Neutral Citation Number: [2008] EWHC 3054 (QB)

Case No: QB/2007/PTA/0754

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 December 2008

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

(1) ELIZABETH CLAIRE CROSSLEY **(2) PETER JOHN CROSSLEY**	**Appellants**
- and -	
NEWSQUEST (MIDLANDS SOUTH) LTD	**Respondent**

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The Appellants in person
Alexandra Marzec (instructed by **Farrer & Co**) for the **Respondent**

Hearing dates: 26 & 27 November 2008

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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.

....

THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

1. There is now before the court an appeal in Action No. HQ06X02106 from an order of Master Miller dated 15 November 2007. The Claimants, Mr and Mrs Crossley, have brought proceedings for libel against Newsquest (Midlands South) Ltd as the publisher of the *Worcester News*. When the matter was before the Master he considered, alongside it, similar applications in Action No. HQ06X02107, in which the Defendants were the Crossleys' neighbours, Mr and Mrs Wallace. There was an appeal in that matter also, which was heard before Openshaw J in October this year. There was accordingly an application before the present appeal started, on behalf of the Defendant, that I should adjourn it so that it could be dealt with by Openshaw J at some stage in the future. It was thought that this might save time and money and also avoid the possibility of inconsistent outcomes. I rejected that application, not least because it would involve even further delay in this long drawn out litigation. There was no information available as to when Openshaw J is next likely to be sitting in the Queen's Bench Division, but there would almost certainly be a lapse of several months. I also pointed out that since his judgment on several of the issues which are common to the present case is, although not binding on me, an authoritative and persuasive judgment of the High Court, it was most unlikely that any significant inconsistency would arise.

2. The substantive application now before me, issued as long ago as 22 May 2007, is that of the Defendant. Its purpose was to strike out the claim under CPR 3.4(2) or, in the alternative, to seek summary judgment under CPR Part 24. The Master acceded to the Defendant's application and also refused the Claimants permission, sought in applications dated 3 May and 28 June 2007, to add new claims based on alleged infringement of their privacy and breach of confidence. He also considered an application for costs-capping. A similar application was made to me by Mrs Crossley at the outset of the hearing, on the basis that she was seeking to limit each side's costs of the appeal to £4,000 and to confine the Defendant's representation to counsel alone. This I rejected, since three days had been set aside for this appeal and the preparation has no doubt involved considerable effort on the part of both solicitors and counsel. Furthermore, the fees were no doubt already incurred before they arrived at the hearing.

3. Following the hearing before the Master, he delivered a reserved judgment running to some 38 pages, in which he gave detailed consideration to all of the issues raised. My function is to review that judgment rather than to embark on a rehearing.

4. The background to this litigation has been set out in a number of judgments over the years, but I shall nevertheless attempt to summarise it in order to set the present applications in context.

5. The claim relates to an article published in the *Worcester News* on 23 July 2005. I now set it out in full, with the addition of paragraph numbers for ease of reference:

> "COURT: Neighbour vows to fight on after ruling on decade-long dispute
>
> **Millionaire must pay out for sewage saga**

1. A judge has ordered a multi-millionaire who claimed she could not afford to pay a £50,000 legal fees bill to cough up.

2. Claire Crossley, aged 57, and her husband Peter, 58, have been embroiled in a dispute with their neighbours Robin and Jill Wallace, both 70, for more than a decade.

3. The saga – over a reed bed sewage draining system that the Crossleys constructed on the Wallaces' land, in Powick, near Worcester, allegedly without their permission – has seen the couples in court on numerous occasions.

4. Finally, last month, the Wallaces won a civil case against the Crossleys, with Judge Andrew Geddes imposing a host of rulings.

5. One of the rulings stated the Crossleys pay the Wallaces £50,000 toward the £120,000 they have spent so far on legal fees.

6. They were told to pay up last Monday, but Mrs Crossley appealed, claiming she could not afford to stump up one lump sum, instead she wanted to pay the Wallaces £800 a month.

7. But at an appeal hearing at Worcester County Court on Wednesday, the Wallaces' solicitor Norman Robertson-Smith said the Crossleys owned […] properties across Worcestershire – renting the majority of them out.

8. 'I'm not at all satisfied that Mrs Crossley and her husband are unable to reach the order I have made', said Judge Geddes.

