs Morrison had in fact misrepresented her achievements at Parkstone GS, as a result of which her professional credibility was 'minimal'. He did so without giving Mrs Morrison any chance to explain why, on her case, her pen portrait was accurate and justifiable. No doubt he was under pressures of time: the Defence pleads (but the

Reply does not admit) that the reason for not contacting her for her responses was that the defendants had to act with great haste in obtaining approval for their decision to appoint a replacement NCA. Mr Tomlinson concedes, as I have said, that there was a tight timetable. If Mr Edgar was convinced that he had appointed the wrong person, he had to move quickly to terminate her appointment and find a replacement. But there is force in Mr Tomlinson's point that Mr Edgar should at least have contacted Mrs Morrison to ask for her explanation, something which would hardly have taken much time, and without having obtained her explanation he should have expressed himself in terms of concern (which is what the de-accreditation procedure seems to have envisaged) rather than expressing a damaging adverse factual conclusion. His conclusion that she had been guilty of a misrepresentation, and that her professional credibility was minimal, is therefore one that it was not objectively necessary or reasonable for him to state in order to achieve his aim.

68. This, it seems to me, is where Mr Tomlinson is on his strongest ground. In my judgment, he should not be shut out from arguing that Mr Edgar should either have contacted Mrs Morrison to learn her explanation for what at first sight appeared to him to be an important misrepresentation on her part, or alternatively have expressed himself in his two letters only in terms of concerns which required investigation. There is, in my judgment, a reasonable prospect of success for the argument that, if he was not going to obtain her side of the case, and whether or not he regarded himself as using the formal de-accreditation procedure, he needed to do (and should have done) no more than express himself in terms of concerns which required investigation and which led the defendants to decide not, after all, to make use of Mrs Morrison's services.

69. In *Downtex v Flatley* [2003] EWCA Civ 1282, the Court of Appeal gave the following guidance on the exercise of this jurisdiction:

> "[20] [Counsel] relied upon the observation of Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 90 at 95, in relation to the power of the court to dispose summarily of defences which have 'no real prospect' of being successful. 'Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. The proper disposal of an issue under Pt 24 does not involve the judge conducting a mini−trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.'
>
> ….
>
> [31] As already quoted at paragraph 20 above, the summary procedure should not involve the conduct of a mini−trial in a case where the defence advanced is 'fact sensitive' and there is reason to think that further facts may emerge or require investigation at trial before a fair and/or final conclusion can be reached. However, where

> there is sufficient material before the court on the pleadings or in evidence to allow the court to form a confident view upon the prospects of success for the defence advanced and the case is not fact sensitive in the sense that the essentials have all been deployed and there is no reason to think that the defendant will be in a position to advance his case to any significant extent at trial, then the court should not shy away from careful consideration and analysis of the facts relied on in order to decide whether the line of defence advanced is indeed no more than fanciful."

70. Much of the defence is formally in issue in the sense that (being beyond the claimant's knowledge) it is not admitted, and Miss Page urges me to take the view, given in particular the defendants' full disclosure of the relevant documents, which are consistent with the pleaded case, that it is unlikely to be challenged with any success at trial. Mr Tomlinson strongly disagrees. He argues that questions of duty and interest are intensely fact-dependent, and that there are a number of issues which need to be determined after hearing oral evidence, in particular whether or not Mr Edgar was using the NS' de-accreditation procedure; why, if so, it was appropriate for him to state concluded views as to Mrs Morrison's guilt of misrepresentation, especially without contacting her for her explanation; why it was necessary to copy the head teachers in to the second letter; and just how urgent the letters were. Mr Tomlinson argues that although there was a tight timetable, the urgency was not such as to demand action so instant that Mrs Morrison's response could not be sought and obtained, and reflected in the letter as ultimately written. He says I should hesitate before deciding that the position is so clear that it is not fit for amendment.

71. In the light of the disproportionate costs already incurred and likely to be incurred over what on any view was very limited publication, it would be very tempting to follow Miss Page's suggested course. But I do not think that it would be right to do so, given in particular that the important and disputed question of the procedure which Mr Edgar followed is not even pleaded in the defence. Moreover, as Mr Tomlinson observes, referring to Tugendhat J's words in *Lewis v Metropolitan Police* [2011] EWHC 781 (QB) at [30], the law of qualified privilege so far as it relates to communications made by a public authority is difficult and developing. Not without concerns as to the high standards of judgment and decision-making which the law may now be expecting of local authority officials in Mr Edgar's position, especially by contrast with the common law of qualified privilege as it has so long been understood, in my judgment it would be wrong to shut the claimant out from advancing a case founded on s6 of the Human Rights Act 1998 and Art.8 of the Convention.

