Neutral Citation Number: [2009] EWHC 1717 (QB)

Case No: HQ08X01392

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2009

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

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Between :

AJINOMOTO SWEETENERS EUROPE SAS	**Claimant**
- and -	
ASDA STORES LIMITED	**Defendant**

- -
- -

Mr James Price QC and Mr Matthew Nicklin (instructed by **CMS Cameron McKenna**) for the **Claimant**
Mr Andrew Caldecott QC and Mr Manuel Barca (instructed by **Kempner Robinson**) for the **Defendant**

Hearing dates: 6 July 2009

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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 MR JUSTICE TUGENDHAT

Mr Justice Tugendhat:

1. On 15 May 2007 ASDA (as the Defendant is normally referred to) announced that it would become the first supermarket in Britain to commit to the removal of all artificial colours and flavours from its own label food and soft drink products. Since then it has marketed a wide range of food products in its own brand range "Good for you", and its own brand cola, bearing words which the Claimant claims are a malicious falsehood. ASDA is one of the leading supermarket chains in the UK.

THE WORDS COMPLAINED OF

2. The words complained of appear on a large number of food products. Some 80 or so are listed in an Appendix to the Particulars of Claim. The food products bear two different types of wording complained of by the Claimant. The difference apparently depends upon whether or not the product is sweetened. For example, yogurts, mousses and dairy cream packaging includes the following words:

> "ASDA Good for you – less than [a figure is given] % fat – No hidden nasties* - [there then follows the description of the product]
> * no artificial colours or flavours, no aspartame & no hydrogenated fat".

3. For other food products, such as "ready to eat cooked and sliced chicken breast", on the front of the package the note following the asterisk omits the words "no aspartame". But for such products there is another note at the back of the package:

> "We promise that all good for you products are always low or lower in fat and won't ever contain any * hydrogenated fat, artificial flavours, artificial colours or aspartame ".

4. ASDA's own brand cola bears the words: "zero sugar zero aspartame".

THE MEANINGS COMPLAINED OF

5. The Claimant pleads that:

> "In their natural and ordinary meaning, the words on the packaging of the 'Good for you' range and the ASDA own brand cola meant … that aspartame [1] is an especially harmful or unhealthy, or [2] potentially harmful or unhealthy, sweetener, and [3] is one which consumers concerned for their own health and that of their families would do well to avoid, either altogether or in the quantities likely to be found in soft drinks and other food products" (numbering added).

6. There are there in the phrases numbered [2] and [3] at least two alternative meanings of different levels of seriousness. I shall refer to the pleaded meanings as "meaning [1]", "meaning [2]" and "meaning [3]". Meaning [1] is especially, i.e. actually, harmful or unhealthy and meaning [2] is potentially harmful or unhealthy.

THE CLAIMANT'S CLAIM

7. The Claimant is the European subsidiary of a Japanese multinational corporation. It manufactures and sells aspartame to food and beverage industries in the UK (and elsewhere). The Claimant claims to have a 45% share of the European market for aspartame.

8. It is not, of course, suggested that any of the information on these packages is false in the sense that the products do in fact contain aspartame, contrary to what is stated. The complaint is that, by advertising that their own brand products do not contain aspartame, ASDA is impliedly making a statement derogatory of products that do contain aspartame, and so of aspartame itself. The Claimant claims that this implied derogatory statement is a false statement. The Claimant goes on to say that ASDA know that the implied statement is false, and that that is malice in this context. The Claimant claims that these false statements are calculated to cause pecuniary damage to the Claimant in respect of its business. The Claimant claims that if such statements continue to be made by ASDA, then shoppers will be scared of buying products containing aspartame, and the Claimant will lose sales. By this I do not mean to convey that this case is only about the Claimant's profits. There is a public interest involved. If aspartame is safe, which I have no reason to doubt, then it would be a loss to the public, and deprive them of freedom of choice, if it were to become stigmatised for no good reason. But this consideration is not an element of the tort of malicious falsehood.

9. Four allegations made by the Claimant constitute the necessary elements for the tort of malicious falsehood, in accordance with the Defamation Act 1952 s.3: (1) a false statement (2) referring to the claimant's goods (3) published maliciously and (4) calculated to cause pecuniary damage.

THE ORDER FOR TRIAL OF A PRELIMINARY ISSUE

10. On 8 April 2009 Sir Charles Gray ordered that there be the trial of preliminary issue on meaning. The Order as drawn up reads:

> "The issue of what meaning or statement(s) of fact are borne or conveyed by the words complained of in paragraphs 4 and 8 of the Particulars of Claim be tried as a preliminary issue".

11. Para 4 of the Particulars of Claim relates to the packaging on the food and cola to which I have already referred. Para 8 relates to an e-mail sent by ASDA on 13 September 2007 to suppliers who manufacture ASDA's own brand products. It is said to bear the same meaning as the words on the packaging, and I shall return to it later.

