Neutral Citation Number: [2008] EWCA Civ 432

Case No: A2/2007/0979 & 0989

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE GRAY
[2007] EWHC 926 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/04/2008

Before :

THE LORD CHIEF JUSTICE OF ENGLAND & WALES
LORD JUSTICE LAWS
and
LADY JUSTICE ARDEN

- -

Between :

PETER CURISTAN	**Appellant/ Respondent**
- and -	
TIMES NEWSPAPERS LIMITED	**Respondent /Appellant**

Richard Parkes QC and Matthew Nicklin (instructed by **Messrs Schillings**) for the **Appellant/Respondent**
Victoria Sharp QC and Alexandra Marzec (instructed by **Times Newspapers Limited**) for the **Respondent/Appellant**

Hearing dates : 25-26 February 2008

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Approved Judgment

Lady Justice Arden :

Introduction

1. This judgment concerns appeals against the determination by Gray J ([2008] 1 WLR 126; [2007] 4 All ER 486) of two preliminary issues in proceedings for defamation brought by Mr Peter Curistan, a chartered accountant and well-known businessman in Northern Ireland. I have set the preliminary issues out in [10] below. Mr Curistan contends that an article published by the defendant (whom I shall call "The Sunday Times"), which was partly based on statements made in Parliament, was defamatory of him. The essential issues concern (1) the availability of qualified privilege for those statements and (2) the actionable meaning of the article, which comprised in part those statements and in part other factual material representing the newspaper's own investigative findings. The first issue is largely fact-specific but the second issue involves a novel challenge to the so-called "repetition rule" which generally applies to reported speech in defamation proceedings.

2. The repetition rule has the effect that "[f]or the purpose of the law of libel a hearsay statement is the same as a direct statement..." (per Lord Devlin in *Lewis v Daily Telegraph* [1964] AC 234, 284). The purpose of the rule is to protect the individual's right to his reputation: "repeating someone else's libellous statement is just as bad as making the statement directly" (per Lord Reid in *Lewis* at 260). In *Stern v Piper* [1997] QB 123, this court applied the rule to the situation where the defendant contended that it had simply made a statement that an allegation had been made. Thus the policy of the rule appears potentially to apply in all circumstances and irrespective of whether the meaning of a statement is that the publisher is only reporting that a statement has been made without adopting or endorsing it. But an important inroad was made in *Al-Fagih v H.H Saudi Research Marketing (United Kingdom) Ltd* [2002] EMLR 13, where this court declined to apply the repetition rule where statements that allegations had been made were made on a privileged occasion. The first issue in this case is whether any part of the article is entitled to reporting privilege but the second and important issue is whether the judge was correct to accept the submission that he had to find a single meaning for the whole article, including any privileged parts, and in so doing to apply the repetition rule to the allegations which he found were entitled to privilege. Privilege and meaning are two key elements of the law of defamation. They ultimately concern the freedom of expression of the media as well as the right of the individual to protection for his reputation. Moreover, in these proceedings, that freedom and right are invoked in the context of a statement made in Parliament. The right to freedom of expression assumes a special importance in the context of statements in Parliament because they concern political matters.

3. I shall need to start by outlining the background and the judgment of the judge. The principal issues and contentions on these issues on these appeals are formulated in [16] to [20] below. A summary of my conclusions will be found at [21] and [22] below, and I amplify these at [24] to [76] below.

Background

4. Mr Curistan commenced these proceedings following the publication of an article, under the headline " 'IRA' developer in row over accounts", by The Sunday Times in its Belfast edition on 19 February 2006 and reproduction of that article on its website. (The English edition of The Sunday Times carried only a shortened version of the same article). The article in question, with paragraph numbers added, is set out in the Part A of the Appendix to this judgment. I have added details of the accompanying photograph, which was not published on the website, but little turns on it so far as these appeals are concerned.

5. The critical structural feature of the article, which has led to the issues arising on these appeals, is that it is a hybrid report containing both statements made by The Sunday Times, and statements said to be covered by qualified privilege. This is because The Sunday Times referred in its article to certain statements made by Mr Robinson MP in the House of Commons some days earlier on 8 February 2006. These passages are italicised in the Appendix. I will call them "the privileged passages", although the availability of privilege is one of the issues raised by these appeals. ("The non-privileged passages" are therefore the passages in the article apart from the privileged passages). The existence of the privilege, however, for fair and accurate reports of what is said in Parliament is long-standing, and not in doubt. Although an article reporting something said on a privileged occasion is common in practice, there is surprisingly little authority, so far as counsel's researches go, in which the impact of the commingling of privileged material with a substantial amount of non-privileged material on the liability of the newspaper or broadcaster for defamation has been considered. The principal authority is the decision of the House of Lords in *Dingle v Associated Newspapers Ltd* [1964] AC 371. Even then, the issues directly before the House concerned only the correct approach to damages.

6. The Sunday Times' case is that the privileged passages are a fair and accurate report of some of the statements made by Mr Robinson on that occasion. The significant parts of the statements made by Mr Robinson are set out in Part B of the Appendix to this judgment. If The Sunday Times can make out its defence, the privileged passages will be the subject of qualified privilege by virtue of s 15 of the Defamation Act 1996 ("the DA 1996"), read with Sch. 1, Pt 1, para.1 thereto. I refer to this privilege below as "reporting privilege". Section 15 of the DA 1996 and Sch. 1, Pt 1, para.1 thereto provide:

> "15 *Reports, &c. protected by qualified privilege*
>
> (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.

SCHEDULE 1

QUALIFIED PRIVILEGE

PART I

STATEMENTS HAVING QUALIFIED PRIVILEGE WITHOUT EXPLANATION OR CONTRADICTION

1. A fair and accurate report of proceedings in public of a legislature anywhere in the world."

These proceedings

7. Pursuant to agreement between the parties, the judge has ordered that these proceedings be tried by a judge sitting without a jury. It is not necessary to do more than indicate the general nature of the issues raised by the pleadings. The essential allegation in the particulars of claim is that The Sunday Times' article heavily embroidered the allegations made by Mr Robinson in Parliament. It is said that Mr Robinson did not use the word "financial malpractice" and did not accuse Mr Curistan of money laundering. Mr Curistan's case was that The Sunday Times made use, for example, of the qualifications to the accounts of Mr Curistan's companies in order to give force to its distorted report of Mr Robinson's allegations when the real position was that the qualifications to his company's accounts were immaterial. In addition, the reference in the article to the due diligence report (Appendix, Part A, (ix) to (xi)) suggested that the exercise had been prompted by doubts as to the legitimacy of his business interests. In fact, it was an essential ingredient of the process of appointment of a developer for the Laganside development. The Sunday Times also attempted to buttress Mr Robinson's allegations by using the standard response of the auditors of Mr Curistan's accounts that they would not comment on the client's affairs. In short, The Sunday Times had attempted to cast "a pall of sleaze over" Mr Curistan's business operations.

8. There are two principal defences. First, The Sunday Times contends that the article was protected by qualified privilege insofar as it reported allegations made in Parliament. Secondly, it seeks to justify the article on the basis, so far as relevant to this appeal, that there were reasonable grounds to suspect that Mr Curistan had been associated with IRA dirty money, and was also involved in financial malpractice.

9. The judge summarised the rival contentions on meaning in the following passage, in which he also usefully explains two more terms used by practitioners in this field, namely the *Lucas-Box* meaning and *Chase* levels:

> "8. According to para 7 of the defence, the meaning which the defendant seeks to justify (the so-called *Lucas-Box* meaning: see *Lucas-Box v News Group Newspapers Ltd, Lucas-Box v Associated Newspapers Group plc* [1986] 1 All ER 177, [1986] 1 WLR 147) is that: (a) there were reasonable grounds to suspect that the claimant had been associated with IRA dirty money, and was also involved in financial malpractice; and that (b) in order to support his denial of the allegations made against him by Peter Robinson MP in Parliament linking him to the IRA's 'dirty money', the claimant had publicly made a false claim that the accounts of his company Sheridan Millennium Ltd were not qualified in any way.
>
> 9. The rival contentions are therefore whether the article means that the claimant was *guilty* of involvement in money laundering and other financial malpractices (criminal or otherwise) or whether it means that there are *reasonable grounds to suspect* that the claimant had been associated with IRA 'dirty money' and involved in financial malpractice. These two different levels of meaning have come to be labelled 'a *Chase* level 1 meaning' and 'a *Chase* level 2 meaning' respectively, following the decision of the Court of Appeal in *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772, [2003] EMLR 218.
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> 10. I can see that there is some advantage in the use of labels such as these as shorthand. It is, however, common ground in the present case that it is open to me to determine whatever meaning I think the words would have conveyed to ordinary reasonable readers without being constrained to pigeon-hole them in one or other of the *Chase* levels."

The preliminary issues heard by the judge

10. The preliminary issues on which the judge ruled related to:

i) Whether reporting privilege was available for that part of the article which set out what had been said in Parliament, and

ii) Whether the article bore a particular meaning which The Sunday Times sought in its defence to justify as true, that is to say, whether it bore a *Chase* level 2 meaning (reasonable grounds to suspect association with IRA money laundering), as opposed to a *Chase* level 1 meaning only (guilty of involvement in IRA money laundering).

The judgment of Gray J

11. The judge's rulings on both issues have been appealed. The judge heard the issues in the opposite order to that set out above and dealt with them in his judgment in the order in which he had heard them. He held in favour of The Sunday Times on issue (i):

> "55. It seems to me to be clear that, in what he said in Parliament, Mr Robinson is accusing the claimant of being associated with IRA 'dirty money', ie with laundering money for the IRA. The reference to 'such men' being involved in government initiatives must be a reference to the claimant and to Mr Mackin, both of whom Mr Robinson had mentioned moments earlier. Moreover Mr Robinson refers to 'recent reports' showing that it is not the case that the claimant and his business activities are legitimate.
>
> 56**.** It is true that Mr Robinson calls for an investigation. But I think that his audience would have understood that the investigation for which he called was designed to expose the claimant's criminality (as he saw it) rather than to discover if he had been guilty of criminality.
>
> 57. As I have already pointed out at [45], above, Mr Parkes maintains that the *Sunday Times* report of what Mr Robinson said is neither fair nor accurate. Certainly the report is not complete. I have to bear in mind that -
>
> > 'a reporter is in principle allowed to summarise and to be selective without losing the benefit of the privilege. It is not suggested that in themselves these parts of the article are unfair.'
>
> 58. I must next consider the extent of the extraneous material added to the reportage. It is on any view substantial, since it extends to most, although not all, of paras (v)-(xviii) of the article. On the other hand this additional material does not consist of adjectival or journalistic comment; nor is there any 'editorialisation'. In these respects the *Sunday Times* article can be distinguished from the BBC programme which was the subject of complaint in *Henry v BBC*. Furthermore there was in the present case 'no excessive commentary or misleading headlines' of the kind against which Kirby J warned in *Chakravarti*'s case.

