Neutral Citation Number: [2011] EWCA Civ 859

Case No: A2/2011/0086

IN THE COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2011

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LAWS
and
LORD JUSTICE LONGMORE

- -

Between :

Lait	**Appellant**
- and -	
Evening Standard Limited	**Respondent**

- -
- -

Mr Richard Rampton QC and Mr Ian Helme (instructed by **Carter-Ruck**) for the **Appellant**
Mr Mark Warby QC and Ms Victoria Jolliffe (instructed by **Taylor Wessing**) for the **Respondent**

Hearing dates : 5 July 2011

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Approved Judgment

Lord Justice Laws:

INTRODUCTION

1. This is a claimant's appeal in a libel action, with permission granted by Smith LJ on consideration of the papers on 4 February 2011, against orders made by Eady J on 9 December 2010 when he dismissed the claimant's application for summary judgment in respect of the pleaded defences of fair comment (or honest comment, which is the preferred expression following the guidance given by the Supreme Court in *Spiller v Joseph* [2010] UKSC 53) and justification, and granted summary judgment in the defendants' favour in respect of the honest comment defence.

2. The appellant is the former Conservative MP for Beckenham. She did not stand for Parliament in the 2010 election, having announced on 20 September 2009 that she would not do so. Her claim arises in respect of an article published by the respondents in the first edition of the Evening Standard on 9 November 2009. The appeal requires the court to revisit what is known in the law of defamation as the single meaning rule.

THE FACTS

3. The context of the case, and the article complained of, arose out of the notorious controversies of 2009 relating to claims for expenses by Members of Parliament. MPs having their main homes outside London were able to take advantage of a system known as Additional Costs Allowance (ACA), often referred to in the press as the second homes allowance. The scheme allowed those MPs who qualified to recover costs which were wholly, exclusively and necessarily incurred in obtaining accommodation in London. The allowance covered, for example, the reimbursement of interest on mortgage loans. MPs were free to keep any profit made on the sale of the second home; and if an MP nominated the second home as his main residence, he or she might retain the profit without payment of capital gains tax.

4. The appellant's principal home was at Rye in Sussex. She purchased a flat in her Beckenham constituency and claimed the mortgage interest under the ACA. She also claimed (as the system allowed) travelling expenses.

5. What became known as the expenses scandal endured for many months in 2009. At length an investigation was undertaken by the Committee on Standards in Public Life under the chairmanship of Sir Christopher Kelly. They published a report on 4 November 2009. In July 2009 a decision had been taken to withdraw the benefit of the ACA from MPs whose constituencies were within 20 miles of Westminster. The appellant had acquired her Beckenham flat at an earlier date. Recommendation 7 of Sir Christopher Kelly's November 2009 report is relevant to the case and was in these terms:

> "The recent removal of the right to claim additional accommodation expenses from MPs with constituencies wholly within 20 miles of Westminster should be extended to those whose constituency homes fall within a reasonable commuting distance. The independent regulator should draw up a revised list of constituencies to which this principle applies. "

6. A few days later, on 9 November 2009, the appellant and three other women MPs wrote to *The Times* expressing concerns about this proposal. This is what the letter said:

> "Sir, There is cross-party consensus about the need to get more women into the House of Commons, and to encourage women with young families to stand for Parliament. As serving MPs, we are concerned that aspects of Sir Christopher Kelly's proposals will discourage women who might otherwise seek their party's nomination as well as exposing existing MPs to unnecessary risk.
>
> The Kelly report does not address the fact that MPs are, in effect, shift workers. On Mondays and Tuesdays, we are expected to remain at the House of Commons for 10 pm votes. The voting process is slow, and means that we are often unable to leave Westminster until 10.45 pm. Under Kelly's proposed regime MPs whose constituencies are within an hour's train journey of London will receive no financial assistance to rent accommodation, and will have to return home each evening.
>
> Trains are slower and less frequent at night, and some MPs will not be able to reach their home stations until after midnight. In some cases, they will have to alight at unstaffed stations and walk to their cars through car parks or wait for taxis. The risk of mugging or sexual assault is obvious, and is likely to deter women who currently have jobs where the safety of employees is treated with the seriousness it deserves. We cannot believe that Sir Christopher Kelly seriously intends that his proposals should put female MPs at unnecessary risk, but in the light of this report we call upon the leaders of our parties to reaffirm their commitment to making Parliament a friendlier place for women. We also call on the Independent Parliamentary Standards Authority to ensure that the safety of current and future MPs is a guiding principle in its deliberations."

7. The letter prompted the publication in the Evening Standard, the very same day, of the article complained of in these proceedings. I will set out the same passages as did the judge:

> "But today women MPs attacked one of the Kelly Report's key proposals – a ban on second homes for those who live within an hour of Westminster.
>
> Labour's Claire Curtis-Thomas, Kali Mountford and Phyllis Starkey, as well as Tory MPs Jacqui Lait and Eleanor Laing, said that the proposals 'will discourage women who might otherwise seek their party's nomination, and well as exposing MPs to unnecessary risk'".

Here is the paragraph said to defame the appellant:

> "However, the criticism may risk the ire of some. Ms Lait claimed large sums to travel to her family home in Sussex, even though her constituency home was 11 miles from Westminster. She was forced to pay back nearly £25,000 after it emerged she had made a major capital gain on the sale of a home funded by the taxpayer."

PROCEDURAL HISTORY

8. In order to understand the issues in the case, and the impact (or otherwise) of the single meaning rule, it is necessary to trace some of the procedural history. The claim form was issued on 22 December 2009. The particulars of claim pleaded the meaning of the words complained of as follows:

> "4. In their natural and ordinary meaning these words meant and were understood to mean that the Claimant deliberately failed to account for a large profit that she had made on the sale of a taxpayer-funded home, a deception so serious that the Parliamentary Fees Office ordered her to pay back almost £25,000."

In fact the appellant had not been "forced" to repay £25,000, or any sum, and had not done so. The respondents had got the facts wrong: the allegation concerned a different MP. A laconic correction was published in the Evening Standard on 26 November 2009, but no further reparation was offered or made.