72. The defendants proposed that the issues introduced by the draft amendment to the Reply should be determined as a preliminary issue by judge alone, and the claimant, very sensibly, does not oppose that course.

73. However, it does seem to me to be desirable, especially considering my conclusions on the plea of malice, that the issues for determination should be more clearly pleaded than they are in the proposed amendment. There are real difficulties, as Miss Page rightly submitted (see [39] above), with the way in which the current proposed pleading intermingles matters said to be relevant to malice with matters relevant to

questions of necessity and proportionality. I am not prepared simply to give permission to amend in the proposed terms. Mr Tomlinson will need to re-formulate his case in the light of this judgment, and of course I will hear argument on the terms of that further draft, which should both narrow and clarify the ambit of the current draft, and should be submitted to the defendants' advisers 7 days in advance of the hearing. It ought to be capable of agreement, but if there is any dispute about the terms of the proposed draft, each side should exchange brief skeleton arguments, and provide them to the court, in the usual way.

74. It seems to me that determination of these issues by judge alone will involve a decision as to whether or not the claimant's Art.8 rights are in fact engaged, and may also require the judge to decide the issue of meaning at the same time. If either proposition is contentious, I will of course hear argument about it and give directions for the hearing of the preliminary issue.

75. Finally, I should refer to Mr Tomlinson's argument that in a case such as this, where a public authority wishes to rely on qualified privilege, it is necessary for the authority to plead and prove that it has acted in a manner compatible with any Convention rights which are engaged, with the result that the current defence is misconceived. The difficulty with this is that it involves the defendant setting up and then knocking down a point which may not be raised against it, which is not the way in which the process of pleading works. The defendant can hardly be expected to plead that Art.8 is not engaged: that would be to anticipate a case which may not be made, as it was not in this case (or in *Clift*) until Mr Tomlinson's arrival on the scene. Equally, the claimant cannot be expected to raise the point in her Particulars of Claim, before it is known whether the defendant will plead privilege. As Ward LJ made clear in *Clift* at [39], the defence remains the common law defence of qualified privilege, and the public authority must plead that it is under a duty to communicate the information to those who have a corresponding duty or interest in receive it. That is what has been pleaded. If the claimant wishes to plead in response that for public law/HRA reasons there was in fact no duty and thus no qualified privilege, that is in principle a matter for her to raise in her Reply, as she now seeks to do. It may be worth noting Lord Bingham's observation in *Kay* at [29] that it would be burdensome and futile for a local authority to plead and prove that a possession order was justified in terms of Art.8: it would be enough for it to assert its claim in accordance with domestic property law. It would then be for the occupier to raise an Art.8 defence. Of course, in the possession context the local authority can then answer the Art.8 defence in its Reply, whereas in defamation, the Art.8 argument (if the nettle is not grasped by the defendant in the defence) can only be raised in the Reply. It may be that that defunct species of pleading, the rejoinder, will have to be disinterred.

DEFENDANTS' CROSS-APPLICATION: MALICE

76. I now turn to the defendants' cross-application, which is for summary judgment on the whole claim or alternatively on the issue of malice. It is only the second limb which is now alive. This involves going over again much of the ground already traversed on the claimant's application for leave to amend, but in the context of malice very different considerations apply, which concern not objective questions of whether or not there was a duty to act as the defendants did but, rather, Mr Edgar's own state of mind.

77. A plea of qualified privilege will be defeated either (1) where the defendant (in this case through the medium of Mr Edgar) did not believe that what he wrote was true or was indifferent to its truth, or (2) where his dominant motive in writing the letters was improper, in the sense of not being related to the duty or interest on which the privilege is based: but (so far as the second alternative is concerned) it is only where the defendant's desire to comply with the relevant duty or interest plays no significant part in his motives for publishing what he believes to be true that express malice can properly be found (*Horrocks v Lowe* [1975] AC 135, especially at p151).

