Neutral Citation Number: [2007] EWHC 2860 (QB)

Case No: HQ06X03905

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2007

Before :

THE HONOURABLE MR JUSTICE GRAY

- -

Between :

Frank Warren	**Claimant**
- and -	
The Random House Group Limited	**Defendant**

- -
- -

Adrienne Page QC and William Bennett (instructed by **Carter-Ruck Solicitors**) for the **Claimant**
Desmond Browne QC and Matthew Nicklin (instructed by **Simons Muirhead & Burton Solicitors**) for the **Defendant**

Hearing dates: 20th, 21st & 22nd November 2007

- -

Approved Judgment (II)

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.

.....

THE HONOURABLE MR JUSTICE GRAY

Mr Justice Gray:

The application to be decided.

1. In an earlier judgment in this case I refused the application of the defendant, The Random House Group Limited, for permission to amend its defence. The effect of the proposed amendment had been to withdraw the defence based on its offer of amends and to substitute for it a plea of justification in respect of one of three passages complained of by the claimant, Mr Warren, in its book about the career of the boxer Ricky Hatton. For the purpose of that judgment it was necessary for me to say little of the factual and procedural background to the case.

2. This judgment deals with two cross-applications. The first is an application by the defendant for permission to amend its defence. The amendment sought is in part necessitated by my earlier refusal to grant permission to the defendant to amend its defence to substitute a plea of justification for its reliance on the offer of amends (which was the subject of my earlier judgment). The amendment for which permission is now sought by the defendant makes substantial revisions and additions to what are known as "*Burstein* particulars". This application is opposed in its entirety by the claimant. In addition the claimant makes a cross-application to strike out the *Burstein* particulars as they originally stood.

The procedural history

3. As I have said, it was unnecessary for me in my earlier judgment to say a great deal about the procedural history of this case. The dates which are for present purposes material are these: the Particulars of Claim were served on 21 December 2006. On 7 March 2007 the defendant made an offer of amends in respect of one of the three passages complained of in the defendant's book. The letter containing the offer accepted that the facts as recounted in that passage were incorrect and needed to be corrected. On 12 March 2007 the defence was served; in addition to reliance on the offer of amends which had been made, it included *Burstein* particulars. Those particulars included an allegation that the boxer Mr Phillips had attempted to renegotiate his fee in the light of the fact that the fight with Mr Hatton was to be televised on the US television programme Showtime ("the Phillips allegation"). The defendant's offer of amends was accepted in the Reply served on 18 April 2007. That pleading also included a challenge to the admissibility of the *Burstein* particulars as they then stood. Thereafter it was agreed that the substantive libel action should be tried by judge and jury but that statutory compensation (if any) in respect of the publication which was the subject of the accepted offer of amends should be tried by judge alone. Disclosure took place on 7 June 2007 and inspection followed on 27 June 2007.

4. On 4 October 2007 a statement in open court was read. It related only to the passage complained of which was the subject of the defendant's offer of amends, subsequently accepted by the claimant. In that statement Counsel for the defendant apologised for the publication of the passage in the book which alleged that the Claimant had dishonestly "conned" Mr Phillips into accepting a fee of £50,000 for fighting Mr Hatton by falsely telling him that Showtime were not interested in televising the fight on US television.

5. On 6 November 2007 the defendant served a draft amended defence which withdrew the reliance previously placed on the accepted offer of amends and instead pleaded justification with supporting particulars. That was the pleading for which I refused permission for the reasons given in my earlier judgment.

6. At the conclusion of the earlier hearing on 21 November 2007, I announced my decision to refuse permission to make the amendment and told the parties that I would hand down a reasoned judgment as soon as possible thereafter. Thereupon the defendant set about preparing a substitute draft amended defence, which was served on the claimant that same evening and produced in court the following morning.

The re-formulated Defence

7. The reformulated amended defence runs to over 30 pages. Much of it is devoted to the defences of justification which are advanced in respect of the other two passages in the book of which the claimant complained but in respect of which no offer of amends was made by the defendant. For present purposes nothing turns on those pleas of justification. They will in due course be determined by judge and jury.

8. What is relevant to the present application is that part of the draft amended defence which deals with the Phillips allegation. There is no longer any defence of justification to that allegation because I refused permission to add it. Following my earlier ruling, however, the offer of amends defence has been resurrected, albeit with a number of significant changes. The paragraphs which are material for present purposes are paragraphs 6.4 to 6.6 inclusive. In order to make this judgment easier to follow, it is necessary to for me to set out those paragraphs verbatim:

