Neutral Citation Number: [2004] EWCA Civ 983

Case Nos: A2/2003/2490
A2/2003/2490(B)
A2/2003/2490(Z)A2

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
(MR JUSTICE GRAY)
HQ03X01813 and HQ03X01775

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 July 2004

Before :

LORD JUSTICE SEDLEY
LORD JUSTICE LONGMORE
and
LORD JUSTICE MAURICE KAY

- -

Between :

JAMEEL AND ANOTHER	**Appellant**
- and -	
TIMES NEWSPAPERS LIMITED	**Respondent**

- -
- -

James R K Price QC and Jonathan Barnes (instructed by Peter Carter-Ruck & Partners) for the **Appellant**
Stephen Suttle QC (instructed by **Times Newspapers Limited**) for the **Respondent**

Hearing date: Tuesday 11 May 2004

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JUDGMENT

Lord Justice Sedley :

The issues

1. On 8 June 2003 the Sunday Times, which is published by the respondent company, published an article under the headline "**Car tycoon 'linked' to Bin Laden**" Above the article and headline were photographs of the claimant Mr Jameel, of premises of the claimant company Hartwell PLC, and of the Twin Towers burning on 11 September 2001, and below the photographs the words: "Accused: Yousef Jameel's family firm bought the British car dealer Hartwell in 1990. Now he is alleged to have helped fund training for the terrorists who carried out the September 11 attacks."

2. The text of the article read:

> "A Saudi billionaire who helped build one of Britain's biggest car dealerships is being sued by the families of victims of the September 11 terrorist attacks.
>
> Yousef Jameel, whose family firm bought the British business Hartwell in 1990, is named in papers claiming more than $1 trillion damages from defendants accused of helping to fund Osama Bin Laden and his Al-Qaeda network.
>
> Lawyers acting for the families say Jameel was one of the rich Saudi individuals and businesses, targeted by fundraisers acting for Muslim causes, including rebel fanatics, called "the Golden Chain" because their net worth totalled more than £51 billion.
>
> Money from Saudi Arabia is said in court documents to have financed Al-Qaeda camps in Afghanistan where the hijackers trained. Jameel, whose family is one of the wealthiest in Saudi Arabia, is among 225 defendants named in papers filed in a Washington DC court.
>
> Hartwell turns over more than £600m and employs 3,500 people in Britain. Its 48 outlets sell Audi, Volkswagen, Jaguar and Ford cars. Its other interests include property, software and financial services. It was bought by the Saudi-based Abdul Latif Jameel Group (ALJ).
>
> The Jameel family first made its money through a Toyota franchise in Saudi, along with oil, shipping and real estate. Jameel recently transferred his shareholding in the £2 billion a year company to his children.

Jameel's lawyers say he no longer has an interest in Hartwell. They also emphasise that there is no case to answer: he has never supported or made donations, either directly or indirectly, to Bin Laden. They add that he has not been contacted by the lawyers for the September 11 case or served with papers, although he knew that a Yousef Jameel was cited as a defendant. They also point out that other wealthy Arab donors have been defrauded into innocently giving money for humanitarian causes which was used to fund Jihad fighters.

“Mr Jameel recognises that because of his standing and prominence as a businessman in Saudi Arabia and his well known generosity it is understood, rightly or wrongly, that he is [the person named in the writ], “Jameel's lawyers said.

ALJ made a substantial donation for “the rescue and help” of Muslims in Kosovo. In 1999 ALJ gave the Saudi Red Crescent about £1.3 m. A charitable organisation modelled on the Red Cross and based in Riyadh, the Saudi Red Crescent is also named as a defendant in the September 11 action. Jameel's lawyer said his client was unaware of the donation. Jameel was at the centre of a legal row in 1988 when he was accused by Carole Bailey, his British former wife, of kidnapping their daughter and holding her in Saudi Arabia. He had indicated in court that he would not prevent the girl's return to Britain and had persuaded the court to remove a £1m bond that would have been forfeit. It is understood that the row with Bailey has been resolved.

After their acrimonious divorce Jameel, who is in his late fifties, married Linda Richards, a former model with whom his has three daughters.

Jameel's name was added to the list of defendants after the name “Yousef Jameel” was found on a computer disk seized by Bosnian police during searches of the offices of a charity known as the Benevolence International Foundation in Sarajevo in March last year.

That document, known as the Golden Chain list, was used in the case against the head of a Saudi-based charity that was said to have conned donors and misused their cash. Enaam Arnaout was accused by American authorities of funnelling money to Al-Qaeda, but admitted a lesser offence of sending money to Muslim fighters in Bosnia and Chechnya.