9. Although paragraph 4 of the original particulars of claim pleads only one meaning (and alleges no innuendo), as the judge was to point out other meanings are to be found in paragraph 6, which on its face sets out facts and matters to be relied in support or aggravation of the damages claimed rather than the alleged meaning of the article. Thus paragraph 6(2) asserts:

> "The allegation was used in the Article specifically to undermine the Claimant's concerns that the proposals to reform funding for Members of Parliament risked deterring women who might otherwise seek their party's nomination. In so doing the Article not only obscured a concern shared by numerous Members of Parliament, but also, critically, called into question whether the Claimant's stance was genuine. Given that the Claimant is an elected public servant who depends on the trust of her constituents, the implication is potentially hugely damaging."

10. On 15 February 2010 the respondents issued an application to strike out the claim on grounds *inter alia* that the words complained of were not capable of bearing the meaning alleged. The application came before Eady J on 25 March 2010. He held (judgment of 25 March 2010, paragraph 15) that paragraph 4 of the particulars of claim was "over-pleaded and sets out a meaning which the words are incapable of bearing". He declined however to conclude that the words were not capable of bearing *any* defamatory meaning. He referred to the contents of paragraph 6. He observed (paragraph 20) that the plea in aggravation of damages should be about the

defendant's conduct, and it was "muddling" to rely on a different meaning as aggravating the damages. He said this about paragraph 6(2):

> "19. This introduces what Mr Warby [sc. for the respondents] characterises as the 'hypocrisy' charge in relation to the Claimant's stand on the proposed reforms. As I have already indicated, I think this is a legitimate meaning – at least for the purposes of argument at trial. But it is confusing (especially, potentially, for a jury) to have to address a different defamatory meaning in respect of aggravation of damages from the primary meaning. They would have to decide whether the words bore the meaning in question and I cannot see why it should be pleaded in a different place. If it belongs anywhere, it belongs in the conventional meaning paragraph (in this case, paragraph 4 of the particulars of claim). If the opportunity is taken to amend the pleading, no doubt that can be embraced within it."

In light of one of the submissions advanced by Mr Rampton QC for the appellant I should also set out paragraph 11 of Eady J's judgment of 25 March 2010:

> "Most readers will know, therefore, that much of that conduct was lawful and recognised as being within the system. So why, asks Mr Warby, would anyone think the worse of the Claimant? That is all well and good, but the fact remains that the article uses the words 'forced' and 'emerged', which are capable in my judgment of suggesting something to her discredit. She had to be forced to 'pay back' sums of money to which, at least morally, she is now thought not to have been entitled. She had initially tried to avoid doing the right thing and, what is more, it did not 'emerge' for some unspecified time. This introduces connotations of concealment and being underhanded. All I say is that these are *possible* defamatory meanings."

11. The judge held on 25 March 2010 that paragraph 6(2) and certain other sub-paragraphs of paragraph 6 were an abuse of process and struck them out, together with paragraph 4; but by his order of 25 March 2010 he afforded the appellant an opportunity to provide amended particulars of claim and seek the respondents' consent or the court's leave to amend accordingly.

12. The appellant served amended particulars of claim on 15 April 2010. The natural and ordinary meanings pleaded in the new paragraph 4 were as follows:

> "(1) The Claimant milked the parliamentary expenses system by buying a second (constituency) home with taxpayers' money and in due course selling it and making a large capital gain on the sale. In those circumstances, she had a moral obligation both to disclose this gain and to repay all or some of it. But she did neither, choosing instead to conceal it for as long as she could. In consequence, when it was eventually

> discovered, she was forced to repay nearly £25,000 of it to the taxpayer.
>
> (2) In consequence, the Claimant's publicly stated opposition to the proposed reforms, whose effect would be to prevent her from claiming expenses on her constituency home because it was within an hour (11 miles) of Westminster, could legitimately be regarded as insincere and hypocritical, being motivated not, as she had claimed, by concern that the reforms might discourage women from standing for Parliament and present a risk to the personal safety of women MPs, but by a desire not to lose the benefit of public funding for her constituency home.
>
> (3) The Claimant's conduct in both the foregoing respects was disreputable, underhanded and dishonourable, with the result that her criticism of the proposed reforms was apt, rightly, to provoke public anger."

There followed an amended defence and reply. The reply was served in May 2010. In it the appellant averred (paragraph 9.8.1) that she had realised no capital gain on the Beckenham flat and (paragraph 9.8.3) that she had no obligation of payment to the State in respect of any such gains. On 30 June 2010 (as the respondents discovered in September 2010) she sold the flat for £290,000, realising a profit of some £174,000 of which about £130,500 represented a gain generated by the mortgage loan on which the interest had been paid by the taxpayer.

13. On 23 June 2010 the appellant issued an application supported by a witness statement for summary judgment on the ground that the respondents' pleaded defences of justification and honest comment were bound to fail. At paragraph 30 of the witness statement she says:

> "The Defendant states in paragraph 13.7 to 13.10 of its amended defence that I have made a capital gain at the taxpayer's expense on the Beckenham flat since it is worth more now than it was when I paid for it. I do not understand the basis for the Defendant's plea as it does not appear to be capable of justifying the sting of the words complained of or the meanings which the defendant says are true. There is no allegation that I have done anything disreputable, dishonourable or wrong. "

As will be clear, this was a week before she sold the flat. On 7 September the respondents issued a cross-application for summary judgment on the ground that their defence of fair comment was bound to succeed. Both applications came before Eady J on 22 November 2010 and his judgment upon them of 9 December 2010 in the respondents' favour is, as I have said, the subject of this appeal.