12. The order as drawn raises an open ended question, which permits a number of answers simultaneously: what meaning or statements (in the plural) are borne by the words complained of? Whether that is what the order means may depend upon what Sir Charles Gray gave in his judgment as his reasons for making the order. It was the claimant that applied for the trial of an issue by preliminary issue, through their counsel Mr Nicklin. Sir Charles Gray's judgment includes the following:

> "13. In an action for damages for malicious falsehood the burden of proving the falsity of the words in whatever meaning they are found to bear lies on the claimant. If Ajinomoto fails to establish that the words complained of bear the natural and ordinary meaning alleged, its claim will fail. In its defence Asda, as it was perfectly entitled to do, did not specify what meaning it contends is borne by the words complained of. I should for completeness record the fact that in Further Information, served pursuant to a Part 18 Request, Asda asserted that "the only relevant statement of fact contained in the words complained of is that the products in question contain no (zero) aspartame…
>
> 32. … I accept that in the present case the issue of meaning is self-contained or, as Mr Nicklin put it, a "slam dunk" point. If Ajinomoto's meaning is rejected, that will be an end of the case. If on the other hand Ajinomoto's natural and ordinary meaning is upheld, Asda will know what it is that Ajinomoto has to establish in order to succeed on the issues of falsity and malice. The parameters within which the issue of falsity will or may fall to be determined thereafter will have been set by the court's preliminary determination of the issue of meaning. As regards the issue of malice, I accept that the single meaning rule does not apply when it comes to determining that issue (see Gatley at paragraph 17.23 and *Bonnick v Morris* [2003] 1 AC 300), but I think that a preliminary decision on meaning may also assist the parties when they come to consider their respective positions on the issue of malice….
>
> 37. I am satisfied that the issue whether the words complained of would be understood to bear the natural and ordinary meaning pleaded in paragraph 7(1) of the Particulars of Claim is suitable for trial as a separate and preliminary issue in the action…."

13. The question posed in para 37 of the judgment is not open-ended: it requires to be answered Yes or No. Thus the form of the Order leaves open an issue between the parties, which is referred to in the judgment, but not resolved by Sir Charles Gray, namely whether or not the rule, known in defamation as the single meaning rule, also applies to the tort of malicious falsehood. If it does apply to malicious falsehood, only one answer may be given to the question posed in the Order. If it does not apply to malicious falsehood, then the answer may be either one meaning, or two or more different meanings.

THE SINGLE MEANING RULE

14. The rule is explained by the House of Lords in *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65. In that case the defendant newspaper had published an article with a headline and illustrated by photographs. The plaintiff complained of the meaning which they said was conveyed to a publishee who read the headline and looked at the picture, but did not read the article. The question for the court was

whether the publication could bear two meanings: one for that group of readers who read the headline and looked at the pictures, but did not read the article, and a second meaning for publishees who read and looked at all three, the headline, the pictures and the article. The context is thus a little different from that in the present case (as will appear). But that does not alter the principle.

15. Lord Bridge said at pp71E-72F:

> "… two principles … are basic to the law of libel. The first is that, where no legal innuendo is alleged to arise from extrinsic circumstances known to some readers, the "natural and ordinary meaning" to be ascribed to the words of an allegedly defamatory publication is the meaning, including any inferential meaning, which the words would convey to the mind of the ordinary, reasonable, fair-minded reader. This proposition is too well established to require citation of authority. The second principle, which is perhaps a corollary of the first, is that, although a combination of words may in fact convey different meanings to the minds of different readers, the jury in a libel action, applying the criterion which the first principle dictates, is required to determine the single meaning which the publication conveyed to the notional reasonable reader and to base its verdict and any award of damages on the assumption that this was the one sense in which all readers would have understood it. The origins and the implications of this second principle are the subject of a characteristically penetrating analysis in the judgment of Diplock L.J. in *Slim v. Daily Telegraph Ltd.* [1968] 2 Q.B. 157, 171-172, 173, 174, from which it will, I think, be sufficient to cite the following passages:
>
> > "Everyone outside a court of law recognises that words are imprecise instruments for communicating the thoughts of one man to another.
> >
> > The same words may be understood by one man in a different meaning from that in which they are understood by another and both meanings may be different from that which the author of the words intended to convey. But the notion that the same words should bear different meanings to different men and that more than one meaning should be 'right' conflicts with the whole training of a lawyer. Words are the tools of his trade. He uses them to define legal rights and duties. They do not achieve that purpose unless there can be attributed to them a single meaning as the 'right' meaning. And so the argument between lawyers as to the meaning of words starts with the unexpressed major premise that any particular combination of words has one meaning which is not necessarily the same as that intended by him who published them or understood by any of those who read them but is capable of ascertainment as being the 'right' meaning

> by the adjudicator to whom the law confides the responsibility of determining it. . . .
>
> "Where, as in the present case, words are published to the millions of readers of a popular newspaper, the chances are that if the words are reasonably capable of being understood as bearing more than one meaning, some readers will have understood them as bearing one of those meanings and some will have understood them as bearing others of those meanings. But none of this matters. What does matter is what the adjudicator at the trial thinks is the one and only meaning that the readers as reasonable men should have collectively understood the words to bear. That is 'the natural and ordinary meaning' of words in an action for libel. . . .
>
> "Juries, in theory, must be unanimous upon every issue on which they have to adjudicate; and since the damages that they award must depend upon the defamatory meaning that they attribute to the words, they must all agree upon a single meaning as being the 'right' meaning. And so the unexpressed major premise, that any particular combination of words can bear but a single 'natural and ordinary meaning' which is 'right,' survived the transfer from judge to jury of the function of adjudicating upon the meaning of words in civil actions for libel."
>
> It is precisely the application of the principle so clearly expounded in these passages which, in a libel action where no legal innuendo is alleged, prevents either side from calling witnesses to say what they understood the allegedly defamatory publication to mean. But it would surely be even more destructive of the principle that a publication has "the one and only meaning that the readers as reasonable men should have collectively understood the words to bear" to allow the plaintiff, without evidence, to invite the jury to infer that different groups of readers read different parts of the entire publication and for that reason understood it to mean different things, some defamatory, some not."

