Neutral Citation Number: [2008] EWHC 398 (QB)

Case No: HQO7X02333

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2008

Before :

MR JUSTICE TUGENDHAT

- -

Between :

MATTHIAS RATH	**Claimant**
- and -	
(1) GUARDIAN NEWS AND MEDIA LIMITED	**Defendants**
(2) BEN GOLDACRE	

- -
- -

Mr Matthew Nicklin (instructed by **Eversheds**) for the **Claimant**
Mr Andrew Caldecott QC and **Ian Helme** (instructed by **Olswangs**) for the **Defendants**

Hearing date: Friday 15th February 2008

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Approved Judgment

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

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MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

INTRODUCTION AND BACKGROUND

1. These are libel proceedings arising from the publication by the Defendants of three articles in a column of *The Guardian* newspaper entitled *Bad Science* which appeared in both the print and online versions of the newspaper on 20 January 2007, 27 January 2007 and 17 February 2007.

2. The Claimant describes himself as a physician and scientist specialising in the area of nutritional research. He is the founder of the Dr Matthias Research Institute in California, which is a medical research and development organisation set up to investigate the health benefits of micronutrients in fighting a number of diseases.

3. Proceedings were commenced on 6 July 2007, with Particulars of Claim served on 9 July 2007. The meanings attributed to the articles were as follows:

20 January 2007 ("the first article"):

> "… that the Claimant was a vitamin peddling Aids denialist who falsely claimed that his vitamin pills are a more effective treatment for AIDS than antiretroviral drugs".

27 January 2007 ("the second article"):

> "… that the Claimant was selling ridiculous vitamin pills on the back of his false claim that they were better than antiretroviral drugs in treating HIV and AIDS."

17 February 2007 ("the third article"):

> "… that the Claimant was a vitamin-peddling anti-medication salesman who was guilty of exploiting vulnerable Aids victims in South Africa by selling them ridiculous vitamin pills on the back of his false claim that his pills were better than antiretroviral drugs in treating HIV and AIDS and was thereby substantially responsible for the needless deaths of hundreds of thousands of people".

4. A Defence was served on 1 October 2007. It advanced defences of justification and fair comment. In relation to the first article, the Defendants contend that the article is true in the meanings that the Claimant:

> "(1) has made false and irresponsible claims that his vitamin pills provide more effective treatment for HIV/AIDS than antiretroviral ("ARV") medication;
> (2) has vigorously and irresponsibly campaigned against ARV medication being made available through the public health system in South Africa; and
> (3) is associated through his colleague Anthony Brink with an appallingly extreme attack against Zackie Achmat following his successful campaign for making ARV medication available through the public health system in South Africa".

5. In relation to the second article, the Defendants contend (in para 7 of the Defence) that the article is true in the meaning that:

> "the Claimant was selling vitamin pills on the back of the false and ridiculous claim that they provide better treatment for HIV/AIDS than ARV medication."

6. In relation to the third article, the Defendants contend (in para 10 of the Defence, in the form in which it was originally drafted), that the article is true in the meanings that the Claimant:

> "(1) aggressively and irresponsibly sells to AIDS victims in South Africa the false message that his vitamin pills provide better treatment for HIV/AIDS than ARV medication;
> (2) has misled people in South Africa into rejecting ARV medication for HIV/AIDS in favour of his vitamin pills;
> (3) has substantially contributed to the "madness" (whereby ARV treatment is discredited and is rejected by HIV/AIDS sufferers in preference for vitamins) which has perhaps let hundreds of thousands of people in South Africa die unnecessarily".

7. Further, in relation to the third article, the Defendants contend (in para 13 of the Defence) that insofar as the third article would be understood to mean that the Claimant "has contributed in large part to a madness which has perhaps let hundreds of thousands of people die unnecessarily", then this is fair comment.

8. In relation to damages, the Defendants (in para 15 of the Defence) purport to rely upon the publication by the Defendants of earlier articles upon which the Claimant did not sue.

9. A Reply was served on 2 January 2008. The Defence and the Reply are each long documents, 30 pages (plus 17 pages of attachments) and 41 pages, respectively.

APPLICATIONS BEFORE THE COURT AT THIS HEARING

10. On 23 January 2008 the Claimant issued an Application Notice seeking the following orders under CPR Part 3.4(2) (save as otherwise stated):

i) that Paragraph 5(3) of the Defence and the supporting particulars of justification under Paragraphs 12(48) to (50) be struck out ("the *Polly-Peck* Application");

ii) that Paragraph 10(3) of the Defence and the supporting particulars of justification under Paragraphs 12(44), 12(45) and 12(47) ("the 'perhaps' Application") - this application is based in the alternative on under CPR Part 53 PD4.2;

iii) that Paragraph 12(38) of the Defence be struck out;

iv) that the Claimant be granted summary judgment on the Fair Comment plea in para 13 of the Defence, under CPR Part 53 PD4.2 and/or Part 24 ("the Summary Judgment Application"); and

v) that the words referring to previous publications in paragraph 15 of the Defence be struck out ("the *Dingle* Application").

11. On 11 February 2008 the Defendants issued an Application Notice seeking permission to Amend the Defence in terms of the accompanying draft. This is not disputed, except in relation to paras 10 and 13. Mr Nicklin submits that the draft amendments, while curing one defect which the Claimant had pointed out, nevertheless raise another. The issue arises under the 'perhaps' application and will be considered below.

THE POLLY PECK APPLICATION

The Claimant's submissions

12. The Claimant seeks to strike out the *Lucas-Box* meaning advanced in Paragraph 5(3) of the Defence (see para 4 above). Mr Nicklin submits that the Claimant did not complain of those words in the article which give rise to the meanings in Paragraph 5(3) of the Defence. It is common ground that a claimant is entitled to isolate in the words complained of a "separate and distinct" defamatory statement, if there is one, and that the Defendants are not then entitled to assert the truth of other defamatory statements by way of justification. That is what the Claimant submits the Defendants have done in this case.

13. In such a case, it is not in dispute that the legitimate parameters of a Defence of justification can be stated (as Mr Nicklin did in his Skeleton argument) as follows:

i) In determining whether a Defendant's *Lucas-Box* meaning is a permissible meaning, the Defendant is, of course, entitled to rely on the whole of the publication, to put the words complained of in their proper context, and is not limited by the words selected for complaint by the Claimant (*Polly Peck v Trelford* [1986] QB 1000 *per* O'Connor LJ at p.1020e-g; *Cruise v Express Newspapers plc* [1999] QB 931,950g).

ii) The Court has to decide whether there are "two distinct libels" (i.e. that of which the Claimant complains and that which the Defendant seeks to justify). "Distinct" in this context means that "the imputation defamatory of the plaintiff's character in the one is different from the other": see *Polly-Peck* p.1021A.

iii) Only if the several defamatory allegations in their context have a common sting, is the Defendant is entitled to justify this common sting: see *Polly-Peck* p.1032D-E.

iv) Further, although the court's case management concerns to keep libel actions within their proper bounds can be traced back to long before the introduction of the CPR, the CPR re-emphasises the importance of limiting actions to the central issues to be determined. For example, in *McKeith v News Group Newspapers Ltd* [2005] EMLR 780 Eady J held that the Court needs to identify the "*real issue*" at the heart of the case [17]:

> "For the purpose of defining what the "real issue" is, one is not confined to that which is pleaded. It is necessary to stand back from the formulation of the case by the parties' counsel and to take a broad and non-technical approach. That would plainly follow from such cases as *Polly Peck* and *Rechem International Ltd v Express Newspapers*, The Times, 18 June 1992. In that case Neill LJ referred to the need to reduce the "expense and complexity" of libel actions and stated that:
>
> > "A balance has to be struck between the legitimate defence of free speech and free comment on the one hand and on the other hand the costs which may be involved if every peripheral issue is examined and debated at the trial".
>
> What is or is not "peripheral" must be judged objectively, on the facts of the individual case, having regard to both of those considerations."