9. 'Mrs Crossley has told me she has about [a particular sum was mentioned] secured on her properties. Obviously, with a property portfolio of [again a particular sum was mentioned] it would not be a problem to raise more.

10. 'Otherwise, I'm afraid to say she'll have to sell a property to release the funds.'

11. Reacting to the verdict, Mr Wallace said: 'We were pleased with the hearing.

12. ‘But we have had so many positive results from court cases and hearings over the past few years, yet still the problems of smell from the sewage, trespass and expense continue.

13. ‘Maybe now, at last, Mrs Crossley will start to accept that she has no right to use our stream bed as a sewage treatment plant’, said Mr Wallace.

14. But Mrs Crossley has vowed to fight on, regardless. She plans to appeal the rulings made by Judge Geddes in the civil case which took place last month.

15. ‘There’s been a serious miscarriage of justice’, she said. ‘I wouldn’t keep pursuing this unless I was convinced that one day I’d get the right result and justice will be done.’

WHAT THE COUPLES ARE IN DISPUTE ABOUT

16. The waste from a septic tank runs from Kings End Cottage, in Kings End Road, Powick, which is owned but rented out by the Crossleys, who live in London, down into a stream in woodland on the Wallaces’ land at their nearby home.

17. The Wallaces claim the Crossleys surreptitiously built a reed bed – an environmentally-friendly sewage system – in the woodland after being ordered by Malvern Hills District Council to clean up the mess seeping into their stream.

18. The Wallaces claim the system is ineffective, failing to filter sewage properly, resulting in lingering odours of rotting faecal matter near their house.

19. They also claim the Crossleys trespassed on their land in order to create the reed bed system.

20. The Crossleys argue that the reed bed is the most environmentally-friendly and effective system, and that the Wallaces had approved it before it was installed.”

(In citing the article, I have removed certain figures as they are not necessary to understanding this judgment and Mrs Crossley requested the minimum intrusion into her financial affairs.)

6. Paragraphs 16-20 were set out in a separate box underneath a photograph. This was accompanied by a caption “Jill and Robin Wallace at their stream which has been used to dump sewage”. Issue has been taken by Mr and Mrs Crossley with that

caption, not only because the water in the background is not apparently the "stream" described in the article, but also because, it is said, the emotive phrase "used to dump sewage" is not an accurate representation of the findings of His Honour Judge Geddes at the Worcester County Court.

7. At paragraph 21 of his judgment the Master ruled that:

> " … The only sting and the one which is only open to any jury in this case would amount to no more than that the claimants' sewage treatment system was ineffective in that as a result of bad design, poor maintenance or being overloaded, it failed to filter the sewage and other waste properly resulting in an effluent passing on to the Wallace defendants' land and causing sewage fungus to appear in the reed and obnoxious smells to linger over the reed bed over what constitutes a stream area and the pond, and possibly getting as far as the house, and the claimants had from time to time trespassed on the Wallaces' land."

8. The Master went on to conclude that no reasonable jury could come to a finding other than that, in that natural and ordinary meaning, the words were substantially true. He found, in effect, that the plea of justification was bound to succeed. It is said on the Defendant's behalf that his ruling in this respect was surplus to requirements, since he had earlier ruled that the claim was bound to fail for other reasons (in particular, because of defences of privilege and the inability of the Claimants to set out a viable case of malice against the Defendant).

9. It is thus apparent that the subject of the article was the outcome of recent proceedings resolving a neighbours' dispute. This had gone on for a number of years and concerned the arrangements made for the discharge of sewage from the Claimants' property, as well as from two other adjoining properties, which drained into a septic tank on the Claimants' land. From there the effluent continued through settlement tanks and a reed bed on the Wallaces' land.

10. Proceedings were launched by the Wallaces in the Worcester County Court in 2003, complaining that the inadequacy or failure of these sewage arrangements had led to an actionable nuisance. Mr and Mrs Crossley counterclaimed.

11. The county court proceedings were not the first to which this dispute had given rise. There had also been litigation involving the Malvern Hills District Council and the Environment Agency. For present purposes, however, that background is not directly relevant.

12. The county court action came on for trial before Judge Geddes on 18 April 2005 and the hearing lasted nine days. A reserved judgment was handed down on 4 May of that year, whereby the Judge found for the Wallaces and dismissed Mr and Mrs Crossleys' counterclaim. It was acknowledged by Judge Geddes that over the years Mrs Crossley had made considerable efforts to ensure that the sewage would be efficiently disposed of, but the shortcomings of the system meant that a nuisance was being committed by reason of both smell and the development of an unsightly fungus.

