**Neutral Citation Number: [2011] EWHC 292 (QB)**

Case No: HQ09D05481

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 February 2011

**Before** :

**THE HONOURABLE MR JUSTICE EADY**

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**Between :**

**LORD ASHCROFT KCMG** **Claimant**

**- and -**

**(1) STEPHEN FOLEY**
**(2) INDEPENDENT NEWS & MEDIA LIMITED**
**(3) ROGER ALTON** **Defendants**

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**Mark Warby QC** and **Adam Speker** (instructed by **Davenport Lyons**) for the **Claimant**
**David Price** (of **David Price Solicitors & Advocates**) for the **Defendants**

Hearing dates: 3-4 February 2011

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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 EADY

## Mr Justice Eady :

1. The Claimant applies in this libel action to strike out the defences of justification and fair comment as being unsustainable for a variety of reasons. One of the principal complaints is of a lack of clarity as to the case he has to meet. Mr Warby QC, on his behalf, placed in the forefront of his argument the fundamental proposition that time and costs should not be wasted in pleading to a vague and incoherent case.

2. The application is dated 18 June 2010. On 26 November, the Defendants sought permission to amend the terms of their defence, no doubt in an attempt to clarify their case. It was thus decided at the outset of the hearing before me to treat the draft amended defence as being the Defendants' "best shot" and to address the Claimant's criticisms of that.

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

4. On the second day of the hearing, when Mr Price was coming towards the end of his submissions on the Defendants' behalf, he produced another draft which had been submitted to the Claimant's advisers the previous evening. Mr Warby was thus confronted with a shifting target and simply submitted that the defence of justification should be struck out and any new proposals assessed on their merits at such time as Mr Price had had the opportunity to think through his clients' case, at his leisure, and to absorb fully Mr Warby's criticisms. I rather agree that this would be more satisfactory than tinkering with any of the three drafts produced so far, and especially in a case where the implications are so serious. It is far better to give the Defendants the time to express their case with appropriate clarity, rather than adopting too "rough and ready" an approach. It certainly emerged in the course of Mr Price's submissions that the Defendants now wish to make much more straightforward allegations of wrongdoing against the Claimant than those expressed in the circumlocutory terms of the first, second and third drafts.

5. The Claimant has suggested that he is the largest donor of funds to the Conservative Party in its history, to the tune of somewhere around £10m. He was appointed to the House of Lords in 2000, when the current Foreign Secretary, Mr William Hague, was the leader of the party and upon his recommendation. There was some controversy at the time as to his tax status, following which he gave an assurance before his appointment that he would become resident in this jurisdiction for tax purposes. There were those who expressed the view that it is inappropriate for people who do not pay taxes in the United Kingdom to participate in the processes of its legislature. He is now, like all other members of the House of Lords, treated for tax purposes as ordinarily resident and domiciled here (by virtue of ss.41 and 42 of the Constitutional Reform and Governance Act 2010). At all events, it is clear that the focus of much of

the Claimant's business activities is elsewhere and, in particular, in the Caribbean region.

6. In these proceedings, he complains of allegations made in *The Independent* newspaper, on 19 and 20 November 2009, and correspondingly on its website from that time onwards. The First Defendant was the author and the Third Defendant was at that time the editor. The Second Defendant then owned the newspaper.

7. The first article was introduced as the lead story on the front page under the heading "Ashcroft's bank lent millions to disgraced premier". That is a reference to Mr Michael Misick, the former Prime Minister of the Turks & Caicos Islands ("TCI"). It continued on page 2 under the further heading "Ashcroft 'puts any hope of democracy here at risk'". It is there said of Mr Misick that he came to power in 2003 with, according to his own claim, assets of only $50,000 but thereafter funded "a celebrity lifestyle" and by 2008 "claimed a net worth of '$80m or $180m'". It refers to accusations against him of benefiting from improper sales of Crown land and of taking bribes from developers. The second article was spread across three pages under the main heading "How Ashcroft became the banker to paradise".

8. It is the Claimant's case that both these articles implicate him clearly, in the eyes of a reasonable and fair-minded reader, as one who participates in corrupt activities in the TCI. Moreover, the second article contains an additional accusation against him that he told a "blatant lie" in his solicitor's letter addressed to the Defendants in an attempt to cover up his conduct. This distinct allegation arises from an inset black box on the first page of the 20 November articles under the heading "Michael Ashcroft and The Independent". This was apparently inserted, in some haste, by way of response to the solicitor's complaint following the first article. It purported to state his case, as the Defendants at that time apparently understood it, and contained *inter alia* the sentence "Neither Lord Ashcroft nor any company associated with him lent money to the Turks & Caicos Prime Minister Michael Misick". It is said that this summary of his position, together with the fourth paragraph of the article, misrepresents what his lawyers actually said.

