Neutral Citation Number: [2012] EWHC 3721 (QB)

Case No: HQ09X04347

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2012

Before :

Mrs Justice Sharp

- -

Between :

Andrew Miller	**Claimant**
- and -	
Associated Newspapers Limited	**Defendant**

- -
- -

Manuel Barca QC (instructed by **Simons Muirhead & Burton**) for the **Claimant**
Mark Warby QC and Adam Speker (instructed by **RPC LLP**) for the **Defendant**

Hearing dates: 21st, 22nd, 23rd, 24th and 25th May 2012

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE SHARP DBE

Mrs Justice Sharp:

1. This is the judgment following a trial in a libel action brought by the Claimant, Andrew Miller against the publishers of the Daily Mail, Associated Newspapers Ltd.

2. Mr Miller is a management consultant with a professional background in engineering and computing. He is the co-founder and erstwhile managing director of Impact Plus Limited (Impact Plus), an independent management consultancy specialising in IT-related projects for clients which have included many large businesses and public bodies. Impact Plus was founded in 1990 and became a successful business. It was sold to Hitachi, the Japanese multinational corporation in 2007.

3. The action is brought in respect of an article published in the Daily Mail on the 2nd October 2008 (the Article). The Article was published as the front page splash and continued on page 4, and it was also published online on the Daily Mail's website and it said this.

"Questions over ANOTHER Yard contract

MET BOSS IN NEW 'CASH FOR A FRIEND' STORM

EXCLUSIVE

By **Stephen Wright**

Crime Editor

SIR Ian Blair used public money to pay a close friend a five-figure sum to sharpen his image, it emerged last night.

The beleaguered Scotland Yard chief employed Andy Miller to advise him on how to 'make the transition' when he took over as Britain's top officer three years ago.

Mr Miller's company briefed Sir Ian, then Deputy Metropolitan Police Commissioner, on his communications strategy, leadership style and the key messages he should hammer home. But incredibly, no other company was invited to bid for the so-called 'vanity contract' understood to be worth more than £15,000.

Details of the image makeover deal surfaced during an inquiry into a series of contracts awarded by the Met to Mr Miller's company, Impact Plus, during Sir Ian's time in office.

In all, Impact Plus has received more than £3million of police work

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Sir Ian in new cash storm

Continued from Page One

[ragout:] **Sir Ian will face inquiry into award of contracts to his friend**

From the Mail, July 28

from Scotland Yard over a six year period. The awarding of contracts to Mr Miller, a skiing partner and close friend of Sir Ian for 30 years, is being examined by a team of officers led by HM Chief Inspector of Constabulary, Sir Ronnie Flanagan.

Sources said that Mr Miller's colleague in Impact Plus, Martin Samphire, acted as Sir Ian's 'image consultant' under the terms of the contract.

It is understood that Sir Ian's predecessor, Sir John Stevens, who stepped down in January 2005, was unaware of the arrangement. Details of the payment to Impact Plus were disclosed to key members of the Metropolitan Police Authority yesterday by Sir Ronnie.

The meeting was called at short notice after the Daily Mail submitted a series of questions about the contract.

Last night the Metropolitan Police Authority was under mounting pressure to suspend Sir Ian. Never before in modern times has the head of the Met suffered the indignity of being forcibly removed from office.

Last month Sir Ian effectively suspended the country's top Asian policeman, Assistant Commissioner Tarique Ghaffur, for holding a press conference to outline his racial discrimination claims against the Met.

The allegations that Sir Ian faces are potentially far more serious, yet so far he has not been suspended from his post.

Insiders said nervousness around the contracts issue reflected the desire to keep Sir Ian in post until the end of the year to take the fall-out from the Stockwell shooting inquest.

A number of influential police figures would prefer Sir Ian to quit at the end of the inquest rather than face disciplinary proceedings over his links to Miller.
Home Office sources say senior investigators believe the Met chief has displayed 'very poor judgment'. The Flanagan inquiry team is checking whether internal procurement rules − or 'good practice' − were broken.

Legal experts say that given Sir Ian's personal relationship with Mr Miller, there should have been at least three bidders for the 'vanity contract'. One said: 'despite this being a relatively small contract, Sir Ian should have gone the extra mile to ensure that procurement procedures were fully transparent'.

Investigators are also said to be baffled as to why Sir Ian sought

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**'A complete
waste of money'**

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the advice of Mr Miller's firm.

Scotland Yard has a highly regarded public affairs department, yet he called in Impact Plus, an IT consultancy with no specialist knowledge of public relations and communications strategies.

One source said: 'There was a great deal of surprise when this contract came to light. It was basically to advise Sir Ian on the messages he should put out and what he should do in his first few weeks in power.

'You could say it was about advising him on how to enhance his image. Given what has happened since, you can't help thinking it was a complete waste of money'.

4. The Article appeared after the publication by the Defendant of four earlier articles which are not complained of in this action: on 20 July 2008, an article in the Mail on Sunday entitled "MPS chief in £3M quiz over friend's deal"; on 26 July 2008 an article in the Daily Mail entitled "How Met Chief's friend won contract from the yard with 'dearer' bid"; and on 28 July 2008 an article in the Evening Standard entitled "Met chief to face full inquiry into £3m contracts."

5. The defamatory meaning of the Article was determined as a preliminary issue by Tugendhat J in a judgment handed down on 11 November 2011 ([2011] EWHC 2677 (QB). It is this:

> "that there were (at the date of publication) reasonable grounds to suspect that Mr Miller was a willing beneficiary of improper conduct and cronyism because of his friendship with Sir Ian Blair in respect of the award of a number of Metropolitan Police Service contracts to Mr Miller's company worth millions of pounds of public money."

6. The principal issues which require resolution are first, whether as the Defendant contends, the words are substantially true; second, in the alternative, whether the action is an abuse of the process, and third, if neither of those issues is resolved in the Defendant's favour, damages.

A brief history of the litigation

7. The action was begun on 29 September 2009. The Particulars of Claim were served on 26 November 2009. The original meaning relied on by Mr Miller [1] was amended after a ruling made on 31 March 2010 by Eady J ([2010] EWHC 700(QB)) that the words were capable of bearing a meaning defamatory of Mr Miller but at a lower

[1] The original meaning complained of was this: "(1) the Claimant corruptly exploited his friendship with Sir Ian Blair to obtain an improper payment of a five figure sum from public funds; (2) the Claimant, on behalf of his company, agreed to act as Sir Ian Blair's image consultant under a 'vanity contract' knowing that his company had no relevant knowledge or experience thus improperly obtaining payment for work that he knew that his company was not competent to carry out."

level than that of which he had complained. [2] On 12 July 2010 a Defence was served. The substantive defence relied on was justification.[3] A Reply to the Defence was served on 16 December 2010. On 14 July 2011 the parties agreed to trial by judge alone. After Tugendhat J's ruling on the preliminary issue of meaning, both the claim and the defence were amended accordingly. It was complained of by Mr Miller and justified by the Defendant in an Amended Defence, served on 6 January 2012. An Amended Reply was served on 2 February 2012. Witness statements were exchanged on 14 March 2012.

8. On 11 and 14 May 2012 the Defendant proposed certain amendments to its defence of justification in correspondence. On the first day of the trial, Mr Barca Q.C. for Mr Miller objected to those amendments and to the content of the Defendant's trial skeleton. His objection was grounded on unfairness to Mr Miller and his potential exposure to cross-examination on matters which he had not had the opportunity to address in his witness statement. It was also said in relation to some of the matters which the Defendant proposed to add to its defence, that the Defendant could not rely on them in any event, because they related to conduct of persons other than Mr Miller, and it was therefore impermissible to rely on them in relation to a defence of 'reasonable grounds to suspect' (see paragraph 38 to 41 below). Mr Barca submitted the skeleton argument was an additional attempt to enlarge upon the Defendant's pleaded case by relying on allegations or insinuations which had not been pleaded or foreshadowed in the proposed amendments. It also evinced an intention on the part of the Defendant to use the content of documents in the trial bundles as a 'Trojan Horse' to prove its case, without serving the necessary hearsay notices and without the consent of the Claimant. Mr Warby Q.C. for the Defendant did not accept these criticisms. In the event however a pragmatic solution was arrived at with the consent of the parties and without prejudice to the arguments raised by each side. Since the trial was by judge alone both were content for these matters, and in particular, the evidential sufficiency of the Defendant's case, to be resolved by the trial process itself. Mr Miller was given the opportunity to give evidence in chief about the new allegations; and a Re-Amended Defence was drafted and served during the trial which incorporated a substantial number of amendments including those proposed before the trial, to the Defendant's case on justification.

The evidence

9. *For the Claimant* Oral evidence on the issue of justification was given by Mr Miller who was cross-examined over the course of three days and by Martin Samphire, a former Director of Impact Plus and the Account Manager for its work with the Metropolitan Police Service (the MPS). The witness statement of Martin Sarbicki, a chartered accountant and the Finance Director of Impact Plus from 2000 to 2007 was unchallenged, and went in by agreement. In addition I heard evidence from Mr

[2] The amended meaning said this: "[B]y accepting a five figure sum from public funds at the instigation of his close friend Sir Ian Blair in circumstances where the rules of tendering had not been complied with, the Claimant was the willing beneficiary of improper conduct and cronyism by a public official."

[3] The meanings justified were that the Claimant exploited his friendship with Sir Ian Blair to obtain contracts for his company out of which he benefited financially; and there were at the date of publication reasonable grounds to suspect that the Claimant was a willing beneficiary of cronyism because of his friendship with Sir Ian Blair, who had been involved formally, and informally in the process to award a number of Metropolitan Police Service contracts to the claimant's company worth millions of pounds of public money.

Miller's wife, Karen Miller about the effect of the Article and the litigation on Mr Miller.

10. *For the Defendant* The Defendant did not call any witnesses. In support of its case on justification it relied on hearsay evidence contained in documents it had obtained as a result of pre-trial third party disclosure applications made against Hitachi, the Metropolitan Police Authority (the MPA) and the MPS. Four hearsay notices were served in March 2012; and the Defendant gave notice of its intention to rely on the content of two further documents the week before trial. The hearsay evidence consisted of a note to Chrissie Taylor in Sir Ian Blair's office of 27 November 2002 from Andy Kinch (the Kinch note); two notes of interview written by Hilary Walker: the first "a note of interview with Willis Ltd 28 November 2002", the second, "a note of interview with Impact Plus 3 December 2002"; and extracts from witness statements submitted by 4 people to an investigation conducted by Sir Ronald Flanagan (see paragraph 11 below): Catherine Crawford dated 7 October 2008, Sir Paul Stephenson dated 1 and 27 October 2008, Ailsa Beaton and Hilary Walker) and an extract from the Report of that investigation (the Flanagan Report). The Defendant also relied on admissions made on the pleadings, the content of certain documents and ultimately, some parts of the evidence given by Mr Miller at trial.

The Flanagan Report

11. Sir Ronnie Flanagan was appointed on 30 July 2008 to investigate the conduct of Sir Ian Blair in relation to the award of work to Impact Plus (or as it was specifically described, to conduct an investigation into the circumstances surrounding the letting and management by the MPS of contracts with Impact Plus and the role in that process of Sir Ian Blair). Mr Miller was one of 41 people interviewed. The Flanagan Report was produced in July 2009. It was not publicly reported, and was kept confidential. It concluded there was absolutely no evidence of dishonesty on the part of Sir Ian Blair or any other person interviewed or otherwise featured in the investigation.

Issue One: Justification

Legal Principles:

12. As a result of the meaning determination by Tugendhat J, if the Defendant is to succeed in a defence of justification, it must justify what is commonly referred to as a *Chase* level 2 meaning (reasonable grounds to suspect guilt) rather than a *Chase* level 1 meaning (actual guilt). The description of levels of meaning in this way derives from the decision of the Court of Appeal in *Chase v Newsgroup Newspapers Ltd* [2003] EMLR 218, [2002] EWCA Civ 1772 at 45.

> "The sting of a libel may be capable of meaning that a claimant has in fact committed some serious act, such as murder. Alternatively it may be suggested that the words mean that there are reasonable grounds to suspect that he/she has committed such an act. A third possibility is that they may mean that there are grounds for investigating whether he/she has been responsible for such an act."

13. In *King v Telegraph Group Ltd* [2004] EWCA Civ 613 Brooke LJ approved the following summary of principles accepted by the judge below, as to the evidence it is open to a defendant to adduce in support of a *Chase* Level 2 meaning:

> "(1) There is a rule of general application in defamation (dubbed the "repetition rule" by Hirst LJ in *Shah*) whereby a defendant who has repeated an allegation of a defamatory nature about the claimant can only succeed in justifying it by proving the truth of the underlying allegation – not merely the fact that the allegation has been made;
>
> (2) More specifically, where the nature of the plea is one of "reasonable grounds to suspect", it is necessary to plead (and ultimately prove) the primary facts and matters giving rise to reasonable grounds of suspicion *objectively judged*;
>
> (3) It is impermissible to plead as a primary fact the proposition that some person or persons (e.g. law enforcement authorities) announced, suspected or believed the claimant to be guilty;
>
> (4) A defendant may (for example, in reliance upon the Civil Evidence Act 1995) adduce hearsay evidence to establish a primary fact – but this in no way undermines the rule that the statements (still less beliefs) of any individual cannot themselves serve as primary facts;
>
> (5) Generally, it is necessary to plead allegations of fact tending to show that it was some conduct on the claimant's part that gave rise to the grounds of suspicion (the so-called "conduct rule").
>
> (6) It was held by this court in *Chase* at [50] – [51] that this is not an absolute rule, and that for example "strong circumstantial evidence" can itself contribute to reasonable grounds for suspicion.
>
> (7) It is not permitted to rely upon post-publication events in order to establish the existence of reasonable grounds, since (by way of analogy with fair comment) the issue has to be judged as at the time of publication.
>
> (8) A defendant may not confine the issue of reasonable grounds to particular facts of his own choosing, since the issue has to be determined against the overall factual position as it stood at the material time (including any true explanation the claimant may have given for the apparently suspicious circumstances pleaded by the defendant).