59. Is the privileged reportage extricable from the rest of the article? In other words is it severable or capable of being distinguished by the typical *Sunday Times* reader? Paragraph (i) conflates part of what Mr Robinson said in Parliament with what the newspaper claims to have discovered about the falsity of claims made by the claimant about having a clean bill of health. There are, however, no quotation marks around the second half of para (i). Moreover, para (ii) makes clear what was Mr Robinson's accusation against the claimant made in the House of Commons. That is plainly the accusation which the claimant seeks to rebut in paras (iii) and (iv) of the article.

60. It is plain that from para (v) onwards the article is largely, if not exclusively, devoted to the newspaper's investigation into the claimant's various companies and into their accounts. It is true that in paras (xiii) and (xiv) there are references back to what Mr Robinson had said in Parliament. In each of those two cases it is made clear that it is Mr Robinson who is being quoted. Moreover it is in my view important to note that these references are made (and would appear to the reader to have been made) in the context of the *Sunday Times* investigations into the claimant's corporate empire and the companies' accounting practices. Readers would no doubt expect a newspaper to follow up an MP's claims about a prominent businessman like Mr Curistan by carrying out an investigation of its own.

61. In my judgment the parts of the article which quote or refer to what Mr Robinson said in his speech would be recognised as such by *Sunday Times* readers. I think the passages are extricable from the remainder of the article in that sense. The same applies to the headline: the inverted commas around IRA indicate that the allegation is one made by someone other than the newspaper itself, ie Mr Robinson.

62. Finally I ask myself whether there is a connection between the reportage in the article and what the *Sunday Times* added. My answer is that there is such a connection. The accusation levelled against the claimant in the House of Commons was an association with the IRA's 'dirty money'. What is more, Mr Robinson mentioned the claimant's companies, albeit without naming all of them, as well as mentioning Mr Mackin, formerly of the IRA. As for the material added by the *Sunday Times*, that consisted in the fruits of its investigation into the claimants' companies in order to see whether there was evidence of IRA money being laundered through those companies' accounts.

63. It is common ground that Mr Mackin was at the material time a co-director with the claimant of seven of those companies. In my view there is a clear and real nexus between what Mr Robinson said in the House on the one hand and the additional material included in the *Sunday Times* article alongside reporting of Mr Robinson's speech. This is not a case of gratuitous or collateral or irrelevant commentary being published alongside the privileged material.

> 64. For the above reasons I conclude that the passages in the *Sunday Times* article which are identified in para 6(b) of the defence are protected by qualified privilege as being a fair and accurate report of proceedings in Parliament…."

12. On issue (ii) (meaning), the judge dealt first with two "pre-preliminary" points. He first disposed of the contention made by Mr Patrick Moloney QC, who then appeared for The Sunday Times that, on the question of the meaning, those parts of the article which constituted a report of what Mr Robinson said should be treated merely as the context for the non-privileged words. The judge held that he was precluded from accepting this argument by *Dingle*, which I shall have to consider below (judgment, [19] to [21]). The judge then dealt with the next "pre-preliminary" issue, which was whether the repetition rule applied. The judge held that the rationale of the repetition rule still applied and that it could not be disapplied where the defendant had considerably enlarged upon the report of what had been said in Parliament:

> "25. Is Mr Moloney right when he contends that this is a case where, exceptionally, the repetition rule should be set aside when it comes to interpreting the *Sunday Times* article? Even assuming that the application of the repetition rule would, as Mr Moloney submits, undermine or erode the privilege otherwise available in respect of those parts of the article which report parliamentary proceedings, I do not think that the circumstances of the present case call for the radical modification to an established rule for which Mr Moloney contends. It seems to me that the reasons given by Simon Browne LJ in *Mark v Associated Newspapers Ltd* [2002] EMLR 839 at [27]-[35] for the existence of the repetition rule are just as valid in the circumstances of the present case as they are in other cases. Thus, to the extent that the *Sunday Times* is repeating what Mr Robinson had said, it is just as bad as if the newspaper was making the statement about the claimant directly. If the repetition had not taken place in the columns of a newspaper such as the *Sunday Times*, little damage would have been done by Mr Robinson uttering his remarks on the floor of the House. Parliament may be a public forum but that does not mean that what members of Parliament say in the House attracts wide publicity.
>
> 26. Mr Moloney is of course right when he says that, other things being equal, a newspaper can repeat with impunity a libel which was originally published in circumstances of parliamentary privilege. The problem here is that the *Sunday Times* did not confine itself to reporting what Mr Robinson said. His accusation is coupled in the first paragraph of the article with the newspaper's own allegation that the claimant falsely claimed that accountants had given him a clean bill of health. Elsewhere in the article the newspaper amplifies that allegation

> by reference to what two firms of accountants have said and done in relation to the claimant's companies (paras (iv)-(viii) and (xvii)). The *Sunday Times* did not confine itself to reporting what Mr Robinson said in Parliament about Mr Dessie Mackin being a co-director with the claimant of several companies. Instead the newspaper chose, as it was of course perfectly entitled to do, to indorse that allegation by referring in para (xiii) to information evidently supplied to the newspaper by 'security sources'. The *Sunday Times* also incorporated in its article at paras (ix)-(xi) a reference to another firm of accountants having been called in by the Northern Ireland Department of Economic Development to perform a full due diligence test to assess whether the claimant's company should be permitted to retain a substantial building development contract. Those paragraphs raise serious questions--to put it at its lowest--as to the claimant's integrity. In these various ways the newspaper, as I repeat it had every right to do, considerably fleshed out and enlarged upon what had been said in the House of Commons.
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> 27. I recognise of course the high importance attached to the freedom to publish fair and accurate reports on proceedings in parliament: see for example *Wason v Walter* (1868) LR 4 QB 73 at 89, [1861-73] All ER Rep 105 at 110-111 per Cockburn CJ and *Cook v Alexander* [1973] 3 All ER 1037 at 1041-1042, [1974] QB 279 at 288 per Lord Denning MR. But what is the position where a newspaper elects to go beyond publishing a report of the proceedings in Parliament and includes material of its own, as the *Sunday Times* did in this case?
>
> 28. In my judgment the *Sunday Times* article of which the claimant complains does not qualify for the special exemption from the repetition rule for which Mr Moloney contends. It would have been open to the *Sunday Times* to publish an unadorned report of Mr Robinson's words in the House. If that course had been adopted, the newspaper's entitlement to privilege would not have been open to doubt. However, in this case the *Sunday Times* chose not to take that course. I have summarised above the material extraneous to what was said in the course of the parliamentary debate which the newspaper included in its report.
>
> 29. The newspaper having chosen to enlarge upon Mr Robinson's strictures, I see no reason to disapply the repetition rule when determining the meaning of the article in its entirety. It may be that as a result the hurdle which the newspaper will have to surmount when seeking to establish a defence to this action will be a higher one. But that stems from the *Sunday Times*'s own choice to make substantial additions to and elaborations of what Mr Robinson said in Parliament."

13. Having dealt with the two "pre-preliminary" issues in the way described above, the judge went on to hold that the article bore the *Chase* level 1 meaning:

"30. I have not rehearsed the detailed textual arguments of counsel on the issue of meaning because I think it would be unprofitable for me to do so. Instead I will give my answer to the first preliminary issue and thereafter explain my reasons for arriving at that conclusion.

31. In my judgment the natural and ordinary meaning which would have been conveyed to the hypothetical ordinary reasonable reader of both the *Sunday Times* article and the website posting is that the claimant through his companies was associated with IRA 'dirty money' and was thereby *guilty* of IRA money laundering and financial malpractice.

32. My reasons for that conclusion are as follows: I accept that the quotation marks around IRA in the headline of the article, taken by itself, would indicate to the reader no more than that it had been *alleged* that the claimant is linked to the IRA. However, the body of the article, read as a whole, appears to me to convey clearly to the reader that such a link did in fact exist. It is true that the language employed in the first two paragraphs of the article is consistent with a *Chase* level 2 meaning, ie the existence of reasonable grounds for suspicion rather than actual guilt. It is also true that paras (iii) and (iv) contain the claimant's denials of wrongdoing and that those denials are by no means formulaic. The claimant expressed himself in firm and apparently convincing terms.

33. As it appears to me, the balance of the article is couched in terms which would in my view cause the ordinary reasonable reader to conclude that the claimant's denials are untrue and that he has indeed been associated with the IRA's dirty money. Why else the references to false accounting within the claimant's business empire? PWC are said to have qualified the 2002-2003 accounts of one of the claimant's companies; the 2003 accounts are said to have contained 'the heaviest qualification'. The reader is told that information and explanations have been denied to PWC by or on behalf of the claimant. The records of various substantial sums are said in the article either to have been unobtainable for reasons which are unexplained or to be so lacking in detail than an audit could not be carried out. The quotation attributed to a PWC spokesman about the firm's policy would in my opinion suggest to the reader that PWC were not prepared to stand behind and support their client--why else include this paragraph in the article?

34. Moreover the reader of para (ix) of the article would, I think, conclude that something was seriously amiss with the claimant's Sheridan group of companies if a 'full due diligence check' needed to be carried out in order to assess whether the group should be allowed to retain what is evidently a large and lucrative development contract. There follows immediately a reference in para (xiii) to the claimant's links to Mr Mackin who has, so the reader is told, been convicted of IRA membership and was the IRA's finance director before becoming Sinn Fein's head of finance. Some indication is given to the reader of the closeness of that link in para (xiv) of the article, where the two of them are said to be co-directors of 23 companies. Seven of those companies are said to have been convicted of failing to keep proper accounts. Then in para (xvii) the reader is told that

> a Dublin firm of accountants has resigned from some of the claimant's companies because they too were unable to establish whether proper books and records had been kept. The article concludes with a reference to Mr Mackin as a friend of the claimant since student days.
>
> 35. Mr Moloney rightly points out that nowhere in the article is it said in terms that the claimant is a money launderer for the IRA or that he has been associated with the IRA's 'dirty money'. Any such conclusions would, I accept, be inferences. Are they inferences which the ordinary reasonable reader would draw? I answer that question in the affirmative. Although the claimant's rebuttal features with some prominence in the article, virtually everything which follows casts doubt on the truth of that rebuttal. The first paragraph of the article links the charge of association with the IRA's 'dirty money' with the claimant's false claim to have been given a clean bill of health by accountants. The reader is told that one firm of accountants has qualified the claimant's companies' accounts twice, that another firm has resigned and that a third firm has been called in to carry out full due diligence to see if a company of the claimant should be allowed to retain a lucrative contract. The reader would in my view inevitably draw the conclusion that the reason for the claimant's persistent failure across the gamut of his companies to make proper disclosure of financial records was to conceal the fact that such disclosure would reveal the claimant's association with the IRA's 'dirty money' and so would also reveal the claimant's involvement in money laundering for the IRA."