9. It is necessary to have in mind, by way of background, the fact that concerns were raised about governance in the TCI by the Foreign Affairs Committee of the House of Commons. As a result, Sir Robin Auld was engaged to carry out an investigation ("the Inquiry") and to report. *The Independent* states that one of his tasks was to inquire into how Mr Misick funded his lifestyle and acquired his massive wealth over so short a time span. When he reported in 2009, Sir Robin's concerns about corruption and "amorality" led the UK government to impose direct rule from London, which for the time being continues.

10. The defamatory meanings which the Claimant attributes, in paragraph 7 of his particulars of claim, to the first article were as follows:

> "(1) that the Claimant is guilty of engaging in corrupt dealings with Michael Misick, the notoriously corrupt ex-premier of the Turks & Caicos Islands by
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> (a) procuring companies that he controls to provide vast loans to Mr Misick to finance the building of Mr

> Misick's palatial home and fund his lavish lifestyle, all with a view to buying illicit political influence to serve the Claimant's private interests; and
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> (b) corruptly exploiting the influence he acquired in this way so as to serve his own interests and to subvert democracy in the Turks & Caicos Islands;
>
> (2) that the Claimant was thereby party to the culture of political amorality under the Misick regime which was uncovered by an official report, and which made it necessary for the British Government to impose direct rule; and further
>
> (3) that the Claimant's behaviour in the Turks & Caicos Islands provided good grounds to fear that he would, if the Conservatives were to win the forthcoming General Election, exploit his wealth and influence in such a way as entirely to undermine any prospect of democracy in the Islands by causing the Foreign Office to alter its policy towards the Islands so as to facilitate further political corruption there by the Claimant in furtherance of his private interests."

11. The natural and ordinary meanings attributed to the first article, in paragraphs 7(1) and 7(2) of the particulars of claim, as cited above, are also attributed to the second article. Additionally, however, it is said in paragraph 11 that it bore the following meanings:

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

12. Although the Defendants deny that the publications were defamatory, it has not been suggested that they were incapable of bearing any of the Claimant's meanings. Those which the Defendants seek to justify were set out in the original defence in accordance with the practice sanctioned by the Court of Appeal in *Lucas-Box v News Group Newspapers Ltd* [1986] 1 WLR 147.

13. The second version of the Defendants' meanings, as formulated for the purposes of the application to amend last November, was in these terms so far as the first article was concerned:

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

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

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

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

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

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

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

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

> 7.9 In consequence, tangible safeguards should be put in place to keep the Claimant away from policy on the TCI.
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> 7.10 In consequence, the close relationship between the Claimant and William Hague is alarming because Mr Hague at the date of publication stood to become Foreign Secretary in a future Conservative government (and did become Foreign Secretary) with responsibility for the TCI."

14. The Defendants rely on the same *Lucas-Box* meanings, for the purposes of the second article, as those set out under paragraphs 7.1 to 7.8 of the proposed amended defence. Additionally, at paragraph 13, they rely upon the following specific meanings:

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

15. By the conclusion of the hearing, Mr Warby told me that he had been persuaded that the first three of the *Lucas-Box* meanings set out in paragraph 13.2 of the defence should be allowed to stand, as representing at least a viable plea. He maintained his challenge, however, to the other meanings.

16. So far as the *Lucas-Box* meanings are concerned, the only proposed amendments in the third of the defences (produced towards the end of Mr Price's oral submissions) involved the deletion of paragraphs 7.5 and 7.6. (There were other proposed amendments to the particulars themselves.) The particulars of justification run from paragraphs 7.11 to 7.67 (over 21 pages of the pleading). There is no need to set them out *in extenso*, but I shall refer to individual sub-paragraphs as and when necessary.

17. The third version of the defence contained no changes to the *Lucas-Box* meanings attributed to the second article.

18. There was criticism on both sides of the form in which the parties' respective meanings were set out. Mr Price, for the Defendants, complained that the Claimant's meanings were artificially composite and Mr Warby says that those of the Defendants were inappropriately "atomised" and led to the Defendants attempting to justify non-defamatory meanings. Be that as it may, it soon emerged in the course of argument that, so far as substance was concerned, there was rather less between the parties than might at first appear.

19. Criticism was directed both to the *Lucas-Box* meanings and to the particulars of justification intended to support them. Of course, until the *Lucas-Box* meanings have settled into their final form, it may be thought premature to direct too much attention to the particulars, since their relevance can only be judged against the meanings to which they are directed. Inevitably, however, some attention was directed in the course of submissions to both.