> (9) Unlike the rule applying in fair comment cases, the defendant may rely upon facts subsisting at the time of publication even if he was unaware of them at that time.
>
> (10) A defendant may not plead particulars in such a way as to have the effect of transferring the burden to the claimant of having to disprove them.

14. As Hirst LJ explained in *Shah* v *Standard Chartered Bank* [1999] QB 241, at 261 a plea of reasonable suspicion is only sustainable because its sting is that the claimant has by his conduct brought suspicion upon himself. That is why it is an essential requisite of a defence of justification to such a charge that it should focus on some conduct on the claimant's part giving rise to reasonable suspicion, albeit it may be necessary in a complicated case to portray some of the background and to set out the material which connects the main facts relied on. But the essential question remains whether the claimant has by his conduct brought suspicion upon himself.

15. I respectfully agree therefore with what was said by the New Zealand Supreme Court in *APN & TVNZ v Simunovich Fisheries Ltd & Ors* [2009] NZSC 93 at paragraph 34:

> "Circumstantial evidence cannot contribute to reasonable grounds for suspicion unless it gives rise to an available inference concerning the conduct of the plaintiff. The circumstantial evidence suggestion was first made by Brooke LJ himself in *Chase* [at paragraph 51] where he said that a defendant could "rely on strong circumstantial evidence implicating [the plaintiff]" as grounds for reasonable suspicion. The circumstantial evidence could hardly have any value unless it "implicated" the plaintiff by means of an available inference as to the plaintiff's conduct. That is why we have said that our elaboration represents something which was already implicit in the sixth principle."

16. In the context of this case, in my view Mr Barca is right therefore to submit that the need to prove reasonable grounds to suspect <u>actual</u> willingness/knowledge of such improper conduct and cronyism makes it particularly important to focus on what evidence the Defendant can properly adduce in support of a *Chase* level 2 meaning. While strong circumstantial evidence may contribute to the reasonable grounds for suspicion, such evidence is merely an adjunct (rather than an alternative) to the conduct rule. It is also necessary, as *King* makes clear, to prove the primary facts which are relied on to support such a defence: it is not sufficient, as some of Mr Warby's submissions have come close to suggesting, to prove reasonable grounds to suspect the existence of those primary facts.

The Defendant's case on justification in summary

17. In seeking to prove the substantial truth of the meaning of the Article, the Defendant's case on justification has focused on events surrounding two contracts awarded by the MPS to Impact Plus, the first of which is said to have provided the gateway to contracts worth some £3 million to Impact Plus. First, the successful tender by Impact Plus for a consultancy contract in December 2002 to provide assistance to then

Deputy Commissioner of the MPS, Sir Ian Blair,[4] in relation to a project known as C3i [5] (the Programme Conscience contract), and secondly, and to a much lesser extent, a contract managing Sir Ian Blair's transition from deputy commissioner to Metropolitan Police Commissioner in December 2004 (the Transition Contract).

18. A large number of matters were pleaded and explored in detail in cross-examination, but in the end, the Defendant's core case centred on a number of key facts and the inferences the Defendant says can properly be drawn from them. These include the fact that Mr Miller and Sir Ian Blair were friends, the fact that Impact Plus was awarded the Programme Conscience contract, a number of conversations (some admitted - as to the fact but not necessarily the content – and some in dispute) said to have taken place between Mr Miller and Sir Ian Blair at various points before and during the tender process for that contract, and various matters surrounding the tender process itself. The latter include in particular, the fact that both Mr Miller and Sir Ian Blair participated in the tender process, including at the presentation made by Impact Plus to the MPS on 3 December 2002, and the fact, as it is alleged to be, that Sir Ian Blair made or took part in the decision to award the contract to Impact Plus. As to the pleaded inferential facts relied on, it is said for example that Mr Miller sought to and did use his friendship with Sir Ian Blair to gain meetings for himself and other members of Impact Plus staff with senior MPS officers and business opportunities for Impact Plus. Various matters as to Mr Miller's knowledge are also relied on. It is said again, as an example, that Mr Miller was given advance notice of the tender which was, as he knew, privileged information about and an insight into the tender which put him and his company at an advantage against other prospective tenderers.

19. There was some debate between the parties about the scope of the evidence it was proper for the court to receive in relation to a *Chase* level 2 defence of justification in this context. Despite his extensive cross-examination of Mr Miller on such topics, Mr Warby suggested in closing that it was important to avoid hindsight, and any explanation given by Mr Miller now cannot dispel the existence of reasonable grounds to suspect by reference to other key facts, whatever the court makes of the later explanation. He accepted however during the course of argument, that a person's state of mind was as much a fact as the state of his digestion,[6] and that, logically, it was a matter the court should be able to look at together with all the other facts in order to consider whether there were reasonable grounds to suspect. But he said it was capable of being unjust to defendants and was an unnecessary interference with its freedom of expression, to place it at risk of defeat in a case of this kind, as a result of what a claimant later says and the court's assessment of that.

20. Though each case must obviously be judged on its facts, in my view there is no necessary unfairness in permitting a claimant to give such evidence. The assessment the court is asked to make when determining whether there were reasonable grounds to suspect is an objective one. The question is not whether it was reasonable to publish a particular defamatory allegation on the defendant's state of knowledge at the

[4] As I shall refer to him, though he is now Lord Blair.
[5] See further paragraph 55 below.

[6] Per Bowen LJ (1885) 29 Ch D 459, 481

time of publication (an issue which could, depending on the circumstances, enable a defendant to rely on the defence of *Reynolds* privilege) but whether there were, objectively, on the true facts, reasonable grounds to suspect x y or z at the date of publication. I mention *Reynolds* privilege because it provides an important safeguard to freedom of expression, in particular to the media, in respect of allegations which it publishes in the public interest after responsible investigation, but which it cannot subsequently prove to be true (such allegations may for example turn out to be false because of matters known to a claimant which responsible journalism could not have discovered). It should be borne in mind too that the fact that the test is an objective one is of substantial benefit to a defendant in the respect made clear by *King* principle 9: that is, for the purpose of its case on justification a defendant can rely on facts which existed at the date of publication whether or not it knew of them before it published the allegation complained of. There can be no dispute that the Defendant has taken advantage of that principle here having regard to its reliance on material obtained after publication by third party disclosure applications for example. Thus, each side must accept the burden, and well as the benefit to which the objective test gives rise.

21. Here, it is an intrinsic part of the factual matrix relied on to support the Defendant's case on justification that Mr Miller in fact acted with a certain purpose, or intended certain consequences, and that the court can draw inferences from other facts as to his actual state of mind or state of knowledge. It seems to me that he is therefore is entitled to give evidence pertaining to those issues, because it is relevant to the material factual position at the time (I should add we are not concerned here with any true explanation the claimant may have given as at the date of publication for the apparently suspicious circumstances pleaded by the defendant, which, as is common ground, has to goes into the factual mix if such an explanation is given: see *King* principle 8).

Summary of conclusions on justification

22. In summary, the Defendant has failed to establish that there were reasonable grounds (as at the date of publication) to suspect that Mr Miller was a willing beneficiary of improper conduct and cronyism because of his friendship with Sir Ian Blair in respect of the award of a number of MPS contracts to Mr Miller's company worth millions of pounds of public money. The defence of justification therefore fails.

23. I have reached that conclusion broadly for these reasons. The facts the Defendant has proved, or which are admitted, when looked at in their proper context do not persuade me that the defamatory meaning of the Article is substantially true. The Defendant was of course entitled to take its stand evidentially, as it did to a considerable extent, on the uncontroversial facts (including what was admitted in the pleadings and by Mr Miller in his evidence where relevant) and to say on that basis alone, it has made its case. However, the core facts relied on must be looked at in the context of the overall factual position as it stood at the material time; and in my judgment when that is done, the factual position, fails to establish, assessed objectively that as at the date of publication, there were reasonable grounds to suspect Mr Miller of the conduct alleged. Moreover, insofar as there is a dispute about facts of potential importance to the resolution of the central issue, amongst the many matters canvassed at trial, in my judgment, the Defendant has failed to prove them to be true.

The hearsay problem

24. In this context I should refer to the hearsay evidence on which the Defendant relied. It is not suggested the Defendant was not entitled to rely on such evidence. However, looking at the matter realistically, the Defendant sought to prove its version of events without recourse to the oral evidence of the key participants (save insofar as it relied on what Mr Miller himself said as I have already indicated). It relied for example on highly selective extracts of statements made to the Flanagan Inquiry by some of those who were involved in events in 2002; and on the contents of contemporaneous documents written by such individuals, but without calling those who made the statements or the authors of the documents. Some of the documents might have been said to speak for themselves; but some of them did not. In the circumstances, it seemed to me I was given only a partial (in both senses of the word) insight into what had gone on, and the provisions of section 4 of the Civil Evidence Act 1968 relating to the weight to be given to hearsay evidence, are material here in my view. [7]

25. I give the following examples. The Defendant suggested by reference to an extract from the witness statement of Ms Catherine Crawford, the Chief Executive of the MPA [8] made dated 7 October 2008 to the Flanagan Inquiry, that at some point in Spring 2002 there was an occasion when Mr Miller spoke to Sir Ian Blair using the words "Programme Conscience" and impressing on him Impact Plus's skills at delivering it. This was part of the Defendant's case that Mr Miller was in effect, drip feeding Mr Blair with information about Impact Plus's capabilities, particularly that which it had called Programme Conscience [9] with a view to business that might be gained as a result. In her statement Ms Crawford said this: "I can't give an exact date but it must have been fairly early on, the beginning of 2002 or the end of 2001 (I may be able to be more precise on the date when I can find some papers). I remember having a fairly informal conversation with Ian [Blair] about the risks attached to being SRO [the Senior Responsible Officer] for the programme [the C3i Programme]. He said something to the effect that it had been suggested to him that it would be very sensible if he had, what he called, a programme conscience…". The reason given by the Defendant for not calling Ms Crawford was that she had already produced a signed statement (i.e. that made in 2008) relating to the matters in issue in the action.

26. On the face of it, it would have been reasonable and practicable in my view to call Ms Crawford to give evidence as to the circumstances in which this conversation took place and what was said so the reliability of her evidence could be properly evaluated

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[7] "(1) In estimating the weight (if any) to be given to hearsay evidence in the civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence. (2) Regard may be had in particular, to the following: (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;(b) whether the original statement was made contemporaneously with the occurrence or the existence of the matter stated; (c) whether the evidence involves multiple hearsay;(d) whether any person involved had any motive to conceal or misrepresent matters; (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose; (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

[8] The MPA has oversight of the MPS, and various statutory duties: it enters into contracts for the MPS. It has responsibility for monitoring and ensuring financial probity, for which it is ultimately accountable.

[9] See paragraph 68 below.

and challenged. As I have said, Ms Crawford's Flanagan witness statement was made in 2008, and thus many years after what was said to be an informal conversation about which her recollection was obviously vague, is said to have taken place. Perhaps for understandable reasons, the Defendant did not call Sir Ian Blair either. Be that as it may, the evidence involved multiple hearsay as the Defendant sought to use Ms Crawford's evidence to prove that what Sir Ian Blair said to her was true. Moreover, Mr Miller, who of course did give evidence, and therefore could be cross-examined, strongly denied that he or Sir Ian Blair had spoken about these matters at that time in the terms the Defendant suggested that they had, solely on the basis of Ms Crawford's evidence.

27. The Defendant also relied on the hearsay evidence contained in two documents to establish as a fact that, as was planned by the MPS (though it was unable to say by whom) Sir Ian Blair interviewed the companies and then made or took part in the decision to offer the contract to Impact Plus. These documents were first, a note from Andy Kinch who worked in the Procurement Department sent on 27 November 2002 to Chrissie Taylor, at the Deputy Commissioner's Office (the Kinch note); and secondly an internal MPS note prepared by Hilary Walker on the 3 December 2002. In its Civil Evidence Act notices, the Defendant said that Mr Kinch and Ms Walker were not called because "neither had in 2008 any independent recollection of the events set out" in the statements relied on.

28. The Kinch note said:

> "Further to our recent phone conversation, I can confirm that arrangements have been made for the two potential suppliers to meet the Deputy Commissioner as follows-
>
> Thursday 28 November at 14.30 Willis
>
> Tuesday 3 December at 12.00 Impact Plus.
>
> These papers are returned as the Deputy Commissioner may wish to refer to them during the interviews. I will confirm the names of the personnel from these companies with you as soon as possible.
>
> Finally, once the Deputy Commissioner has interviewed the companies we would be most grateful if he could record the outcomes of them on these papers, in order that we can award the contract to the preferred supplier and finalise the contractual terms."

