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Case No: TLQJ/06/0631

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/04/2007

Before :

THE HONOURABLE MR JUSTICE GRAY

- -

Between :

Peter Curistan	**Claimant**
- and -	
Times Newspapers Limited	**Defendant**

- -
- -

Richard Parkes QC and Matthew Nicklin (instructed by **Schillings**) for the Claimant
Patrick Moloney QC (instructed by Times Newspapers Limited) for the Defendant

Hearing date: 26 March 2007

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE GRAY :

Introduction

1. The claimant in this action, Peter Curistan, is a Chartered Accountant and a well-known businessman in Northern Ireland. He claims damages for libel against the defendant, Times Newspapers Limited, in respect of an article published in the issue of the *Sunday Times* for 19 February 2006. He also claims in respect of the reproduction of the article on the defendant's website. The claimant's complaint relates to the Irish edition of the newspaper. The English edition carries a shorter version of the same article.

2. The parties having agreed to trial by Judge alone, I have to decide two preliminary issues, namely:

    i) the meaning of the words complained of, and

    ii) whether certain passages in the words complained of are protected by statutory qualified privilege, as being a fair and accurate report of proceedings in Parliament.

    Consequential on my decision on those two issues, a number of further questions will arise for decision but it has been agreed that those questions should be addressed at a separate hearing after this judgment has been handed down.

3. Notwithstanding an invitation by Mr Patrick Moloney QC for the defendant to the contrary, I will deal with the two preliminary issues in the order set out above. Mr Moloney asked me to decide the issue of privilege (issue 2) before the issue of meaning (issue 1). He did so to enable a submission to be advanced as to the meaning which the words complained of would bear if the privileged words were left out of account. That would be an unconventional approach. I reject Mr Moloney's invitation not so much on that ground, but rather because, as I will explain later, it is in my view an approach which is wrong in principle.

The words complained of

4. Before turning to the two preliminary issues, I will set out the words complained of in full. I have added paragraph numbers for ease of later reference.

" '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."

5. 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 which has little, if anything, to do with the article.

The publication on the website is in the same terms as the newspaper article but without any photographs.

The first preliminary issue

6. The first preliminary issue, as formulated on behalf of the claimant, is in the following terms:

> "which defamatory meaning the words complained of bear, and in particular whether they bear the meaning attributed to them by the claimant".

7. The natural and ordinary meaning attributed to the words complained of by the claimant in paragraph 5 of the Particulars of Claim is

> "that the Claimant through his companies, including in particular Sheridan Millennium Ltd and the Sheridan Group,

> was guilty of involvement in money laundering and other criminal financial malpractice for the IRA, an involvement which was amply demonstrated by his long-standing friendship with Dessie Mackin, the finance director of the IRA, by the qualification of the accounts of Sheridan Millennium Ltd by Price Waterhouse Coopers (PWC). By the qualification of the accounts of various of the Claimant's companies by their Dublin auditors and the auditors' resignation, by the failure of seven of those companies to keep proper accounts and by the investigation into the financial affairs of Sheridan Group by BDO Stoy Hayward at the instance of the Northern Ireland Department of Economic Development."

8. According to paragraph 7 of the defence, the meaning which the defendant seeks to justify (the so-called *Lucas-Box* meaning) 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 Newsgroup Newspapers Ltd* [2003] EMLR 218.

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 test to be applied

11. There is no dispute between the parties as to the test which should be applied in determining what meaning the words would have been understood to bear. There are numerous authorities bearing on the point. Comprehensive guidance was given by Sir Thomas Bingham MR in *Skuse v Granada Television Ltd* [1996] EMLR 278 at 285. He summarised the principles, so far as the material in the present case, as follows:

> "(i) the court should give to material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable [reader].

> (ii) the hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer, and may indulge in a certain amount of loose thinking. But he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available….
>
> (iii) while limiting its attention to what the defendant has actually said or written, the court should be cautious of any over-elaborate analysis of the material in issue…
>
> (iv) the court should not be too literal in its approach…".

12. Apart from *Skuse*, it is necessary to refer only to a passage from the judgment of Lord Phillips MR in *Gillick v Brook Advisory Centres and another* [2002] EWCA Civ 1263 in which he repeated at paragraph 7 what he described as an impeccable synthesis of the authorities by Eady J:

> "The courts should give the article the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once. Hypothetical reasonable readers should not be treated as either naïve or unduly suspicious. They should be treated as being capable of reading between the lines and engaging in some loose thinking, but not as being avid for scandal. The court should avoid over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or accountant would analyse the documents or accounts. Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader. The court should certainly not take too literal approach to its task".

