Neutral Citation No: [2002] EWCA Civ 772 Case No: QBENI/2001/2847

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(QUEEN'S BENCH DIVISION)
(HHJ Previte QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29th May 2002

Before :

LORD JUSTICE SIMON BROWN
LORD JUSTICE MUMMERY
and
LORD JUSTICE DYSON

- -

Between :

ROSALYN JANE MARK	**Appellant**
- and -	
ASSOCIATED NEWSPAPERS LIMITED	**Respondent**

- -
- -

David Price Esq, Solicitor Advocate & Rupert Butler Esq
(of **Messrs David Price**) for the Appellant
Mark Warby Esq, QC
(instructed by **Messrs Reynolds Porter Chamberlain**) for the Respondent

Hearing dates: 13th/14th May 2002

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JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Lord Justice Simon Brown:

1. The appellant, Miss Mark, was employed by Mr and Mrs Blair as their children's nanny from 1994 to 1998. When she left she wrote a book about it. The Mail on Sunday ("MoS") obtained a copy of the book and on 3/4 March 2000 (a Friday and Saturday) spoke to the appellant about it. They then published in that night's issue of MoS an article about the matter. At 2.00am that Sunday morning (5 March 2000) the Blairs obtained a High Court injunction forbidding further publication of the article. Some hours later both MoS and the appellant made statements. The following day, Monday 6 March 2000, the Daily Mail - MoS's sister paper, also published by the respondents, Associated Newspapers Limited - published their own article about these events. It is that article which is sued upon in these proceedings. That it was defamatory of the appellant is not in dispute. What is in dispute, however, is the precise defamatory meanings it is capable of bearing.

2. On 7 December 2001 Judge Previte QC, sitting as a Deputy Judge of the Queen's Bench Division, struck out the meanings pleaded in the appellant's Amended Particulars of Claim. It is against that order that the appellant, with permission given by myself on the papers on 11 February 2002, now appeals to this court.

3. With that brief introduction let me at once set out the words complained of. On page 2 of the Daily Mail for Monday 6 May 2000, under the headline "**Blairs step up legal battle over book by their former nanny**" and alongside a photograph of the appellant separately entitled "Miss Mark, as she agreed to pose for a Mail on Sunday photographer", three different versions of the article were published in various editions. The differences were comparatively minor, however, and for the purposes of the appeal it has been agreed simply to refer to the version which now follows (with paragraph numbers added for convenience):

> "1. Tony and Cherie Blair will today step up their legal battle to prevent the publication of a book about their family written by a former Downing Street nanny.
>
> 2. The Prime Minister said yesterday he would do 'whatever it takes' to protect the privacy of his children.
>
> 3. He was speaking after his wife obtained a High Court injunction at 2am on Sunday halting publication of material from the book in the Mail on Sunday. The newspaper was denied the chance to put its case at the hearing.
>
> 4. The newspaper stressed yesterday that great care had been taken to 'ensure that nothing in our story intruded into the privacy of the Blairs' children or family life.'
>
> 5. It also accused the Prime Minister's Press Secretary, Alastair Campbell of 'astonishing hypocrisy' and said: 'If Mr Blair has a problem, it is with his former nanny.'

6. The book, which runs to 180,000 words, was written by Ros Mark, 30, nanny to the Blair children from 1994 to 1998.

7. In a robust statement, the Mail on Sunday said it would contest the injunction in the High Court today and alleged that Miss Mark had 'misrepresented her position'.

8. 'She has written a 451-page book about her life with the Blairs which has been offered to a number of publishers,' the paper said.

9. 'Over 24 hours on Friday and Saturday we spoke to Ros Mark several times. She talked to us openly, confirmed she was seeking a publisher for her book and discussed its contents.

10. She insisted that confidentiality would not be a problem. She was fully aware we were writing a story, posed for pictures and gave us two photographs of her with the Blairs.

11. At 5.45pm on Saturday we spoke to Alastair Campbell and told him what we had learned. He said he had discussed the matter with Ros Mark. He insisted that Downing Street were relaxed about what she was doing and that the Blairs had total faith in her.

12. Following this, we spoke again to Ros Mark and she offered us an option on serialisation of her book.

13. At 11.15pm, five and a half hours later, we were told by Alastair Campbell that he was seeking an injunction on behalf of the Blairs.

14. We told the Blairs' lawyers that we wanted to be represented at any hearing and arrangements were made for this to take place.

15. At 1.58am, when 1.5 million copies of our newspaper had already been printed and distributed, we were told that an injunction had been granted halting printing of our newspaper. Our lawyers were not even informed that a hearing was taking place. Only after this did the judge agree to speak to our lawyers.'