29. Ms Walker's note of 3 December said:

> "The overall assessment by Mr Blair and Ms Beaton was they were confident the company [Impact Plus] could undertake the task and showed a good appreciation of the complexities of the project. Ms Beaton expressed her concern that the company would need careful management to ensure they did not exceed the brief in phase 2 and generate a level of work not envisaged

> in the original requirement. Following the presentation the recommendation was to offer the contract to Impact Plus subject to satisfactory references being received. The contract would be offered on the basis of a capped price of £61k for phase 1 and a negotiated price for phase 2 capped to an overall total contract price of £155k. This should cover the first year of the contract. Any future on-going reviews would be competitively tendered."

30. It is not disputed that Sir Ian Blair was present during the interview, but putting to one side for the moment whether this evidence falls foul of the conduct rule, this evidence seems to me to be a very slender and unsatisfactory basis for establishing that Sir Ian Blair made or took part in the decision and falls very far short of persuading me that he did so. Nor do I attach significance to the content of the memo from Sir Ian Blair of 4 April 2003 [10] (well after the contract was awarded) which the Defendant suggested evidences that it was always "intended" that the final decision as to the choice of company was Sir Ian Blair's alone. It is to be borne in mind the Defendant did not call anyone who actually attended the presentations or took part in what occurred thereafter to say the precise role Sir Ian Blair played in the decision making process; or to put to them the allegation that it was intended that Sir Ian Blair would interview both companies and personally decide which one to choose.

31. Taking the Kinch note first, I do not consider much, if anything can be read into it, in particular in the absence of any explanation from Mr Kinch as to why he said what he did. On the face of it, it is no more than an administrative memo, about arrangements. It is of course possible that Mr Kinch (who did not attend the presentation on the 3 December, and who is not said to have played any part in the decision himself) believed Sir Ian Blair would make the decision, but this does not establish that it happened; nor indeed that (unidentified) persons within MPS planned it to happen. As for Ms Walker's note, it is material to consider it in light of what both she and Ailsa Beaton said about this point (and other matters bearing on the propriety of the relevant procurement process within the MPS) in their witness statements to Flanagan. Ailsa Beaton was Sir Ian Blair's Deputy working on the C3i project at the material time. She was one of the three MPS personnel present at the presentation by Impact Plus on 3 December 2012; and there can be no doubt that she, like Ms Walker played a very important part in the relevant events. The Defendant relied on part of her witness statement to Flanagan, as hearsay evidence to establish her apparent dislike of Mr Miller something which in turn it used to support a suggestion that she would not have wanted Impact Plus to have been selected. The Defendant also relied on part of Ms Walker's witness statement to Flanagan in which she said Sir Ian Blair had said that one of the companies he wanted to invite (to tender) was run by Mr Miller, a friend of his i.e. that Sir Ian Blair made it known that he wanted Impact Plus on the list of those invited to tender.

32. The Defendant did not however rely on what Ms Beaton or Ms Walker said about other matters which might be thought to be relevant (and adverse) to its case on justification. These matters were however highlighted by Mr Barca. In short Ms

[10] In which he said: "that decision is no longer mine": see paragraph 94 below. This is cited as an example of the Defendant's willingness to seize upon any passing turn of phrase and use it as a foundation from which to draw baseless (and in any event) unreasonable inferences as to the conduct of Mr Miller and Impact Plus.

Beaton and Ms Walker mounted a robust defence of the probity of the process. Amongst other matters their witness evidence to Flanagan said this.

33. *Ms Beaton*: Sir Ian Blair participated in the interview process for the C3i contract 'on the basis that this needed to be someone that both of us could work with and he needed to be comfortable that he could work with these people'. He did not participate in the pre-interview discussions. Mr Miller had told her that he knew Sir Ian Blair so she had always been aware of their friendship. Not least because of this, she took an instant dislike to Mr Miller and, all things being equal, would not have favoured him or his company in any way. She was not influenced by any person to ensure that MPS employed Impact Plus at any time. She was aware that Sir Ian Blair had sent a letter to the MPA declaring his friendship, and believed that Sir Ian had told her this himself. Her advice to him '…would have been that if these people were going to be advising us then he really should be meeting the persons giving the advice so that he can't completely take himself out of the procurement. It was going to be personal advice to him and myself and most importantly to him. That puts him in a particularly awkward position but I believe he took advice from Steve Atherton about this.' She would have behaved in exactly the same way in Sir Ian Blair's position, and would have notified the MPA at exactly the same time. There was no doubt in her mind that Impact Plus had written and given a far better proposal than the other bidder (Willis). She would normally expect the most senior person in the (tendering) organisation to be present at a meeting like the presentations, particularly if the contract was important to the tenderer (and given that Sir Ian Blair was going to be present). 'I would expect anyone who was having to work closely with a consultancy to be present at presentations of this kind. Otherwise you are expecting him to take advice from someone he had never met.'

34. There was nothing odd about the Impact Plus presentation. Her recollection of any meetings with both Sir Ian Blair and Mr Miller present was that he 'was absolutely 100% as he would have been with other people in the room'. The 'main conversation would have been between Steve Atherton and myself, or Hilary Walker and myself about who the contract should be awarded to.' Sir Ian Blair '… was perfectly entitled to give his opinion despite his known friendship with Andy Miller. There was no undue influence to direct anyone on the selection panel and I would not have taken a company on if I did not think they could do the work.' She said 'I wouldn't have been comfortable with Sir Ian Blair not being there because this consultancy was going to be reporting to himself and myself...''I believe that Steve Atherton was aware of the friendship between Andy Miller and Sir Ian Blair. I am pretty certain that that was absolutely clear and that's why there are very formal notes on the file about these proposals because there were known to be some sensitivities. Steve Atherton would not normally on any Procurement do the kind of note that was done. It would have been done by someone in his department but Steve wouldn't have done it. I don't think there was ever any discussion that took place where it was suggested that either Sir Ian Blair, Andy Miller or both should not be at the presentations. I don't think it was ever flagged as an issue...' 'I don't believe that the final decision was made to award the contract immediately following the presentation. I believe that following the presentation there would have been some financial negotiation and references would have been taken up before any final decision to award the contract would have been made.'

35. *Ms Walker:* She was directly answerable to the Procurement Director, Steve Atherton, who was her direct line manager. In her role, she would correspond with various members of the MPA, including Catherine Crawford, for approval/authority/advice on various things. She was also responsible for Andy Kinch. Sir Ian Blair did say that Mr Miller was a friend of his '… and he obviously couldn't be involved in the evaluation side. So, that was that, it was given as read. Sir Ian made it clear right from the start, I knew that he and Mr Miller were friends.' She sat in on the presentations. As far as she could recall '… the two bids had been evaluated prior to any presentation. As far as I know and can recall it was Ailsa doing the technical, and it was me doing the commercial.…It could be perceived that he [Sir Ian Blair] may influence the decision, but as far as I'm concerned that wasn't the case. I personally wasn't influenced in any way throughout the process to put it to Impact Plus...''Prior to the presentation, you would have ranked them, either price wise, technically or both. The rankings and notes of any conversations would all be on the file… It would probably be me, that wrote the notes on the file.' 'As far as I'm concerned, Sir Ian's presence did not influence the final decision that was made… Again, the presentation was not part of the evaluation. It was basically to clarify points. I was there to clarify the commercial points, Ailsa was there to clarify the technical points, and Sir Ian was there to ask any questions as a client that he may be concerned about. Again, I was unaware of any undue influence, as I would have told Steven Atherton.' 'The decision was made after the presentations because you don't make a decision about the recommendations until you've clarified any point that you want to clarify and that was the purpose of the presentations. The people involved in the recommendation would have been myself and Ailsa and probably Steve Atherton. If I recall rightly I would have put the recommendation through to Steve and he would have awarded it.' 'In relation to the evaluation process Sir Ian did not play any part in it. To my knowledge no direct, indirect, or implied influence was placed on anyone. I had no other concerns in relation to this contract and the tendering process.'

36. Mr Warby suggested in respect of these additional aspects of Ms Walker and Ms Beaton's statements, which contradicted the Defendant's case and which it did not rely on, that it should be borne in mind, that both ladies would have been defensive as to their conduct of the procurement process within the MPS. In my view however, it is unfair to the individuals concerned to advance such a case in their absence; and Mr Warby's submission simply underscores the difficulties caused when hearsay evidence on important matters is deployed in this way. As the authors of Phipson on Evidence, 17th edition, say at paragraph 29-15 "the [Civil Evidence] Act is not intended to provide a substitute for oral evidence. The basic principle under which the courts operate is that evidence is given orally with cross-examination of witnesses, and the admission of hearsay evidence is, and should be the exception to the rule. Caution should be exercised before tendering important evidence through hearsay statements. Hearsay evidence is better used where the evidence is peripheral or relatively uncontroversial."

37. It seems to me that selective snippets of hearsay from individuals who have not been called, particularly where it has been "cherry picked" from material which casts it in a different light, provides an obviously unsatisfactory evidential basis upon which to invite a court to find facts and/or draw adverse inferences whether as to the conduct of those individuals or anyone else. In a sense, it is Hamlet without the Prince. There may be cases where hearsay evidence and/or the contemporaneous documents in

combination provide persuasive evidence, but in my judgment, they did not do so here. It is no answer to the problematic nature of the hearsay evidence relied on in this case for the Defendant to suggest as Mr Warby did that it was open to Mr Miller either to call the relevant individuals himself, or require their attendance for cross-examination. The burden is on the Defendant to prove its case; and the tendering of hearsay evidence which lacks weight for various reasons doesn't cast any burden on a claimant to require the witness concerned to be called for cross-examination let alone to call the person concerned as his or her own witness.

The conduct rule problem

38. I should also refer to the conduct rule problem. As *King* principles 5 and 6 make clear, strong circumstantial evidence of the conduct of people other than the claimant may be admissible where appropriate. In my view however, a considerable number of the matters the Defendant relied on could not be regarded as strong circumstantial evidence giving rise to a sustainable defamatory inference against Mr Miller.

39. It may be that this problem resulted as Mr Barca submitted, at least in part from the way the Defendant's case developed. Initially for example, the Defendant's contention before Eady J was that whatever defamatory criticisms were made of Sir Ian Blair by the Article, it did not attribute any conduct, let alone misconduct to Mr Miller. Be that as it may, the Defendant's case contained many allegations relating to the conduct of others – particularly those within the MPS –which could not in my view properly form part of its case against Mr Miller.

40. In particular, various criticisms were made about what the MPS did or did not do in relation to the procurement process, some by reference to the construction of detailed MPS regulations. Quite apart from the absence of evidence from those within the MPS who might have shed light on what the MPS did and why, the link to Mr Miller seemed to me to be very tenuous, and the Defendant's case against him in this regard unconvincing and contrived. For example reference was made to an HMIC report published in 2000 which identified a culture within the MPS where on occasion procurement regulations took second place to ensuring that operational objectives were achieved, and of which it was said Mr Miller knew or ought to have known. Mr Miller said he did not read it, until he read the Flanagan report in draft in 2009. There may have been laxities in the way the MPS went about things. But even in the context of matters which related more directly to Mr Miller these seemed to me to be nothing to the point, particularly given the absence of evidence (or persuasive evidence) that Mr Miller knew about such "laxities" or of evidence capable of giving rise to any suspicion that there was collusion amongst the various individuals within the MPS involved in the procurement process to ignore these requirements in order to give Impact Plus some kind of advantage in the tendering process at the behest of Sir Ian Blair.

41. One of these criticisms was that during the procurement process, a rival bidder was not told by the MPS, as it should have been under the MPS regulations, that Impact Plus had submitted a revised tender. It is not clear to me on the evidence that the MPS was obliged to do so (whether it was may have depended on whether a decision was made that its requirement had been understated). There is also no evidence as to who was responsible for this failure by the MPS as it is said to be. But even putting to one side the undisputed fact that Mr Miller did not know who the rival bidder was the

responsibility for complying with the MPS regulations lay firmly with the MPS and the convoluted attempts to fix Mr Miller with knowledge about these matters, or tie him in to any of this (presumably with the conduct rule in mind) were it seems to me simply unconvincing. [11]

Mr Miller's evidence

42. In my judgment Mr Miller was an honest witness. Though challenging the accuracy in particular, of what he said, Mr Warby did not suggest otherwise. I also conclude he gave a generally accurate account of events, and I accept the important elements of his evidence insofar as it was challenged. It is true that his evidence was not entirely consistent and was occasionally unclear. There was for example a muddle about one of the conversations on which the Defendant relied.[12] However Mr Miller was subjected to a lengthy and tenacious cross-examination, though courteously conducted, about events a very long time ago, including for example, conversations which had taken place some 10 years earlier. In addition he was asked about a considerable number of matters introduced into the Defendant's case either at or very shortly before the trial. Although his memory struck me as good, and he had given an account of some of these matters to the Flanagan Inquiry in 2008, it is not surprising that there were some discrepancies or the odd confusion, or indeed that Mr Miller occasionally reacted with some vigour to the questions he was asked. His account of the way things were normally done when tendering for contracts, Impact Plus's relationship with the MPS, what took place in relation to its tender for the Programme Conscience contract and the Transition contract was also supported by the evidence of Mr Samphire, an impressive witness in my view, whose evidence was not subject to serious challenge.