13. On 20 June 2005 argument took place on the matter of costs and the learned Judge made a final order. A month later, on 20 July, he dealt with an application by Mr and Mrs Crossley to vary the earlier costs order. They wished to discharge their outstanding liabilities at the rate of £800 a month, rather than having to pay an immediate contribution of £50,000 in respect of the Wallaces' costs. That application was rejected.

14. The offending article was thus published three days after the final hearing in the county court. The Defendant places reliance upon the timing, partly because it is of significance when judging whether or not the article could constitute a contemporaneous report of court proceedings for the purposes of s.14 of the Defamation Act 1996 (thus attracting absolute privilege), and partly because no complaint was made by the Claimants about the publication of the article until three days short of the expiry of the limitation period the following year. The inference is invited that the complaint was triggered by the ruling of the House of Lords Appellate Committee, on 20 June 2006, to the effect that various of the Claimants' proposed appeals (including against the rulings of Judge Geddes) were not admissible. It is said by the Defendant, in effect, that the Claimants launched this claim, not with the genuine purpose of seeking vindication for their reputations, as they now claim, but purely for the purpose of attempting to re-litigate the underlying property dispute – since all their possibilities of appealing had by then been exhausted.

15. One of the grounds relied upon for striking the claim out is that it represents an abuse of process by way of being a collateral attack on the adverse outcome of the other proceedings: see e.g. *Henderson v Henderson* (1843) 3 Hare 100 and *Johnson v Gore Wood & Co* [2002] 2 AC 1. Although the Master upheld the Defendant's submissions in this regard, it is argued that this too was surplus to requirements, like the finding on justification, since the findings on privilege and malice were enough to achieve the Defendant's objective. I turn, therefore, to the Defendant's primary case, based as it is upon CPR 3.4(2) and CPR Part 24.

16. As I have indicated, the Defendant relies both on CPR 3.4(2)(a) and (b); that is to say, it is submitted that the statement of case discloses no reasonable grounds for bringing the claim and, in the alternative, that it constitutes an abuse of the process.

17. As is well known, the test under Part 24 is whether or not the relevant party has "no real prospect of succeeding on the claim or issue". In this context, it is well established that a "real prospect of succeeding" is to be contrasted with a prospect which is merely "fanciful".

18. The Defendant's application before the Master was supported by a witness statement of Ms Sophie Vickers, its solicitor.

19. In the skeleton argument placed before the Master on the Defendant's behalf, by counsel appearing on that occasion, the background history of the dispute was set out as representing what were said to be uncontroversial facts. I need not repeat them for the purposes of the present appeal, but it is appropriate to record that the Defendant's newspaper had reported some of those earlier stages in articles exhibited to Ms Vickers' witness statement. What is clearly of prime importance for present purposes, however, are the county court proceedings which took place in 2005.

20. The orders made by Judge Geddes on 20 June of that year comprised the following:

    i) The Claimants were ordered to cease causing material to drain from their septic tank on to the neighbouring land so as to cause a nuisance;

    ii) They were ordered to stop entering on to the Wallaces' land save for the purposes of inspection and maintenance;

    iii) They were ordered to pay £3,250 damages for nuisance and trespass;

    iv) The counterclaims were dismissed;

    v) They were ordered to pay the Wallaces' costs of the claim and of the counterclaim;

    vi) The Wallaces were ordered to pay the Claimants' costs of a hearing on 29 May 2004 on the standard basis and their costs of a specific allegation related to the claim in nuisance on the indemnity basis;

    vii) The Claimants were ordered to pay interest on the damages and costs;

    viii) The Claimants were ordered to pay by 18 July 2005 £50,000 on account of the total costs.

21. There is no doubt that the hearings up to and including 20 June 2005 took place in open court and were thus reportable. It was argued by Mrs Crossley, on the other hand, that the application to vary, which came before the court on 20 July, should have been listed in private in accordance with the practice direction attaching to CPR Part 39. That is because it involved consideration of their financial affairs. The fact remains, however, that the hearing did take place in open court and thus was reportable. No application was made for the court to sit in private and there was a reporter present throughout. In these circumstances, it is necessary to consider briefly the relevant principles under statute and at common law, which afford the protection of privilege to media reporting of judicial proceedings.