> "6.4 ~~In the event that the Claimant accepts the offer of amends,~~ The Defendant ~~intends to~~ will rely, in mitigation or extinction of any compensation payable to the Claimant upon:
>
> 6.4.1. such matters as are proved under Paragraph 5 above; and
>
> 6.4.2 the following matters which are directly relevant to the contextual background in which a defamatory publication came to be made:
>
> (1) Vince Phillips is a citizen of the United States. He became a professional boxer in 1989 and in 1997, became a world-champion after achieving a 10th-round knockout of the then undefeated IBF Light Welterweight title-holder, Kostya Tszyu. Mr Phillips successfully defended his title three times.
>
> (1A) On 29 April 2002, Mr Phillips entered an agreement appointing Sugar Ray Leonard Boxing LLC ("SRL") as his promoters ("the SRL Agreement"). The agreement provided, amongst other things:
>
> (a) that SRL would become the exclusive promoters of Mr Phillips for a period of 2 years from the date of the agreement; and

(b) that fights under the agreement Mr Phillips would be subject to the "Minimum Purse Requirement" specified in the agreement, in particular that Mr Phillips would be paid US$150,000 for any Main Event Bout in which Mr Phillips participated and which was broadcast as part of the US Television Network, Showtime's Championship Boxing Series.

(1B) On 5 April 2003, Ricky Hatton was due to fight ~~Vince~~ Mr Phillips at MEN Arena in Manchester. The fight was arranged by the Claimant. The Claimant became the Promoter for Mr Phillips under a six title-bout agreement dated 25 January 2003 ("the Agreement"). ~~on behalf of and Mr Phillips' promoter, Sugar Ray Leonard.~~ Under the Agreement, Mr Phillips was to be paid US$50,000 for the fight, with US$10,000 of this sum becoming payable upon receipt of the signed agreement and the British Boxing Board of Control medicals. In a side agreement, SRL released Mr Phillips from the exclusive SRL Agreement to allow him to box for the Claimant. In return, Mr Phillips agreed to pay SRL US$5,000 of his purse for the Hatton fight and 20% of the purse for any subsequent fights under the Agreement with the Claimant.

(1C) As was the position with Ricky Hatton (see Paragraph 5.9A above), under the Agreement, Mr Phillips granted to the Claimant all rights and title and interest in the live gate receipts and the rights to exploit the broadcast rights of his fights.

(1D) Mr Sauer had negotiated the SRL Agreement with SRL for Mr Phillips. He was aware, therefore, that under the SRL Agreement a boxing bout involving Mr Phillips that was to be shown as part of Showtime's Championship Boxing Series would have attracted a minimum purse of US$150,000 for Mr Phillips. The transmission of the fight on the Showtime network would have meant that the Claimant would have been paid a very substantial sum by Showtime for the rights to transmit the fight and that, correspondingly, Mr Phillips could negotiate a larger purse. Mr Phillips, as a US former world-champion, was the only reason that Showtime would have been interested in showing a fight involving the then relatively unknown Ricky Hatton.

(1E) By agreement dated 11 February 2003, Mr Phillips appointed Jason Schlessinger as his manager for a period of 3 years.

(2) On or about 16 or 17 March 2003, Showtime announced publicly that they were going to broadcast the fight between Mr Phillips and Ricky Hatton on 5 April 2003. ~~Subsequently, the US television network Showtime acquired from the Claimant the rights to transmit the fight on US television.~~ Upon learning

this, Mr Phillips (by a letter written to Sports Network by Mr Sauer dated 18 March 2003) attempted to renegotiate ~~his fee of US$50,000~~ parts of the Agreement with the Claimant on the basis that the Claimant would receive from Showtime for the broadcasting rights to the fight, the US$50,000 originally agreed with Phillips was a pitiful sum (Ricky Hatton's purse was £550,000) and was substantially less than the purse that could have received had Mr Sauer known at the outset that Showtime were going to broadcast the fight. In the circumstances, it was the Claimant's moral obligation to increase Phillips' purse. Yet, the Claimant did not do so. By letter dated 20 March 2003, Stephen Heath (acting for and on behalf of the Claimant) refused the request to vary the agreement. ~~When the Claimant refused, Mr Phillips indicated that he was no longer interested. In consequence, the Claimant began lining up an alternative boxer. This alternative boxer was, however, not of sufficient interest to Showtime. The Claimant therefore decided that he needed to get Mr Phillips back on the bill for the fight.~~

(2A) On or about 19 March 2003, Mr Sauer was informed by the State of Arkansas that there was an outstanding sum due from Mr Phillips in relation to child support. The State claimed that the sum of US$18,136 ("the Child Maintenance Debt") had to be paid before Mr Phillips' passport would be released. In fact, Mr Phillips did not owe the claimed Child Maintenance Debt and Mr Sauer immediately began to try to resolve the issue.

(2B) On or around 20 March 2003, Mr Sauer had a detailed conversation with Sterling McPherson (the Claimant's representative in the US) informing him of the Child Maintenance Debt issue and the immediate problem that if Mr Phillips' passport was not provided to him, there would be no way he could fly to the UK for the fight on 5 April 2003. Mr McPherson confirmed that he was aware of the passport problem and gave Mr Sauer the name of a US Congressman who might be able to assist in getting Mr Phillips' passport released in time for the fight.