14. The first article includes the following:

> "If you think the intuitionists and vitamin peddlers in the UK are weird, you really want to go to South Africa, where President Thabo Mbeki has a long history of siding with the HIV denialists, who believe that HIV does not cause Aids (but that treatments for it do), and where his health minister talks up fruit and vegetables as a treatment, as we have previously covered here.
>
> In this world, which is not as remote as you might think from where you're sat, Zachie Achmat is a hero: the founder of the Treatment Action Campaign in South Africa, he recently won a break-through in his long battle against the vitamin-loving Aids denialists of Mbeki's government, to make HIV medication available through the public health system.
>
> Achmat is also HIV positive, and was wealthy enough to afford antiretroviral medication, but deprived himself, risking his own life, as a matter of principle, until they were made widely available despite even the personal pleas of Nelson Mandela, an avowed in public supporter of both antiretroviral medication and Acmat's work.
>
> Achmat's victory, tragically a decade too late, was a deep wound for Matthias Rath, the German vitamin impresario who claims that his vitamin pills are better for Aids than medication and his colleague Anthony Brink, a barrister and the leader of an allied organisation, the Treatment Information Group, which campaigns vociferously against the currently available antiretroviral medication, claiming – loudly - that they are not just ineffective but actively harmful.

> This man Anthony Brink has now managed to file a complaint against Achmat with, of all places, the Hague international criminal court: Achmat is accused of genocide for successfully campaigning to get access to HIV drugs for the South African people.
>
> Now I have read this ridiculous document – which has been reported as a proper news event in much of the gay and South African media – and for the first 50 pages or so you get the familiar anti-medication and Aids-denialist stuff: they talk up the side effects of HIV drugs, they misrepresent the research….
>
> Achmat has been nominated for the Nobel peace prize, and is a hero in ways you'd better hope you never get the chance to be. Meanwhile this vicious and unhinged hatred, this surrealist charge of genocide, comes from a colleague of the vitamin peddler Rath: from Anthony Brink, from the man who is credited with introducing Mbeki to HIV denialism, who has helped cost the lives of tens of thousands of people needlessly deprived of effective treatments."

15. In his Particulars of Claim, the Claimant set out, and complained of, only the first four paragraphs of the first article. Mr Nicklin submits that these paragraphs are an introduction to the article, but they contain a distinct charge against the Claimant. The balance of the article concentrates on specific criticisms made about Anthony Brink, and his conduct in filing a complaint about Zackie Achmat to the International Criminal Court in The Hague ("the ICC"). The Claimant has not sued on this part of the article. The words complained of give rise to the meaning pleaded in the Particulars of Claim at Paragraph 5. This is a "separate and distinct" meaning from the material relating to Mr Brink. The *only* connection identified in the article between Mr Brink and the Claimant is that the Claimant is said to be a "colleague" of Mr Brink in two paragraphs (the fourth and final paragraphs). There is no express suggestion made in the article that the Claimant participated in or supported Mr Brink's action.

16. Mr Nicklin further submits that there is no suggestion in the Defence that the article bears a common sting which should permit reference to the material about Mr Brink.

17. In their Defence, the Defendants advance three parts to their *Lucas-Box* meaning. Paragraphs 5(1) and 5(2) relate to and arise from the words complained of. Paragraph 5(3), Mr Nicklin submits, is a wholly separate allegation. The only disreputable conduct alleged against the Claimant in Paragraph 5(3) is that he is, by dint of being a colleague of Mr Brink, "associated with" an "appallingly extreme attack" against Mr Achmat. This has nothing to do with the allegation that the Claimant has been peddling his vitamin pills as a more effective treatment for HIV/AIDS than ARVs.

18. Mr Nicklin submits that the structure of the Defence further supports this contention. Paragraph 5(3) is a free standing part of the *Lucas-Box* meaning. Paragraphs 12(48) to (50) are a free-standing part of the defence of justification. There is no overlap in meaning or justification. There is no reference to Mr Brink, Mr Achmat or the complaint to the ICC in any of the other paragraphs of the Particulars of Justification.

The complaint made by the Claimant is "readily extricable" from the remainder of the article. There is no connection, save for the fact that Mr Brink is said to be a colleague of the Claimant.

19. Mr Nicklin also invokes case management considerations to support the exclusion of Paragraph 5(3) (and the purported justification thereof) from the parameters of the case. He submits that the central issue in the case relates to whether the Claimant is a vitamin peddling charlatan who is guilty of making false and irresponsible claims that vitamins and micronutrients are more effective than ARVs in the treatment of AIDS and HIV, and whether, by so doing, the Claimant is substantially responsible for the deaths of perhaps hundreds of thousands of people. The trial of this case will involve a complicated and detailed assessment of medical and scientific evidence as to the relative efficacy of vitamins and micronutrients and ARVs and the foundation for and honesty of the Claimant's claims in relation to this relative efficacy. Against this, the episode relating to Mr Brink's complaint against Mr Achmat is peripheral. Were it to feature in the case, then the Court will have to analyse (1) the complaint made by Mr Brink and whether it was, as alleged by the Defendants, "manifestly extreme and hysterical and an incitement to hatred of Mr Achmat"; and (2) whether the Claimant had by dint of being a "colleague" of Mr Brink or otherwise by his conduct "endorsed" Mr Brink's "appallingly extreme attack". Mr Nicklin accepts that the lodging of Mr Brink's complaint was alleged in the article to have been provoked by Mr Achmat's campaign (with TAC and others) to make ARV medication available through the public health system. Inevitably, the investigation of these issues will lengthen an already long trial. The Defendants' current estimate is 4 weeks, but this is before the parties have grappled with the expert evidence.

The Defendants' Submissions

20. Mr Caldecott emphasises that a Claimant may select the passages and meanings he chooses to complain of, only if they are *truly* distinct. Whether they are

> "…is a question of fact and degree in each case. Several defamatory allegations in their context may have a common sting, in which event they are not to be regarded as separate and distinct allegations. The defendant is entitled to justify the sting, and once again it is fortuitous that what is in fact similar fact evidence is found in the publication": *Polly Peck (Holdings) Plc v Trelford* [1986] Q.B. 1000 at p1032; applied subsequently by the Court of Appeal in *Cruise v Express Newspapers Plc* [1999] Q.B. 931 at 948C and *Carlton Communications Plc v News Group Newspapers Ltd (No.1)* [2001] EWCA Civ 1644, [2002] E.M.L.R. 16 at [22].

21. Mr Caldecott notes that it is not disputed that the allegation on which para 5(3) of the Defence is founded does appear in the first article complained of dated 20th January 2007. He refers to the fact that it also appears in the letter of claim as one of the "*principal*" meanings of the article. The headline ("No way to treat an Aids hero"), correctly makes clear that it is concerned with the attack on Zackie Achmat. The article refers to Achmat's victory in ensuring through the Treatment Action Campaign ("TAC") that ARV medication became publicly available in South Africa (paras 2-3), saying that this was a "deep wound" for the Claimant and his colleague Mr Brink with

their avowed hostility to ARV medication. It goes on to deplore Mr Brink's retaliatory allegation of genocide against Achmat, and to the complaint being made by Mr Brink as a colleague of the complainant.