78. This is a case which has been ordered to be tried by jury. Malice is very much a jury issue, but there are circumstances in which the judge can and should prevent the issue from going to a jury. In *Alexander v Arts Council of Wales* [2001] 1 WLR 1840 [37], May LJ identified the proper approach:

> ".....it is open to the judge in a libel case to come to the conclusion that the evidence, taken at its highest, is such that a jury properly directed could not properly reach a necessary factual conclusion. In those circumstances, it is the judge's duty, upon a submission being made to him, to withdraw that issue from the jury. This is the test applied in criminal jury trials: see *R v Galbraith* [1981] 1 WLR 1039, 1042c. In my view, it applies equally in libel actions."

That approach was reiterated recently in *Khader v Aziz* [2010] EWCA Civ 716 at [23].

79. Similarly, in *Spencer v Sillitoe* [2002] EWCA Civ 1579, [2003] EMLR 10 at [23], Buxton LJ said:

> "The question in a case such as the present comes down to whether there is an issue of fact on which, on the evidence so far available, the jury could properly, and without being perverse, come to a conclusion in favour of the claimant."

80. This usually means that the court must provisionally resolve all apparent conflicts of fact in the claimant's favour, although there are important caveats, for example where the claimant's evidence is 'fatally incoherent or self-contradictory': see *Webster v British Gas Services Ltd* [2003] EWHC 1188 (QB) at [17], *per* Tugendhat J.

81. As to the standard which the evidence of malice must satisfy, a plea of malice is a very serious matter, and is the equivalent of an allegation of dishonesty. In *Alexander v Arts Council of Wales* [2001] 1 WLR 1840 at [32], May LJ explained what was required:

> "'In order to enable the plaintiff to have the question of malice left to the jury, it is necessary that the evidence should raise a probability of malice and be more consistent with its existence than with its non-existence. It is not sufficient if it falls short of that and is consistent only with a mere possibility. To direct a jury to consider mere possibilities in such a case would be

> practically to destroy the protection which the law throws over privileged communications."

82. If the plea itself or the supporting evidence does not disclose a case more consistent with the presence of malice than its absence, the court must therefore ensure, at whatever stage is appropriate, that the court's time is not wasted by allowing a plea of malice to go forward: *Blackwell v News Group* [2007] EWHC 3098 (QB) [14], per Eady J.

83. Miss Page suggests that the particulars of malice can be divided into two broad areas of complaint: what she calls the 'unfair dismissal' allegations, and complaints about the actual content of the letters. In the course of argument, Mr Tomlinson focused on the latter, suggesting that the vital question was whether Mr Edgar misrepresented in his letters the effect of the Oftsed reports.

84. The 'unfair dismissal' allegations are, firstly (Reply para 27.1), that Mr Edgar was rushed and unfair in his reactions to the concerns expressed to him, and relied on the fact that allegations had been made and concerns expressed as sufficient to condemn and dismiss Mrs Morrison without an investigation, and, secondly (Reply para 27.2), that he failed to contact her before reaching his conclusion, blocked her email so that she could not contact him to take part in the investigation or defend herself, suggested to others that she might alter her pen portrait if alerted, and caused her to be told that she was not required to attend the 4th December meeting, thus preventing her from defending herself, an object which (so it is to be inferred) Mr Edgar was determined to achieve. The first component – failure to investigate - appears to entail his failure to establish and investigate the validity of the concerns from Sheena Moynihan or David Hood: in particular, he did not obtain corroboration of the central allegation that the pen portrait was misleading beyond a single newspaper article (which he relied on for the truth of its contents), and the 1996 Ofsted report, the impact of which he distorted, since (as it is said that he 'well knew'), the jargon 'in serious weaknesses' is not a term used to indicate the overall finding about a school, and he ignored the true import of the 2000 report, which showed that Parkstone GS had improved during Mrs Morrison's time, instead 'seeking to imply' that the report did not reflect on her as she was not in post at the time when the school was inspected and the report written. Moreover, there was no great haste to appoint a new NCA.

85. Miss Page submits that there are only two allegations in that catalogue which could be said to disclose an arguable case of malice. They are the allegations of conscious distortion of the effect of the two Ofsted reports (the 1996 report by giving the phrase 'serious weaknesses' a meaning which Mr Edgar knew it did not bear, and the 2000 report by the alleged implication that the improvements at Parkstone GS were not Mrs Morrison's doing). They are allegations which relate to the contents of the letters as well as to the 'unfair dismissal' side of the malice plea. They are at the core of Mr Tomlinson's argument. I will leave them on one side for the moment. As to the other 'unfair dismissal' allegations, Miss Page argues that the correctness or otherwise of Mr Edgar's decision to dismiss Mrs Morrison is at best a peripheral issue. Justification aside, the question is whether, having developed concerns about Mrs Morrison and having decided to dismiss her as an NCA – justifiably or not – Mr Edgar's communication of his concerns, his decision and his reasons, is more consistent with the presence than the absence of malice.