16. The decision to seek the injunction was taken after a four-way conference phone call late on Saturday between Mr Blair in his Sedgefield constituency, Mrs Blair in Downing Street, Mr Campbell in his North

London home, and Cabinet Office Minister Lord Falconer in his Islington home.

17. Yesterday morning Miss Mark vehemently denied authorising publication of material from the book. Her former literary agent Jonathan Harris also denied playing any part. She said: 'I am absolutely devastated that something I wanted to be nice about the Blairs and my time with them has been presented in the way it has, and has caused them upset.'

18. The Blairs claim publication breaches a confidentiality agreement signed by Miss Mark when she went to work in Downing Street after the 1997 general election. Mrs Blair was a co-signatory to the agreement.

19. Mr Blair talked to Miss Mark yesterday and later defended her saying she was a 'good person who will not have intended any harm'.

20. But in a personal statement issued from Downing Street, he said: 'As Prime Minister I obviously accept that there's a great deal of media interest in me and my family. But I'm not just the Prime Minister, but also a father and husband and Cherie and I are absolutely determined, no matter how unusual our own lives may be because of the nature of my job, that our children have as normal an upbringing as possible.

21. We do not seek injunctions lightly and we will do whatever it takes to protect the legitimate privacy of our children from unwarranted intrusion in their lives.'

22. A further statement from Downing Street last night said Miss Mark had indicated she would not proceed with publication of the book.

23. In its first statement the Mail on Sunday, sister paper of the Daily Mail, hit out at the process it said had denied it the opportunity to put its case.

24. 'The process used is called an ex-parte injunction, one of the most draconian instruments in English law,' the statement said.

25. 'The projected publication of Miss Mark's book is a matter of significant political and public interest. We believe that anyone who cares about press freedom should be concerned about the way ex-parte injunctions are increasingly used to suppress stories in the media.'

26. In its second statement it said: 'Alastair Campbell's press briefing on behalf of the Prime Minister exhibits astonishing hypocrisy.

27. Having obtained an unprecedented 2am injunction (to which the Mail on Sunday was not given the chance to put its case) on the grounds of breach of confidence, he is now implying that the newspaper is guilty of invasion of privacy.

28. It is true, the Mail on Sunday understands, that Ros Mark's 180,000 word manuscript exposes details of the Blair children's private lives on almost every page.

29. The newspaper, on the other hand is well aware of the Press Complaints Commission's rules on the privacy of children and its article scrupulously avoided any reference which might breach that code.

30. If Mr Blair has a problem, it is with his former nanny. It was she who composed this 451-page manuscript, she who placed it with an agent to sell to publishers, and she who was prepared to break every confidence of her former employers.

31 This is what the Mail on Sunday article in essence was about, and why it was in the public interest. But instead of entering into sensible debate, first Mr Campbell tried, in draconian manner, to suppress our story. Now he is cynically attempting to misrepresent it.'"

4. Two adjacent boxes of text accompanied the main text as follows:

"**What the Prime Minister said:**

'As Prime Minister I obviously accept that there's a great deal of media interest in me and my family. But I'm not just the Prime Minister, but also a father and husband and Cherie and I are absolutely determined, no matter how unusual our own lives may be because of the nature of my job, that our children have as normal an upbringing as possible. We do not seek injunctions lightly and we will do whatever it takes to protect the legitimate privacy of our children from unwarranted intrusion in their lives.'

What the Mail on Sunday said:

'Alastair Campbell's press briefing on behalf of the Prime Minister exhibits astonishing hypocrisy. He is now implying that the Mail on Sunday is guilty of invasion of privacy. It is true that Ros Mark's manuscript exposes details of the Blair

> children's private lives on almost every page. But our article scrupulously avoided any reference which might breach that code. If Mr Blair has a problem, it is with his former nanny. She composed this manuscript, placed it with an agent and was prepared to break every confidence of her former employers. This is why the article was in the public interest. But instead of entering into debate, Mr Campbell tried to suppress our story. Now he is cynically attempting to misrepresent it.'"

5. The natural and ordinary meaning of that article as pleaded by the appellant in her Amended Particulars of Claim is:

> "that the claimant lied when she (a) denied authorising the publication of material by the Mail on Sunday from the book and (b) claimed to be devastated the Mail on Sunday article [ie by the way that her plans for a book had been presented by the Mail on Sunday], when the truth was that the claimant had willingly co-operated with the newspaper in the disclosure of such material and had offered an option on serialisation."