22. Mr Caldecott further submits that it is also not disputed that the supporting particulars of justification (Particulars of Justification (48) to (50)) would, if established, prove that meaning to be true. The Defence pleads that Mr Brink's genocide complaint is directly accessible via a link on the Claimant's Rath Foundation website, and was expressly endorsed by a press release dated 15th January 2007 (as "entirely valid and long overdue") as pleaded in Particulars of Justification (49). This is so, despite the Claimant's assertion in the letter of claim that he distances himself from the personal nature of the attack.

23. Mr Caldecott submits that the allegation of genocide against Achmat is part of the campaign to discredit ARVs to which the Claimant is a party, which the Defendants assert operates on false premises. Achmat is synonymous in South Africa with TAC, and TAC advocates ARV treatment (see the Particulars of Justification (39)). The challenged meaning and particulars are therefore directly relevant to meeting the sting of which the Claimant himself complains. Moreover the Claimant in his Reply does not challenge Particulars of Justification (41), in which the Defendants plead the Claimant's own allegations of genocide against those who advocate or defend ARV treatment. The allegation of genocide by Mr Brink adopted by display on the Claimant's website, and his express endorsement by the press release, is simply 'more of the same' (or similar facts, to use the phrase in *Polly Peck*, ibid). Its significance lies in the fact that its terms are so particularly offensive and inflammatory – and that it is directed at TAC's Chairman.

24. Mr Caldecott notes that it is not argued by the Claimant that the Defendants' meaning pleaded in para 5(2) (or any of the the *Lucas-Box* meanings) is a meaning which the words complained of are incapable of bearing. He submits that Particulars of Justification (48) to (50), (which Mr Nicklin submits are free-standing and directed only to meaning 5(3)), in fact support meaning 5(2) also, and so would remain in the Defence, even if meaning 5(3) were deleted.

25. Accordingly, Mr Caldecott submits that the Claimant is simply trying to blue-pencil out an allegation directly relevant to the charge he has complained of and with which it shares a common sting.

Discussion

26. As I indicated at the hearing, I have decided that Mr Caldecott's submissions are to be preferred. The meaning pleaded in para 5(2) is that the Claimant has vigorously and irresponsibly campaigned against ARV medication being made available through the public health system in South Africa. In my judgment the meaning pleaded in para 5(3) is a particular instance of the wider allegation in para 5(2). So the two allegations have a common sting, namely that the Claimant has vigorously and irresponsibly campaigned against ARV medication being made available through the public health system in South Africa. While the article does not state that the Claimant has expressly endorsed, on his website, the actions of Mr Brink, it remains open to the Defendants to rely on what the Claimant has in fact done in that regard to justify the truth of the allegations in both para 5(2) and para 5(3). Accordingly, it also follows

that there are no material case management benefits to be obtained by striking out para 5(3).

THE PERHAPS APPLICATION

27. This point is based on the transposition of the word perhaps from after the word "let" (where it appears in the third article) to before the word "let" in the Defence para 10(3) (as well as in para 13), in the form in which it was served.

28. In the words complained of the passage reads:

> "Matthias Rath is the multimillionaire vitamin salesman who aggressively sells his message to Aids victims in South Africa that Rath vitamin pills are better than medication. He has contributed in large part to a madness that has let perhaps hundreds of thousands of people die unnecessarily…"

29. In the draft amended Defence the word order in para 10(3) (and 13) has been restored to match that in the words complained of, as follows:

> "… has substantially contributed to the "madness" (whereby ARV treatment is discredited and is rejected by HIV/AIDS sufferers in preference for vitamins) which has ~~perhaps~~ let perhaps hundreds of thousands of people in South Africa die unnecessarily."

30. In para 12(47) of the draft which is now proposed the particulars of justification have been amended to similar effect, and the relevant sentence now reads as set out in para 35 below.

31. Mr Nicklin submitted, with obvious force, that the position of the word "perhaps" in Paragraphs 10(3), 12(47) and 13 of the Defence changes the meaning dramatically. He submits that it is clear from the words complained of in the third article that the only element of doubt in what is alleged is not *whether* the Claimant shares responsibility for the deaths of people, but only *how many* people he is responsible for killing.

32. He submits that the defects in the Defence cannot simply be cured by what he calls tinkering with the wording in the proposed amendments.

33. Mr Nicklin accepts that Paragraph 10(3) of the draft Amended Defence is a meaning that the words are capable of bearing. However, he submits that this change of wording radically affects the nature of the case that they are attempting to prove. Instead of attempting to prove that "perhaps" the Claimant is responsible for letting hundreds of thousands of people die unnecessarily (i.e. a reasonable grounds to suspect or *Chase* Level 2 charge), the Defendant are now seeking to establish that the Claimant is substantially responsible for letting "perhaps" hundreds of thousands of people die unnecessarily (i.e. a *Chase* Level 1 meaning, where the only doubt is over the number of people who the Claimant is responsible for killing). The old Particulars of Justification were setting out to prove the truth of the objectionable Paragraph

10(3). The Defendant cannot upgrade a Chase Level 2 meaning to a Level 1 meaning whilst leaving the Particulars of Justification substantially unaltered.

34. Mr Nicklin submits that the meaning now sought to be defended as true is astonishingly serious; that the Claimant has substantially contributed to the deaths of perhaps hundreds of thousands of people. Before being satisfied that such an allegation were true, the Court would require the clearest evidence. Yet, the Particulars of Justification advanced against the Claimant are hopelessly inadequate.

35. Mr Nicklin submits that the only paragraphs which could be suggested to support the serious allegation being levelled at the Claimant are Paragraphs 12(44), (45) and (47). The final of these paragraphs relies upon an *inference* that the Claimant is culpable for the mass homicide that is alleged. These read as follows:

> "(44) As an example of persons adversely affected by the false claims and criticisms the Defendants will rely on paragraphs 8 and 11 to 42 of an affidavit by Peter Saranchuk who is a Canadian doctor working in an AIDS clinic administered by the Provincial Administration of the Western Cape in Khayelitsha (Site C). Of the 4 patients there referred to, one died, one was put in danger of dying and two were put at risk of unnecessary morbidity by reason of the Rath Foundation's activities. Insofar as those paragraphs contain expressions of opinion, the Defendants will contend that Dr Saranchuk's conclusions are correct. A copy of the affidavit (already served on the Claimant in other litigation to which the Defendants are not a party) is provided with this defence.
>
> (45) According to the Rath Foundation websites, 6,000 Africans die every day from AIDS…
>
> (47) The Defendants will invite the Court to infer from the above that it is inevitable that the Claimant's claims and criticisms will have influenced very substantial numbers of HIV/AIDS sufferers into discontinuing, reducing or not taking ARV treatment and so caused or contributed to their premature deaths. Further the Claimant's said conduct has substantially contributed to a climate of doubt and disillusion over the efficiency and safety of ARV treatment and a disproportionate confidence in alternative non-medical treatments which ~~could perhaps have~~ <u>has</u> caused the needless death of <u>perhaps</u> hundreds of thousands".

36. In relation to Paragraph 12(44), Mr Nicklin submits that it purports to rely upon an affidavit of Peter Saranchuk, and that he, in turn, gives details of four case studies. None of the patients in these case studies is identified. As the Defendants recognised in Paragraph 12(44), Dr Saranchuk's evidence consists largely of opinion evidence, particularly the critical allegations made in Paragraphs 8, 48, 49 and 50 of the affidavit. Of the case studies he cites, in only one instance did the patient die – Patient Four.