(3) In view of the passport difficulties, Mr Phillips stopped training and the Claimant began lining up an alternative boxer. This alternative boxer, Aldo Rios, was, however, not of sufficient interest to Showtime. The Claimant therefore decided that, in order to retain the lucrative agreement he had with Showtime, he needed to get Mr Phillips back on the bill for the fight. Therefore, ~~about 5 days prior to the date of the fight~~, on 31 March 2003, the Claimant telephoned Mr Schlessinger (~~by that stage~~ acting for Mr Phillips) and indicated that the fight must go ahead as planned. ~~It then became apparent that there were problems with Mr Phillips' ability to travel to the United~~

~~Kingdom. He had an outstanding sum of US$19,000 in relation to child maintenance ("the Child Maintenance Debt") and without that being paid he would not have been permitted to leave the United States.~~

(4) Mr Schlessinger indicated, in a fax dated 31 March 2003, that in order for the Claimant to fight as required on 5 April 2003, the Claimant would have to (a) advance an additional sum to Mr Phillips sufficient for him to be able clear the Child Maintenance Debt; (b) pay the outstanding purse to Mr Phillips by bankers' draft; (c) pay Mr Schlessinger US$40,000 by bankers' draft on the night of the fight for his services in getting Mr Phillips to the fight in Manchester; (d) provide two first class tickets for the trip to Manchester.

(5) In response, the Claimant specifically confirmed by return fax dated 1 April 2003 that he agreed the following terms in variation of the Agreement: ~~Mr Schlessinger agreed with the Claimant that Mr Phillips would fight on condition that the Claimant would pay~~:

(a) ~~to Mr Phillips, (i) the purse of US$50,000 after the completion of the fight; and (ii)~~ the Claimant would pay the Child Maintenance Debt, thereby enabling Mr Phillips to settle the outstanding sum and to travel to the UK, on the basis that the Child Maintenance Debt was not properly due to the State of Arkansas and would be refunded to the Claimant (and, if not, would be repaid by Mr Phillips); ~~and~~

(b) the Claimant would provide a bankers' draft payable to Mr Schlessinger, when Mr Phillips entered the dressing room on the night of the fight ~~a fee~~ in the sum of US$40,000 for making the necessary arrangements to get Mr Phillips to the fight; and

(c) the Claimant would provide two first class return tickets from Los Angeles to Manchester.

~~(5) The Claimant confirmed the arrangements in a letter to Mr Schlessinger on or about 1 April 2003. Mr Schlessinger insisted that his payment be made on the night of the fight either in cash or by bankers' draft.~~

(6) Mr Phillips duly arrived in the UK on 3 April 2003 for the fight.

(7) Contrary to the agreement with Mr Schlessinger~~'s instructions~~, on the night of the fight, Mr Schlessinger was presented not with ~~cash or~~ a bankers' draft, but by an ordinary cheque from the Claimant's company in the sum of US$40,000. The fight

was transmitted on Showtime as part of its Championship Boxing Series.

(8) A dispute then arose between the Claimant and Mr Schlessinger. Mr Schlessinger, recognising that a simple cheque could be stopped on the Claimant's instructions, demanded an assurance that the cheque would be honoured. ~~The Claimant and/or~~ Stephen Heath on behalf of the Claimant's Company provided such an ~~assurance~~ undertaking in writing that the cheque would be honoured. On that basis Mr Schlessinger accepted the cheque for US$40,000. The Claimant nevertheless dishonoured the cheque.

(9) This dispute caused a hiatus on the evening of the fight. At one point, Mr Phillips got changed and was about to leave the venue. ~~mistakenly believed that this dispute was over US Television rights, whereas it was in fact about the payment of the agreed fee to Mr Schlessinger.~~

(10) After the fight, the agreed US$50,000 became payable to Mr Phillips. The Claimant dishonestly tried to avoid paying Mr Phillips this sum by presenting him with a bill ~~at the end of~~ after the fight by letter dated 5 April 2003 which, when all deductions and other purported sums due from Mr Phillips were taken into account, showed that, according to the Claimant, Mr Phillips actually owed the Claimant (or his company) US$12,267 ~~12,000~~. Amongst the illegitimate and dishonest deductions were:

(a) the wrongful deduction of tax allegedly due on the US$40,000 paid to Mr Schlessinger (for which Mr Phillips was in no way liable);

(b) the wrongful deductions of sums totalling US$19,125 for the airline tickets (which the Claimant had agreed to provide on 1 April 2003) and upgrade to the Claimant's hotel (when the original hotel was unsatisfactory to Mr Phillips and the hotel costs were to be paid by the Claimant under the Agreement);

(c) the wrongful deduction of the Child Maintenance Debt (which the Claimant had agreed on 1 April 2003 to recoup in the first instance from the State of Arkansas); and

(d) the wrongful deduction of US$15,077 in respect of the alleged costs of the alternative boxer, Aldo Rios (when the decision to line up an alternative boxer had been wholly the Claimant's and for which he could not seek to recoup the costs against Mr Phillips).