Jameel's lawyers said it was possible he was the person in the Golden Chain document. But it listed only wealthy individuals who could be asked for money: there was no

> evidence that they had donated. Jameel said he was approached by a fundraiser on the list but had never contributed.
>
> He also pointed out that the draft list dated from 1988, "when Bin Laden's role with the Afghanistan mujaheddin against the Soviet army was looked on favourably by the Islamic and western governments alike". He emphasised his close relations with America, saying he studied at the American University in Cairo and was appalled by the September 11 attacks.
>
> On Friday lawyers for the September 11 families took the unusual step of publishing the names of Jameel and other defendants including 37 individuals and eight charitable organisations, in the International Herald Tribune and Al-Quds, the Arabic newspaper, in an announcement of the start of legal proceedings. American courts allowed notice to be served in this way because of risks to bailiffs in Saudi Arabia.
>
> Motley Rice, the American law firm, is representing 2,760 relatives of the September 11 victims. Its case says the "actions of the defendants… were intentionally malicious, unconscionable, and in reckless disregard of the rights and safety of all the plaintiffs". But there are no details of specific charges against Jameel.

3. Mr Jameel and Hartwell separately sued the publishers for libel, averring that the words meant that there were reasonable grounds for suspecting that Mr Jameel was associated with Osama Bin Laden and had helped to fund the September 11 terrorists, and that Hartwell's funds had been so utilised. The paper's defence was that the article meant no such thing, and that insofar as it did bear a lesser meaning that there were grounds for inquiry or investigation, this was justified by the facts recounted. In each case the paper also claimed qualified privilege.

4. The claimants faced no plea of justification in relation to the more serious meaning which they attribute to the article. The defendants accept that the repetition rule shuts this out: see *Shah v Standard Chartered Bank* [1999] QB 241, 269. In relation to the lesser meaning, however, the defendants contended successfully before Gray J that the repetition rule did not apply, so that they could rely on the same particulars as for their plea of qualified privilege, all of them in one way or another second-hand.

5. The applications which came before Gray J were these:

- In the Hartwell action, an application by the defendants to strike out the claim or to enter summary judgment for them on the grounds, in essence, that the article bore no meaning defamatory of Hartwell; or that, if it did, Hartwell had no real prospect of defeating a plea of justification.

- In the Jameel action, an application by the defendants for summary judgment under CPR part 24 on the grounds that the article was not capable of meaning that that there were serious and substantial grounds for suspecting that Mr Jameel had been associated with Osama bin Laden and had helped to fund terrorist training.

6. In a reserved judgment following full argument, Gray J on 7 November 2003 held that the article was incapable of carrying any meaning defamatory of Hartwell; that it was incapable of meaning that serious grounds for suspicion existed against Mr Jameel; and that insofar as it bore the lesser meaning that there were grounds for inquiry into Mr Jameel's role, this meaning was capable of justification but not necessarily justified. He accordingly struck out Hartwell's claim and dismissed its action. Mr Jameel's action was to proceed to trial only upon the lower defamatory meaning, the issues including whether that meaning was present and, if it was, whether it was justified by the matters particularised in support of the plea of qualified privilege.

7. By permission of Keene LJ, Mr Jameel now appeals against the decision of Gray J that the higher defamatory meaning was unsustainable. For reasons I will come to, no appeal is pursued against Gray J's holding that the lower level of meaning was susceptible of justification without the handicap of the repetition rule. Following the refusal of permission to appeal against the striking out of its action, Hartwell has renewed its application. We granted permission and heard the appeal alongside that of Mr Jameel.

8. Because part of Mr Price's submission on behalf of Hartwell was that the slur upon it is in part a reflection of the slur upon Mr Jameel, we will consider Mr Jameel's appeal before turning to Hartwell's.

Mr Jameel's case

Defamatory meaning

9. Mr Jameel does not assert that the article accuses him directly or by implication of funding terrorism. His case is that it says or implies either that reasonable grounds exist for suspecting that he has done so or at the very least that good reason exists for investigating whether he has done so. Of these three levels of meaning, Gray J held that only the third was (as was admitted) arguably present in the article.

10. The elevation of this taxonomy of meanings into legal categories is recent. It is correct to say that as long ago as 1963, in *Lewis v Daily Telegraph* [1964] AC 234, a libel action arising out of an article headlined "Fraud squad probe firm", it was recognised, at least by Lord Devlin, that such an allegation might operate on any of three levels, each distinctly capable of justification: the fact of an inquiry, the existence of reasonable grounds for suspicion, and guilt. But, although the practice (criticised by Lord Devlin, loc. cit., 287) has persisted of letting a claimant plead only his highest meaning and then argue for any lesser one, it was not until the decision of this court in *Bennett v News Group Newspapers Ltd* [2002] EMLR 860 that recognition was accorded to these three classes as being legally distinct.