22. It was long recognised at common law that court reports were, for reasons of public policy, protected at least by a qualified privilege. That is because it is regarded as important that the public should have information available as to what takes place in judicial proceedings. Over the years there have been statutory provisions supplementing the common law and the current position is set out in ss.14 and 15 of the Defamation Act 1996:

    "*Reports of court proceedings absolutely privileged*

    14.–(1) A fair and accurate report of proceedings in public before a court to which this section applies, if published contemporaneously with the proceedings, is absolutely privileged.

    (2) A report of proceedings which by an order of the court, or as a consequence of any statutory provision, is required to be postponed shall be treated as published contemporaneously if it

is published as soon as practicable after publication is permitted.

(3) This section applies to–

(a) any court in the United Kingdom,

(b) the European Court of Justice or any court attached to that court,

(c) The European Court of Human Rights, and

(d) any international criminal tribunal established by the Security Council of the United Nations or by any international agreement to which the United Kingdom is a party.

In paragraph (a) "court" includes any tribunal or body exercising the judicial power of the State.

(4) In section 8(6) of the Rehabilitation of Offenders Act 1974 and in Article 9(6) of the Rehabilitation of Offenders (Northern Ireland) Order 1978 (defamation actions: reports of court proceedings), for 'section 3 of the Law of Libel Amendment Act 1888' substitute 'section 14 of the Defamation Act 1996'.

Reports, etc., protected by qualified privilege

15.–(1) The publication of any report or other statement mentioned in Schedule 1 to this Act is privileged unless the publication is shown to be made with malice, subject as follows.

(2) In defamation proceedings in respect of the publication of a report or other statement mentioned in Part II of that Schedule, there is no defence under this section if the plaintiff shows that the defendant–

(a) was requested by him to publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction, and

(b) refused or neglected to do so.

For this purpose 'in a suitable manner' means in the same manner as the publication complained of or in a manner that is adequate and reasonable in the circumstances.

(3) This section does not apply to the publication to the public, or a section of the public, of matter which is not of

> public concern, and the publication of which is not for the public benefit.
>
> (4) Nothing in this section shall be construed–
>
> (a) as protecting the publication of matter the publication of which is prohibited by law, or
>
> (b) as limiting or abridging any privilege subsisting apart from this section."

23. There is apparently no authority on the rather curious terms of s.15(3), which might appear to imply that a defendant would have to show, even in the case of a court report untainted by malice, that it was also of public concern *and* for the public benefit. This is a burden which would seem onerous, although the court's construction of the meaning of these provisions would no doubt have to be informed by due regard to Article 10 of the European Convention on Human Rights and Fundamental Freedoms. One might be forgiven for thinking that in this day and age, and especially having regard to recent jurisprudence both domestic and in Strasbourg, it is inherently a matter of public concern and public benefit that citizens should have information available to them as to what takes place in court – just as though they had the opportunity to attend the relevant hearings themselves.

24. In the present case it is argued that a neighbours' dispute would not of itself be of public concern; nor would the publication of information about such matters be necessarily for the public benefit. That is as may be, but once any dispute (even though it may in itself be relatively trivial) becomes the subject of litigation in Her Majesty's courts (as opposed to arbitrations which take place traditionally in private), the public is entitled to know what goes on and how justice is being administered on its behalf.

25. It may be that the significance of s.15(3) is to be found in the different wording of s.14. Absolute privilege is confined to reports of domestic and European courts. It does not extend to courts elsewhere. The categories covered by s.15, by contrast, are very wide indeed: see the contents of Schedule 1 to the 1996 Act. Thus, it may be that the additional hurdles set up in s.15(3) would have to be overcome in relation to matters taking place elsewhere in the world. For example, the privilege would attach to reports of "proceedings in public before a court anywhere in the world". If a British citizen were to be defamed in the course of such proceedings, it may be that the defendant would have to show "public concern" and "public benefit" before being entitled to rely on the statutory privilege. Such concerns were expressed in the report of the Supreme Court Procedure Committee on Defamation (the "Neill Committee") in July 1991 at para. XII.13:

> "Equally, however, we think it wrong that defamatory (in some cases very grave) charges can be reported in this country under statutory privilege without any corresponding statutory protection for the individual who is under criticism or attack. We are not satisfied that sufficient protection would be provided in such circumstances by the exercise of editorial discretion."