RIVAL MEANINGS

14. The issues in the case are focussed in particular on three putative meanings of the words complained of, that is the words "the criticism may risk the ire of some", read of course in their context. It is convenient to explain what these meanings are before turning to the judge's conclusions on 9 December 2010 and the issues in the appeal. I may give them the labels they acquired in the argument: the "shut up" meaning, the "hypocrisy" meaning and the "underhanded concealment" meaning. The first two are reflected in paragraph 12.1.1 and 12.1.2 of the re-amended defence, which pleads the meanings said by the respondents to constitute honest comment. A meaning sought to be defended as comment is called the "Control-Risks" meaning, after *Control-Risks v New English Library* [1990] 1 WLR 183. Paragraph 12.1 of the re-amended defence is headed "Particulars of Comment" and reads:

> "By signing a letter to *The Times* attacking a key reform proposal of the Kelly Report which would ban second home expenses for MPs within an hour of Westminster the Claimant had exposed herself to legitimate criticism and/or behaved in a way which
>
> 12.1.1 was apt to provoke justified anger, and/or
>
> 12.1.2 could legitimately be regarded as hypocritical and not motivated by the concerns she had expressed for the safety of women MPs,
>
> having regard to her own exploitation of the parliamentary Expenses System which included milking the system, and was disreputable, or dishonourable, or morally wrong."

15. Paragraph 12.1.1 describes the shut up meaning and paragraph 12.1.2 the hypocrisy meaning. The underhanded concealment meaning is not pleaded by the respondents pursuant to *Control-Risks*, but the appellant pleads it at paragraph 4(3) of the amended particulars of claim which I have set out. The hypocrisy meaning was also there pleaded at paragraph 4(2), having originally appeared at paragraph 6.2 of the original particulars of claim and in that context discussed by the judge at paragraph 19 of his judgment of 25 March 2010 which I have also set out. The shut up meaning only surfaced at paragraph 12.1.1 of the re-amended defence.

THE JUDGMENT

16. Since the cross-applications resolved by the judge on 9 December 2010 respectively assaulted and supported the defence of honest comment, it is little surprise that the focus of Eady J's judgment was upon the *Control-Risks* meanings. The underhanded concealment meaning gets an oblique mention at the end of his judgment, and I will return to it at the end of mine.

17. As I shall show the shut up meaning occupies centre stage in the judgment, and also in the submissions of Mr Warby QC for the respondents. It is therefore convenient first to set out the judge's description of it, reporting Mr Warby's argument, at paragraph 13 of his judgment as follows:

> "Even if the reference to the Claimant having to pay back £25,000 was wrong, and even though there is no basis for attributing an insincere motive to the Claimant in putting her name to the letter, he argues that there is still a possible defamatory meaning which the defendant should be allowed to defend by way of fair comment. His case is that right-thinking members of the public would be fully entitled to feel angry at the Claimant, (and, I assume, the other signatories) purely because they should simply 'shut up' and not hold forth at all on the subject of expenses. In particular, people are entitled to be cross at their opposing or criticising *any* of the recommendations to be found in the Kelly report. This may seem a little harsh. The question is, however, whether the article is capable of bearing that meaning and, if it is, whether there is a viable defence of fair comment in respect of it."

18. I may now summarise the essence of the judge's conclusions in these following propositions. (1) The words must at least bear the shut up meaning. (2) A reasonable jury would be bound to find that the shut up meaning constituted honest comment in light of the underlying facts. (3) The hypocrisy meaning was at most an additional imputation. (4) Given (1), (2) and (3), it would be disproportionate and abusive (my words) to litigate the "theoretical" possibility that the appellant might recover damages for that additional imputation. (5) The underhanded concealment meaning added nothing: it depended on the factual error relating to the repayment of £25,000, but the defamatory sting of that was the appellant's profit on her flat, obtained with the aid of a subsidised mortgage, and her unwillingness to relinquish it. (6) It followed that the defence of honest comment must succeed.

19. These conclusions are not set out in the judgment as I have ordered them, and some passages in the judge's reasoning are, with respect, opaque. In order, however, to expose the force or otherwise of the parties' submissions I must set out substantial excerpts. But there is first a preface. There are three aspects of the law of defamation which I should briefly introduce so that the judgment may be properly understood. First there is the single meaning rule, to which I referred at the outset and which was central to Mr Rampton's argument (though the judge made no mention of it). This is a fiction adopted by the law for practical reasons to the effect that in a defamation case the allegedly defamatory words must be taken to have only one natural and ordinary meaning. The classic exposition is that of Diplock LJ as he then was in *Slim v Daily Telegraph* [1986] 2 QB 157, 171F – 174G. Issue was joined at the Bar as to whether the rule applies in the adjudication of an honest comment defence, and I must confront that; I will set out the material passage from Lord Diplock's judgment in *Slim* when I come to do so. Secondly, it is well settled that for a defence of honest comment to succeed there must be a sufficient substratum of fact to warrant the comment: *London Artists v Littler* [1965] 2 QB 375 *per* Lord Denning MR at 392H. Thirdly, in order to keep a proper balance between the Convention right of free expression (arising under Article 10 of the European Convention on Human Rights) and the protection of individual rights, "the court was required to stop as an abuse of process defamation proceedings that were not serving the legitimate purpose of protecting the claimant's reputation... the test [was] whether there was a 'real and

substantial tort'": *Jameel v Dow Jones* [2005] QB 946 at 947 (headnote). I must return also to the *Jameel* case.

20. With that introduction I turn to the judgment. It will be necessary to go back and forth from one passage to another. I am going to start with the second half of paragraph 43 where, as I understand him, the judge arrives at proposition (1), that the words complained of must at least bear the shut up meaning, and proposition (2), that a reasonable jury would be bound to find that the shut up meaning constituted honest comment in light of the underlying facts. (The first half of the paragraph concerns the hypocrisy meaning, and I will return to that.)

> "43... The words do plainly mean that people might react with anger to her public pronouncement [there is proposition (1)] and, as I have indicated, that is a view which *could* honestly be held by some people in the light of her having taken advantage of the old system. Indeed, I would go further. I cannot see that a jury could realistically come to any other conclusion about that [there is proposition (2)]."