11. *Bennett* concerned a newspaper story about an investigation into the activities of a number of police officers at Stoke Newington police station, who had ultimately been cleared. The newspaper had pleaded a *Lucas-Box* meaning (2) that there were sufficient grounds for investigating the allegations against the claimants, and now wished to add a meaning (4) that the claimants had been reasonably suspected of various crimes. The court said (in para. 36):

> "… A statement that a police officer is under is investigation is no doubt defamatory, but the sting in the libel is not as sharp as the statement that he has by his conduct brought suspicion on himself. That point is reflected in a passage in the speech of Lord Devlin in *Lewis* already cited which refers to " three categories of justification – proof of the fact of the enquiry, proof of reasonable grounds for it and proof of guilt". We do therefore see a significant difference between subparagraphs (2) and (4). The latter calls the plaintiffs' conduct into question in a way that the former does not, and subparagraph (4) can be allowed as an amendment only if it is both a possible meaning and is capable of being supported by particulars which are not hearsay and (in the *Shah* sense) focus on the conduct of individual plaintiffs. A less stringent test is appropriate for subparagraph (2), as the plaintiffs' advisers seem to have gone some way to acknowledging, as noted above."

The reference in the final sentence of this passage is to the fact that the claimants had not demurred to the ten heads of particulars pleaded by the newspaper in support of meaning (2), namely grounds for investigation.

12. No issue arises before us about the need for the claimant to situate at least his highest pleaded meaning at one of these three levels: see now the judgment of Brooke LJ in *Chase v News Group Newspapers* [2003] EMLR 218, para. 45. For my part I would think it high time that claimants were required to plead their levels of meaning in the alternative, especially since the decision in *Bennett*. It is also common ground that the judge correctly derived the legal tests of meaning from *Skuse v Granada Television Ltd* [1996] EMLR 278, 285-7 and *Gillick v BBC* [1996] EMLR 267, 272-3. He tabulated them in this way:

i) The courts should give to the 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 an over-elaborate analysis of the material in issue.

iii) The court should not be too literal in its approach: (see *Lewis v Daily Telegraph Limited* [1964] AC 234 at 277 per Lord Devlin and in particular "the lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when derogatory").

iv) A statement should be taken to be defamatory if it would tend to lower the claimant in the estimation of right-thinking members of society generally or affect a person adversely in the estimation of reasonable people generally.

v) In determining the meaning of the material complained of the Court is not limited by the meanings which either the claimant or the defendant seeks to place upon the words.

13 The argument of James Price QC for Mr Jameel is that the judge failed to apply the tests correctly. Gray J set out his conclusion on meaning as follows:

17. The caption to the photographs is couched in terms of allegation and accusation. The word "linked" in the headline is in inverted commas. It is clear from the text of the article that the link is made in the proceedings brought in the US on behalf of the families of the victims of the September 11th atrocity against no less than 225 defendants. Mr Jameel is said "by lawyers acting for families" to be one of the rich Saudi individuals, called "the Golden Chain", who had been "targeted" by fundraisers acting for Muslim causes including rebel fanatics (see paragraph 3 of the article). I accept that the ordinary reader might well not appreciate that the targeting is unrelated to the funding of the 11th September atrocity. Later in the article (paragraph 9) there is reference to Mr Jameel's family group of companies having made a donation to an organisation which is also a defendant in the proceedings brought by the families of victims of 11th September. The article also refers (at paragraph12) to Mr Jameel's name having been on the "the Golden Chain list", which was found in Sarajevo and which featured in a prosecution brought against a man named Arnaout, who was accused (but not convicted) of funnelling money to Al-Qaeda without the knowledge of those who had donated it.

18. But those passages in the article have to be read in the context of what is to be found in other inter-woven passages which give Mr Jameel's side of the story mostly through the mouth of his solicitors. As Mr Suttle points out, these passages tell the reader the following:

    i) that Mr Jameel had no case to answer:

    ii) that Mr Jameel had never supported or made donations, either directly or indirectly, to Osama Bin Laden;

    iii that Mr Jameel had not been contacted by the lawyers for the plaintiffs in the US proceedings or served with papers, although he knew that a Yousef Jameel was cited as a defendant;

    iv) that other wealthy Arab donors had been defrauded into innocently giving money for humanitarian causes which was used to fund Jihad fighters;

    v) that Mr Jameel "recognises that because of his standing and prominence as a business man in Saudi Arabia and his well known generosity it is understood, rightly or wrongly, that he is [the person named in the writ]";

    vi) that Mr Jameel was unaware of the 1999 donation by ALJ to Saudi Red Crescent;

    vii) that, whilst it was possible that Mr Jameel was the person named in the "Golden Chain" list, that document listed only persons who could be asked for money and that there was no evidence that they had donated;

viii) that Mr Jameel had been approached by a fundraiser named on the list but had never contributed;

ix) that the "Golden Chain" list was draft only and dated from 1988, "when Osama Bin Laden's role with the Afghanistan mujaheddin against the Soviet army was looked on favourably by Islamic and western governments alike";

x) that Mr Jameel had close relations with the USA, studied at the American university in Cairo and was appalled by the September 11th attacks;

xi) that there are no details in the particulars of claim in the US proceedings of any specific charges against Mr Jameel and

xii) that Mr Jameel no longer has any interest in Hartwell.

