Neutral Citation Number: [2009] EWHC 2863 (QB)

Case No: IHJ/09/0886

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 November 2009

Before :

SIR CHARLES GRAY
Sitting as a High Court Judge

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Between :

Dr. Sarah Thornton	**Claimant**
- and -	
Telegraph Media Group Limited	**Defendant**

- -
- -

Mr Justin Rushbrooke (instructed by **Taylor Hampton**) for the **Claimant**
Mr David Price (instructed by **David Price Solicitors and Advocates**) for the **Defendant**

Hearing dates: 20th October 2009

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Judgment

SIR CHARLES GRAY

The issues on the application

1. The issues which I have to decide on arise in the context of an application by the Claimant to strike out the defence of fair comment in a libel action brought by her against the publishers of a review of a book written by the Claimant. The question raised by the application is whether there is a real prospect of success for the defence of fair comment in circumstances where, according to the argument of the Claimant, firstly, the review contains statements of fact rather than comment and, secondly, those facts are said to constitute misstatements.

The Parties

2. The Claimant, Dr. Sarah Thornton, is the author of a book entitled *Seven Days in the Art World* ("the Book"). According to the flyleaf of the Book it consists of a series of seven fly-on-the-wall narratives based on seven different days covering events in the contemporary art world.

3. The Defendant is Telegraph Media Group Limited, which publishes *The Daily Telegraph* both in printed form and on its dedicated website.

The Book Review

4. The book review with which this Action is concerned was published in the issue of *The Daily Telegraph* for 1 November 2008. It appeared on page 28 of the Saturday edition of the newspaper. The review remained on the *Telegraph* website from the beginning of November 2008 until around late March or early April 2009. The author of the review was Ms Lynn Barber, who is herself an author. She has not been joined as a Defendant in the action.

5. Dr. Thornton complains of only part of the article. It is, however, necessary, for reasons which will become apparent, to set out the whole of the review. I have italicised those parts of the review which are the subject of Dr. Thornton's complaint.

> "**Seven Days in the Art World by Sarah Thornton: review**
>
> **Confronted with reflexive ethnographic research on the art market, Lynn Barber isn't buying**
>
> Sarah Thornton is a decorative Canadian with a BA in art history and a PhD in sociology and a seemingly limitless capacity to write pompous nonsense. She describes her book as a piece of "ethnographic research", which she defines as "a genre of writing with roots in anthropology that aims to generate holistic descriptions of social and cultural worlds". *She also claims that she practices "reflexive ethnography", which means that her interviewees have the right to read what she says about them and alter it. In journalism we call this "copy approval" and disapprove.*

Thornton claims her book is based on hour-long interviews with more than 250 people. I would have taken this on trust, except that my eye flicked down the list of her 250 interviewees and practically fell out of its socket when it hit the name Lynn Barber. I gave her an interview? Surely I would have noticed? I remember that she asked to talk to me, but I said I had already published an account of my experiences as a Turner Prize juror which she was welcome to quote, but I didn't want to add to. And although she lists all four Turner jurors from my year (2006) among her interviewees, it is obvious from the text that only one gave her any inside information, and a very partial account at that. He seems to have forgotten one particularly sensitive encounter he had with Sir Nick Serota at a judging meeting.

Thornton's seven "days" are seven chapters, some of which feel like years, set in different areas of the art world: a Christie's auction, an art criticism seminar at the California Institute of the Arts, Basel Art Fair, the Turner Prize, Artforum magazine, a visit to Takashi Murakami's studios and the 2007 Venice Biennale. The chapters on the CalArts seminar and Artforum are unreadably dull – though I was amused to learn that Artforum went through a period when it suffered from "the wrong kind or unreadability". Nowadays it seems to have attained the right kind or unreadability.

Her account of a 2004 Christie's auction in New York contains some interesting snippets about what sells best. Paintings sell better than sculpture because they are portable and "easily domesticated", though they have to be small enough to fit into the average Park Avenue lift. Blue and red paintings sell better than brown ones, cheerful ones better than glum ones; female nudes better than males. Collectors dislike anything that has to be plugged in and presumably flee in horror at the idea of something like Sarah Lucas's Two Fried Eggs and a Kebab, which requires new fried eggs every day. Collectors, it seems, are quite a timid bunch.

