Neutral Citation Number: [2012] EWCA Civ 423

Case Nos: A2/2011/2166 & A2/2011/0761

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR JUSTICE EADY
[2011] EWHC 292 (QB)
[2011] EWHC 1710 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2012

Before :

Lord Justice Pill
Lord Justice Elias
and
Mrs Justice Sharp

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Between :

Stephen Foley (1)	**Appellants**
Independent News & Media Limited (2)	
Roger Alton (3)	
- and -	
Lord Ashcroft KCMG	**Respondent**

Paul Epstein QC (instructed by **David Price Solicitors & Advocates**) and **David Price QC** (of David Price Solicitors & Advocates) for the **Appellants**
Mark Warby QC and Adam Speker (instructed by **Davenport Lyons**) for the **Respondent**

Hearing dates : 1-2 February 2012

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Approved Judgment

Lord Justice Pill and Mrs Justice Sharp:

Introduction

1. The defendants, Stephen Foley, Independent News & Media Limited and Roger Alton, appeal from two interlocutory orders made by Eady J, in a libel action brought against them by the claimant, Lord Ashcroft. The first appeal is from an order dated 17 March 2011 striking out the defendants' defences of justification and honest comment. The second appeal is from an order dated 1 July 2011 refusing the defendants' application to amend their defence to add revised defences of justification and honest comment. The orders were made following reserved judgments which were handed down on the 18 February 2011 and the 1 July 2011.

2. The first appeal relates to a draft defence produced in November 2010 (the November draft) which by consent of the parties was considered at the first hearing in place of the original defence; the second appeal relates to a draft produced in March 2011 (the March draft). This appeal is principally concerned with the March draft. However it is necessary to consider both the judge's rulings since the March draft re-incorporated parts of the November draft, which the judge had already struck out and in relation to which, by agreement between the parties, there was no further argument at the second hearing. There is therefore a considerable degree of overlap between the two appeals. We accept that in the situation as it developed, the defendants have adopted an appropriate procedure in proceeding in that way.

3. Before the appeal we were invited to consider some material which was not before the court below, some contained in proposed further amendments to the March draft, and some not. We declined to do so, since the issue for this court is whether the March draft should have been permitted in the form in which it was presented to the judge, and the material was therefore irrelevant.

4. The issues raised on these appeals centre principally on the judge's determination as to the clarity and adequacy of the pleadings of the defences of justification and honest comment and whether the words complained of are capable of bearing certain of the meanings which the defendants wish to justify. In addition, a respondent's notice for the second appeal raises two discrete additional grounds for dismissing the appeals.

5. The claimant is a businessman, a life peer and a supporter and former Deputy Chairman of the Conservative party. At the time of the publications complained of in this action the second defendant was the publisher of the Independent newspaper, the first defendant Mr Foley was a journalist employed or engaged by the second defendant, and the third defendant, Mr Alton was the Editor of the Independent.

6. The action is brought in respect of two prominent articles written by Mr Foley which appeared in the Independent on the 19 and 20 November 2009. An important part of the background to their publication was the imposition of direct rule on the Turks & Caicos Islands ("TCI") by the British Government in August 2009 as a result of a critical report on its governance under the then Premier, Mr Michael Misick, published by a commission of inquiry headed by Sir Robin Auld.

7. The articles themselves concerned in broad terms the claimant's business interests and dealings in the TCI particularly through the British Caribbean Bank ("BCB"). As can be seen from their headlines they focussed in particular on loans said to have been made by BCB to Mr Misick seen against the background to which we have referred and the claimant's relationship with the Conservative Party. The words complained of also referred to a letter said to have been written by Mr Shaun Malcolm, described as former chairman of the PDM, the political party that was in opposition during Mr Misick's premiership, and sent by him to Mr David Cameron. The letter apparently expressed alarm about reports of a close relationship between the claimant and Mr William Hague. An extract from the letter was quoted in the headline on the second page of the first article.

8. The article of 19 November, billed as an exclusive, occupied the whole of the first and second pages. The banner headline on the front page was "**Ashcroft's bank lent millions to disgraced premier – Loans helped fund Turks and Caicos leader's lavish lifestyle – Alarm raised over Tory donor's influence if Cameron wins power**". The headline on the second page was "**Ashcroft 'puts any hope of democracy here at risk'**"". The article of 20 November occupied 3 pages of the Independent (pages 36, 37 and 38). Its headline was "**How Ashcroft became the banker to paradise**", with the sub-heading: "**Much is known about Lord Ashcroft's involvement in the Caribbean territory of Belize. But the British public has heard less about his interests in the Turks and Caicos islands**."

9. The second article also included, set out separately on page 36, in a black box headed "**Michael Ashcroft and the Independent**", what were said to be points made on the claimant's behalf by his lawyers following publication of the first article (though there is a dispute about whether those points fairly characterised what the lawyers said).

10. The action was begun on 14 December 2009. The claimant's case in summary is that the words selected from both articles firmly implicate him as a participant in corrupt activities in the TCI. It is also said that as a result of the juxtaposition of the points made in the black box, and the allegations in the main body of the article, the second article implicitly accuses him of telling a series of blatant lies in an attempt to cover up such conduct.

11. The following natural and ordinary meanings are attributed by the claimant to the first article in the Particulars of Claim:

> "7. (1) …the Claimant is guilty of engaging in corrupt dealings with Michael Misick, the notoriously corrupt ex-premier of the Turks and Caicos islands by (a) procuring companies that he controls to provide vast loans to Mr Misick to finance the building of Mr Misick's palatial home and fund his lavish lifestyle, all with a view to buying illicit political influence to serve the Claimant's private interests; and (b) corruptly exploiting the influence he acquired in this way so as to serve his own interests and to subvert democracy in the Turks and Caicos Islands;
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> (2) … the Claimant was thereby party to the culture of political amorality under the Misick regime which was uncovered by an

> official report, and which made it necessary for the British Government to impose direct rule; and further
>
> (3) … the Claimant's behaviour in the Turks and Caicos Islands provided good grounds to fear that he would, if the Conservatives were to win the forthcoming General Election, exploit his wealth and influence in such a way as entirely to undermine any prospect of democracy in the islands by causing the Foreign Office to alter its policy towards the Islands so as to facilitate further political corruption there by the Claimant in furtherance of his private interests".

12. For the purposes of the second article the claimant relies on the meanings pleaded at paragraph 7(1) and (2) above, and on these additional meanings

> "11. (3) … the Claimant's behaviour in the Turks and Caicos Islands provided good grounds to fear that if the Conservatives came to power at the next election the Claimant would bring about a premature abandonment of direct rule from the United Kingdom and resume his corrupt activities in the Islands; and
>
> (4) … the Claimant had told blatant lies in an attempt to cover up his corrupt dealings with Mr Misick, by falsely denying that the British Caribbean Bank had lent Mr Misick $5m, and by claiming that neither he nor any company associated with him had lent money to Mr Misick".

13. A defence was served on 11 February 2010. It did not admit that the words were defamatory, and denied that the words bore the meanings complained of. Substantive defences of *Reynolds* privilege (responsible journalism on a matter of public interest), statutory privilege, justification (truth) and honest comment were relied on. On the 18 June 2010, after the provision by the defendants of answers to a Part 18 Request for Further Information, the claimant issued an application to strike out the defences of justification and honest comment (and one sentence from the *Reynolds* defence, though this is not the subject of appeal). On 19 November 2010 the defendants produced a draft amended defence (the November draft) which made a number of significant amendments to the *Lucas Box* meanings, and which incorporated the further information provided in answer to the claimant's Part 18 request.

14. The defendants set out the meanings they intended to justify (the so-called *Lucas-Box* meanings). At that stage, the meanings justified for the first article were these:

> "7.1 The Claimant's bank ("BCB") lent millions of dollars to Michael Misick, the notoriously corrupt former Premier of the TCI (to the knowledge of the Claimant both as to the loans and the fact that Mr Misick was corrupt and motivated by the desire on the part of the Claimant to obtain influence and benefit which led to Mr Misick being favourably treated).

7.2 The Claimant is associated with Johnston [Johnston International Ltd, a construction company] which constructed and funded Mr Misick's beachfront mansion through BCB and Leeward Ltd which sold the land on which the mansion was built and funded by BCB (to the knowledge of the Claimant both as to the funding and sale and in relation to the funding motivated by the desire on the part of the Claimant to obtain influence and benefit which led to Mr Misick being favourably treated).