14. In the course of his judgment, the judge made one reference only to the single meaning rule. He noted at [17] that Mr Parkes had reminded him that he had to find a single meaning for the article read as a whole. He did not explain the effect of the rule but Mr Parkes has referred the court to *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 at 71 to 72. In essence the single meaning rule is the rule that for purposes of the law of libel a defamatory statement is taken to have a single meaning, to be determined by the judge or jury as appropriate, and this is so even if different readers would read the same statements as having different meanings. The statement must of course be read as a whole or, as it has been put, "the bane and the antidote must be taken together". The following passage from *Duncan & Neill on Defamation*, 2nd ed. (1983), p. 13, para. 4.11, approved by the House of Lords in Charleston at page 70, provides a useful description of this principle:

> "In order to determine the natural and ordinary meaning of the words of which the plaintiff complains it is necessary to take into account the context in which the words were used and the mode of publication. Thus a plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage."

15. The combined operation of the single meaning rule and repetition rule had the effect that the meaning of the non-privileged parts of The Sunday Times' article was found

not simply in the context of Mr Robinson having made allegations about Mr Curistan but on the basis that, having repeated those allegations, The Sunday Times was to be treated as having made those allegations itself.

Issues arising on these appeals

16. The issues arising on these appeals may be described as follows:

(1) *The privilege issue* – did the judge err in his determination that the privileged passages in the article are privileged pursuant to section 15 of the 1996 Act?

(2) *The meaning issue* – this has two parts:-

(i) *The single meaning/ repetition rule issue* - Is the meaning of the non-privileged parts of the article to be found by applying the single meaning rule and the repetition rule to the allegations made by Mr Robinson and referred to in the article, or should the allegations in the privileged passages be treated only as forming the context in which the non-privileged parts of the article are written?

(ii) *The Chase meanings issue* - Do the non-privileged passages of the article bear a *Chase* level 2 meaning (The Sunday Times' defence, which pleads such a meaning, is summarised in [8] above), or do those passages bear only a *Chase* level 1 meaning, as the judge found, namely that Mr Curistan was in fact guilty of IRA money laundering and financial malpractice?

17. Mr Curistan appeals against the judge's ruling on the privilege issue. The Sunday Times appeals against the judge's ruling on the meaning issue.

Summary of the parties' cases on the main issues

18. In the briefest of outlines, the parties' cases are as follows:

Mr Curistan's case

19. Mr Curistan submits that The Sunday Times is not entitled to rely on qualified privilege because:

i) the privileged passages were not a fair or accurate report of what Mr Robinson had said in Parliament;

ii) the privileged passages were so intermingled with non-privileged material that the privilege was lost;

iii) The Sunday Times had adopted Mr Robinson's allegations as its own;

iv) whether or not The Sunday Times was entitled to rely on reporting privilege, the article had to be read as a whole applying both the single meaning rule and the repetition rule; and

On that basis the article bore the meaning that Mr Curistan was guilty of involvement in money laundering and other criminal financial malpractice for the IRA.

The Sunday Times' case

20. The Sunday Times submits:

i) the privileged passages were a fair and accurate report of Mr Robinson's statements in Parliament and were entitled to reporting privilege;

ii) The Sunday Times had not adopted any of those allegations;

iii) the meaning of the non-privileged passages was to be ascertained on the basis that the privileged passages formed the context in which the statements in the non-privileged passages were made and on the basis that the repetition rule did not apply; and

iv) on that basis the meaning of the non-privileged passages was that there were reasonable grounds to suspect that Mr Curistan might be guilty of IRA money laundering and financial malpractice.

Summary of conclusions

21. In summary, for the reasons given below, in my judgment:

(1) on the privilege issue, the judge was correct;

(2) on the single meaning/repetition rule issue, the judge was wrong to treat the privileged passages as other than the context in which the statements in which the non-privileged passages were made; and

(3) he ought to have held that the article had a *Chase* level 2 meaning.

22. The two appeals were argued separately but the issues are interrelated. Accordingly I have formulated a unified set of propositions to explain how I have reached the conclusions summarised above:

i) Section 15 of the DA 1996 constitutes a mandatory rule of law that fair and accurate reports to which it applies and which satisfy the conditions set out in that section are entitled to qualified privilege;

ii) One of the requirements of a fair and accurate report is that the quality of fairness must not be lost by intermingling extraneous material with the material for which privilege is claimed;

iii) The maker of a report will be liable in defamation for allegations entitled to reporting privilege if he adopts them as his own;

iv) The judge correctly applied these principles to the privileged passages and correctly concluded that they were entitled to qualified privilege;

v) In the case of an article consisting in part only of passages entitled to reporting privilege, the meaning of the non-privileged passages is to be ascertained on the basis that (1) the privileged passages merely provide the context in which the statements in the non-privileged passages were made, and (2) the repetition rule has no application to the privileged passages;

vi) In the present case, the meaning of the article is a *Chase* level 2 meaning. The defence of The Sunday Times pleads such a meaning, namely that there were reasonable grounds to suspect that Mr Curistan had been associated with IRA dirty money and involved in financial malpractice.

23. I will take each of those reasons in turn and amplify them, addressing as I do so the submissions made by counsel.

Proposition (i): Section 15 of the DA 1996 constitutes a mandatory rule of law that fair and accurate reports to which it applies and which satisfy the conditions set out in that section are entitled to qualified privilege

24. Section 15 is set out in [6] above. Although this proposition is self-evident, it is necessary to start with it as section 15 is the rule laid down by Parliament. Miss Alexandra Marzec, junior counsel for The Sunday Times, prepared a note setting out the statutory history of section 15, which is derived from section 3 of the Parliamentary Papers Act 1840, which figured in *Dingle*. The important policy behind the statutory rule was authoritatively explained thus by Cockburn CJ in *Wason v Walter* (1868) LR 4 QB 73 at 89:

> "It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the Houses of Parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends…. Can any man bring himself to doubt that the publicity given in modern times to what passes in Parliament is essential to the maintenance of the relations existing between the government, the legislature, and the country at large? "

25. As Simon Brown LJ observed in *Stern v Piper* at page 137 (and again in *Al-Fagih* at [35]), the law of statutory privilege presupposes the existence of the repetition rule. Section 15 does not require any act of the parties to become applicable. Provided the

statutory conditions are met, the report is privileged. Any common law rule that would diminish or destroy this privilege would have to give way to the statutory rule.

Proposition (ii): One of the requirements of a fair and accurate report is that the quality of fairness must not be lost by intermingling extraneous material with the material for which privilege is claimed

26. There are a number of authorities on what constitutes a fair and accurate report. It need not be a verbatim report. It can be selective and concentrate on one particular aspect as long as it reports fairly and accurately the impression that the reporter would have received as a reasonable spectator in the proceedings: see generally *Cook v Alexander* [1974] QB 279, and *Tsikata v Newspaper Publishing Ltd* [1997] 1 All ER 655.

27. However, these appeals are principally concerned with the quality of fairness. Fairness in section 15 has been held to mean fairness in terms of presentation rather than fairness between the speaker and the subject of the statement (see per Lord Denning MR in *Cook v Alexander* at 289). A report does not cease to be fair because there are some slight inaccuracies or omissions (*Andrews v Chapman* (1853) 3 C & K 286 at 290). It follows that if there is a substantial or material misstatement of fact that is prejudicial to the claimant's reputation, the report will not be privileged. If the report refers to an accusation made on a privileged occasion which is in fact untrue, the defence of fair comment may be available if it is in terms which would be fair if the accusation were well-founded and provided that the comment is made in good faith and without malice (*Mangena v Wright* [1909] 2 KB 958, 977).

28. Fairness can also be lost by the presence of extraneous material. This proposition is supported by a memorable passage in the speech of Lord Denning in *Dingle* (see [33] below). In that case, the plaintiff complained of an article written in the Daily Mail which included the reporting of a report of a Parliamentary select committee. The reporting of the select committee's report was privileged under the Parliamentary Papers Act 1840. At trial the judge held that the part of the article which reported on the proceedings in Parliament was privileged. The remainder of the article was found to be defamatory and the judge then set about fixing the damages for the libel. The case then went to this court and to the House of Lords (Lord Radcliffe, Lord Morton of Henryton, Lord Cohen, Lord Denning and Lord Morris of Borth-y-Guest). The issues before the House related to the assessment of damages. The House, dismissing an appeal from this court, held that the judge had wrongly taken into account evidence that the plaintiff's reputation had already been damaged by what had been said in Parliament or by what had been said on other occasions, and that the Daily Mail had subsequently published an article which vindicated the plaintiff's reputation.

29. Only Lord Radcliffe, Lord Denning and Lord Morris focussed on the issues arising from the inclusion within a single article of privileged and non-privileged material. Lord Radcliffe clearly considered that the privilege attaching to the reporting of a select committee report was not lost simply because the article included other matters. He held at page 389: "We have to start our consideration of this case therefore by

recognising that so far as the Daily Mail or any other newspaper confined itself to reproducing extracts from the report and acted in good faith and without malice the respondent would have no cause of action in defamation against it." Then again at page 392 he importantly held that the meaning of the article was to be found by disregarding the privileged part of the article:

> "If one reads the article through without including the extract from the select committee report, which is protected, the effect of what is imputed to the respondent does not seem to amount to such deliberate misstatements or deliberate concealments as constitute an offence under section 12 of the Prevention of Frauds Act."

30. Lord Radcliffe therefore approached the judge's assessment of damages on the basis that the judge has assessed them for a libel imputing sharp practice but not a criminal offence.

31. Significantly, when Lord Radcliffe dealt with the matters which the judge had to leave out of account in assessing damages, he held at page 394:

> "… and the judge had to eliminate that part of the article that consisted of extracts from the select committee's report, since under the Act of 1840 such extracts could not in law be treated as a libel."