21. The judge had earlier described aspects of the history which in my judgment amply demonstrate a substratum of true fact going to support the shut up meaning. I should set out parts of paragraphs 36, 39 and 40:

> "36. The factual basis for such a comment would not involve having to show that the Claimant had made claims of 'virtue' or that she had a secret motive. It would simply consist of the bare fact that she had taken advantage of the expenses system (and, in particular, by making a capital gain on a subsidised constituency home and/or being reimbursed the cost of travel to and from her homes)...
>
> ...
>
> 39. Party leaders in the wake of the expenses 'scandal' were effectively telling MPs to 'shut up' on the subject and to take their medicine. Even though some suggested at the time that this may have been governed by electoral or public relations considerations, rather than by principle or natural justice, it illustrates how difficult it now is in this context to argue that no reasonable citizen could feel legitimate anger at the behaviour of their elected representatives. This is not, of course, specific to Mrs Lait. It would apply to each and every one of her co-signatories (as well as most other MPs). In the case of each MP, there will have been his or her own expenses claims, and they will no doubt differ considerably; yet the criticism is not based wholly on individual figures but largely upon the suggestion that, merely by taking advantage of the 'overly-generous' system, they have forfeited the right to be heeded any longer on that topic.

> 40. For these reasons, a jury of 12 citizens, which would no doubt include voters and taxpayers, *could* (at the least) come to the conclusion that, notwithstanding the failure to establish hypocrisy, the rather ill-formulated observation about justifiable 'ire' constitutes fair comment."

22. I turn next to what else the judge had to say about the hypocrisy meaning. First, he clearly thought that there was little prospect of a jury finding a sufficient substratum of fact on which a defence of honest comment in that meaning might realistically be based. He describes the material facts at paragraphs 9 and 22, which I may summarise thus. Sir Christopher Kelly's Recommendation 7, the subject of the concerns expressed in the letter to *The Times*, was wholly irrelevant to the appellant's particular circumstances: as I have said, it had already been decided in July 2009 that MPs whose constituencies lay within 20 miles of Westminster would be excluded from the ACA. The appellant's Beckenham constituency was well within that distance, but she had acquired the flat there at an earlier date. Recommendation 7 would merely extend the exclusion to constituencies within an hour's journey time of London, even though more than 20 miles away. That would be neither here nor there so far as the appellant was concerned. Accordingly Mr Rampton submitted that it was really not possible to identify any "hidden agenda or selfish motive" behind the appellant's subscription to *The Times* letter. At paragraph 10 the judge stated that he "[saw] the force of Mr Rampton's argument that the factual substratum for hypocrisy is nowhere to be found".

23. For proposition (3) above, that the hypocrisy meaning was at most an additional imputation, I should turn first to paragraphs 33 and 34 of the judgment:

> "33. Since, as I ruled last March, 'hypocrisy' is a defamatory meaning of which the words are capable, one might well think it should be left to a jury to rule at trial whether in fact they do bear that meaning. If it is upheld, then on the present pleading it seems to me that the Defendant would be unlikely to make good that specific charge. It might thus seem to follow that it cannot succeed in its submission that the defence is bound to be upheld. Its fate could depend on the meaning the words are ultimately held to bear.
>
> 34. Yet things cannot, in my view, be quite that simple. I need to consider whether the other pleaded meaning would have a better chance of success. Mr Warby seemed in argument to place most reliance on the alternative argument that people may well be angered by the Claimant's putting her signature to such a letter, not so much because of hypocrisy, but because MPs who had claimed expenses under the old system (i.e. virtually all of them) should slink away in shame and keep their mouths shut – at least in relation to proposals for reforming expenses."

Then part of paragraph 42:

> "42... If the only meaning relied upon was that the claimant had been a hypocrite, it would be possible to rule that neither

> justification nor fair comment could succeed, since the necessary factual substratum is missing. On the other hand, a jury could come to the conclusion that the words bore the alternative defamatory meaning [sc. the shut up meaning] along the lines of Mr Warby's argument."

Finally on proposition (3), the first half of paragraph 43:

> "One possible approach would be to leave it to the jury to decide if the words bore the meaning of hypocrisy or not. This seems to me to be unduly theoretical. It is not a case in which 'hypocrisy' could be held to be the only defamatory meaning. If the jury came to the conclusion that the words did carry that imputation, this would not of itself entail success for the Claimant, since the alternative defamatory meaning [sc. the shut up meaning] would survive."

24. Proposition (4) was that given propositions (1), (2) and (3), it would be disproportionate and abusive (my words) to litigate the "theoretical" possibility that the appellant might recover damages for the additional imputation of hypocrisy. The passage in the judgment which goes to support it is paragraph 45:

> "45. Would it be realistic to suppose that a jury would conclude that the defence of fair comment succeeds in relation to Mr Warby's alternative meaning but decide, nevertheless, that the Claimant should be compensated for an additional unsubstantiated implication of hypocrisy? It seems to me that the answer must be in the negative. In any case, it would make no sense for further time and large sums of money to be spent on resolving that theoretical point."

25. Proposition (5) was that the underhanded concealment meaning added nothing: it depended on the factual error relating to the repayment of £25,000, but the defamatory sting of that was the appellant's profit on her flat, obtained with the aid of a subsidised mortgage, and her unwillingness to relinquish it. At paragraph 28 the judge said:

> "... In this case specific reliance is placed on the available facts about the Claimant's expenses. It is pointed out that she made a capital gain on her Beckenham flat and, despite having had substantial contributions to her mortgage interest payments, she has not volunteered to make over any of the gain to the taxpayer (except, of course, through capital gains tax following disposal). It so happens that she was not 'forced' to do so. While it is accepted that she is under no legal obligation to do this, the retention of the capital gain is nevertheless characterised as 'milking' the system in an unacceptable (or 'disreputable') way. This seems to me to be the real sting of the mistaken allegation of fact (i.e. being 'forced' to pay back £25,000). It is not so much that the MP in question was forced

> to pay the money over – rather that the profit had been made with the taxpayers' help and not voluntarily disgorged."

And at paragraph 47:

> "47... Moreover, there is nothing left in the complaint about the factual error over the £25,000, since the defamatory sting is that the Claimant made a profit on the sale of her flat with the aid of subsidised mortgage payments but had not been willing to forego it. That remains available to the Defendant as a factual substratum, even though the Claimant was not 'forced' to refund the taxpayer either by her party leader or anyone else. Those basic facts go to support the defamatory comment identified above."

26. The judge concluded (and so stated at the beginning of paragraph 47) that the defence of honest comment was bound to succeed.