86. Essentially, the claimant's case on the 'unfair dismissal' allegations is that Mr Edgar published his letters because he had decided to dispense with Mrs Morrison's services, come what may, and sought to bolster that decision by destroying her professional standing. The argument is that Mr Edgar was perfunctory in dealing with the concerns expressed to him, and gave no consideration to the fairness of his chosen process, as shown particularly by his failure to allow Mrs Morrison a chance to respond to those concerns; if Mr Edgar was not investigating the claimant but simply referring concerns to NS for them to investigate, he should have confined himself to notification of the allegations, should have been careful to tell NS the true nature and status of the source information, and should not have suggested that the claimant's status as a SIP and NCA needed to be considered. It will be seen that there is a strong vein of carelessness running through this case, and Mr Tomlinson reminded me that although carelessness is not to be equated with malice, it may, depending on the circumstances, be some evidence of indifference to truth (*Lillie v Reed* (No.2) [2002] EWHC 1600 (QB) at [1292]-[1294].

87. It seems to me that some realism needs to be injected into this debate. Mr Edgar was a middle-ranking local authority official faced with a difficult problem which had to be resolved with (as is conceded) some urgency. There can be no real doubt that his council was obliged to appoint an NCA to each National Challenge school on a tight timetable, and he had been told that each of the two head teachers who had to work with Mrs Morrison had serious concerns about her suitability. The concerns expressed by the two head teachers showed that confidence in Mrs Morrison had been lost, and in the circumstances it was plainly going to be difficult to expect the head teachers to accept her as their NCA, regardless of the validity of their concerns. The issue had to be resolved quickly and (if necessary) a replacement had to be found. In other words, the very existence of concerns raised by head teachers (unless misconceived on their face) was likely to be as important to a decision to terminate Mrs Morrison's appointment as their justification. Indeed, Mr Tomlinson accepts that the whole scheme of appointment of NCAs contemplated that they must get on with their schools, and that there would be no complaint had Mr Edgar simply written to the publishees to say that in the light of concerns on the part of the head teachers, which needed to be investigated, he intended to terminate Mrs Morrison's contract. Against that background, it is clear to me that the 'unfair dismissal' allegations, where they go beyond rhetoric or mere assertion, fall well short of disclosing even an arguable case that is more consistent with the presence than the absence of malice in the writing of the letters complained of.

88. I should add that I cannot give weight to the allegation that Mr Edgar blocked the claimant's email so that she was unable to contact him or anyone else at Buckinghamshire County Council to defend herself, because of its complete lack of particulars and its inherent implausibility (how would a man in Mr Edgar's position be able to block an individual's access to an entire County Council, and even if she could not reach him by email, how would that prevent her from telephoning or writing to him?); and the assertion that he 'prevented' her from attending the 4th December board meeting amounts to no more than an extrapolation from the fact that, when she rang in to say that she was running late, she was told first by his PA and then by Mr Edgar himself that she need not attend. The claimant invites an inference that he was determined to keep from her the fact that she was under investigation and had resolved not to give her a chance to defend herself. There is another inference

available, at least as cogent, and that is that he told her not to bother to attend simply because she was running late. Had he been determined to stop her attending, it might have been expected that he would have done something more positive than respond to a telephone call that he can have had no reason to expect.

89. I return to the two allegations of distortion in relation to the 1996 and 2000 Ofsted reports. These are the core of the case on malice. I repeat that the claimant's case is that Mr Edgar distorted the 1996 report by giving the phrase 'serious weaknesses' a meaning which he knew it did not bear, that is to say as meaning Ofsted's overall and general finding about the school, and that he distorted the 2000 report by the alleged implication that the improvements at Parkstone GS were not Mrs Morrison's doing, because she was not in post at the time of the report, when in fact the report showed that the school had improved considerably under her leadership. It will be remembered that Mrs Morrison's pen portrait stated that as head of Parkstone GS from 1997 to 2000 she moved the school "from serious weaknesses (Ofsted 1997) to a 'very good school' (Ofsted 2000)". In other words, she had been the head responsible for the improvement between the two inspections, from 'serious weaknesses' to a 'very good school'.