19. I have to ask myself whether, given the inclusion of those passages, the putative ordinary reasonable reader could reasonably understand the article to mean that there are serious and substantial grounds for suspecting and/or which may prove that Mr Jameel is associated with Osama Bin Laden in connection with terrorism and/or that he helped fund the training of terrorists who carried out the September 11 atrocities. I cannot accept that the words are capable of bearing that meaning. Although it is by no means a conclusive point, nowhere in the article does the author adopt or endorse the allegations made in the US proceedings. Moreover the article tells the reader in clear terms that it is reporting allegations made in those proceedings. In the light of the detailed refutation of them incorporated in the article, I do not accept that there is any warrant for the ordinary reasonable reader taking it that the US lawyers must have had reasonable grounds for making the allegations against Mr Jameel.

20. As to the Golden Chain list, the reader is told that Mr Arnaout conned the donors when he funnelled their money to Al-Qaeda. It is further made clear (paragraphs 14 and 15) that the donors named in the list are not said to have made donations and that Mr Jameel asserts that he made no contribution. In ant event the article reports Mr Jameel's assertion that he list dates back to a time when the activities of Osama Bin Laden were looked on favourably by western governments. The article concludes by saying there are no specific charges levelled against Mr Jameel in the US proceedings.

14. Mr Price's chief ground of attack on the judge's reasoning is that he has noted but failed to apply the so-called bane and antidote principle restated most recently by this court in *Mark v Associated Newspapers Ltd* [2002] EMLR 839. The principle is, in substance, that a publication which advances and then purports to dispel a

defamatory allegation can be acquitted of any possible defamatory meaning only in the very clearest of cases. Mud, in short, is likely to stick, and it is for a jury to say whether it has done so.

15. The judge dealt with this aspect of the case at paragraphs 13 to 16 of his judgment:

> 13. The argument for Mr Jameel proceeded as follows: Mr Price drew attention to the eye-catching photographs and to the caption. He described the headline of the article as being the "bane", that is the sting of the libel on his client. He relied on two authorities for the proposition that it is rarely possible for the text of an article to draw the sting of a defamatory headline. The first is *Charleston v News Group Newspapers Limited* [1995] 2 AC 65, which as it happens was a case where it was accepted that the obviously defamatory headline and photographs were neutralised by the accompanying text. But Lord Nicholls said at 74C:
>
> > " This is not to say that words in the text of an article will always be efficacious to cure a defamatory headline. It all depends on the context, one element in which is the lay out of the article. Those who print defamatory headlines are playing with fire. The ordinary reader might not be expected to notice curative words tucked away further down the article. The more so, if the words are on a continuation page to which a reader is directed".
>
> 14. Then second authority relied on was *Mitchell v Faber and Faber Limited* [1998] EMLR 807. Hirst LJ said at 815:
>
> > "So far as the antidote is concerned, it seems to me that only in the clearest of cases would it be proper for a judge to rule that the sting in the words, which are ex hypothesis capable of a defamatory meaning in themselves, is drawn by the surrounding context, so that in the result those words cease to be capable of a defamatory meaning. In my judgment the general though perhaps not universal rule should be that this is a matter for the jury and not the Judge to decide".
>
> Reliance was also placed on dicta to a similar effect in *Cruise v Express Newspapers* [1998] EMLR 780 at 786; *Sergi v ABC* [1983] 2 NSWLR 418 and *Mark v Associated Newspapers* [2002] EMLR 839.
>
> 15. This is not of course a case where rejection of the claimant's pleaded meaning would result in the case being withdrawn from the jury because, for present purposes, it is accepted by Mr Suttle that the article is capable of bearing the lesser, but still defamatory, meaning for which he contends. Nor is it a case where the newspaper has included a bare denial by the claimant, which appears to have been the situation contemplated in *Mark v Associated*

Newspapers (see paragraph 42). Nevertheless I accept that I should not readily accede to the suggestion that the passages relied on by the newspaper have the effect of reducing the meaning of the article to a level lower than would otherwise have been the case.

16. It appears to me that I must consider what meanings the *Sunday Times* article is capable of bearing by following the approach laid down in *Skuse* and *Gillick* and by determining what the article read as a whole would have conveyed to readers, giving due weight to the headline but reading it in the context of the text of the article as a whole.

16. There seems to me to be an unaddressed tension between the principle that the feasible range of meanings is to be derived from the article as a whole, read through the eyes of a sensible person, and the principle that if the article contains a defamatory statement or imputation, that will define its meaning unless it is very plainly negatived in the same article. Gray J sought to address it by reminding himself (at the end of paragraph 15) of the bane and antidote principle as he turned (in paragraph 16) to the range of feasible meanings.

