Neutral Citation Number: [2008] EWCA Civ 834

Case No: A2/2008/0010, A2/2007/2805

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
The Hon Mr Justice Gray and the Hon Mr Justice Eady
[2007] EWHC 2856, 2860, and 3062 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2008

Before :

SIR ANTHONY CLARKE MR
LORD JUSTICE MAY
and
LORD JUSTICE WILSON

- -

Between :

FRANK WARREN	**Claimant/ Respondent**
- and -	
THE RANDOM HOUSE GROUP LIMITED	**Defendant/ Appellant**

- -
- -

Mr Desmond Browne QC and Mr Matthew Nicklin (instructed by Simons Muirhead & Burton) for the Appellant
Ms Adrienne Page QC & Mr William Bennett (instructed by **Carter-Ruck**) for the Respondent

Hearing dates: 9, 10 & 11 June 2008

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Approved Judgment

Sir Anthony Clarke MR:

This is the judgment of the court to which each member of the court has made a substantial contribution.

Introduction

1. The appellant is a well known publisher and the respondent is a well known boxing promoter. These appeals are interlocutory appeals against two decisions of Gray J and two decisions of Eady J respectively in an action in which the respondent claims damages for libel against the appellant. The respondent complains about three passages in an autobiographical book published by the appellant entitled 'Ricky Hatton: The Hitman, My Story'. Ricky Hatton is a well known boxer. The book was partly ghost written by Niall Hickman. The respondent has not joined Mr Hatton or Mr Niall as a defendant and the appellant has not joined either of them as a third party.

2. The three passages are in different parts of the book. The first appeal relates only to the first of those passages, which contains what Gray J described as 'the Phillips allegation'. He described the other two passages as respectively containing 'the Vilches allegation', which concerned a boxing match between Mr Hatton and Mr Vilches, and 'the lying allegation', which involved what on the respondent's case were lies he is alleged to have told in public about Mr Hatton. In the pleadings as they stand the appellant pleads justification in respect of both the Vilches allegation and the lying allegation.

3. By an order made on 5 December 2007 Gray J refused the appellant's application to amend the defence so as to plead justification of the Phillips allegation. The first ground of appeal in the first appeal ('the Gray appeal') is a challenge to that refusal. After the judge had indicated his intention to refuse that application, the appellant applied to amend the defence to plead what are known as *Burstein* particulars, after the decision of this court in *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579. The judge granted the application in part but refused it in part. The second ground of appeal challenges that refusal. The judge gave his reasons for those decisions in two judgments handed down on 5 December 2007 ('Gray I' and 'Gray II' respectively).

4. The second appeal ('the Eady appeal') challenges two parts of an order made by Eady J on 20 December 2007. In one he refused to order disclosure of two contracts for reasons which he had given *ex tempore* on 13 December 2007 and in the other he struck out part of the plea of justification of the lying allegation.

5. Sir Henry Brooke granted permission to appeal in both appeals, albeit (as he put it) with the greatest reluctance. The first ground in the Gray appeal raises questions of some importance as to the circumstances in which a party can resile from an accepted offer to make amends which was made under section 2 of the Defamation Act 1996 ('the 1996 Act'). The second ground only arises if the first ground fails. We will therefore consider them in that order. We will then consider the first ground in the Eady appeal, which relates to disclosure, because it too relates to the Phillips allegation. Finally, we will consider the second ground in the Eady appeal, which relates to the plea of justification of the lying allegation.

The Phillips allegation

6. The Phillips allegation arises from a passage on pages 185 to 187 of the book which is too long to set out in full here. In essence it describes an incident which Mr Hatton describes as "the beginning of the end for Frank Warren and Ricky Hatton". Mr Hatton describes how, before a fight with Vince Phillips, Mr Phillips had been "distraught", "he was shouting out that people were trying to rip him off and that he should be getting a lot more money". The book describes Mr Phillips' purse as a "low payment" and Mr Hatton says that he had been told by Mr Paul Speak that "before the fight, Vince had been told the purse was so low because there was no interest from American TV". Mr Phillips is then said to have gone "bonkers" when he arrived at the arena and "found out that Showtime were showing [the] fight". The defamatory meaning attributed to the passage complained of in the particulars of claim is as follows:

> "In their natural and ordinary meaning the words complained of above meant and were understood to mean that the Claimant had dishonestly conned the boxer Vince Phillips into accepting a pitiful fee for putting his life at risk by fighting Ricky Hatton by lying to him that this was all that could be paid because American TV did not want to televise the fight".