32. Similarly, at page 414, Lord Morris accepted that the judge had to leave the privileged parts of the article out of account when he was fixing damages:

> "The judge had approached the case with two broad questions in mind which he framed as follows: (1) To what extent was the plaintiff wrongfully defamed by the defendants? And (2) How much damage to his reputation was caused by this?
>
> In regard to the first of these questions I think that the approach of the judge was entirely correct: he excluded from consideration those parts of the article which were privileged and he excluded those parts which were true. He held that the extracts contained in the article which came from the select committee's report were published without malice. He held that some parts of the article though only of slight materiality were true. He proceeded therefore to isolate those matters from the "indefensible part of the libel" and then posed the second question in the words: "How much damage is attributable to so much of the libel as is neither privileged under the Act nor true?"

33. Lord Denning, however, went further and considered the extent of the privilege provided by the 1840 Act. At page 411, he held:

> "But here comes the question: Suppose that the reports in other newspapers were privileged, as they were in this case, cannot they be referred to in order to mitigate damage? I think the answer must be "No." If a newspaper seeks to rely on the privilege attaching to a parliamentary paper, it can print an extract from the parliamentary paper and can make any fair comment on it. And it can reasonably expect other newspapers to do the same. But if it adds its own spice and prints a story to the same effect as the parliamentary paper, and garnishes and embellishes it with circumstantial detail, it goes beyond the privilege and becomes subject to the general law. None of its story on that occasion is privileged. It has "put the meat on "the bones" and must answer for the whole joint. If it cannot justify it, it must pay damages: and it cannot diminish these by reference to the privileged reports which it and others may have given previously. It is rather like the position of a Member of Parliament. Within the House he may make all sorts of defamatory statements under the cloak of parliamentary privilege. If he steps outside and, throwing off his cloak, repeats them at large, he exposes himself to attack. If he fails to justify his words, he must pay damages. He is not allowed to say in mitigation that he had already done the plaintiffs a lot of harm by what he had already said in the House, or even that other members in the House had also done the plaintiffs harm by what they had said there".

34. The judge considered these passages and concluded at [21] of his judgment that he could not accept that the passage which I have quoted from the speech of Lord Denning was to be interpreted as meaning that the privileged passages in a hybrid article were relevant only as context. However, Lord Denning clearly thought that in the absence of over-embellishment the passages which merely contained a fair and accurate report would be privileged and outside the scope of liability for defamation. Lord Radcliffe treated the privileged passages as not constituting a libel at all. Lord Morris only dealt with the issue in the context of damages but he put the privileged passages on a par with passages which could be justified. It can be argued that these passages are concerned only with damages. However, I read the passages as going further than this. Even if I am wrong on that point, I cannot see that the law can consistently provide that the same matter should be relevant in establishing liability for defamation yet be irrelevant when it comes to the assessment of damages. I will come back to this point below.

35. The position, therefore, is, as Kirby J observed the High Court of Australia in *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519 at para. 153 that:

> "Excessive commentary or misleading headlines which amount to commentary run the risk of depriving the text of the quality of fairness essential to attract the privilege"

36. Thus, I conclude that reporting privilege will be lost if the quality of fairness required for reporting privilege is lost by intermingling extraneous material with the material for which privilege is claimed.

Proposition (iii): The maker of a report will be liable in defamation for allegations entitled to reporting privilege if he adopts them as his own

37. This proposition is worded in the way that it is so as to deal in terms with an issue in this case as to the effect of the adoption of a privileged statement if the adoption occurs in a non-privileged context. Mr Richard Parkes QC, for Mr Curistan, submits that, if a defendant has so intermingled the privileged material with non-privileged material that, on a true interpretation of the latter, he has effectively adopted the privileged statement as his own, it is no defence that the privileged material taken on its own had the benefit of reporting privilege. The privilege is lost.

38. It is common ground that there is a concept of adoption in this field. *Buchanan v Jennings* [2005] 1 AC 115 is an example of such adoption, though in that case the adoption was by the maker of the privileged statement rather than the maker of a fair and accurate report of that statement. In *Buchanan*, an MP who had made a statement in Parliament (a privileged occasion) was asked about it in a newspaper interview. The MP told the interviewer that he did not "resile" from the statement that he had made in Parliament. The Privy Council held that Parliamentary privilege was not available, as the MP had adopted his earlier statement on a non-privileged occasion. In that case, the MP had adopted his privileged statement by express words, but clearly adoption can also be by conduct or by implication from the express words used. In addition adoption may be of a part only of the privileged statement. Whether adoption has occurred in any case depends on the meaning of the statement whereby adoption is said to have occurred.

39. In my judgment, Mr Parkes' formulation runs together the concept of intermingling and that of adoption. It is important to keep the two concepts separate. As *Buchanan* shows, the effect of adoption is that the defendant becomes liable (subject to any other defences available to him) for the tort of defamation for what he has said. The report (if it is itself privileged) continues to be privileged. Where intermingling occurs the legal consequence is different. Intermingling results in a loss of privilege for the report as well as liability in defamation (subject to any relevant defences) for statements which do not form part of that report. Intermingling and adoption can arise out of the same statement but *Buchanan* shows that they need not do so and that the concept of adoption can be applicable on its own.

40. In the present case, for the reasons given in [46] below, The Sunday Times did not adopt any of Mr Robinson's privileged statements.

Proposition (iv): The judge correctly applied these principles to the privileged passages and correctly concluded that they were entitled to qualified privilege

41. Mr Parkes points out that in this case the volume of the extraneous material far exceeded that for which reporting privilege is claimed. He submits that the addition of this quantity of extraneous material rendered the report of the Parliamentary

proceedings unfair. He also submits that the reader would have been left with a confused impression as to what was and was not actually said in Parliament and that the additional material served to reinforce and confirm the truth of the report so that the reader would have concluded that Mr Robinson's allegations are likely to have been "a true bill". Put another way, the article so intermingled potentially privileged material with non-privileged material that the resulting article could not be protected by privilege. Mr Parkes used a number of metaphors: he contended that the newspaper had chosen to muddy the waters of the Parliamentary report and had been responsible for embroidery and elaboration.

42. Mr Parkes criticises the reasoning of the judge. The judge held that the privileged passages were "extricable" from the non-privileged parts of the article and would have been so understood by the readers (Judgment, [61]). He then went on to find that there was an adequate connection between the privileged passages and the non-privileged passages so that the additional material was not irrelevant (Judgment, [63]). Mr Parkes submits that the judge's reasons do not go to the point which he makes, namely that the additional material reinforced the allegations made by Mr Robinson. The connection which the judge found between the extraneous material and the privileged passages did not support the judge's conclusion. The issue was whether the report was rendered unfair. Unfairness to Mr Curistan arises because the additional material reinforced the allegations. The connection is likely to make it more difficult for the reader to distinguish between what was said in Parliament and the additional material. The reader would have had difficulty telling what was or was not part of the report of the Parliamentary proceedings. The judge wholly failed to consider in this context whether the article was a confusing tangle of reportage and extraneous material. Yet, when it came to meaning, he accepted the submission that The Sunday Times had in various ways "considerably fleshed out and enlarged upon what had been said in the House of Commons" ([26]).

43. Mr Parkes further submits that, in any event, the article misrepresented the words used by Mr Robinson. Mr Parkes lays particular emphasis on paragraph 21 in part B of the Appendix to this judgment. On his submission, all Mr Robinson was saying was that until Mr Curistan had been properly investigated to discover whether he had been involved in criminality, as the IRA leaders had been, his previously good reputation as a legitimate businessman was under a shadow. In other words, Mr Parkes submits that Mr Robinson's speech merely suggests that there are reasonable grounds to suspect whether Mr Curistan may have an association with the IRA's dirty money. (Indeed this was the meaning of the Parliamentary statement pleaded in the defence as originally served.) In any event, the judge was wrong to suggest that an allegation of guilt of an association with IRA dirty money was an allegation of money laundering. He might, submits Mr Parkes, merely have been referring to innocent handling of money. Moreover, the reference to an association between Mr Curistan and Mr Mackin might simply be an entirely innocent reference to an association between them as co-directors in the company. The judge was altogether too cynical.

44. Miss Victoria Sharp QC, for The Sunday Times, submits that, with one qualification, the judge adopted the right approach and came to the right conclusion. The qualification relates to the judge's suggestion that it was relevant that there was a connection between the privileged passages and the extraneous material. Miss Sharp agrees with Mr Parkes that such connection is unnecessary: it imposes a requirement

that is not required by the statute for the reporting privilege to apply. But as she points out, the judge used it to create an additional hurdle to be overcome by The Sunday Times. In those circumstances, Mr Curistan cannot complain about it. I agree that section 15 of the DA 1996 does not require any connection.

45. Miss Sharp submits that it is not enough to look at paragraphs (19) and following of the Hansard report. It is necessary to start at paragraph (6), and the references to the Northern Bank raid and then the allegation that senior members of the IRA have accumulated serious wealth and have been involved in money laundering. (I have not included these passages in part B of the Appendix to this judgment). She points out that Mr Curistan does not say that any part of the report is untrue except the allegation by Mr Robinson amounting to an accusation of money laundering of financial malpractice. There was no adoption by The Sunday Times of the allegations made by Mr Robinson. She further submits that the sentence "They pleaded guilty", together with paragraphs (xv) and (xvi), make the report of what was said in Parliament less serious. The reference to Stringfellows and table dancing made no difference. The matters about the company's accounts could not be attributed to Mr Robinson's Parliamentary speech because they referred to the denial which post-dated that speech.

46. On a fair reading of the article, The Sunday Times did not, in my judgment, adopt Mr Robinson's statements made in Parliament. The word 'IRA' in the headline to the article is in quotation marks. The statements made by Mr Robinson are set out without any express comment. The material in (v) to (xii) of the article is directed to Mr Curistan's riposte to Mr Robinson's statements. The additional material about the companies' convictions in respect of deficiencies in their compliance with accounting requirements merely fill out Mr Robinson's privileged statement on that subject and give it greater definition. The Sunday Times does not expressly or by implication express any view on Mr Robinson's statements, their truthfulness, gravity or otherwise. The statement about Stringfellows adds nothing of relevance to Mr Robinson's statements.

47. Mr Curistan's real case is one of intermingling. On that basis, the only questions are (1) whether there was a recognisably distinct report of Parliamentary proceedings, (2) how far Mr Robinson went and (3) whether the excessive extraneous material deprived the report of the Parliamentary proceedings of its quality of fairness.