(11) The Claimant subsequently claimed that Mr Schlessinger extracted the sum of US$40,000 under duress. But whether this was correct or not, the Claimant had no basis on which to refuse to pay Mr Phillips his proper and agreed fee for the fight. In any event, the Claimant subsequently removed the stop on the cheque and the agreed fee of US$40,000 was duly received by Mr Schlessinger on 20 May 2003.

(12) Mr Phillips subsequently lodged a complaint with the British Boxing Board of Control ("BBBofC") complaining that the Claimant had wrongfully failed to pay him his agreed fight fee. This complaint to the BBBofC (and a complaint brought by the Claimant against Mr Phillips and Mr Schlessinger) were withdrawn, by agreement, on or around 28 November 2003 on the basis that the respective parties would be free to pursue ~~brought~~ legal proceedings. The Claimant launched proceedings against Mr Phillips in the High Court on 3 March 2004 (HQ04X00650) claiming that Mr Phillips now owed him £44,570.81. In the proceedings, Mr Phillips denied that he was liable for the sum claimed by the Claimant and counterclaimed for US$32,305 (being the agreed fight fee minus the advance received by Mr Phillips, and (on proof being supplied that the sums had been paid by the Claimant) the World Boxing Union tax, BBBofC tax and US$5,000 for FEU tax against the Claimant~~'s company~~. Although the terms of that settlement are confidential, the Defendant believes and it is the Defendant's case that (a) the Claimant received none of the sum he claimed against Mr Phillips; while Mr Phillips (b) received a substantial payment from the Claimant~~'s company~~ in settlement of his counterclaim. Such a settlement demonstrated that there was (as the Claimant knew) no justification for the deductions from Mr Phillips' purse set out in Paragraph 6.4.2(10) above.

(13) ~~Whilst, therefore,~~ Whatever the truth of the allegation that the Claimant ~~did not~~ attempted dishonestly to con Mr Phillips into accepting a pitiful fee for the fight by lying to him about the sale of TV rights for the fight, as demonstrated above, the Claimant did attempt to dishonestly avoid paying Mr Phillips his fee for the fight and Mr Phillips rightly regarded the fee as pitiful given that the deal had originally been done on the basis that only Sky was covering the fight and that Showtime's interest in the fight was almost entirely due to Mr Phillips' appearance on the bill.

6.5 Notice of the Defendant's intention to rely upon the matters pleaded in Paragraph 6.4.2 above was given in the letter making the Offer of Amends referred to in Paragraph 6.1 above.

6.6 In the event that the Claimant rejects the offer of amends, then the Defendant relies upon it as a defence in relation to the meaning pleaded in Paragraph 5 of the Particulars of Claim."

9. The draft amended defence addresses the issue of damages at paragraphs 7 to 9 inclusive. It is not necessary to set out those paragraphs in this judgment. Suffice it to say that, in support of its denial that the claimant is entitled to aggravated damages, the defendant asserts at paragraph 8.5A that the allegations complained of by the claimant are true. It is pleaded that both the claimant's solicitors' letter before action, the representations made in the particulars of claim were misleading and untrue. It is contended that the offer of amends made by the defendant was made on a mistaken basis and that the defendant learned, after the making of the offer of amends, that the Phillips allegation is true. In support of that averment the defendant relies amongst other things on paragraph 6.4.2 of the draft amended defence which I have quoted in the preceding paragraph.

The scope of *Burstein* particulars

10. The matters which are said to be "directly relevant to the contextual background in which a defamatory publication came to be made" are pleaded in the 13 sub-paragraphs which are to be found in paragraphs 6.4.2 of the proposed pleadings. That is a quotation taken from *Burstein v Times Newspapers Limited* [2001] 1WLR 579. Since the argument on this part of the present application was mainly directed to the question whether the pleaded particulars are or are not legitimate *Burstein* particulars, it is necessary for me to refer to some of the dicta both in that case and the later case of *Turner v Newsgroup Newspapers Limited* [2006] 1WLR 3469.

11. In *Burstein* the Court of Appeal accepted that for the purposes of mitigating damages evidence of particular facts which were directly relevant to the contextual background in which a defamatory publication came to be made were not rendered inadmissible by any rule of common law, even though they might include matters which were not causatively connected with the publication of the libel, or which concern the claimant's general reputation, character or disposition, or which consisted of facts that in other circumstances might have been ingredients of a defence of justification.