26. That is a possible clue to Parliament's intention in the enactment of s.15(3). Be that as it may, I am quite satisfied that the present Defendant does not require to overcome any additional hurdles in relation to a report of proceedings in the Worcester County Court. Citizens in this jurisdiction are entitled to know what goes on in public hearings before any of Her Majesty's courts.

27. It thus becomes important to identify which parts of the article of 23 July 2005 can be characterised as fair and accurate reports of court proceedings and, in determining the issue of absolute privilege, whether any such reporting was "contemporaneous". There can be little doubt that a report published three days after a court hearing would be so classified. On the other hand, in so far as the report went into earlier hearings (for example relating to costs on 20 June or the handing down of judgment on 4 May 2005), either for background or to make sense of what took place on 20 July 2005, it might be said that it could not be categorised as contemporaneous. This would be an artificial and technical approach, especially in a context in which Article 10 of the European Convention would be relevant as an aid to interpretation. It would mean that something said in court on 20 July, either by the Judge or the advocates, would attract absolute privilege, whereas what had taken place in court only one or two months earlier would be covered only by qualified privilege. Yet it might be impossible to understand the effect of what was said on the later occasion without reference to the earlier hearings. So, for example, in the present case it might be argued that paragraphs 7-10 of the article were squarely within the zone of absolute privilege but that paragraphs 4 and 5, and the first two lines of paragraph 6, were subject only to qualified privilege.

28. I would rule that such an artificial construction would be contrary to Parliament's intention, and that the absolute privilege understandably attaching to the 23 July report of the 20 July hearing would also extend to the reporting of the earlier hearings, at least in so far as it was reasonably necessary to give context to what took place on 20 July and to enable readers to understand it. In other words, that coverage should be construed as forming an integral part of the (contemporaneous) report of the 20 July hearing. Nonetheless, since there seems to be no authority directly in point, I recognise that it might subsequently be held by an appellate tribunal that a stricter interpretation should be applied; that is to say, that a blue pencil should be applied to remove sentences, or parts of sentences, making reference back to earlier hearings so as to exclude them from absolute protection.

29. In the result, I would rule without qualification that paragraphs 1 and 4-10 of the article are protected by absolute privilege, but acknowledge that paragraphs 4 and 5 (and the first few words of paragraph 6) *could* be held to be protected only by qualified privilege. My own ruling, however, is that absolute privilege extends to them. In practice, it makes no difference to the outcome.

30. It is clear that paragraphs 11-15, covering the reactions of the Crossleys and the Wallaces after the county court proceedings were concluded, would not be protected by either form of reporting privilege (I say nothing at this stage as to *Reynolds*, which is also pleaded in the defence). Nor are paragraphs 2 and 3, which would appear to be by way of background only.

31. That leaves paragraphs 16-20, published in the separate box under the heading "WHAT THE COUPLES ARE IN DISPUTE ABOUT". It may be that these should

be regarded, as the Master thought, as being covered also by qualified privilege: see para. 25 of his judgment. I believe that all the facts alleged were addressed in the course of the county court action and might be considered, not unreasonably, as identifying the nature of the dispute on which Judge Geddes had ruled on 4 May 2005. On the other hand, especially as the headline is expressed in the present tense, these paragraphs could be construed as being an attempt at summarising the overall dispute – which obviously has extended more widely than the county court proceedings. Although I can thus see an argument to the effect that paragraphs 16-20 should excluded, I proceed on the same basis as the Master and treat them as being within the scope of reporting privilege. The offending caption to the photograph would fall to be treated as part of the attempt to report, fairly and accurately, the outcome of the trial. It would thus attract qualified privilege (if it is to be interpreted as reflecting the main text of the article). As I have said, it must not be construed in isolation.

32. Taking into account the traditional latitude allowed by the law, to allow for the inevitable compression required in such reports, I hold that the reporting was fair and accurate: see e.g. *Gatley on Libel and Slander* (11th edn) at 13.37 *et seq*.

33. I need next to address the submissions on malice, since if the Master was correct in concluding that there is no realistic prospect of the Claimants establishing malice against any of the individuals responsible for publishing the article, then it would follow that no claim could succeed in respect of those parts of it protected under s.15 of the 1996 Act.