6. In his judgment striking out that meaning (subsequently referred to as the "lying meaning") the Deputy Judge observed:

> "The defamatory meanings which I do consider the words are capable of bearing are that Miss Mark:
>
> (i) has written a book which contains matter confidential to the Blair family and has offered it to publishers;
>
> (ii) has done so in breach of an agreement she entered into with Mr and Mrs Blair;
>
> (iii) wrongly represented to MoS that nothing in her book constituted breach of confidentiality."

7. There followed an application by which the appellant sought permission to re-amend her Particulars of Claim to allege (in addition to the lying meaning were she to succeed in her proposed appeal for its reinstatement) a further natural and ordinary meaning (subsequently referred to as "the breach of confidence meaning"):

> "that the claimant was prepared to sell to publishers a book that she had written about the Blair family and had offered the Mail on Sunday an option on serialisation in total disregard of her obligations of confidence to the family."

8. Although by his further order dated 14 February 2002 the Deputy Judge appears to have given only a conditional permission to re-amend, at the start of the hearing before us it was agreed by both parties that, whatever the outcome of the appeal, the

appellant would amend her pleading to include the breach of confidence meaning and, indeed, would plead it in an extended form as follows:

> "that the claimant was prepared to sell to publishers a book that she had written about the Blair family and had offered the Mail on Sunday an option on serialisation in total disregard of her obligations of confidence to the family and had lied in representing to the Mail on Sunday that confidentiality would not be a problem." (extension underlined)

The respondents, I may add, are keen that these further meanings *should* be pleaded: the scope for their proposed plea of justification is thereby widened.

9. It will readily be seen that the lying meaning focuses principally upon paragraph 17 of the article (although, of course, in the context of other paragraphs too) whereas the breach of confidence meaning concentrates on paragraphs 8, 12, 30 (and the second box), the extension to that meaning being found in paragraph 10.

10. The respondents' application for the court's ruling on meaning was made under paragraph 4.1 of Practice Direction Part 53:

> "4.1 At any time the court may decide:
>
> (1) whether a statement complained of is capable of having any meaning attributed to it in a Statement of Case …"

11. The correct approach to such an application, formulated by Eady J at first instance and expressly commended and adopted by this court on appeal, appears in *Gillick -v- Brook Advisory Centres & Jones*: [2001] EWCA Civ 1263:

> "The proper role for the judge when adjudicating a question of this kind is to evaluate the words complained of and to delimit the range of meanings of which the words are reasonably capable, exercising his or her own judgment in the light of the principles laid down in the authorities and without any of the former Order 18 rule 19 overtones. If the judge decides that any pleaded meaning falls outside the permissible range, then it will be his duty to rule accordingly. In deciding whether words are capable of conveying a defamatory meaning, the court should reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation. The purpose of the new rule is to enable the court to fix in advance the ground rules and permissible meanings, which are of cardinal importance in defamation actions, not only for the purpose of assessing the degree of injury to the claimant's reputation but also for the purpose of

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

12. The Deputy Judge below, having directed himself in accordance with *Gillick*, said this:

> "If a reader of MoS were to be asked to summarise the article I think that a fair summary would be: Miss Mark, who was employed for four years by Mr and Mrs Blair as their nanny, has written a book about her life with the Blairs. The book contains material about the private lives of the Blair children. Publication of that material would be in breach of Miss Mark's obligation of confidence which she entered into when Mr Blair became Prime Minister. Miss Mark has offered her book to publishers. She has discussed her book with MoS and told that newspaper that 'confidentiality would not be a problem'. She co-operated with MoS knowing that MoS intended to publish an article about the book. When the Blairs learned that MoS intended to publish an article about the book they applied for and obtained from a judge at a private hearing an injunction which stopped MoS publishing the article. MoS maintains that publication of the article would be in the public interest; and that no injunction should have been granted, least of all at a private hearing at which MoS was not represented.'
>
> If a reader were to be asked to say, very briefly, what the article was about, I think the answer would be: 'There are court proceedings between Mr and Mrs Blair and MoS arising out of the Blairs' former nanny, Rosalyn Mark, writing and seeking to publish a book about the Blair family in total disregard of her obligations of confidence to the Blair children.'"