37. Mr Nicklin then advanced a detailed attack on the defects on that affidavit as material to support a plea of justification. Mr Nicklin accepts that Paragraph 12(45) is unobjectionable as a statistic, but submits that it is incapable of supporting the allegation the Defendants are attempting to prove. As is common ground, AIDS is an incurable and fatal disease. It is irrelevant to the Defendants' defence on this point to establish that a large number of people in Africa are dying from AIDS. The Defendants are seeking to establish that the Claimant is substantially responsible for at least a large proportion of these deaths. As to Paragraph 12(47), Mr Nicklin submits that this simply invites the bare inference "from the above" (which, in relation to the critical issue of demonstrating the link between the Claimant's alleged misinformation and the deaths of perhaps hundreds of thousands of people, can only relate to Paragraphs 12(44) and 12(45)) that the Claimant's conduct "has substantially contributed to [the madness] which could perhaps have caused the needless death of hundreds of thousands".

38. Mr Nicklin submits that no reasonable court could conclude that the meanings pleaded by the Defendants (as now set out in the draft amendments) are justified.

The Defendants' submissions

39. Mr Caldecott responds that the Defendants do not just rely on the sub-paragraphs (44) to (47), but on all that is pleaded before. He summarises the case as follows. ARV drugs are the only medication or treatment that reduces or delays death in AIDS sufferers (sub-paras (7), (9)); that without ARV therapy nearly all patients with AIDS will die of opportunistic infections (mortality will be in the order of 50% within a year (sub-para (10)), and over 300,000 died in South Africa in 2004 (sub-para (11)); that the Claimant has been conducting a highly active campaign in South Africa making false claims about micronutrients and false criticism of ARV drugs (sub-paras (23), (36)); that this campaign has a potent appeal in South Africa (given the conditions there) (sub-para (37)); HIV infected patients who have stopped taking ARV drugs compromise their health (sub-para (38)); the Claimant himself claims that TAC's "credibility in the townships is crashing" (sub-para (42)). Mr Caldecott submits that, from these matters, the trial tribunal can properly draw the inference that the Claimant will have influenced substantial numbers of sufferers to discontinue or reduce the ARV drug treatment, thereby causing or contributing to their premature deaths (sub-paras (47)).

Discussion

40. In my judgment the case cannot be put as high as Mr Nicklin submits. That is all that I need decide to reach the conclusion that I expressed at the hearing, namely that the case as now pleaded cannot be struck out. It is arguable that a case can be made on the basis of inference, as Mr Caldecott submits, and that the evidence to support a plea of justification does not have to relate to particular AIDS sufferers.

PARAGRAPH 12(38) OF THE DEFENCE

41. Paragraph 12(38) of the Defence reads:

> "The promulgation of the false claims and criticisms caused such concern that 199 health professionals involved in the

> provincial ARV programme wrote to the Minister of Health on 20th September 2005. Their letter records that "many of us have had experiences with HIV infected patients who have had their health compromised by stopping their [ARVs] due to the activities of the [Rath] Foundation" The letter was released to the media on 28th September 2005 accompanied by a press release. The letter contains endorsements from named professors of medicine, HIV doctors, nurses, pharmacists, clerks and laboratory workers from over 30 different facilities in the Western Cape. The Claimant has made no attempt to moderate the false claims and criticisms despite the grave and proper concerns evinced by the letter and press release".

42. Mr Nicklin submits that this Paragraph is an attempt to introduce the opinion evidence (which cannot be tested) of 199 health professionals contained in a letter and its subsequent endorsement by "professors of medicine, HIV doctors, nurses, pharmacists, clerks and laboratory workers." The only proper way to adduce this evidence is to plead and thereafter to prove the examples which presumably underpin the expression of opinion which can then be explored (much in the same way as the Claimant has tried to do in relation to the Affidavit of Dr Saranchuk; which stands as the clearest example of the risk of injustice that proceeding with untested expressions of opinion represents).

43. Mr Caldecott states that that is not the meaning of that paragraph. The Defendants rely on the letter as demonstrating the irresponsibility of the Claimant in continuing with his campaigned in the face of the notice that he had been given of the dangers that would result.

44. It is understandable that Mr Nicklin should be concerned that this sub-paragraph should not be misunderstood. Mr Caldecott accepts that if what the 199 professionals said is to be relied on as proving the truth of the words complained of, then this form of pleading would not suffice. On that basis, I decided that the sub-paragraph could stand as it is. It will be open to Mr Nicklin to bring to the notice of the court any further points that may arise from this paragraph as the case progresses.

FAIR COMMENT – SUMMARY JUDGMENT APPLICATION

45. The comment now sought to be defended in para 13 of the draft Amended Defence in relation to the third article is that:

> "the Claimant's conduct in relation to the false claims and criticisms has contributed in large part to a madness which has ~~perhaps~~ let perhaps hundreds of thousands of people die unnecessarily"

46. The Claimant applies for summary judgment in their favour on this issue. The test under CPR Part 24 applies. It is common ground that this is an action which will be tried by judge alone, so there are not the constraints on the exercise of the courts powers that arise when a trial is to be by jury. CPR Part 24 provides;

> "24.2 The court may give summary judgment against a ... defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that – ...
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

47. Mr Nicklin submits that there is no real prospect of the Defendants persuading the court that the allegation in question is comment at all, or (if they may succeed on that) that the comment is based on facts truly stated.

48. Again it is to be noted that there is no suggestion by Mr Nicklin that the words complained or are incapable of bearing the meaning that the Defendants seek to defend as comment. Their case on fair comment corresponds to their case on justification of the meaning pleaded in para 10(3). There is no inconsistency in the Defendants' stance. Mr Caldecott submits, and there is no dispute, that a comment may itself be capable of justification: *Sutherland v Stopes* [1925] AC 47, HL and Gatley, 10th edition at 12.3:

> "Justification is a defence to any imputation contained in the words complained of, whether of comment or of fact..."

49. In support of the plea of fair comment the Defendants, in para 13 of their Defence, repeat the particulars under para 12, which are there relied on as particulars of justification. The Defendants also plead reliance on s.6 of the Defamation Act 1952.

50. A convenient summary of the law on fair comment is to be found in the judgment of Lord Nicholls in the Court of Final Appeal of Hong Kong, in *Tse Wai Chun Paul v Albert Cheng* [2001] EMLR 777, at paras [16]-[21]:

> "16. In order to identify the point in issue I must first set out some non-controversial matters about the ingredients of this defence. These are well established. They are fivefold. First, the comment must be on a matter of public interest. Public interest is not to be confined within narrow limits today: see Lord Denning in *London Artists Ltd v Littler* [1969] 2 QB 375 at 391.
>
> 17. Second, the comment must be recognisable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege. Much learning has grown up around the distinction between fact and comment. For present purposes it is sufficient to note that a statement may be one or the other, depending on the context. Ferguson J gave a simple example in the New South Wales case of *Myerson v Smith's Weekly* (1923) 24 SR (NSW) 20 at 26:

> "To say that a man's conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment".
>
> 18. Third, the comment must be based on facts which are true or protected by privilege: see, for instance, *London Artists Ltd v Littler* [1969] 2 QB 375 at 395. If the facts on which the comment purports to be founded are not proved to be true or published on a privileged occasion, the defence of fair comment is not available.
>
> 19. Next, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.
>
> 20. Finally, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views: see Lord Porter in *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449 at 461, commenting on an observation of Lord Esher MR in *Merivale v Carson* (1888) 20 QBD 275 at 281. It must be germane to the subject-matter criticised. Dislike of an artist's style would not justify an attack upon his morals or manners. But a critic need not be mealy-mouthed in denouncing what he disagrees with. He is entitled to dip his pen in gall for the purposes of legitimate criticism: see Jordan CJ in *Gardiner v Fairfax* (1942) 42 SR (NSW) 171 at 174.
>
> 21.These are the outer limits of the defence. The burden of establishing that a comment falls within these limits, and hence within the scope of the defence, lies upon the defendant who wishes to rely upon the defence".