7.3 The Claimant's son, appointed by the Claimant to run BCB in the TCI, had a close relationship with Mr Misick, which included administering his bank accounts (to the knowledge of the Claimant and motivated by the desire on the part of the Claimant to obtain influence and benefit which led to Mr Misick being favourably treated).

7.4 The Claimant, through BCB, helped to finance Mr Misick's lavish lifestyle (to the knowledge of the Claimant and motivated by the desire on the part of the Claimant to obtain influence and benefit).

7.5 The Claimant was aware that Mr Misick was corrupt and that through BCB, he was helping him to pursue a lavish lifestyle.

7.6 The Claimant's dealings with Mr Misick (through BCB as set out in paragraphs 7.47 to 7.52 below) were motivated by the desire on the part of the Claimant to obtain influence and benefit which led to Mr Misick being favourably treated.

7.7 The Claimant was knowingly party to and a beneficiary of the culture of political amorality in the TCI which was uncovered by the *[Foreign Affairs Committee]* Report and the Inquiry and which made it necessary for the British government to impose direct rule.

7.8 At all relevant times, the Claimant conducted himself in a manner to give rise to good grounds for concern over his power to wield influence in the TCI in the event that (as transpired) the Conservatives won power so as to hinder it on its path to good governance and away from the culture of political amorality identified by the Inquiry.

7.9 In consequence, tangible safeguards should be put in place to keep the Claimant away from policy on the TCI.

7.10 In consequence, the close relationship between the Claimant and William Hague is alarming because Mr Hague at the date of publication stood to become Foreign Secretary in a future Conservative government (and did become Foreign Secretary) with responsibility for the TCI."

15. The defendants relied on the *Lucas-Box* meanings pleaded at paragraphs 7.1 to 7.8 for the purposes of the second article, and the following additional meanings:

> "13.2 In an attempt to downplay his dealings with Mr Misick and his involvement in the culture of political amorality identified by the Inquiry the Claimant:
>
> 13.2.1 Lied by denying that he attempted to buy influence in the TCI by lending money.
>
> 13.2.2 Lied by describing the allegation that he indirectly funded and built Mr Misick's mansion as 'completely unfounded'.
>
> 13.2.3 Lied by denying that any company associated with him had lent money to Mr Misick to fund a lavish lifestyle, or for his private or personal use.
>
> 13.2.4 Lied by denying that he had any economic interest in Johnston.
>
> 13.2.5 Sought to obfuscate in relation to the $5 million loan and his association with Johnston and was guilty of an economy with the truth and a lack of candour and frankness reasonably to be expected of someone in his political and commercial position."

16. In addition, five comment meanings (the so-called *Control Risks* meanings, *Control Risks v New English Library Ltd* [1990] 1 WLR 183 (CA), 189 per Nicholls LJ) were defended for the purposes of the honest comment defence; three for the first article which overlapped with the *Lucas Box* meanings pleaded at paragraphs 7.8 to 7.10; and a further two for the second article. These were as follows for the first article:

> "8.1 Due to his wealth (in the context of a relatively small TCI economy and population) and the way in which he uses it to obtain political influence, the Claimant has a level of influence over the TCI that puts any hope of democracy at risk.
>
> 8.2 The Claimant has conducted himself in a manner to give rise to the need for tangible safeguards to be put in place to keep the Claimant away from policy on the TCI to prevent the Claimant from using his influence to hinder it on its path to good governance and away from the culture of political amorality identified by the Inquiry.
>
> 8.3 In consequence, the close relationship between the Claimant and William Hague is alarming…"

And for the second article:

> "14.1. A quick move away from direct rule before safeguards are established will once again give the Claimant and his family

> disproportionate influence in the TCI which he may use to hinder it on its path to good governance and away from the culture of political amorality identified by the Inquiry.
>
> 14.2. The Claimant has conducted himself in a manner to give rise to good grounds for concern over his power to wield influence in relation to the TCI if the Conservatives win power so as to hinder it on its path to good governance and away from the culture of political amorality identified by the Inquiry."

17. The particulars of justification covered some 21 pages in all, as the judge noted, and were later extended to 23 pages. There was some attempt to identify which meanings some of them went to support, but all of the particulars were relied on in support of the defended comments. The claimant did not consent to the amendments on the ground that they did not cure the deficiencies in the defence about which they had already complained. We do not accept that there has been any acceptance on behalf of the claimant of the adequacy of the proposed amendments.

18. The complaints made by the claimant about the November draft were in summary, these. It was said it did not comply with the basic requirements of pleading that it should state a clear and coherent case. Nor did it comply with well-established principles governing the pleading of defences of justification and comment. In particular, that any such plea (a) must be directed at one or more defamatory meanings which are clearly identified, which the words are capable of bearing, and which are relevant by way of defence to the claim as then issued by the claimant; (b) must be based on or supported by particulars which are not only clear but also both relevant to, and sufficient to support each meaning; and (c) must focus on conduct of the claimant and not be based on rumour or hearsay.

19. On 18 June 2010 the claimant applied to strike out the defence and on 26 November 2010 the defendants applied to amend by reference to the November draft. The judge considered that the November draft did not pass muster as a pleading in important respects, both as to the meanings justified and the particulars intended to support them. His detailed findings can be found in his judgment. In general terms, he regarded the meanings justified, even when read with the particulars, as vague and lacking in clarity and coherence; some made allegations which were not defamatory of the claimant at all; others simply did not identify what the claimant was supposed to have done that was reprehensible.

20. The judge directed his attention particularly to the meanings because, he said, if the claimant's complaints about them were accepted, it would follow that the defences of justification would be fundamentally undermined and it would follow that many of the sub-paragraphs would have to be stood to one side, and either omitted or redrafted to fit in with any reformulation of the *Lucas Box* meanings. Nonetheless he also dealt with the particulars. In general terms in the judge's view the particulars were diffuse, obscure and contained a great deal of material that was irrelevant because what was alleged would not, in itself, support any defamatory meaning. He gave illustrative examples of the deficiencies he identified and highlighted certain other specific areas of concern. One example was the adequacy of the particulars pleaded to support the meaning alleged at paragraph 7.8. Another example was the defendants' reliance on long passages from Sir Robin Auld's report which made no reference to the claimant, let alone any finding against him,

and was not relevant to any properly pleaded meaning. We also find prolixity and lack of focus. We consider the role of particulars more fully when dealing with reformulated paragraph 7.2, at paragraph 48 and following.

21. The judge's criticisms of the particulars of justification were relevant also to the defence of honest comment since, as we have indicated, three of the comment meanings mirrored three of the justification meanings, and the particulars the judge had already criticised were relied on in support of that defence as well. There were additionally specific criticisms made, for example, of the particulars in relation paragraph 8.1, because, for example, in the judge's view there was nothing pleaded which supported the assertion of an established "level of influence". As to what was pleaded at paragraph 14.1 and 14.2, the judge considered the case against the claimant was not clear, and needed to be spelled out in the particulars.

22. Towards the end of the second day of the hearing the judge was invited to consider a third draft of the defence produced by the defendants. This proposed further amendments to the meanings, by deleting those pleaded at paragraphs 7.5 and 7.6, and further amendments to the particulars themselves. The judge took the view that the claimant was being confronted with "a moving target"; and it was better to strike out the defences of justification and honest comment, leaving the defendants to consider and absorb the criticisms made, and then to express their case with appropriate clarity rather than "tinkering" with the three drafts already produced.

23. At various stages of his judgment the judge gave pointers to the defendants as to what he considered they would need to plead if they were to advance the case he understood them to want to make. Though he accepted the defendants' submission that it was not for the court to dictate to a defendant how to plead its case, nevertheless he said it was legitimate for the court to try and focus the parties on the real dispute between them which in the context of a libel action often involved ensuring a defendant was justifying a coherent defamatory meaning, and correspondingly that a claimant knew what he was supposed to have done. In effect, he drew a distinction between a bad case, and a badly pleaded case: his concern here was that this was an example of the latter.