The argument of the defendants on meaning

13. It is convenient if I start by summarising the argument of Mr Patrick Moloney QC on behalf of the defendant as to meaning. As I understood him, he initially contended in oral argument that, in determining meaning, I should ignore those passages in the article which are privileged and decide what meaning the non-privileged words bore when considered in isolation. Whether or not I understood his oral submission aright, Mr Moloney ultimately adopted the position (which was also how he put his case in paragraph 14 of his skeleton argument) that the meaning falls to be determined by reference to the non-privileged words *in the context of* the privileged words. I take Mr Moloney to be accepting that the article complained of must be considered as a whole in order to determine the meaning of the non-privileged words.

14. Mr Moloney disputed the contention of the claimant that the privileged parts of the article (i.e the first part of paragraph 1; paragraph 2; the first part of paragraph 13 and

most of paragraph 14) would have been understood to bear the meaning that the claimant was *guilty* of being associated with the IRA's "dirty money" or of IRA money-laundering or financial malpractice (i.e a *Chase* level 1 meaning). His contention was that the privileged words meant that Mr Curistan had been accused in Parliament of those matters. The defendant's pleaded case is that the *Sunday Times* report in those paragraphs of what Mr Robinson said in his speech would have been understood to mean no more than that the Claimant was *reasonably to be suspected* of such misconduct but Mr Moloney accepted that this had been pleaded in error.

15. Mr Moloney further argued that it was illegitimate and contrary to principle for the claimant to employ the privileged material so as to elevate the defamatory meaning of the non-privileged parts of the article from reasonable grounds for suspicion to actual guilt. He submitted that this is to subvert the privilege which parliament has conferred on reports of its proceedings. According to Mr Moloney, the claimant is not entitled to apply the so-called "repetition rule" in such a way as to remove the protection of privilege which parliament has seen fit to give to reports of its proceedings and which would otherwise have been available in respect of the report of Mr Robinson's speech.

16. I should explain that, according to authorities which include *Shah v Standard Chartered Bank* [1999] 1 QB 241 and *Chase*, the repetition rule requires the court to treat the statement that "B says A is guilty" as conveying a defamatory meaning which is no different from a statement that "A is guilty". The reason why the defendants say that the repetition rule should not be applied in the circumstances of the present case is that none of the reasons for that rule, as spelled out in *Mark v Associated Newspapers* [2002] EMLR 839, applies or should apply. The overall submission of the defendant is that, if the repetition rule is disapplied, as it should be, the *Sunday Times* article is saying in effect no more than that:

> "Peter Robinson MP says Curistan is guilty; Curistan denies it. We have looked into the matter and found some grounds to suspect that the MP may be right ".

Accordingly the defendant contends for a *Chase* level 2 meaning.

Argument for the claimant as to meaning

17. Mr Richard Parkes QC for the claimant does not accept that any question of principle arises in relation to the determination of the meaning of the article in this case. He contends that those parts of the article which are privileged must be taken into account along with the rest of the article when deciding what meaning or meanings it bears. He reminds me that I must find a single meaning for the article read as a whole.

18. According to Mr Parkes, the starting point, when determining meaning, is the report of what Mr Robinson MP said in the House of Commons. There follow paragraphs 3 and 4 of the article in which the *Sunday Times* reports the claimant's response to Mr Robinson's allegations. Mr Parkes submits that, having done so, the effect of the whole of the remainder of the article is to undermine the claimant's denials and thereby to bolster and enforce the allegations made by Mr Robinson. The reader is given to understand that the claimant's denial is a false one and that there are a number of good reasons for concluding that the charge made by Mr Robinson in the

House of Commons was a true bill. There is in the circumstances, submits Mr Parkes, no room for the *Chase* level 2 meaning of reasonable grounds to suspect for which Mr Moloney contends. This is a case where the imputation made in the article, read as a whole, is one of actual guilt.

The correct approach to meaning

19. I will address first Mr Moloney's argument, summarised at paragraph 13 above, as to the approach which Mr Moloney invites me to take as to the meaning of the article complained of. He says that I should determine the meaning borne by the non-privileged parts of the newspaper article *in the context of* the privileged words. To the extent that Mr Moloney is urging me to take a special course when deciding the natural and ordinary meaning of the *Sunday Times* article, I reject that invitation. In my judgment the approach which the court should adopt in cases where part, but not all, of the words complained of is protected by privilege is to consider the article as a whole. It would in my opinion be artificial, potentially misleading and contrary to principle to downgrade the privileged parts of the article when determining its overall meaning.