We should record that the contract between Mr Phillips and the respondent that Mr Phillips should fight Mr Hatton for a fee of US$ 50,000 was dated 25 January 2003 and that the fight took place at MEN Arena in Manchester in England on 5 April 2003.

Ground 1 of the Gray appeal: the accepted offer of amends

7. In order to put this issue in context we must explain the nature of the respondent's allegation, the offer of amends, the defence as originally pleaded, the acceptance of the offer of amends and the circumstances in which the appellant sought (and seeks now) to plead justification of the Phillips allegation. In short, the appellant wishes to rely upon the evidence of Mr Russell Sauer, a US attorney at Latham & Watkins LLP, Los Angeles, which is contained in a statement made on 1 November 2007, long after the date of the offer, namely 7 March 2007 and the date of acceptance of the offer, namely 18 April 2007, and after the date the terms of the apology were agreed, namely 1 August 2007, and the date the agreed Statement in Open Court was read, namely 4 October 2007. However, before considering the facts in more detail and, in order to ensure that we only focus on what is relevant, we consider first the scheme of the relevant part of the 1996 Act and the principles applicable to issues of the kind that arise here.

Offers of amends: the principles

8. At [10] Gray J ('the judge') described the issue of principle as being whether and, if so, in what circumstances it is open to a defendant in a libel action, whose offer of amends in respect of a defamatory imputation has been accepted by the claimant, to withdraw that offer of amends and in its place to advance a plea of justification in respect of that imputation. As the judge observed at [11], the resolution of that issue turns largely on the provisions contained in sections 2 to 4 of the 1996 Act. We note

in passing that Eady J played an important part in the formation of the offer of amends scheme and its introduction into the 1996 Act. The appellant invited him to recuse himself from this part of the case and he decided to do so.

9. Sections 2 to 4, which came into force in 2000, provide, so far as material, as follows:

> "**2. Offer to make amends**
>
> (1) A person who has published a statement alleged to be defamatory of another may offer to make amends under this section.
>
> (2) The offer may be in relation to the statement generally or in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys ("a qualified offer").
>
> (3) An offer to make amends -
>
> (a) must be in writing,
>
> (b) must be expressed to be an offer to make amends under section 2 of the Defamation Act 1996, and
>
> (c) must state whether it is a qualified offer and, if so, set out the defamatory meaning in relation to which it is made.
>
> (4) An offer to make amends under this section is an offer
>
> (a) to make a suitable correction of the statement complained of and a sufficient apology to the aggrieved party,
>
> (b) to publish the correction and apology in a manner that is reasonable and practicable in the circumstances, and
>
> (c) to pay to the aggrieved party such compensation (if any), and such costs, as may be agreed or determined to be payable.
>
> ….
>
> (5) An offer to make amends under this section may not be made by a person after serving a defence in defamation proceedings brought against him by the aggrieved party in respect of the publication in question.
>
> (6) An offer to make amends under this section may be withdrawn before it is accepted; and a renewal of an offer which has been withdrawn shall be treated as a new offer.

3. Accepting an offer to make amends

(1) If an offer to make amends under section 2 is accepted by the aggrieved party, the following provisions apply.

(2) The party accepting the offer may not bring or continue defamation proceedings in respect of the publication concerned against the person making the offer, but he is entitled to enforce the offer to make amends, as follows.

(3) If the parties agree on the steps to be taken in fulfilment of the offer, the aggrieved party may apply to the court for an order that the other party fulfil his offer by taking the steps agreed.

(4) If the parties do not agree on the steps to be taken by way of correction, apology and publication, the party who made the offer may take such steps as he thinks appropriate, and may in particular –

(a) make the correction and apology by a statement in open court in terms approved by the court, and

(b) give an undertaking to the court as to the manner of their publication.

(5) If the parties do not agree on the amount to be paid by way of compensation, it shall be determined by the court on the same principles as damages in defamation proceedings.

The court shall take account of any steps taken in fulfilment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances, and may reduce or increase the amount of compensation accordingly.

(6) If the parties do not agree on the amount to be paid by way of costs, it shall be determined by the court on the same principles as costs awarded in court proceedings.

…

(10) Proceedings under this section shall be heard and determined without a jury.