48. On the question whether the report of the Parliamentary proceedings was recognisably distinct, there can, in my judgment, be no doubt but that the passages italicised in part A of the Appendix to this judgment explicitly report something that was said in Parliament. The passages attribute the information given to this source. (Paragraphs (i) and (ii) clearly would be read together). The rest of the article is easily distinguishable from this report. This is, however, subject to the qualification about paragraph (xiv) which the Lord Chief Justice makes in his judgment (which I have seen in draft), and with which I agree. The whole of the rest of the article, that is, the whole of the article apart from the passages italicised in part A of the Appendix, is addressed to matters germane to what Mr Curistan inaccurately said in his denial of Mr Robinson's accusations, which is itself reported in paragraphs (iii) and (iv). As the headline says, Mr Curistan is in a "row over accounts". Paragraphs (xiii) and (xiv) report allegations made by Mr Robinson of a personal association between Mr Curistan and Mr Mackin, but in my judgment the hypothetical reasonable reader

would conclude that they were inserted because the link with Mr Mackin was also referred to by Mr Robinson and because it is relevant to the accounting breaches and other matters referred to in (xv) to (xvii). Clearly, the editor of the article has taken care not to make the allegations made by Mr Robinson: see, for example, the quotation marks round the word 'IRA' in the headline and round various quotations in the article itself.

49. The report also had to convey an accurate impression of what Mr Robinson said. The issue here is whether The Sunday Times misinterpreted what Mr Robinson was saying. Contrary to Mr Parkes' submission, it is in my judgment impossible to conclude that simply because Mr Robinson does not say money laundering he was referring to some form of association with IRA dirty money involving less or no criminality. What Mr Robinson said has to be read as a whole. When the statement in Parliament is read as a whole, it is in my judgment clear that Mr Robinson was suggesting a lack of legitimacy and that the judge correctly took a realistic view of what Mr Robinson was suggesting. In reality, Mr Robinson was accusing Mr Curistan of actual involvement in illegal fundraising/money laundering for the IRA. In particular, in paragraph 21 in part B of the Appendix to this judgment, Mr Robinson said that, until recently, he had believed that:

> "most people believed that [Mr Curistan's] activities were legitimate. Given recent reports, I believe they will consider that this is not the case."

50. Para (i) of the article (part A of the Appendix) quotes the words "association with IRA's dirty money", which are a verbatim report of what Mr Robinson said about Mr Curistan's Sheridan group. On a commonsense understanding of what he said, Mr Robinson accused Mr Curistan of money laundering and financial malpractice. Mr Robinson also linked Mr Curistan with Mr Mackin.

51. Was the extraneous material in the non-italicised parts of the article in part A of the Appendix sufficient to deprive the report in the italicised passages of its necessary quality of fairness? I agree with the judge that the extraneous material could be distinguished from the report of what was said in Parliament. In addition, it is of some materiality that the additional material was factual, not comment. I agree with the judge that the extraneous material was not excessive and that the report was therefore privileged. That is sufficient to dispose of Mr Curistan's appeal on the meaning issue.

Proposition (v): In the case of an article consisting in part only of passages entitled to reporting privilege, the meaning of the non-privileged passages is to be ascertained on the basis that (1) the privileged passages merely provide the context in which the statements in the non-privileged passages were made, and (2) the repetition rule has no application to the privileged passages

52. What the judge did, having rejected the submissions made on the "pre-preliminary" issues, was to consider the meaning of the non-privileged passages on the basis of the

whole of the article and he did this through a combination of the single meaning rule and the repetition rule. The real complaint is about the repetition rule. If that is not applicable to the privileged words, those words can only be relevant as context.

53. As Mr Parkes submits in his skeleton argument, the repetition rule is a very well established common law principle in England and Wales, and profoundly affects the meaning to be put on words and the way in which words can be justified. It "reflects a fundamental canon of legal policy in the law of defamation, dating back nearly 170 years, that words must be interpreted, and the implications they contain justified, by reference to the underlying allegations of fact and not merely by reliance upon some second-hand report or assertion of them." (*Shah v Standard Chartered Bank* [1999] QB 241 at 263). Mr Parkes submits that importance of the repetition rule was recently reasserted by this court in *Roberts v Gable* [2008] 1 WLR 129. Likewise, he relies on the judgment of this court, of which I was a member, given by Sedley LJ in *Berezovsky v Forbes* [2001] EMLR 45, where this court held that the repetition rule was Convention-compliant. However, that case did not concern reporting privilege. *Stern v Piper* is binding authority for the proposition that, in a case where no privilege arises, the effect of the rule is that the reported statement has to be treated as one made by the defendant.

54. A feature of the repetition rule is that it applies irrespective of the defendant's position in relation to it. As Simon Brown LJ said in *Stern v Piper*, the repetition rule *dictates* the meaning to be given to the words used. In *Mark*, Simon Brown LJ (with whom Mummery and Dyson LJJ agreed) went on to say that the assumed meaning accorded with reality. Thus he said:

> "…that [i.e.that the repetition rule dictates the meaning to be given to the words used] is by no means to say that that the meaning dictated is an artificial one. Rather, the rule accords with reality. If A says to B that C says D is a scoundrel, B will think just as ill of D as if he had heard the statement directly from C."

55. I venture respectfully to think that Simon Brown LJ was not here saying that in every case where a person reports that someone has made an accusation that that person is himself necessarily to be understood as underwriting the truth of the accusation, but rather that he must take responsibility for its further dissemination. This is consistent with what Simon Brown LJ went on to say was the responsibility of a newspaper for the dissemination of reported speech:

> "29. …If, moreover, A is a respectable newspaper, D's position will be worse than if B had merely heard the statement directly from C. It will be worse in part because there will be many more Bs, and in part because responsible newspapers do not generally repeat serious allegations unless they think there is something in them so that the very fact of publication carries a certain weight. If, of course, in retailing C's statement, A says that C is often unreliable so that B should not suppose the statement necessarily to be true, that would certainly mitigate

> the gravity of the libel. Just as it would aggravate the libel if A said that C's statements ordinarily turned out to be true. But in either event, D's reputation would be damaged and the repetition rule precludes A from pretending the contrary (ie, justifying by asserting that what he said was true, the only defamer being C)."

56. Simon Brown LJ referred to the Strasbourg jurisprudence and considered whether there was any inconsistency between the repetition rule and that jurisprudence. He reached the conclusion that there is no conflict because the repetition rule does not apply where qualified privilege applies:

> "33…For my part I see no inconsistency between the repetition rule as explained in *Stern* and *Shah* on the one hand and, on the other, the ECtHR's decision in *Thoma* that journalists cannot be "systematically and formally" required to "distance themselves from the content of a [defamatory] quotation". On the contrary, it seems plain to me that any supposed tension between these has now been satisfactorily resolved by this court's decision in *Al-Fagih*. What that case recognised is that "the repetition rule concerns only the scope of the defence of justification in report cases: it does not limit the scope of qualified privilege at common law. Least of all does it require that an unadopted allegation is to be treated in the same way as an allegation asserted to be true."
>
> 34 That, to my mind, is the crucial point to bear in mind. The repetition rule concerns the meaning of words—and, of course, justification, the other side of the same coin. It recognises the reality as I have sought to explain it. It does not have the effect of making defamatory a publication which otherwise would not be. But when, of course, it comes to qualified privilege, the precise terms and circumstances in which the defamation comes to be repeated become all-important. The (non-exhaustive) 10 factors identified by Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 are then all in play. It is at this point that the journalist can seek to pray in aid "the contribution of the press to discussion of matters of public interest" (see paragraph 30 above). *Thoma*, in short, says much about the circumstances in which the defence of qualified privilege may be available in a case of mere reportage, nothing about the meaning to be attributed to the published words. That is true equally of the *Verdens Gang* case on which Mr Warby also seeks to rely. Both proceeded on the clear basis that the publications in question were defamatory. Whereas in *Thoma*, however, the journalist had merely reported the allegations (and so, in the absence of "particularly strong reasons" for penalising him, there was no sufficient cause to do so), in *Verdens Gang* the allegations had been adopted and in those circumstances the court held the complaint inadmissible.

> 35 In short, whilst I am certainly prepared to recognise that the approach adopted in *Al-Fagih* may need to be taken further still—rather than perhaps confined merely to the reporting of statements (attributed and unadopted) by both sides to a political dispute—I reject entirely the argument that the repetition rule as such needs changing. To regard reportage as being incapable of harming a person's reputation would be to introduce into the law a fiction which the repetition rule is designed to avoid. Furthermore, as I sought to point out in both *Stern v. Piper* and *Al-Fagih*, abolishing the repetition rule would make a nonsense of the law of qualified privilege."

57. In those paragraphs Simon Brown refers to *Al-Fagih*. In that case, this court held that the repetition rule does not apply to a case where the newspaper is entitled to qualified privilege at common law for neutral reportage, that is, for responsible reporting on matters of public interest under the principle in *Reynolds v Times Newspapers* [2001] 2 AC 127 in circumstances in which it does not adopt the allegation, which it reports neutrally. It is one of the indicia of *Reynolds* privilege that the defendant does not adopt the allegations on which it is reporting as statements of fact (see *Reynolds* at 205), but as explained above a defendant becomes liable for defamatory statements made under reporting privilege if he adopts them as his own.

58. In my judgment, it is impossible to distinguish what Simon Brown LJ says in *Mark* about qualified privilege under the principle in *Reynolds* and reporting privilege. He was, however, referring only to the application of the repetition rule to the passages protected by qualified privilege and not to non-privileged passages in a hybrid article. Mr Parkes submits that The Sunday Times repeats a submission that was rejected by this court in *Stern v Piper*. In that case it was unsuccessfully argued that where a journalist was discussing, as opposed to adopting, an allegation made by another he ought not to be required to prove the truth of the underlying allegation. I do not accept Mr Parkes' submission. *Stern v Piper* was decided before *Al-Fagih* and *Mark*, and accordingly before this court held that the repetition rule does not apply to reports entitled to qualified privilege.

59. To apply the repetition rule would also in my judgment be inconsistent with section 15 of the DA 1996. As I have already noted, Simon Brown LJ observed in *Stern v Piper* at page 137 (and again in *Al-Fagih* at [35]) that the law of statutory privilege presupposes the existence of the repetition rule. Put another way, the clear intention of section 15 is at minimum to disapply the repetition rule as it would otherwise apply to the fair and accurate report. What Mr Curistan contends is that the single meaning rule applies to the article as a whole, and that the meaning of the non-privileged words is to be found by taking the cumulative effect of the privileged words and the non-privileged words together and applying the repetition rule. There is no "antidote" in the article to the bane of Mr Robinson's allegations. The existence of a defence of privilege would be relevant only to the assessment of damages and not meaning. As I see it, this is merely an indirect way of applying the repetition rule to the privileged words. The non-privileged words have on this analysis to be interpreted (from the standpoint of the hypothetical reasonable reader) on the footing that the defendant is himself making the allegations which in the report are attributed to someone else. In my judgment, this infringes the privilege given to the fair and accurate report since it

imposes a sanction on its author for what is said in that report. Moreover, it is bound to have a chilling effect on the addition of factual material to a report, as is commonly expected from the responsible press today, and may have the same effect on the addition of comment, even though the defence of fair comment is not affected.