17. It may well be that the tension requires resolution. But in the present case I do not believe that this is critical. If, as the judge went on to hold, the natural meaning of the publication was not that Mr Jameel had drawn suspicion on himself by his conduct but only that facts existed which warranted investigation of his conduct, there was no bane requiring an antidote. There was only the level (iii) allegation which, subject to the next issue, was going to trial. If, on the other hand, the article arguably operated at level (ii) when read in either way (that is, whether taken as a whole or taken piecemeal as bane and possible antidote) the question again ceases to matter. It is only where the two tests yield different answers that it will become necessary to decide which prevails, and for reasons to which I now turn I do not think this is such a case.

18. In my judgment the judge was mistaken in concluding that the article did not arguably contain any level (ii) allegation. The distinction between the two levels is a fine one. Indeed, as Simon Brown LJ said in relation to Mr Mohammed Jameel's action against the Wall Street Journal [2004] EMLR 89, para. 19:

> …"Once it is recognised that the article may be asserting no more than that in one way or another the respondents may unwittingly have assisted terrorists in the past and may by introducing more controls be able to prevent that in future, the borderline between what for convenience we have been calling level 2 meaning (reasonable grounds to suspect) and level 3 meaning (grounds merely for investigation) becomes somewhat blurred.

> The difference and inter-relationship between level 2 and level 3 meanings have been disclosed in a number of cases, most notably in *Lewis v Daily Telegraph* [1964] AC 234 (where this distinction was first drawn), *Bennett v News Group Newspapers Ltd* [2002] EMLR 218. It is not perhaps an entirely satisfactory distinction"

19. Nevertheless, Simon Brown LJ went on to quote without disapproval paragraphs 23-25 of Gray J's judgment in the present case, which are set out later in this judgment.

20. I must not be understood as saying that whenever a level (iii) meaning is arguably present, so will a level (ii) meaning be. But it does appear to me that the present article, fairly read, is arguably capable of conveying to a reasonable reader not just that grounds exist for inquiring into Mr Jameel's possible role in funding terrorism but that grounds exist for suspecting that this is what he has done. The article also contains significant material capable of dispelling both suggestions, but not so unequivocally presented as to constitute an incontestable antidote for whatever poison a jury may detect. It is in my judgment for a jury to say what the article read as a whole means, whether its conclusion is that the meaning resides at level (ii), at level (iii) or at neither level. All that we have to decide, and what I would hold, is that it would not be unreasonable were a properly directed jury to find that the article as a whole suggested, without sufficiently dispelling the suggestion, that grounds existed for suspecting Mr Jameel of funding terrorism; just as it would not be unreasonable for them to find no defamatory meaning at all.

21. I would therefore allow Mr Jameel's 's appeal on this issue. His draft pleading at present reads as follows:

> 4. In their natural and ordinary and/or inferential meaning, and in the context in which they appeared, the said words bore and were understood to bear the following meaning, namely that there are sufficient grounds to enquire whether the Claimant has been associated through funding with Osama Bin Laden and Al Qaeda and/or whether he helped to fund the training of the terrorists who carried out the September 11th atrocities ~~serious and substantial grounds for suspecting, and/or which may prove, that the Claimant is associated with Osama Bin Laden in connection with terrorism and that he helped fund the training of the terrorists who carried out the September 11th atrocities.~~

In accordance with what is said earlier in this judgment, the deleted words should be restored and placed ahead of the underlined ones, followed by the word "alternatively". So pleaded, the action may go to trial.

Justification and repetition

22. The first ground of appeal annexed to Mr Jameel's appellant's notice was this:

> "The learned Judge held that the repetition rule, derived from a decision of the House of Lords, and re-stated by this court in *Stern v Piper* [1997] QB 123, did not apply to this case. This was wrong: the repetition rule applies to all cases, without exception, in which the allegedly defamatory publication takes the form 'A says that B is / has done [something defamatory]'."

23. The judge's reasoning deserves to be set out in full:

> 23) It might at first blush appear that the distinction between what I have called level (ii) and level (iii) meanings is artificial and over-refined. But, quite apart from the fact that the distinction is one which is clearly made in the authorities to which I have referred, it appears to me that there are real distinguishing features.
>
> 24) In the first place an imputation that there exist reasonable grounds for suspicion of misconduct generally (but not invariably – see *Chase* at 231 per Brooke LJ) arises because the person suspected has acted in such a way as to bring suspicion on himself. As Hirst LJ put it in *Shah*:
>
> > "For these reasons I consider Mr Browne's submission is correct, and that it is an essential requisite of a defence of justification of reasonable suspicion that it should *focus* on some conduct on the plaintiff's part giving rise to reasonable suspicion.
>
> I choose the word 'focus' advisedly, in order to avoid any implication that such a defence must be exclusively confined to allegations of such conduct. Clearly it will be necessary, particular in the complicated case like the present, for the defendant to portray in some detail the relevant background, and also to set out material which connects together the main facts relied upon".
>
> 25) The second distinguishing feature is that sufficient grounds may exist for an enquiry or investigation in circumstances where the information available is incomplete and where it may comprise or consist in hearsay statements. To take a mundane example, a police officer to whom a complaint is made may justifiably conclude that further investigation

into that complaint is required even if it is based exclusively on hearsay evidence.