13. Concluding that the words complained of were not reasonably capable of being understood to bear the lying meaning pleaded, the Deputy Judge said:

> "It is submitted by Mr Price that a reasonable reader would infer from the words attributed to MoS and Miss Mark that Miss Mark had lied when she said that she had not authorised publication of material from her book. In order to draw that inference the reader would have had to understood MoS to be saying that Miss Mark had authorised publication of material from her book. I do not consider that a reasonable reader would understand MoS to be saying that. In my opinion a reasonable reader would understand MoS to be saying, in the context of paragraphs 8 - 10, that Miss Mark had discussed the content of the book with MoS and had told MoS that 'confidentiality would not be a problem'. Insofar as it is alleged by MoS that Miss Mark had 'misrepresented her position' in my opinion a reasonable reader would understand 'misrepresented' to mean in the context of paragraph 8 - 10 that Miss Mark had told MoS wrongly that 'confidentiality was not a problem', in other words that Miss Mark had said either that she was not under any obligation of confidence to the Blair family or that the book did not breach that obligation. Whilst a reasonable reader might well conclude that there was scope for misunderstanding between MoS and Miss Mark I do not consider that a reasonable reader would infer from Miss Mark denying that she had authorised publication of material from her book that Miss Mark had lied."

14. I need not deal separately with the judge's reasoning with regard to the second limb of the lying meaning, that based on the appellant's statement that she was "absolutely devastated": it is common ground that the pleading in that regard stands or falls together with the primary lying meaning based on the appellant's denial of having authorised publication of material from the book.

15. In short, therefore, the judge below decided that the lying meaning would only arise if the reader were to "understand MoS to be saying that Miss Mark had authorised publication of material from her book", and that the article could not reasonably be understood in that way.

16. In a further section of his judgment, however, the judge then turned to consider what the position would be "if I am wrong about that and the article complained of is capable of being understood to mean Miss Mark has lied because words attributed to MoS contradict what is attributed to Miss Mark". Even in that event, he held, the words would still not be capable of bearing the lying meaning because:

> "I accept that reporting the statements made by MoS and of Miss Mark is not, of itself, reasonably capable of being understood to mean that Miss Mark had lied and that there are no other matters contained in the words complained of, or in the circumstances in which the article was published, sufficient to indicate to a reasonable reader that the statements of MoS should be preferred to the statements of Miss Mark."

17. It is plain that the judge there was accepting the respondent's argument, previously recorded in the judgment as follows:

> "… this is a bane and antidote case and not a simple repetition rule case. [Respondent's counsel] submits that a meaning of guilt ie that Miss Mark has lied, is impossible merely on the basis that two conflicting statements have been published in the article. Further, that there is nothing which allows the claimant to say that the article indicated, to a reader not avid for scandal, that one party's case should be preferred to the other; …. He submits that the court should treat the 'antidote' as negating the 'bane' leaving a neutral picture."

18. The Deputy Judge reached that alternative conclusion principally under English law. For good measure, however, he added that such a conclusion was reinforced by the ECtHR's judgement in *Thoma -v- Luxembourg* (application number 38432/97, 29 March 2001).

19. As will readily be seen, for the appellant to succeed in her appeal she must overthrow the Deputy Judge's conclusions on both points. She must establish first, that what she was saying and what the MoS were saying would indeed reasonably have been read as inconsistent statements: the article could not be implying that her vehement denial was a lie unless it contained also a contrary assertion. Secondly, she must establish that this is not a bane and antidote case and, in this connection, that *Thoma -v- Luxembourg* presents no insuperable obstacle in her path. These two points I shall discuss in turn under the respective headings "Contradictory Statements" and "Bane and Antidote".

Contradictory Statements

20. Paragraph 17 of the article records that on the Sunday morning the appellant "vehemently denied authorising publication of material from the book". Paragraph 7 notes MoS's "robust statement" alleging that the appellant "had misrepresented her position". Which of those two statements would the reader understand to have been made first? As became clear during the course of the hearing, Dyson LJ and I had in fact read the article one way, Mummery LJ the other. Dyson LJ and I, over-influenced, as I now think, by the order in which the respondents chose to refer to the two statements, understood the appellant's denial to have followed MoS's statement. (Later, of course, MoS made a second statement, referred to in paragraphs 26 - 31 of the article, but this for present purposes is not material.) Even on this view, however, I for my part understood the appellant to be denying something which MoS were asserting against her, namely, that she had in fact authorised them to publish material from her book which they had then included in their own injuncted article. This seemed to me to be the natural meaning of the article given that: (a) the injunction had halted "publication of material from the book" (paragraph 3), the very conduct which the appellant had denied authorising; (b) the injunction was granted "on the grounds of breach of confidence" (paragraph 27); (c) it was "to protect [the Blairs'] children from unwarranted intrusion in their lives" (paragraph 21); and (d) the

appellant was being alleged by MoS to have "misrepresented her position" (paragraph 7), "insisted that confidentiality would not be a problem" (paragraph 10), and been "prepared to break every confidence of her former employers" (paragraph 30 and the second box). Why, one further asks oneself, would the article bother to refer to the appellant's vehement denial of something unless that something was being alleged against her? It follows that even on this reading of the article I understood it to be saying that MoS were asserting, and the appellant was denying, that she had authorised the publication of the injuncted article, implicit in which (subject only to the bane and antidote point) was the allegation that her denial was a lie.