60. Moreover, if the repetition rule were to apply to the ascertainment of meaning of the non-privileged statements appearing in the same article so as to impose a higher hurdle for the maker of those statements to have to overcome if he wishes to justify the truth of those statements, the value of the privilege would be undermined and indeed would be revealed as incomplete. That would in my judgment be contrary to the purpose of section 15. In all the circumstances, I conclude that the submission that the repetition rule should apply to the accusations made in the report is contrary to section 15. It is therefore no answer that the defendant may be able to rely on some other defence, such as *Reynolds* privilege. My conclusion on this point is also an answer to the submission of Mr Parkes that to disapply the repetition rule would elevate political speech into a special category by requiring an adjustment of the rules of meaning when applied to a report of a statement in Parliament when this would be contrary to *Reynolds.* As I see it, the disapplication is a consequence of the statutory protection given to reporting privilege.

61. Furthermore, a conclusion that, where an article contains both passages entitled to reporting privilege and passages not so entitled, the repetition rule applies to the privileged parts is also internally contradictory. It involves saying that the report is privileged but at the same time can enhance the seriousness of allegations made in other parts of an article containing both the privileged words and non-privileged words. Moreover, my conclusion on this point receives support from *Al-Fagih* and *Mangena*, referred to above ([27]).

62. Mr Parkes further submits that to disapply the repetition rule to the privileged passages would be to water down the meaning of the rest of the article. He contends that, if a statement is made recording an allegation made in Parliament, the objective meaning of the report may be (subject to principles outlined in [14] above) and in this case was, that the allegations are true. In my judgment, it cannot automatically be said that, because a report has been made of someone else's statement, the reader will automatically treat the report as a statement by the person making the report that what was said was true. Mr Parkes further submits that the newspaper can protect itself by stating that it does not adopt or endorse an allegation made on the privileged occasion. He suggests that the newspaper should specifically qualify its report, by adding some such words as follows after the accusations: "whether this allegation is true or false cannot be ascertained". In my judgment, this is artificial, and merely makes explicit something that a reader would regard as implicit since newspapers are expected to report on allegations made in Parliament in a neutral way, because the mere fact of the making of the allegations is a matter of public interest. Moreover, Mr Parkes' approach imposes a burden on the reporters not required by Strasbourg jurisprudence: in *Pedersen and Baadsgaard v Denmark* (App no 49017/99) [2006] 42 EHRR 486, at [77], the Strasbourg court held that:

> "…[A] general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information

> on current events, opinions and ideas (see, for example, *Thoma v. Luxembourg*, cited above, § 64)."

63. Putting aside the repetition rule and returning to *Dingle*, Mr Parkes submits that the correct rule is that privilege is only taken into account at the stage of damages. There is no doubt that the privileged passages must be left out of account if and when damages for defamation are assessed. But, in my judgment, it makes little sense to leave privileged passages out of account at that stage and yet to allow them to be used in order to influence the meaning of the non-privileged passages.

64. Mr Parkes further submits that to disapply the repetition rule would be incompatible with the Convention. It would "tip the balance" unfairly against the individual in violation of his rights under art 8. This is an important submission because the law must be Convention-compliant, as I have stated above. In my judgment, it is not disproportionate to disapply the repetition rule. It will be recalled that the repetition rule involves an imputed meaning. It does not turn on whether the hypothetical reader would have interpreted the report as an endorsement by the maker of the report of the allegations made in it. In the present case, the allegations in the report were not adopted and were as I have held clearly distinguishable from the rest of the article. There was no suggestion by The Sunday Times that Mr Curistan was guilty of association with IRA money laundering or dirty money or financial malpractice. The operation of the repetition rule is in these circumstances arbitrary and for the reasons given above diminishes the privilege given to reports of Parliamentary proceedings. In my judgment, in those circumstances, it is not disproportionate to hold that the repetition rule does not apply to determine the meaning of the non-privileged parts of the article. Mr Curistan's private interest in the protection of his reputation has to give way to the public interest in knowing what was said in Parliament.

65. I will now deal with some ancillary submissions of Mr Parkes. Mr Parkes submits that if the repetition rule could be sidestepped the requirement of fairness of the report would be rendered otiose. This is not correct. Fairness is a separate requirement related to the manner of presentation of what was said (see [27] above).

66. Mr Parkes submits that there would be substantial practical difficulties if the repetition rule were disapplied for the purposes of ascertaining the meaning of non-privileged passages of an article containing both privileged and non-privileged material. In particular, he submits that, in cases where there was a factual dispute as to whether qualified privilege was available, it would be difficult to reduce the number of potential meanings by interim applications since the jury would be entitled to consider meaning on more than one basis. He submits that there might indeed have to be more than one trial. The existence of qualified privilege would have to be established before meaning could be established. But that does not seem to be any real reason why a jury could not be asked to bring back alternative verdicts.

67. Mr Parkes submits that this application of the repetition rule might also make it difficult to make an offer of amends since there would be an element of added uncertainty about the meaning of the allegedly defamatory words where there was a dispute as to whether qualified privilege applied or not. But this does not seem to me to be an insuperable difficulty. On the contrary, it is just another variable that those advising the defendant would have to consider before making an offer of amends.

68. It might be suggested that to disapply the repetition rule would also make it more difficult to establish malice. This is as it may be. However, I do not consider that this can be a real objection to disapplying the repetition rule. Disapplication of the repetition rule does not render privileged a report which is actuated by malice.

Proposition (vi): in the present case, the meaning of the article is a Chase level 2 meaning. The defence of The Sunday Times pleads such a meaning, namely that there were reasonable grounds to suspect that Mr Curistan had been associated with IRA dirty money and was also involved in financial malpractice

69. Once the repetition rule is disapplied, there is no reason why a fair and accurate report entitled to qualified privilege under section 15 should be read as anything more than a statement that the allegations mentioned in the report were made. The report would not of course be entitled to qualified privilege if the writer had adopted the allegations made in the privileged passages or so intermingled them with extraneous material that the privilege was lost.

70. If qualified privilege applies, the only remaining question is the meaning of the non-privileged passages in the context of the accompanying report. To some extent I have already dealt with this above.

71. The judge's conclusion was that the non-privileged passages were couched in terms which would cause the ordinary reasonable reader to conclude that Mr Curistan's denials were untrue and that he had been associated with the IRA's dirty money. He took the view that this was the reason for referring to what he called false accounting within Mr Curistan's companies. He considered that the quotation attributed to a spokesman for the companies' auditors would suggest to the reader that the auditors were not prepared to stand behind the client. The need for a due diligence check would convey to the reasonable reader that such a check was necessary in order to assess whether the group should be allowed to continue to be involved in the Laganside development. The closeness of the link with Mr Mackin was emphasised. In the judge's view, the ordinary reasonable reader will draw those inferences (see Judgment, [33] to [35]), despite the fact that nowhere in the article was it said in terms that Mr Curistan was a money launderer for the IRA or that he had been associated with the IRA's dirty money.

72. Mr Parkes submits that, even if the repetition rule is disapplied, the article as a whole would still bear the meaning that Mr Curistan was guilty of IRA money laundering, because the remainder of the article would still serve to tell the reader that Mr Robinson's allegations were a true bill and reinforce those allegations.

73. In the skeleton argument signed by Mr Moloney and adopted by Miss Sharp on this appeal, the case for The Sunday Times on the meaning of the non-privileged passages of the article is put as follows :

> "The hypothetical reasonable reader, reading this article on a Sunday morning, would see that it did not state, expressly or by implication, that the claimant was guilty of being a money launderer for the IRA. Rather it is stated that:

> a) he had been so accused, by a Paisleyite MP, acting under the protection of Parliamentary privilege (which is expressly referred to in the article);
>
> b) he had vigorously denied it, and had prayed in aid the state of his accounts;
>
> c) but that the newspapers enquiries had revealed that his claims about his accounts were false.
>
> The reasonable reader would not conclude, whether from the article as a whole or from considering the actionable passages (b) and (c) in the context of the privileged passage (a), that the MP was certainly right that the claimant was certainly guilty. Rather he would understand that the newspaper to be saying that there were reasonable grounds to suspect that the MP might be right, but that the claimant's guilt had by no means yet been established."

74. I do not accept Mr Parkes' submission. As I have already said, the extraneous material in the non-privileged passages was directed to the subject matter of Mr Curistan's denial of Mr Robinson's allegations. To my mind, the ordinary reasonable reader would have quickly picked up that what The Sunday Times was doing was giving facts which cast doubt on Mr Curistan's rebuttal of Mr Robinson's accusations. The Sunday Times is known to be a serious newspaper. By inference, the ordinary reasonable reader would infer that there were grounds for suspecting that Mr Robinson's accusations might have or had some truth in them. But, since the extraneous material did not directly go to IRA money laundering or financial malpractice, I do not consider that the ordinary reasonable reader would have read the additional facts concerning the accounting irregularities in Mr Curistan's companies, which were of a comparatively technical nature, as pointing to guilt.

75. Moreover, as I have explained above, the details which The Sunday Times gave about the companies in which Mr Curistan and Mr Mackin were jointly involved merely made what Mr Robinson said more precise, and did not constitute any material adverse change from what Mr Robinson said.

76. In the circumstances, I consider that the appeal of The Sunday Times on the meaning issue should be allowed. In my judgment, the meaning is a *Chase* Level 2 meaning and not a *Chase* level 1 meaning. If there properly remains any issue as to the exact *Chase* level 2 meaning which applies, the judge can determine that matter.

Disposition

77. For the reasons given above, I would dismiss Mr Curistan's appeal and allow the appeal of The Sunday Times. The parties are agreed that they will apply to the High Court for any further case management directions consequential on the order of this court.

Lord Justice Laws:

78. I have had the advantage of reading Arden LJ's judgment in draft and I gratefully adopt her comprehensive account of the facts and circumstances of the case. I agree with her conclusion that Mr Curistan's appeal should be dismissed and The Sunday Times' appeal allowed. In particular, I share her view (paragraph 48) that the material in the article which was of the newspaper's own making – Arden LJ calls it the "extraneous" material – can on the facts be distinguished from the article's report of what was said in Parliament. The judge below held to like effect: paragraph 61 of his judgment, cited by Arden LJ at paragraph 12.