The evidence in more detail

43. In order to assess the significance of the facts relied on by the Defendant as to the substantial truth of the defamatory meaning of the Article, as *King* makes clear, it is necessary to put them in the relevant context and to understand something of the background. I therefore set out some of these matters, including the contextual facts, as they emerged from the evidence. I should add that it should be borne in mind as I have said that I heard no direct evidence from Sir Ian Blair or anyone else within the MPS and the MPA at the relevant time; and any conclusions I draw or evidence in relation to those bodies or any named individuals within them must be read subject to that. The events described relate to the position at the material time for this action unless otherwise stated.

44. Mr Miller and Sir Ian Blair have been good friends since the early 1970s. They normally are part of a group that go on an annual ski trip together and meet three or four times a year for dinner.

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[11] See for example how the matter is pleaded by the Defendant: "The Claimant had good reason to believe that there would be other bidders, but did not suggest that they should be given any such information [about Impact Plus's alternative bid] or any such opportunity [to speak to Sir Ian Blair]. He had no reason to believe that the MPS had informed any rival bidders or given them any such opportunity. He therefore had good reason to believe or suspect that Impact Plus was the only company to have tendered any price at all for the work specified in the Impact Plus bid, and that the process would not be a competitive one."

[12] See paragraph 86 below.

Impact Plus: the development of its business, the nature of its work and clientele

45. Impact Plus is an independent management consultancy which by the mid 1990s specialised in IT-related projects for clients. Mr Miller, who is now 58, co-founded Impact Plus in 1990 and was one of its joint managing directors during his time there until it was taken over by Hitachi in 2007.

46. Mr Samphire joined Impact Plus in 1998. He had previously been a director at a project management consultancy for many years, introducing project and change management principles to and improving project working at a wide range of private and public sector organisations; his clients included large utilities such as BT, National Power and Nuclear Electric. He also worked with clients in financial services such as Deutsche Morgan Grenfell and Standard Chartered, and other sectors such London Underground, British Aerospace and the Cooperative Society. I refer to this and other evidence of this nature because it is relevant amongst other matters to whether Impact Plus was fit to do the tasks it was ultimately selected to do and was a worthy winner of the tenders on the merits.

47. Impact Plus became a plc in 2000. By that time it employed between 70 and 80 people and had a substantial client list including blue chip clients from a variety of sectors, including the public sector, banking (including three of the top five UK banks), finance, insurance and pensions, oil and gas, retail, logistics and manufacturing. Its main office was in Teddington, Middlesex; and it had offices in Manchester, Edinburgh and Dublin, as well. In the mid 1990s, it expanded its business into the public sector, and by the time it was taken over by Hitachi in 2007 public sector work accounted for more than half its business. Its public sector clients included various government departments including the Ministry of Defence, the Department of Transport and Office of the Deputy Prime Minister, the Cabinet Office, the Met Office, the National Audit Office as well as the MPS.

48. By 2002 Mr Samphire's primary role was to develop new business and lead consulting assignments in the Commerce, Industry and Public Sector. He was also the head of Impact Plus's Programme and Change Management Skills Group. His clients in 2000 to 2002 included British Energy, BT, John Lewis/Waitrose, the Met Office, Northumbrian Water, Royal Mail/Consignia and the MPS. In evidence he said this:

> "A number of these clients had issues with their project and change management approaches as well as major challenges in their business models. The challenge was that the solutions were fairly easy to define, but successful implementation (managing the project) was more difficult. IP [Impact Plus] provided expertise to plan and implement the changes necessary – covering strategy, process, people and technology. My role combined sales/business development, client account management and directing/leading delivery teams.

49. Mr Miller was in charge of business development. He said Impact Plus was a successful business delivering independent advice. It focused a considerable amount of effort on sales and marketing, and employed some people to work almost full time

on it. He said: "once invited to tender for a contract you still had to beat the competitors to win the contract, but first, you had to be on the radar of the relevant procurement department or officer. We made calls, went out and introduced ourselves." He explained the need for this approach in this way. "Professional services firms are selling services, not a product. Clients are effectively buying a promise that you and your expert employees can improve their business. They will not do so if they have not met you so you need to find efficient ways of meeting potential clients, whether targeted meetings, speaking well at conferences or otherwise. I understand this is typical of all professional services businesses, whether management consultants, solicitors, accountants, architects or any other. None of this had anything to do with "cronyism". It is all good business development practice and essential for any professional services business including management consultancy."

50. Mr Samphire also described the nature of business development undertaken at Impact Plus. He said that as a small consultancy, Impact Plus actively went out looking for clients and business, and as he had done at his previous consultancy, he spent about fifty per cent of his time on business development. He said that Impact Plus believed that its consultants (rather than its sales team) would be most successful in developing business in the public sector: "marketing the type of management consultancy we were offering meant explaining and understanding cultural and people issues as well as selling technology related services. Because of my background I was able to talk to clients about more than sales points – I could get into the practical details of their problems and would sometimes build a plan for resolving it in front of a client when we met. This was a method which I used with the MPS."

51. Impact Plus carried out some corporate entertaining for clients as part of its normal business development. Impact Plus had four Chelsea tickets which were used for clients and also family and friends, with clients taking precedence. Mr Samphire took MPS employees to a match on two occasions. By March 2004 he had been working with Mike Aston, the C3i Programme Director for just over a year, and had discovered he was a fanatical Wolves supporter. He took to Mr Aston to see Chelsea play Wolves on 27 March 2004; and he took Dave Weir, Ms Beaton's PA to see Fulham play Reading on 25 November 2006.

52. Mr Samphire said that early in 2000 Impact Plus identified that what it was doing in the private sector had resonance in the public sector. The perception was that the private sector was ahead of the public sector in adopting new ways of working in relation to a number of areas including managing structural changes. He therefore arranged and attended a number of meetings with significant organisations including the MoD, central government and the MPS (as to which see for example, paragraphs 63 to 66 below). He said "They were surprised and complimentary about what we were doing. They particularly liked our action-orientated rather than theoretical, approaches to business process engineering, information/document management project, programme and change management. We were seen as different to the bigger consultancies that had worked in the public sector for many years."

53. There were some differences to how the public sector procured services compared to the private sector, such as the use of framework contracts for larger contracts for example, "S-Cat" and "G-Cat". These schemes were designed to simplify bidding in the public sector. G-Cat applied to goods and S-Cat to services. A public sector organisation which had a project for which it wanted bids was able to go to a list of

approved businesses in particular areas such as management consultancy and use simplified bidding and tendering processes. Impact Plus was listed on S-Cat in the early 2000s; and certainly by the time it tendered for the Transition contract. Mr Samphire described it as a way of shortening the competitive procurement process for public sector organisations. Once companies had got on the framework (a lengthy process which could take up to a year) public sector organisations could conduct a procurement process using everyone on the framework, or particular organisations on the framework, or go to just one of the organisations on the framework which considerably shortened the procurement process.

The MPS: public procurement and the C3i Programme

54. The MPS is a public authority with a very large procurement budget (about £850 million). Procurement matters within the MPS are overseen by the MPA and are governed by both UK and EU law. By the time of trial[13] the Defendant acknowledged the regulations it had originally relied on for the purposes of its defence of justification were not those in force at the material time. It is not presently necessary to refer to the detail, but it is common ground that matters were governed by Council Directive 92/50, implemented into domestic law by The Public Services Contracts Regulations 1993 (1993 SI no 3228); and, so far as the MPA was concerned, by the MPA's Financial and Contract Regulations and Financial Delegation of June 2000 and internal Standing Orders and Contract Regulations.

55. C3i is an acronym for Command, Control Communications and Information. The aim of the C3i programme was to replace the existing infrastructure for all 999 and non 999 calls in the MPS and replace it with a completely new infrastructure plus additional technology. The C3i programme was a Private Finance Initiative (PFI) project until about September or October 2002 when the MPS became directly responsible for its implementation. It is common ground that it was an enormous "hugely expensive" and complex programme (described by Mr Miller as the largest programme of change ever undertaken by any police force in the world). It involved the closure of the all the existing thirty two control rooms (for the thirty two London boroughs) and five call-handling centres and their amalgamation into three new purpose built combined call-handling and control rooms, as well as a wholesale changeover from shortwave radio to mobile telephone technology.

56. Sir Ian Blair joined the MPS as its Deputy Commissioner on the 1 February 2000. Amongst his other duties, he assumed overall responsibility for a number of large scale procurement and information technology (IT) matters. But in particular, he became the Senior Responsible Officer (the SRO) for the C3i programme. As SRO, Sir Ian was the individual responsible for ensuring that the C3i programme met its objectives and delivered its projected benefits. There is no dispute that this was an extremely important project to the MPS, or that the success or failure in delivering it on time and on budget was of critical importance to those responsible for doing so, particularly Sir Ian Blair and Ms Beaton. Ms Beaton was the Head of the Directorate of Information within the MPS (DoI) and worked directly for the Deputy Commissioner. She was appointed Deputy SRO for the C3i programme in about April 2000.

[13] Until then, the Defendant relied on the MPS Regulations 2002 which were not in force at the relevant time.

Impact Plus and its involvement with the MPS before the Programme Conscience and Transition contracts

57. It is clear from the evidence that by mid 2002 Mr Samphire and others from Impact Plus had worked, and were continuing to work, on various projects within the MPS and were well-known to a number of senior people there including those associated with the C3I programme. It is not disputed that as a result, as Mr Samphire said in evidence, Impact Plus had established a reputation at the MPS for good value consultancy work that delivered results and met client expectations. The work done and contacts made were referred to in some detail in the evidence and it is sufficient to refer to them relatively briefly.

58. At an early stage (in August 1996) Impact Plus did work reviewing the roles and responsibilities of key individuals within two projects MPS was running (the early stages of what became the C3i programme). The results of Impact Plus's review were contained in a report it produced in 1996. On 5 September 1996 Mr Miller wrote to the then Commissioner, Sir Paul Condon, about serious problems, as he perceived them with the C3i projects, unearthed by Impact Plus's review. He was invited to a meeting on 17 September 1996 with Sir Paul to discuss the issues he had raised. At the meeting he made a detailed presentation about these matters for which he subsequently received a letter of thanks from Sir Paul dated 26 September 1996 which thanked him for his "courtesy, efficiency and professionalism."

59. Mr Miller contacted Ms Beaton soon after she joined the MPS in April 2000 to make himself known to her, and sought a meeting. It is common ground that when he did so, he mentioned his friendship with Sir Ian Blair, and that Mr Miller and Ms Beaton then met on the 26 July 2000. In an internal email, not seen by Mr Miller until disclosure in this action, Ms Beaton then contacted Mr Keith Luck, suggesting further contact should be with his office and that Mr Samphire would call, and Sir Ian Blair then recommended the meeting had to be with Mr Miller, not "one of his people". A message was then left on 15 September 2000 with Mr Miller's office that Mr Luck was happy to wait until Mr Miller was in London for such a meeting and envisaged a slot in the next 4 weeks.

60. Ms Beaton's witness statement to Flanagan records her view that she considered his mentioning Sir Ian Blair's name was inappropriate: "I don't like people telling me they know my boss and therefore how important they are as a result of that, which I think is completely inappropriate". As I have said, the Defendant relied on this part of her witness statement to establish her apparent dislike of Mr Miller, something which in turn it used to support a suggestion that she would not have wanted Impact Plus to have been selected. Read in its context it seems to me the point Ms Beaton was making was that she chose Impact Plus because it was the better candidate and despite her dislike of Mr Miller. The Defendant also relies on this as part of its contextual case, and as an example of Mr Miller "name-dropping" and using his friendship with Sir Ian to gain meetings with senior MPS officers and business opportunities for MPS. This was an allegation Mr Miller denied. Mr Miller said he knew Ms Beaton's predecessor, Michael Taylor, who had sponsored all the work done by Impact Plus for the MPS in the past and with whom he had a good relationship. There was nothing out of the ordinary in contacting Ms Beaton, or indeed in his getting a meeting with her,

something he would have expected to occur in any event. That this was normal business practice is borne out in my view by what Mr Samphire said, and did. He too made arrangements to meet Ms Beaton, and to meet Mr Atherton when he was new to the post.[14] As it is, Mr Miller said he had mentioned the name in the interests of transparency; he would not have wanted Ms Beaton to have found out that he and Sir Ian were friends after the meeting; it would appear she had taken what he said in a different way, and that was unfortunate. As for Ms Beaton's supposed antipathy, after the meeting on the 26 July 2000, at her suggestion they went and had lunch immediately afterwards.

61. As part of its case the Defendant suggested to Mr Miller, that his business methods included establishing informal contacts with senior people in organisations and becoming the trusted brand. In this context Mr Miller was asked about a presentation he made in 2006 to the Annual Consultant's forum and client entertainment (that on one occasion he had taken Mr Aston to see Chelsea and this was done to get the goodwill and good opinion of the client). Mr Miller said this was long after the procurement process. More importantly, the opinion of the client of any consultancy is not formed by a pint of lager or a lunch. It is formed by your competence in doing the work that you do. In this respect he was no different to a barrister.