21. On Mummery LJ's reading of the article, however, the lying meaning becomes plainer still. If one understands the appellant's denial (referred to in paragraph 17) to have been issued *before* MoS's allegation (referred to in paragraph 7) that she had misrepresented her position, then it necessarily follows that MoS were characterising her denial as a lie. On this reading, therefore, as indeed I understand Mr Warby QC to accept, the lying meaning becomes well-nigh incontestable.

22. Recognising, moreover, that "judges should have regard to the impression that the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader" (per *Gillick* - see paragraph 11 above), it seems to me very difficult for Mr Warby to contend that Mummery LJ's understanding is outside "the range of meanings of which the words are reasonably capable", a contention which he must not only make, but make good. Indeed, I go further. Reading the article through a second time - as is surely permissible given, as here, a somewhat confusing, although intrinsically interesting, article - it seems to me that Mummery LJ's reading is to be preferred. When, after all, save in her statement on the Sunday morning, had the appellant ever actually stated "her position" so as to be capable of having "misrepresented" it? To suggest that she had stated it in the various discussions she had with MoS on the Friday and Saturday (see paragraphs 9 and 10 of the article) now seems to me not an entirely satisfactory answer.

23. On any view, therefore, I conclude that the judge below was wrong to hold that no reasonable reader would understand MoS to have been saying that the appellant had authorised publication of material from her book. I would, moreover, add this. Although the Deputy Judge in his second judgment of 14 February 2002 described the lying meaning as "fundamentally different" from the breach of confidence meaning, I do not so regard it myself. Both meanings, it will be apparent, involve the assertion that the appellant lied (although, it is true, this was added only by extending the breach of confidence meaning). At the heart of the lying meaning is the contention that the appellant authorised MoS to include in their article material from her book in breach of her duty of confidentiality to the Blairs (the allegation that she subsequently lied when denying having done so merely turning the knife in the wound); at the heart of the breach of confidence meaning is the allegation that she was *prepared to* authorise publication of the book (and/or its serialisation by MoS), similarly in breach of her duty of confidence to the Blairs.

24. As is apparent from the full statement issued by the appellant on 5 March 2000, she claimed to have "made clear [to the literary agent Jonathan Harris] that I did not want

anything published without the family's consent" and that her book had got into the hands of MoS without her consent or knowledge. She also pleads in her Amended Particulars of Claim that she was not aware that MoS had a copy of the manuscript of her book and that she "told Ms Barton [MoS's reporter], as was the case, that she would not publish the book without obtaining the approval of the Blair family". At the end of the day it seems to me that whichever of the pleaded meanings one takes, the appellant's prospects of success in the action will depend in large part upon whether or not the jury accept her claim that she neither had, nor would in future have, authorised any publication of the book's contents save with the Blairs' consent. She may, indeed, naively have believed (and possibly even stated) that "confidentiality would not be a problem" - that perhaps being the explanation for having gone to the trouble of writing the book in the first place without clearing it with the Blairs in advance. But if in truth she never committed herself, and never would have committed herself, to the publication of any of this material without the Blairs' agreement, then it might indeed be thought a damaging lie to say of her that she "was prepared to break every confidence of her former employers", the real thrust of MoS's allegation against her.

Bane and Antidote

25. For this next part of the judgment it must be postulated that the article is reporting inconsistent statements, namely that of MoS asserting, the appellant for her part denying, that she authorised publication of material from her book. This being the case, the rival arguments advanced on the appeal appear on analysis (and I should note that this analysis has involved some reconstruction, or at least reorganisation, of the submissions actually made) to be these. Mr Price for the appellant contends (a) that MoS's assertion, repeated by the Daily Mail, that the appellant authorised publication of material from her book (plainly something which she should not have done without the Blairs' consent) and misrepresented her position are themselves plainly defamatory under the repetition rule, (b) that the publication of the appellant's denial is not an effective antidote and (c) that the media's duty to report on matters of public interest in adequately protected by the defence of qualified privilege. Mr Warby's contrary submission is that, providing only that the opposing statements are reported neutrally, ie without the publisher indicating to the reader that the defamatory assertion which is then recorded as having been denied is adopted by the publisher, or is to be preferred, the denial should be regarded as the antidote, neutralising the bane of the assertion. He submits, indeed, that even without reference to the denial, the reporting of an unadopted allegation should not properly be regarded as defamatory in the first place.