THE APPELLANT'S CASE

27. This account of the judgment shows all too starkly how convoluted this case can look. Indeed, more generally, it is almost a commonplace that the law of defamation has become mired in technicality (see for example Lord Diplock's rueful reference to "this protracted exercise in logical positivism" in *Slim v Daily Telegraph* at 171E); and that is no service to litigants or the general public. However in justice to practitioners in the field (and, with respect, the judges who have developed the law), this is an area where there are bound to be subtle distinctions. The reason is that – as Mr Rampton submitted at the outset of his argument – the foundation of the law of defamation is the concept of meaning: and the idea of meaning has over the centuries scratched the heads of the philosophers, never mind the lawyers. But it was the philosopher Ludwig Wittgenstein who said that everything that can be said, can be said clearly (though he comprehensively broke his own rule); and we owe a duty to get this chapter of the common law, as much as any other, as clear as it can be made.

28. In that vein, reduced to its essentials Mr Rampton's central argument for the appellant can I think be simply stated. It is that the words complained of were capable of bearing the hypocrisy meaning, which was plainly defamatory; there was a good case (I think he would say an unanswerable case) that in that meaning they could not be defended as honest comment; and in those circumstances his client was entitled to have the hypocrisy meaning put to a jury. The jury's duty would be to decide (a) whether the words in fact bore the hypocrisy meaning, and (b) if they did, whether in that meaning they constituted honest comment.

29. In addition Mr Rampton submits that the underhanded concealment meaning should also have been left to the jury. I will return to that. It will make for clarity if at this stage I address the case in terms of the hypocrisy meaning.

30. Mr Rampton rested his submission that the judge was obliged to leave the hypocrisy meaning to the jury on the single meaning rule. By the rule, as I have said, a putative defamatory statement is to be taken as having only one natural and ordinary meaning. It is the judge's function to decide what meaning or meanings such a statement is

capable of bearing; if he concludes that there are two or more possible meanings, then by force of the single meaning rule the jury must decide which (single) meaning the words *in fact* bear. But Eady J did not do this. Certainly, he held that the words were capable of the hypocrisy meaning; he did so on 25 March 2010 – indeed Mr Rampton submits, with some force, that in paragraph 19 of his judgment of that date he effectively invited the appellant to plead the hypocrisy meaning. In his judgment under appeal, as I have shown the judge confirmed (paragraph 33) that earlier ruling. And of course he also upheld the shut up meaning. But he declined to leave the two meanings for a jury to decide which one the words actually bore. That, says Mr Rampton, violated the single meaning rule.

HONEST COMMENT AND THE SINGLE MEANING RULE

31. It is of course inherent in Mr Rampton's argument that the single meaning rule applies not only in relation to the meaning(s) pleaded by a claimant but also to any *Control-Risks* meanings pleaded as honest comment by a defendant. As I have foreshadowed, this was put in issue by Mr Warby. In his skeleton argument (paragraph 30) Mr Rampton was inclined to accept that "the question whether the rule applies to the defence of honest comment has not been conclusively determined by the Court of Appeal". At the hearing, however, he submitted that indeed it had. He first cited *Merivale v Carson* (1887) 20 QBD 275, which was a classic case of comment (fair or not): it concerned a newspaper review of a theatrical production. The following observations of their Lordships were made in the course of the court's consideration of the honest comment defence. At the outset of his judgment Lord Esher MR said at 279:

> "The first thing to be considered is, what are the questions which in such a case ought to be left to the jury. The first question to be left to them is, what is the meaning of the alleged libel?"

And at 281:

> "I cannot doubt that the jury were justified in coming to the conclusion to which they did come, when once they had made up their minds as to the meaning of the words used in the article, *viz.* that the plaintiffs had written an obscene play, and no fair man could have said that."

Likewise Bowen LJ at 282:

> "We must begin with asking ourselves, what is the true meaning of the words used in the alleged libel?"

These observations only make sense on the footing that the court was applying the single meaning rule in its assessment of the honest comment defence. It is true that there is no overt discussion in the judgments of the rule, nor indeed any reference to it. The report of the argument suggests that it was not referred to by counsel either. It was applied as a matter of course.

32. The next case is *Slim v Daily Telegraph* [1986] 2 QB 157 to which I have already referred. Again, there is no express discussion of the application of the single meaning rule to the defence of honest comment. But the defence was in issue in the case, and in my view Lord Diplock's remarks, which as I have stated are the classic exposition of the subject, must be taken as applying in that context. It is true that there is a passage in Lord Denning's judgment (at 170B-F) which might be thought to suggest that the single meaning rule did not apply to honest comment; and the third member of the court, Salmon LJ, held that the words complained of did not bear any of the meanings pleaded by the plaintiffs. However Lord Diplock's observations were expressly approved (albeit not in the context of honest comment) by Lord Bridge, with the assent of Lords Goff, Jauncey and Mustill, in *Charleston v News Group Newspapers* [1995] 2 AC 65. I will set out the passages from Lord Diplock's judgment at 171 – 174 of *Slim* which Lord Bridge cites at 71H – 72F:

> "Everyone outside a court of law recognises that words are imprecise instruments for communicating the thoughts of one man to another. The same words may be understood by one man in a different meaning from that in which they are understood by another and both meanings may be different from that which the author of the words intended to convey. But the notion that the same words should bear different meanings to different men and that more than one meaning should be 'right' conflicts with the whole training of a lawyer. Words are the tools of his trade. He uses them to define legal rights and duties. They do not achieve that purpose unless there can be attributed to them a single meaning as the 'right' meaning. And so the argument between lawyers as to the meaning of words starts with the unexpressed major premise that any particular combination of words has one meaning which is not necessarily the same as that intended by him who published them or understood by any of those who read them but is capable of ascertainment as being the 'right' meaning by the adjudicator to whom the law confides the responsibility of determining it...
>
> Where, as in the present case, words are published to the millions of readers of a popular newspaper, the chances are that if the words are reasonably capable of being understood as bearing more than one meaning, some readers will have understood them as bearing one of those meanings and some will have understood them as bearing others of those meanings. But none of this matters. What does matter is what the adjudicator at the trial thinks is the one and only meaning that the readers as reasonable men should have collectively understood the words to bear. That is 'the natural and ordinary meaning' of words in an action for libel...
>
> Juries, in theory, must be unanimous upon every issue on which they have to adjudicate; and since the damages that they award must depend upon the defamatory meaning that they attribute

> to the words, they must all agree upon a single meaning as being the 'right' meaning. And so the unexpressed major premise, that any particular combination of words can bear but a single 'natural and ordinary meaning' which is 'right', survived the transfer from judge to jury of the function of adjudicating upon the meaning of words in civil actions for libel."