4. Failure to accept offer to make amends

(1) If an offer to make amends under section 2, duly made and not withdrawn, is not accepted by the aggrieved party, the following provisions apply.

> (2) The fact that the offer was made is a defence (subject to subsection (3)) to defamation proceedings in respect of the publication in question by that party against the person making the offer.
>
> …
>
> (3) There is no such defence if the person by whom the offer was made knew or had reason to believe that the statement complained of -
>
> (a) referred to the aggrieved party or was likely to be understood as referring to him, and
>
> (b) was both false and defamatory of that party;
>
> ….
>
> (4) The person who made the offer need not rely on it by way of defence, but if he does he may not rely on any other defence.
>
> ….
>
> (5) The offer may be relied on in mitigation of damages whether or not it was relied on as a defence."

10. As appears below, on the facts of the instant case, an offer of amends was made before service of the defence and relied upon in the defence. It was accepted in the reply. The terms of an apology were subsequently agreed between the parties and the apology was made in open court in the agreed terms by counsel on behalf of the appellant.

11. It is common ground that on these facts, as applied to the appellant as offeror and to the respondent as offeree, the key elements of the scheme are these:

    i) the appellant made an offer of amends in accordance with section 2(1) to (4);

    ii) the offer was not withdrawn before it was accepted: section 2(6);

    iii) the offer was accepted by the respondent within section 3(1);

    iv) it follows that, by reason of section 3(2), the respondent could not continue with the action but was entitled to enforce the offer to make amends in the manner prescribed in the section;

    v) the parties agreed on the terms of an apology in open court, which was made, so that there was no need for either party to operate section 3(3) or (4);

    vi) since the parties did not agree on compensation, the next step was for the amount of compensation, if any, to be determined by a judge in accordance with section 3(5) and (6).

12. It is further common ground and, in any event, plain from sections 2 and 3 that the compensation and costs would not be assessed by way of continuation of the respondent's action for damages for libel, that the respondent cannot require the appellant to give an undertaking not to re-publish as a term of accepting an offer of amends and that the respondent could not claim and the court grant an injunction preventing a repetition of the libel. This is in our opinion of some importance because it follows that there is nothing in these sections which prevents the appellant from repeating the libel and then pleading justification. Moreover, if such publication were to be threatened, as we see it the general rule that the court will not restrain publication of material which the publisher intends to justify would, save perhaps in exceptional circumstances, prevent the respondent from obtaining a *quia timet* injunction.

13. It is to be noted that the scheme in sections 2 to 4 is different from the summary disposal provisions in sections 8 to 10 of the 1996 Act. The defendant thus has a series of options when faced with a claim for libel. He can of course admit liability, or seek a summary disposal under section 8 or defend the proceedings, with or without making a Part 36 offer to settle. It is however true, as Mr Desmond Browne QC submits on behalf of the appellant, that the defendant cannot plead justification unless there is material to support such a plea.

14. At [33] the judge noted that sections 2 to 4 of the 1996 Act replaced the cumbersome (and rarely used) provisions of section 4 of the Defamation Act 1952. At [34-35] he set out a passage from the report of the Neill Committee and a passage from the judgment of Eady J in *Nail v News Group Newspapers* [2004] EMLR 19 as follows:

> "34. …. the report of the Neill Committee … concluded that it seemed:
>
> > "... desirable to have some more streamlined defence available (rather than merely the opportunity of mitigating damages) in circumstances where a defendant has behaved fairly and reasonably after the tort has been committed. Putting it bluntly, there is a need to discourage that small minority of plaintiffs who wished to proceed to trial from purely financial motives, rather than being motivated by desire for vindication, especially in circumstances where the defendant is conceived to be 'over a barrel'"
>
> 35. In *Nail v News Group Newspapers* … Eady J described the offer of amends regime as being one which:
>
> > "… provides, as it was supposed to, a process of conciliation. It is fundamentally important that when an offer has been made, and accepted, any claimant knows from that point on that he has effectively "won". He is to receive compensation