16. Lord Nicholls agreed and added this at pp73F-74B:

> "At first sight one would expect the law to recognise that some newspaper readers will have seen only the banner headline and glanced at the picture. They will not have read the text of the accompanying article. In the minds of these readers, the reputation of the person who is the subject of the defamatory headline and picture will have suffered. He has been defamed to these readers. The newspaper could have no cause for complaint if it were held liable accordingly. It has chosen, for its own purposes, to produce a headline which is defamatory. It

> cannot be heard to say that the article must be read as a whole when it knows that not all readers will read the whole article.
>
> To anyone unversed in the law of defamation that, I venture to think, would appear to be the common sense of the matter. Long ago, however, the law of defamation headed firmly in a different direction. The law adopts a single standard for determining whether a newspaper article is defamatory: the ordinary reader of that newspaper. I leave aside cases where some readers may have special knowledge of facts which would cause them to give the words a different meaning.
>
> In principle this is a crude yardstick, because readers of mass circulation newspapers vary enormously in the way they read articles and the way they interpret what they read. It is, indeed, in this very consideration that the law finds justification for its single standard. The consequence is that, in the case of some publications, there may be many readers who understand in a defamatory sense words which, by the single standard of the ordinary reader, were not defamatory. In respect of those readers a plaintiff has no remedy. The converse is equally true. So a newspaper may find itself paying damages for libel assessed by reference to a readership many of whose members did not read the words in a defamatory sense.
>
> I do not see how, consistently with this single standard, it is possible to carve the readership of one article into different groups:..."

17. There is no corresponding decision in relation to the tort of malicious falsehood. The reference by Diplock LJ to juries is of limited relevant to the tort of malicious falsehood. Claims in malicious falsehood have long been tried in the Chancery Division without a jury. They are not common in the Queen's Bench Division. They are often linked to other claims which have to be brought in the Chancery Division, such as trade mark infringement. In one such case, *Vodafone Group Plc v Orange Personal Communications Services Ltd* [1997] FSR 34, Jacob J, as he then was, questioned (but did not have to decide) whether the single meaning rule does apply to malicious falsehood. He said this:

> "As a comparative stranger to this branch of the law I find the "one meaning rule" strange, particularly for malicious falsehood. Without authority, I should have thought it would be enough to satisfy the criterion of falsity for the plaintiff to prove that the defendant made a statement which was false to a substantial number of people. That, for instance, is the position in passing off (a tort also concerned with false representations): for that tort it is enough to show that the representation fools some of the people, even if not most of them.
>
> The reason for the libel rule in part relates to the entitlement of jury trial for libel (as Diplock L.J. explained in *Slim*). Save in

> exceptional circumstances the right to jury trial remains for libel and slander (see section 69(1) of the Supreme Court Act 1981) but there is no such right in relation to malicious falsehood. So it by no means follows that that historical reason for the rule in libel should apply to malicious falsehood. Another reason for the rule relates to the function of a jury in awarding damages for defamation: unless one has settled on a particular meaning one cannot judge the extent of the defamation. But in malicious falsehood damages are rather different: they are essentially compensatory for pecuniary loss as for most other torts. So again it does not seem necessarily to follow that the libel rule should apply to the tort. However, as I say, the parties were agreed that I should proceed on the basis that I am a notional jury identifying the single meaning of the words complained of. That is what I will do, and, as will be seen, in this case the point is academic."

18. Mr Price, now leading Mr Nicklin, submits that the single meaning rule does not apply in malicious falsehood. But, he submits, that is academic in this case, because the words complained of are not ambiguous. I do not agree that it is academic. On his own case the words are sufficiently ambiguous for the pleader to have pleaded different meanings of at least two possible levels of seriousness: see para 6 above.

19. Further explanation is needed of the single meaning rule. The law accepts that the same words may bear two (or more) meanings. But there can be only one natural and ordinary meaning. Any other meaning must be what is called an innuendo. An innuendo meaning is one which would be understood only by publishees who know facts which are neither stated in the words complained of, nor part of general knowledge. These are known as extrinsic facts, as mentioned by Lord Bridge in *Charleston*. In *Grubb v Bristol United Press Ltd* [1963] 1 QB 309, at 327 Pearce LJ said:

> "... any innuendo (that is, any allegation that the words were used in a defamatory sense other than their ordinary meaning) cannot rely on a mere interpretation of the words of the libel itself but must be supported by extrinsic facts or matters. Thus, there is one cause of action for the libel itself, based on whatever imputations or implications can reasonably be derived from the words themselves, and there is another different cause of action, namely, the innuendo, based not merely on the libel itself but on an extended meaning created by a conjunction of the words with something outside them. The latter cause of action cannot come into existence unless there is some extrinsic fact to create the extended meaning."

20. However, the difference between an innuendo meaning and a natural and ordinary meaning is not clear cut. It is a matter of degree.

21. In *Skelton v Jones* [1963] 1 W.L.R. 1362, 1370-1371 Lord Morris explained the width of the concept of natural and ordinary meaning as follows:

> "The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words. See *Lewis v. Daily Telegraph Ltd*…. The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words."

22. It is of course an implied or inferred meaning that the Claimant alleges in this case: see para 5 above. The difficulty that may arise is in distinguishing "general knowledge", which the court must take into account in deciding the natural and ordinary meaning, and "extrinsic facts", which may only be taken into account if a claimant alleges an innuendo meaning.

23. The experienced pleader in the present case faced that difficulty: He did initially plead an innuendo meaning, but the Claimant later abandoned it in circumstances described in his judgment by Sir Charles Gray. And the Claimant is now faced with an amendment to the Defence (referred to below at para 50) which Mr Price says leaves him uncertain as to what sort of meaning that could be relevant to.

24. In the end, the matter has proceeded before me on the footing that the only type of meaning I have to consider is a natural and ordinary meaning. So, if the single meaning rule applies, the question then becomes: what general knowledge is to be attributed to the reasonable reader?