But the whole business of auctioning contemporary art has been blown apart by the recent Damien Hirst sale. In 2004, the period Thornton writes about, there was still an unwritten rule that auction houses did not encroach on galleries by selling new work, but the time gap between sale and resale was narrowing. Hirst first cut out the middle man by selling the contents of his Pharmacy restaurant at auction in 2004, but it was still second-hand work. Recently, he made the final jump to selling new work, and we are still waiting to see what the effect will be on dealers.

It is typical of Thornton's approach that she talks to auctioneers, collectors, art historians, academics and critics

before she finally gets round to meeting an artist. She chooses the prolific and fashionable Takashi Murakami and visits his various studies in New York and Japan, where she finds teams of assistants literally painting by numbers, having started the day with ten minutes of communal callisthenics. Murakami is, predictably, a fan of Andy Warhol and confides, "Warhol's genius was his discovery of easy painting". But, in business terms, Warhol was an amateur compared to Murakami. Having redesigned Louis Vuitton's trademark monogram print in multi-colours, Murakami now insists on having a Louis Vuitton boutique in his shows. He calls it "my urinal" which, Marc Jacobs of Louis Vuitton hastens to explain, does not mean that he p---es on it but is referring to Marcel Duchamp's iconic work.

I wouldn't be sure. The art world is full of p--- and Thornton seems prepared to swallow any amount of it. Equipped with reams of earnest questions, she lacks the basic journalistic tool of scepticism, and seems to accept whatever anyone tells her at face value. She also suffers from that odd New York Times tic of believing that all facts, any facts, are equally important – thus, when interviewing an art consultant called Philippe Ségalot, she solemnly records "We both decide on fish carpaccio and sparkling water." Is this relevant? Would we read his remarks differently if he'd chosen, say, prosciutto and Evian? In journalism we call this "padding" – heaven knows what you call it in ethnographic research."

6. The article was accompanied by a photograph. No complaint is made of either the photograph or the caption.

Dr. Thornton's Complaint

7. The defamatory meanings attributed on behalf of Dr. Thornton to the article are three in number:

   i) That [she] had dishonestly claimed to have carried out an hour-long interview with Lynn Barber as part of her research for *Seven Days in the Art World*, when the true position was that she had not interviewed Ms Barber at all, and had in fact been refused an interview.

   ii) That [she] had given her interviewees the right to read what she proposed to say about them and alter it, a highly reprehensible practice which, in the world of journalism was known as "copy approval".

   iii) That [she] had thereby shown herself to be untrustworthy and fatally lacking in integrity and credibility as a researcher and writer.

8. Dr. Thornton frames her claim not only in libel but also in malicious falsehood. Detailed particulars both of falsity and of malice are set out in the Particulars of Claim. Nothing, however, turns on the claim in malicious falsehood. I shall therefore

say no more about it. Both compensatory and aggravated damages are claimed but nothing turns on them for present purposes.

The *Telegraph* defence

8. The defence of fair comment is pleaded at paragraph 7:

> "Further or alternatively, the passage of the article relating to reflexive ethnography, in so far as it is defamatory of the Claimant, is comment. The comment is based on true or sufficiently true facts. The comment is one that an honest person could hold on the basis of the facts. The subject matter of the comment is a matter of public interest, namely the Book, reflexive ethnography and/or the Claimant's practice of reflexive ethnography.
>
> The meaning sought to be defended as comment
>
> 7.1 The Claimant's practice of reflexive ethnography is comparable to copy approval in journalism which is disapproved of by journalists."

9. There follow the facts on which the Defendant asserts the comment was based. Those facts consist for the most part of quotations from passages in the Book from p.255-257. They include an account by Dr. Thornton of the practice called "reflexive ethnography" and of the manner in which she uses that technique in her writing. These particulars also include words from p.xvii of the Introduction: "Each story is based on an average of 30-40 in-depth interviews and many hours of behind-the-scenes 'participant observation'. Although usually described as 'fly-on-the-wall', a more accurate metaphor for this kind of research is 'cat on the prowl', for a good participant observer is more like a stray cat. She is curious and interactive but not threatening. Occasionally intrusive, but easily ignored". It is further pleaded that the contents of the book in general appeared to Ms Barber to suggest that Dr. Thornton was keen to establish friendly relations with her interviewees and was willing to accept what she was told at face value.