26) I ask myself what follows from the existence of those two distinguishing features in terms of the permissible ambit of the particulars of justification. I start by considering whether the conduct rule applies to a plea of justification of the meaning that there are sufficient grounds for an enquiry/investigation. As I have already pointed out, such grounds may exist independently of any incriminating conduct on the part of the individual concerned. The state of the evidence may be such that there is no action or omission on the part of the individual such as to require an enquiry/investigation. But the evidence is nevertheless such as to call for an enquiry/investigation. This suggests that, as a matter of logic, there is no reason to impose the requirement that any plea of justification to a level (iii) meaning should be based on the conduct of the claimant. Indeed Mr Price accepted that the conduct rule will not always apply in cases where the meaning sought to be justified is a level (iii) meaning. The point is not free of authority. In the passage quoted earlier from the judgment in *Bennett*, Robert Walker LJ pointed out the significant difference between a level (ii) and a level (iii) meaning, saying "the former calls the plaintiff's conduct into question in a way that the latter does not".

27) That is not, however, to say that in every case where the imputation sought to be justified is the existence of sufficient grounds for enquiry/investigation, the plea of justification may succeed even if no conduct on the part of the claimant is relied on. I think Mr Price is right when he says that it all depends whether the article in question alleges conduct on the part of the claimant. If it does, then it will or may be necessary for the defendant, albeit seeking to justify at level (iii) only, to assert and prove that conduct as part of his defence of justification.

28) Is this such a case? Mr Price contends that the *Sunday Times* article included an allegation of conduct on the part of Mr Jameel, namely that he supported Muslim causes including rebel fanatics (paragraph 3). I do not so read the article: it says no more than that Mr Jameel was one of those "targeted" by fundraisers. The article does not appear to me to allege any conduct on the part of Mr Jameel. It is couched entirely in terms of what is alleged against him. Accordingly I cannot accept that it is fatal to the prospects of success for the plea of justification that it does not rely on any conduct on the part of Mr Jameel.

29) I turn to the repetition rule. The rationale of this rule is contained in the pithy statement of Lord Devlin in *Lewis* at page 248 that:

> "For the purpose of the law of libel a hearsay statement is the same as a direct statement and that is all there is to it".

It appears to be established that, in cases where the words impute actual guilt of misconduct or the existence of reasonable grounds to

suspect such conduct, a defendant cannot rely on hearsay statements (or repetitions) in his particulars of justification. In such cases what the defendant has to establish is the existence of objectively reasonable grounds for asserting guilt or the existence of reasonable grounds for suspicion, as the case may be. In *Shah* May LJ put it thus at 269:

> "If a defendant wishing to justify a publication to the effect that there are reasonable grounds to suspect the plaintiff of discreditable conduct can rely on what he has been told by persons whom he regards as honest and reliable, it must follow that evidence would be admissible as to the reputed honesty and reliability of the defendant's informants. The practical problems which that might cause in a case such as *Hinduja's* case are obvious. In principle, however, evidence of this kind would be objectionable because it would introduce irrelevant considerations in purported proof of what the defendant has to establish. The defendant has to establish that there are objectively reasonable grounds to suspect the plaintiff. The evidence under consideration would be directed rather to an essentially subjective judgment of the honesty and credibility of third parties. In human terms, anyone is entitled to believe what third parties tell them. But such belief does not establish that what is reported is objectively credible."

Hirst LJ expressed himself in similar terms and Neill LJ agreed with both judgments.

30) The question which arises in the present case is whether that reasoning applies in cases where the imputation sought to be justified is the existence of sufficient grounds for enquiry/investigation rather than reasonable grounds for suspicion. As already pointed out, grounds for enquiry/investigation do not have to be shown to be "objectively reasonable". The point of the investigation is to discover whether they are so. I find it difficult to see how in principle hearsay material may not be relied on to support the contention that sufficient grounds exist for enquiry or investigation. That appears to have been the view of Robert Walker LJ in *Bennett*. In the passage already quoted he appears to contemplate that a "less stringent test" is appropriate in a level (iii) meaning case, i.e. that hearsay statements may in a suitable case be relied on.

31) My conclusion is therefore that the *Sunday Times* is not to be shut out in the circumstances of the present case from relying in support of its plea of justification to the lesser meaning of sufficient grounds to enquire/investigate upon material which includes hearsay statements.