20. Despite the earlier obscurity, Mr Price stated that his clients' intention was, or at any rate now is, to allege that the British Caribbean Bank ("BCB") is the Claimant's, not merely by reference to his shareholding, but also in the sense that he directs its activities and decision-making: it follows that, on the Defendants' proposed case, the bank's directors and executives merely do what they are told (either directly or indirectly) by the Claimant. He must, therefore, take direct responsibility for every decision of the bank to which reference is made in the particulars of justification (for example, whether to make a loan to any particular company or individual, and upon what terms, and whether or not to enforce the repayment of capital or interest).

21. The Defendants now wish also to allege, as I understand it, that the Claimant bankrolled corrupt politicians in Belize and in the TCI by authorising loans to be made on non-commercial terms – the purpose being to enable the Claimant to exert political influence and to obtain commercial advantages in return (i.e. corruptly).

22. So far as the Conservative Party in this jurisdiction is concerned, the Defendants' case appears to be that it would be in the Claimant's interests to have direct rule brought to an end in the TCI as soon as possible, so as to enable him to take further advantage of his corrupt activities. Accordingly, they say, it is "alarming" and/or gives "good grounds for concern" that the Claimant has apparent influence over the Conservative Party, and Mr Hague in particular (who has responsibility ultimately for the TCI), and may be in a position to affect government policy on the TCI and, in particular, on the length of time for which direct rule continues.

23. If these allegations are to be made, they must be made clearly and unequivocally. Hitherto, so far as I can understand the rather diffuse allegations contained in the particulars, the Defendants appear to have steered clear of accusations of direct involvement in corruption. The particulars contain a good deal of allegations which would not support, in themselves, any defamatory meaning and are thus irrelevant.

24. As I have said, it is undesirable at this stage to go into any of the current particulars in any detail, but it will suffice to set out paragraphs 7.32 to 7.35 to illustrate the obfuscation of which Mr Warby complains:

"7.32 In 1995 the Claimant through Leeward Ltd, a subsidiary of Belize Holdings Inc ("BHI") which was owned and controlled by the Claimant, acquired for development a large amount of land at the eastern tip of Providenciales, known as Leeward. For a variety of reasons including its stunning natural beauty, it was a prime site for profitable development, which was the Claimant's intention.

7.33 In 1994 the Claimant, through BHI, acquired Johnston. In 1995 he moved its headquarters to Providenciales in order to take advantage of development in Leeward and elsewhere in the TCI.

7.34 At around the same time that the Claimant acquired Leeward Ltd and Johnston he expanded BCB to TCI.

7.35 In 1996 the Claimant brought in Allan Forrest to run Johnston. In 1999 Johnston was bought by Oxford Ventures Ltd, a TCI company. This was said to be a management buyout. Mr Forrest has continued to run Johnston and remains an associate of the Claimant. Further, at all relevant times BCB has been the financial backer of Johnston, which has given the Claimant practical control and a financial interest in the success of the company. On or about 7 July 2010 BCB appointed Keith Arnold receiver of Johnston pursuant to a debenture between BCB and Johnston dated 27 July 2000. Mr Arnold was appointed chairman of Belize Telemedia Ltd 2005 and is a trustee of the Hayward Charitable Belize Trust (see further below) and is also an associate of the Claimant.

7.35.1 By way of further particularisation, the Defendants allege that the Claimant and Mr Forrest are longstanding business associates. It was the Claimant who brought in Mr Forrest to manage Johnston shortly after he acquired it and they have had an ongoing business association since 1999. Mr Forrest is a co-trustee of the Hayward Charitable Belize Trust which, it is to be inferred, is controlled by the Claimant and claims to have net assets in excess of $150 million from its investment in Belize Telemedia Ltd, which was formerly owned by Carlisle Holdings Limited (see further below) and held a communications monopoly in Belize. The Trust is making a claim against the government of Belize following the nationalisation of Belize Telemedia Ltd. BCB is also making a claim against the government arising from a $22.5 million loan from BCB to Belize Telemedia Ltd in 2007. A

press release in relation to BCB's claim and details of it appear on the Trust's website.

7.35.2 The association between them is relevant to the Claimant's association with Johnston and Leeward Ltd and associated companies, his level of influence in the TCI, his helping to fund the lavish lifestyle of Mr Misick, his involvement in the culture of amorality which was uncovered by the FAC Report and the Inquiry and which made it necessary for the British government to impose direct rule and his dishonesty and/or lack of candour and/or economy with the truth in relation to the questions asked of him by the First Defendant and Davenport Lyons' letter of 19 November."

25. I shall address Mr Warby's complaints about the Defendants' *Lucas-Box* meanings in a little more detail. These are central because, if his submissions on meaning are accepted, the defences of justification as they stand at the moment would be fundamentally undermined. It would follow that the many sub-paragraphs of the particulars of justification would also have to be stood to one side, and either omitted or redrafted, to fit in with any reformulation of the *Lucas-Box* paragraphs.