10. Reliance is placed on Section 6 of the Defamation Act, 1952, to which I will return.

11. As to the three defamatory meanings relied on by Dr. Thornton (which I have set out at paragraph 7 above), the first is admitted. In relation to that meaning the Defendant made a qualified offer of amends pursuant to Section 2 of the Defamation Act, 1996. That offer has not been accepted but Dr. Thornton has given notice of her intention to rely on Section 4(3) of the 1996 Act and that she will contend that the Defendant knew or had reason to believe that in the first meaning complained of the review was false. It follows that the present application relates only to the second and third defamatory meanings set out at paragraph 7 above.

12. I should for completeness add that the allegation of malice made against the Defendant is denied. If it survives the present application, the defence of fair comment will, of course, fail if Dr. Thornton were able to establish malice on the part of the Defendant itself or in the alternative she were able to establish that the

newspaper is infected with any malice which may be established as against Ms Barber.

The questions which arise on the present application

13. The two questions which arise on the present application are these:

    i) Do the words selected for complaint by Dr. Thornton include any statement of fact, as opposed to comment, such as would disentitle the Defendant from relying on the defence of fair comment?

    ii) Is it fatal to the success of the defence of fair comment if the facts set out within the text of the review, or some of them, are materially misstated?

14. As I have already said, these questions arise in the context of an application to strike out the defence of fair comment. Moreover the action is likely to be heard with a jury. As I understood him, Mr Justin Rushbrooke, who appeared on behalf of Dr. Thornton, accepts that the defence of fair comment will only be struck out if a negative answer by the jury to either of the two questions set out above would be perverse. As Mr David Price submitted on behalf of the Defendant, the hurdle confronting Dr. Thornton is a high one.

The applicable legal principles

15. The defence of fair comment on a matter of public interest has not had an altogether easy ride over the years. Both of the questions which I have set out in the preceding paragraph have been the subject of extensive discussion in the authorities. Before I come to them, however, I should take as my starting point the authoritative judicial summary of the law on this topic which is to be found in the judgment of Lord Nicholls, sitting in the Court of Appeal of Hong Kong, in *Tse Wai Chun Paul v Albert Cheng* [2001] EMLR 777 at paragraphs 16-21:

> "*Fair comment: the objective limits*
>
> 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.
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> 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.
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> 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."

16. Later at paragraph 41 of his judgment Lord Nicholls says this:

> "41. the purpose for which the defence of fair comment exists is to facilitate freedom of expression by commenting on 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."

17. One of the authorities which Lord Nicholls no doubt had in mind when he referred in paragraph 17 of his judgment to the learning which has grown up around the distinction between fact and comment was no doubt *Kemsley v Foot* [1952] AC 345 Lord Kemsley brought an action for damages for libel in respect of an article entitled "Lower than Kemsley". When it reached the House of Lords, the leading speech was given by Lord Porter. He said at pp356-357:

> "The question, therefore, in all cases is whether there is a sufficient sub-stratum 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 p.166. "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 his 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".

18. It is worth noting that in *Kemsley v Foot* Birkett LJ had said in the Court of Appeal:

> "a defamatory statement is made about a private individual who is quite unknown to the general public, and he has never taken part in public affairs, and the statement takes the form of a comment only and is capable of being construed as comment and no facts of any kind are given, while it is conceivable that the comment may be made on a matter of public interest, nevertheless the defence of fair comment might not be open to a Defendant in that case. It is almost certain that a naked comment of that kind in those circumstances would be decided to be a question of fact and could be justified as such if that

> defence were pleaded. But if the matter is before the public, as in the case of a book, a play, a film, or a newspaper, then I think different considerations apply. Comment may then be made without setting out the facts on which the comment is based if the subject matter of the comment is plainly stated. This seems to me to accord with good sense and the true public interest."

19. After *Kemsley v Foot* was decided in the House of Lords, Section 6 of the Defamation Act 1952 was enacted in the following terms:

> "In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expressions 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."