25. The personal qualities, and the manner of reading, to be attributed to the reasonable reader for the purposes of deciding meaning have evolved over a period of more than a century of case law. These qualities were most recently summarised in *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 where Sir Anthony Clarke MR said at [14]:

> "The governing principles relevant to meaning … may be summarised in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any "bane and antidote" taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce

> of some strained, or forced, or utterly unreasonable interpretation…" …. (8) It follows that "it is not enough to say that by some person or another the words might be understood in a defamatory sense."".

26. The hypothetical readers in the present case are the millions of shoppers and consumers who eat and drink food and beverages bought at ASDA, and who will continue to do so in the future. So, what Lord Nicholls said about readers of mass circulation newspapers, applies with at least as much force to them: they vary enormously in the way they read articles and the way they interpret what they read. They will have greatly differing levels of general knowledge, and will read the packaging in different ways. Some will hardly read the packaging at all, perhaps feeling little respect for any form of advertising. Those on a diet, or with an allergy, may want to know every piece of information written on the packaging, and read it with care. In the case of some products the packaging is not disposable. For example "real dairy squirty cream" is in a canister. That may be expected to stay on the kitchen table during a meal, giving time for the consumers to study it casually when they have nothing more interesting to do.

27. The parties agree that to answer the question whether the single meaning rule applies to malicious falsehood it is necessary to consider the reason why the rule exists in defamation. Mr Price submits that the reason is historical, and he cites Diplock LJ's account in *Slim* at p174F (cited above) of the need for the rule in cases to be tried by jury. He also notes the consequences of the rule to which Lord Nicholls drew attention in *Charleston*. Thus, he submits, it has no place in malicious falsehood. If this is right the Claimant can succeed, in Jacob J's words, if he can prove that "the statement was false to a substantial number of people". Claimants may be expected to adopt Mr Price's stance. It is likely to give them a better chance of success, albeit that if they do succeed they may recover lower damages than they would recover if they succeed under the single meaning rule. But in many cases, damages are not the major consideration for a claimant. In many cases, what claimants want is to demonstrate what they say is the truth.

28. Mr Caldecott submits that the reason for the rule is to be found in what would now be expressed in terms of Art 10 and the Human Rights Act. He cites the words of Morland J in *Charterhouse Clinical Research Unit Ltd v Richmond Pharmacology Ltd* [2003] EWHC 1099 para 14:

> "… it is the duty of the courts to keep claims alleging trade libels within their proper bounds, particularly having regard to s.12(4) of the Human Rights Act 1998 and Article 10 of the Convention…"

29. In my judgment the reason for the rule in defamation is to protect freedom of expression on the one hand, and the right to reputation on the other hand, striking a balance between the two. The rule is a control mechanism.

30. That this is the reason for the rule can be seen from the examples given in *Slim* and *Charleston*. Where words are addressed to millions of people, there are likely to be people who genuinely give to the words a meaning which the law characterises as illegitimate. This may be because (as in *Charleston*) they do not read all the words, or

(as in *Slim*), because they just understand them differently or, as in cases such as the present, because they have different levels of general knowledge, or read them in different circumstances. If there were not the single meaning rule, then a claimant would be entitled to adduce evidence from a witness who understood the words in what the law characterises as an illegitimate sense, and in whose eyes the claimant's reputation was accordingly damaged.

31. An alternative to the single meaning rule would be, as suggested by Jacob J, that the statement was false to a substantial number of people. That test would not, of course, apply when the statement was made only to one, or a few people, as is sometimes the case. In such a case the alternative to the single meaning rule might in effect have to be whatever meaning happens to be attributed to the statement by the person to whom it is made. Either of these alternatives would strike a balance more favourable to protection of reputation, and less to freedom of expression, than the existing rule. They would allow more successful claims in defamation.

32. According to Gatley (11th ed para 3.16), at some time well before 1807 "… words were construed *mitiori sensu*, that is to say the mildest meaning would be attributed to them even if that involved a forced and artificial construction". A version of the single meaning rule which applied the mildest meaning would strike the balance between protection of reputation and respect for freedom of expression at a point less favourable to protection of the right to reputation, and more favourable to the right of freedom of expression. It would tend to reduce the possibilities of successful claims in defamation. So to that extent there was more freedom of expression before 1807 in relation to defamation. There are possible variations, or additions, to each of the sub-paragraphs (1) to (8) cited above from *Jeynes* which, if made, would tend to increase, or decrease, the likelihood of successful defamation actions. The law would then strike the balance between protection of reputation and respect for freedom of expression at a point more, or less, favourable to protection of reputation.

33. Much of the modern rule was established by, or by the time of, *Capital and Counties Bank v Henty* (1881-82) LR 7 App Cas 741. In that case, as Lord Blackburn recorded at p 769, the claim was as follows:

> ""1. The plaintiffs are bankers, and the defendants are brewers. 2. The defendants falsely and maliciously wrote and published of the plaintiffs the letter following: 'Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank (late the Hampshire and North Wilts). Westgate, Chichester, 2nd December, 1878.' Meaning thereby that the plaintiffs were not to be relied upon to meet the cheques drawn on them, and that their position was such that they were not to be trusted to cash the cheques of their customers.""

34. It was held that there was no case to go to the jury. At p 772 Lord Blackburn said:

> "In construing the words to see whether they are a libel, the Court is, where nothing is alleged to give them an extended sense, to put that meaning on them which the words would be understood by ordinary persons to bear, and say whether the

> words so understood are calculated to convey an injurious imputation. The question is not whether the defendant intended to convey that imputation; for if he, without excuse or justification, did what he knew or ought to have known was calculated to injure the plaintiff, he must (at least civilly) be responsible for the consequences, though his object might have been to injure another person than the plaintiff, or though he may have written in levity only. As was said in the opinion of the judges delivered in the House of Lords during the discussion of Fox's Bill, I think quite justly, no one can cast about firebrands and death, and then escape from being responsible by saying he was in sport."

