



**Neutral Citation Number: [2009] EWHC 781 (QB)**

Case No: HQ08X01392

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 8 April 2009

**Before :**

**SIR CHARLES GRAY**  
**Sitting as a Judge of the High Court**

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**Between :**

**AJINOMOTO SWEETENERS EUROPE SAS** **Claimant**

**- and -**

**ASDA STORES LIMITED** **Defendant**

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**Matthew Nicklin** (instructed by **CMS Cameron McKenna LLP**) for the **Claimant**  
**Manuel Barca** (instructed by **Addleshaw Goddard LLP**) for the **Defendant**

Hearing date: 3 March 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.

.....  
**SIR CHARLES GRAY**

## **Sir Charles Gray :**

### **The issue**

1. In this malicious falsehood action the Claimant, Ajinomoto Sweeteners Europe SAS (“Ajinomoto”), seeks an order for the trial of a preliminary issue “as to the statement(s) of fact contained in or conveyed by the words complained of in paragraphs 4 and 8 of the Particulars of Claim”. The application is opposed by the Defendant, Asda Stores Limited (“Asda”).

### **The parties**

2. Ajinomoto is one of a number of companies which manufactures and supplies an artificial sweetener called aspartame. It is the French subsidiary of a Japanese multinational corporation. The patent in aspartame expired in 1992. Many companies in addition to Ajinomoto around the world now manufactures and supplies aspartame. Asda owns a large number of supermarkets throughout the UK and is a well known leader in that field.

### **Asda’s campaign**

3. It is common ground that in May 2007 Asda announced the commencement of a campaign which was designed to ensure that, by the end of that year, none of its 9,000 own-label food and soft-drinks products would contain any artificial colours or flavours or any hydrogenated fat or flavour enhancers. Asda also committed itself at that time to the replacement of aspartame in its low-calorie products with an alternative sweetener made from sugar, namely sucralose.
4. The campaign was launched by means of a press release sent out by Asda on about 15 May 2007 to a large number of media organisations. The release included the following words:

“ASDA vows to remove artificial colours and flavours from all own-label food and soft drinks by end of 2007. Supermarket to give customers the cleanest food in Britain with a ‘no nasties’ guarantee.”

One of the ‘nasties’ which it was said was to be removed from Asda’s products in order to ‘make life easier and healthier’ for customers was identified as aspartame.

5. Since the start of that campaign Asda has sold a wide range of products in its own-label range, including its own brand cola, with packaging which includes in capital letters the words:

“NO HIDDEN NASTIES.”

Beneath that heading one or other of the following statements is set out, namely:

- i) “No artificial colours or flavours, no aspartame and no hydrogenated fat”;
- ii) “No artificial colours or flavours, no hydrogenated fat and no aspartame”;

- iii) “No artificial colours or flavours and no aspartame” and “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”;
- iv) “No artificial colours or flavours and no hydrogenated fat” and “We promise that all good for you products are always low or lower in fat and won’t ever contain any hydrogenated, artificial flavours, no artificial colours or aspartame”.

Ajinomoto relies on the fact that there is an asterisk against the words “NO HIDDEN NASTIES”, which is picked up by another asterisk against the statements set out above.

### **The issue of reference**

- 6. There is an issue between the parties as to whether recipients of the press release would have understood the references to aspartame as being references to Ajinomoto, given that aspartame is manufactured and sold by other suppliers. Nothing, however, turns on that issue for the purposes of the present application.

### **The issue of meaning**

- 7. According to Ajinomoto, the natural and ordinary meaning of the words on the packaging is that aspartame is an especially harmful or unhealthy, or potentially harmful or unhealthy, sweetener and 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.
- 8. Somewhat unusually, given that the action is framed in malicious falsehood, the Particulars of Claim allege in addition that the words bore that meaning by innuendo. The particulars relied upon in support of the innuendo meaning are these:

- “1. The effect of the said words was to trade on and/or to reinforce concerns in consumers’ minds resulting from media publicity, in particular a health scare concerning aspartame as a possible cause of cancer, or risk factor for cancer, which had received extensive media publicity following publication in July and November 2005 of a carcinogenicity study by the Ramazzini Institute of Bologna, Italy. Copies of the media reports on which [Ajinomoto] relies are delivered herewith.
- 2. The said words associate aspartame with hydrogenated fat, as harmful products. As is widely known, hydrogenated fat, or trans fat, is harmful to health because it increases the risk of coronary heart disease by raising levels of LDL cholesterol and lowering the levels of the beneficial HDL cholesterol. As a result, health authorities around the world recommend that consumption of hydrogenated fat be reduced to trace levels. In the United Kingdom, all major retailers have

ceased adding hydrogenated fats to their own products, and in consequence on the 13 December 2007, the Food Standards Agency issued news releases stating that voluntary measures to reduce trans fats in food had resulted in safe levels of consumer intake.”