24. Having prepared to listen to argument on this important and apparently open question of law, the members of this court were surprised to find that neither counsel was prepared to argue it. From the standpoint of Stephen Suttle QC for the defendants this was unsurprising: he considers that he has under his belt a ruling, which will now govern the evidence and argument at trial, that to justify the level (iii) meaning he can adduce evidence of the bare fact that the allegations he relies on had been made in the US proceedings and followed up by the defendant's journalist. It is perfectly true that all this matter will anyway go before the jury in relation to qualified privilege, but the disapplication of the repetition rule to level (iii) justification is still a question highly material to this action.

25. The reason why Mr Price has nevertheless not argued it is that - notwithstanding its position at the forefront of his grounds of appeal - he considers that he is not in a position to do so. The point arose, he says, on the defendant's application for summary judgment, which failed. His sole appeal is on the antecedent question of the possible range of meanings, on which he lost below.

26. Gray J at the start of his judgment set out the three questions before him:

2. The principal questions which I am asked to decide are:

(i) whether the article is capable of bearing the meaning put on it on behalf of Mr Jameel, namely that it meant that there are “serious and substantial grounds for suspecting and/or which may prove” that Mr Jameel’s family is associated with OBL in connection with terrorism and helped fund the terrorists who carried out the September 11th atrocities or

(ii) whether the article is capable of bearing no higher meaning than that put on it by the newspaper, namely that there were “sufficient grounds to enquire” whether Mr Jameel has been associated through funding with OBL and Al-Qaeda and/or whether he helped to fund the atrocities of 11th September and

(iii) if the latter, whether the plea of justification in that meaning is bound to succeed with the result that the *Sunday Times* is entitled to summary judgment.

The third question, though expressed to arise only if the meaning were limited to level (iii), arises equally if the meaning is not so limited but includes level (iii). The former was the situation found by Gray J; the latter is the situation found by us. In both cases, as it seems to me, the permissible mode of justification of a libel arises out of the question of meaning: indeed, if Mr Price is right in his insistence on the point, the repetition rule is principally a rule about meaning (see the remark of Simon Brown LJ in *Stern v Piper* [1997] QB 123, reiterated by him in *Mark v Associated Newspapers* [2002] EMLR 839, para.29, that the rule "dictates the meaning to be given to the words"; though it is right to say that in the course of argument we have respectfully wondered whether "conditions" or "qualifies" might be a preferable verb).

27. When Keene LJ gave Mr Jameel permission to appeal on sight of the papers, he wrote:

> "There is a reasonable prospect of a successful appeal on grounds 1 and 2. Even on the judge's approach to meaning it is appropriate that this court should consider the applicability of the repetition rule."

It seems to me unsatisfactory that an issue which was at the forefront both of the grounds of appeal and of the single Lord Justice's reasons for granting permission to appeal should be abandoned by the appellant on the grounds that have been given to us. It also seems to me - and both counsel agreed with this - that it is a double misfortune that the action will now go to trial on the basis of an unappealed ruling on a potentially critical point, with the risk that it will one day reappear in this court in a fresh endeavour to apply the repetition rule to level (iii) meanings.

28. In these circumstances I would venture only the following comments. The proposition that the repetition rule applies across the board derives from the decision of this court in *Stern v Piper* [1997] QB 123. That decision certainly contains no qualification, in relation to level (iii) meanings, of the well established repetition rule; but the decision predates *Bennett v News Group Newspapers Ltd* [2002] EMLR 860, which is the effective source of the third level of meaning in issue here. The question whether the conduct and repetition rules apply to a *Bennett* level (iii) meaning is, so far as we know, unaddressed.

29. The repetition rule, in essence, prevents a defendant from hiding behind the fact that he is only repeating what others have alleged. He can accordingly not justify the libel by proving that the allegations have been made, but only by proving that they are true. But if a level (iii) libel is to have any legal existence distinct from the first two levels, it has to be because it asserts something less than either guilt or conduct founding reasonable suspicion. If so, it ought to be possible in principle to justify it

by pleading and proving no more than that a third party has alleged enough to warrant an investigation of the claimant's activities.

30. This much, at least, might suggest that Gray J was right to hold that the repetition rule does not, or not always, apply to a level (iii) libel. But the consequences of so holding are disquieting. It means that, so long as a slur on an individual's reputation is cast in level (iii) terms, it can be justified by reliance on the bare fact of assertions made by others, without any need to make them good. The court which decided *Bennett* was not asked to address this problem. Faced with it in the course of preparing to hear this appeal, it seemed to me, first of all, that there was no prior reason why the repetition rule should apply to this third and novel class of libel; secondly, that there were defensible theoretical reasons why it should not; but thirdly that there were strong practical reasons why it should - among them that disapplying the rule will place a premium upon formulating slurs as level (iii) allegations and defending them unembarrassed by the otherwise general restraint on repeating the allegations of others.