20. In that connection Mr Moloney referred me in the course of argument to *dicta* of Lord Denning in *Dingle v Associated Newspapers* [1964] AC 371 at 411 as suggesting otherwise. The passage relied on is this:

> "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 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 papers 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 privilege reports which it and others may have given previously".

21. It is necessary to bear in mind that the issue before the House of Lords in *Dingle* was whether a defendant newspaper which published an article in an unprivileged form defamatory of the claimant could rely in mitigation of damages upon a privileged article previously published by that defendant dealing with the same subject matter. That question was answered in the negative by the other four members of the House. I note that at page 394 Lord Radcliffe explained how the judge should approach the question of damages as follows:

> "The judge's task in arriving at a figure of damages for the defamation contained in the article of June 16 was not a simple one. He had first to eliminate from his mind that small part of the imputation that he found to have been justified… next 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. Having done all this, he had to ascertain and measure what was the actionable defamation and assess a figure of damages in relation to the injury it had caused…."

The speech of Lord Morris at 414 was to a similar effect. In these circumstances I cannot accept that, in the absence of any expression of disagreement, the passage quoted from the speech of Lord Denning is to be interpreted in the way that Mr Moloney suggests. Such parts of the article which are privileged are to be ignored when it comes to the assessment of damages; however, at the stage of determining meaning those passages are to be taken into account together with the other non-privileged passages.

22. I deal next with Mr Moloney's argument that in the circumstances of the present case the repetition rule should be disapplied when determining meaning because the application of the rule would have the effect of undermining or eroding the privilege which would otherwise attach to parts of the article. I have summarised his argument at paragraphs 15 and 16 above.

23. Although I do not believe it acquired its label until the decision of the Court of Appeal in *Stern v Piper* [1997] QB 123, the repetition rule is of long standing. As Hirst LJ said in *Shah* at 261g:

> "the judgments [in *Stern*] traced through in great detail the history of the repetition rule, dating back to the 1820's, thus showing how deeply embedded it is in our law of defamation".

24. The purpose of the rule is to prevent a jury from deciding that a publication which conveys either rumour or hearsay or similar bears a lesser meaning than would attach to the original allegation itself. As a matter of everyday experience, one knows that a libel at second or third hand may be just as injurious as its original publication and sometimes more so.

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* at paragraphs 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 *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 MPs 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 (paragraphs 4-8 and 17). 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 endorse that allegation by referring in paragraph 13 to information evidently supplied to the newspaper by "security sources". The *Sunday Times* also incorporated in its article at paragraphs 9 to 11 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.

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] LR4 QB 73 *per* Cockburn CJ at page 89 and *Cook v Alexander* [1974] QB 279 *per* Lord Denning at page 288. 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.

Ruling on 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, i.e the existence of reasonable grounds for suspicion rather than actual guilt. It is also true that paragraphs 3 and 4 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 paragraph 9 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 paragraph 13 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 paragraph 14 of the article, where the two of them are said to be co-directors of 23 companies. 7 of those companies are said to have been convicted of failing to keep proper accounts. Then in paragraph 17 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.

The second preliminary issue

36. The second preliminary issue, as formulated by the Defendant is "whether and to what extent the passages in the article complained of, for which the defendant has claimed in its Defence herein qualified privilege as a fair and accurate report of proceedings in Parliament, are so protected". The claimant's formulation is different, namely: "whether publication of the words complained of is protected by qualified privilege as a fair and accurate report of proceedings in Parliament". The difference in the parties' respective formulations of the issue foreshadows the fundamental dispute between them, which is whether privilege is forfeited in the present case because of the inclusion in the *Sunday Times* article of admittedly non-privileged material.

37. Privilege of the kind relied on by the newspaper was recognised by the common law for reasons explained by Cockburn CJ in *Wason v Walter* in the passage referred to at paragraph 27 above. The privilege now also exists by virtue of statute: section 15(1) of the Defamation Act 1996 confers privilege on reports within the categories listed in Schedule 1 to the Act. The question which I have to decide is whether the report in the *Sunday Times* qualifies as a "fair and accurate report of proceedings of a legislature anywhere in the world" within the meaning of the Schedule. If so, there is no right to an explanation or contradiction.

38. The Defence identifies at paragraph 6(b) those parts of the article for which privilege is claimed. They consist of the words of paragraph 1 up to and including "the IRA's dirty money"; the whole of paragraph 2; the first sentence of paragraph 13, and paragraph 14 except for the names of the companies and the last sentence of that paragraph.