34. It is well settled that if a judge is in a position to conclude at any stage, whether before or during a trial, that there is no allegation or evidence of malice capable of supporting such a finding, then the issue should be disposed of forthwith. Where there is to be, or may be, a trial by jury, then the test to be applied is whether or not a jury, conscientiously performing its duties, could uphold such a finding: see e.g. *Alexander v Arts Council of Wales* [2001] 1 WLR 1840. At the pleading stage, if allegations of malice are made which are equally consistent with its absence as with its presence, then those allegations should be struck out: *Somerville v Hawkins* (1851) 10 CB 583 and (at the Court of Appeal stage) *Telnikoff v Matusevitch* [1991] 1 QB 102, 120A-E, *per* Lloyd LJ. Clearly, it is not enough simply to plead the bare assertion that the relevant defendant was malicious or, as initially pleaded here, that the defendant " … published or caused to be published the said words knowing they were false or recklessly".

35. When they were prompted by a request for further information, the Claimants amplified their case on malice, but only to a limited extent, by asserting that the Defendant was "recklessly indifferent" to the fact that the words complained of were false. No specific false statement was identified; nor was it made clear which individual within the Defendant's organisation was supposed to be genuinely indifferent to the truth or falsity of the words.

36. The Claimants' amplified case on malice included reliance upon "emotive" language used in the article. It will surely be a rare instance in which emotive language can give rise to an inference of recklessness or improper motive. Nevertheless, it is right that I should consider the particular examples prayed in aid.

37. There is nothing in the criticism of the word "saga". This is obviously used to reflect the long term nature of the neighbours' dispute.

38. There is also the use of the phrase "dump sewage" in the caption to the photograph. If and in so far as this implied that the Claimants had deliberately dumped raw sewage on the Wallaces' land or in their stream, that would clearly be seriously defamatory and would not be supported by any finding made by Judge Geddes. The criticism has always been directed towards the ineffectiveness of the sewage treatment system.

39. As one knows from general experience about the editorial process, it is more than likely that the caption to the photograph was inserted shortly before publication by a sub-editor rather than by the author (Emma Cullwick). If this is indeed the case, it would be necessary for the Claimants to establish against that individual that he or she chose to use the phrase "dump sewage" deliberately in order to give a misleading impression, or that the person concerned was genuinely indifferent as to the accuracy of the summary. No such person or state of mind has so far been identified.

40. Moreover, it is important in this context (as well as in the assessment of the natural and ordinary meaning) to have in mind that the caption should be read in the context of the article as a whole. It would be taken by any reasonable reader to be an attempt at summarising the nature of the allegations or findings as to what constituted the nuisance. It is not appropriate, as a matter of English law, to interpret headlines or captions as though they stood on their own: see e.g. *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65. Thus, I am satisfied, as was the Master, that the caption, taken in its proper context, would be construed by readers as a rough and ready summary of the references in the article to the nuisance arising from the "smell of the sewage" as a result of the inadequacies of the "reed bed sewage draining system that the Crossleys constructed on the Wallaces' land".

41. In paragraph 17 of the article, criticism is directed by Mr and Mrs Crossley at the use of the word "surreptitiously". That is an attempt to describe what the Wallaces were claiming had happened, as indeed they did, and it is balanced by the Crossleys' response (reflected in paragraph 20) that the Wallaces had "approved" the reed bed before it was installed. That encapsulates the nature of the conflict. Moreover, Judge Geddes found that some of the relevant works had taken place on the Wallaces' land without their realising it until later. Although "unobserved" might have been a more apt description, I find it difficult to cavil at the use of "surreptitiously" in the circumstances.

42. There is also reference in paragraph 16 of the article to the Malvern Hills District Council having ordered the Crossleys, some years before, "to clean up the mess seeping into their stream". There was an abatement notice in 2001 and there is no material inaccuracy in using that form of words to summarise its effect.

43. Objection is also taken to the phrase "lingering odours of rotting faecal matter near their house". Yet this lay at the heart of the claim for nuisance, which Judge Geddes had recently upheld.

44. There is thus nothing, in my judgment, to support a plea of malice in the criticisms which are made of the Defendant's phraseology.