26. Let it be assumed for the moment that the two contradictory statements in question here are indeed to be regarded as having been reported neutrally rather than the article being weighted ("spun" to use Mr Warby's word) in MoS's favour (although this is something to which I shall later return). On this basis the competing arguments appear to me to raise two central questions.

i) Is the repetition rule reconcilable with the Strasbourg jurisprudence upon which Mr Warby principally relies?

ii) Even if it is, does the reporting within the same publication of two conflicting statements (the one defamatory, the other its denial), without the publishers disclosing a particular preference for either, have the consequence that the denial is to be regarded as the antidote, the publication in the result losing its otherwise defamatory meaning?

(i) The Repetition Rule

27. This issue on analysis arises strictly independently of the bane and antidote argument and logically falls to be considered first. It is Mr Warby's contention that the repetition rule cannot survive the decisions of the ECtHR in *Thoma -v- Luxembourg* (Application No 38432/97, 29 March 2001) and *Verdens Gang and Aase -v- Norway* (Application No 45710/99, 16 October 2001), at any rate in the case of an essentially neutral media publication. Before examining the argument it is necessary to remind oneself just what the repetition rule is. I shall hope to be forgiven for doing so by reference to two judgments of my own in this court:

> "The repetition rule … is a rule of law specifically designed to prevent a jury from deciding that a particular class of publication - a publication which conveys rumour, hearsay, allegation, repetition, call it what one will - is true or alternatively bears a lesser defamatory meaning than would attach to the original publication itself. By definition, but for the rule, those findings would otherwise be open to the jury on the facts; why else the need for a rule of law in the first place?" (*Stern -v- Piper* [1997] QB 123, 135-136)

> "At first blush one might wonder why a correctly attributed and unadopted allegation is defamatory at all; to state that the allegation has been made is, after all, true. Such a report is, however, plainly defamatory under what is known as the repetition rule: a report of a defamatory remark by A about B is not justified by proving merely that A said it: rather the substance of the charge must be proved. A jury cannot be invited to treat the allegation as reported as bearing any lesser defamatory meaning that the original allegation …." (*Al Fagih -v- HH Saudi Research and Marketing (UK) Limited* [2002] EMLR 13, paragraph 35)

28. I noted in *Stern -v- Piper* Lord Reid's dictum in *Lewis -v- Daily Telegraph Limited* [1964] AC 234, 260:

> "Repeating someone else's libellous statement is just as bad as making the statement directly."

I noted too Lord Denning's observation in *"Truth" (NZ) Limited -v- Holloway* [1960] 1 WLR 997, 1003:

> "If the words had not been repeated by the newspaper, the damage done … would be as nothing compared to the damage done by this newspaper when it … broadcast the statement to the people at large …."

29. Although, therefore, it is true to say, as indeed I said in *Stern -v- Piper*, that the repetition rule, where it applies, "dictates the meaning to be given to the words used" , that is by no means to say that the meaning dictated is an artificial one. Rather the rule accords with reality. If A says to B that C says that D is a scoundrel, B will think just as ill of D as if he had heard the statement directly from C. If, moreover, A is a respectable newspaper, D's position will be worse than if B had merely heard the statement directly from C. It will be worse in part because there will be many more Bs, and in part because responsible newspapers do not generally repeat serious allegations unless they think there is something in them so that the very fact of publication carries a certain weight. If, of course, in retailing C's statement, A says that C is often unreliable so that B should not suppose the statement necessarily to be true, that would certainly mitigate the gravity of the libel. Just as it would aggravate the libel if A said that C's statements ordinarily turned out to be true. But in either event, D's reputation would be damaged and the repetition rule precludes A from pretending the contrary (ie, justifying by asserting that what he said was true, the only defamer being C).