It is evident that the purpose of this provision was to widen the ambit of the defence.

20. I can now go straight to the recent decision in *Lowe v Associated Newspapers Limited* [2007] QB 580. In that case Eady J conducted a detailed examination of the authorities from *Kemsley* onwards. At paragraph 42 of his judgment he said:

> "I am also required by the Human Rights Act, 1998 to take into account Article 10 and the jurisprudence associated with it. Having regard to those considerations, I am left in no doubt that the right to comment freely on matters of public interest would be far too circumscribed if it were a necessary ingredient of the English common law's defence of fair comment that the commentator should be confined to pleading facts stated in the words complained of. It would be more consonant with Article 10, and the rights of a free press in a democratic society, if the restriction were expressed in terms of the "subject matter" as did Lord Porter at [1952] AC 345. He did so not only at p.358… but also at p357 where he formulated the nature of the inquiry as being: "is there subject matter indicated with sufficient clarity to justify comment being made". So too did Birkett LJ in the Court of Appeal. I am therefore inclined to adopt his statement of the law in these terms (as cited above); namely that comment may be made, if the matter is already before the public, without setting out the facts on which the comment is based – provided the subject matter of the comment is plainly stated."

21. Eady J concluded at paragraph 55 of *Lowe* that the two particular principles highlighted in *Kemsley* are:

i) “If facts are stated in words complained of and are wrongly stated, this will undermine the defence of fair comment;

ii) A defendant is not precluded from pleading extrinsic facts in support of a plea of fair comment.”

22. Although it was not referred to by Eady J in *Lowe*, I should refer to the earlier case of *Associated Newspapers Ltd v Burstein* [2007] EMLR 21 because that case was concerned with an allegedly defamatory review of an opera published by the *Evening Standard*. Keene LJ observed at paragraph 23:

> “Moreover, the words complained of were contained in a review by a critic, as any reader would appreciate, and which the reader will expect contain a subjective commentary by the critic. The words also embody, quite obviously, powerful elements of value judgments – the word “heroic” in itself does that… such value judgments are not something which a writer should be required to prove are objectively valid, as the Strasbourg Court has pointed out when dealing with the Article 10 right in *Nilsen v Norway* [2000] 30 EHRR 878 at [50].”

23. I should refer to a decision of Tugendhat J. in *Rath v Guardian News and Media Ltd.* [2008] EWHC 398 (QB). The Claimant in that case sought summary judgment on the issue of fair comment which was pleaded by the Defendant in the following terms:

> “the Claimant’s conduct in relation to the false claims and criticisms has contributed in large part to a madness which has let perhaps hundreds of thousands of people die unnecessarily.”

24. Having reviewed a number of authorities, Tugendhat J recited at paragraphs 61-64 of his judgment the reasons adduced on behalf of the Defendant for saying that the words were clearly comment. The first of those reasons was that the nature of the column supported that interpretation: it was not a news column but an opinion piece. At paragraph 65 of his judgment, the judge accepted that:

> “The Defendants have a real prospect of persuading the court that the statement (that the Claimant had contributed to letting people die unnecessarily) is something which the reasonable reader can recognise as comment in the sense that the statement is, or can reasonably be inferred to be, a deduction, inference, conclusion, criticism, remark or observation.”

25. At paragraph 81 of his judgment Tugendhat J observed that the decision in *Kemsley* had been “overtaken” by section 6 of the Defamation Act (quoted at paragraph 19 above). Accordingly at paragraph 88 of his judgment, the judge said that he could not conclude that the defendants had no real prospect of proving any of the statements of fact upon which they relied. He held that in those circumstances he could not conclude either that the defendants had no real prospect of succeeding in their plea in reliance upon section 6.

26. Before leaving the authorities, I should record the fact that I was also referred in the course of the hearing to a decision of the Court of Appeal in *Joseph & Ors v Spiller and Anr* [2009] EWCA Civ 1075. Judgment in that case was handed down after oral argument in the present case was finished. Each of the parties submitted a note in relation to that case. Pill LJ, with whom Hooper LJ and Wilson LJ agreed, held that the judge below had been wrong to rule that the words complained of were incapable of being comment. The defence of fair comment was nonetheless struck out by the Court of Appeal on other grounds.