45. Another category of allegations relied upon in this context is that of "omissions". There are matters which the Defendant's staff could have included in the article and their failure to do so is said to support a reckless indifference to the overall accuracy of the piece. It is, of course, elementary that newspaper reports have almost always to be selective: what is more, there is generally scope for argument over the judgment as to what should be included or left out. This is therefore not fertile ground in which to find evidence of malice. In particular, there is nothing in the point that the Defendant should have included in its article, relating to recent events in 2005, information about a much earlier "consent to discharge", or requirements imposed by the Environment Agency, or the results of examining samples of effluent at various times in the past.

46. No one disputes that Mr and Mrs Crossley had made efforts to achieve an effective sewage system through the adoption of the reed bed system. The problem is that it was not effective to prevent a continuing nuisance. That is what the litigation was about. The judgment of Judge Geddes went on for many pages and dealt in great detail with the allegations which had been made over a nine day hearing. It was inevitable that a newspaper report would be able to publish only a fraction of its contents. There is no reason to suppose that the resulting summary was, by ordinary standards, materially inaccurate; still less that any such inaccuracy was brought about by recklessness on the part of the Defendant's employees or agents.

47. In these circumstances, I would agree with the Master that the court has a clear duty to exclude the plea of malice from this litigation.

48. Traditionally, a defendant's malice has always been regarded as potentially relevant not only to the defence of qualified privilege but also to that of fair comment. It is important to note, however, that the significance of malice in that context has been significantly reduced in recent years by the recognition that motive is largely irrelevant in the context of the expression of honest opinions and that, essentially, the important question for the purposes of fair comment is whether or not the commentator honestly held the opinion expressed: see e.g. the observations of Lord Nicholls in *Cheng v Tse Wai Chun* [2000] 3 HKLRD 418, Ct of Final Appeal (HK).

49. This has potential relevance in the present case because reliance is placed by the Defendant on the defence of fair comment in relation to the observations attributed in the article, at paragraphs 11-13, to Mr Wallace. It would be Mr Wallace's state of mind that would be relevant, since he was the commentator. As there is no hope of establishing malice in the context of qualified privilege, it is hardly surprising that the court should also have concluded that any such defence of fair comment would not be defeasible on that basis either. There is no reason to suppose that the opinions expressed by Mr Wallace were not honestly held by him.

50. What is suggested, in effect, is that he was expressing satisfaction with the result of the hearing before Judge Geddes, but only cautious optimism as to the future. He was explaining that there had been many hearings in the past which, although apparently favourable from his point of view, had not led to any diminution in the "problems of smell from the sewage, trespass and expense". What he hoped was that, at last, Mrs Crossley would start to accept that she had no right to use his stream bed as a sewage treatment plant. Whether this is comment or fact, or a mixture of the two, it is difficult to see how the Crossleys could overcome the defence of either fair comment or justification in respect of those paragraphs.

51. The conclusions reached by the Master on privilege, malice and fair comment were such as to entitle the Defendant to the relief sought. It was thus strictly not necessary for him to go on to address the matter of justification. He did, however, hold that the plea of justification in relation to any possible defamatory meaning was bound to succeed. What he said was this (at para. 30):

> "Here again it is a substantial justification which is required not perfection. It seems to me in the light of the totality of the article, the judgment and the history of this matter, that again no jury being properly directed could possibly reach the conclusion that the article is other than substantially true, in so far as it alleges matters of fact and is true so far as the alleged natural and ordinary meaning of the words which I have found to be capable of being arguably pursued here."

52. I consider that the Master was entitled to reach that conclusion; that is to say, that there is no realistic prospect of the defence of justification failing. It would be bound to succeed for reasons corresponding to the findings of Judge Geddes.

53. The Master also acceded to the submissions of abuse of process. He referred to a number of authorities and in particular to *Johnson v Gore Wood* [2002] 2 AC 1, 22, and the words of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536, where he said, in relation to that case which concerned injuries sustained to the "Birmingham Six", that:

> "It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

54. In the present case, as in a number of earlier cases, the abuse of process is said to arise from the possibility of the court having to preside over and adjudicate upon proceedings which would involve the re-litigation of issues which have already been determined, or could have been determined, in earlier hearings. Here, the Master carefully considered the law and came to the conclusion that both actions should be struck out. In the appeal relating to the claim against Mr and Mrs Wallace, Openshaw J on 10 October dealt with the matter, at para. 20, shortly and robustly:

> "These proceedings for libel are, in my judgment, a flagrant and obvious attempt to re-litigate the same issues all over again. The Wallaces, and for that matter the Crossleys themselves, have been put to enormous expense in contesting

> the case before Judge Geddes. It is simply not reasonable or just that they must do so all over again in a defamation action nor, might I add, is it right that further time of the courts, which is an increasingly scarce and valuable resource, is further taken up with this matter."