26. *Paragraph 7.1.* It is said that this is primarily a meaning concerning BCB, rather than the Claimant, and that banks are in the business of lending money. Without more, therefore, the meaning is not defamatory of him – even though the former premier is described as "notoriously corrupt". There is no suggestion that there was a connection between the lending to that individual and any instance of corruption. It is also linguistically odd in the sense that it is alleged that BCB lent millions of dollars to Mr Misick " … motivated by the desire on the part of the Claimant to obtain influence and benefit". This curiosity was adopted in Mr Price's skeleton argument at paragraph 30, where he says that the pleading is sufficiently clear because it alleges that the Claimant " … had knowledge … that the transactions were motivated by [his] desire for influence for which reason Mr Misick was treated favourably". This appears to be suggesting, therefore, that the Claimant was personally a party to the decision to lend the money – otherwise the attribution of a motive to him would make no sense. Yet, until the oral submissions, the Defendants studiously drew back from alleging that the Claimant himself made any such decisions. The nearest they came to it was to describe BCB as "his" bank. As I think Mr Price now accepts, that in itself is ambiguous. It may refer to nothing more than the Claimant's shareholding. At paragraph 7.23 he is referred to as "the owner and controller of BCB since 1987". That, again, may refer to a controlling interest – without any direct responsibility for the conduct of day-to-day affairs.

27. The position has now been clarified, at least to the extent that the Defendants wish to allege that the Claimant "controls" in the sense that he directs the bank's operations, directly or indirectly, and that the executives of the bank simply do his bidding, including his son in the TCI, who is rather airily described as "in thrall" to his father. The case now seems to be that the Claimant did indeed authorise or direct the loans to Mr Misick; that in doing so he was motivated by a desire to obtain political or commercial influence; and that, with the same motivation, he directed that Mr Misick

should be "favourably treated", meaning that he was excused the repayment of capital and/or instalments of interest. How these allegations are to be proved is, of course, quite another matter. It would at least be necessary at the pleading stage, however, for the Defendants to set out those facts from which they say a reasonable tribunal of fact could infer the truth of these serious charges.

28. I bear in mind throughout this exercise, of course, Mr Price's submission that it is not for the court to dictate to a defendant how to plead a defence of justification. Nevertheless, it is legitimate for the court to try and focus the parties on the real dispute between them. Often this will include, in a libel context, ensuring that a defendant is justifying a coherent defamatory meaning and, correspondingly, that the claimant knows what he is supposed to have done.

29. *Paragraph 7.2.* The word "associated" is notoriously vague and is often used in pleas of justification to gloss over exactly what is being said as to the claimant's involvement in disreputable conduct. Mr Warby submitted that it would accord with principle not to permit justification by mere association. He made reference in this context to the cases of *Al Rajhi Banking & Investment Corp v Wall Street Journal (Europe) Sprl (No 1)* [2003] EWHC 1358 (QB) at [17] and [29] and *Al Rajhi Banking & Investment Corp v Wall Street Journal (Europe) Sprl (No 2)* [2003] EWHC 1776 (QB) at [17]. In order to pass muster, a pleaded "association" in particulars of justification must itself be "guilty". To put it another way, any "association" on the part of a claimant must itself be in some way reprehensible before it can play a legitimate part in a plea of justification.

30. The paragraph is especially confusing since the references to Johnston and Leeward Ltd do not appear to attribute any disreputable conduct to those companies. Obviously, neither selling land nor funding the construction of a house is inherently wrong. It is, therefore, difficult to see how any association with either of those companies on the part of the Claimant could itself be disreputable or give rise to a defamatory meaning. Yet again, however, the "cut and paste" facility comes into operation. Whatever it is that is criticised about the funding through BCB is said to have been "motivated", in relation to the funding specifically, by the Claimant's desire to obtain influence and benefit. Again it is said that Mr Misick was "favourably treated". His direct involvement needs therefore to be spelt out as best the Defendants can.

31. This topic is picked up in the particulars at sub-paragraphs 7.48 and 7.49. First, it is said that Mr Misick was unable to provide to Sir Robin Auld any evidence as to the payment of interest or capital by him on commercial terms and/or in accordance with loan agreements. This appears to be putting the burden on Mr Misick or the Claimant to prove the Defendants' case. What needs to be alleged, if it is thought proper to do so, is that the Claimant agreed to or approved an arrangement whereby Mr Misick was given loans, on favourable terms and/or without any requirement for the payment of interest or repayment of capital, and that this arrangement was entered into from the motive of obtaining improper influence.

32. Secondly, reference is made to the acquisition at the end of 2003 or beginning of 2004, by Mr Misick, of beachfront land at a substantial undervalue. The land was said to be subject at that time to a charge in the sum of $2.1m in favour of BCB which was then released.