31. There the matter must rest. We cannot decide issues which are not before us, and we cannot compel a represented party to argue a point he does not consider it appropriate to argue.

Hartwell's case

32. Gray J, reminding himself that he was concerned only with the limits of what a jury could reasonably decide the publication meant, concluded:

> "I cannot accept that the article is capable of bearing the meaning that there are serious and substantial or even reasonable grounds for suspecting that Hartwell, or money generated by its business, helped fund the September 11th atrocity."

Reverting to the *Skuse* principles, Gray J considered, as I do, that it would take a very suspicious-minded reader to find such an implication in the article. He pointed out in particular that money derived from Hartwell's business by Mr Jameel's family was not Hartwell's money.

33. Having rejected this 'higher' meaning, Gray J went on to reject the 'lower' meaning that grounds existed for an inquiry into whether Hartwell was implicated in funding terrorism. Here too he considered, as I do, that even this reading attributed too much suspicion to an ordinarily cautious reader.

34. Mr Price contends that a slur on an individual closely connected with a trading corporation is capable of defaming it, irrespective of any allegation of corporate misconduct. As a proposition of law this has no visible means of support. As a proposition of fact it may sometimes be true: whether it is will depend entirely on what has been written. In the present case, in my judgment, nothing in the article comes factually close to such a transmissible slur. It is accepted that the article, including its headline and the photographs, does not directly defame Hartwell PLC at any level. Nor do I consider that any reasonable jury could find that it does so through the company's association with Mr Jameel.

35. It has to be kept well in mind that a limited liability company is a distinct legal person, not an extension of its proprietor (if I may adopt an imprecise but useful term). To defame the proprietor, even in an article which identifies the business as his, is not to defame the company unless the article also suggests that the company is itself implicated in the wrongdoing or suspicion of wrongdoing attributed to the individual, or that it merits investigation for the same reasons as its proprietor. This article suggests none of these things. At most it suggests that the profits derived by Mr Jameel from his financial interest in Hartwell - in other words money which is his, not the company's - has found its way into terrorist hands. That is not a pleasant thing for any company to contemplate, but it implies no wrongdoing on its part, nor even grounds for investigation.

36. I would add that caution is needed in relation to satellite actions of this kind. A good many libel claimants have corporate business interests which are commonly identified in articles about them. If every libel claimant is able to draw in his wake a string of companies claiming that they have been injured because their proprietor has been, English libel litigation, already something of a honeypot, will become a goldrush.

37. I would dismiss Hartwell's appeal. Its claim consequently remains struck out and the judgment in favour of Times Newspapers Ltd stands.

Lord Justice Longmore:

38. Eady J in Gillick v Brook Advisory Centres said this:-

> "In deciding whether words are capable of conveying a defamatory meaning, the court should reject those meanings which can only emerge as the produce of some strained or forced or utterly unreasonable interpretation."

This was said in the course of that learned judge's statement of principles in relation to determining whether words are capable of bearing a particular meaning. This court described the whole of Eady J's statement of the principle as "an impeccable synthesis", see [2001] EWCA Civ 1263, para. 7.

39. In this case the question is whether the article complained of is capable of meaning that there are serious and substantial grounds for suspecting that the claimant or his family helped fund the terrorists who carried out the atrocities of 11th September 2001 in New York. It is admitted that the article is capable of meaning that there are sufficient grounds to enquire whether the claimant helped to fund the atrocities. As Simon Brown LJ said in Jameel v Wall Street Journal [2004] EMLR 89 at paragraph 20 the distinction between the two meanings "is not perhaps an entirely satisfactory distinction". The difference between the two imputations is largely a matter of degree. I cannot say that a juror who selected the first meaning would have selected a meaning which emerged as the produce of a strained, forced or utterly unreasonable interpretation. I would not myself interpret the article in that way but that is not the test. A jury could reasonably interpret it in that way. I therefore agree that the appeal should be allowed.

40. It is ironic that in the earlier Jameel case Eady J had decided that the newspaper article in issue in that case was incapable of meaning that there were sufficient grounds for inquiry into the relevant conduct (the lesser imputation) and thus could only mean, if it meant anything defamatory, that there were reasonable grounds for suspicion (the higher imputation). This court considered that it was for the jury to determine what the meaning was. The present case is precisely the converse; Gray J has ruled out the more serious imputation and only left the less serious imputation to the jury. The result, however, is the same; the jury should be entitled to consider both meanings.

42. I am conscious of the great experience Gray J has in this field but if he had had the benefit of the judgment which reversed Eady J in the other Jameel case, he would, I think, be unlikely to have come to the conclusion which he did.

43. In the event I agree with Sedley LJ for the reasons he gives and, while dismissing Hartwell's appeal, would allow Mr Jameel's appeal. I echo his view that it is desirable for a claimant to plead expressly each of the meanings on which he proposes to rely.

Lord JusticeMaurice Kay:

44. I agree with both judgments.