12. Some guidance as to what this means in practice can be derived from the judgments in *Burstein*. Mr Burstein's complaint was about an allegation that he had organised hecklers to wreck performances of atonal music. The particulars on which the defendant wanted to rely in reduction of damages were in essence that Mr Burstein himself had in the past organised a band of hecklers to go about wrecking performances of modern atonal music which was the sting of the libel of which he was complaining in the action. There was no plea of justification. The basis on which the evidence was admitted appears from paragraphs 40 to 41 of the judgment of May LJ. In those paragraphs he said that the admissibility of the evidence in question was essentially a procedural case management question which would be heavily affected, if not determined, by questions of procedural fairness and of case management. He held that there was a background context to the defamatory publication complained of and that to keep that away from the jury was to put them in blinkers. He added that the heckling which Mr Burstein had organised would appear sufficiently from an appropriately confined selection of the documents to which the defendant wanted to refer. That evidence was directly relevant to the damage which

he claimed had been caused by the defamatory publication. Agreeing with May LJ, Sir Christopher Slade emphasised that he considered the case to be a special one on its facts. At paragraph 59 of his judgment he listed the facts which the defendant wished to adduce in evidence and held that, to preclude the jury from knowledge of those facts, was indeed to compel them to look at the case in blinkers when they came to assess damages.

13. *Turner* was a libel action in respect of an article which accused the claimant of being involved in a twilight world of swingers and wife-swapping, of being depraved and immoral and other similar accusations. The *Burstein* particulars sought to be relied on are listed in paragraphs 13 to 14 of the judgment of Keene LJ, namely the claimant's membership of a fetishist/swingers club; the role of the claimant as the agent who arranged for his wife to be photographed in pornographic poses and an article in which the claimant publicised his failed marriage and the fact that his former wife had been a "page 3" model. Those facts fall within a small compass. Two of the three matters were conceded to be admissible: see paragraph 62 of the judgment of Keene LJ. The court held that Eady J had been correct to admit the evidence both of the claimant's bad reputation and of the claimant's acts of misconduct, since they provided directly relevant background to the case.

14. It does not appear to me that *Turner* adds materially to or subtracts materially from the scope of the decision in *Burstein*. In my view *Turner* is a case which was decided on its own special facts. It is clear that there was a sufficient nexus between the three matters sought to be adduced in evidence as contextual material and the allegations which the claimant in that case was complaining were libels upon him. The practical effect of permitting the evidence to be adduced was not unfair to the defendant and it was confined both in its subject matter and its duration.

Application of the *Burstein* principle to the facts of the present case

15. In line with the guidance given in *Burstein*, I consider that my task on this part of the application is to decide as an essentially procedural case management question whether the matters sought to be relied on by the defendant are fairly relevant in the tribunal's assessment of the damage done to the claimant's reputation by the publication of the words complained of. In performing this task I have to bear in mind not only the importance of ensuring that the tribunal is not put in blinkers as well as the need to ensure that the ambit of the litigation is kept within reasonable bounds.

16. The starting point is the libel of which the claimant is complaining. The words complained of are set out at paragraph 4 of the particulars of claim. The meaning attributed to those words on behalf of the claimant is that they meant that he "had dishonestly conned the boxer Vince Phillips into accepting a pitiful fee for putting his life at risk by fighting Ricky Hatton by lying to him that this was all that could be paid because American TV did not want to televise the fight".

17. As I have indicated earlier, the Phillips allegation was initially the subject of an offer of amends, which the defendant subsequently and unsuccessfully sought permission to withdraw. The offer of amends defence has now been reinstated but on a much broader and, I think, different basis. Much of what is added to the *Burstein* particulars consisting in the underlined passages quoted in paragraph 8 above can be

seen to be derived directly from what had previously stood as particulars of justification in the previous draft amended defence for which I refused permission in my earlier ruling. Thus it can be seen that paragraphs 6.4.2 (1A) to (13) of the pleading now before the Court correspond with paragraphs 5.24 to 5.38 inclusive of the particulars of justification in the previous proposed amended defence.

18. In *Nail v Newsgroup Newspapers Limited* [2004] EMLR 362 Eady J at paragraph 36 of his judgment said:

> "Whereas juries used to compensate for the impact of the libel "down to the moment of the verdict", once an offer of amends has been accepted the impact of the libel upon the claimant's feelings will have greatly diminished and, as soon as the apology is published, it is also hoped that reputation will be to a large extent restored. It is naturally true that if a defendant or his lawyers thereafter should behave irresponsibly, or try to drag in material to "justify by the backdoor", that will be an aggravating factor. On the whole, however, once the defendant has decided to got down this route, it would make sense to adopt a conciliatory approach and work towards genuine compromise over matters such as the terms of an apology or the level of compensation".