27. The view taken by the Court of Appeal was that the judge had been wrong to find that the allegations that the claimants took a generally cavalier attitude to contractual obligations and were not to be trusted in business dealings were factual in character rather than an expression of opinions. It appears to me to have been essentially a decision on the facts of the case. I did not find it to be of general assistance as to the principles to be applied on the present application.

<u>Submissions on the first question</u>

28. I am now in a position to address the first of the two questions which I have identified at paragraph 13(i) above as arising for decision on the present application. The first question is whether the words complained of include any statements of fact, as opposed to comment, such as would disentitle the defendant from relying on the defence of fair comment.

29. On any view Ms Barber's review consists overwhelmingly of a subjective commentary by her on a recently published book. As Keene LJ said in *Associated Newspapers v Burstein,* quoted at paragraph 22 above, this is what any reader would expect of a review. As it so happens, her commentary is critical and in some passages extremely so. I refer by way of example to the last sentence of the review which I have set out earlier at paragraph 5.

30. Mr Rushbrooke argues that it is clear beyond argument that the words in the review "…her interviewees have the right to read what she says about them and alter it…" are a statement of fact by Ms Barber and not a comment by her. That is reflected in the second meaning attributed to those words in paragraph 14.2 of the Particulars of Claim and quoted in paragraph 7(ii) above. It is Dr. Thornton's case that not only do her interviewees not have "the right" to read in advance of publication what she says about them but also that such interviewees do not have any "right" to "alter" her drafts. Mr Rushbrooke maintains that this should have been clear to Ms Barber, not least from page 257 of the Book where Dr. Thornton writes:

> "…also, as part of a practice called "reflexive ethnography", the people who were quoted in a particular chapter had the opportunity to read what I wrote. Their feedback often led to a richer and more accurate of the art world, and I am exceptionally appreciative of those who took this extra time".

31. In support of his contention Mr Rushbrooke referred to the dictum of Lord Nicholls in the *Cheng* case at paragraph 17 (quoted at paragraph 16 of this judgment). He relies also on the speech of Lord Porter in *Kemsley* (see paragraph 18 above).

32. In the light of those authorities the contention on behalf of Dr. Thornton is that in her review Ms Barber is informing readers of her review as a matter of fact that Dr. Thornton's methodology involves giving interviewees the right to read what she says about them and the right to alter it. That, says Mr Rushbrooke, is a clear statement of fact.

33. On behalf of the Defendant Mr Price emphasises the extreme importance of context. He maintains that a review of a literary work is classic fair comment territory. He relies on the dictum quoted at paragraph 22 above in *Associated Newspapers v Burstein*. Mr Price contends that the defence of fair comment is not limited to pure value judgments which are incapable of proof. The defence has at least the potential to cover factual inferences.

<u>Conclusion on the first question</u>

34. It is by no means always easy to differentiate fact from comment. Mr Price is of course right to emphasise the importance of context. What might otherwise appear to be a statement or at least an inference of fact may be seen to be a factual inference when account is taken of admissible surrounding circumstances. Plainly, as Mr Rushbrooke concedes, the text of Ms Barber's review read as a whole is relevant contextual material. Her review is both subjective and in parts hostile and even waspish. Her observations about the book would in my opinion be perceived by readers of the review to reflect her critical opinion of Dr. Thornton's methodology.

35. That brings me to the passage selected for complaint which is italicised in paragraph 5 above. I note in passing that earlier in the same paragraph Ms Barber had referred to Dr. Thornton's "seemingly limitless capacity to write pompous nonsense". Readers might reasonably take that to be a comment by Ms Barber about Dr. Thornton's description of her own book as "ethnographic research". Ms Barber then turns in her review to Dr. Thornton's practice of "reflexive ethnography". Ms Barber writes: "….which means that her interviewees have the right to read what she says about them and alter it". In my judgment a reader might understand from those words, without being guilty of perversity, that Ms Barber is giving her subjective interpretation of what she understands in practice takes place between Dr. Thornton and her interviewees. A reader might reasonably understand the words "which means" to be Ms Barber's "take" or comment upon Dr. Thornton's methodology. There then follow words with an expression of disapproval by Ms Barber, which as I understand it is accepted to be comment.