90. The unchallenged evidence is that the Ofsted inspection had been in February 1996, 19 months before 1st September 1997 when she became head, and the 2000 inspection had taken place in December of that year, six months after Mrs Morrison had been suspended. So she had been in charge for only a part, albeit the major part (about 33 out of 58 months), of the period between the inspections, but her pen portrait did not make that clear. Her case is that her dating of the report as 1997 rather than 1996 was a simple mistake which could have misled nobody.

91. There is a real dispute as to the proper sense of 'serious weaknesses'. The Ofsted 1996 report found that Parkstone GS was even then a 'very good school with some excellent features and some aspects which need further development', but that the quality of management at its highest level showed some serious weaknesses. It was that finding of serious weaknesses in one area to which Mrs Morrison had been referring in her summary of the findings of the report, but she did not refer to the overall finding. Her case is that in the education business everyone knows that 'serious weaknesses' is never an overall finding of an Ofsted report, but only ever indicates a failing in one or more areas.

92. The 2000 report again found Parkstone to be a 'very good school', but the 'serious weaknesses' in the senior management area had been remedied. The report did not in fact give credit for this to Mrs Morrison, who had not been at the helm since June 2000, but only to the acting head, Mr Triplow.

93. The claimant's contention as to the meaning of 'serious weaknesses' was not supported by Ofsted itself, and her mistake in dating the 1996 report to 1997 was regarded as significant by NS. On 15th January 2009, Gary Peile of NS wrote to her in these terms (with a copy to Adrian Percival):

> "The case you present is compelling although (the defendants') difficulty over the conflict between an Ofsted finding of Serious Weaknesses in the same report as an overall finding of very good with excellent features is perhaps understandable.

> Upon consultation with Ofsted their comment was that, although the phrase 'serious weaknesses' is used, this was not the overall finding. Your current pen portrait does bear the clear implication that this was the overall finding, therefore you need to further amend your pen portrait to remove this implication. To say that the 1996 report found a serious weakness in leadership and management would accurately present the position. Furthermore, although you present the error in dating the first Ofsted inspection as 1997 and not 1996, it is also the case it seems to us that this error is not without significance given your post at the school commenced in 1997, over 18 months after the inspection."

It is worth noting that NS concluded, after considering the Daily Telegraph article about Mrs Morrison's suspension, that there had clearly been a loss of confidence in her capacity to act as an NCA, such that there was arguably a case for the loss of her accreditation as a SIP (although the decision was that there was not in fact such a case).

94. I note also that the solicitor to the governing body of Parkstone GS wrote to Mrs Morrison on 15th January 2009 to explain that in the education field the term 'serious weaknesses', especially when linked with an Ofsted report, had a particular meaning which would reduce the standing of a school in the eyes of any reader knowledgeable in education. He went on: "The Ofsted report .... does not refer to the School as having 'serious weaknesses' . It does state that there are serious weaknesses in the quality of management at the very highest level, but otherwise the School is found to be 'a very good school with some excellent features and some aspects which need further development'". He expressed the confidence that Mrs Morrison would wish her pen portrait to be accurate, and asked for her assurance that it would be amended so that it no longer suggested that the school had serious weaknesses.

95. Mr Edgar's conclusions on the 1996 report were very much the same as those of Ofsted and of the school's governing body, and his view of the extent to which Mrs Morrison was in fact responsible for the alleged improvements is at least objectively justifiable. What he actually said in his first letter, it will be recalled, was that while Mrs Morrison "clearly has been the head teacher for a period between these inspections, she was not actually in a leadership role at either Ofsted inspection, and the implied progress from 'Serious weaknesses' to a 'Very Good School' is a clear misrepresentation, given that the school was already at a high level of performance in 1996". He used almost identical words in the second letter.

96. Mr Tomlinson contends that Mr Edgar distorted the 1996 report by giving 'serious weaknesses' a sense which he 'well knew' it could not bear, and that he distorted the effect of the 2000 report by implying that the improvements at Parkstone were not Mrs Morrison's doing. He explains that the distortion lay (this is not, I think, quite the way in which the case is pleaded) in Mr Edgar's applying a technical interpretation of the phrase which did not apply in 1996. Up until 31st August 2005, he argues, the term applied to a school which was deemed to have significant weaknesses in one or more areas but provided an acceptable standard of education overall. Mrs Morrison did not use the expression '<u>in</u> serious weaknesses' or '<u>with</u> serious weaknesses', but claimed to have moved the school 'from serious weaknesses', which accorded with the Ofsted

jargon of the time. In other words, on any proper reading of her pen portrait, against the background of the way in which Ofsted used the phrase at the time, she was simply saying in short form that she had moved Parkstone from 'a very good school with serious weaknesses' to 'a very good school'. Mr Tomlinson characterises Mr Peile's conclusion, in the NS letter, as an 'over-simplification' of the true position.