19. Those words were quoted with approval by the Court of Appeal in the same case: see [2005] EMLR 12 at paragraph 19. The Court of Appeal also said this at paragraph 15:

> "Both parties prepared bodies of evidence seeking respectively to aggravate and to mitigate the compensation. The judge either ignored or declined to admit most of this. He was right to do so. Speaking generally, there may of course be evidence from both sides relevant to the determination of compensation. But in principle it seems that a claimant should not normally be permitted to enlarge significantly pleaded allegations upon which the offer to make amends was made and accepted, for example by promoting a new case of malice. Nor should a defendant, who has made an unqualified offer which has been accepted, be permitted to water down significantly the pleaded allegation. Claimant's should therefore plead the full substance for which they seek redress: defendants who wish to make amends for significantly less than that full substance should make appropriate qualifications to their offer".

Submissions on behalf of the defendant

20. Mr Desmond Browne QC for the defendant contends that, in the light of evidence which has come to light since the offer of amends was made, it has become apparent that there is substantially more truth in the Phillips allegation than had previously been appreciated. In that connection Mr Browne relies in particular on evidence obtained from Mr Sauer, who is the American attorney who carried out the negotiations on behalf of Mr Phillips which led to the agreement with the claimant's

organisation to participate in the Hatton fight. Mr Browne argues that, since the evidence has come to light only recently, it was not possible for the defendant to notify the claimant that Mr Sauer's evidence would be one of the matters relied upon as part of the *Burstein* particulars. Mr Browne relied a passage in the judgment of Eady J in *Nail*, namely paragraph 66 which reads:

> "Defendants must expect to deal with the claim "as notified". The claimants are generally entitled, so far as possible, to be informed of anything disparaging which the defendants propose to introduce. When an offer of amends is turned down, there is generally a complete defence available by virtue of section 4(2) of the Defamation Act 1996. It is not proper, therefore, under that very powerful incentive to lure a claimant into accepting what appears to be a genuine offer to put matters right, only for him to find that his reputation will be "rubbished" anyway".

Mr Browne lays stress on the words "so far as possible" in that passage.

21. He further contends that, when it comes to an assessment of damages under the offer of amends provisions, "corners should not be cut". That phrase comes from another judgment of Eady J in *Abu v MGN Limited* [2003] 1WLR 2201 at paragraph 22:

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

22. Mr Browne submits that all his client wishes to do in reliance on the *Burstein* particulars is to ensure that on the assessment of damages the judge is made aware of the full circumstances surrounding the making of the contract for the Phillips/Hatton fight and the immediately succeeding events. If this does not happen, there is a risk that damages will be decided on a false basis.

Submissions on behalf of the claimant

23. Opposing the application for permission to amend, Miss Page for the claimant accepts, as she must, the principle laid down in *Burstein*. She does, however, point out that the particulars admitted in *Burstein* consisted of facts which were either admitted or indisputable. By the same token the facts admitted in evidence in *Turner* fell within a small compass and were also in the main indisputable: see paragraphs 12 to 14 of the judgment of the Court of Appeal. Miss Page also invites me to note that two of the three matters sought by the defendant in *Turner* to be admitted were conceded to be relevant by counsel for the claimant and the third matter in effect went to credit: see paragraph 62 to 64 of the judgment.

24. Turning to the *Burstein* particulars in the present case, Miss Page identifies two principal charges levelled against the claimant: the first is that the claimant was in breach of a moral obligation to increase Mr Phillips's purse following the public announcement by Showtime that it was going to televise the Phillips/Hatton bout on US television: see the particulars at paragraph 6.4.2 (1A) to (E) and (2). The second is that the claimant dishonestly attempted to avoid paying the agreed fee for the fight by making a number of illegitimate and dishonest deductions from the purse payable to Mr Phillips: see the particulars at paragraph 6.4.2 (2A) – (12) inclusive.

25. Taking those two charges in turn, Miss Page submits that several problems would arise if those particulars were to be admitted. In the first place she questions the basis on which the defendant asserts that the claimant was under a moral obligation to pass on to Mr Phillips a proportion of the increased remuneration payable to the claimant's organisation once Showtime acquired the rights to televise the fight on US television. In addition, says Miss Page, it is illegitimate for the defendant now to attempt to re-introduce as *Burstein* particulars the self same particulars which the defendant tried and failed to introduce as particulars of justification in the previous version of the draft Amended defence: see paragraph 5.23 and following. The defendant is not only subverting my previous ruling but also, she submits, attempting opportunistically to plead justification by the back door.

26. As regards the second charge against the claimant, namely that he dishonestly made deductions from Mr Phillips's agreed 50,000 US Dollars purse, it is submitted by Miss Page that those particulars are also re-casted particulars of justification; paragraphs 6.4.2 (2A) to (13) of the current version of the *Burstein* particulars correspond closely to paragraphs 5.27 to 38 of the previously pleaded particulars relied on in support of the defence of justification which I disallowed earlier. She points out that this is effectively confirmed by the defendant's solicitors' letter of 14 November 2007. Miss Page further draws attention to the tension between paragraph 5.11 of the current particulars, which appears to accept that it may be correct that Mr Schlessinger extracted 40,000 US Dollars from him under duress and the charge levelled at the claimant in paragraph 5.10 of the same pleading that the deduction of the US Dollars 40,000 was wrongful, illegitimate and dishonest. Finally it is submitted on behalf of the claimant that the amendment for which permission is now sought in the context of an accepted offer of amends would be to allow burdensome and inappropriate satellite litigation.