24. At [63] the judge said this:

> "There is no doubt that *if* there is a viable defence of justification or fair comment in relation to these very important and serious allegations, then it is in everyone's interests that it sees the light of day and can be properly addressed on a fair and open basis. What is not, however, either in the public interest or to the advantage of either of the parties is for the case to proceed on a muddled basis, with the Claimant and his advisers not being aware of the case they have to meet, either at the stage of disclosure of documents or at the trial itself. That is why the current pleas of justification and fair comment should be struck out."

25. The defendants then adopted a two-pronged approach. They applied for permission to appeal against the judge's Order, on the ground that the judge had erred in striking out the defences of justification and honest comment; and on 14 March 2011 they served the March draft, and on 31 March 2011 issued their application to

amend. The March draft sought to reintroduce the defences of justification and honest comment in a partially amended form. The principal amendments were to the *Lucas Box* meanings originally pleaded in paragraph 7 of the November draft. There was in addition, some relatively minor recasting of the particulars. The comment meanings however remained unaltered, as did the meanings relating to the "lie allegation" pleaded at paragraph 13.2 in both drafts.

26. The defendants' reformulated *Lucas Box* meanings relied on for both articles were now as follows:

> 7.1 The Claimant authorised his bank to lend millions of dollars to Mr Misick without seeking commercial repayment, thereby helping him to pursue his lavish lifestyle, knowing him to be corrupt and motivated by the desire on the part of the Claimant to obtain influence and benefit.
>
> 7.1.1. In the alternative to 7.1, the Claimant knew that his bank was lending substantial sums to Mr Misick without seeking commercial repayment, knowing or strongly suspecting that he was corrupt and acquiesced because he was motivated by the desire to obtain influence and benefit.
>
> 7.2 The Claimant was knowingly party to and a beneficiary of the culture of political amorality in the TCI which was uncovered by the FAC Report and the Inquiry and which made it necessary for the British government to impose direct rule.
>
> 7.3 The Claimant has conducted himself in a manner to give rise to good grounds for concern as at the date of the publication over his power to wield influence in relation to the TCI so as to hinder it on its path to good governance and away from the culture of political amorality identified by the Inquiry".

27. The claimant's solicitors again expressed their dissatisfaction with the defendants' pleading. They addressed this issue at length both in correspondence and through a Part 18 Request for further information of the March draft which was served on 15 April 2011. The Request was not answered, but the defendants responded to certain aspects of these complaints in a letter written by their solicitors on 27 May 2011.

28. When the application to amend by reference to the March draft came before the judge it was common ground that the defendants could not reargue matters on which he had already ruled. They could not therefore ask for the re-introduction of the following matters now contained in the March draft: the *Lucas Box* meanings pleaded at paragraphs 7.2 and 7.3 (since these meanings repeated paragraphs 7.7 and 7.8 in the November draft); the particulars supporting those meanings; the *Lucas Box* meaning pleaded at 13.2.5 and the comment defence. Thus, the judge was only required to rule on paragraph 7.1 (the defendants' 'reformulation' of their *Lucas Box* meaning relating to the claimant's involvement in the loans to Mr Misick); and paragraph 7.1.1 which was an entirely new meaning. The claimant also now invited the judge to rule that the particulars pleaded in support of the meanings pleaded at paragraphs 13.2.1 to 13.2.4 were incapable of proving the

various statements attributed to the claimant; and renewed his complaints about the inadequacy of the particulars as set out in the correspondence.

29. The claimant made two additional points both of which are now raised by the Respondent's Notice in this appeal. The first was that the defendants' pleading failed to pass the relevant threshold test for pleading dishonesty in justification, which was the same as for malice, namely, the facts pleaded in support of a plea of dishonesty in a plea of justification must be more consistent with dishonesty than its absence. Second, it was said the claimant could demonstrate there was no proper evidential basis for important parts of the defendants' amended case relating to the loans, which was a further reason for refusing permission. One result of this attack on the pleadings was the instruction by the defendants of Mr Paul Epstein QC in addition to Mr David Price QC who had settled the pleadings. Both counsel made submissions to the judge on the defendants' behalf, as they did to us.

30. As we have indicated, consistent with his earlier ruling, the judge could not have given permission to the defendants to amend on the parts of the pleading he had already ruled out. But he now refused permission to amend for a number of other reasons, principally because he concluded that paragraph 7.1 was ambiguous in important respects; and also because he concluded that the words were incapable of bearing the new "acquiescence" meaning pleaded at paragraph 7.1.1.

31. Although there were a large number of grounds of appeal advanced in writing, before us it was submitted that the judge fell into error in the following ways. First, by the time of the March draft, if, which they dispute, there was any ambiguity in meaning 7.1, it had been clarified in correspondence. Second, because their case (particularly on whether the claimant had authorised the loans in question) was properly pleaded in accordance with what Mr Warby QC, for the claimant, had accepted would be appropriate in exchanges with the judge in February. Third, because the judge required the defendants to plead their case "with the particularity of an indictment" and thus set the bar too high; and fourth because he erred in concluding the words were incapable of bearing the meanings he ruled out. Further he was wrong to rule out honest comment. The first three grounds were argued by Mr Epstein and the remainder by Mr Price.

32. Though the defendants do not formally concede that the November draft was defective, the parties agreed the appeal should focus on the March draft, both as to the meanings relied on and the pleaded particulars. We address the defendants' arguments as they apply to the relevant paragraphs in the March draft, taking them for the most part in paragraph order.

Paragraph 7.1

33. There can be no doubt the central plank of the defendants' case was the loans to Mr Misick. Two loans to Mr Misick were relied on in the particulars (at paragraphs 7.39 to 7.47): one of $5 million made by BCB in a loan agreement signed by Andrew Ashcroft, the claimant's son; and one called the Coral Square loan. The parties agreed, as did the judge at paragraph 35 when considering the particulars claimed to support it, that this issue is at the 'nub' of the case.

34. The relevant particulars relied on are as follows:

"The $5 million loan

7.39 On 14 March 2007 BCB and Mr Misick entered into a $5 million loan agreement signed by Andrew Ashcroft.

7.40 It is to be inferred that the loan was authorised by the Claimant. The Defendants will rely on the following matters:-

7.40.1. The size of the loan.

7.40.2. BCB had already lent $360,000 to Mr Misick in January 2004, $500,000 in 2004 and had provided the finance for the Coral Square loan referred to below.

7.40.3. Mr Misick was the Premier and any lending to him was a significant matter.

7.40.4. Mr Misick was notoriously corrupt.

7.40.5. The Claimant's ownership and control of BCB as pleaded in paragraph 7.19 above.

7.40.6. The Claimant's practice of not "doing passive" in relation to his commercial interests.

7.40.7 The relationship between the Claimant and his son as pleaded in paragraph 7.20 above.

7.40.8 The extent of the potential political influence and benefit to the Claimant's substantial commercial interests in the TCI arising from lending such a large sum to Mr Misick.

7.41 It is to be inferred that the Claimant knew that Mr Misick was corrupt. The Defendants will rely on the following matters:-

7.41.1. Those pleaded in relation to paragraph 7.29 above.

7.41.2. The fact that he was seeking such a large loan.

7.41.3 The circumstances relating to the purchase and construction of the Belview Villa as pleaded in paragraphs 7.44 and 7.47 below.

7.42 It is to be inferred that the Claimant's motivation in authorising the loan was to obtain influence and benefit. The Defendants will rely on the following matters:-

7.42.1. Extending such a large loan to Mr Misick was an obvious way of obtaining such influence and benefit.

7.42.2. The Claimant's knowledge of Mr Misick's corruption.

7.42.3. The Claimant was aware from previous experience of the benefit of lending money to and/ or conferring benefit on politicians.

7.42.4. The favourable treatment that was given to Mr Misick as pleaded below.

7.43 Mr Misick did not pay interest or capital on commercial terms and/or in accordance with the loan agreement. It is to be inferred on the basis of the matters pleaded in paragraphs 7.40 to 7.42 above that this was authorised by the Claimant and was motivated by the desire to obtain influence and benefit.

The Coral Square Loan

7.44 In or around the end of December 2003 or the beginning of 2004 (the transfer was registered on 26 February 2004) Mr Misick purchased, through a nominee company, from Leeward Ltd the beachfront land in Leeward on which Belview Villa was built for $360,000, which was a substantial undervalue. At the time of the sale the land was subject to a charge in the sum of $2.1 million in favour of BCB, which was released at the time of the purchase and BCB provided a loan to Mr Misick of $360,000.