51. The principles which give rise to argument in the present case are the second and the third.

FAIR COMMENT: FACT OR COMMENT

52. In *Cheng* at para [41] Lord Nichols further explained:

> "The purpose for which the defence of fair comment exists is to facilitate freedom of expression by commenting upon matters of public interest. This accords with the constitutional guarantee of freedom of expression. And it is in the public interest that everyone should be free to express his own, honestly held views on such matters, subject always to the safeguards provided by the objective limits mentioned above. These safeguards ensure that defamatory comments can be seen for what they are, namely, comments as distinct from

> statements of fact. They also ensure that those reading the comments have the material enabling them to make up their own minds on whether they agree or disagree. ”

53. Mr Nicklin referred to cases showing what is meant by the distinction to be drawn between fact and comment. He accepted that the boundary between comment and fact may sometimes be hard to establish. In recognition of its importance to protecting freedom of expression, the law allows some width to what can be held to be comment. In *Branson v Bower* [2001] EWCA Civ 791; [2001] EMLR 800 [11]-[12] Latham LJ said:

> “... It may ... become necessary in some cases to consider with some care the extent to which the boundary between assertions of fact requiring justification and comment as drawn by domestic law has been affected by the passage of the Human Rights Act, and the European jurisprudence. But I am satisfied that in the present case, the judge came to the correct conclusion, applying what I have described as the traditional test.
>
> This test is, in my view, accurately described in *Gatley 9th Edition,* Chapter 12.6. Citing from a judgment of Cussen J in *Clarke-v Norton* [1910] VLR 494 at 499, the editors state, as to what amounts to comment for the purposes of permitting the defence of fair comment:
>
> > "More accurately it has been said that the sense of comment is "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc."”

54. Mr Caldecott notes that the citation from *Clarke v Norton* was again approved by the Court of Appeal in *Associated Newspapers Ltd v Burstein* [2007] EWCA Civ 600; [2007] 4 All E.R. 319 at [19].

55. Mr Nicklin also cites Field J in *O’Brien v Salisbury* (1889) 54 JP 215, 216:

> “If a statement in words of a fact stands by itself naked, without reference, either expressed or understood, to other antecedent or surrounding circumstances notorious to the speaker and to those to whom the words were addressed, there would be little, if any, room for the inference that it was understood otherwise than as a bare statement of fact, and then, if untrue, there would be no answer to the action”.

56. Mr Nicklin further submits that the liberalising effect of *Lowe v Associated Newspapers Ltd* [2006] 3 All ER 357 depends upon the reader being able to recognise the words as comment. If that is so, the newspaper can rely on matters not stated in the article to defend the comment. However, if the reader cannot identify the words as comment, or separate out the comment from the fact, the defence is unavailable. In

the classic statement, Fletcher-Moulton LJ ruled in *Hunt v Star Newspaper* [1908] 2 KB 309, 319-320

> "… comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment: see *Andrews v Chapman.* The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer, though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses… Any matter, therefore, which does not indicate with reasonable clearness that it purports to be comment, and not statement of fact, cannot be protected by the plea of fair comment."

57. Mr Nicklin accepts that the sentence towards the end of the citation, starting "In other cases it merely points....", has to be read in the light of subsequent developments, in particular, subject to *Kemsley v Foot* [1952] AC 345 and *Lowe v Associated*, which permit reliance on matters not stated in the words complained of.

58. There is also a passage from the speech of Lord Porter in *Kemsley v Foot* at pp355-6:

> "The question, therefore, in all cases is whether there is a sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action and I find my view well expressed in the remarks contained in Odgers on Libel and Slander (6th ed., 1929), at p166. 'Sometimes, however,' he says, 'it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that "such conduct is disgraceful," this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables the readers to judge for themselves how far his opinion is well founded; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth. The same considerations apply where a defendant has drawn from certain facts an

> inference derogatory to the plaintiff. If he states the bare inference without the facts on which it is based, such inference will be treated as an allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment. But even in this case the writer must be careful to state the inference as an inference, and not to assert it as a new and independent fact; otherwise, his inference will become something more than a comment, and he may be driven to justify it as an allegation of fact.'
>
> But the question whether an inference is a bare inference in this sense must depend on all the circumstances".

59. In the light of these principles, Mr Nicklin submits that there is nothing in the article, particularly in the key paragraph dealing with the allegations made against the Claimant, to indicate to readers that the allegation (or any part of it) is comment.

60. The passage here in question is in the third article, which appeared under the heading "How money is not the only barrier to Aids patients getting hold of drugs". As already stated, the fourth paragraph reads:

> "Matthias Rath is the multimillionaire vitamin salesman who aggressively sells his message to Aids victims in South Africa that Rath vitamin pills are better than medication. He has contributed in large part to a madness that has let perhaps hundreds of thousands of people die unnecessarily."

61. Mr Caldecott submits that the words "He has contributed in large part to a madness that has let perhaps hundreds of thousands of people die unnecessarily" are clearly comment, and for a number of reasons.

62. First he submits that the nature of the column supports that interpretation. It is not a news column but an opinion piece, appearing weekly under the title *Bad Science*. The other articles complained of are in the same series, and are referred to in the opening words of the third article.

63. Second, Mr Caldecott submits that the topic under discussion, which appears from the rest of the article, is one which obviously leaves room for different views as to the effect of the Claimant's message that vitamin pills are better for Aids sufferers than medication. Third, the writer has already in the article described the evidence for the claim that vitamin C is better than the Aids drug AZT, and observed that it is "farcically weak":

> "… Patrick Holford yesterday found his way on to the letters page to repeat his mind boggling claim that vitamin C is better than the Aids drug AZT…
>
> … what is Holford's evidence for this bizarre, repeated Aids claim? Firstly, he cites two small studies done on cells on a

> laboratory bench, using vitamin C and AZT. This is farcically weak evidence…
>
> But his second piece of evidence is more worrying: a letter from Raxit Jariwalla, the man responsible for the research…
>
> Who is Holford's saviour, Jariwalla? According to the Rath Foundation website, he is 'senior researcher' at the 'Dr Rath Research Institute California'…
>
> Might you expect vitamin C to beat the drug AZT in a trial in humans? It has serious side effects, but AZT was the first and only HIV medication on the market for eight years, it stopped HIV from being an automatic death sentence, and it is still in routine use as part of 'combination therapy'. It works, and cuts HIV transmission, mother to babay, from 25% to 8%; which is good, since 3 million are dead already from Aids, 500,000 of them children, and at least 40 million people are HIV positive Good nutrition is important, but vitamin C is unlikely to prove to be better than medication."