35. At p785-6 Lord Blackburn applied this principle to the facts of that case as follows (albeit with some hesitation, expressed at p787):

> "There can be no doubt that the defendants were not required to take cheques drawn on this bank …, and had a right to refuse to do so. No reason was needed to justify such a refusal.... there are so many reasons why a person may refuse to take on account the cheques drawn on a particular bank, that, ... , the Court could not say that the letter, which in terms goes no further than merely to state the fact, was libellous, as tending to impute a doubt of the credit of the bank. No doubt some people might guess that the refusal was on that ground, but ... it is unreasonable that when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document. I do not think it libellous by itself to state the fact."

36. Thus the single meaning rule, by applying the reasonableness test, makes the publisher liable for a less serious meaning than he might have intended, if he ought to have known his words would convey that. But by the same token it absolves him from liability for a more serious meaning than he might have intended unless he ought to have known his words would convey that. What he actually knew or intended is irrelevant. And what unreasonable publishees may have understood him to mean is also irrelevant.

37. It is common ground, as Sir Charles Gray observed, that where a claimant alleges that the words he complains of are defamatory, as well as that they are a malicious falsehood, he is free to choose which cause of action to pursue. In this case the Claimant could have sued in defamation, but chose to sue in malicious falsehood. Where such a choice exists, it is in the interests of legal consistency, and of freedom of expression, that the same rule of interpretation should apply to both torts.

38. The present case involves a Convention right, namely the freedom of expression of ASDA. It does not involve Article 8 (which includes reputation) because the Claimant has not sued in defamation to protect its own reputation. So if there is another Convention right engaged it can only be the right to protection of property (the First Protocol, Art 1). It is true that, unlike defamation, malicious falsehood has another control mechanism, namely the need to prove malice and, either actual damage, or a

statement calculated to cause pecuniary damage. I have not overlooked that these are requirements which tend to protect freedom of expression, but which are not requirements in the law of defamation. But the fact that the balance to be struck in this case is between the Claimant's property rights and the Defendant's right of freedom of expression (albeit in a commercial context) does not justify any less regard being paid to freedom of expression.

39. For these reasons I accept the submission of Mr Caldecott and hold that the single meaning rule applies to the malicious falsehood alleged in the present case.

40. It remains to consider how the single meaning rule is to be adapted to malicious falsehood. In a defamation case the court would start with the proposition in sub-para (2) from *Jeynes* (and the *Capital and Counties* case). The court should not select one bad meaning where other non-defamatory meanings are available. I adapt that to malicious falsehood in this way. If there are two meanings, both reasonably possible, but in one meaning it is said that the statement is false, and in the other it is not, then the court should adopt the meaning in which the statement is not alleged to be false. In taking this approach, the court will have particular regard to the Art 10 right of freedom of expression, as required by the Human Rights Act s.12(4).

41. I would add this. Claimants (or their lawyers) commonly attempt to characterise all forms of expression as being, or implying, statements of fact or opinion. And when they recognise an opinion, they characterise that as implying the factual statement that the speaker actually holds that opinion. They do this because the law of malicious falsehood is concerned only with the statements of fact, and the law of defamation is almost always concerned only with statements of fact or opinion (the exception is words expressing ridicule). In this case Mr Price made clear that if this case goes further he will submit that, if the packaging complained of is an expression of opinion, then it is an opinion that ASDA does not in fact hold. But in my judgment it is not reasonable to interpret all forms of expression as statements of fact. There are many forms of expression. These include invitations, attempts to attract attention, and questions. All of these (and other) forms of expression are used in advertising. It is not every statement that is meant to be taken seriously (see paras 47 and 48 below). So the single meaning rule also requires that a statement should not be interpreted as a statement of fact, if it would be unreasonable to do that.

THE FORM OF THE WORDS COMPLAINED OF

42. Because meaning depends on context, it is necessary to give a fuller description of the packaging.

43. It varies slightly from product to product, but the yogurt can be taken as representative. The packaging is predominantly in cheerful yellow and green colours. The product is identified by a description in large regular (that is vertical) font, in lower case letters eg "greek style yogurt with strawberry compote". A more detailed description is given in a smaller regular font on a lower line. Above or beside the description, there is a primitive picture of a flower, resembling a sunflower. It is depicted in a style similar to that which a young child might adopt. In the yellow centre of the sunflower appear on three separate lines the words "ASDA Good for you". "ASDA" is in a bold regular font. "Good" on the second line, and "for you" on the third line, are in a font which resembles handwriting. There are eight green leaves

depicted around the yellow flower centre. On one of the leaves is the fat content, eg "less than 3% fat", with prominence given to the "3%". The words are white on green, in a regular font and small capital letters. On the next leaf down appear the words "No hidden nasties*". These too are white on green, in regular font. "No" is in large capital letters and "hidden nasties" in small capital letters. Below the description of the product are the words: "*no artificial colours or flavours, no aspartame & no hydrogenated fat". These are in a font resembling handwriting. Below and to the right of those words there is what looks like a leaf which has fallen off the flower. Inside that are the calories in a font similar to that for the fat content. Below that is a rectangular box, or boxes, in a less cheerful, more businesslike style. The rectangles have black borders. In black regular font are the "Display until" date, the "use by" date and "keep refrigerated". In other products, as appropriate, there are cooking instructions and lists of ingredients. All such information given in businesslike regular black font.