7.45 Thereafter, Johnston built Belview Villa, financed by a loan to Mr Misick of $4.72 million from Coral Square Ltd, a company said to be associated with Johnston. It is to be inferred that the financing was provided by BCB. The Defendants will rely on the following matters:

7.45.1 Coral Square had no existing business. Johnston was a construction company, not a lender. BCB was Johnston's financial backer. BCB was the largest bank in the TCI.

7.45.2. A company search of the TCI Financial Services Commission discloses that Northtown Ltd is the sole director of Coral Square, Southtown Ltd is the company secretary and BHI Corporate Services Ltd is its agent. The sole shareholder is West Indies Development Ltd. A company search of West Indies Development Ltd discloses the same involvement of Northtown Ltd, Southtown Ltd and BHI Corporate Services Ltd. The sole shareholder in West Indies Development Ltd is Leeward Holdings Ltd.

7.45.3. The purpose of the funding was to construct Mr Misick's palatial home.

7.45.4. The involvement of BCB in relation to the release of the charge and the $360,000 loan.

7.46 It is to be inferred that the Claimant authorised the sale of the land, the release of the charge and the provision of finance, knew that Mr Misick was corrupt and that his motivation was to obtain influence and benefit. Paragraph 7.40 and 7.42 above are repeated other than 7.40.2 and 7.41.3.

7.47 Mr Misick did not pay interest or capital on commercial terms and/ or in accordance with the loan agreement. It is to be inferred on the same basis

> above that this was authorised by the Claimant and was motivated by the desire to obtain influence and benefit."

35. Before addressing the paragraph 7.1 meaning it is necessary to consider the role of the pleaded meaning in libel actions. In general terms, the importance of a properly pleaded meaning is difficult to overstate. In virtually every libel action the meanings are key to the determination and proper conduct of all aspects of the litigation from the initial stages through to a trial if one takes place. Though the obligation on defendants to "specify" the defamatory meaning or meanings they intend to justify is now contained in CPR Practice Direction 53 paragraph 2.5(1), the rule in the sub-paragraph accords with the pre-existing practice laid down in *Lucas Box v News Group Newspapers Ltd* [1986] 1 WLR 147 CA and subsequent cases, by which defendants were required to inform the claimant and the court in their pleadings precisely and clearly what meaning they intended to justify, without "circumlocution or obfuscation" (see for example, *Viscount de L'Isle v Times Newspapers* [1987] 3 All ER 499 and *Morrell v International Thompson Publishing* [1989] 3 All ER 733).

36. The claimant argued that paragraph 7.1 did not meet these criteria. What the claimant was said to have done encompassed a number of different possibilities. Further, it was not made clear what the claimant's role with respect to the loans was said to be. The judge held at [21] and [22]:

> "It is obvious that … [paragraph 7.1] admits of a range of possible hypotheses. Mr Warby has described it as "unclear and inherently ambiguous". Is it said, for example, that the Claimant was directly involved at the time the loan was being made? Is it said that Mr Misick was given the money effectively as a gift or, rather, that he was to return the capital but not required to pay any interest? If he was required to pay interest, was the rate not a commercial one? In either event, is it being suggested that Mr Misick was told (expressly or by means of an understanding of some kind) that those terms would not be enforced? If so, was he to pay nothing or only a part of the interest due? If so, was that known, authorised or acquiesced in by the Claimant (and, if so, which)? Or is it said that Mr Misick fell into arrears at some point and that, then and only then, BCB decided (with or without the Claimant's authorisation) to waive or not press for the outstanding payments? Is it said that future payments were also to be waived? There is a myriad of uncertainties.
>
> It is obvious that the present wording is a fudge. The phrase "without seeking commercial repayment" blurs all the questions posed above and plainly, as it stands, it will not suffice. It is obvious that whatever is being alleged amounts to serious misconduct on the Claimant's part and, if it were reproduced in an indictment, it would plainly not pass muster. It does not even identify the "offence" alleged."

37. These findings are elaborated in subsequent paragraphs which include the statement at [27] that "the case must pass muster as a pleading now" that "it is important to

impose discipline now on the case they wish to make against the Claimant". At paragraph 29, the judge stated:

> "If the Defendants have seen a loan agreement between BCB and Mr Misick, they can presumably say what the repayment terms were and whether it is part of their case that they were tacitly acknowledged to be a sham at that stage (and, if so, whether the Claimant was consulted about it). According to his evidence before Sir Robin, Mr Misick had repaid some of the loan. If that is true, it would not be consistent with an allegation (which the Defendants do not yet make) that the contractual repayment terms were a sham from the start. If a decision was subsequently made not to enforce the terms originally agreed, and the Claimant was a party to that decision, it represents a different case. The Claimant is entitled to attempt to collect evidence with a view to rebuttal of the Defendants' charges. He cannot do so unless he is told with whom he conspired and when he gave his agreement to whatever impropriety is alleged. At the moment, all he can do is to deny the general allegations in correspondingly general terms (apart, perhaps, from calling his son – in so far as he is said to have been involved)."

38. Mr Warby QC accepted that the judge's use of the word 'conspired' was inappropriate. We agree. The defendants' claim relates to a loan and not to a conspiracy in any conventional sense. Moreover, the allegation is that a loan was made on terms. It may or may not be on terms that involved 'impropriety'. Any impropriety may be in the motive alleged in paragraph 7.1 rather than in the loan itself.

39. The judge concluded at [37] and [38]:

> "37. It seems to me that the key to establishing a case against the Claimant is to show that the loan was not at arm's length and on commercial terms and that the Claimant authorised it. If those elements are established, the rest falls into place. Accordingly, that is where the primary need for particularity arises. The Defendants need to give their best particulars of the Claimant's role in granting the loan and, specifically, of the nature of the favourable terms.
>
> 38. The conclusion, so far, is that I will not allow the new meaning at paragraph 7.1 for lack of clarity. The draftsmen are trying to make it wide enough to embrace a whole range of possible scenarios but, in their concern to leave nothing out, have presented the Claimant and his advisers with a moving and indistinct target. It cannot suffice to put forward a case to the effect that the Claimant simply must have been involved in some way or other. They need to come off the fence and decide exactly what the charge against the Claimant is."

40. The defendants attempted to justify the wording of paragraph 7.1 as adequate and further submitted that the meaning in paragraph 7.1 was not ambiguous when read with a letter written to the claimant's solicitors on 27 May 2011 and that the letter provided sufficient information to enable the claimant to know what the case against him was. The relevant part of the 27 May letter was written in reply to a letter written by the claimant's solicitors on 14 April 2011 which we should set out first. The letter from the claimant's solicitors said this:

> - "The main charge against our client is one of authorising loans by BCB to Michael Misick which were in some way wrongful. Yet we note that, of the two loans relied on, one (the "Coral Square Loan") is not even alleged to have been made by BCB. It is said, as we understand it, to have been made to Mr Misick by Coral Square Limited. It is not even clear who is said to have been the borrower; in particular, whether that is said to have been Mr Misick or a nominee company of his. BCB is said to have had some financing role in all of this, but exactly what role is unclear to us. So is the evidential basis for these allegations, which are almost all based on inference. You have served no evidence in support of your application.
>
> - The draft amendments fail to make plain what exactly are the alleged vices of the two loans relied on. To say that loans are made by BCB 'without seeking commercial repayment' (7.1) is inherently ambiguous, and unclear. Does this mean that the loan terms at the outset did not 'seek commercial repayment' (whatever that might mean), or that the terms did require such repayment, but were not enforced? This way of stating the case also raises the question of what the supporting details and evidence are.
>
> - One would expect the Particulars of Justification to afford some clarification of the ambiguous and uncertainties just identified. However, the problems are exacerbated rather than ameliorated by the Particulars of Justification at 7.43 and 7.47, where the following is alleged, in relation to each of the two loans relied on ("The $5m loan" and the "Coral Square loan"):
>
>> "Mr Misick did not pay interest or capital on commercial terms and/ or in accordance with the loan agreement."
>
> No other details are provided.
>
> - These are not particulars of *BCB* not "*seeking* commercial repayment". On their face they are no more

> than particulars of *Mr Misick* failing to *make* repayments. To say that Mr Misick did not pay "on commercial terms" begs many questions, and is inherently unclear. It is certainly not a clear and unequivocal allegation that BCB acted wrongfully in any way. The further and alternative case (that Mr Misick "did not pay … in accordance with the loan agreement") is not capable on its face of amounting to an allegation of misconduct by BCB, let alone our client. In any event, the "Coral Square loan" is alleged to have been made by Coral Square Limited."