9. Ajinomoto complains in addition of an e-mail sent on or about 13 September 2007 by two named employees of Asda, which was in the following terms:

“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 (located on the web traqs system). The Product management team have reviewed (and where necessary re-developed) all products to meet the Asda own label health policy.

Asda’s ‘no nasties’ guarantee means that by the end of 2007 all Asda own label food and 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 Agency’s 2010 salt targets
- be free from aspartame ....”

Ajinomoto’s case is that the e-mail bore the same natural and ordinary and innuendo meanings which I have set out above.

10. I need say no more about the innuendo meanings relied on by Ajinomoto because, following an invitation from me in the course of the hearing, Ajinomoto by a Note dated 17 March 2009 prepared by its counsel, Mr Matthew Nicklin, indicated that, if the court were to direct a preliminary issue in relation to the issue of meaning, it would not advance any separate case by way of an innuendo meaning. Mr Nicklin reserved the right to rely, in support of Ajinomoto’s case that the words bore the natural and ordinary meanings alleged in the Particulars of Claim, on the background and context of the labelling of Asda’s products.
11. Mr Manuel Barca on behalf of Asda countered by a Note dated 17 March 2009 that it is not open to Ajinomoto to rely in support of a natural and ordinary meaning on fact-sensitive facts such as the alleged awareness on the part of “health-conscious consumers” of a media controversy about the safety of aspartame. Mr Barca contends that no evidence is admissible in support of a natural and ordinary meaning.
12. I do not think it either necessary or appropriate for me to seek to resolve that dispute (if indeed there turns out to be a dispute) for the purpose of deciding the present

application. The ambit of any evidence in support of the natural and ordinary meaning alleged can be left for later decision.

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”.

### **The issue of falsity**

14. In paragraph 11.1 to 11.7 Ajinomoto sets out detailed particulars of falsity, relying amongst other things on the fact that aspartame has been approved for use in food by various regulatory bodies around the world and also on various studies said to have found that aspartame is safe. One such study, relied on in paragraph 11.4, is a large epidemiological study reported in April 2006 by the United States National Cancer Institute. Reliance is also placed on the fact that at least until March 2008 Asda continued to sell other products, including health products, which did contain aspartame.
15. In rebuttal of the particulars of falsity relied on by Ajinomoto, Asda pleads at paragraphs 12.1 to 12.22 of the Defence, which commence with the prefatory statement:

“12.1 With respect to paragraph 11.1, it is admitted that aspartame has been approved for use in food by regulatory bodies around the world, although (for the reasons set out below) no admissions are made as to whether or not aspartame is ‘prejudicial to health or a healthy diet’, an issue which is plainly neither justiciable nor capable of determination in this action.”

### **The issue of malice**

16. Ajinomoto assert, in support of the allegation of malice, that Asda do not believe aspartame to be unsafe since they have continued to sell products containing aspartame after the publication of the words complained of. Ajinomoto also allege that Asda must have known that the effect of marketing products as being free from aspartame would be to suggest that aspartame is actually or potentially unsafe.
17. The pleaded case of Asda is that the particulars of malice should be struck out because no charge of dishonesty or bad faith is made against any named individual Asda employee or agent. Asda further pleads that the decision to replace aspartame, at considerable additional expense to itself, was a responsible reaction to widespread consumer preferences.

### **The issue of damage**

18. As to damage, Ajinomoto relies on the presumption created by s.3 of the Defamation Act 1952. There is no particularised claim for special damage.

### **The controversy about aspartame**

19. The Reply served on behalf of Ajinomoto admits that aspartame has been the subject of controversy but avers that this is a wholly separate issue from the question whether aspartame is prejudicial to health. Detailed particulars are pleaded of the reasons why Ajinomoto alleges that the studies and statements relied on by Asda in support of its case on falsity are flawed. These particulars run to some nine closely-typed pages in the Reply.