44. The cola packaging is in a quite different style. The word cola is in large capital letters on a grey background, together resembling an American car number plate. The background is black and red, with black covering a larger area than red. Above the word cola, in smaller capital letters, but still very prominent, are the words "zero sugar zero aspartame" on two lines, each preceded by a bullet point. The font is white on the black background, with red outlining round each letter.

45. The most significant difference between the cola and the other products, is that the words "Good for you" and "nasties" do not appear on the cola packaging, whereas they do appear on all the others.

46. In the spoken word, the meaning of a statement is conveyed not only by the words used, but also by the tone of voice, facial expression and other body language, as well the as the context as a whole. In the written word generally, and advertising in particular, some of the meaning is conveyed by the choice of font and colours. So, for example, important information which is intended to be understood literally, including safety information required by statute or regulation, is commonly conveyed in regular type printed in black. Examples in this case are the "use by date", "keep refrigerated", the weight and the price. Capital letters are used to convey emphasis. The meaning conveyed by other fonts and colours is generally less clear, and, as with all questions of meaning, it depends on all the circumstances.

47. There is case law on how the court should approach the question of meaning in cases of marketing. As Jacob J said in *Vodafone* at p38-39:

> "This is a case about advertising. The public are used to the ways of advertisers and expect a certain amount of hyperbole. In particular the public are used to advertisers claiming the good points of a product and ignoring others, … and the public are reasonably used to comparisons— " knocking copy" as it is called in the advertising world. This is important in considering what the ordinary meaning may be. The test is whether a reasonable man would take the claim being made as one made seriously, the more precise the claim the more it is likely to be so taken— the more general or fuzzy the less so."

48. In *Macmillan Magazines Ltd v RCN Publishing* [1998] FSR 9 Neuberger J, as he then was, cited this passage at p12-13, saying it was "the proper approach to be applied to advertising" in that case.

SUBMISSIONS ON MEANING

49. Although there is no innuendo now pleaded in this case, both parties took me to the parts of the pleadings relating to falsehood and malice. They did this to demonstrate examples of what they said are the relevant general knowledge. These show that one of the issues between the parties is as to whether or not there is any doubt or controversy about the safety of aspartame. The parties agree that adverse views have been expressed about aspartame, whether reasonably or otherwise, and whether or not this can be said to amount to a real dispute. Two examples are:

i) In para 12.15.8 of the Defence ASDA pleads the following:

> "On 21 December 2007, the (UK) Food Standards Agency ("FSA")… announced (emphasis added):
>
> > 'a proposal to undertake further research on the artificial sweetener aspartame. Despite extensive safety testing and approval for use in many countries around the world, including the UK, **there continues to be a significant level of consumer concern about this sweetener**.
> >
> > At a recent meeting of [EFSA's] Advisory Forum, the Agency proposed that an EFSA-led study be undertaken of self-selected groups who are sensitive to aspartame. The idea is that the study would compare reported symptoms and biochemical parameters in a double-blind cross over design. EFSA has welcomed the Agency's proposal and will arrange a meeting with key Member states to discuss this further.'"

ii) In para 2.6 of the Reply the Claimant pleads the following:

> "As part of the Frequently Asked Questions section on its website about aspartame, EFSA publishes the following information:
>
> *Is it safe to eat products containing aspartame?*
>
> Based on the previous thorough evaluations and the new opinion from the AFC Panel, EFSA considers that aspartame remains safe for human consumption and that there is no scientific basis for reconsidering its use in foods. Based on the Panel's assessment, EFSA does not see a need for consumers who choose to eat products containing aspartame to modify their dietary habits.

> *The safety of aspartame has been questioned in the past. How does EFSA guarantee the independence of its scientific advice*?
>
> …"

50. Although Mr Price reluctantly agreed to the application to amend the Defence to add paras 7.1 and 7.2, he did not accept that there was evidence before me that any publishees knew the facts pleaded, or that they were general knowledge. Those paragraphs read as follows:

> "7.1 It is denied that the various words complained of in 4 bore or were understood to bear the meanings pleaded in 6 as alleged or at all. Without prejudice to the generality of that denial;
>
> (1) artificial colours or flavours are used in a vast range of food and drink products as widely sold in supermarkets and generally;
>
> (2) many food and drink products as sold in supermarkets and generally do not have low fat content;
>
> (3) many food and drink products as sold in supermarkets and generally do not have low or zero sugar content;
>
> (4) aspartame appears as an ingredient in many food and drink products appearing in supermarkets generally;
>
> (5) artificial colours and flavours and aspartame are all approved for use in food and drink under applicable food regulations.
>
> 7.2 The Defendant accepts that shoppers interested in health range products would know in the most general terms that there was a live controversy as to whether aspartame and artificial colours or flavours might pose a health risk notwithstanding that they are approved for use by regulatory authorities"

51. Obviously, some consumers will be well aware of the good and the bad that has been said by health experts and others on the subject of aspartame, and for that matter on the subjects of hydrogenated fat, artificial flavours, artificial colours, and fat generally. Other consumers may have little or no general knowledge of what has been said about any of these ingredients. A third group of consumers will fall between these extremes. Mr Price submitted that hydrogenated fat is generally known to be unhealthy, whereas artificial colours, as a class, are not. To a consumer who knows that hydrogenated fat is unhealthy, the association with it of aspartame may carry an implication adverse to aspartame. To a shopper who does not know that, and who has no knowledge adverse to artificial colours, the association may carry a different implication.

52. Mr Price submits, consistently with *Charleston*, that the court has to decide the meaning to those consumers who take the trouble to read what the label says about health matters and ingredients from which the product is free. He submits that "hidden nasties" connotes something sinister. The association of the words "no hidden nasties" with "Good for you" clearly suggests that considerations of health are the reason why the absent ingredients are "nasties".