55. True it is that the present Defendant was not a party to the action in the county court between Mr and Mrs Crossley and the Wallaces. There is no question of any issue estoppel. The doctrine of abuse now under consideration, however, extends beyond the principles of issue estoppel and *res judicata*. The doctrine can be applied in some cases where the same or similar issues would have to be resolved between different parties: see e.g. *Schellenberg v BBC* [2000] EMLR 296. The court is also reluctant to permit litigants to reopen issues by way of collateral attack upon an earlier decision.

56. There is little point in rehearsing the arguments on abuse of process at length, since it is unnecessary to the outcome of the present appeal, just as it was strictly unnecessary for the Master to address it. All I need say, against the background circumstances I have described above, is that the Master was fully entitled to reach the conclusion he did, not only in relation to the claim against the Wallaces but also in the claim brought against the newspaper publisher.

57. The next matter I must address is the application to amend for the purpose of adding causes of action founded upon privacy and confidentiality.

58. The first question always is whether or not there would be a reasonable expectation of privacy. While I would accept that ordinarily people may expect their financial affairs to be accorded privacy, once information of that kind has entered the public domain it may very well be, depending on the particular circumstances, that such protection has been lost. Unfortunately, once something is mentioned in open court, it is difficult to see how there can any longer be such an expectation. The basic rule is that anything said in open court may be reported: see e.g. *R v Arundel Justices, ex parte Westminster Press Ltd* [1985] 1 WLR 708.

59. It is true that in CPR 39.2(3)(c) it is provided that a court hearing, or any part of it, *may* be held in private if it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality. There is no provision that such a hearing *must* take place in private; nor was there any application in the present case for the details of Mr and Mrs Crossley's financial affairs to be addressed in private session. The court would have had a discretion to make such an order, if it thought it appropriate, after balancing privacy considerations against the general principle of open justice and the right of the public to be informed as to what takes place in court proceedings. As I have already said, however, the hearing was in fact in open court and a representative of the press was present. In those circumstances, any suggestion that publication in the newspaper of the information discussed in open court constituted a breach of confidence, or an actionable infringement of the Claimants' privacy, is misconceived. The Master was right to refuse any such amendment and the appeal in that respect is also without merit.

60. The final ground of appeal I have to consider is based on allegations of procedural irregularity giving rise to unfairness. There was criticism made of counsel at the

hearing before the Master, partly on the basis that he declined to cite authorities thought by Mr and Mrs Crossley to be in their favour, and partly because he introduced some case law at the hearing without having served copies in advance.

61. There is nothing in either of these points. The cases which it is said counsel should have cited were *Scott v Scott* [1913] AC 417 and *McKennitt v Ash* [2008] QB 73.

62. In fact, after the hearing the Master was supplied with a copy of *Scott v Scott* and he addressed it in the judgment. It made no difference to the outcome. So far as *McKennitt v Ash* is concerned, that is a recent decision of the Court of Appeal on Article 8 of the European Convention and its relationship to the domestic law of confidence. For the reasons I have already given, in relation to the proposed amendments, it has no relevance to the present case.

63. Nor can it be said that producing an authority at, or shortly before, a court hearing gives rise to procedural irregularity. It is often the case that counsel, or the judge for that matter, will think of a case in the course of argument. Furthermore, in this instance, there was no suggestion that the Crossleys had been prejudiced or required further time to consider the relevant case law. Had they done so, no doubt it could have been granted. Indeed, the case before the Master lasted for several days. There was ample time to take such matters into account and respond to them.

64. Nor is there any basis for interfering with the order which the Master made in relation to costs, either as to the awarding of costs against the Claimants or as to his refusal to make a costs-capping order prior to the hearing. Those were matters very much within the Master's individual judgment and discretion.

65. In the result, I have come to the same decision as Openshaw J in the parallel proceedings. The Master made no error of law. He did not take into account any matter that was irrelevant or *vice versa*. Nor was there any irregularity or impropriety giving rise to procedural unfairness. This appeal must accordingly also be dismissed.