41. The defendants' reply, from their solicitors in the letter of 27 May 2011, was as follows:

> "Our clients allege that the loan documents did provide for commercial repayment but Mr Misick did not make such payments. Our clients allege that your client understood from the outset that Mr Misick would not make repayments in accordance with loan agreement. In support of such an inference our clients rely on the primary facts set out in [7.40] to [7.43], including the absence of such repayments…
>
> The absence of such repayments, in combination with the other primary facts, provides a sufficient factual basis for the inference alleged. Insofar as is necessary, our clients will allege that BCB (with your client's knowledge) did not seek to enforce the loans. This has already been alleged in [7.49] in relation to our client's alternative case in [7.1.1]."

42. We are surprised at the failure of the defendants to particularise their pleadings sufficiently. The defence is now in a fifth incarnation. We assume, in the absence of a different explanation, that there were tactical reasons for keeping it as general as possible. We are also somewhat surprised at the tolerance of the claimant towards the making of repeat applications and, with respect, to the judge for permitting them. When invited to make submissions about this, Mr Warby accepted that attempts at amendment will not normally be shut out in circumstances such as these though he added that the closer the case comes to trial the more difficult it is to obtain an amendment. At [38] and in other parts of his judgment, the judge has kept open the opportunity for the defendants to make still further amendments. That being so, we do not consider that this court at present should take a tougher line in that respect.

43. However, repeated satellite litigation on pleadings for tactical reasons is not, in our view, the best use of court resources and we would expect that to be recognised in this as in other areas of the law. There must come a point at which repeated attempts at amendment, necessary because of the defendants' wish to keep the pleading as general as they can, become an abuse of the process of the court.

44. We agree that a properly pleaded meaning is vital to the eventual success and expedition of the hearing and to ensure fairness as between the parties. Unless it was a less than creditable attempt still to keep options open, we do not understand

why the allegation contained in the letter of 27 May 2011 was not included in a draft pleading in advance of the hearing before the judge in June 2011. Even now, no attempt is made by the claimant to bar the defendants from making a further application to amend based on the latter.

45. In relation to paragraph 7.1, the judge's concern, expressed at [38] was lack of clarity. We would dismiss the appeal on the ground that the allegation was insufficiently clear and precise to comply with the specification requirement of the Practice Direction. However, we add that, in our judgment, and subject to one point, the allegation set out in the letter of 27 May 2011 does comply and is supported by sufficient particulars for pleading purposes, though as suggested by Elias LJ in his judgment we agree they may need to be 'tidied up', and should include the additional point that BCB with the claimant's knowledge did not seek to enforce the loans.

46. Large loans were made on a commercial basis. No repayments were made. It was understood from the outset that Mr Misick would not make repayments provided for in the agreements. It can be inferred that repayments were never contemplated. We read the case as put requiring that inference to be drawn. Our qualification is that, if it is to be alleged that the claimant's 'understanding' was based on an express agreement the defendants claim they can prove, particulars of the agreement should be provided. In either event, we would expect cross-examination of the claimant and other witnesses, as to the intentions of the claimant and Mr Misick at the time the loans were made, to be permitted and do not regard that as inappropriately burdensome.

47. The second challenged element in respect of what is pleaded to support paragraph 7.1 is the lack of particularisation of the alleged authorisation. Given the particulars relied on, that requirement is, in our judgment met. The company arrangements and the size of the loans as stated in the particulars, were such that authority could reasonably be inferred. For the purposes of this appeal, the court was not prepared to consider the contents of Mr Price's letter of 19 January 2012, and enclosures. If they are to be included in a fresh application to the High Court following this hearing, that should be done at the first opportunity because the defendants must be close to the end of the road in seeking amendments of their pleadings.

Paragraph 7.2

48. The meaning pleaded at paragraph 7.2 in our view suffered from a different problem, as did the particulars relied on in support of it. The judge was right in our view to describe it as about as vague and general a meaning as it was possible to imagine. Mr Price for the defendants suggested in argument that the defendants could hardly be criticised for justifying such a vague or general meaning since it closely resembled the meaning complained of by the claimant. We do not think that argument is a good one. The claimant's meaning in relation to political amorality is, unlike the defendants' meaning, tied specifically to the making of corrupt loans to Mr Misick. Had the defendants' meaning been similarly circumscribed, as well as properly supported by particulars, then we do not suppose any reasonable complaint could have been made about it.

49. So far as the particulars are concerned, the vice of a vague and general meaning is that it is liable to lead to a loose and ineffective pleading with excessive and

irrelevant particulars, a state of affairs which is not permissible and which has been deprecated, particularly in libel actions, for many years: see for example, *Associated Leisure v Associated Newspapers Ltd* [1970] 2 QB 450 and *Atkinson v Fitzwalter* and ors [1987] 1 All ER 483. Particulars provided in support of a plea of justification must be both sufficient and pleaded with proper particularity. The former requirement is met if the (properly pleaded) particulars are capable of proving the truth of the defamatory meaning sought to be justified. The latter requirement is a factor to be judged not by the number of particulars provided, but by the pleading of a succinct and clear summary of the essential (and relevant) facts relied on, enabling a claimant to know the precise nature of the case against him, and providing him with sufficient detail so he can meet it. As Lord Woolf pointed out in *McPhilemy v Times Newspapers Ltd* [1999] All ER 775 at 793c, a loose and ineffective pleading can achieve directly the opposite effect from that which is intended by obscuring the issues rather than providing clarification. In our judgment this is what has happened here, and we do not think the problem is curable by a request for further information or by simple pruning.

50. There are difficulties in managing a case justly to which a loose and ineffective pleading will give rise at each stage of the litigation. These include at the reply stage when a claimant must specifically admit or deny the allegations against him, giving the facts on which he relies: see CPR 52 PD 19 para 2.8, when disclosure takes place, when witness statements are prepared, and at the trial itself which may take place before a jury. Time and money will almost inevitably end up being wasted over matters which have little to do with the overall merits of the litigation.

51. The particulars pleaded in support of this part of the defendants' case are included in 42 sub-paragraphs. The subjects covered include the loans made to Mr Misick which feature as particulars in support of the meaning pleaded at paragraph 7.1 and a large number of other matters. These include the findings of the Foreign Affairs committee report, the claimant's business interests and activities and involvement in politics going back over many years, including in Belize, the boom in development in the TCI, the involvement of BCB in the TCI, the endemic corruption in TCI, the grant to the claimant of Belonger status, which by inference was said to be because of the claimant's conferment of benefits on the political party or politicians in office in the TCI, a threat by the claimant to foreign office officials to get TCI politicians to stir up trouble; the activities of a number of companies (including Leeward Ltd, Johnston, Oxford Ventures Ltd, Carlisle Holdings Limited) associated with the development boom, and the claimant's links to those companies, and the corrupt granting by Mr Misick of a planning waiver in respect of conditions to provide for environmental protection in relation to the creation of a marina in the TCI by Leeward Ltd, financed by BCB which has caused a large amount of environmental damage in the TCI.

52. The particulars relied on to support this and other parts of the defendants' case were not materially different in the two drafts. In our view it is difficult to extract from the morass of detail what the claimant is said to have done, or what relevance what is pleaded has to the case that he was "party to [a] .. culture of political amorality". It is to be noted that a substantial number of them were the subject of detailed consideration by the judge (at [43] to [52] of his first judgment) where he explained why he considered them to be unsatisfactory. In the absence of any grounds advanced for disturbing them, those criticisms stand. One theme of the criticisms

was the failure of the particulars to spell out exactly what it is the claimant is supposed to have done. We agree with that criticism.