30. How then, if at all, is this affected by recent Strasbourg jurisprudence? *Thoma* is the case upon which Mr Warby principally relies. Put shortly, what the ECtHR held there was that article 10 had been infringed by the Luxembourg court's conclusion that a journalist was to be regarded as having adopted a fellow journalist's allegation simply by failing formally to distance himself from it. The court reiterated what it had said in *Jersild -v- Denmark* (A No 298, 23 September 1994):

> "Punishment of a journalist for assisting in the dissemination of statements made by another person … would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so."

and concluded:

> "A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation was not reconcilable with the press's role of providing information on current events, opinions and ideas." (paragraph 64)

31. There was some consideration of *Thoma* in *Lukowiak -v- Unidad Editorial SA* [2001] EMLR 1043 where Eady J suggested that "it is not easy, in certain respects, to reconcile" *Thoma*'s reasoning with that in *Stern -v- Piper* (or the later Court of Appeal decision in *Shah -v- Standard Chartered Bank* [1999] QB 241 which followed

Stern -v- Piper) (paragraph 58 of *Lukowiak*), and that "at some stage, in the light of these principles [established in *Thoma*] it may be necessary for the English courts to make some adjustment to the blanket approach adopted towards 'repetitions' in *Stern* and *Shah*" (paragraph 59 of *Lukowiak*). None of that, however, was strictly in point in *Lukowiak*. As Eady J continued:

> "In the present context, I am not concerned with meaning or the need to justify, where the English repetition rule would be relevant; but rather with the distinct issue of whether or not this defendant … was under a social or moral duty to pass on to its readers the information …." (paragraph 61).

32. Eady J held in the event that the publication there in question was indeed protected by qualified privilege.

33. For my part I see no inconsistency between the repetition rule as explained in *Stern* and *Shah* on the one hand and, on the other, the ECtHR's decision in *Thoma* that journalists cannot be "systematically and formally" required to "distance themselves from the content of a [defamatory] quotation". On the contrary, it seems plain to me that any supposed tension between these has now been satisfactorily resolved by this court's decision in *Al-Fagih*. What that case recognised is that "the repetition rule concerns only the scope of the defence of justification in report cases: it does not limit the scope of qualified privilege at common law. Least of all does it require that an unadopted allegation is to be treated in the same way as an allegation asserted to be true." (paragraph 36).

34. That, to my mind, is the crucial point to bear in mind. The repetition rule concerns the meaning of words - and, of course, justification, the other side of the same coin. It recognises the reality as I have sought to explain it. It does not have the effect of making defamatory a publication which otherwise would not be. But when, of course, it comes to qualified privilege, the precise terms and circumstances in which the defamation comes to be repeated become all-important. The (non-exhaustive) ten factors identified by Lord Nicholls in *Reynolds -v- Times Newspapers Limited* [2001] 2 AC 127 are then all in play. It is at this point that the journalist can seek to pray in aid "the contribution of the press to discussion of matters of public interest" (see paragraph 30 above). *Thoma*, in short, says much about the circumstances in which the defence of qualified privilege may be available in a case of mere reportage, nothing about the meaning to be attributed to the published words. That is true equally of the *Verdens Gang* case on which Mr Warby also seeks to rely. Both proceeded on the clear basis that the publications in question were defamatory. Whereas in *Thoma*, however, the journalist had merely reported the allegations (and so, in the absence of "particularly strong reasons" for penalising him, there was no sufficient cause to do so), in *Verdens Gang* the allegations had been adopted and in those circumstances the court held the complaint inadmissible.

35. In short, whilst I am certainly prepared to recognise that the approach adopted in *Al-Fagih* may need to be taken further still - rather than perhaps confined merely to the reporting of statements (attributed and unadopted) by both sides to a political dispute

- I reject entirely the argument that the repetition rule as such needs changing. To regard reportage as being incapable of harming a person's reputation would be to introduce into the law a fiction which the repetition rule is designed to avoid. Furthermore, as I sought to point out in both *Stern -v- Piper* and *Al-Fagih*, abolishing the repetition rule would make a nonsense of the law of qualified privilege.

(ii) Publishing a denial

36. Given that under the repetition rule the report of a defamatory allegation is itself prima facie defamatory, is the simultaneous reporting of a denial of that allegation a sufficient antidote to rid the publication as a whole of its otherwise defamatory meaning?

37. The correct approach is not in doubt. If the defamatory sting of an article is wholly removed by surrounding words then, to use Baron Alderson's famous phrase in *Chalmers -v- Payne* (1835) 2 CM & R 156, 159: "The bane and the antidote must be taken together." Nor could it be doubted that the principle applies to repetition cases - see again, *Stern -v- Piper*. As Hutley JA observed in *Sergi -v- Australian Broadcasting Commission* [1983] 2 NSWLR 669, 670: "the bane and antidote theory … is merely a vivid way of stating that the whole publication must be considered, not a segment of it". One asks, therefore, in this as in any other case where the principle is invoked, whether, considered as a whole, the publication is damaging to the claimant's reputation. That, at least, is the question ultimately to be asked. At present, of course, the court is concerned with whether the defamatory meaning sought to be alleged - here the lying meaning - could be conveyed to the ordinary reasonable reader, the supposed antidote notwithstanding. The approach at this interim stage was suggested by Hirst LJ in *Mitchell -v- Faber and Faber* [1998] EMLR 807, 815 as follows:

> "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 of words, which are *ex hypothesi* 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."