33. In *Burstein v Associated Newspapers* [2007] 4 AER 319 Keene LJ stated at paragraph 7 that "[w]here more than one meaning of words is in play in libel proceedings, it is necessary to know to which meaning any defence of fair comment is being alleged to apply". He referred (at paragraph 8) to Eady J's observation in *Lowe v Associated Newspapers* [2007] QB 580 at paragraph 15, in relation to honest comment, that "[a]s with any other defence, the first step is to identify the meaning of the words and then to consider whether the defence of fair comment has been made out".

34. I conclude that at least since 1887 the law has proceeded on the premise, albeit more often assumed than argued, that the single meaning rule applies to the adjudication of a defence of honest comment. I doubt whether it is open to the judges, short of the Supreme Court, now to hold that it does not. Nor do I think it would be practical to do so, for so long as the issue of honest comment is left in the hands of a jury. The jury must return a verdict that is unanimous (or assented to by a specified majority). As it seems to me that must require that in accepting or rejecting a defence of honest comment they (or the required majority) must all apply the same meaning to the words in question. As Lord Diplock said in *Slim*, "[j]uries, in theory, must be unanimous upon every issue on which they have to adjudicate": in practice too.

35. I recognise, but with respect will not dwell upon, the criticisms of the rule canvassed in the context of the tort of malicious falsehood in *Ajinomoto v Asda Stores* [2011] 2 WLR 91. I acknowledge also that a different approach is taken in what has become known as "*Reynolds* media privilege" after *Reynolds v Times Newspapers* [2001] 2 AC 127. I will briefly return to that in discussing, below what I have called the balance between private right and public interest. On this part of the case, I agree with Mr Rampton that the single meaning rule applies to honest comment.

THE MEANING OF THE WORDS COMPLAINED OF

36. But that is by no means the end of the case. It was a premise of Mr Rampton's argument that a properly directed jury would conclude that the single meaning of the words complained of was *either* the shut up meaning *or* the hypocrisy meaning (*or* the underhanded concealment meaning), but not any combination of the three. But the judge did not accept this premise, and neither do I. As I have sought to show, the judge found established (among other things) propositions (1) and (3) as I have articulated them: (1) the words must at least bear the shut up meaning, and (3) the hypocrisy meaning was at most an additional imputation. I think these propositions are correct. As the judge said at paragraph 43 "[t]he words [sc. 'the criticism may risk the ire of some'] do plainly mean that people might react with anger to her public pronouncement". They plainly do; no reasonable jury could in my judgment hold otherwise (and this, I should note, undercuts Mr Rampton's complaint that the judge usurped the jury's role as arbiters of the words' actual meaning: if the shut up meaning was bound to be arrived at, the judge had every business saying so).

37. No less plainly, the hypocrisy meaning is at most an additional imputation. At paragraph 45 the judge referred to "an additional unsubstantiated implication of hypocrisy", and that in my judgment is what it amounts to. It is wholly unrealistic to suppose that the words might be taken *not* to bear the shut up meaning – "that people might react with anger to her public pronouncement" – but still to carry the hypocrisy meaning. No reasonable jury could so conclude. There is no overt reference to hypocrisy in the article; it is not a necessary inference to be drawn from the words; at most the charge of hypocrisy might be a reason in the minds of some (albeit on the facts a false one) for being angered by the appellant's subscription to the letter to *The Times.* Mr Rampton is right to complain that the judge himself, by his ruling of 25 March 2010, encouraged – indeed, effectively invited – the appellant to plead the hypocrisy meaning as an autonomous libel. But that offers no escape from the correct position, which is as I have said, that the hypocrisy meaning was at most an additional imputation.

THE ISSUE IN THE CASE

38. What is the consequence? Mr Warby submitted that this conclusion means that there is no issue in the case which requires the single meaning rule to be confronted. There is in any event only one meaning, the shut up meaning. "*If* the words convey a meaning that the appellant acted hypocritically, that would be an additional comment, implicit in the article, and not an alternative" (skeleton argument, paragraph 7(3)(a)).

39. In my judgment the single meaning rule is not taken out of the case by the status of the hypocrisy meaning as an additional imputation only. There remain, at least, two possible meanings of the words complained of: the shut up meaning on its own, and the shut up meaning plus the hypocrisy meaning. As I see it the real question in the case is whether the judge should have left *these* alternatives, so that the jury might decide which of them was right. It was to this question, in my judgment, that the judge gave a negative answer at paragraph 45 which I have set out above.

PRIVATE RIGHT AND PUBLIC INTEREST

40. Mr Warby's submission is that the judge's negative answer was the correct one. He founded on the decision of this court in *Jameel v Dow Jones* [2005] QB 946, to which I have already referred. The case was concerned with the circumstances in which a libel action might be stopped as an abuse of process. Delivering the judgment of the court Lord Phillips MR, as he then was, stated at paragraph 55:

> "There have been two recent developments which have rendered the court more ready to entertain a submission that pursuit of a libel action is an abuse of process. The first is the introduction of the new Civil Procedure Rules. Pursuit of the overriding objective requires an approach by the court to litigation that is both more flexible and more pro-active. The second is the coming into effect of the Human Rights Act. Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, insofar as it is possible to do so. Keeping a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation must, so it seems to

> us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged."