53. We should mention here the criticism made by Mr Epstein of various references by the judge to the need for the case against the claimant to be pleaded "with the particularity of an indictment." At paragraph 3 of his first judgment the judge said this:

> "Mr Warby emphasised that he was not necessarily suggesting that it would be impossible to formulate a defence of justification or comment such as would pass muster in accordance with pleading principles. He was simply adopting the stance that his client was entitled to know with clarity, and without obfuscation, precisely the case against him. It is at least clear, after further attempts at clarification in the course of oral submissions, that some of the allegations sought to be justified are very serious and would appear to involve the practice of a persistent and wide-ranging policy of corruption. It is in that context that Mr Warby highlighted the longstanding principle that he is entitled to have the particularity of an indictment: *Hickinbotham v Leach* (1842) 10 M & W 361."

54. The judge made a similar observation at paragraph 62 of his first judgment when dealing with the *Control Risks* meanings pleaded by the defendants at paragraphs 14:

> "The only fresh observation Mr Warby puts forward in relation to this plea is that either "disproportionate influence" is not defamatory at all or, if it is, the meaning is wholly distinct from that complained of. The case should be about corruption or influence which is *improper* rather than merely "disproportionate". Correspondingly, that is the sting to which any pleaded facts must relate. It may be that the Defendants are seeking, in this context, simply to defend the comment that the Claimant's influence, or potential influence, on the Conservative Party and its foreign policy is cause for concern, not so much because William Hague or any other government ministers would be party to corruption or favouritism, but because of the Claimant's track record in Belize and the TCI in using money to achieve corrupt advantages or special favours for himself or his businesses. If that is so, it needs to be clarified and the "track record" to be clearly spelt out "with the particularity of an indictment"."

55. At paragraph 19 of his second judgment the judge also said this:

> "It would not be enough in a criminal case for the Crown merely to assert that the defendant controls certain entities, that he must take responsibility for them, and that a corrupt self-interest is the mainspring for what he does. It would be for the Crown to prove it. It has always been recognised that a libel claimant is entitled to "the same precision as an indictment":

> *Hickinbotham v Leach* (1842) 10 M&W 361, 363. That is a proposition which naturally has a particular resonance when the defamatory allegation is itself tantamount to one of criminal misconduct."

56. Mr Epstein submitted that the judge's reference to the "indictment" requirement was inapposite particularly in modern times, because it created an inappropriately high threshold for pleading defences of justification and fair comment; and the judge thus adopted a wrong approach to what was required of the defendants in this case. That argument it seems to us is based on a misunderstanding of a phrase, the meaning and use of which is well understood in the context of the pleading requirements in libel actions, and which is used to encapsulate an important principle.

57. The judge's reference was to an observation by Alderson B in *Hickinbotham v Leach* which was made in the course of argument but then expressly approved by the Court of Appeal in *Zierenberg v Labouchere* [1893] 2 QB 183, 187 and 190 and again in *Wootton v Sievier* [1913] 3 KB 499 at 503 where Kennedy LJ (with whom Cozens-Hardy MR agreed) said this:

> "The degree of fulness and precision which ought to be required in an action for libel from a defendant, who has pleaded a justification and has been ordered to give particulars under that plea, is not infrequently a matter which admits of reasonable debate. Certain general propositions are now, I think, not open to controversy. In every case in which the defence raises an imputation of misconduct against him, a plaintiff ought to be enabled to go to trial with knowledge not merely of the general case he has to meet, but also of the acts which it is alleged that he has committed and upon which the defendant intends to rely as justifying the imputation. This rule of justice is not limited in its application to actions of libel, although, of course, it includes them (see per Kay L.J., *Zierenberg v. Labouchere* [[1893] 2 QB 183, 190]) and its propriety is most evident in a libel case where the defendant has chosen to put the character of the plaintiff in serious jeopardy by the heinousness of the charges which are asserted or involved in the defendant's plea of justification. In such a case, at all events, the pronouncement of Alderson B in *Hickinbotham v. Leach* [(1842) 10M&W 361, 364], approved of and explained in reference to the modern system of pleading by Lord Esher M.R. in *Zierenberg v. Labouchere* [[1893] 2 QB 183, 187], is not one whit too strong: "The plea ought to state the charge with the same precision as in an indictment." "

58. The "precision of an indictment" rule if it can be so described, does no more than require a defendant to comply with the well-established principle that in pleading a defence of justification he must identify the acts which the claimant is said to have committed and which are relied on to justify whichever imputation they are directed to support.

59. This principle has particular resonance when the charges are serious ones, as they are here. In referring to the rule in our opinion the judge did not therefore set the

pleading bar too high. He did no more than require the defendants to comply with principles which are not only well-established but which entirely accord with the modern approach to pleading. It is, in our view, consistent with the approach to an indictment in the criminal courts and the reference to an indictment is not inappropriate. In *R v Landy and Others* [1981] 72 Cr App R 237, at 244, Lawton LJ stated the rationale for the need for particulars in an indictment:

> ". . . first to enable the defendants and the trial judge to know precisely and on the face of the indictment itself the nature of the prosecution's case, and secondly to stop the prosecution shifting their ground during the course of the case without the leave of the trial judge and the making of an amendment."

We agree with the judge's conclusion on 7.2.

60. It was suggested by Mr Epstein and Mr Price that it was particularly inappropriate to rely on this rule in the context of the defence of honest comment, considered later in this judgment, given the nature of that defence and its importance in the context of freedom of expression. We do not think it was. The point at issue in this case was one of clarity. Defendants are required to set out the facts on which they rely to "warrant" the comment; see CPR 53PD.14 para 2.6(2), and further *Cunningham-Howie v Dimbleby* [1951] 1 K. B. 360 and *Lord v Sunday Telegraph* [1971] 1 Q.B. 235. If it was the defendants' intention to establish in their honest comment particulars a matter of fact that the claimant had engaged in corrupt practices in Belize and the TCI, then those facts needed to be properly pleaded and the acts which the claimant had committed needed to be specified.

Paragraphs 7.1.1 and 13.2.5

61. The judge's decision on the meanings pleaded at paragraph 7.1.1 and 13.2.5 fell into a different category since the issue was not primarily one of clarity, but whether the words complained of were capable of bearing either meaning. He stated, at paragraph 38:

> "As to paragraph 7.1.1, that is unacceptable for a different reason; namely, that mere acquiescence is inadequate as a defence to the words complained of."

62. The principles to be applied when making such a determination under CPR 53 Practice Direction paragraph 4.1(1) and on an appeal against such a determination are well-established and are not in dispute on this appeal. In *Berezovsky v Forbes Inc* [2001] E.M.L.R. 1030 Sedley LJ said at [16]:

> "The real question in the present case is how the courts ought to go about ascertaining the range of legitimate meanings. Eady J regarded it as a matter of impression. That is all right, it seems to us, provided that the impression is not of what the words mean but of what a jury could sensibly think they meant. Such an exercise is an exercise in generosity, not in parsimony. It is why, once fairly performed, it will not be second - guessed on appeal by this court: the longstop is the jury. But it is also why, if on an application for permission to appeal it appears that the

> judge had erred on the side of unnecessary restriction of meaning, this court – though it will always be mindful of what Brooke LJ said in *Cruise v Express Newspapers* [1999] QB 931 about self- denial in libel cases- may be readier to take another look. In those cases where it does so, its decision is akin to (and strictly speaking probably is) a holding of law. It will have careful regard to the judge's view, but the view it comes to on the legitimate ambit of meaning will be its own. That is the approach we propose to take here."

63. We were reminded that the threshold for exclusion is a high one and that, as Simon Brown LJ said in *Jameel v Wall Street Journal Europe Sprl (No 1)* [2004] EMLR 6 at [14], every time a meaning is shut out a judge is taking it upon himself to rule in effect that a jury would be perverse to take a different view. *Jameel* was a case where the only substantive defence was one of qualified privilege. Simon Brown LJ observed at [16]:

> "By the same token that the judge's ascertainment of the range of permissible meanings is "an exercise in generosity, not in parsimony" and, moreover, an exercise in which this court will be readier to intervene if the judge has withdrawn from the jury (rather than left to them) any particular meaning, so too in my opinion the judge should be warier even than usual of withdrawing meanings unless there is sound reason for doing so. I can quite see that where the defence of justification is raised with regard to a *Lucas-Box* meaning then it may be important to rule in advance on whether the words are capable of bearing their lesser defamatory meaning so as to control the evidence properly adducible at trial. In a case like the present, however, there seems altogether less reason for a pre-emptive ruling - although I recognise, of course…that the judge was expressly invited to make it."