62. Mr Samphire became the designated MPS account manager in 2000. Thereafter, in December 2000 Impact Plus won consultancy work, unrelated to the C3i programme for Mr Luck and Ann Beasley, the MPS's Resources Director and Business Manager respectively. This involved putting in place a more structured (project based) approach to business planning. Mr Samphire also met Mr Luck in December 2000, and was asked to run some workshops for team leaders in the MPS's Resources Division between January and March 2001. In later 2001 or early 2002 Impact Plus was asked to bid for the next annual review. It put in a bid in February 2002 which was successful and Mr Samphire was therefore working again with Resources in the first part of 2002. In addition, between August and December 2001 Impact Plus was asked to review the MPS's Property Services Division's organisation design and project working approach. It then helped with plans for modernising the division and putting the organisation in place. The work continued until July 2002. [15]

63. During 2001 and 2002 Mr Samphire also had a number of separate meetings in the normal course of business and business development with several individuals within MPS who were, or subsequently became associated with C3i. So, for example, Mr Samphire contacted and then had a meeting with Ms Beaton. In addition, in June 2002 Mr Samphire and a colleague met the C3i Project Manager Terry Dwan.[16] During that meeting they discussed C3i, and Mr Samphire described to him Impact Plus's experience of managing projects and its distinctive approach. As a result, in September 2002 Impact Plus was asked to put in a bid to provide project managers on C3i on a call-off basis, though it did not get the contract.

64. Mr Atherton became the MPS's Director of Procurement in early summer 2002, reporting to Mr Luck. As Director of Procurement he had overall responsibility for the

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[14] See paragraph 65 below.

[15] This contract which was properly invoiced by Impact Plus, did not have anything to do with 'scouting for new locations for the C3i control centres': see further paragraph 86 below.

[16] Mr Dwan was in charge of the early stages of C3i.

contracting of goods and services and the procurement of those goods and services in the most economic and efficient manner in compliance with the rules and regulations.

65. Mr Samphire wrote to Mr Atherton on 17 June 2002 congratulating him on his appointment and asking to meet him as he wanted him to be aware of Impact Plus's services. This was standard approach in business development: he said "one of the things that we did regularly as an organisation was to constantly review any change to personnel in key positions…and I picked up that Steve Atherton had taken on this role."

66. In his letter Mr Samphire referred to the work Impact Plus had been doing with the MPS for a couple of years and said:

> "Reflecting on earlier conversations with Paul, [Andrae] we identified below some areas where we might be able to get involved with yourself and the Met police in the near term:…
>
> - Potential provision of resources into the C3i projects
>
> Our business model does not require us to place a large number of consultants on the ground, full-time in client's offices. Rather, our business model is based on providing specialist advice and resource in small numbers to clients on either a full time or part time basis. In this way we believe we can add most value to our clients…".

67. Mr Atherton and Mr Samphire had an introductory meeting on 19 August 2002. It is not clear whether the term Programme Conscience was used during the meeting (there is no apparent reference to it in the slides used by Mr Samphire) but during the meeting, Mr Samphire explained Impact Plus's capabilities.

68. Impact Plus gave the name 'Programme Conscience' to the full-time model to which Mr Samphire referred in May 2002. Mr Miller described the work done by management consultants generally, the development of the Programme Conscience, and the way the procurement process was dealt with generally as follows:

> "Management consultants aim to help organisations improve their performance. They can provide an objective independent assessment of an existing business and develop and implement plans for improvement. This might be in terms of strategy for the business, changing its structure or working practices, reducing costs or providing training…The work often involves the implementation of new IT (information technology) components.
>
> We tend to speak in terms of "projects" and "programmes". The programme encompasses the overarching objective of the business. Within the programme there will be a number of specific projects aimed at fulfilling that objective. A programme nearly always involves a major new piece of IT which will change the way the people within the business work.

It may change the location of their work and may require a substantial change in their attitude to their work. The biggest problem is often that the changes must be accomplished while the business carries on as usual. Generally speaking, programmes within the public sector are much larger than those within the private sector…in the public sector, the person in charge is the "Senior Responsible Officer (SRO). The person appointed is inevitably a senior individual in the business/organisation. However, they invariably have had no training or experience in leading a major programme. There was certainly no training course at the time. A major worry is often that they do not understand the new IT itself (what I call the IT 'gobbledegook'). Secondly, in my experience, there is often concern about whether they are getting the honest and accurate information and feedback from staff which they need to ensure that the programme is implemented appropriately and successfully. Thirdly, day to day responsibilities and pressures frequently get in the way of running the programme at all. Despite all this, the SRO['s] job (even career) may depend on whether the programme is successfully implemented or not. The Office of Government Commerce (OGC) was set up, in part, to address this issue. They conducted "gateway reviews" to assess the progress of government programmes. However, these reviews were not carried out by particularly heavyweight individuals, and being occasional rather than ongoing, only captured a snapshot of the situation. Typically, problems were covered up and concealed when the reviewers came on site rather than revealed…In response to this, Impact Plus developed what we later called "Programme Conscience". This was an extension of the project/programme "health-check" work we had been carrying out for some time. With Programme Conscience our consultants would become the "eyes and ears" of the SRO/sponsor. Put briefly, Programme Conscience was control, management and ongoing assessment of complex programmes, reporting directly to the programme sponsor or SRO. More particularly, we would assess the health of the programme and explain IT questions which arose, liaise with staff, monitor progress, identify problems, suggest solutions, and generally report on the progress of the programme or specific projects as and when appropriate, on an ongoing basis. In doing this, we enabled the senior person in charge of a programme to focus on the key issues and, importantly, get on with their regular job.

There is absolutely no doubt that Programme Conscience provided a much needed service which was valuable to our clients…It was a service that other consultancies could provide: it was not a piece of unique software or unique concept. However, we developed far greater experience than many

> others. We were the only consultancy to brand the expertise "Programme Conscience."
>
> The first time we delivered this service under the title "Programme Conscience" was in May 2002 for Churchill Insurance and we won other prestigious work. I have mentioned the Ministry of Defence's DII programme…the largest change programme in Europe. Impact Plus provided Programme Conscience to DII. Similarly, GCHQ had some major programmes for which we provided Programme Conscience. We also won Programme Conscience work with large private sector businesses, mostly banks and insurance companies.
>
> We were subject to the procurement processes of a number of public sector organisations at this time. These included the MoD, the Foreign and Commonwealth Office, GCHQ, the Office of the Deputy Prime Minister, the Department for Transport, the Department for Education and Skills, the MPS and the Met Office. We were also involved in a project sponsored by the Chief Executive of the Office of Government Commerce, the department charged with responsibility for ensuring that the public sector receive fair treatment and value from consultancies. The procurement processes we were subject to at the MPS were very similar to those used by the other public sector organisations we dealt with at that time."

Contacts between Mr Miller and Sir Ian Blair and the tendering process

The poisoned chalice conversation in 2000

69. It is common ground that soon after Sir Ian Blair's appointment as Deputy Commissioner in February 2000, he and Mr Miller had a conversation at dinner in which the topic of the C3i programme was mentioned. Mr Miller said he obviously congratulated Sir Ian on his appointment. He said he had become aware of the problems with the C3i programme because of the work Impact Plus had already done for the MPS. He said he had said "I mentioned that C3i was a huge programme in the Metropolitan Police, and said almost certainly you will be made the SRO, it's got a number of problems and watch out for it, because it's a poisoned chalice.", or words to that effect. At the time, Mr Miller said this was news to Sir Ian Blair who possibly hadn't even heard of the programme.

70. The Defendant alleges in amendments to its defence made at trial that there was more than one conversation between Mr Miller and Sir Ian Blair about the C3i programme at about this time, and that in the conversation which Mr Miller accepts took place he told Sir Ian Blair that it was "an unwieldy programme which needed an assistant to ensure that Sir Ian who was responsible for it, kept on top of it" which "fed to Sir Ian that outside help was needed for C3i" – or, as it was put in cross-examination : "he didn't ask for advice and it looks like you're planting a seed." Mr Miller denied there was more than one such conversation or that he had said what was alleged, or for that matter that he was "planting a seed".

71. I am not satisfied there was more than one conversation and I accept Mr Miller's account of what was said. It does not seem to me either that there was anything suspicious about the fact that this conversation took place. The C3i programme was then a PFI project i.e. it was not one being run by the MPS. If Mr Miller was trying to plant a seed in other words, it was on infertile ground. Both Mr Miller and Mr Samphire knew as a result of Impact Plus's work for and contacts within the MPS there were serious problems with the C3i programme at that time. The suggestion that Mr Miller was prospectively planting a seed in respect of work his company could – and would eventually do for the MPS in relation the C3i programme is not warranted in my view. This was it seems to me, as Mr Miller said in evidence, no more than friendly remark to someone joining an organisation.

The "out of the blue" conversation in September/October 2002

72. Some two years later, in about September 2002, when the C3i Programme had moved to one run by the MPS, it is common ground that Sir Ian Blair decided he needed consultancy help regarding the C3i Programme and that he telephoned Mr Miller. Mr Miller gave an account of that conversation both in his witness statement for this trial, and in the various statements submitted by him to the Flanagan Inquiry. In one of those statements to Flanagan he said:

> "One day out of the blue Ian Blair phoned me to say that he had decided he needed external support for C3i, that he wanted to bring in a consultancy which would check how C3i was progressing, not as a one-off but as a continuous activity throughout the life of the programme.
>
> I described Programme Conscience to him. IB said that he thought the term Programme Conscience described it well and that the Met would be issuing a competitive invitation to tender to a number of consultancies, and that this would be a formal process led by the procurement department.
>
> He also told me it would be possible that someone might object to Impact Plus because of our friendship. I said I understood would have to accept such a decision if it came out that way, but kept my fingers crossed."

73. Mr Miller said in evidence that Sir Ian Blair asked him whether he knew anyone who could perform such a role ("do you know anybody who can do this sort of thing") and that as a result he then described to Sir Ian the work Impact Plus could do, and 'Programme Conscience' to him. Mr Miller said he was telephoned as someone whose opinion Sir Ian respected, who knew something about IT and big IT programmes to see whether he knew somebody who could do this. Mr Miller said he told Sir Ian that Impact Plus had been doing major programme work for years and had recently renamed it Programme Conscience. He might also have said that Impact Plus saw Programme Conscience in part as being the eyes and the ears of the SRO. Mr Miller acknowledged the conversation covered Programme Conscience in the context of C3i, but that was not the starting point of the conversation. What was said may be the reason that some of Sir Ian used language similar to some of that used by Mr Miller himself, a point of marginal significance in my view in the context.

74. The core of the Defendant's point here is its allegation that Sir Ian considered he needed such help because he had "been fed that idea" by Mr Miller. I am not persuaded that is the case. First, I think it fanciful to link a need Sir Ian Blair identified in 2002 in relation to a project such as that he was confronted with to the conversation of the nature I have described which had taken place some two years earlier; or indeed that Mr Miller had made a prospective punt for work in 2000 that eventually bore fruit in 2002. Mr Miller said the C3i programme was then in difficulties, the service eventually requested by the MPS and provided by Impact Plus was a valuable one and it helped in the delivery of the C3i programme on time and on budget. The Defendant did not suggest otherwise. I consider it far more likely in the circumstances that Sir Ian Blair rang Mr Miller for the reasons Mr Miller gave: that is, because Sir Ian had identified a need for external consultancy help to be provided to him in relation to this vast programme for which he bore the responsibility and he then rang Mr Miller for advice about who to go to. This was in other words a business conversation albeit the two men were also friends.

75. The Defendant also alleged that the call from Sir Ian Blair gave Mr Miller "the heads up" that a tender process would take place, that Impact Plus would be invited to tender and this therefore gave Impact Plus an (unfair) advantage over other potential tenderers given the short time scale in which the tender then had to be produced (see paragraph 80 below). It sought to buttress its case on the (un)fairness of what occurred by suggesting that the procurement process began when one was envisaged, as it was here. It referred in this context to the fact that Mr Miller had said in one of his statements to the Flanagan Inquiry that this was a good working definition of when the procurement process started. Mr Miller said, reasonably so it seems to me, that he was not a procurement professional, Ms Walker was and she knew what the process was within the MPS, which he did not. In her witness statement to Flanagan, Ms Walker said the formal procurement process began after a request for assistance from the Procurement Department when a form 1049 (Request for Formal Contract Action) was completed by those requesting the assistance detailing amongst other matters, what was required and the estimated cost. This was done on or about 18 October 2002.

76. Whilst I am satisfied that as a result of the conversation Mr Miller knew that a tender might be forthcoming, I am not satisfied that the conversation gave Mr Miller or Impact Plus some kind of unfair or illegitimate or indeed any advantage over its rivals, nor that this could properly be regarded as the start of the procurement process. As Mr Miller said, it was not in the gift of Sir Ian Blair to create an invitation to tender or to announce it. This was a matter for the procurement department – as Sir Ian Blair himself had said. What Mr Miller was told was no more than a weather forecast. Mr Miller's evidence, confirmed by Mr Samphire, was that particularly in public sector procurement, it was commonplace to be told there was or might be a tender "down the line": it did not mean however that an invitation to tender would be issued, nor was it privileged information. Mr Miller didn't telephone Mr Samphire as a result of the conversation. Mr Miller said: "It is not as if we would have started work on anything. There was nothing we could have started work on. We didn't have an invitation to tender, so how could we know what they wanted in any form at all." Both he and Mr Samphire did nothing until the ITT was received.