### **Arguments on the question whether a preliminary issue should be directed**

20. It has been necessary for me to summarise in some detail the issues arising from the respective statements of case in order to address the question which arises on this application, namely whether the issue identified by Ajinomoto (see paragraph 1 above) is suitable for trial as a preliminary issue.
21. The argument of Mr Nicklin for Ajinomoto is as follows: in an action for malicious falsehood it is for the claimant to prove the falsity of the words complained of. If the claimant fails to prove falsity, the claim fails in its entirety, however damaging the effect of the publication and even if the damage was inflicted with some malicious or improper motive on the part of the defendant. The parties' respective cases on meaning, summarised above, are clear-cut, so Mr Nicklin's argument runs, and the issue of falsity falls to be tested against whatever meaning the words are found to bear. He argues that, even if the court were to find an intermediate meaning falling somewhere between the respective meanings contended for by the parties, such a finding would focus or limit the evidence which would be relevant and admissible to determine the issues of falsity and malice.
22. For these reasons Mr Nicklin submits that, in the exercise of the court's general power of case management, I should direct a separate trial of the issue identified at paragraph 1 above in accordance with CPR Part 3.1(2)(i). He contends that this course would enable the overriding objective in Part 3 to be achieved. Reliance is placed on behalf of Ajinomoto on *GKR Karate v Yorkshire Post Ltd* [2001] 1 WLR 2571 at 2576-7.
23. The submission of Mr Barca for Asda is that, far from saving costs, the effect of an order for the trial of a preliminary issue as sought by Ajinomoto would be to increase costs because two trials instead of one would or might be necessary. Mr Barca draws attention to the fact that in the pre-action correspondence Ajinomoto appears to have been contemplating an action in defamation in order to protect its reputation rather than an action in malicious falsehood. The claim as ultimately put forward on behalf of Ajinomoto being framed in malicious falsehood only, Mr Barca points out, correctly, that the Practice Direction under CPR Part 53 is inapplicable because it is confined to defamation actions.

24. Mr Barca further draws attention to the observations made (*obiter*) by Jacob J (as he then was) in *Vodafone v Orange* [1997] FSR 34 to the effect that the rule which applies in defamation actions, that a single meaning has to be ascribed to the words complained of, may not necessarily apply to actions for malicious falsehood. Jacob J drew attention to the fact that in malicious falsehood actions general damages are not recoverable; successful claimants are compensated for pecuniary loss only. Mr Barca accordingly suggests that it may be necessary in the present case for evidence to be given as to how many of those to whom the words complained of were published would have known about the controversy relating to the safety of aspartame. As I have already said, Ajinomoto no longer rely on the innuendo meaning pleaded. However, as I have also recorded, Mr Nicklin on behalf of Ajinomoto does assert an entitlement to rely on the awareness on the part of health-conscious consumers of that controversy in support of the natural and ordinary meaning complained of. This is a question that may need to be explored at a later stage.
25. In his skeleton argument Mr Barca, understandably from his client's perspective, underlines what he suggests are the difficulties confronting Ajinomoto in relation to the issue of malice. Mr Barca further argues that, unlike the position in defamation actions where, as he accepts, orders for preliminary issues may well have the beneficial effect of facilitating settlements, a preliminary verdict in a malicious falsehood action does not, as he puts it, have the same "case-breaking" potential. A claimant in malicious falsehood may succeed outright on the issue of meaning (as well perhaps as recovering the costs of the determination of that issue) and yet his action may fail because either malice or falsity is not established.
26. Finally, in paragraph 13 of his skeleton argument, Mr Barca expresses another concern, namely that Ajinomoto's purpose is to use this malicious falsehood action as a vehicle or (as he puts it) a Trojan horse to establish that aspartame is not prejudicial to health and that its safety is proven beyond any scientific controversy. It is submitted on behalf of Asda that the court should not permit Ajinomoto to use this action as a vehicle to prove the safety of aspartame in circumstances where the entire claim may fail because Ajinomoto cannot prove malice on the part of Asda. Mr Barca points out that the voluminous particulars relied on by Asda in rebuttal of Ajinomoto's allegation of falsity are also relied on by Asda to refute Ajinomoto's "speculative" case in malice.

## **Discussion**

27. In defamation actions it is common for the court to direct the trial of a preliminary issue as to the defamatory meanings which the words complained of are capable of bearing. This enables the defendant to know what he may have to prove in order to make good a defence of justification or fair comment. In some cases it may also indicate to the claimant that he has pitched his defamatory meaning too high. In each case the advantage of directing a preliminary issue is that the parties know where they stand. The expense of going to trial may be avoided altogether or, if not avoided, significantly reduced .
28. The instant action is framed in malicious falsehood, although I accept that it could equally well have been brought in defamation. I cannot see that there can be any objection to a claimant electing to sue in malicious falsehood rather than defamation.