79. We are dealing therefore with a hybrid publication. It includes both a report of Parliamentary proceedings and some comments of the newspaper's own. Mr Curistan complains of the whole article. The right result in the case depends on the accurate application of three principles in the law of defamation: the repetition rule, qualified privilege, and the single meaning rule. I desire to make some short observations as to the relationship between these principles in the context of a hybrid case such as this. In her very full and thoroughgoing treatment of the case Arden LJ has cited all the relevant authorities, for which I am grateful.

The Three Principles Described

80. The repetition rule is a rule of policy. It is a buttress of the law's protection of reputations. It "reflects a fundamental canon of legal policy in the law of defamation, dating back nearly 170 years, that words must be interpreted, and the implications they contain justified, by reference to the underlying allegations of fact and not merely by reliance upon some second-hand report or assertion of them" (*Shah v Standard Chartered Bank* [1999] QB 241, 263, cited by Arden LJ at paragraph 53); see also Lord Reid in *Lewis v Daily Telegraph* [1964] AC 234, 260, cited by Arden LJ at paragraph 2: the purpose of the rule is to protect the individual's right to his reputation: "repeating someone else's libellous statement is just as bad as making the statement directly". And as Simon Brown LJ (as he then was) said in *Mark v Associated Newspapers Ltd* [2002] EMLR 839 at [29], "If A says to B that C says D is a scoundrel, B will think just as ill of D as if he had heard the statement directly from C."

81. The rule involves an exception to the law's general approach to the meaning of words in defamation cases, which is that an impugned publication is to be judged according to the natural and ordinary meaning of the words used, since it may be plain that the publisher is doing no more than repeating what someone else said: in that case the natural and ordinary meaning of the words used is not "X is the case", but "A said that X is the case". But for the policy reasons given in the cases, the publisher is in the same position as if he had indeed stated, "X is the case".

82. Qualified privilege is also a rule of policy. It is a buttress of free expression. As regards reports of Parliamentary speech, the need to ensure that what is said in Parliament may be freely disseminated may be taken as obvious. There is a plain affinity with the absolute privilege that attaches to what is said by members of the legislature within Parliament itself. The privilege is now given by statute, in the shape of s.15 of and Part 1 of Schedule 1 to the Defamation Act 1996, by which

qualified privilege is accorded to "[a] fair and accurate report of proceedings in public of a legislature anywhere in the world".

83. The single meaning rule is, I think, not so much a rule of policy as a function of the need to understand and interpret expressions in the context in which they appear; and this is a matter of common sense and fairness. At paragraph 14 Arden LJ cites *Duncan & Neill on Defamation,* 2nd ed. (1983), p. 13, para. 4.11, approved by the House of Lords in *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 at 70:

> "In order to determine the natural and ordinary meaning of the words of which the plaintiff complains it is necessary to take into account the context in which the words were used and the mode of publication. Thus a plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage."

Relation Between the Three Principles

84. A publication may, and the article in this case does, contain both a fair and accurate report of statements made in Parliament and also comments of the publisher's own, and the two – as is also here the case – may be readily distinguishable. In those circumstances the repetition rule, which favours the protection of reputations, and qualified privilege, which favours free expression, may be in opposition; and the single meaning rule cannot bridge the gap between them. The court's approach to a defamation claim relating to the whole publication must in my judgment be as follows:

i) The report of what was said in Parliament is subject to qualified privilege. This necessarily involves a disapplication of, or an exception to, the repetition rule as regards that part of the publication. If the rule were applied, the privilege would be nullified. The privilege allows the publisher to rely on the fact that he is reporting what another has said. That other is a legislator speaking in Parliament. The very purpose of the privilege is to facilitate what s/he has said. It can only be done if the repetition rule is set aside.

ii) The meaning of the publisher's own comments is to be ascertained separately from the meaning of the report of Parliamentary speech. This necessarily involves a disapplication of, or an exception to, the single meaning rule. So much follows from proposition (i): once it is accepted that those parts of the publication consisting in the report of Parliamentary speech, being covered by qualified privilege, must be understood without reference to the repetition rule, the publisher's own comments must necessarily be interpreted according to their own terms and no special rule applies. Accordingly the relation between the report and the comments is that the first sets the context for the second; no more.

85. Thus the hybrid case involves exceptions both to the repetition rule and the single meaning rule, but does so on a principled basis for the reasons I have outlined. All this is consistent with, indeed largely flows from, the reasoning of their Lordships in *Dingle v Associated Newspapers Ltd* [1964] AC 371. Arden LJ has set out the material passages.

86. The learned judge below held (i) (paragraph 64) that those parts of the publication consisting in the report of Parliamentary speech were subject to qualified privilege, and (ii) (paragraphs 25 – 29) that those same parts of the publication (as well as the rest) were subject to the repetition rule. But on the approach I have outlined, these findings contradict each other. The first was correct, and the second incorrect.

Embellishment and Adoption

87. Finally I add these short comments about embellishment and adoption. It is plain that there will be no qualified privilege in an account of Parliamentary speech if the publisher has so embellished the material that it cannot be said to be a fair and accurate report. So much, I think, is shown by this passage from Lord Denning's speech in *Dingle* at 411:

> "But if it [sc. the publisher] adds its own spice and prints a story to the same effect as the parliamentary paper, and garnishes and embellishes it with circumstantial detail, it goes beyond the privilege and becomes subject to the general law. None of its story on that occasion is privileged. It has 'put the meat on the bones' and must answer for the whole joint."

88. Some care is I think needed in considering the concept of adoption, discussed by Arden LJ at paragraphs 37 – 40. In a sense the publisher who embellishes Parliamentary speech may be said to have adopted it: by "putting the meat on the bones" he has made the allegation his own. But I think it is misleading to characterise such a case as one of *adoption.* Rather than adopting what was said, the publisher has produced a critically different text. Since what he has produced cannot be said to be a fair and accurate report of Parliamentary speech, the law gives him no shield of qualified privilege. That is the whole analysis of the case; no recourse to any such idea as adoption is required.

89. In *Buchanan* [2005] 1 AC 115 a Member of Parliament effectively re-stated outside Parliament what he had earlier stated inside it. The first statement was absolutely privileged. It could not sensibly be suggested (and was not) that the later utterance was somehow a fair and accurate report of the earlier. Thus the species of qualified privilege which arises in this case did not arise there. Again, no recourse to adoption is needed for the case's analysis.

90. In a hybrid case such as this, where there is, first, a fair and accurate report of Parliamentary speech and, secondly, further distinct material, the law is clear: other things being equal the first is subject to qualified privilege and the second is not.

91. In all these circumstances I entertain some doubt as to whether adoption is a useful conceptual tool in this area of the law.

Conclusion

92. For all these reasons I would as I have indicated concur in the orders which Arden LJ proposes.

Lord Phillips of Worth Matravers CJ :

93. I am grateful to Arden LJ for her careful exposition of the facts and issues and for her analysis of the relevant law which, as she has observed, is surprisingly sparse. I am also grateful to Laws LJ for his concise identification of the principles that are applicable. I share the conclusions reached by each of them and propose, by way of summary, to set out my own list of the issues raised by this appeal and my resolution of those issues. Although we are concerned with an appeal and a cross-appeal, I shall refer to the claimant as the 'appellant' and the defendant as the 'respondent'.

94. The issues are as follows:

    i) Did the article published by the respondents make clear those parts that purported to report what Mr Robinson had said in Parliament?

    ii) Were those parts sufficiently fair and accurate to attract 'reporting privilege'?

    iii) Was reporting privilege in respect of those parts lost by reason of the comments made by the respondent in the remainder of the article?

    iv) What is the correct approach to ascertaining the meaning of the article?

    v) What did the article mean?

Did the article make clear those parts that purported to report what Mr Robinson had said in Parliament?

95. The judge held that the parts of the article which quoted or referred to what Mr Robinson said in his speech would be recognised as such by Sunday Times readers, so that what was reported could be distinguished from the remainder of the article. Arden LJ agrees. She has italicised in Part A of the Appendix to her judgment those passages which she considers explicitly report what was said by Mr Robinson in Parliament. I agree with the judge and with Arden LJ, subject to one minor reservation. I do not think that it is clear how much of that portion of the article that Arden LJ has subdivided as portion (xiv) purports to be a report of what Mr Robinson said and how much of it consists of additional information provided by the respondent. It seems to me that the reader might only attribute the first sentence to Mr Robinson. I do not think that this matters. As I understand the position, no challenge is made to the accuracy of portion (xiv) of the article. If that is correct, then the defendant does not need to rely on privilege in relation to the statements in portion (xiv). Apart from portion (xiv) the article clearly delineates those parts that purport to be reporting what Mr Robinson said in Parliament. The article does not resort to the type of 'intermingling' with extraneous matters that is inconsistent with a fair and accurate report.

Was the report of what Mr Robinson said in Parliament 'fair and accurate'?

96. It was submitted on behalf of the appellant that the respondent's report of what Mr Robinson said in Parliament was not 'fair and accurate'. The respondent reported that Mr Robinson had accused the appellant of 'IRA money laundering'. The appellant submitted that this significantly exaggerated the accusation made by Mr Robinson. He

submitted that all that Mr Robinson had said was that there were grounds to investigate whether the appellant had been associated with the IRA's dirty money. The judge rejected this submission. Arden LJ, in paragraphs 49 and 50 of her judgment, concludes that he was right to do so. I agree, for the reasons given by Arden LJ.

Was reporting privilege lost by reason of the comments made by the respondent in the remainder of the article?

97. I have adopted Arden LJ's helpful shorthand 'reporting privilege' to describe the qualified privilege that is the subject matter of this appeal. In answering this question I believe that the judge has fallen into confusion. He ruled that the reported portions of the article were protected by qualified privilege, but went on to hold that when considering the meaning of the article the so called 'repetition rule' applied to them. The repetition rule, as accurately described by Arden and Laws LJJ, is the antithesis of reporting privilege. What, in effect, the judge did was to hold that the respondent lost the benefit of reporting privilege by virtue of the comments that the respondent added to what was reported. The judge came close to recognising this in paragraphs 28 and 29 of his judgment when he said:

> "It would have been open to the *Sunday Times* to publish an unadorned report of Mr Robinson's words in the House. *If that course had been adopted the newspaper's entitlement to privilege would not have been open to doubt.* However in this case the *Sunday Times* chose not to take that course. I have summarised above the material extraneous to what was said in the course of the parliamentary debate which the newspaper included in its report. The newspaper having chosen to enlarge on Mr Robinson's strictures, I see no reason to disapply the repetition rule" (emphasis mine).