77. In the event, preparations were made by the MPS formally to start the tendering process. An email of 18 October 2002 from Andy Kinch to Rosemary Roberts said "Following a meeting between Steve Atherton, Director of Procurement Services and the Deputy Commissioner, Procurement Services are to undertake a competitive tender exercise with a view to appointing a company that will provide an ongoing independent review/health check of the C3i project for the Deputy. They anticipate it will cost in the region of £50,000 to £60,000. I would be most grateful if the attached form 1049 could be completed and signed as appropriate." The form was duly completed.

78. The Defendant relied on an internal MPS email from Ms Beaton sent on 21 October 2002 to Mr Atherton and copied to Sir Ian Blair in which she made a number of comments on the draft terms of reference for the Programme Conscience contract. She suggested that it should be a very clear requirement for the successful company to exclude itself from any other work with the MPS for the period of the contract. Her suggestion wasn't followed, and there was no such requirement in the Invitation to Tender that was sent out to Impact Plus amongst others. The point is however whether or not to act on the recommendation of Ms Beaton was an internal matter for the MPS. It was not alleged that Mr Miller knew of Ms Beaton's recommendation at the time or that there was any basis to suspect he sought to prevent the implementation of her recommendation.

79. An email of 22 October 2002 from Mr Atherton to Mr Kinch stated: "You will need to establish with Ailsa [Beaton] the selection process for the consultants, the deputy had the view that he would like personally to meet the final 2 contenders but that other [sic] would be sifted on his behalf. Given the change to the process, I would recommend that Ailsa sift down to 2 and then arrange to meet the shortlisted 2 with the Deputy. Please get Ailsa's agreement to this." On 24 October 2002 Ms Beaton sent an email to Mr Kinch which said: "We also need to agree the selection panel – I am happy to take Steve's [Atherton] advice but perhaps him, KL [Keith Luck], the deputy and me."

80. On 28 October 2002, the ITT for "Support to the Senior Responsible Officer of the C3i Programme, was sent out to four companies: Atos KPMG, Deloittes, Impact Plus and Willis Limited. It stated that inquiries arising during the tender preparation should be addressed to Andy Kinch in writing, or if verbal, confirmed in writing and that the tender had to be completed and returned by 13.00 on 7 November 2002. [17]

81. I have already said that I am not satisfied the "out of the blue" conversation gave Impact Plus any advantage over the others invited to tender, and I therefore reject the suggestion the Defendant also made that because of the "heads up" Impact Plus had received, it was better placed than the others on the list to produce an ITT in the short time available. As it was, the evidence of both Mr Miller and Mr Samphire was that it was commonplace for tenders to be produced under pressure of time; and this

[17] In Instructions to Tenderers (Annex A to the ITT) –in a paragraph headed "Contract" it was stated that "Any amendment(s) requested by a tenderer will be subject to consideration." It was also stated in a paragraph headed "Modification and Withdrawal" that "Tenderers may modify their tender prior to the deadline for receipt by giving written notice…to the Authority. No tender may be modified subsequent to the deadline for receipt…. "

occasion was no different. The ITT was received in the offices of Impact Plus on 29 October 2002 (a Thursday). It was addressed to Mr Samphire who was working away from the office. In the event he did not consider it until the following Monday, 4 November 2002.

82. Mr Samphire said he then went to see Mr Miller and they discussed the work requirement the ITT specified of two days of work per month. Both considered this to be inadequate and far less than the C3i Programme actually needed. Their view was that there were only two options - not to bid at all, or to bid for the work which in their view was needed if the job required was to be done properly. There was a third possibility - putting in a bid for the tender, but then pointing out more work was needed once they were "in" and when it would be difficult for the customer to withdraw or renegotiate (known in the trade as "upgrade to viability") but this would have been unethical at the very least.

83. Mr Miller said he and Mr Samphire thought given the timescale it was important to call someone who could make an on the spot decision, and in particular, the SRO, otherwise they might fail to put in a proposal they believed in simply because it took too long to go through the MPS 'sausage machine'. This might have happened if they had contacted someone who was at a relatively junior level in procurement such as Mr Kinch. Mr Miller could not now say whether he was personally aware that the document required the contact to be made with Mr Kinch (he thought it likely the detail would have been gone through by Mr Sarbicki together with Mr Samphire, rather than by him). But looking at the matter at a practical level, they were on a very tight timescale and he did not think even looking at the matter now, calling Mr Kinch would have been right way to go about it.

The third conversation

84. Mr Miller therefore called Sir Ian Blair, as the Managing Director of Impact Plus speaking to the SRO. He said this was something he would have done whatever organisation he was dealing with and whichever person was named on the ITT. He said by doing so they took a risk, but in the ordinary course of business that is what one does. "If we saw a problem we would take it to the correct level for the scale of the problem that it was, and address it at that level." Mr Samphire said the same thing. He said: "We risked losing out on this contract because we were determined to advise the MPS what we believed C3i needed to work properly right from the outset.

85. The Defendant attaches considerable significance to the fact that Mr Miller made the call to Sir Ian rather than to Mr Kinch, who was the point of contact identified in the ITT. Whether it was strictly within the terms of the tender or not, I do not consider the point to be of any real significance, particularly in the light of the undisputed evidence of what happened when the call was made, and thereafter. This was that Sir Ian Blair immediately cut Mr Miller short, saying this was not a matter for him but for Steve Atherton in procurement. Mr Samphire then had at least two discussions with Mr Atherton about the revised tender. He told Mr Atherton the MPS specification did not adequately cover the work Impact Plus believed was necessary. Mr Atherton then authorised Impact Plus to proceed with an alternative bid, which would be assessed on its merits, and this is what Impact Plus then did. On the face of it there was nothing wrong with Impact Plus putting in such a revised bid. Certainly from Mr Samphire's perspective it was normal practice to submit revised tenders, and there was nothing in

the ITT saying it could not be done. As for the regulations (the Public Service Contracts Regulations 1993) I have already explained why I do not think they advance the case against Mr Miller. Even so, and for what it is worth, rule 21(4) contemplates as proper bids those which contain offers or variations to the ITT; and that a public authority is only permitted not to take account of such offers if this has been expressly mentioned in the contract documents, which was not the case here.

A fourth conversation before the contract was awarded?

86. I should mention here, albeit briefly, an allegation made by the Defendant that there was a fourth conversation between Mr Miller and Sir Ian Blair which was relevant, and which had taken place in August 2001. Mr Miller said at some point, he thought more likely after the Programme Conscience contract was awarded to Impact Plus he had a conversation with Sir Ian Blair in which he offered to look into potential sites for C3i centres. It is not however said this discussion had anything to do with the possible need for an external consultancy/health check support role for the SRO; and the Defendant's suggestion as to its date is based on a demonstrable error in the Flanagan Report (which erroneously linked this conversation and its date with invoices for a Property Division contract in August 2001 which had nothing to do with C3i: see paragraph 62 above).

87. Only two of the companies invited to tender did so: Willis Limited on 6 November 2002 and Impact Plus (its tender signed by Mr Samphire) on 7 November 2002.

88. Impact Plus's tender offered its own specification for about three times as much work specified in the ITT at about three times the estimated cost. The Introduction and Background to Impact Plus's tender stated amongst other things: "Our proposal is further informed by discussions between the MPS Deputy Commissioner and the MPS Director of Procurement and the Joint Managing Director of Impact Plus, Andy Miller on 4/5 November. We are deliberately submitting an alternative bid to that requested as we believe that the Statement of Requirements defines an inadequate requirement to that actually needed." The Defendant suggested the references to discussions meant there had been more than one discussion involving Mr Miller and Sir Ian Blair (or at least there appeared to be more than one). Secondly, it suggested this sent a message to those assessing it that the Deputy Commissioner had seen and assessed the Impact Plus bid. Taking the latter point first, that is a slightly curious allegation since it might be thought it would have been wrong for Mr Miller not to mention his contact with Sir Ian Blair. As it is, however, what was done has to be looked at in its context: including the permission given for the revised tender by Mr Atherton, the absence of evidence that anyone involved in the assessment (Ms Beaton or Ms Walker or indeed Mr Atherton) did anything other than assess the tenders on the merits; and the absence of evidence that the tender was won on anything other than the merits. As for his purpose in flagging this up, Mr Miller said these matters were spelled out at the beginning of the ITT (i.e. the discussions with Sir Ian Blair and Steve Atherton) in order to provide, an audit trail to those receiving it of the authorisation Impact Plus had been given to submit a bid which differed from the specification**.** As to whether there was more than one discussion with Sir Ian Blair, Mr Miller said there was not. As a matter of ordinary language, the word "discussions" is often used when people have a discussion; and it could just as well be a reference to all the discussions which Mr Miller and Mr Samphire said took place (including with Mr Atherton).

89. The tender went on to say that it envisaged 2 phases to the contract: Phase 1 would be a one month intensive review prior to producing a summary report detailing amongst other matters "the then current "state of health" of the C3i Programme". Phase 2 would be the ongoing Programme Conscience role, initially envisaged to last for one year. "The scope and resourcing of Phase 2 would be largely dependent upon the findings from Phase 1." Under "Costs" it said: "Since we believe strongly that the Invitation to Tender defines an inadequate requirement to that needed, our costs may be higher than the MPS originally envisaged. We ask you to consider that the Programme Conscience role is, in effect, an insurance policy for the C3i Programme…Whilst we are happy to discuss a larger or smaller role, we do not believe that a role much smaller than the one outlined in this document, is either useful or safe for you. We would prefer to withdraw from this proposal, rather than undertake a role that is inappropriate…." In Appendix 1 Phase I was priced based on assumptions about the scope of work and experience in a range of £41,000 to £61,000; and whilst stating it could not be precise about the scope of Phase 2, it forecast an average cost of between £10,000 - £17,000 per month. It assumed ten and a half months of work in Phase 2 to arrive at the total price in Appendix A (£149,000 - £237,000).

90. I have already referred to the various criticisms made by the Defendant of what the MPS then did or did not do after receipt of the tenders by reference to the procurement regulations which applied at the relevant time. It was suggested for example that under the regulations, Willis should have been told of Impact Plus's revised bid, or that Impact Plus had bid for work other than that specified in the ITT so it could have been given an opportunity to submit a bid which competed for that work. It was also suggested that after awarding the contract to Impact Plus, "the important fact that the contract did not go to the lowest bidder" was not disclosed to the MPA either, as it should have been. As I have said, Mr Miller pointed out when cross-examined on this issue, he didn't even know who the rival bidder was. But in any event ensuring the regulations were complied with was a matter for the MPS and/or the MPA not Mr Miller/Impact Plus. These allegations therefore contribute nothing to the case against Mr Miller in the absence of any evidence that either he/Impact Plus were under an obligation to comply with the regulations, or that he knew both what the regulations specifically required (which is not the same as being aware in general terms that such regulations exist) and that the regulations had not been complied with.

91. I mention here one further allegation made by the Defendant on the topic of what might be called favourable treatment. It is that before the interviews, Mr Kinch "refused to meet with representatives of Willis in this period, despite requests from them that he should do so." An email from Tony Harvey of Willis to Steve Atherton, on the subject, "Debrief on C3i: Willis tender" sent in January 2003 and therefore after the interviews said this: "Steve, When we met before Christmas, to discuss your outsourcing programme, you mentioned that our tender for C3i had not been particularly well-received…Having discussed with my colleagues who were involved, I can confirm that the tasking specified was indeed towards the "outer edge of our envelope." In addition, we had only a few working days to submit proposals, which was apparently insufficient to allow Andy Kinch to arrange a meeting we requested to…flesh out our understanding of your requirements…" What was said does not in my view support the allegation that Mr Kinch refused to meet Willis, as the

Defendant alleged. Against the background of an acknowledgement that this work was towards "the outer edge of the envelope" Mr Harvey's later comment appears as Mr Barca suggested to be more akin to special pleading, than a complaint.

92. On 12 November 2002 a comparative analysis of the two tenders from Willis and Impact Plus was provided by Mr Atherton to Sir Ian Blair. Mr Atherton commented that Willis had stuck rigidly to the specification but failed to demonstrate added value and intellectual input to the approach, whereas Impact Plus had proposed an alternative which produced a comprehensive approach but at a price he described as significantly over engineered and difficult to support in terms of value. Mr Atherton suggested Sir Ian Blair meet with both suppliers and explore the various shortcomings of their proposals as Mr Atherton perceived them to be.

93. On 25 November 2002 Sir Ian Blair spoke to Mr Miller and suggested he should be at the interview. Sir Ian Blair told Mr Atherton he had done so the next day in a note (handwritten on the letter referred to at paragraph 94 below) which said: "I have spoken to Andy Miller on the phone on 25th and suggested he should be at the presentation. If Peter Martin wishes to be at the selection, then I am happy with that but will leave that to him. "

94. On 26 November 2002 Sir Ian Blair wrote a letter to Peter Martin, the Treasurer of the MPA, copied to Catherine Crawford and Mr Atherton which said as follows:

> "Dear Peter,
>
> "Project Conscience: C3i Programme"
>
> As I mentioned at the C3i Steering Group, I am seeking to appoint a consultancy firm to act as my eyes and ears on the C3i programme. Such a person will work part-time and will work to Ailsa and me, particularly in my role as Senior Responsible Officer. Their job will not be to double guess the programme director or systems integrator but just to ensure that, across the vast piste of this programme, everything is happening that is supposed to be happening and to give me personal, non –gobbledygook reports about progress.
>
> This is being procured in accordance with normal guidelines but the purpose of this note is just to let you know that the last two candidates for appointment are Willis Risk Management and Impact Plus. Impact Plus is owned and run by a friend of mine, Mr Andrew Miller.
>
> Steve Atherton is aware of this and I am looking to him to ensure that all proprieties are observed in relation to the procurement process. However I thought it important, in the interests of transparency, to let you know that the possibility exists that Impact Plus will be selected. I am copying this note to Catherine Crawford and to Steve Atherton."