97. These are somewhat arcane arguments to apply to the construction of a pen portrait which Mrs Morrison was using in late 2008, over three years after the change of usage which Mr Tomlinson cites, and on which, as she knew, potential local authority employers and schools would place substantial reliance. It seems to me that Miss Page is right to submit that in the circumstances, while there may still be room for technical argument as to exactly what the Ofsted usage was between 1996 and 2005, and as to exactly what Mrs Morrison's pen portrait might have meant, there is no possible prospect of it being shown that Mr Edgar, whose conclusions about the pen portrait were so similar to those reached by NS, Ofsted and the school's governing body, could have been activated by malice in writing as he did.

98. As for the second alleged distortion, namely Mr Edgar's ignoring of 'the true import of the 2000 Ofsted report, which clearly showed that Parkstone had improved considerably under the Claimant's leadership', and his 'seeking to imply that the report did not reflect on her as she was not in post at the time it was made', it seems to me that the claimant is in difficulty. Mr Edgar's summary of the 2000 report is essentially accurate, namely that the claimant was the head teacher for a period between the two inspections but not actually in a leadership role at the time of either inspection (and in this context the false dating of the report to 1997 rather than 19 months before her appointment is very important). If, which I doubt, that does more than make the fair point that she can only have been responsible for such improvements as were made while she was in a leadership role, and implies that the report did not attribute to her any responsibility for the improvement, the fact is that the 2000 Ofsted report did not identify her as responsible for the improvements since 1996. In so far as it attributed credit for improvement in management of and relationships with staff (the area of 'serious weaknesses' in 1996), it appears to have given it to the acting head. In short, it does not seem to me that there is any arguable basis for the allegation that Mr Edgar sought to convey what, on the claimant's case, would have to amount to a dishonest flavour of the 2000 Ofsted report. What he said was entirely compatible with good faith.

99. The final matters relied on by the claimant in support of her case on malice are pleaded at paragraph 27(3) of the Reply. They fall within Miss Page's second group of allegations, because they relate to the contents of the letters. They are (1) that Mr Edgar 'deliberately misled' the publishees and the claimant herself by implying that he had reached his conclusion that she had to be dismissed after a thorough and proper investigation; (2) that he went beyond simply drawing matters to the attention of NS and invited NS to consider whether Mrs Morrison should remain a SIP and NCA, which was unjustified; and (3) that by copying the second letter to the two head teachers, he ensured that the letter or its purport would be published to a wide number of members of staff.

100. The first point is not borne out by the letters. In the first letter, there was no representation that Mr Edgar had conducted a thorough investigation: he simply set out what he had done and stated his conclusion. In the second letter, Mr Edgar did

state expressly that he had thoroughly investigated inaccuracies in Mrs Morrison's pen portrait, but he stated in terms what the investigation amounted to and what inaccuracies he had discovered, so that the aptness of the adverb 'thoroughly' was a matter on which any recipient could form a view. I see no misleading of the recipients of the first letter which is even arguable, and none of the recipients of the second letter which could be said to be deliberate, which seems to be an assertion for which there is no evidence whatever. Even if the description of his investigation as 'thorough' was an exaggeration, that would be far from amounting to an intentional misleading of the recipients.

101. The second point, which applies only to the first letter to Mr Percival at NS, seems to me to take matters no further. Mr Edgar made clear in the letter why he asked NS to investigate Mrs Morrison further and consider her accreditation: it was because of the importance of ensuring that vulnerable schools received the best support from NCAs with a proven track record. It cannot sensibly be argued that his decision was not a proper one. Far from arguably being evidence of malice, it seems to me to underline the legitimate purpose of the letter.

102. The last point is hopeless. Mr Edgar was entitled to form the view that the head teachers had to know what he had decided to do and why, and there is no evidence whatever that the letter was published to staff members generally, let alone that he 'ensured' such wider publication.

103. The remaining paragraphs of the pleas of malice are paragraph 27.3A, which as I understand it adopts the particulars of malice for the argument on qualified privilege, and paragraph 27.4, which summarises the claimant's conclusions. They take matters no further. I therefore grant summary judgment on the plea of malice in accordance with Miss Page's cross-application.