36. I have in the circumstances come to the conclusion that it would be wrong to conclude that there is no realistic prospect of the defendant being able to establish that the words in question represent Ms Barber's comment on the methodology of Dr. Thornton. To put it another way, I cannot say that a finding by the jury that the words constitute comment would be perverse. Accordingly I answer the first question in favour of the defendant.

<u>Submissions on the second question</u>

37. As set out in paragraph 13 above, the second question is whether it is fatal to the success of the defence of fair comment that certain facts are set out within the text of the review which are materially wrong or misstated. I should make clear that this

question is premised on the words complained of being comment or arguably so (as I have found) and upon the existence within the review of a number of statements of fact (which is common ground).

38. The broad thrust of Mr Rushbrooke's submission on this question is that, even assuming, contrary to his argument, that the passage in question is to be regarded as comment, there is no real prospect of the defence of fair comment succeeding since the reviewer has got a basic fact wrong.

39. In this connection Mr Rushbrooke relied on the safeguards to which Lord Nicholls referred in *Cheng* at paragraph 41; and notably the requirement that the comment be based on facts which are true. That according to Lord Nicholls, is one of the "outer limits" of the defence of fair comment (see paragraph 21 of his speech). Mr Rushbrooke invites me to answer in the negative the question posed by Lord Porter in *Kemsley*, namely whether there is a sufficient substratum of facts stated or indicated in the words which are the subject matter of the action.

40. The statements in Ms Barber's review, whether they be properly categorised as statements of fact (as Mr Rushbrooke argued) or as comments (as I have found them arguably to be), are that Dr. Thornton gives interviewees the right to see her copy in advance and the right to alter it. According to Mr Rushbrooke, there is no evidence whatever before the court which could even arguably establish the truth of those statements. There is no evidence to controvert the assertion made by Dr. Thornton at page 257 of the Book which I have quoted in paragraph 30 above. Mr Rushbrooke's case is that Ms Barber has simply misstated the facts. Accordingly he submits that the words complained of are not susceptible, even arguably, of the defence of fair comment. A finding in favour of the Defendant on the issue of fair comment would be perverse.

41. As I have stated at paragraph 9 of this judgment, the particulars of the facts on which, according to the Defendant's case, Ms Barber's comment was based include passages in Dr. Thornton's Book from pages 255-257 under the heading "acknowledgments". At page 257 Dr. Thornton expresses her indebtedness to her interviewees for being so generous with their thoughts. Dr. Thornton writes that:

> "as part of a practice called "reflexive ethnography", the people who were quoted in a particular chapter had the opportunity to read what I wrote. Their feedback often led to a richer and more accurate account of their art world and I'm exceptionally appreciative of those who took this extra time".

Those facts are not reported in terms in the review by Ms Barber but I accept that Mr Price is entitled to rely upon extrinsic facts: see the dicta by Birkett LJ in *Kemsley* and by Eady J in *Lowe* cited at paragraphs 19 and 21 above.

42. Mr Price argued that, since phrases such as "reflexive ethnography" are not entirely clear, a wider range of interpretation should be accorded to the reviewer. He contends that Dr. Thornton is not justified in seeking to draw a rigid distinction between the grant of rights, strictly so called, and what in practice happens. He asserts that it is Ms Barber's opinion, based on years of journalistic experience, that such a distinction is very easily blurred, particularly where the author is keen to ingratiate herself with the interviewee. That appeared to Ms Barber to be what happened in the present case.

Mr Price submits that it was permissible for Ms Barber to draw the inference that the reflexive ethnography practised by Dr. Thornton amounted in practice to the grant to interviewees of a right to alter. Even if there was an element of exaggeration or over-simplification on the part of Ms Barber in her review, it would be wrong on that account to deprive the entitlement of the Defendant to the defence of fair comment under domestic law and to defend what Ms Barber wrote as being a value judgment under Strasbourg jurisprudence.

Conclusion on the second question

43. In appropriate circumstances the publisher of a review of a literary work or dramatic or artistic work will be held to have complied with the requirement that words should indicate, at least in general terms, the factual basis for the comment if the reviewer identifies for the benefit of his or her readers the book or play or film or picture as the case may be: see the dictum of Birkett LJ in *Kemsley* which I have quoted above.