98. I consider that this approach by the judge was wrong in principle. The extraneous material did not have the effect of removing reporting privilege from the portions of the article which were otherwise protected by that privilege. My conclusion flows from the clear approach of Lord Radcliffe and Lord Morris in *Dingle v Associated Newspapers Ltd* [1964] AC 371, as identified by Arden LJ in paragraphs 29 to 32 of her judgment. I agree with Arden LJ that, while *Dingle* was concerned with the assessment of damages, the necessary implication of these passages is that reporting privilege for those parts of the article that were protected by it was not lost by the fact that the article included extraneous matter, albeit that the extraneous matter was itself defamatory.

99. Nor, on analysis, did Lord Denning dissent from this approach. In the passage quoted by Arden LJ at paragraph 33 of her judgment, Lord Denning was considering the effect of a separate publication that included matter that had been published under the cloak of privilege on an earlier occasion. I emphasise the words that make this clear:

> "But if it adds spice and prints a story *to the same effect* as the parliamentary paper, and garnishes it and embellishes it with circumstantial detail, it goes beyond the privilege and becomes subject to the general law… If it cannot justify it, it must pay

> damages: and it cannot diminish these by reference to the privileged reports which it and others *may have given previously*."

100. For these reasons I have concluded that the privileged portions of the article published by the respondent did not lose reporting privilege by reason of the comments that the respondent added to those portions. This leads me directly to the next issue.

What is the correct approach to ascertaining the meaning of the article?

101. The judge approached this question by applying the so-called 'single meaning rule'. It does not seem to me that this rule can always be applied to an article that reports that a person has made a defamatory statement, which it details, and then goes on to make its own comment on the statement. If the defamatory statement alleges that the claimant has committed a criminal offence, if the repetition rule applies to the report of that statement, and if the additional comment alleges no more than that there must be a suspicion that the statement is true, the article cannot be given a single meaning. The reported portion has one meaning and the comment another. By adding its comment the publisher of the article cannot escape liability for the meaning in the reported portion, for the repetition rule prevents this.

102. Where, as here, the repetition rule does not apply to the reporting passages, because these are protected by reporting privilege, the publisher is only liable in respect of the comments that have been added to those passages. The meaning of the added comments has, however, to be determined having regard to their context, and the most significant element of that context is likely to be the privileged passages to which the comments are added. If the meaning of the added comments is that the reported allegations are true, then the publisher of the added comments can be said to have 'adopted the reported allegations as his own'. In those circumstances the publisher will, however, be liable (subject to any defences such as justification or fair comment) in respect only of the added comments. Reporting privilege will still attach to the reporting passages, but because he has adopted them in un-privileged commentary, this will be of little comfort to the publisher.

103. It follows, on the facts of this case, that the meaning for which the respondent is liable is the meaning to be attached to those portions of the article that are additional to those that reported what Mr Robinson said. The report of what Mr Robinson said is, however, the context in which the additional portions were written and in which the meaning of those portions falls to be determined.

What did the article mean?

104. For reasons that I have just given, the more accurate question is 'what did the portions of the article that were additional to the report of Mr Robinson's statement mean?' As to that question, I agree with Arden LJ that the comments added by the respondent meant that there were *grounds to suspect* that the appellant had been associated with IRA dirty money and was also involved in financial malpractice: the so-called *Chase* level 2 meaning. It is the publication of words bearing that meaning that the respondent has to defend.

105. For these reasons, I agree with Arden and Laws LJJ that the appellant's appeal should be dismissed and the respondent's cross-appeal be allowed.

APPENDIX

Notes:

1. The numbering of the paragraphs did not appear in the originals and have been added to facilitate reference to parts of the document.

2. The article was accompanied by a photograph depicting Mr Mackin at what is described in the caption as an IRA funeral. Reference is made in that caption to Mr Mackin's conviction for being a member of the IRA. There is also a smaller photograph of the claimant captioned "Curistan: 'horrified'". There is also a photograph of premises occupied by Stringfellows. The publication on the website is in the same terms as the newspaper article but without any photographs.

PART A

"'IRA' developer in row over accounts

(i) *A Belfast based property developer accused of "association with the IRA's dirty money"* has falsely claimed accountants have given him a clean bill of health.

(ii) *Peter Curistan, an investor in Belfast's Odyssey Arena complex, has been accused under parliamentary privilege of IRA money-laundering and financial malpractice. The claims were made two weeks ago by Peter Robinson, the Democratic Unionist MP, in the House of Commons.*

(iii) Curistan said last week that he was horrified by "these scandalous allegations" for which he said there was no foundation. He invited Robinson "to come in and inspect all our books, to appoint whatever accountancy firm he wants to inspect our books for the last 10 years".

(iv) The businessman said the accounts had been done every year by Price Waterhouse Coopers (PWC), and had never been qualified in any way.

(v) But The Sunday Times has obtained copies of the accounts of Curistan's Sheridan Millennium Ltd for 2002 and 2003, the latest prepared. Both contain statements of qualification from PWC and state "we were unable to determine whether proper accounting records had been kept".

(vi) The 2003 accounts, which were to be submitted late and are not yet in the public domain, contain the heaviest qualification. PWC says: "We have not obtained the information and explanations that we considered necessary for the purpose of out audit".

(vii) PWC says it was unable to obtain records of sums of £593,253 and £162,666 because of a legal dispute with Irish Estate Management. They were also unable to obtain details of sums amounting to $1,190,564 (£683,000) and $688,468 (£395,139) in dispute with the IMAX corporation. In 2002, PWC also state it had not obtained all the information necessary to conduct an audit.

(viii) Asked if they were meeting Curistan to discuss their concerns, and if they were confident that they would remain auditors in the long term, the accountancy company replied: "It is not PWC's policy to make a comment in respect of its clients' affairs."

(ix) Northern Ireland's Department of Economic Development has called in another firm of accountants, BDO Stoy Hayward, to perform a full due diligence check on Curistan's books in order to assess whether his Sheridan Group, which is based in British Virgin Islands, should be allowed to retain its development contract in the Laganside Corporation.

(x) The contract involves the construction of housing, offices, a hotel, retail outlets, cafes and other leisure facilities.

(xi) A source close to the development said: "In order for the department to be satisfied, they need BDO to examine accounts that are as up to date as possible, but under any sort of normal due diligence they cannot be content with an accounting period which is two years in arrears."

(xii) Curistan has not submitted accounts for 2004 or 2005 and it is understood that his next set will cover an 18-month period.

(xiii) *In his Commons statement, Robinson linked Curistan to Dessie Mackin, Sinn Fein's head of finance whom he called the IRA's head of finance.* Security sources say Mackin, who has been convicted of IRA membership, succeeded Joe Cahill as the IRA's finance director.

(xiv) *Robinson put Mackin's personal wealth at £1.75m. Mackin and Curistan are jointly involved in about 23 companies, seven of which* – Century City, Strike Four, Flix Restaurants, Daylong, Sheridan Simulation, Sheridan Theatres Dublin and Grovepark Properties – *were prosecuted last December in Dublin's District Court for failing to keep proper accounts.* They pleaded guilty.

(xv) All seven companies were given the Probation Act, provided they made a large donation to charity. Most of them were based in the Parnell Centre in Dublin, which recently granted a licence to Peter Stringfellow for a table-dancing club, despite local objections that it would lower the tone of the place.

(xvi) The latest accounts for Strike Four, which ran a restaurant that close in 2000, show accumulated losses of €2.52m (£172m) at the end of September 2004. The loss for the year was €447,485.

(xvii) Curistan's Dublin auditors, Horwath Bastow Charleton, resigned from Sheridan Simulation and other companies last year saying that, like PWC, they were unable to establish if proper books and records had been kept.

(xviii) Curistan could not be contacted. He has described Mackin as a friend since his student days."

Part B

The statements in Parliament

Extract from statement made in Parliament by Mr Robinson MP:

> "….
>
> 17. The proceeds of the Northern bank raid—the largest ever in the British isles - have still not been recovered. They are retained by the republican movement, and the IRA has done nothing to assist in the recovery of that cash—in fact, it has done the opposite. Holding and using the proceeds of a bank robbery is a continuing crime…
>
> 18....
>
> 19….
>
> 20. It has now been revealed that, over several years, senior IRA figures have accumulated massive wealth. Its finance director, Des Mackin, now owns property worth more than £1.75 million. He has a conviction for IRA membership in the mid-1980s and served as Sinn Fein's treasurer. He, along with the Belfast tycoon, Peter Curistan, are the two co-directors of numerous companies, seven of which were prosecuted in the district court in Dublin recently for failing to keep proper accounts.
>
> 21. Instead of rewarding republicans for criminality, the Government should address the involvement of such men in government initiatives. Curistan is the key private sector investor behind Belfast's flagship £100 million Odyssey centre in my East Belfast constituency. Many of us have been aware of Mr. Curistan and his business activities and, until recently, I believe that most people believed that they were legitimate. Given recent reports, I believe that they will consider that that is not the case. His Sheridan Group was awarded a massive development contract in June 2005 by the Laganside Corporation, which is a public body, for residential provision, offices, a hotel, niche retail outlets, waterfront cafés and other leisure facilities, together with parking. When he winds up, will the Secretary of State ensure that the activities of the Sheridan Group and its association with the IRA's dirty money are fully investigated? Will he guarantee that no further public money is channelled in its direction until, if ever, it gets a clean bill of health?
>
> 22. I have already referred to the security concerns in Dublin over a popular city centre hotel, which is thought to be run by the Provisional IRA. It is used by the Irish Government Ministers and others during their working week. A senior Republican who is originally from Armagh is the main owner of the hotel and he had his home and businesses raided last week by the Irish police, and files searched in

the offices of his solicitors and accountants. This particular individual has a collective property portfolio valued in excess of £70 million. The Garda are investigating a money trail that is likely to trace his multi-million pound fortune back to IRA slot machine scam in London in the 1980s.

23. In recent years, the IRA purchased businesses in Dublin and further afield. They were usually high-turnover cash businesses, such as public houses and gaming halls, that allowed the terrorist to launder dirty money, stolen cash and counterfeit notes. It is estimated that the provos own more than 20 pubs in Dublin alone, but their interests extend very much further. The IRA sought to use the proceeds of the Northern bank robbery to infiltrate the banking system in Bulgaria to provide the ultimate vehicle for laundering cash. The IRA's chief of staff, Siab Murphy, is the owner of a property portfolio that stretches to Eastern Europe. He has made a personal fortune £40 million on the back of a smuggling empire based at his farm that straddles the border with south Armagh. I have referred to these individuals in order to highlight on members just how deeply embedded criminality is within the IRA, including its upper echelons. ”