Argument of the defendant on privilege

39. Mr Moloney for the newspaper invites me to note the context in which the claimant came to be mentioned in Mr Robinson's speech. Particular points include the main theme of the speech being the continued involvement of Sinn Fein/IRA in criminal activities; the reference to the "massive wealth" of senior IRA figures; the

involvement of "such men" in government projects; and Mr Robinson's call for a full investigation into the claimant's group of companies and its association with the IRA's "dirty money".

40. Mr Moloney contends that the *Sunday Times* makes clear, amongst other things by using quotation marks, which parts of the article constitute reporting of the MP's words. Paragraph 2 of the article refers in terms to the words having been spoken under parliamentary privilege.

41. It is the newspaper's case that no reasonable observer of the debate could be in any doubt but that Mr Robinson was accusing the claimant of being guilty of involvement in illegal IRA fundraising/money laundering. It is clear from the words of the published article, as it is from what Mr Robinson said in Parliament, that he was asserting as a fact that the accusation of IRA money laundering against the claimant is well-founded. Citing *Cooke v Alexander* and *Wason v Walter*, Mr Moloney contends that the report gives the reader a fair impression of what Mr Robinson said.

42. According to the newspaper, the non-privileged parts of the article reflect the investigation carried out by the *Sunday Times* into the question whether Mr Robinson's charges against the claimant were well-founded. The argument for the *Sunday Times* is that the inclusion of this material is no reason to deny privilege for those parts of the article which constitute reporting of what took place in the House of Commons. The additional unprivileged material does not render the reportage unfair or inaccurate.

The response of the claimant to the claim for privilege

43. Responding to the contention that the passages identified at paragraph 6(b) of the Defence are protected by privilege, Mr Parkes emphasises that, as appears from *Cook v Alexander*, the requirement is that the report should be fair and accurate insofar as it relates to the claimant and his reputation. He does, however, concede that the report may be selective and subjective. He points out that the burden of proving fairness and accuracy rests on the defendant.

44. Reliance is placed on *Dingle v Associated Newspapers*; dicta by Kirby J in *Chakravarti v Advertiser Newspapers Limited* [1998] HCA 37 and a decision of mine in *Henry v BBC* [2005] EWHC 2787 (QB).

45. The first point made by Mr Parkes is that, when one compares what Mr Robinson said in the House of Commons with the *Sunday Times* article, it is immediately apparent that the article is not reporting fairly or accurately what the MP said. According to Mr Parkes, Mr Robinson did not suggest or even imply that the claimant has been guilty of handling IRA "dirty money". On analysis the effect of what was published was that, until the claimant has been properly investigated to discover whether he has been involved in criminality, his previous good reputation as a legitimate businessman is under a shadow.

46. Mr Parkes submits that the claim for privilege is unsustainable because of the nature and extent of the material which the newspaper has added to and mixed with its report of Mr Robinson's speech. It is contended that this is a case where the newspaper has

(to quote Lord Denning in *Dingle)* "put meat on the bones and must answer for the whole joint".

The law relating to privilege for a fair and accurate report

47. The starting point, when deciding whether the claim to privilege is well-founded, is the importance which must be attached to the role of the media in reporting proceedings in public of the various entities listed in Schedule 1 to the 1996 Act. This consideration was emphasised in the 19th century case of *Wason v Walter* and, more recently, by Lord Bingham of Cornhill in *McCartan Turkington Breen v Times Newspapers Limited* [2001] 2 AC 277 at 290:

> "In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call, or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and enquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction."

That case concerned the reporting of a public meeting but it appears to me that precisely the same considerations arise in connection with the reporting of parliamentary proceedings.

48. The question which arises here is when that privilege which in principle attaches to a report of parliamentary proceedings is lost because of the addition of extraneous non-privileged material in the same article or report. At what point is privilege lost? The editors of the current (10th) edition of *Gatley* say at paragraph 14.104:

> "There is a great deal of case law on the meaning of a fair and accurate report in the context of judicial proceedings but comparatively little on parliamentary proceedings…"

Fairness and accuracy in relation to reports of judicial proceedings is dealt with at paragraph 13.37. It is clear that what is required is substantial fairness and substantial accuracy. Paragraph 13.46 reads:

> "It has been said that for privilege to apply a report 'must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any court or whatever, in addition to what forms strictly and properly the legal proceedings'. This is true if, e.g the report contains comment inextricably mixed with what happened in court or remarks plainly unconnected with the proceedings, but the proposition needs to be qualified in two ways. First, if an article contains an accurate report and comment which is separable from it, the report may be defended as a fair and accurate report and the comment as fair comment….."