44. In such a case the defendant reviewer may freely comment on the dramatic quality of the play or film or the literary or artistic merits or demerits of the book or picture. That appears to me to be clear from such authorities as *Cheng* (per Lord Nicholls at paragraph 19 and 41), *Kemsley* (per Lord Porter at page 356), *Burstein* (per Keene LJ at paragraph 23) and *Lowe* (per Eady J at paragraph 42). The reader of the review can then, if so inclined, buy the book and read it or go to see the play or film or see the picture at an exhibition or gallery. The reader of the review is then in a position to make up his or her own mind whether the comment is a fair one.

45. The problem, as I see it, is this: Ms Barber did of course identify Dr. Thornton's book as the subject of her review. Readers of the review in the *Telegraph* could buy the book and read it. No doubt some readers would have done so. But many readers of the *Telegraph* and visitors to its website would not have done so. Even assuming that these readers were able to digest and absorb the significance of what Dr. Thornton states at page 357 of the review, how would they be able to judge whether Ms Barber's claim about Dr. Thornton's methodology is a fair one? If the review had praised or criticised the quality of Dr. Thornton's writing, such an assessment could be judged by readers to be fair or unfair. But where the review makes assertions about such matters as the way a writer deals with interview material, the position appears to me to be very different.

46. Moreover those readers of the review who did read the Book - and who got as far as page 357 - would see Dr. Thornton's claim that her *modus operandi* in writing the Book had been to give the interviewees the opportunity to read what she wrote and would see also that Dr. Thornton says that she appreciated their feedback because it led to a richer and more accurate account of their art world. But how would that enable such readers to determine whether Ms Barber had got her facts wrong in her review? Did Dr. Thornton give all interviewees that "opportunity"? If interviewees took advantage of that opportunity, what changes, if any, were made to Dr. Thornton's written account of the interviews?

47. Accordingly such readers of the review as did consult the Book would be none the wiser. How could they tell from reading the Book whether Ms Barber had materially misstated the facts when she wrote in the *Telegraph* review that interviewees did have the right to read what Dr. Thornton had written and the right to make alterations to it?

It appears to me that, in order for the defence of fair comment to stand, it was incumbent on Ms Barber to indicate in her review for the benefit of readers, at least in general terms, how Dr. Thornton claimed to deal with interview material incorporated in the Book and why Ms Barber was sceptical about her claim. Having done so, Ms Barber would be free to comment on the validity of Dr. Thornton's practice. It appears to me that the review, as it stands, significantly misdescribes what Dr. Thornton says in her Book about the way she deals with interviewees.

48. I have quoted at paragraph 19 above section 6 of the Defamation Act, 1952. I have already held that a jury could without perversity find that Ms Barber's statement about the methodology of Dr. Thornton constitutes comment. But if the Defendant is unable to prove the truth of Ms Barber's statement about Dr. Thornton's methodology, there is no realistic possibility of section 6 enabling the defence of fair comment to succeed.

49. I remind myself that this is an application to strike out, so that Mr Rushbrooke must satisfy me that there is no realistic prospect of the defence of fair comment succeeding. Moreover, since the trial is due to take place with a jury, I have to be satisfied that it would be perverse for the jury to conclude that the defence of fair comment succeeds.

50. Dr. Thornton has, as she is perfectly entitled to do, selected for complaint a relatively small portion of the review. Of course it is open to Ms Barber to rely in support of her defence of fair comment on other parts of her own review which are not the subject of complaint by Dr. Thornton, if and to the extent that those other parts of the review cast light or bear on the significance of those parts which are complained of. It seems to me to be clear, however, that Ms Barber's assertion about Dr. Thornton's methodology when dealing with interviewees is a free-standing assertion. It follows that the Defendant cannot derive assistance from other passages in the review.

51. In my judgment the passage from the *Telegraph* review selected for complaint by Dr. Thornton does contain a clear and material misstatement by Ms Barber. A finding to the contrary by a jury would in my view be perverse. For that reason I see no real prospect of the defence of fair comment succeeding. It must follow that the defence of fair comment be struck out.