27. As to Mr Browne's alternative contention that, irrespective of whether the particulars are admissible under the *Burstein* principle, they have been rendered admissible by reason of the content of the claimant's claim for aggravated damages, Miss Page argues that it is unprecedented for a defendant on an assessment of damages in a defamation case to be permitted to enter what is in effect a plea of justification. Once an offer of amends is accepted and apology is made, issues as to the aggravation of damage largely fall away and are of historic interest only.

Discussion and conclusion

28. I have endeavoured in paragraphs 10 to 14 above to summarise what appears to me to be the proper ambit of *Burstein* particulars. It is impossible to lay down a hard and fast rule as to what is and what is not to be permitted to be adduced as being "directly relevant to the contextual background" to the publication complained of. The Court

of Appeal in *Turner* appears to have found it difficult to articulate the underlying principle. What is clear, however, as it appears to me, is that it is for the Judge to decide in the exercise of his or her case management powers on a case by case basis what evidence should be permitted to be adduced by way of *Burstein* particulars and what evidence should not be allowed. In performing this function the judge should have regard to the need to be fair to both parties; to the need to ensure that damages are not assessed on a false basis and to the overriding requirement of proportionality.

29. In the ordinary way *Burstein* particulars will be relied on by a defendant who is contesting liability and seeking to mitigate the damages payable to the claimant. It is important not to lose sight of the fact that in the present case the defendant has offered amends to the claimant and has apologised to him in respect of the Phillips allegation. There is no contest as to liability in respect of that allegation. That does not of course mean that this defendant is debarred from relying on *Burstein* particulars for the purpose of the judicial assessment of damages under section 3(6) of the Defamation Act, 1996. But in my view the latitude to be afforded to the defendant in regard to its *Burstein* particulars cannot be any wider on such an assessment than it would be if the defendant were seeking to reduce damages in the context of a denial of liability.

30. It appears to me that in the present case there is little dispute between the parties as to the principles, such as they are, governing the admissibility of the *Burstein* particulars. I say "such as they are" because the principles are, inevitably and rightly, flexible and sensitive to the particular facts of the case where they are being applied. The real dispute here is as to the application of the principles rather than as to the principles themselves.

31. I will start by considering the particulars pleaded at paragraphs 6.4.2 (2A) to (12) of the proposed amended defence, that is, the particulars relating to the allegedly illegitimate and dishonest deductions from Mr Phillips purse. (I exclude sub-paragraph (13) because that is a hybrid sub-paragraph which needs to be dealt with separately). The first point to be made in relation to these particulars is that one finds no reference in the words complained of at paragraph 4 of the particulars of claim to deductions being made from Mr Phillips's purse, whether dishonestly or otherwise. That is not of course of itself fatal to this part of the amendment but it does show that the defendant is seeking to move away from the subject matter of the claimant's complaint.

32. The next relevant consideration appears to me to be that the defendant is attempting by an indirect route to do that which in my previous ruling I held that it should not be permitted to do, namely to enter what is in effect a plea of justification in a case where the defendant has elected to follow the offer of amends provisions of the 1996 Act and has participated in making a public apology to the claimant for the Phillips allegation. I accept of course that, at the time when it decided to make an offer of amends, the defendant did not have the benefit of much of the information which it has now deployed in the particulars from (2A) to (12). But the defendant in the present case is a substantial publishing house with ample resources and access to specialist advisors. The decision to make an offer of amends, rather than to set up a plea of justification in relation to the Phillips allegation, appears to have been a deliberate one which was made in circumstances where the defendant through its legal advisers was aware that its knowledge of the circumstances surrounding the negotiation of Mr Phillips's purse was incomplete. I accept that there is a public

interest in damages not being assessed on a false basis. But there is also a public interest in the upholding of compromises arrived at in order to bring litigation or part of it to an end. I remind myself in this context also that the libel complaint related not to deductions from the purse but to the different allegation that the claimant conned Mr Phillips by lying to him that the fight would not be broadcast on US television.

33. Finally in relation to the charge against the claimant that he dishonestly made deductions from Mr Phillips's purse, I take the view that, if this part of the amendment were to be permitted, there would be a prolonged contest between the parties as to the rights and wrongs of what the claimant did and did not do in relation to the remuneration payable to Mr Phillips. There would no doubt be substantial further disclosure, several additional witness statements and also additional court time in front of the judge dealing with the assessment of damages. To take but one example: at paragraph 12 of the particulars, the defendant relies on a complaint lodged with the British Boxing Board of Control. Mr Browne made clear that the claimant wants disclosure of all documents relating to that complaint and its investigation. This illustrates how disproportionate the assessment of damages would become if there were to be a roving commission of inquiry into these highly contentious but ultimately peripheral issues between the parties.