Then at paragraph 57:

> "In *Schellenberg v BBC* [2000] EMLR 296 the claimant had settled defamation actions against the *Guardian* and the *Sunday Times* on disadvantageous terms, when it seemed likely that he was about to lose. He then pressed on with this almost identical action against the BBC. Eady J struck this out as an abuse of process. He rejected the submission that he should not do so as this would deprive the claimant of his 'constitutional right' to trial by jury. He said:
>
> > '… I see no reason why such cases require to be subjected to a different pre-trial regime. It is necessary to apply the overriding objective even in those categories of litigation and in particular to have regard to proportionality. Here there are tens of thousands of pounds of costs at stake and several weeks of court time. I must therefore have regard to the possible benefits that might accrue to the claimant as rendering such a significant expenditure potentially worthwhile.'
>
> He added that the overriding objective's requirement for proportionality meant that he was bound to ask whether 'the game is worth the candle'. He concluded:
>
> > 'I am afraid I cannot accept that there is any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources.'"

At paragraph 58 Lord Phillips indicated that Eady J's approach in *Schellenberg* had been approved by this court in *Wallis v Valentine* [2003] EMLR 175, and the court clearly echoed that approval in *Jameel* itself. At paragraph 69 Lord Phillips said:

> "If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick."

41. Eady J himself applied *Jameel* in *Williams v MGN* [2009] EWHC (QB) 3150, in which a convicted murderer complained of an imputation in a national newspaper that he had been the henchman of another criminal. The imputation was not justified, but the claim was struck out in effect on the footing that the claimant had no reputation to lose. *Jameel* was also applied by this court in *Khader v Aziz* [2010] EWCA Civ 716, where it was held (paragraph 32) that the appellant "would at best recover minimal damages at huge expense to the parties and of court time".

42. The principle identified in *Jameel* consists in the need to put a stop to defamation proceedings that do not serve the legitimate purpose of protecting the claimant's reputation. Such proceedings are an abuse of the process. The focus in the cases has been on the value of the claim to the claimant; but the principle is not, in my judgment, to be categorised merely as a variety of the *de minimis* rule tailored for defamation actions. Its engine is not only the overriding objective of the Civil Procedure Rules but also, in Lord Phillips' words, the need to keep "a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation". This will especially be so where a defence of honest comment is advanced by a responsible – I emphasise the adjective – journalist. In the different but in some ways comparable context of qualified privilege in media cases – *Reynolds* privilege (where for reasons given in *Bonnick v Morris* [2003] 1 AC 300 at paragraph 22 the single meaning rule is not applied) – Lord Nicholls said this (*Bonnick* paragraph 23):

> "Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved."

43. Accordingly the balance to be struck between public interest and private right will be a material consideration when the court has to consider the application of the *Jameel* principle in a case where a responsible media defendant pleads honest comment. This conclusion is I think fortified by s.12(4)(a) of the Human Rights Act 1998, which provides:

> "The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
>
> (a) the extent to which—
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published..."

44. The practical consequence, as it seems to me, will be that where a comment, honestly expressed in a media publication and grounded upon a sufficient factual basis, may

reasonably be thought to carry an additional imputation which may not be so grounded, the defendant should not ordinarily be held liable for that imputation unless it was maliciously advanced. I say ordinarily: there may be cases where the imputation, even though adventitious and unintended, is so to speak so large that the balance of public interest and private right requires the claim to be carried forward.

45. I do not consider that this approach, if my Lords take the same view, should be regarded as a radical step. The balance to be struck between public interest and private right is increasingly to be seen as a function of our constitution; and the law of defamation is increasingly to be seen as an aspect of it. It is no more than an ordinary incident of the common law's incremental method that familiar notions such as abuse of process should be fashioned for its service.

CONCLUSION IN THIS CASE

46. As I have said, there is no overt reference to hypocrisy in the article containing the words complained of. At most the charge of hypocrisy might be a reason in the minds of some for being angered by the appellant's subscription to the letter to *The Times.* It is telling to note, as Mr Warby pointed out, that there is no suggestion in the letter before action of 11 November 2009 that the publication's sting was a charge of hypocrisy, nor in the draft apology put forward not by the respondents but by the appellant's own solicitors on 17 November 2009; nor, as I have shown, in the original pleading. In my judgment Eady J was quite right to conclude at paragraph 45 that the appellant's claim to be compensated for the possible imputation of hypocrisy should not be permitted to consume "further time and large sums of money". That conclusion is, I think, underlined and confirmed by that aspect of the *Jameel* principle which I have sought to explain.

47. There are two further points I must confront. First, I should briefly address the underhanded concealment meaning. I consider that the judge was right at paragraph 28 to hold that the real sting of the mistaken reference to £25,000 was "not so much that the MP in question was forced to pay the money over – rather that the profit had been made with the taxpayers' help and not voluntarily disgorged"; right also to conclude at paragraph 47 that in consequence "there is nothing left in the complaint about the factual error over the £25,000". The error itself had, of course, been acknowledged on 26 November 2009.

48. Secondly, Mr Rampton advanced a distinct argument (skeleton, paragraphs 42 – 46, briefly pursued at the hearing) to the effect that at paragraphs 44 and 45 of his judgment Eady J has applied a "hypothetical equivalent" of s.5 of the Defamation Act 1952 to the defence of honest comment. I have not set out s.5. It is with respect enough to say that it is in my judgment clear that in paragraph 45 the judge was doing no more nor less than applying the *Jameel* principle; and if there were any doubt upon the matter, it is that principle as I have sought to explain it which in any event provides the correct resolution of the case.

49. I would dismiss the appeal.

Lord Justice Longmore:

50. I agree that, for the reasons given by Laws LJ, this appeal should be dismissed.

The Master of the Rolls:

51. The background facts of this case are set out in paras 2 to 6 above, and the allegedly defamatory article ("the article") is quoted in para 7. The three possible meanings attributable to the article are identified in paras 14 and 15 above, and they are "the shut up meaning", "the hypocrisy meaning" and "the underhanded concealment meaning", as explained by Laws LJ. The first two meanings are said by the defendants to constitute honest comment.