38. Applying that approach in *Cruise -v- Express Newspapers plc* [1999] QB 931, 940, Brooke LJ spoke of "those rare cases in which it is open to a judge to consider that the alleged antidote so obviously extinguishes the alleged bane that there is no issue which can properly be left to a jury".

39. Amongst the many authorities drawn to our attention on this appeal were two in which the court had in fact felt able to rule that the publication complained of was incapable of a defamatory meaning. I think it instructive to note their basic facts. The first, *Bik -v- Mirror Newspapers Limited* [1976] 1 NSWLR 275 is another

Australian case. The publication there was devoted to the report of a ministerial statement *clearing* the plaintiff's reputation. I cite only briefly from Herron CJ's judgment:

> "The plaintiff's submission is plain and bald. He asserts that, where it is intended to clear a person of a defamatory stigma by a published statement, defamatory matter is necessarily published because the statement of his innocence supports an implication that it has previously been said or believed that the person has been guilty of discreditable conduct. In other words, to specify the nature of the allegation intended to be refuted, it is said, is plainly defamatory."

40. That submission was, not surprisingly, rejected. The court concluded that: "from beginning to end, the article sued upon sets out to destroy any suggestion that the plaintiff was guilty … the whole tenor of the article is to inform the reader that Mr Bik was wholly cleared …".

41. The second case, *Charleston -v- Newsgroup Newspapers Limited* [1995] 2 AC 65 concerned the publication of an article with headlines, photographs and captions, the photographs showing the plaintiffs' faces superimposed on the near-naked bodies of models in pornographic poses. Considered alone, as they would have been by a significant minority of readers, the headlines, photographs and captions were clearly capable of bearing a defamatory meaning. The critical question, however, was whether that availed the plaintiff. There was simply no dispute but that, read as a whole, the article would not be regarded by a reasonable reader as defamatory of the plaintiffs. All this is plain from the following short passage in Lord Bridge's speech, at p71:

> "There is no dispute that the headlines, photographs and article relating to these plaintiffs constituted a single publication nor that the antidote in the article was sufficient to neutralise any bane in the headlines and photographs. Thus it is essential to the success of [counsel for the plaintiffs'] argument that he establish the legitimacy in the law of libel of severance to permit a plaintiff to rely on a defamatory meaning conveyed only to the category of limited readers."

The argument in the event failed.

42. What view, then, is likely to be taken of a neutral report which sets out both an allegation and its denial? For my part I find it very difficult to conceive of circumstances in which the mere printing of a denial could of itself be said to constitute an antidote sufficient to neutralise the bane, let alone that it could be thought so obviously to have this effect as to entitle the court at an interim stage to withdraw the issue from the jury. Many of the cases on qualified privilege, indeed, suggest the same conclusion. Factor 8 in *Reynolds* ("Whether the article contained

the gist of the plaintiff's side of the story"), for example, predicates that not even that, let alone a bare denial, will have extinguished the defamatory meaning.

43. Returning to the facts of the present case, I conclude that there is no question whatever of paragraph 17 of this particular article constituting a sufficient antidote to the bane represented by the remainder of the article. On the contrary, as I have endeavoured to explain, the publication here of the appellant's denial (particularly if read as preceding MoS's statement reported in paragraph 7 of the article) compounds rather than mitigates this defamation. Nor, I would add, do I regard the respondents as having in fact reported these contradictory statements neutrally. Indeed, far from it: to my mind the article is heavily weighted in MoS's favour. The writer seems to me to associate himself very closely with MoS's view - hardly surprisingly, given, as stated in the article, that these are sister newspapers, owned by the same publisher. In short, as it seems to me, a less promising interlocutory plea for a strike-out under the bane and antidote principle would be hard to find.

44. It follows from all this that in my judgement the Deputy Judge, highly expert and experienced in this field though I recognise him to be, was wrong on both points. However one reads this article it seems to me to record the appellant and MoS as making inconsistent statements. The lying meaning is therefore reasonably open to the reader and the bane and antidote argument simply will not run. I would allow this appeal.

Lord Justice Mummery:

45. I agree.

Lord Justice Dyson:

46. I also agree.