33. There is also reference to the building of Belview Villa, financed by a loan of $4.72m from a company called Coral Square Ltd (said to be "associated" with Johnston). Again, it is said that Mr Misick was unable to provide any evidence of interest or capital on commercial terms in relation to that loan. What needs to be alleged in relation to the Claimant is that he was involved in all these transactions directly, giving his approval and/or authorisation, specifically to achieve a corrupt advantage for himself by way of political or commercial influence. Moreover, it must be shown that he knew of and sanctioned the "soft" loan arrangements.

34. *Paragraph 7.3.* This paragraph seems to relate to the Claimant's son, of whom it is said that he had a close relationship with Mr Misick and that, in particular, he administered his bank accounts. Yet again, however, the same words are cut and pasted into the paragraph ("to the knowledge of the Claimant and motivated by the desire on the part of the Claimant to obtain influence and benefit which led to Mr Misick being favourably treated"). How can the mere fact of administering Mr Misick's bank accounts, of itself, be said to be motivated by the Claimant's desire to obtain influence? It is necessary to allege an improper arrangement which, even if entered into by his son, was authorised by the Claimant – for the same improper motive of achieving personal influence and benefit. Also, again, it is necessary to show the respects in which Mr Misick was "favourably treated" and that this was at the Claimant's instigation.

35. *Paragraph 7.4.* Here the allegation is made directly about the Claimant, although curiously the cutting and pasting means that "the Claimant, through BCB, helped to finance Mr Misick's lavish lifestyle to the knowledge of the Claimant … ". This hardly makes sense. The pasting here, however, is somewhat truncated, since there is no reference to Mr Misick having been "favourably treated". It is unclear also whether this is a free-standing sub-paragraph on its own, or whether the "help" that the Claimant is said to have given is distinct from what is alleged in the preceding paragraphs. Mere funding cannot in itself be disreputable and, if there is intended to be a defamatory meaning in this sub-paragraph, it needs to be spelt out and, in particular, if it is intended to suggest that something corrupt occurred – presumably different from Mr Misick having been "favourably treated" (since that is specifically not alleged).

36. *Paragraphs 7.5 and 7.6.* As I have already indicated, these now appear to have been withdrawn in the latest version of the defence.

37. *Paragraph 7.7.* This is as vague a defamatory meaning as one can imagine. The Claimant is said to have been "knowingly party to and a beneficiary of the culture of amorality in the TCI … ". Mr Warby submits, not unreasonably, that this paragraph is, to the extent that it is defamatory of the Claimant at all, "unclear and incoherent". It must be clarified. It may be possible by reference to the findings of Sir Robin Auld to refer to a "culture of amorality", but the Defendants need to prove it for themselves and, more importantly, to tie in the Claimant to the role which he is supposed to have played and, at least in general terms, the nature of the benefits he has derived from this culture.

38. *Paragraph 7.8.* The Defendants have appeared so far to be alleging corrupt payments to senior political figures in both Belize and the TCI, authorised by the Claimant and intended by him to achieve political and commercial benefits for himself as a result.

In this paragraph, by contrast, the allegations relate to the Conservative Party in this jurisdiction. It is necessary, therefore, to spell out with clarity and specificity exactly what "good grounds" are relied upon as giving rise to the concern as to his power to wield influence in the TCI (for example, by the termination of direct rule) through the Conservative Party. The suggestion appears to be that there are such grounds for supposing that he would use his connections with the Conservative Party to divert the TCI from "its path to good governance and away from the culture of political amorality identified by the [Auld] Inquiry". That is obviously a serious allegation, at least in embryo, and it does need to be expressed without any ambiguity at all.

39. *Paragraphs 7.9 and 7.10.* The same points can be made in relation to these paragraphs. The facts need to be spelt out with the utmost clarity.

40. *Paragraph 13.2.* This is the only new *Lucas-Box* meaning so far as the second article is concerned. As I have made clear above, Mr Warby now only challenges sub-paragraphs 13.2.4 and 13.2.5.

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

42. I do not propose to address the remainder of the particulars in any detail for the reasons given above. It is desirable, however, to refer to certain specific aspects of them to which submissions were directed.

43. I turn first to the significance of Sir Robin Auld's report on governance in the TCI. There are large sections of the particulars which consist in the recitation of chunks from the report, which Mr Warby criticises on two primary grounds. Not only does this offend against the principle that one does not plead evidence (but only the facts it is intended to prove), but a defendant cannot support a plea of justification simply by reciting that someone else has asserted the facts on which he intends to rely or believes them to be true. This has come to be known, of course, in recent years as the "repetition rule".