53. Mr Price recognises that artificial colours and flavours are not, as a class, considered to be unhealthy, and so he offers an explanation for why the reader would understand aspartame to be unhealthy. He submits that a reason is given for the exclusion of artificial colours and flavours, namely that they are artificial, or not natural. In any event, ASDA conspicuously do not say that their own label products do not include artificial sweeteners. On the contrary, in their announcement of 15 May 2007 they said that aspartame was being replaced with Sucralose, which is another artificial sweetener, albeit the announcement says it is "a sweetener made from sugar that tastes like sugar".

54. On the other hand, hydrogenated fats are dangerous in that they are well known to cause coronary heart disease. So "nasties" means something dangerous insofar as it includes those fats.

55. Mr Price goes on to submit that the consumer will not see ASDA as simply responding to "half-baked" consumer perception, but will perceive it as lending its considerable expertise and weight to a perception that aspartame is actually or potentially harmful.

56. In the course of his development of this submission, I raised the question whether what ASDA's advertisement is doing is "lending its weight" by the use of knocking copy, or whether ASDA is stating that it is able to suit the tastes and beliefs of all possible customers, without endorsing any of them. I raised the examples of meat marked 'kosher' or 'halal', or fruit and vegetables advertised as English or organic. Another example would be prepared food marked "suitable for vegetarians".

57. In my view, in the case of the meat marked 'kosher' or 'halal', or food marked "suitable for vegetarians", no reasonable person could understand a supermarket or grocer to be suggesting that it was better than the non-kosher or non-halal meat that it was selling, or as expressing any view on the dietary laws or vegetarian preferences to which those words relate. In the case of the English or organic fruit and vegetables, it is not quite so clear. Some shoppers may think that English apples or strawberries are better than foreign ones, organic better than non-organic. ASDA's marketing managers may disagree with that assessment, but recognise that it is a view held among some of their customers (however misguidedly), and appeal to such customers, while thinking their view to be mistaken. No reasonable person could assume that a grocer will only stock, and only advertise, food that he himself would recommend, particularly in modern Britain, where there is such diversity of culture and taste. This view does not mandate any particular answer to Mr Price's submission, but it does raise possibilities that may need to be considered.

58. Mr Caldecott submits that, as is well known, food safety is regulated by government agencies which exclude the sale, or impose conditions upon the sale, of harmful or dangerous ingredients. Within the range of ingredients which are permitted, there is

continuing public dispute as to whether some ingredients should be banned, or whether others which are banned should be permitted, and as to the relative superiority of one over another. Some of these disputes can be definitively resolved by experts, others cannot. Even where such disputes can be resolved by experts, consumers may remain unpersuaded, whether reasonably or otherwise. The existence of such disputes gives retailers an opportunity to raise profit margins. A product that is perceived by some to be superior can be sold for a higher price. Customers understand that supermarkets are not regulators and that they want to attract as many customers as possible, from across the range of our diverse society. Customers value freedom of choice.

59. Mr Caldecott submitted that customers make allowance for marketing in food labelling. The statements complained of here are very precise in their literal meaning: the item contains no aspartame. But in the implied meaning of which the Claimant complains, ASDA's statement could hardly be more vague. The Claimant's complaint is that, by implication, all these statements about "no aspartame" are really 'knocking copy', knocking, that is, all the other food and drinks which do contain aspartame, and so knocking aspartame itself.

60. Mr Caldecott submits that meaning [1] (especially i.e. actually harmful or unhealthy) is very serious. If that is what ASDA is saying about the products which do contain aspartame, and if it were true, then it would be very surprising that ASDA, or any other supermarket or grocer, should sell any products containing aspartame. Mr Caldecott submits that meaning [2] (potentially harmful) is unclear. Either it means the same as meaning [1], or it means that aspartame might be subject to a question mark as to its safety, and thus potentially pose a risk. He submits that meaning [3] adds nothing but is a gloss on either or both of [1] or [2].

61. Mr Caldecott amplified his submissions on meaning [1]. He submits that advertising that the own label products do not contain aspartame would have no point unless other products which do contain aspartame were available on the market. "Nasties" on the labels clearly applies as much to artificial flavours and colours as it does to aspartame, and consumers know that many products contain artificial flavours and colours. "Nasties" is a plural noun which is not in common use. It is what he calls a portmanteau term, by which he means that it covers a very wide range of meanings. He refers to it as "marketing speak", by which he means that it is a word which is attractive to advertisers because it is so vague.

62. Both sides invite me to attribute to the reasonable reader some knowledge of what has been said about aspartame in the passages in the pleadings to which they referred me.

DISCUSSION

63. The adjective "nasty" is in common use, and it can mean anything from "unpleasant" to "dangerous" or "very bad". I also note that, as is generally known, advertisers need to avoid saying anything which is demonstrably incorrect. Consumers in general are aware that there are trading standards and advertising standards to be complied with by retailers.

64. The words "Good for you" and "nasties" are respectively inviting, or conveying, approval of products which do not contain aspartame, and disapproval of those that do contain it. I accept that these do have an adverse connotation.

65. I do not accept Mr Price's submission that the words complained of mean something different in relation to aspartame and in relation to artificial colours and flavours. In my judgment what is said about artificial colours and flavours is said about aspartame, and vice versa. No reason is given in the packaging for excluding from the own brand range all artificial colours and flavours. No reasonable reader could understand the words as a statement by ASDA that all artificial colours and flavours are especially or actually harmful or unhealthy. Such a broad statement would be wholly unreasonable, and readers who interpreted ASDA as conveying that meaning would be utterly unreasonable in so doing. That would a forced interpretation.