64. Fourth, Mr Caldecott put it as follows in his Skeleton Argument:

> "No reader with any sense would think that the Second Defendant had toured South Africa, gathering statistics of those who had specifically died in reliance on the case made by the anti-ARV party. The word "perhaps", qualifying the consequences of the heresy in relation to the numbers of dead is plainly an opinion. Its message is: this cannot be guaranteed as a fact. Likewise the word "madness" is clearly an opinion. Equally the allegation that the Claimant has "contributed in large part" is an opinion. Historians, for example, frequently differ about the contribution a particular person has made to a particular cause or consequence. The underlying fact is that the Claimant has aggressively and irresponsibly sold a false message about micronutrients and ARVs (see the pleaded supporting facts and its justification as factually true in paragraph 10(1) of the Defence)."

65. In my judgment the Defendants have a real prospect of persuading the court that the statement (that the Claimant has contributed to letting people die unnecessarily) is something which the reasonable reader can recognise as comment in the sense that that statement is, or can reasonably be inferred to be, a deduction, inference, conclusion, criticism, remark, or observation. Causation of death is often a complicated matter. There is a real prospect of the Defendants persuading the court that reasonable readers would appreciate that the Defendants cannot be understood as stating what has caused, or contributed to, the deaths, otherwise than as an inference from other facts or circumstances. These facts from which such an inference might be drawn are stated in the third article: see paras 60 and 63 above.

FAIR COMMENT: FACTS TRULY STATED

66. As already noted, the facts stated in the third article include:

> "Matthias Rath is the multimillionaire vitamin salesman who aggressively sells his message to Aids victims in South Africa that Rath vitamin pills are better than medication".

67. Mr Nicklin refers to the fact that in a subsequent paragraph of the article there appear the words:

> "Nevirapine, a follow up drug, in a single dose reduces maternal HIV transmission from 25% to 15%. It's given away free for that purpose by the drug company but in many places it is rejected by people who have been misled by vitamin-peddling anti-medication entrepreneurs"

68. In para 12(51) of the Defence it is pleaded that:

> "The Defendants do not allege that the Claimant or the Rath Foundation sells micronutrients in South Africa. However, insofar as the articles make that suggestion, it adds nothing of substance in terms of defamatory meaning. The true sting of the articles is focussed on the false claims and criticisms and/or their inducement to people to use micronutrients rather than ARVs and/or the potential consequences of this conduct for HIV/AIDS sufferers and babies exposed to potential infection in South Africa. Further the Claimant does sell his products elsewhere for substantial prices and the false claims and criticisms relating to AIDS are bound to have increased those sales and the general commercial appeal and profile of the Claimant's nutritional supplements".

69. In para 12(21) of the Defence the Defendants plead:

> "The Claimant manufactures vitamin and other micronutrient products and sells them on the internet and through natural health outlets...."

70. In para 12(51) of the Defence the Defendants plead s.5 of the Defamation Act 1952, and in para 13 they plead s.6 of that Act. These sections read:

> "5. Justification.
>
> In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.
>
> 6. Fair comment.

> In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

71. In para 3.19 of the Reply the Claimant pleads:

> "Save that the final sentence is not admitted, Paragraph (21) is admitted. The Claimant does not sell vitamins and micronutrients in South Africa (and Paragraph (51) is noted). On the contrary, the Dr Rath Foundation provides vitamin and micronutrient supplies to community organisations in the townships of South Africa – through the South African National Civic Organisation – free of charge to help tackle the recognised serious problem of malnutrition and micronutrient deficiency in patients with AIDS. This is in sharp contrast to the manufacturers of ARV's who continue to seek fully to exploit their patented drugs for massive profits from some of the poorest countries in the world".

72. Accordingly, and as was made clear before me, it is common ground on the pleadings that the Claimant manufactures vitamin and other micronutrient products, that he sells them on the internet and through natural health outlets, but that he does not sell them in South Africa. What he does is to provide vitamin and micronutrient supplies to community organisations in the townships of South Africa free of charge to help tackle the recognised serious problem of malnutrition and micronutrient deficiency in patients with AIDS.

73. Mr Nicklin therefore submits that the third article includes false statements that the Claimant "is a vitamin salesman who aggressively sells his message to Aids victims in South Africa" and that, in respect of South Africa, he is "a vitamin peddling entrepreneur".

74. The law on this point is the third principle summarised by Lord Nicholls in *Cheng* para 50 above. But it is necessary to consider the cases to which he was referring.

75. The first of these, to which Mr Nicklin refers, is *London Artists Ltd v Littler* [1969] 2 QB 375, where Lord Denning MR said this at pp 390-392:

> "In my days at the Bar we used to meet the difficulty by the "rolled-up" plea which had the great advantage that the defendant was not bound to distinguish between fact and comment: see *The Aga Khan v. Times Publishing Co. Ltd.* [1924] 1 K.B. 675. But that plea fell into disfavour after 1949, when R.S.C., Ord. 82, r. 3 (2) compelled the defendant to distinguish between fact and comment. Instead of the "rolled-up" plea, the defendant now pleads simply "the said words were fair comment" - a plea which is obviously incomplete when the

> said words contain facts as well as comment. But the plea carries with it an implication that the facts are true on which the comment is based; and the defendant can be ordered to give particulars of those facts: see *Cunningham-Howie v. F. W. Dimbleby & Sons, Ltd.* [1951] 1 K.B. 360. So long as that implication is read into the plea, it is unobjectionable....
>
> Three points arise on the defence of fair comment...
>
> The second point is whether the allegation of a 'plot' was a fact which the defendant had to prove to be true, or was it only comment? In order to be fair, the commentator must get his basic facts right. The basic facts are those which go to the pith and substance of the matter: see *Cunningham-Howie v. Dimbleby* [1951] 1 K.B. 360, 364. They are the facts on which the comments are based or from which the inferences are drawn - as distinct from the comments or inferences themselves. The commentator need not set out in his original article all the basic facts: see *Kemsley v. Foot* [1952] A.C. 345; but he must get them right and be ready to prove them to be true. He must indeed afterwards in legal proceedings, when asked, give particulars of the basic facts: see *Burton, v. Board* [1929] 1 K.B. 301; but he need not give particulars of the comments or the inferences to be drawn from those facts. If in his original article he sets out basic facts which are themselves defamatory of the plaintiff, then he must prove them to be true: and this is the case just as much after section 6 of the Defamation Act, 1952, as it was before. It was so held by the New Zealand Court of Appeal in *Truth (N.Z.) Ltd. v. Avery* [1959] N.Z.L.R. 274, which was accepted by this court in *Broadway Approvals Ltd. v. Odhams Press Ltd.* [1965] 1 W.L.R. 805. It is indeed the whole difference between a plea of fair comment and a plea of justification. In fair comment he need only prove the basic facts to be true. In justification he must prove also that the comments and inferences are true also."

76. But the case on which Mr Nicklin places most reliance is *Kemsley v Foot* [1952] AC 345. Mr Nicklin cites Lord Porter at pp.357-358, where explained the rule as follows:

> "In a case where the facts are fully set out in the alleged libel, each fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails in his defence. Does the same principle apply where the facts alleged are found not in the alleged libel but in particulars delivered in the course of the action? In my opinion it does not. Where the facts are set out in the alleged libel, those to whom it is published can read them and may regard them as facts derogatory to the plaintiff; but where, as here, they are contained only in particulars and are not published to the world at large, they are not the subject-matter of the comment but facts alleged to justify that comment. In the present case, for

> instance, the substratum of fact upon which comment is based is that Lord Kemsley is the active proprietor of and responsible for the Kemsley Press. The criticism is that that press is the low one. As I hold, any facts sufficient to justify that statement would entitle the defendants to succeed in a plea of fair comment. Twenty facts might be given in the particulars but only one justified, yet if that one fact were sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the defendants' plea".