44. It is true that Mr Warby in his pleaded meanings has made reference to Sir Robin's report, by way of background, but that does not mean that any defamatory sting relating to the Claimant can be justified by merely cutting and pasting its contents. Mr Price has sought to overcome this objection by inserting, from time to time, that Sir Robin has made some particular finding "correctly". That is to say, he is adopting the relevant finding(s) from the report and explicitly recognising that he must make the allegations good by adducing evidence independently of the report itself. But lengthy citations simply clutter this part of the pleading.

45. A further point to be made about Sir Robin's report is that it makes no reference to the Claimant, let alone any criticism of his conduct (as the first article itself makes clear). What it does is to arrive at some general conclusions about "amorality" in the TCI, but that, in itself, casts no shadow on the Claimant and, unless it can be shown to be relevant in some way to a defamatory meaning, should not be allowed to create a climate of prejudice in the case. In this context, Mr Warby again referred to *Al Rajhi Banking & Investment Corp (No 2)*, cited above, at [5]. The purpose of any plea of justification is, obviously, to establish the truth of one or more defamatory imputations about the relevant claimant. The *reductio ad absurdum* of this tactic, in the present case, is where the particulars cite Sir Robin's report quoting itself, in turn, from an earlier report by Sir Louis Blom-Cooper QC dating back to 1986. Not only does Sir Louis make no reference to the Claimant (either), but the report itself antedates his arrival on the TCI business scene by ten years.

46. Clarity and economy in pleading are naturally always important but, as Mr Warby points out, where there remains the possibility of a jury trial, it becomes especially important to identify the issues the jurors are to resolve and the facts they are invited to find: see e.g. *Radu v Houston (No 4)* [2009] EWHC 398 (QB) at [6]-[10].

47. Mr Warby also points to muddle and confusion over the acquisition by the Claimant of "Belonger" status in the TCI. This relates to a residential status in that jurisdiction which, it is said, was accorded to the Claimant very shortly after he began his activities there. It carries certain advantages not available to others. The allegation is that this would normally take some time to acquire and that it can, therefore, be inferred that the Claimant was given special treatment for some reason. Mr Warby expressed his complaint succinctly:

> "It is clear enough that the Defendants would like to accuse the Claimant of corruptly procuring the grant to him of 'Belonger' status in the TCI in some way, but cannot properly plead such a case. They therefore resort in the first instance to insinuation based largely on hearsay."

When the Defendants were invited to clarify their position, it was asserted that "political favours were a factor in the grant". It thus remained obscure which favours were being granted, to whom and by whom. In a defence skirting round the edge of corruption, plainly any such allegation needs to be spelt out. I think that Mr Price came to recognise this in the course of his oral submissions.

48. Meanwhile, however, reliance seems to be placed on an unsatisfactory inference; namely, to the effect that a report in 2004 found that there had been some instances of Belonger status being granted in return for "political favours" and that it should be inferred that the grant to the Claimant affords one such example. (This appears to be the effect of paragraph 36 in the Defendants' further information.) Moreover, it is also plainly inadequate for the Defendants in this potentially very serious context to resort to the formula that "the facts relating to the grant are within [the Claimant's] knowledge".

49. As I have already indicated, Mr Warby makes a general point on the frequent references to "links" or "associations" in the particulars of justification. It is clearly right that, where it is intended (as appears now to be the case) to allege that some

particular "association" has been instrumental in obtaining or bestowing corrupt benefits, the impropriety should be spelt out – or at least the facts from which the inference of corruption is to be drawn. One example Mr Warby cites is that of Johnston (at sub-paragraph 7.35 which I have set out above). There seems to be an implication that a "management buyout" was a sham and that the company remains under the direct control of the Claimant. It must not be left as an unfocused smear. The Claimant must know the case he has to meet. He needs to know the facts relied upon in order to decide whether to admit or deny them and, in so far as they are to be admitted, whether he challenges the inference contended for.

50. A separate point is made in relation to Leeward Ltd. Not only is there an unspecified "association" alleged, but there is also an allegation (separate, apparently, from any suggestion of corruption) to the effect that one of its developments has generated environmental concerns (see e.g. at sub-paragraphs 7.39 and 7.42). The defamatory allegations complained of relate to corruption: in so far as reliance is placed on "environmental concerns", the relevance has to be clearly identified.

51. A further area of complaint relates to sub-paragraphs 7.11 to 7.22, concerning (presumably improper) influence over Conservative politicians in this jurisdiction. The Defendants have already been asked to identify any act or omission on the part of the Claimant that is said to give rise to "grounds for concern". No satisfactory response has been received, despite the fact (or so it appears) that no examples have been provided of the Claimant hitherto having exercised (or "bought") any improper (or undercover) influence upon Conservative Party policy or executive acts by ministers, either in the present government or any previous Conservative administration.