52. The first question is whether the single meaning rule, as explained by Diplock LJ in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 171-174, and as discussed more recently by Sedley LJ in *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2010] EWCA Civ 609, [2011] 2 WLR 91, applies where the defence is one of honest comment. In my view, it does. First, given the rationale for the rule in the field of defamation (which has been affirmed in *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65, 71-72), it is a little hard to see why, as a matter of principle, it should not apply when the court is assessing a defence of honest comment. Secondly, it appears to me that it would be inconvenient, particularly if the case was being tried by a jury, if the single meaning rule applied in a defamation trial for some purposes, but not for others. Thirdly, a number of authorities support this conclusion: see *Merivale v Carson* (1887) 20 QBD 275, 279, 281 and 282, and *Burstein v Associated Newspapers Ltd* [2007] EWCA Civ 600, [2007] 4 All ER 319, paras 7-8. I also agree with Laws LJ that the approval in *Charlesworth* [1995] 2 AC 65 of Diplock LJ's judgment in *Slim* [1968] 2 QB 157 appears to support this conclusion.

53. The second question is whether the underhanded concealment meaning would be properly maintainable at a trial. For the reasons summarised by Laws LJ in para 47 above, I do not consider that it could be.

54. The third question concerns the shut up and hypocrite meanings. The Judge held that these were not simply alternative meanings between which, if the case was heard by a jury, could be left to the jury to choose. As he said, on any view, the article had the shut up meaning. The only issue as to meaning which could even arguably be said to be appropriate for a jury to determine was whether the article had the hypocrite meaning in addition to the shut up meaning, or whether it only had the shut up meaning. Again, like Laws LJ, I agree.

55. Given that the Judge could not rule out the possibility that a jury would hold that the article had the hypocrite meaning as well as the shut up meaning, and that if it did so, the jury might have rejected the defendant's honest comment defence, it might be thought that the Judge had no alternative but to let the case to proceed to trial in the normal way. The only reason that he did not do so is explained by his decision to strike out the claim pursuant to the principles laid down by this court in *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946, paras 55-59, 69, much of which is quoted by Laws LJ at para 40 above.

56. That raises the final, and crucial, question: was the Judge right to strike out the claim on this ground? I find this a difficult question. Many defamation actions may seem pretty trivial, vindictive or pointless to an objective independent observer. However, in such cases, there is obvious force in the proposition that a person who has an arguable case for saying that she has been defamed should be entitled to bring

proceedings, on the basis that access to justice is a fundamental right, that so long as she has an arguable claim she should be allowed to proceed with it, and that, if the claim fails or results in nominal damages, she will be at risk on costs.

57. While that represents the general rule in civil litigation, there will, as Lord Phillips MR explained in *Jameel* [2005] QB 946, para 55, be exceptions, in the light of the CPR and its emphasis on proportionality, and particularly in a defamation case, where freedom of expression, under Article 10 of the Convention is engaged. Those exceptions can include cases where, even bearing in mind the importance of access to the courts generally and of the opportunity for vindication in particular, there is no "realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages … in terms of expense and the wider public in terms of the court resources", to quote from Eady J in *Schellenberg v British Broadcasting Corporation* [2000] EMLR 296, 319, in a passage cited with approval in *Jameel* [2005] QB 946, para 57 (and see *Khader v Aziz* [2010] EWCA Civ 716, [2010] 1 WLR 2673, paras 31-32). Having said that, when considering whether to strike out a claim on this ground, the court must exercise particular care before shutting out an arguable case.

58. In this case, as I say, it appears that there is an arguable case that the article was defamatory, because a jury (or if the trial is by judge alone, the judge) may conclude that it had the hypocrite meaning in addition to the shut up meaning. However, it seems to me that it would be wrong for this court to reverse Eady J's decision to strike out the claim.

59. First, there is no overt reference to hypocrisy in the article: it is at best an implication which some readers might glean in addition to the plainly implied shut up meaning. For my part, while I agree with Eady J that one cannot rule out the possibility of a jury properly finding that the article carried the additional hypocrite meaning, it seems to me that it would be something of a long shot: it is certainly not what the article conveys to me.

60. Secondly, there is no suggestion of malice on the part of the defendant. In my view, any court should, and indeed would, be slow to accept that a statement was defamatory, when it was honestly made, and grounded on a factual basis, especially where the allegedly defamatory meaning is merely a possible addition to what can fairly be characterised as the natural meaning.

61. Thirdly, an allegation of hypocrisy, especially against a Member of Parliament at the height of the so-called MPs' expenses scandal, does seem to me to be at the lower end of the defamatory scale. An allegation of hypocrisy is certainly *prima facie* defamatory if untrue, but hypocrisy has had its serious philosophical and political defenders, and it is the sort of allegation which is familiar in the robust give and take of political debate. I emphasise that this is not meant to suggest that an untruthful allegation of hypocrisy may not be *prima facie* defamatory, and as the Judge said, politicians should not be open to being freely defamed. However, the fact that, even if a defamatory meaning was made out, it would not be grave, is relevant as a factor when deciding whether the instant claim should be struck out on the ground that it is not worth the candle.

62. Fourthly, the hypocrisy meaning of the article was not identified or alleged (i) in the full letter before action written by the claimant's solicitors two days after the article was published, (ii) in the draft apology settled by the claimant's solicitors six days later, or even (iii) in the claimant's original statement of case five weeks later, and it does not appear to have formed part of the claimant's case when the matter first came before Eady J nine weeks after that. Given that this case is concerned with a newspaper article, which is relatively ephemeral in nature, the fact that the allegedly libellous meaning does not seem to have been at all readily apparent to the claimant or to her experienced legal advisers appears to me to be significant.

63. Bearing in mind all these four factors (which are not entirely unconnected with each other), I do not think that it would be right to interfere with Eady J's conclusion. Of course, the Judge was not exercising a discretionary power or a case management function. However, in assessing whether this libel action was "worth the candle", the Judge was carrying out a balancing exercise, with which this court should not interfere unless satisfied that he was wrong. Further, Eady J has unrivalled professional and judicial experience in the field of defamation and his conclusion is accordingly worthy of particular respect, and it was supported by the factors identified in paras 59-62 above.

64. Accordingly, like Laws and Longmore LJJ, and for reasons which are very similar to those which are more fully and elegantly expressed by Laws LJ, I would dismiss this appeal.