> and an apology or correction. In any proceedings which have to take place to resolve outstanding issues, there is unlikely to be any attack upon his character. The very adoption of the procedure has therefore a major deflationary effect upon the appropriate level of compensation. This is for two reasons. From the defendant's perspective he is behaving reasonably. He puts his hands up, and accepts that he has to make amends for his wrong doing. As to the claimant, the stress of litigation has from that moment at least been significantly reduced.
>
> Whereas juries used to compensate for the impact of the libel "down to the moment of verdict", once an offer of amends has been accepted the impact of the libel upon the claimant's feelings will have greatly diminished and, as soon as the apology is published, it is also hoped that reputation will be to a large extent restored. It is naturally true that if a defendant or his lawyers thereafter should behave irresponsibly, or try to drag in material to "justify by the back door" that will be an aggravating factor. On the whole, however, once the defendant has decided to go down this route, it would make sense to adopt a conciliatory approach and work towards genuine compromise over matters such as the terms of an apology or the level of compensation.
>
> One of the reasons for the Neill Committee's recommendations of this new offer of amends procedure, back in July 1991, was to give media and other defendants a possible exit route when they face the uncertainty and arbitrariness of jury awards in that area".

As the judge observed, those passages in the judgment of Eady J were cited with approval by this court on appeal in *Nail*: see [2005] EMLR 12 at [19] and [20].

15. We agree with the judge (at [37]) that the provenance of sections 2 to 4 sheds valuable light on the purposes underlying them and the objectives which might be achieved by introducing a streamlined procedure. We further agree with him that those objectives include the provision of an exit route for a defendant who is unwilling or unable to advance a substantive defence in respect of the whole or a part of the claim against him and the opportunity for a claimant to achieve an economical and rapid resolution of his complaint or part of it. In the present context, it should be noted that the amount of the compensation, although assessed on the same basis as damages, will be less than the amount of damages would have been, and the scheme provides the

defendant with a new defence under section 4(2) unless the claimant can prove malice under section 4(3).

16. The question is whether there are any circumstances in which a defendant whose offer of amends has been accepted can undo the agreement evidenced by that offer and acceptance and, if there are such circumstances, what they are. One view might be that, absent fraud, there are no such circumstances because the statutory language is both clear and mandatory. Thus, upon such acceptance, section 3(2) provides that the party accepting the offer "may not … continue defamation proceedings in respect of the publication concerned" and section 3(5) provides that, if the parties do not agree on the amount to be paid by way of compensation, "it shall be determined by the court". Moreover, although section 2(6) provides that an offer of amends may be withdrawn before acceptance, there is no provision which entitles the defendant to do so (or otherwise to resile from the offer) after acceptance.

17. There is undoubted force in the view that, once the offer has been accepted, it is too late for the defendant to resile, although Ms Adrienne Page QC, in our judgment correctly, accepts that the position cannot be as stark as that. The judge held that, on acceptance, a binding and legally enforceable contract comes into existence. If that is so, it follows that either party could escape from his obligations under the contract by deploying the traditional grounds for impugning a contract, including misrepresentation and common mistake. While the statutory scheme has many of the attributes of a contract, and is certainly consensual, we are inclined to think that it is not a contract in the sense of creating contractual rights and obligations, because it contains express provisions as to what should or should not happen next and the court retains a role. Nevertheless, we have reached the conclusion that Ms Page is right to accept that, whether or not a contract properly so called comes into operation, the court would permit either party to resile from it on one of the traditional contractual grounds. It is not, however, necessary to reach a final conclusion on this point in this case because it is not suggested by Mr Browne that the appellant could rely on any such grounds on the facts of this case.

18. The question then arises whether there are any other grounds upon which the court can or might allow a defendant to resile from an accepted offer of amends. In the application notice issued by the appellant which led to Gray I, it sought permission to amend the defence to withdraw the offer of amends and to plead justification 'because permission is required under CPR Part 17.3'. Together with rule 17.1(2), rule 17.3 is of course the general power under which the court has a discretion to grant permission to amend a statement of case after service. It is clear from the application notice and the judgment that before the judge the appellant relied upon that power.

19. Both before the judge and before us Mr Browne relied upon the general principles which govern late applications for permission to amend, which of course include *Cobbold v Greenwich LBC* [1999] EWCA Civ 2074, August 1999, and *Basham v Gregory*, unreported, 21 February 1996. In *Cobbold* Peter Gibson LJ, with whom Sedley LJ agreed, after referring to the overriding objective and stressing that every case must be considered not only expeditiously but also fairly, added:

> "Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment

> can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed."

The observations of Peter Gibson LJ have been followed many times. The essential principle is sometimes encapsulated by the proposition that it is never too late to amend, provided that there is no prejudice to the other party which cannot be cured by an appropriate order for costs. Just such a principle was applied to a late amendment to plead justification in a defamation action in *Basham v Gregory*.