52. The sensitive, and potentially scandalous, nature of these allegations plainly demands that the Claimant is entitled to be told exactly what is alleged against him. Which ministers are alleged to have been influenced by the Claimant in the discharge of their public duties? A case cannot be conducted, whether to be tried by jury or by judge alone, on the basis of "nods and winks". If it is the case, for example, that the Defendants are intending to allege no more than that the Claimant in paying for fact-finding visits by British politicians was *intending* to exert influence on government policy towards direct rule in the TCI, then this should be made clear.

53. I turn now to the plea of fair comment (nowadays regularly described as "honest comment"). The pleading obligations of a defendant in this context include, first, a requirement to set out the defamatory comment, contained in the words complained of, which it is sought to defend: see e.g. *Control Risks v New English Library* [1990] 1 WLR 183. Next, having done so, a defendant must identify the facts on the basis of which it is alleged that a person could honestly express the relevant comment. In respect of the first article the relevant parts of the defence are to be found in paragraph 8 and, as to the second article, in paragraph 14.

54. The meanings identified as comment in paragraph 8 are as follows:

> "8.1 Due to his wealth (in the context of the relatively small TCI economy and population) and the way in which he uses it to obtain political influence, the

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

55. The supporting facts relied upon in paragraph 8 are simply those set out by way of particulars of justification in sub-paragraphs 7.11 to 7.67. I do not believe that there is any dispute as to the necessary element of "public interest".

56. As to the first of these meanings, I am not clear as to whether the Claimant's alleged use of "his wealth" is supposed to represent something different from the loans through BCB pleaded in the context of justification. I suspect that there is intended to be no difference, since the particulars relied upon are exactly the same.

57. Mr Warby observes, with some justification, that the gravity of this meaning is considerably higher than that pleaded in the context of justification at paragraph 7.8 ("good grounds for concern"). This rather suggests that the Claimant's attempts to obtain political influence (through the use of "his wealth") have been successful, in the sense that he has achieved "a level of influence over the TCI that puts any hope of democracy at risk". Mr Warby enquires what is the conduct on the Claimant's part on which the Defendants rely. The particulars themselves, as currently pleaded, do not provide any factual basis from which a reader can infer an already established "level of influence". I would accept that the sub-paragraph represents a defamatory comment on a matter of public interest: what is lacking, at the moment, are the facts demonstrating the supposed influence that is said to put any hope of democracy at risk.

58. Mr Warby's criticism of paragraph 8.2 mirrors that which he directs towards paragraph 7.9. That is to say, the pleading lacks anything said to have been done by or on behalf of the Claimant which could warrant the comment. What has he actually done? Is it simply the fact that he has paid for politicians to go on fact-finding visits? Is it the payment of large donations to Conservative funds? If it is to be said, in addition to this, that his track record of corruption in either Belize or the TCI rings warning bells as to his influence on the Conservative Party (past or prospective), then the position needs to be clarified.

59. The comment that the Claimant's relationship with William Hague, both before and after he became Foreign Secretary, is "alarming" requires a solid factual foundation – unless it is to be treated merely as rhetorical hyperbole. Mr Warby concludes that " … the hypothesis seems to be that [the Claimant] can and would successfully bend Mr Hague to his will for [his] private ends, and corrupt Mr Hague in his public duties". He adds that there is, currently, no basis whatever for that to be found in the pleading.

From a professional point of view, allegations of that gravity can only be made with the closest circumspection. It is one that requires to be made good by hard facts – or else withdrawn. This is not even one of those cases, put forward in other parts of the pleading, where it is suggested that the Claimant has funded, or otherwise carried out transactions with, persons who are said to be notoriously corrupt. There is nothing to suggest that Mr Hague, or any of his ministerial colleagues, is susceptible to improper or corrupt influence. If anything is relied upon apart from the well known fact of the Claimant's large scale political donations, it must be identified with cogency.

60. The last point Mr Warby makes in relation to fair comment concerns the *Control Risks* meanings pleaded at paragraph 14:

> "14.1 A quick move away from direct rule before safeguards are established will once again give the Claimant and his family disproportionate influence in the TCI which he may use to hinder it on its path to good governance and away from the culture of political amorality identified by the Inquiry.
>
> 14.2 The Claimant has conducted himself in a manner to give rise to good grounds for concern over his power to wield influence in the TCI if the Conservatives win power so as to hinder it on its path to good governance and away from the culture of political amorality identified by the Inquiry."

61. Once more, the supporting facts relied upon are those to be found in support of the plea of justification at paragraphs 7.11 to 7.67. Again, I would not suppose that the "public interest" ingredient required for a fair comment defence is challenged.

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

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

64. I should make clear that these are not the only defences relied upon. The Defendants wish to argue that the allegations are not defamatory and, specifically, do not accuse the Claimant of corruption. There is also reliance on privilege – pleaded in a variety of ways. These issues do not need to be addressed, however, on the current applications.