64. The lower "acquiescence" meaning pleaded at paragraph 7.1.1, was expressly added and included in the March draft to meet the event the defendants were unable to prove their case on authorisation. But the question for the judge was whether the words were capable of bearing the meaning that the claimant merely "acquiesced" in the wrongful conduct in relation to the loans (whatever it was said to be). The essence of the argument advanced for the defendants was that the article itself made no explicit allegation about the claimant's involvement with or knowledge of the loans; and an ordinary reasonable reader could conclude therefore (to put it in layman's terms) that it was his bank and he knew what was going on.

65. We do not think the words were capable of this limited meaning. There is nothing in them which suggests that the claimant knew what was going on in relation to the loans to Mr Misick, and merely acquiesced in the wrongdoing of others. The articles plainly portray the claimant as intimately involved with the affairs of BCB from the headlines onwards and, as the judge said, put him at the forefront of their attack, referring for example to "Lord Ashcroft's British Caribbean Bank…" and to "Lord Ashcroft's financing for the former prime minister…".

66. As for the *Lucas-Box* meaning 13.2.5, we do not consider the judge erred on the side of unnecessary restriction in this case either. The second article presented two facts side by side. First, and unequivocally, that BCB (Lord Ashcroft's bank, as it is described at various points throughout as we have said) loaned $5 million to Mr Misick. Second, in the black box, and indeed also in the article, that the claimant totally denied that this had occurred. We read the claimant's statements as straight denials.

67. It is conceivable, as Mr Warby accepted, that a reader might just conclude the claimant did not know the truth about the loans, and therefore that his denials were a product of ignorance. But a jury could not sensibly conclude in our judgment that when he made those denials the claimant had sought only "to obfuscate" or that he was guilty merely "of an economy with the truth and a lack of candour and frankness". We do not accept the defendants' submission that the denials could be read as equivocal because of confusion over ownership structures or because they left questions unanswered. We agree with the judge's approach at paragraph 41 of his earlier judgment, cited at paragraph 75 below when considering paragraphs 13.2.1 to 13.2.4.

Paragraph 7.3

68. By the time of the March draft, the defendants' case on meaning had been narrowed, as meanings 7.9 and 7.10 of the November draft had been abandoned on justification at least, but the same particulars were relied on for what was now paragraph 7.3 (formerly 7.8). The matters alleged included that the claimant had made large donations and lent money to the Conservative Party as a result of which he was nominated for a peerage; his position as treasurer of the Conservative Party; that the claimant was turned down twice for a peerage; his close relationship with Mr William Hague, the claimant's refusal to reveal whether he had complied with an assurance of permanent residence after he was made a working peer; and the organisation and financing of trips to TCI for members of the (Conservative) Shadow Cabinet at the time [see particulars 7.11-22 and 7.62 onwards]. Some of the particulars pleaded in support of the defendants' case on the claimant's involvement in the culture of political amorality, were relied on here, including his financing of a campaign of Said Musa which led him to being elected Prime Minister there. Some of these particulars were also relied on in support of the defendants' inferential case on "knowledge and motivation" pleaded in relation to paragraph 7.1.

69. The principle that a plea of justification should focus on conduct of the claimant is well-established, and has not been disputed in this appeal. The problem with this part of the case identified by the judge in his first judgment was that the relevant particulars did not satisfy this conduct requirement, and did not make clear what was being alleged against the claimant. The judge said at [52] of his first judgment:

> "The sensitive, and potentially scandalous, nature of these allegations plainly demands that the Claimant is entitled to be told exactly what is alleged against him. Which ministers are alleged to have been influenced by the Claimant in the discharge of their public duties? A case cannot be conducted, whether to be tried by jury or by judge alone, on the basis of "nods and winks". If it is the case, for example, that the

> Defendants are intending to allege no more than that the Claimant in paying for fact-finding visits by British politicians was *intending* to exert influence on government policy towards direct rule in the TCI, then this should be made clear."

70. The judge's concerns were, in our view, legitimate when they were expressed, and remained so, even in relation to the defendants' more restricted case. We do not read the judgment as requiring the defendants to allege for example that any of the politicians identified in the March draft were susceptible to improper influence or had actually been improperly influenced; merely that if such a case was to be made it needed to be spelled out, rather than hinted at. The problem in our view was in the way the matter was pleaded. The particulars in the March draft relied on a large number of different matters pleaded in a diffuse and rambling way. They seemed to us to suffer from deficiencies similar to those pleaded in support of the amorality meaning pleaded at paragraph 7.2. Some of the matters alleged, if not properly anchored to the meaning, might otherwise be merely prejudicial rather than relevant. As on other occasions, the judge was not saying this part of the case could not be advanced at all, but that it was necessary for the case against the claimant to be properly formulated and clear before it was. In our view this was a proper exercise in proportionate case management by the judge.

Paragraphs 8 and 14: honest comment

71. A defendant relying on a defence of honest comment has to identify the facts on the basis of which it is said a person could honestly express the relevant comment. The importance of the defence in relation to freedom of expression and its breadth having regard to the objective test of the "fairness" of the comment i.e. whether any person, however prejudiced, exaggerated or obstinate his views, could have honestly expressed it on the proved facts or on alleged facts protected by privilege, does not however obviate the need for the facts which are relied on to be properly pleaded, in accordance with the normal requirements of clarity, nor does it alter the judge's task in ensuring that cases are fought in a proportionate way on the matters which are in issue between the parties as some of the defendants' submissions have tended to suggest. In short, it does not follow from the breadth of the defence of honest comment that a defendant is entitled to advance a loose and ineffective pleading, and we repeat what we have said earlier in relation to the need for specificity and what we have said at paragraph 60.

72. We agree with the judge that the inadequacy in pleading terms of the justification particulars undermines the honest comment defence. We would expect an honest comment defence by a newspaper on the lines of paragraphs 8.1 to 8.3 and paragraph 14.1 and 14.2 to be warranted provided the facts relied on are pleaded with sufficient clarity. The parties were agreed that, as comments, paragraphs 8.1 to 8.3 stand or fall together and that no distinct considerations arise from the comment at 8.3 based on the alleged relationship between the claimant and Mr Hague. We accept that but Pill LJ was somewhat surprised at the claimant's concession when a new dimension is introduced, the claimant's close relationship with a third party, against whom no allegations are sought to be made. It is that relationship which is claimed to be alarming.

73. Deplorable though repeated applications for amendments in our view are, the claimant has not disputed that a further application could now be made and the judge plainly contemplated one.

Paragraphs 13.2.2 to 13.2.4

74. We agree with the judge's approach to these paragraphs at paragraph 40 of his second judgment:

> "Inherent in these allegations is the need to prove the underlying factual position which the solicitors' letter denied. To that extent, if I understand correctly, this case is parasitic upon the primary case considered above. Essentially, if the Defendants are able to advance a properly pleaded case against the Claimant, to the effect that he did personally attempt to buy influence through authorising the $5m loan and/or the funding of Mr Misick's mansion and his 'lavish lifestyle', and so on, then the Defendants should be able to plead that his denials of the relevant misconduct were dishonest. I would allow such a pleading to stand, subject to those primary charges themselves being properly formulated."

75. We also agree with the approach that the judge had taken in paragraph 41 of his earlier judgment to which he referred at paragraph 39 of his second judgment:

> "41. He argues that nowhere in the article was anything said which attributed to the Claimant no more than obfuscation, or lack of candour, in dealing with the newspaper. He is presented to the readers as having made clear and unequivocal statements. He was represented, in particular, as having "totally denied" that BCB had lent $5m to Mr Misick. That is to be found in the fourth paragraph of the article. This, together with the black box at the foot of page 36 (headed "Michael Ashcroft and The Independent"), are said by Mr Warby to give rise to the plain meaning of blatant lying. I am asked to rule that the words as published are incapable, however, of conveying merely that the Claimant was guilty of "economy with the truth", or "lack of candour and frankness". I agree that it should come out and that the Defendants should meet the allegation head on by proving, if they are able to do so, that the Claimant actually lied."

76. At the hearing before this court Mr Warby took the further point, not previously taken, that the introductory words to the allegations in 13.2.1 to 13.2.4, at 13.2, require the allegations to be linked with dealings with Mr Misick and involvement in the culture of political amorality which have not properly been pleaded. We agree that it does present a further obstacle but it is one which could be cured by a coherent pleading, and/or itself amended. The 'dealings', to quote 13.2, in so far as they refer to the loans, are, in our view, easily susceptible to an acceptable pleading, as stated at paragraph 45 above.