20. We are not persuaded that those principles apply without modification to a case in which the dispute has been settled by the acceptance of an offer of amends, especially where the agreement (whether formally a contract or not) has been part performed by the making of an agreed apology. The whole point of the statutory procedure is that the action comes to an end and is replaced by an entirely new procedure. It is thus not appropriate to apply principles which apply before the action has come to an end. As Eady J put it in the passage from *Nail* quoted above, the claimant knows that he has 'won' and the stress of litigation has been significantly reduced and, from the defendant's point of view, the adoption of the procedure will have had a major deflationary effect upon the damages.

21. We conclude that the general principles relied upon by Mr Browne apply no more to this situation than they would after acceptance of a Part 36 offer or, indeed, after a settlement agreement reached outside the CPR. There was some argument as to whether the acceptance of a Part 36 offer creates a contract: see eg *Flynn v Scougall* [2004] EWCA Civ 873, [2004] 1 WLR 3069, referred to at [28] below, cf *Scammell v Dicker* [2001] 1 WLR 631, which was about withdrawal of an offer before acceptance. Like Mr Peter Prescott QC in *Orton v Collins* [2007] EWHC 803, [2007] 1 WLR 2953, we are inclined to the view that it does not, essentially for the same reasons as in the case of an accepted offer of amends. In both cases the court retains a role. However that may be, there can in our judgment be no serious suggestion that the ordinary principles applicable to amendments of statements of case apply after a settlement as a result of an accepted Part 36 offer has taken place. They plainly do not.

22. The same is true of a case where the parties have entered into a contract outside either the offer of amends procedure or CPR Part 36. One of the threads running through Mr Browne's submissions was that, unless the appellant is permitted now to plead justification, the compensation will be assessed on a false basis. However, much the same can be said whenever, in any kind of dispute, liability is settled and damages remain to be assessed. The principles to be applied are not then the same as in the case where there has been no such settlement. That is because of the public interest in the settlement of disputes by agreement.

23. If that is so, what principles do apply? Ms Page accepts that the court must retain a residual discretion, if only because it retains a role or potential role in relation to the assessment of compensation. Our attention was drawn to the principles which have been held to apply where a party seeks to vary an undertaking which he has given to the court as a result of a settlement agreement. Ms Page submits that similar principles should be applied in a case of this kind and that, while the court retains a residual discretion, it should be exercised so as to unwind an agreement only in special, by which we think she meant exceptional, circumstances.

24. Ms Page draws our attention in particular to the decision of this court in *Di Placito v Slater* [2003] EWCA Civ 1863, [2004] 1 WLR 1605, where the court was considering the correct approach to the release or modification of an undertaking voluntarily given in the course of litigation. Potter LJ, with whom Laws and Arden LJJ agreed, said at [31] that he thought that the test of special circumstances was appropriate in order to emphasise that the discretion is not simply at large, but is to be exercised only in a situation where circumstances have subsequently arisen which, by reason of their type or gravity, were not circumstances which were intended to be covered or ought to have been foreseen at the time the undertaking was given.

25. At [32] Potter LJ identified three matters of particular importance. The first was the context. The second was whether the undertaking was given to the court independently of the agreement of the other party or as part of a collateral bargain, "as for example as part of, or pursuant to, the freely agreed compromise of an action". He added that in the former case, the court would be concerned with questions of judicial policy and the importance of ensuring that an undertaking solemnly given to the court is observed unless and until the court releases or discharges the undertaking. As to the latter case, he said this:

> "… the court will be primarily concerned with the issue of justice as between the parties and the fact that, by granting release from or modifying the injunction, the court will deprive the beneficiary of the undertaking of the benefit of a bargain voluntarily made."

26. As Potter LJ expressly recognised at [34], that is an important point. Other things being equal parties should be kept to their bargain, at any rate unless there are contractual grounds for avoiding them, which there were not here. The third matter identified by Potter LJ, at [33], was that the question is whether there were 'special circumstances' in the sense of circumstances so different from those contemplated or intended to be governed by the undertaking at the time that it was given that it is appropriate for the undertaker to be released from his promise.