77. Mr Nicklin also cites the words of Lord Oaksey at p.361:

> "What is meant in cases in which it has been said comment to be fair must be on facts truly stated is, I think, that the facts so far as they are stated in the libel must not be untruly stated".

78. As Mr Nicklin noted, Eady J has commented on that passage in *Lowe v Assocated* at paras 35-36. He said:

> "Whether such a stark distinction would be drawn today between facts *stated* and those *pleaded* is open to question. I should be surprised if it were now to be held that the omission to establish one important fact would lead to overall failure merely because it had been stated in the article. That would appear to be inconsistent with the policy underlying the rule, with regard to justification, that the words complained of need only be shown to be *substantially* accurate. I can see no principled distinction in this respect between the two defences. Moreover, I should be surprised if the proposition were to be found compatible with Article 10 and the Strasbourg jurisprudence, which generally allows leeway for journalists in the exercise of their trade, so as to accommodate a degree of inaccuracy and exaggeration. Fortunately I do not need to determine this issue on the present application."

79. Since Eady J was concerned in that case with a different issue (he held that a defendant is not precluded from pleading extrinsic facts in support of a plea of fair comment) he did not need to express his view in any detail as to the consequences if facts are not truly stated. He simply said:

> "If facts are stated in words complained of, and are wrongly stated, this will undermine the defence of fair comment".

80. As to whether, in the present case, there is or is not a false statement of fact, Mr Caldecott adopts in his submissions the same point as is made in para 12(51) of the Defence, set out in para 68 above. First, he submits that the statement in the article is that it is his message that the Claimant sells in South Africa, not his vitamins. Second, if the Defendants are wrong about that, and insofar as the article makes a false statement, then it is immaterial to the comment.

81. As to the law, Mr Caldecott submits that *Kemsley v Foot* is no longer authority for the proposition for which Mr Nicklin invokes it at this stage of the argument. It has been overtaken by s.6 of the Defamation Act 1952, which was passed in the same year as the House of Lords delivered their speeches (the hearings had been in 1951 and the speeches were delivered in February 1952). He submits that s.6 applies because this is an action for libel in respect of words consisting partly of allegations of fact and partly of expression of opinion. It follows that defence of fair comment will not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

82. Mr Caldecott submits that the law is expressed in Lord Nicholls' third principle, which was itself a summary of what Lord Denning said in *Littler*. Eady J's reservations about *Kemsley v Foot* were correct, although it is not necessary to go to Art 10 to reach that result. It is already enacted by s.6.

83. Mr Nicklin submitted that s.6 would not have applied to the words complained of in *Kemsley v Foot* because in that case the words complained of did not include an allegation of fact. So I should not read s.6 as qualifying what was said in *Kemsley v Foot.* He submits that the very experienced counsel in *Lowe v Associated* did not, apparently, refer Eady J to s.6, and they were right not to do so.

FAIR COMMENT: CONCLUSION

84. In my judgment the Defendants have a real prospect of showing that this case is within s.6 of the Defamation Act 1952, and I do not have to consider the case of a plea of fair comment that is not within that section. Eady J did not have to decide in *Lowe v Associated* the point that I am being asked to decide. The Defendant does have a real prospect of success on the issue of fair comment. I have already held that he has a real prospect of success in establishing that the allegation in question is comment. And whether or not he succeeds in overcoming the Claimant's point that the facts are not truly stated, depends upon whether, in accordance with s.6, the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

85. There is before me an application for a ruling on meaning under CPR Part 53 PD4.2 in relation to para 13 of the Defence (see para 10 (iv) above). That rule provides:

> "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;
>
> (2) whether the statement is capable of being defamatory of the claimant;
>
> (3) whether the statement is capable of bearing any other meaning defamatory of the claimant.

> 4.2 An application for a ruling on meaning may be made at any time after the service of particulars of claim. Such an application should be made promptly."

86. Under this jurisdiction, I cannot express a final view as to the meaning of the words complained of in so far as they are not alleged to be defamatory – that is, the meaning of the purported statement of facts which are relied upon as supporting the defamatory comment. Any application under CPR Part 53 PD4.2 must relate to a determination of the defamatory meaning (if any) that the words complained might be capable of bearing. It is not suggested (nor could it be, at least in any natural and ordinary meaning) that it is defamatory of the Claimant to allege that he sells vitamins in South Africa, whether that be true or false.

87. Before it can be determined whether the facts are truly stated, it is first necessary to determine what has been stated, and in what respects, or to what extent, it is untrue. It may in principle be that this is a task that the court can be invited to perform under CPR Part 24, particularly in a straightforward case, where only one or two facts are stated, and where it is (or they are) stated in terms such that it is clear whether they are wholly true or false. Mr Nicklin also relies on CPR Part 24, although I have not been referred to any case in which a ruling under that jurisdiction has been made on the meaning of a statement of fact upon which a comment is said to have been based. Nor have I been addressed on any guidance there may be as to how the court should approach such an application for a ruling on the meaning of words that are not defamatory. I accept that if there is no real prospect of the Defendant establishing the truth of any of the allegations of fact relied on, then the Defendant will have no prospect of succeeding on the defence of fair comment, even by reliance on s.6 of the Defamation Act 1952.

88. But in the present case, for the reasons given by Mr Caldecott, I cannot conclude that the Defendants have no real prospect of proving any of the statements of fact upon which they rely. I do not think it right at this stage of the proceedings for me to decide whether the fact that the Claimant donates, rather than sells, vitamin pills, makes the statement that he sells them wholly untrue, or only partly untrue. And assuming that that statement is either wholly or partly untrue, the significance of that in the context of s.6 (and the other facts set out at para 63 above) does not appear to me to be sufficiently clear for me to make a ruling at this stage. And in those circumstances, I cannot conclude that the Defendants have no real prospect of succeeding in their plea in reliance upon s.6: that is of failing to establish that the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges. That is an issue that, in the present case, cannot be disposed of at this interlocutory stage.

89. It follows that the Claimant fails on this part of his application.

THE *DINGLE* APPLICATION

90. The Defendants, (in Paragraph 15 of the Defence), purport to rely

> "in reduction or mitigation of damage… on the fact that the Claimant made no complaint whatever in relation to articles in *The Guardian* dated 14 May and 30 June 2005 and 24 February

> and 5 September 2006, which make allegations which were by their nature the same or similar to those complained of in this action".