The second qualification is not for present purposes material.

49. I accept that the following three considerations are important when it comes to deciding whether a particular report qualifies as "fair and accurate", namely

> (i) the amount of the extraneous non-privileged material which has been added to and mixed with the privileged material;
>
> (ii) whether the typical reader of the particular publication would be able to distinguish the passages which constitute reportage in the true sense of that word from the unprivileged material added by the publisher. This is largely a matter of editorial or journalistic presentation; and
>
> (iii) the extent to which it can be said that the extraneous additional material is connected with the privileged reportage.

50. There is comparatively (and surprisingly) little modern authority which assists on the question when privilege is lost on the grounds with which this case is concerned. In *Tsikata v Newspaper Publishing* [1997] 1 ALL ER 655 one of the three sentences complained of was held by the trial judge and by the Court of Appeal not to be protected by the statutory privilege which was available in respect of the other two sentences. Nevertheless the claim to privilege in respect of those two sentences was upheld. However, there was in that case a reasonably clear connection between all three sentences.

51. In *Henry v BBC*, I rejected the BBC's claim for statutory privilege in respect of a news bulletin the terms of which are set out in paragraph 73 of my judgment. My reasons for doing so, as stated at paragraphs 88 and 89, were that, whilst the broadcast did include some privileged material, there was a substantial amount of what [counsel for the claimant] called "editorialising". I gave some examples. My conclusion was:

> "….that the news bulletin is so heavily laden with editorial comment that it does not qualify for protection under section 15 of the 1996 Act. There is simply too much in the broadcast which is plainly not reportage of the kind which section 15 is designed to protect. The BBC was in effect adopting the Taylor conclusions as its own and indeed embroidering them".

52. The only other authority to which I should refer is the decision of the High Court of Australia in *Chakravarti* to which I have already referred. Kirby J agreed with the other members of the court that the claimant's appeal should be allowed. At paragraph 153 of the report he commented on the principles applicable to the fair report issue as follows:

> "i) it is not enough that the challenged report be generally fair. It must also be accurate. It must be a report of the proceedings described. To the extent that it goes beyond a report, and the reporter engages in comment, description and elaboration of the reporter's own, the privilege provided for a 'report' will be inapplicable and may be entirely lost. The tendency for journalists to intersperse descriptive reports with adjectives and comments of their own is not new. ……
>
> 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".

Kirby J went on to refer to the public benefit to be derived from reports of the privileged kind. It is to be noted that in the passage quoted that he confines himself to saying that, where the publication goes beyond a report, the privilege "may" be entirely lost. He said that excessive commentary or misleading headlines "run the risk" of depriving the text of the quality of fairness essential to attract the privilege.

53. In the light of those authorities it appears to me that I must first decide what was the effect of what Mr Robinson said in his speech in the House. I must then decide whether the extraneous material added by the newspaper in the article has the effect of rendering the article as a whole substantially lacking in the qualities of fairness and accuracy on which the privilege depends. The answer to the latter question depends on the three considerations to which I have alluded at paragraph 46 above, namely the extent of the extraneous non-privileged material added; the extricability or severability of that material (i.e the extent to which it would be distinguishable by the reader from the reportage strictly so-called); and the degree of connection between the privileged material and the extraneous additional material.

Conclusion on the privilege issue

54. The Hansard report makes clear that the theme of Mr Robinson's speech in Parliament was one of opposition to the precipitate restoration of Parliamentary allowances to Sinn Fein MPs. The ground of that opposition is broadly the continued involvement of members of the Provisional IRA in money laundering and other criminal activity. Mr Robinson introduces the name of Mr Curistan in this passage:

> "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.
>
> 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 activity and, until recently, I believe that most people believed that they were legitimate. Given recent reports, I believe 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 cafes 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?"

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", i.e. 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 paragraph 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 paragraphs 5-18 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*.

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 1 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 paragraph 1. Moreover, paragraph 2 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 paragraphs 3 and 4 of the article.

60. It is plain that from paragraph 5 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 paragraphs 13 and 14 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 claimants' 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, i.e 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 paragraphs 6(b) of the Defence are protected by qualified privilege as being a fair and accurate report of proceedings in parliament. Accordingly I answer the second preliminary issue in the affirmative.