It is a matter for the claimant and its legal advisers to decide whether it is advantageous to assume the twin burdens of proving falsity and malice.

29. Whilst Mr Barca is correct that Part 53 is confined in its application to defamation actions, I do not see that the approach of the court to an application for the trial of a preliminary issue in a malicious falsehood action should be materially different. CPR Part 3, which includes the power to direct the separate trial of an issue, applies to both causes of action. Whilst it may be that the “case-breaking” potential of a preliminary issue in a malicious falsehood action may not always be as great as it is in the case of many defamation actions, that does not appear to me of itself to be a reason for refusing Ajinomoto’s application in the present case.
30. Of course there are a number of respects in which claims in malicious falsehood are to be distinguished from claims in defamation. One such distinction was suggested by Jacob J in *Vodafone*. I do not think it would be right for me to express on the present application any concluded view on the question whether the so-called single meaning rule, which has long been recognised in libel actions, also applies in malicious falsehood actions. It appears to me that there are sound practical reasons for adopting the single meaning rule, at least in the circumstances of the present malicious falsehood action. If the door were to be opened for the adducing of a wide range of subjective interpretations of the words complained of by individual publishees, the length of the trial would or might be considerably increased. Be that as it may, I am not persuaded that the decision in *Vodafone* justifies my taking a different approach to the present application in a malicious falsehood from the one which I would have taken in a defamation action.
31. The major consideration on any application for the trial of a preliminary issue is whether the preliminary trial of that issue will save costs, subject always to the proviso that no order will be made if it would or might cause unfairness to the opposite party to hive off the issue in question. The strength of Ajinomoto’s position, as it appears to me, is that if the meaning pleaded at paragraph 6 of the Particulars of Claim is rejected by the judge, the claim would fail and there would be no reason for any further litigation. As I have already indicated in paragraph 7 above, Ajinomoto no longer relies on any separate innuendo meaning as a fall-back position.
32. Subject to one qualification which I will mention shortly, 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.
33. Moreover, whilst I do not accept that the issue of the safety of aspartame is not justiciable, I readily acknowledge that any trial of that issue would be prolonged and exceedingly costly to the parties. There would have to be scientific and medical



evidence given by experts. There would also need to be a minute examination of the methodology and conclusions arrived at by the various regulatory bodies involving aspartame and referred to in the pleadings, as well as of the studies carried out into aspartame. The trial of the issues raised in the Particulars of Claim in relation to the issue of falsity, as well as in the wide-ranging response in the Defence at paragraphs 12.1 to 12.22 and in Ajinomoto's rebuttal pleaded at paragraphs 2.1 to 2.19 of the Reply, would doubtless last for several weeks and would be hugely expensive for both parties. In my judgment these considerations underline the desirability of directing the trial of a preliminary issue in the circumstances of the present case.

34. The qualification to which I referred in paragraph 32 above arises out of a concern expressed by Mr Barca in the course of the hearing that Ajinomoto would or might, if successful upon the trial of the preliminary issue sought as to meaning, thereafter seek an order for the trial of another preliminary issue, namely falsity, in advance of any trial in relation to the issue of malice. Mr Barca submits that it would be improper for Ajinomoto to slice up the issues in this way, especially if Ajinomoto were to seek to postpone or perhaps to avoid altogether going to trial on the issue of malice. Mr Barca was not able to point to any evidence supporting his concern that Ajinomoto intends to use the process of the court in this way. Nevertheless I invited Mr Nicklin at the hearing to take instructions from his client as to its intentions regarding the action.
35. Having taken instructions from his client, Mr Nicklin informed the court by his Note of 17 March 2009 that Ajinomoto does not intend to have the issue of falsity tried before the issue of malice. According to Mr Nicklin, Ajinomoto does wish to explore the possibility of seeking the trial of a second preliminary issue, namely the issue of malice, in advance of the issue of falsity. As I understand it, Ajinomoto will contend that Asda cannot honestly believe aspartame to be unsafe, given that it continues to sell in its stores products containing aspartame.
36. In the light of that information, based upon instructions from Ajinomoto, I am satisfied that Asda's concern about Ajinomoto's tactical intentions has no foundation. It is neither necessary nor desirable for me to comment on the rival contentions canvassed during the hearing as to the merits or demerits of the case advanced in relation to the issues of falsity and malice.

## **Conclusion**

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. As I have said, a preliminary determination will, whichever way it is decided, assist the parties to know where they stand and may well result in a considerable saving in costs. When this judgment comes to be handed down, I will hear argument as to the wording of the issue to be tried separately and as to the future conduct of the action.