27. Similar considerations appear to us to be relevant here. As we see it, those considerations emphasise the rare nature of the case in which it is likely to be appropriate to relieve a party of the consequences of his bargain if, as here, it was freely entered into. Thus, as Potter LJ recognised in his case, it is not a broad discretion. Thus it is not a discretion of the kind conferred on the court by CPR rule 14.1(5) to permit a party to amend or withdraw an admission. The critical reason for the distinction is that the parties have reached agreement with important and well-understood consequences. The offer of amends scheme has been a very valuable addition to the resolution of claims of this kind, in that it has benefits for both sides in defamation proceedings, as both the judge in this case and Eady J in *Nail* and other cases have emphasised. No judge has greater experience of this class of dispute than they have and we have concluded that the correct approach is to limit the circumstances in which the court should interfere.

28. Support for this conclusion is we think to be found in the decision of this court in *Flynn v Scougall*, where (under the then rules) a defendant applied under CPR rule 36.6(5) for permission to reduce a payment into court and, before his application was heard, the claimant gave notice under rule 36.11(1) to accept the payment. This court

held that the application did not automatically stay the claimant's notice, whether the notice was given before or after the defendant's application was made, but also held that the court had power to grant the defendant's application. In doing so, however, May LJ (with whom Potter and Brooke LJJ agreed) adopted Goddard LJ's phrase, giving the judgment of this court in the pre-CPR case of *Cumper v Pothecary* [1941] 2 KB 58 at 70, that there must be

> "a sufficient change of circumstance since the money was paid to make it just that the defendant should have an opportunity of withdrawing or reducing his payment."

29. The decision in *Flynn v Scougall* supports the existence of a discretion in a case where the court still has a role to play but, in exercising the discretion, the court asked whether the defendant should be permitted in justice to reduce the Part 36 payment "so as to deny the claimant's otherwise unfettered right to accept the full payment within the 21 days": per May LJ at [42]. The court answered that question in the negative. In principle, the present case seems to us to be significantly stronger in the claimant's favour than *Flynn v Scougall*. Although the claimant there had the unfettered right referred to by May LJ, there was no agreement between the parties. Here, by contrast, there was an agreement between the parties which entitled the respondent to have the compensation assessed by the court.

30. Both before the judge and before us Mr Browne relied upon articles 6 and 10 of the European Convention on Human Rights ('the ECHR'). He submitted that, if the appellant is not entitled to plead justification of the Phillips allegation it will be denied the right to a fair trial in accordance with article 6 and its right to freedom of expression under article 10. The judge rejected both those submissions and so do we.

Article 6

31. We entirely accept that, like any other litigant, the appellant was entitled to a fair trial under article 6 of the ECHR. That of course includes the right to a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent: see eg *De Haes and Gijsels v Belgium* (1997) 25 EHRR 1 at [53]. The appellant was not deprived of any of its rights under article 6. It had the right to defend the respondent's claim in any way it saw fit. However, instead of defending the claim on liability, it chose to make an offer of amends under section 2 of the 1996 Act. In making the decision to make such an offer, it had the benefit of legal advice from those with very extensive experience of defamation law and practice. As already indicated, the purpose of making the offer was that, if it was accepted by the claimant, the defamation action would come to an end and compensation would be paid. In this way the appellant freely entered into an agreement to bring the proceedings to an end.

32. It is true that there is some Strasbourg jurisprudence which limits the circumstances in which rights under article 6 can be exercised: see eg *Di Placito v Slater*, per Potter LJ at [51]. Thus, in order to be effective, a waiver of a right to a hearing in public must be made without undue compulsion: *Pfeifer and Plankl v Austria* (1992) 14 EHRR 692 at [37]. Moreover, it must be made in an unequivocal manner and not run counter to any important public interest: *Hakansson and Sturesson v Sweden* (1991) 13 EHRR 1 at [66]. Potter LJ also said that it is clear that arbitration proceedings agreed to by

contract or in some other voluntary manner are regarded as generally compatible with article 6 on the basis that the parties have expressly or tacitly renounced or waived their right of access to an ordinary court. See also a recent decision of this court (comprising Sir Anthony Clarke MR, Waller and Sedley LJJ) to the like effect in *Stretford v Football Association Ltd* [2007] EWCA Civ 238, [2007] 2 Lloyd's Rep 31.

33. In short the appellant had the right to a fair trial of this action in accordance with article 6 but freely chose to offer to settle the action by making an offer of amends which was duly accepted. We were referred by both parties to the decision of the Privy Council in *Millar v Dickson* [2001] UKPC D4, [2002] 1 WLR 1615, where Lord Bingham described waiver thus at [31]:

> "In most litigious situations the expression 'waiver' is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise."