95. By the 27 November 2002 both Willis and Impact Plus had been informed by Mr Kinch that they had been put on a shortlist for the tender; and they should attend for an interview [with the Deputy Commissioner]. Their interviews were fixed for the 28 November 2002 and the 3 December 2002 respectively. Impact Plus confirmed its attendees would be Mr Miller, Mr Samphire and John Coughlan. The interview panel comprised Sir Ian Blair, Ms Beaton and Ms Walker.

96. The Defendant suggested there was no need for either Mr Miller or Sir Ian Blair to be at the interviews, in particular when Ms Beaton and Ms Walker from the MPS were there to explore the technical issues, and commercial matters. I do not regard Sir Ian's presence as anything other than sensible for the reasons Ms Beaton and Ms Walker gave in their witness statements to the Flanagan Inquiry. Whoever won was required to work directly with Sir Ian Blair: and it was obviously important he could work with who was selected. Ms Beaton's professional view was that Sir Ian Blair had to be part of the assessment process as he had to be able to work with the people "in front of him." If Procurement had said "No" she would have accepted it, but at no time did Procurement express that view. Mr Miller said that on every other occasion when he had pitched for 'Programme Conscience' work, the SRO was always there: it would have been "utterly nonsensical for the SRO not to be present, because the consultancy in question reports to them and they must feel comfortable with the style of the people, with the competence of the people, with the personal chemistry, if you like, as well." As for his own presence, Mr Miller said he believed Sir Ian Blair wanted him there for transparency, and so his colleagues could see who they were dealing with. Mr Miller said from his perspective given the size and importance of the organisation it would have been discourteous for the managing director not to have been there.

97. It is said that Impact Plus was advised by Ms Walker and agreed to cap the price of the contract to the amount of phase 1 of the contract in order not to exceed the EC threshold because the contract had not been advertised in accordance with the required procurement procedures. The Defendant's case is this was improper and Mr Miller agreed with it, despite his knowledge and awareness of relevant procurement regulations. The suggestion being that what was proposed and accepted was disaggregation (i.e. "parcelling out" larger contracts to get round the EU threshold beyond which contracts had to be advertised in the OJEC (the official journal of the EU)). Mr Miller accepted he was aware that there were "sign-off limits" to public sector procurement contracts but it was not something he dealt with either at Impact Plus, or with clients, as it wasn't his responsibility or his area of expertise. He said it was completely normal for public sector clients to say there was a EU procurement limit which could not be exceeded. He did not accept that he had acted improperly. Mr Miller explained (and indeed Impact Plus's tender document made clear) that what work was required to be done by Phase 2 depended on what they found once Impact Plus started work on Phase 1: at that stage, they knew the C3i programme was in difficulties, but they had no idea of the scale of it. As he said, there were a number of variables affecting the cost of both Phases which Impact Plus was proposing: thresholds under EU procurement law had nothing to do with it. The mechanics of how it was paid did not affect the contract price.

98. On 3 to 6 December, Ms Beaton took up references for Mr Samphire and Mr Coughlan. On 6 December 2002 Ms Walker informed Mr Samphire that Impact Plus had been selected for the contract. It had been selected because it understood the task

needed and could provide the necessary requirement. Between the 9 and 18 December 2002 there was correspondence between Ms Walker and Mr Samphire on certain of the contract terms. On 16 December 2002 Impact Plus started work on the C3i Programme Conscience contract.

99. It is worth recording here Mr Samphire's evidence that most of the features highlighted by the Defendant in relation to the awarding of the Programme Conscience contract and the tendering process were normal and commonplace. He said that Impact Plus was regularly told of possible tenders. "If I spent too long thinking about a particular potential bid there wouldn't be many hours left in the week." It was also quite common for a limited time to be available for preparing a bid. Putting in variations to tenders was "commonplace." There was nothing in the ITT to suggest that it was wrong to ask permission to vary this particular bid. It was normal practice in 2002 for other bidders not to be told if a revised bid was submitted by one of those tendering, because such a course would vastly extend the timetable for the bid. It was very common for Mr Miller to come along to presentations with him. As far as he was concerned there was no reason why he should not have done so in this case as it was openly known that he and Sir Ian Blair were friends. It is also to be noted that Mr Samphire's unequivocal evidence about the propriety of what occurred, not challenged by the Defendant, was this: "I believe that I and [Impact Plus] acted professionally and with great integrity in our dealings with the MPS at all times. I believe that [Impact Plus] won the C3i Programme Conscience work properly in a competitive market…I do not believe that there is any chance that he [Sir Ian Blair] would have taken the risk of appointing a friend's company…That Ian Blair and Andy were friends was never an issue…".

100. On 4 April 2003 Sir Ian Blair sent a memorandum to Ms Beaton, copied to Mr Miller, Mr Samphire, Peter Martin, Catherine Crawford, Mike Aston and Mr Atherton which said as follows:

> "Impact Plus: Programme Conscience
>
> I remain extremely impressed by the work of Impact Plus and I believe that both Mike and you share this view. I am sure they will continue effectively to operate in the conscience role for the period between now and the beginning of the C3i service.
>
> However, as a consequence of some of their findings, we have additionally engaged them for other important work on C3i: for instance, to renegotiate some of the relationship with Lockheed Martin. This seems both effective and cost effective. However, as you know, one of the managing directors of Impact Plus, Andy Miller, is a personal friend of mine and, although he is not directly engaged in the Ailsa Beaton and Hilary Walker programme conscience work, I need to demonstrate an absolute transparency in the relationship between the MPS and Impact Plus over this matter. Having discussed it with him, I know Andy Miller is in complete agreement that this is vital.
>
> My suggestion is that you should, as deputy SRO, now re-scrutinise the way in which we are engaging with Impact Plus

> on any work beyond their original remit and, from now on, take responsibility for the commissioning of any additional work from them or others arising out of their agreed programme conscience role. I would like your scrutiny to be carried through in conjunction with Peter Martin and to result in a system by which, if Impact Plus are employed in additional roles to that of programme conscience, that decision is no longer mine. I am sure you will additionally want to involve Steve Atherton in this process.
>
> As stated, this is about transparency and must not be a reason to slow down the necessary changes being undertaken in the C3i programme. I am copying this note to Andy Miller, to Martin Samphire, to Peter Martin, to Catherine Crawford, to Mike Aston and to Steve Atherton."

101. Sir Ian Blair was not involved in the process to award Impact Plus any of the subsequent contracts that it was awarded with the MPS.

102. Between April and October 2003 internal discussions took place at MPS regarding the extension of the C3i contract. On 3 October 2003 Ms Walker, wrote to Mr Samphire confirming the extension of Independent Health Check of C3i Programme from 15 December 2003 to 31 March 2005 under existing terms and conditions. Planned activities were to be submitted to and agreed by Ms Beaton on a regular basis. Between 1 April 2004 and 31 August 2004 Impact Plus conducted a redirection review. It is common ground that the Programme Conscience contract, worth £150,000, was very valuable to Impact Plus: and was the gateway to variations and extensions that brought a revenue of nearly £2 million over subsequent years, and that the total revenue to Impact Plus from the work it did for the MPS was of the order of £3 million.

The Transition Contract

103. In about October 2004, it was announced that Sir Ian Blair was to become the new Commissioner of the Metropolis. Shortly afterwards, he appointed Mr Samphire to facilitate a weekend seminar on his transition to Commissioner and Sir Ian Blair's "vision". This seminar took place on 6 November 2004.

104. On 15 November 2004 Deputy Assistance Commissioner Bryan made a request for a tender for "Consultancy Support Requirement for Sir Ian Blair". The background to that request was the taking up by Sir Ian Blair (then the Commissioner Designate) of his post as Commissioner. The request said the work required was to support the transition process to provide independent advice on strategy development and the transition process, including advice on effective project management, organisation design, change management and to act as a confidential sounding board for the Commissioner Designate. It is not suggested it had anything to do with PR or image makeovers.

105. From about 21 November 2004 in pursuance of a competitive tendering process the MPS sent out to Impact Plus and three other consultancies, an invitation to tender for "S-Cat TD010 Consultancy Support". On 24/25 November 2004 Mr Samphire

submitted Impact Plus's tender for the Consultancy Contract. In early December 2004 Impact Plus was awarded the Consultancy Support Contract, i.e. the Transition Contract, following the competitive tender process.

106. On 1 February 2005 Sir Ian Blair took up his post as Commissioner. In February 2005 he was advised by Sir Paul Stephenson and Catherine Crawford not to go on holiday with Mr Miller because of the level of involvement the MPS had with Impact Plus at that time, and he agreed. In March 2005 Sir Ian Blair initiated a review of C3i procurement.

Discussion

107. Mr Warby submitted that it would not be right to examine each of the matters it relied on in isolation to see whether it afforded reasonable grounds to suspect; and he accepted that some of them, by themselves, could not do so. So matters such as the friendship between Mr Miller and Sir Ian Blair, the nature of it, Mr Miller's attitude to winning business, the name dropping as a method of doing business (illustrated by his approach to Ms Beaton) and the conversation in which Mr Miller offered to find suitable premises for C3i (the fourth conversation) were all relevant contextual matters against which to judge 5 key pieces of conduct. The starting point was the procurement process. That was the point when it was important to bear in mind there was a business prospect and a friendship and this arose during the "out of the blue" conversation. Even on Mr Miller's account, this involved an informal contact and he relied too on the conversation between Mr Miller and Sir Ian Blair based on Catherine Crawford's evidence. Second, the call from Mr Miller to Sir Ian, going over the head of Mr Kinch. Third, the call from Sir Ian Blair to Mr Miller inviting him to the presentation. Fourth, what happened at the presentation, that is, that both of them were present when there was no need to be there and the agreement to cap the contract costs, which was improper and, broadly, in breach of the regulations. Thus Mr Warby submitted, even on Mr Miller's account there were objectively speaking, reasonable grounds to suspect improper conduct and cronyism and a willing acceptance of both.

108. I agree that it would not be right to look at matters in isolation, and I also agree with Mr Warby's characterisation of some of the matters which had been pleaded, and about which Mr Miller had been asked as contextual rather than central. I have already given my view about the disputes of fact, as there were in relation to some of the matters, on which the Defendant relied and there is no need for me to repeat or summarise my findings. However, all the matters on which the Defendant relied must be considered in <u>their</u> proper context, and in the light of what the evidence did not show, as well as what it did.

109. To take some examples. There is no evidence that Impact Plus was not well-suited for the role to which it was appointed. The evidence is that it was: that is that it had the expertise, resources and experience to undertake the work on C3i which it offered and was engaged to undertake, and that it had already established a good reputation within the MPS by the time it was invited to tender for the Programme Conscience contract. There is no evidence that anyone else invited to tender was better suited to the role. The evidence is that the only other company which tendered regarded the work as "outside the envelope"; and in any event its presentation and tender was assessed by the relevant procurement personnel unfavourably in comparison to that put forward by Impact Plus. In other words, the evidence is that Impact Plus was clearly the better

candidate and won the tender on the merits (rather than being favoured regardless of its ability to undertake the work and because of Mr Miller and Sir Ian Blair's friendship). There is no evidence, or none that satisfies me, that Sir Ian Blair played any part in the initial sift, or indeed in the ultimate selection of Impact Plus. The evidence such as it is, is that the procurement process was followed after the meeting. There is no evidence that Mr Miller or Sir Ian Blair concealed their friendship from those involved in the process; on the contrary, it was clearly declared to the MPS and the MPA before the interviews took place. A large number of individuals from the MPS and MPA, each with different roles and responsibilities, were involved in detail in the tendering process and award of contracts. The evidence does not support any suspicion that any of them were a party to an arrangement by Sir Ian Blair or Mr Miller for that matter, to side step or ignore the proper procedures to help Impact Plus get the contract. It is not suggested that the work Impact Plus ended up doing for the MPS was unnecessary, or that the fees charged by Impact Plus were inappropriate for the work it undertook or that its work was not valuable to the MPS. To the contrary. The evidence is that Impact Plus was appropriately paid for the work it did, and that it did a good and valuable job.

110. As for the transition contract the Defendant's case was limited to this: Impact Plus gained this contract in part as a result of its already established relationship with the MPS flowing in substance from events in 2002. It seems to me in those circumstances, that this was not a free standing allegation and it only became relevant if the Defendant established its case on justification in relation to the Programme Conscience contract.

111. It might be said that the key parts of the Defendant's case, looked at in isolation and without the relevant context would merit some inquiry or raise questions which were worthy of investigation. But no more than that. In the end, standing back from the detail and focusing on the key parts of the Defendant's case as Mr Warby submitted them to be in context I am not satisfied that the case on justification is made out.