66. There is a contrast between what I call the cheerful and informal colours and fonts used for this part of the packaging, compared with the severe black and upright fonts used for the information about "use by" dates and other matters. The difference, in my judgment, is between statements that are to be understood seriously, in Jacob J's words, namely those in black vertical fonts, and statements that are vague and to be understood as mere advertising, with little, if any, content or endorsement from the advertiser. The function of these parts of the packaging would be reasonably understood as being to attract attention, rather than to inform.

67. These considerations are sufficient for me to conclude that there is no statement by ASDA that aspartame is especially or actually harmful or unhealthy.

68. However, I also note the basis of the plea of malice. The Claimant's case in malice (Particulars of Claim para 12.6) includes the following:

> "The fact that [ASDA]'s own brand tablet sweeteners and some of its own brand pharmaceutical products on sale [up to the issue of the Claim Form] were made from aspartame, demonstrates the dishonesty of the Campaign so far as aspartame is concerned".

69. There are a number of questions that might arise if this action proceeds, but which I am not required to answer at this stage. These questions include whether the statements are fact or opinion, and if fact, whether they are true or false and, if false, whether ASDA made them maliciously.

70. But the fact that I am not asked to answer any question about malice, does not mean that I am obliged ignore the way the plea of malice is put.

71. In my judgment if it crossed the mind of any reasonable readers to think that ASDA might be saying that aspartame was actually harmful, then they would ask themselves how ASDA could be saying that in circumstances where, as those consumers must also be aware, other products containing aspartame remained for sale on ASDA's shelves. They must be assumed to be aware of that, because comparative advertising implies that the product referred to adversely is one that is on sale. And ASDA do not just sell food products in the "Good for you" range. The Claimant pleads that it also sells its own brand tablet sweeteners and its own brand pharmaceutical products.

72. There are at least two possibilities. One is that ASDA is dishonest, as the Claimant alleges. An alternative is that ASDA is not dishonest, and therefore that ASDA's packaging cannot be meaning to convey that aspartame is especially harmful. In my judgment a reader who had thought thus far, and then concluded that ASDA were indeed dishonest (by conveying the meaning that aspartame was especially or actually harmful) would be "unduly suspicious" and "avid for scandal", and would be a person who gave to the packaging an "utterly unreasonable interpretation". They would thus disqualify that meaning from acceptance as the single meaning within the rule.

73. This is not to say that ASDA is above suspicion generally. Few in the world, if any, are above suspicion in any circumstances. But the dishonesty suggested in this context is part of a major marketing campaign intended to run nationwide over an indefinite period. If dishonest, it could not hope to escape detection, and have very adverse consequences for ASDA. It is just not plausible, unless there is no other more credible interpretations of events.

74. There are alternative interpretations of events. An alternative interpretation is that ASDA is just offering a choice to consumers, with a view to attracting every section of the population, whether reasonable in their views on food, or unreasonable in their views on food, and that ASDA is not concerned with their customers' tastes, except to satisfy as many of them as they can within the limits of what is lawfully and economically possible.

75. Accordingly, without hesitation I answer that the words on the food packaging complained of in paragraph 4 of the Particulars of Claim do not mean that aspartame is especially (or actually) harmful or unhealthy.

76. Next I consider the cola packaging. Here the case is even stronger, and the same answer must follow. In the case of the cola there is not even the words "Good for you" or "Nasties".

77. I turn to meaning [2]. If it were relevant (contrary to my view) I would accept that a substantial number of consumers would understand the words on the food packaging to mean that aspartame is potentially harmful or unhealthy, in the sense that there remains a risk that it might be found to be so.

78. However, I also find that a substantial number of consumers would understand that these words complained of are not seriously meant to convey information, but rather are meant to attract as customers those who are already inclined to hold the view (reasonably or otherwise) that there is something objectionable about aspartame.

79. Both views would, in my view, be open to a reasonable person to hold. So I have to decide which is to be the single meaning. I do so by applying the principle set out in para 40 above. ASDA has a right to sell products which do not contain aspartame. ASDA does not have to give a reason for that choice. There are so many reasons why a supermarket may wish to sell products that do not contain a particular ingredient that the Court cannot say that the "Good for you" packaging, which in terms states a fact (i.e. "no aspartame"), tends to impute a doubt as to the safety of aspartame. No doubt some people might guess that ASDA's choice was related to that ground. But it is less reasonable that, when there are a number of good interpretations, a bad one should be seized upon

80. Accordingly, I answer that the words, both those on the food packaging and those on the cola, complained of in paragraph 4 of the Particulars of Claim do not mean that aspartame is potentially harmful or unhealthy.

81. In my judgment meaning [3] adds nothing to meanings [1] and [2] and does not require a separate answer.

82. The e-mail in paragraph 8 of the Particulars of Claim also requires no separate answer. It reads:

> "Dear Supplier, As part of ASDA's ongoing commitment to health, every ASDA own label product will need to comply with the updated ASDA health policy …. ASDA's 'no nasties' guarantee means that by the end of 2007, all ASDA own label food an soft drink products will:
> - be free from artificial colours and flavours,
> - be free from hydrogenated fat or flavour enhancers, such as monosodium glutamate (MSG)
> - meet or beat the Food Standard's Agency's 2010 salt targets
> - be free from aspartame".

83. The answer to be given in respect of this is the same as that to be given in respect of the food packaging

CONCLUSION

84. In my judgment the meaning borne or conveyed by the words complained of in paragraph 4 of the Particulars of Claim is:

> "if you the customer think that aspartame may be bad for you, or unpleasant to taste or consume, then this product is for you."

85. In my judgment the meaning borne or conveyed by the words complained of in paragraph 8 of the Particulars of Claim is:

> "if customers think that aspartame may be bad for them, or unpleasant to taste or consume, then these products are for them."