We accept Mr Browne's submission that *Millar* (and other cases) established the principle that, before the court can find that a defendant has waived his Convention rights, it must be satisfied that there has been a voluntary, informed and unequivocal election.

34. We are satisfied on the facts of this case that, when the appellant made its offer of amends (and did not withdraw it before acceptance), it did so voluntarily on the basis of highly qualified legal advice. The offer was both informed and unequivocal and was made and accepted in accordance with sections 2 to 4 of the 1996 Act. There is no relevant public interest or other principle which leads to the conclusion that the appellant has been deprived of a right to a fair trial. Finally, we note in passing that we are unable to accept the submission that there was no consideration for the agreement. Consideration was amply provided by the mutual promises of the parties, which are recognised to be in the interests of both and to be in the public interest.

Article 10

35. It is not in dispute that the right to the freedom of expression in article 10(1) is of considerable importance, as has been stressed many times, both in the ECtHR and in these courts. Moreover, it includes the right both to receive and impart information. Under article 10(2), any limitations on the right must be such as are prescribed by law and necessary in a democratic society, they must be proportionate to the legitimate aim pursued and they must be relevant and sufficient and based on an acceptable assessment of the relevant facts.

36. We accept Ms Page's submission that, in so far as there is any interference with the appellant's right of expression, it arises only because it has made an offer of amends which has been accepted. In this regard the position is no different from a case in which the claimant has accepted an offer to settle made under CPR Part 36 or, indeed, an offer made outside Part 36. In the case of an offer made outside Part 36, where the court has no further part to play, the rights of the parties to the settlement agreement are entirely contractual and, subject to any contractual defences, would be honoured by the courts. We see nothing disproportionate about this approach.

37. In the case of an accepted offer of amends, again as stated above, although the defendant has to pay compensation in accordance with the statutory scheme, there is nothing to prevent him from repeating the words complained of and, in such a case, nothing to prevent him from pleading justification in any future libel proceedings which the claimant might bring.

38. In these circumstance, while we recognise the importance of the right of freedom of expression enshrined in article 10, the application of the principles set out above does not, in our judgment, interfere with that right.

Other considerations

39. In these circumstances, as we see it, there is no question here of the court reading down the provisions of the 1996 Act to make them compatible with the Human Rights Act 1998 because the approach we have outlined is already consistent with the Act. Equally we do not think that cases in which it has been held the courts will or may now approach the enforcement of contracts differently from the way in which they did before the Human Rights Act came into force assist the appellant. We were referred for example to *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, [2003] EMLR 88. Such cases do not assist the appellant because, for the reasons we have given, the principles we have outlined do not infringe a defendant's rights under the ECHR.

Special circumstances – the correct approach

40. The question is whether there are here on the facts special circumstances which lead to the conclusion that the appellant should be permitted to resile from the statutory scheme which flows from the respondent's acceptance of its offer of amends. We have concluded that we should address this question because the judge did not. His analysis of the principles was different from our analysis because he did not consider whether special circumstances would permit him to allow the appellant to plead justification after acceptance of the offer of amends and, if so, whether they existed. He treated the issue of discretion, if it arose, as a discretion to grant an application for permission to amend applying the ordinary principles under CPR Part 17. He said that, if the issue of discretion arose (which he held that it did not because his view was that only contractual defences were available), he would have exercised it in favour of the respondent.

41. Since he applied the principles applicable to the ordinary Part 17 case, given his approach to the statutory scheme, it seems clear that he would have held that there were no special circumstances here which should or would (or even might) permit the court to allow the appellant to plead justification and would have refused the application for permission to amend to do so. However, since the case has been argued somewhat differently before us, we have concluded that we should consider for ourselves whether there were here any relevant special circumstances.

42. We ask ourselves the questions posed by Potter LJ in *Di Placito v Slater*, namely whether it would be just to deprive the respondent of the benefit of the bargain made with the appellant and whether the circumstances are so different from those contemplated at the time of the agreement that it would be just to allow the appellant to resile from the agreement. This involves a consideration of the relevant

circumstances, including a consideration of the question whether the circumstances which have subsequently arisen were circumstances which were intended to be covered or ought to have been foreseen at the time the agreement was made.