Issue two: abuse of the process

112. The Defendant's case is this. It is said that this action does not serve the legitimate aim of vindicating Mr Miller's reputation of an imputation of which he reasonably seeks vindication, or compensating him for such an imputation, or alternatively it has involved the devotion of resources on a scale which is wholly unreasonable and disproportionate to the pursuit of any legitimate aim. The Defendant in this context relied on the history of the litigation, comparing, in effect how Mr Miller's case was put when it started, and where it ended up. It was said at the outset, Mr Miller complained only about false and defamatory allegations about his role in a £15,000 contract Impact Plus won in 2004 (the Transition Contract, or as it was called in the Article, the "vanity" contract); he complained that he had been accused in relation to that contract of guilt, corruption and fraud which were serious charges, and that he had suffered financial loss as a result. However he withdrew his special damages claim, and the court then held that the Article could not bear the meaning of guilt of corruption or fraud, or even grounds to suspect such conduct and in fact that it imputed "nothing more serious" than reasonable grounds for suspicion of willingly accepting the benefits of cronyism and improper conduct by Sir Ian Blair. It is said that Mr Miller initially contemplated suing over the Daily Mail articles from July 2008 onwards, and made a considered decision not to sue in respect of any imputation

in relation to the Programme Conscience contract. When he initiated his complaints, the Flanagan Inquiry was underway and he looked to Flanagan to vindicate him, holding back from beginning proceedings whilst it was in progress, and then vigorously trying to persuade Flanagan/MPA to vindicate him by making public his report. He focussed on the Article and inaccuracies of fact (as they are admitted to be) about the vanity contract but has ended up fighting an action on a ground not of his own choosing.

113. It is further said that Mr Miller had sufficient vindication from Flanagan, in relation to any imputation of guilt or corruption or the like (since Flanagan plainly exonerated Mr Miller amongst others of any dishonesty or impropriety); and in the circumstances it was hard to see what could be gained from fighting expensive litigation to clear his name of any taint of reasonable grounds to suspect that he had accepted the benefits of cronyism or impropriety. Finally it is said the lack of proportionality is illustrated by the fact that the Defendant made an open offer on the 9 October 2009 to correct the factual error in the Article, to clarify that the Defendant was not alleging impropriety against Mr Miller and to pay damages of £5,000 and costs of £15,000 to settle the claim.

114. I do not accept these arguments. So far as Flanagan is concerned, it is trite law as Mr Barca pointed out that the purpose of a defamation action (and an award of damages) is to provide public vindication.

> "It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public, and as compensation to him for the wrong done. "
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> Per Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150, and approved by Lord Hailsham LC *in Cassell & Co Ltd v Broome* [1972] AC 1027 at 1071

115. The Flanagan Report was never made public, because the MPA chose not to publish it. It cannot therefore be said it has afforded – or could afford – Mr Miller any public vindication in respect of the defamatory allegation contained in the Article. When it was put to Mr Miller that Flanagan was a sufficient vindication for the Article, Mr Miller said and understandably so it seems to me that the formal reason for the Flanagan investigation was to investigate the conduct of Sir Ian Blair, not the conduct of Andy Miller. It did exonerate him. But even if it had been formally published, it did not begin to cover the damage caused by the Daily Mail. "I am still waiting for the Daily Mail to admit they made all these mistakes…they have never acknowledged as being wrong, they never even suggested it was defamatory – in fact they denied it was defamatory – nothing whatsoever from Flanagan or a report designed for a different purpose can begin to address the damage caused by the Daily Mail to my reputation. They started it, they should finish it." I also think it likely that had Mr Miller issued a press release based on the parts of Flanagan released to him, it would as Mr Barca put it, have sunk without trace.

116. I do not think much can be made either of the way Mr Miller initially put his case in his personal letter of complaint to Paul Dacre of 17 July 2009. He is of course not a lawyer, and I think it unreasonable to criticise him for not understanding all the "lawyerly ins and outs" as he put it or for failing to grapple with whether the Article bore a *Chase* level 1 or 2 meaning (issues which can hardly be described as obvious or straightforward to the layman). It should be noted too that the Defendant has never justified the allegations which Mr Miller summarised in that letter. These were that Impact Plus won a contract when a respected competitor offered to do the work for a third of the price; and that Impact Plus was paid to conduct "an image makeover" or "vanity contract" for Sir Ian Blair; and that this contract was not competitively tendered.

117. Costs are inevitably a matter of concern; and it is said Mr Miller has (or has had) solicitors and/or counsel acting on a CFA, and that he has refused to manage the litigation proportionately because his solicitors refused to conduct the case within the Defamation Proceedings Costs Management Scheme. Mr Miller said that he knew nothing of the scheme: and this was not challenged. More important perhaps, it is clear that Mr Miller did try and resolve the litigation through protracted correspondence and meetings with Mr Garside of the Defendant throughout July and August 2009. The Defendant's own stance was that the Article was not defamatory of Mr Miller and it offered no apology, even for the mistake it acknowledged the Article made. It could have sought a preliminary issue ruling on meaning at an earlier stage and then made an Offer of Amends under the Defamation Act 1996; and a defendant may also protect itself by a timely Part 36 Offer.

118. The single meaning found, is inevitably a "crude yardstick" as it was described by Lord Nicholls in *Charleston v News Group Newspapers* [1995] 2 AC 65 at 73. A court (or a jury) is always called upon to be the ultimate arbiter of what words complained of in libel litigation mean, and both claimant and defendant pitch their meaning (strictly the meaning a defendant justifies) at a particular level. The claimant should do so at the gravest defamatory meaning he contends the words complained of bear. This meaning puts a "ceiling" on damages. It doesn't however prevent the recovery of damages if meaning is ultimately determined at a lower level. The matter was explained in this way by Diplock LJ in *Slim v Daily Telegraph* [1968] 2 QB 157 at 175:

> "…the plaintiff is, in effect, estopped from contending that the words do bear a *more* injurious meaning and claiming damages on that basis. But the averment does not of itself prevent the plaintiff from contending at trial that even if the words do not bear the defamatory meaning alleged in the statement of claim to be the natural and ordinary meaning of the words, they nevertheless bear some other meaning *less* injurious to the plaintiff's reputation."

119. I can see no difference in principle where the matter is adjudicated on pre-trial. In other words it does not follow in my view that an action is an abuse of the process of the court if pursued in respect of a lower meaning than that originally complained of, after a pre-trial ruling such as that which was made in this case. There may be some room for debate about whether a claimant at trial can rely on a substantially different meaning to that of which he complains, rather than a variant or lower level of

meaning in the same "ladder". But the argument here is not a theoretical one. It has been found that the Article defames Mr Miller. In my view the allegation made is a very unpleasant one against a professional man in his position, affecting a core attribute of his personality. It cannot be said to be trivial: on the contrary, it is serious for the very reason identified by Hirst LJ in *Shah*: its sting is that the claimant has by his conduct brought suspicion upon himself (see paragraph 14 above).

120. The Article was published as a front page splash in one of the most popular newspapers in the country with a circulation of millions. The defamatory meaning found by the judge has been defended "tooth and nail" by the Defendant as true, even though it is a higher meaning than the Defendant originally justified. It is plain in my judgment from Mr Miller's evidence, that this is an action which has been genuinely pursued by a claimant who feels himself to have been grievously wronged. When it was put to him that he would not have started this action if he had known of the meaning Tugendhat J would rule that it bore for example, he said: "I am a professional management consultant. I need the trust of people in my integrity for me to do my business work, never mind to have respect from my family, my friends, my acquaintances, and very very importantly, the hidden objection from people I don't know and I've never met who can mutter and mumble bad things have been done." The open offer made was one Mr Miller was entitled to reject in my view. It contained no offer of an apology and the damages offered were low. I can find no principled or rational basis for concluding Mr Miller's continuation with the claim after the ruling by Tugendhat J, was an abuse of the process in these circumstances.

Issue three: damages

121. A number of particular factors have to be considered here. First, Mr Miller relies on repetition of the sting complained of in 5 subsequent articles published in the Daily Mail. Whether it is legitimate do so is a matter of some debate. In *Collins Stewart v Financial Times Ltd* [2006] EMLR 5 at [26] and [27] Gray J expressed the view that there were sound reasons of principle and practice why a claimant should pursue a separate complaint in respect of subsequent articles rather than relying on them in aggravation of damages. The editors of *Duncan and Neill on Defamation* (3rd edition) on the other hand after referring to that decision, submit that if a claimant were to seek to rely upon later publications as aggravating the damages (rather than by way of separate causes of action) the court would decide what is required to do justice between the parties, using its case management powers. It seems to me as a minimum that normally the words complained of should be specified, if not actually set out, as should the meaning which the claimant says should be attributed to them. The practical difficulty is that this wasn't done here though the Defendant said in its defence that Mr Miller should do so. Further, as Mr Warby pointed out, there was no reconsideration of this part of the claim following the ruling on meaning; and the Defendant does not accept these articles bear the meaning the Article bears. I do not think the answer is as Mr Barca suggested that the Defendant did not apply to strike out this part of the claim, since the onus is on the claimant to make good a claim in aggravation of damages. I have concluded therefore that I should focus as did the parties, on the Article, and the damages flowing from its publication.

122. Secondly, I must be astute to ensure as Mr Warby submitted, that the award of damages does not "cover" or take account of the articles of which Mr Miller did not

complain, and their effect on him: that is those which were published before the Article itself.

123. Thirdly it seems to me that Mr Miller is entitled to rely on the following matters in aggravation of damages. (i) The Defendant's failure to publish any apology or correction or retraction, despite the errors it admitted in relation to the "vanity" contract. (ii) Its persistence in its defence of justification to trial and the accusation also publicly made that Mr Miller was abusing the process of the court by continuing with his action. (iii) The cross-examination of Mr Miller: though courteous as I have said, was lengthy and tenacious. It was obviously a considerable ordeal for Mr Miller. (iv) The prominence of the Article, and the influential nature of the Daily Mail. It is true that the focus was on Sir Ian Blair as the Defendant said, but Mr Miller was undoubtedly subject to significant collateral damage, if I can so describe it. (v) The failure to contact Mr Miller before publication. The Defendant suggested Mr Miller would not have responded if asked because of confidentiality issues concerning the sale of Impact Plus to Hitachi. I have no doubt that Mr Miller would have done so. His response to the point in cross-examination was heartfelt: "If it had been on, shall we say, very complicated questions, I would not have responded. But if a journalist from the Daily Mail had contacted me to say. "We're thinking of running a story which says that there was a vanity contract, there was an image makeover, that it was not competed, do you have any comments to make?" I would have said, "You bet. Everything you've just said is a pack of lies." Nobody from the Daily Mail had the courtesy to contact me before they wrote something that trashed my reputation."

124. Fourthly, this is not a case in my judgment, where any of the matters relied on in justification [18] or in the abuse argument, operate to reduce the damages. Nor is this a case where directly relevant facts have been proved which should be taken into account in relation to damages. [19] There are no mitigating factors.

125. I turn then more directly to the question of assessment. The question is what sum is reasonably required to compensate Mr Miller and re-establish his reputation. As was said in *John v MGN Ltd* [1997] QB 586 at 607, CA

> "The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused."

126. Mr Miller was evidently extremely angry about and upset by the Article and the effect it had on his reputation: it had been "trashed" as he described it, by an Article which contained ghastly insinuations, and was nasty and devious. Both he and his wife were forced to give some sort of explanation to people of allegations that were totally unreasonable, totally untrue and could be proved to be untrue. Mr Miller said he felt the atmosphere change amongst for example, his tennis club where he had many acquaintances, and where he was told people were talking about the articles and wondering whether he was a bit dodgy. People made hurtful comments and would

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[18] See for example in *Pamplin v Express Newspapers* Ltd [1988] 1 WLR 116 at 120, CA.

[19] *Burstein v Times Newspapers* Ltd [2001] 1 WLR 579, CA.

crack so-called jokes: "Oh here comes the copper's mate, here comes dodgy Andy onto court." He acknowledged that such comments may have started in July 2008 but they got worse after the 2nd October. He was told by a respected journalist in the insurance industry that his reputation in the insurance industry – the single most important sector to him now he had retired from Impact Plus - had been seriously damaged; and he was very distressed by the effect this all had had on his family. It was also apparent that the litigation itself had put him under considerable strain, dealing for example with the "rainforest" of papers as he described it, and the further allegations made at the trial itself. Mrs Miller described both the effect of the Article and the litigation itself on Mr Miller. She said it was the specific wording of it that really got under his skin and made him so angry, and the litigation process had made it much more difficult.

127. I take account of all the factors set out above. I have already said I regard the allegation made by the Article as serious. It was very prominently published to many millions of people. I am in no doubt that Mr Miller had suffered considerably as a result of its publication; and was very distressed and hurt by it. There was substantial aggravation in my view. This is also a case where a significant award is required to vindicate Mr Miller's good name, "in case the libel, driven underground emerges from its lurking place at some future date" and so "he can point to a sum sufficient to convince a bystander of the baselessness of the charge." [20] and to restore Mr Miller's reputation. In the light of all these matters Mr Miller is awarded damages in the sum of £65,000.

[20] *Cassell* op cit at 1027 at 1070-1071, per Lord Hailsham LC-