91. The Claimant submits that this pleading violates the long-established principle that evidence led to establish that there have been other publications to the same or similar effect as the words complained of are inadmissible in mitigation of damages – see *Gatley* §33.35 and *Dingle v Associated Newspapers Ltd* [1964] AC 371. In that case, at p 395 Lord Radcliffe said that what the judge:

> "… intended to do was to mitigate the damages he was to award to the respondent by the consideration that, though the "Daily Mail" had defamed him on June 16, the person it was defaming already possessed at that date a reputation tarnished to some extent by what had been said about him in the report and in its reproduction and, for all I know, embellishment in other newspapers. To do this is not merely to ascertain and isolate the actionable matter: it is to fix the damages arising from that matter by reference to similar (I do not say identical) allegations made by other persons in other publications.
>
> In my opinion this is an inadmissible proceeding. There is more than one reason why it should not have been followed. ...
>
> Whatever may be the qualifications or requirements as to evidence led on the issue of reputation by way of mitigation of damages for libel, I do not believe that it has ever yet been regarded as permissible to base such evidence on statements made by other persons about the same incident or subject as is embraced by the libel itself. In my opinion it would be directly contrary to principle to allow such an introduction. A libel action is fundamentally an action to vindicate a man's reputation on some point as to which he has been falsely defamed, and the damages awarded have to be regarded as the demonstrative mark of that vindication. If they could be whittled away by a defendant calling attention to the fact that other people had already been saying the same thing as he had said, and pleading that for this reason alone the plaintiff had the less reputation to lose, the libelled man would never get his full vindication. It is, I think, a well understood rule of law that a defendant who has not justified his defamatory statements cannot mitigate the damages for which he is liable by producing evidence of other publications to the same effect as his; and it seems to me that it would involve an impossible conflict between this rule and the suggested proof of tarnished reputation to admit into consideration other contemporary publications about the same incident. A defamed man would only qualify for his full damages if he managed to sue the first defamer who set the ball rolling: and that, I think, is not and ought not to be the law. "

52. At p416 Lord Morris put it this way:

> "Was the judge warranted in assessing damages on the basis that the respondent came to court with a damaged reputation? It cannot be denied that textual publications in newspapers of the report of the Select Committee would occasion highly unpleasant and prejudicial publicity for the respondent. If such publications were in good faith and without malice the statutory protection would apply. If, however, there was publication of defamatory matter in respect of which there was no statutory protection then damages should have been awarded in accordance with well recognised general principles. Included in these is the rule that a defendant may, in order to mitigate the damages, adduce general evidence to show that the plaintiff is a man of bad reputation. See *Scott v. Sampson* 8 Q.B.D. 491 ; *Hobbs v. Tinling* [1929] 2 K.B. 1; 45 T.L.R. 328, C.A. ; *Speidel v. Plato Films Ltd* [1961] A.C. 1090. It ought not, however, to avail a defendant to prove that a plaintiff has been under a temporary cloud of suspicion when the success of the plaintiff in libel proceedings demonstrates that there need never have been any such suspicion. If over a period of days a newspaper published highly defamatory matter concerning some well known person who did not immediately bring an action, the newspaper could not, if after some days an action was brought, seek to reduce the damages that they ought to pay by pointing to the temporary adverse publicity which they themselves by their own wrongful actions had wrongfully created... The position may have been, as it was expressed at the trial, that he was "a man with a good reputation under a cloud." His very purpose in his litigation was to disperse the cloud. He succeeded in doing so. It would be singular if the damages awarded to him were measured on the basis that the cloud was still there."

Defendants' submissions

92. Mr Caldecott submits that the issue on damage is what injury to reputation and feelings did *this* article cause. It may be relevant to both reputation and feelings that earlier articles to like effect in the same newspaper have passed without complaint and been read by many of those who would have read the article complained of. It is relevant to the exercise of isolating the recoverable damage.

93. Mr Caldecott submits that *Associated Newspapers Ltd v Dingle* [1964] A.C. 371 is authority against reliance on publications in <u>other</u> newspapers; per Lord Radcliffe at 395 (with whom Lord Morton and Lord Cohen agreed), per Lord Denning at 411, per Lord Morris at 416; and it is so summarised in *Burstein v Times Newspapers Ltd* [2001] 1 W.L.R. 579, [2001] E.M.L.R. 14 at [36].

94. Further, there has been modernisation of the law in relation to the admissibility of evidence material to damage. Broadly it now seems that relevant contextual material may be admitted. See *Burstein* ibid, at [40]:

> "… not only is the admissibility of evidence essentially procedural, but the authorities to which I have referred show that the admissibility or otherwise of evidence of reputation in reduction of libel damages is heavily affected, if not determined, by questions of procedural fairness and of case management".

95. It is at least arguable that earlier articles in the same newspaper may be admissible as material to the circumstances of publication, particularly on the test as stated in *Turner v News Group Newspapers Ltd* [2006] EWCA Civ 540; [2006] 1 W.L.R. 3469 at [56]:

> "I accept the point made in argument that it is somewhat repetitive to use the words "background" and "context" in the phrase "directly relevant background context", but that in itself does not produce obscurity. It is in any event inevitable that cases will occur where it is not easy to determine whether the test in *Burstein's* case is met or not. That does not mean that the test is an inappropriate one, any more than is that propounded in *Scott v Sampson* : as Viscount Simonds recognised in *Speidel's* case, the line between evidence of general bad reputation and evidence of specific conduct giving rise to such a reputation is not easy to draw. What constitutes the directly relevant background will vary from case to case, but I would myself accept the need for the courts to proceed, as Mr Browne advocates, with some caution in applying *Burstein's* case, given that it represents a modification of the long-standing rule in Scott v Sampson . As Eady J put it in *Polanski v Condé Nast Publications Ltd* (unreported) 21 October 2003, one should guard against extending too creatively the concept of "directly relevant background". The Court of Appeal in Burstein's case was concerned to avoid jurors having to assess damages while wearing blinkers. If evidence is to qualify under the principle spelt out in Burstein's case, it has to be evidence which is so clearly relevant to the subject matter of the libel or to the claimant's reputation or sensitivity in that part of his life that there would be a real risk of the jury assessing damages on a false basis if they were kept in ignorance of the facts to which the evidence relates" (emphasis added by Mr Caldecott)

96. An analogy may be drawn in this context with the duty to mitigate. Lack of challenge on public interest issues by those well versed in the media may reasonably tend to indicate to the publisher that the party criticised does not object to the hostile side of the argument being put.

97. Mr Caldecott further submitted that it is at the very least arguable that to exclude any reliance on articles in the same publication to like effect in the recent past might also offend Article 10 on the basis that damages so awarded may be disproportionate, especially where public figures choose to make no challenge when the allegation first appears. But he did not enlarge upon this, or cite any Art 10 cases.

Discussion

98. It is correct that it is only Lord Morris in *Dingle* who expressly dealt with the effect of publications to a similar effect by the same defendant. Nevertheless, it seems to me that the reasoning of the other members of the committee would apply with greater force to a publication by the same defendant than it applies to a publication by a third party. So the point is in my judgment within the principle established in *Dingle*.

99. It is also correct that that *Burstein* and *Turner* represent a development in the law since *Dingle*. However, there is nothing in the *Burstein* line of cases that suggests that the Defendant's previous publication of a similar defamatory allegation can be relied on, or that the Claimant's omission to complain is conduct (it is certainly not misconduct) directly relevant to the subject matter of the libel, such that there would be a real risk of the jury assessing the damages on a false basis.

100. Prior publications by the same publisher can be relied on in aggravation of damages: Gatley 32.51. Mr Nicklin expressly disclaimed any wish to rely on them in this case for that purpose. But it would seem logical that what is admissible in aggravation of damages may, in principle, be admissible in mitigation of damage. I cannot say that there may never be a case where a failure by a claimant to point out to a newspaper an error in a prior publication would be irrelevant to mitigation of damage where a newspaper later repeated the same error in another publication.

101. But there is no possible scope for any such argument in the present case. The Defendants are not saying that if the Claimant had complained of a previous publication then they would have omitted or modified the articles complained of. As Mr Nicklin points out, the Claimant has complained about these articles, and they remain on the First Defendant's website, and are being defended by a plea of justification.

102. It follows that this part of the Claimant's application succeeds, and the words in question must be struck out of para 15 of the Defence.

CONCLUSION

103. The Claimant’s application set out in para 10(v) above succeeds, and his other applications are dismissed. The Defendants’ application to amend the Defence is allowed.