65. There are two other relatively minor matters raised at this stage by Mr Warby.

66. The first relates to the plea of *Reynolds* privilege contained in paragraph 5 of the defence (which otherwise has not arisen for consideration on the applications now before me). Mr Warby complains of a plea contained in paragraph 5.6 to the effect that before publication the First Defendant, Mr Stephen Foley, "made contact with a number of sources". A journalist will more often than not take objection, quite legitimately, to revealing any information which tends to identify a source (in accordance with s.10 of the Contempt of Court Act 1981). It is nevertheless considered to be a relevant matter for enquiry, where a defence of *Reynolds* privilege is raised, to consider the nature of the journalist's sources. That is recognised to be part and parcel of making an assessment of what is generally referred to as "responsible journalism". "Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories": *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205A-B.

67. As emerged in *Jameel v Wall Street Journal (Europe) Sprl (No 1)* [2003] EWCA Civ 1694, and subsequently during the trial itself, there are very real difficulties in some cases for a jury in reaching a conclusion on "responsible journalism" when it is not possible to make any assessment of the quality of the source or the information provided. The point Mr Warby takes, against that background, is that no reference should be made in this case to "a number of sources". That is because it has now been expressly pleaded on the Defendants' behalf that paragraph 5.6 of the defence does not seek to rely on any information communicated by a source. He, therefore, makes the simple point that if the sources in question provided no relevant information, or none that is relied upon, the fact of the contact with them becomes completely irrelevant. Journalists, in other words, cannot collect "brownie points" for having rung round a number of people who had no relevant information to give. It does not advance the debate in any way. I agree with this submission and the allegation should accordingly be struck out.

68. The second matter relates to something quite different. Since the proceedings were begun, the ownership of *The Independent* has changed hands. It is no longer owned by the Second Defendant. Since it is reasonable to assume that the First and Third Defendants are not men of sufficient substance to reimburse the Claimant's costs by themselves, in the event of his being successful, he not unnaturally wishes to seek comfort as to the financial status of the Second Defendant.

69. Mr Warby has a subsidiary point, to the effect that none of the existing Defendants would now be in a position to direct the newspaper to publish a report of the outcome of this libel action – as would be required by the Press Complaints Commission ("PCC") Code of Conduct. This does not seem to me to be a point of great significance, since the obligation under the Code arises, and can be enforced, in relation to the relevant "publication" (i.e. *The Independent* newspaper). It is not tied to any particular corporate entity. In those circumstances, it seems to me to be

unrealistic to suppose that, in the event of the Claimant succeeding in his action, those now directing the affairs of *The Independent* could refuse to publish a report. If they chose not to do so, of course, there would be little in the way of sanction since, as is often observed, the PCC lacks "teeth". But that is a separate point. I have little doubt that it could require "the publication" in question to publish the outcome.

70. The more substantive point is that relating to the means of the Second Defendant. It is not unreasonable for the Claimant to try to establish the facts. The issue is whether or not any of the Defendants can be compelled to respond. The Second Defendant appears at the moment unwilling to do so, and it may be that the Claimant would be wise to draw the inference, therefore, that there would be insufficient funds available to meet any order for costs at the conclusion of the trial. I am unpersuaded, however, that the court has the power to make an order.

71. Mr Price has suggested that publicly available documents should suffice to inform the Claimant as to the viability of the Second Defendant, but as Mr Warby points out, the latest information available, especially in view of the recent change of ownership, is largely historical.

72. Mr Warby makes the point that it is an important feature of the overriding objective that the court should be able to take into account " … the financial position of each party" and, what is more, the parties are required to help the court to further the overriding objective. He suggests, in the light of this, that there may be power in the court to order the parties to place information on the table as to their respective financial positions. I think that is to read too much into the general provisions contained within CPR 1.1.

73. His next argument is based upon the principles relating to security for costs. Of course, a defendant may obtain security for costs in circumstances where the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it would be unable to pay the defendant's costs if ordered to do so: see CPR 25.13(2)(c). In my judgment, however, this does not avail him in circumstances where the boot is on the other foot. A claimant cannot obtain security for costs against a defendant and, accordingly, there is no reason to suppose that he could obtain information of the kind that would be deployed on such an application.

74. Mr Warby has further deployed the provisions of CPR 18.1 and CPR 3.1(2)(m). The information he seeks, of course, does not relate to any issue in the case. But the latter provision in not tied specifically to pleaded issues:

> "3.1– …
>
> (2) Except where these Rules provide otherwise, the court may
>
> …
>
> (m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective."

I am not persuaded, in the absence of any direct authority, that this broad provision enables the court to interrogate a defendant as to his, her or its means, purely with a view to giving a claimant comfort as to the recoverability of costs in the event of success.

75. In those circumstances I refuse the order sought. That concludes the issues on which I was invited to rule on these applications.