34. For the above reasons I have decided that the amendments sought by the defendant should not be permitted in relation to those particulars which are devoted to the allegedly illegitimate and dishonest deductions from Mr Phillips's purse, viz paragraphs 1(E), (2A) to (12). I will revert to paragraph (13) later.

35. I turn to the balance of the *Burstein* particulars, that is, paragraph 6.4.2 (1), (1A) to (1D) and (2) which concern the claimant's failure to agree to vary the agreement with Mr Phillips when it emerged that Showtime was to televise the fight on US television after all. These particulars fall some way short of justifying the sting of the libel of which the claimant complains, namely that he lied to Mr Phillips about Showtime televising the fight in the US. But these particulars cannot be dismissed as irrelevant: they contain the essence of the defendant's case as to the effect which the fact of the fight being televised in the US ought to have had on the remuneration to be received by Mr Phillips from the claimant or his organisation for participating in the fight. I accept that an allegation of breach of a moral obligation falls well short of an allegation of lying. But in my judgment if damages were to be assessed in this case in ignorance of the fact that Showtime acquired rights to televise the fight on US television at a no doubt very substantial price, albeit after the claimant's organisation and Mr Phillips through Mr Sauer had agreed the purse, the judge carrying out that assessment would be doing so "in blinkers". The damages would or might risk being assessed on a false basis. I do not think that case management considerations should prevent the defendant relying on the alleged breach of moral obligation. The point sought to be taken by the defendant is a short one which can and should be confined in its subject matter and duration.

36. Accordingly I allow the amendment sought to introduce sub-paragraphs (1a) to (e) and 2 of the proposed amended defence. I said earlier that I would return to sub-paragraph 13. That paragraph elides the allegation that the claimant dishonestly attempted to avoid paying Mr Phillips his agreed fee for the fight and the separate allegation that the fee was pitiful given that the deal was done on the basis that only Sky was covering the fight and not Showtime. In my judgment the former is

impermissible for the reasons given at paragraphs 30 to 33 above. The latter is permissible because it is a repetition of the defendant's case as to the breach of moral obligation on the part of the claimant.

37. Such being my decision on the defendant's application for permission to amend the *Burstein* particulars, I can deal briefly with the claimant's cross-application to strike out the *Burstein* particulars originally pleaded in the Defence. By parity of reasoning with what I have said about the application for permission to amend, I agree with Miss Page that paragraph 6.4.2 (3), to (13) should be struck out. As to sub-paragraph 13 the words "did attempt to dishonestly avoid paying Mr Phillips fee for the fight" are struck out but the remainder stands.

The admissibility of the particulars in rebuttal of the claimant's claim for aggravated damages

38. I accept that there will be cases where a claimant asserts in his particulars of claim the falsity of the words complained of in such a way that it can be said that the claimant is erecting a positive case of falsity. I do not, however, accept that the mere assertion in a letter before action that the allegations complained of are false amounts to the assertion of a positive case of falsity such as would entitle the defendant to adduce evidence of the truth of the allegations without pleading justification. It is a question of degree in every case.

39. Looking at the particulars of aggravation of damages set out in paragraph 11 of the particulars of claim, I am not persuaded that individually or collectively they set up a case of falsity of the allegations which is sufficient to enable the defendant to assert in rebuttal the truth of the implications complained of without a plea of justification. To take one or two examples, it does not appear to me that the allegation in paragraph 11.1 that the defendant failed to take proper precautions in order to ensure that Mr Hatton did not use the book unjustly and one-sidedly to vent his spleen against the claimant constitutes an assertion of falsity sufficient to trigger an entitlement on the part of the claimant to set up what would in effect be a plea of justification. The same applies to the pleading in paragraph 11.4 that the claimant's solicitors notified the defendant of the falsity of the Phillips allegation. Still less do I accept that an assertion by the claimant that the defendant callously disregarded the "true reputation" of the claimant has the effect for which the defendant is contending.

40. I should for completeness make clear that I do not accept that the witness statement now obtained by the defendant's solicitors from Mr Sauer and dated 1 November 2007 implicitly indicates that there was an agreement for the broadcasting of the Phillips/Hatton fight entered into by the claimant's organisation and Showtime prior to 25 January 2003. Nor do I accept this is implicit in paragraph 38 and 48.3 of the Reply.

41. In my judgment Miss Page is correct in her submission that, once an offer of amends has been accepted by a claimant and the defendant has apologised publicly for the relevant imputation, the circumstances under which it will be open to a defendant at the statutory assessment of compensation to run the case that the imputation is true will be few and far between.