The respondent's notice

77. The claimant raised two additional reasons why these appeals should be dismissed, and we mention them even though we do not consider either point is necessary for the resolution of these appeals, and the arguments were dealt with very briefly on this appeal. They are set out at paragraph 29 above.

78. The first point relates to the judge's acceptance of the proposition that pleading fraud or the like by way of justification was subject to less stringent requirements than those that apply to pleading such allegations in other contexts, such as the pleading of malice to defeat a defence of honest comment or qualified privilege. The claimant's point is a simple one. Allegations of fraud, bad faith or deliberate misconduct are subject to the same requirements whether they appear in a plea of justification, or a plea of malice or indeed anywhere else. It was submitted that any other approach is illogical and the judge was wrong to accept the defendants' submissions as to what the majority decided in *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1, which was not a defamation case. The defendants submit in brief that the right approach is the one they advanced before the judge, and he appeared to accept, namely that it is not necessary for a defendant to plead facts in support of a plea of justification directed to prove dishonesty that are more consistent, as a matter of probability, with the presence of dishonesty than with its absence.

79. The judge recorded the two competing arguments advanced, but it seems to us he did not expressly accept either argument. At paragraph 15 of his second judgment he said this:

> "It is fair to say that the principle referred to by Tugendhat J in *Bray v Deutsche Bank*, by reference particularly to the Court of Appeal decision in *Telnikoff v Matusevitch*, goes back at least as far as *Somerville v Hawkins* (1851) 10 CB 583 in the middle of the nineteenth century. But it is generally linked specifically to the requirements for pleading malice (albeit nowadays often equated to dishonesty). I do not believe that I have hitherto encountered a corresponding rule applied to pleading justification. I will proceed, therefore, on the assumption that particulars of justification, for an inference of dishonesty to be based upon them, do not need to be in themselves consistent *only* with such a conclusion – at least in a case where dishonesty is expressly pleaded. That would seem to accord with the majority in *Three Rivers*." (emphasis added)

80. The underlined words used by the judge do not appear to be in issue in this appeal and applying that test, paragraph 7.1, to adopt the defendants' formulation, passed muster. We see no need to resolve the issue raised by the claimant. It does not provide a further reason for refusing the amendments and our conclusions about the pleadings would not have been different whichever of the two competing arguments prevailed.

81. The second point raised by the claimant was this. The claimant's argument below was that it could be demonstrated to the standard required by CPR Part 24, that crucial parts of the defendants' proposed amended case in justification relating to the loans to Mr Misick, and the claimant's alleged authorisation of them, lacked a sufficient evidential basis. The defendants' case in this respect was supported by a

witness statement from the defendants' solicitor. It was submitted that the judge should have examined the evidential position and, had he done so, the result would have been that the application for permission to amend would have failed for this additional reason.

82. However, Mr Warby accepted in the course of argument that, as is apparent from the judgment, the judge did not decline to examine the evidence as a matter of principle on the ground, for example, that it would never be open to a judge in an appropriate case to take that course. The judge simply decided to approach this case, as he stated at paragraph 25, by reference to the general principle that the court should assume on an interim application that properly pleaded allegations will be proved at trial. He did so having regard to Mr Price's evidence that the defendants did have evidence to support their case, including from a confidential source, but could not be compelled to produce it. There was no error of principle by the judge in adopting the approach he did and no further ground on which the amendment should have been refused.

Conclusion

83. We would not disturb the judge's rulings on meanings. The other decisions made by him were in our view legitimate case management decisions. However, we repeat the view we have expressed that paragraph 7.1 is easily capable of satisfactory amendment and that, provided the facts relied on are properly pleaded, comment of the kind specified in paragraph 8 can legitimately be pleaded.

84. We would dismiss both appeals.

Lord Justice Elias :

85. I agree that the two appeals should be dismissed for the reasons given in the cogent analysis of Pill LJ and Sharp J. The issue before a very experienced defamation judge was not whether there was a proper case to argue; it was whether the pleadings were sufficiently clear and particularised to enable the claimant to know precisely how the defendants were putting their case on justification and fair comment. The judge gave very full and detailed reasons why they were not, and like Pill LJ and Sharp J, I consider that he was fully justified in taking the view he did.

86. There are however two matters on which I wish briefly to comment. The first concerns paragraph 7.1 which is the kernel of the appeal. As the pleading stood before the judge, that paragraph was plainly not sufficiently focused and Mr Epstein, in his very able submissions on this point, came very close to conceding that it was not.

87. The letter sent by Mr Price on 27 May 2011, the material part of which is set out in Pill LJ and Sharp J's judgment at para.41, sought to reformulate paragraph 7.1 so as to identify more precisely what the defendants' case was in this regard. It shows that their case is that the claimant authorised a loan arrangement which was a sham from the beginning, and that it was always the understanding of the parties concerned that there would be no, or no proper, repayment on commercial terms.

88. The judge did not consider the letter at all in his judgment. Mr Epstein was critical of the judge's failure to do so, particularly given that Mr Epstein says that he concentrated on the version of paragraph 7.1 therein set out in his submissions. I do not think that this is a fair criticism. The defendants had been given every opportunity to clarify their pleadings and it was for them to commit themselves to a particular formulation of their case, as set out in their pleadings, and for the judge to rule on that. This was especially so given that the judge's ruling was not a final one, and even now the defendants are not prevented from sharpening this justification defence if they so wish.

89. However, I respectfully agree with Pill LJ and Sharp J that the reformulated paragraph 7.1 set out in the letter is, subject to the qualification which Pill LJ and Sharp J give at paragraph 46 above, sufficiently clear and precise. Mr Warby sought to contend otherwise and suggested that even in this amended form paragraph 7.1 was still too vague. I would reject that submission. I think that it would now be perfectly clear to the claimant what is being alleged.

90. Mr Warby also submits that the factual stratum for alleging that the claimant authorised the loan is not made out. I would reject that submission too. In my judgment the particulars relied upon in paragraph 7.40 are capable of supporting the inference that the loan was approved by the claimant. Whether that is so or not is obviously not in issue in this appeal. The only question is whether the claimant would understand the case being made against him and could properly respond to it, and I am satisfied that he could.

91. Finally, Mr Warby raises an additional point concerning the particulars as they relate to the meaning identified in the letter. Mr Warby says that the allegation that there was in fact no, or no proper, repayment of the loan, which is an alleged fact relied upon in the pleadings at paragraph 7.43, does not constitute evidence that the loan was from the beginning a sham. Furthermore, that is so even if it be the case that the Premier was, to the knowledge of the claimant, corrupt, and even if the claimant had hoped to gain influence and benefit by making the loan. There can be many reasons why loans are not repaid, including the insolvency of the debtor, and the specific particulars relied upon in paragraphs 7.40 to 7.43 to make good these allegations in paragraph 7.1 are not capable of doing so. The defendants have not, for example, alleged that it is clear that the Premier would not be in a position to repay commercial interest on a loan of that size or anything of that nature.

92. I see force in these submissions and I doubt whether the particulars specifically relied on at present are sufficient to justify the meaning. However, in addition to these particulars, the defendants have stated in the letter of 27 May that "in so far as it is necessary, our clients will allege that BCB (with your client's knowledge) did not seek to enforce the loan." They refer to the fact that this is a point made elsewhere in the pleadings at paragraph 7.49. It seems to us that this, together with the other factors, is capable, if proved, of sustaining the allegation. I would agree with Pill LJ and Sharp J that the particulars are in principle capable of sustaining the case, although they would need to be tidied up and the defendants would need to identify precisely which particulars were being relied on to justify the paragraph 7.1 meaning in its final formulation.

93. The second observation I wish to make is this. I agree with Pill LJ and Sharp J that it is not in the event necessary for the court to decide whether a pleading of fraud in

the context of justification should be subject to the same stringent requirements as it is in other contexts. But my strong preliminary view is that it should. I can see no obvious reason why a pleading which asserts the truth of an allegation of fraud should be subject to less stringent rules than the plea of fraud itself. However, it is a point of some importance on which we heard only limited argument, so it would not be appropriate to determine that question in this appeal.