43. It appears to us that an important starting point for such a consideration is this. A person does not have to publish defamatory material without checking whether or not it is true. Thereafter he does not have to make an offer of amends. The purpose of the scheme is to engender compromise and the time when all reasonable enquiries should be made is before an offer to make amends is made because, save in special or exceptional circumstances of the kind we have described, the defendant will have to pay compensation under the scheme. The same is true of a defendant making a CPR Part 36 offer or an offer outside Part 36.

Were there special circumstances on the facts?

44. The relevant chronology may be summarised in this way. The book was published on 21 September 2006. On 9 October the respondent's solicitors ('C-R') wrote a letter before action which included the statements that Mr Phillips' contract for the contest against Mr Hatton was negotiated through attorneys acting for him and that Mr Phillips was represented by Sugar Ray Leonard Boxing ('SRLB') as his promoter. Ms Page submits that if the appellant wanted to investigate the true position it could, should and would have ascertained who those attorneys were and made appropriate enquiries of them. She relies upon the fact that it did not do so and that it did not discover until much later that Mr Sauer was the attorney acting for Mr Phillips at the time the agreement to fight Mr Hatton was made. As appears below, it was not until 26 September 2007 that the first contact was made between the appellant's solicitors ('SMB') and Mr Sauer.

45. On 19 October 2006 SMB wrote to C-R saying that they were investigating the allegations, "which necessarily entails contacting Mr Phillips and his representatives in the US". The solicitor with conduct of the matter on behalf of the respondent at SMB is Mr Mireskandari. According to his fifth statement, which is dated 21 November 2007 and which was served on the second day of the hearing before the judge (and after he had indicated his decision on the application for permission to amend to allege justification), Mr Mireskandari spoke to Mr Phillips on 1 November 2006. Mr Phillips told him that he had known before the evening of the fight that the fight was due to be televised on Showtime, that he had been angry because he was concerned that he might not get paid at all and that his fee was pitiful given that the original agreement had been made on the basis that only Sky were covering the fight. Mr Phillips did not mention the involvement of SRLB or Mr Sauer. Ms Page notes that Mr Mireskandari does not say whether he enquired of Mr Phillips who was representing him when the agreement was made and invites the inference that he did not. On 6 November SMB wrote to C-R saying that their investigations were continuing and that they had been unable to date to contact Mr Phillips or any of his representatives in the US. They also asked C-R to supply a copy of the agreement between Mr Phillips and the respondent and copies of the documents relied upon.

46. When at a late stage of the hearing we asked Mr Browne to explain why, in the light of their discussion with Mr Phillips on 1 November, SMB were alleging on 6 November that they had been unable to contact him, Mr Browne told us that the date given by Mr Mireskandari in his statement and by himself in his submissions had

been in error and that the discussion had taken place on 6 November, just after the letter was sent. On the same day, again no doubt after sending the letter, Mr Mireskandari, according to his fifth statement, spoke to Mr Jason Schlessinger, with whom he had a number of follow up conversations, and to Mr Speak. Mr Schlessinger had become Mr Phillips' manager by the time of the fight. He told Mr Mireskandari that Mr Phillips had been offered US$50,000 for the fight on the basis that television coverage would only be on Sky and that there would be no US television coverage. Subsequently, US television had expressed an interest in the fight and Mr Schlessinger had tried to renegotiate the fee with the respondent but the respondent had refused. Mr Speak confirmed to Mr Mireskandari that what appeared in the book was what he had told Mr Hatton.

47. According to Mr Mireskandari, whose account there is no reason to doubt, Mr Schlessinger did not mention the involvement of either SRLB or Mr Sauer. Ms Page submits that this again invites the question what enquiries were made about the identity of Mr Phillips' attorney at the time of the contract. She further submits that in the *Burstein* section of the defence as originally pleaded, which Mr Mireskandari said was approved by Mr Schlessinger, it is alleged that there had been an attempt to renegotiate the fee before Mr Schlessinger became Mr Phillips' manager. Mr Browne submits, however, that there is no reason to conclude that Mr Mireskandari did not make all reasonable inquiries and that Ms Page's submissions depend upon hindsight, given what we now know to be the contents of the statement made much later by Mr Sauer. We return to this below.

48. On 16 November 2006, C-R replied to SMB's letter of 6 November refusing to provide the documents sought. On 28 November, again according to Mr Mireskandari's fifth statement, he spoke to Mr Gerald Cukier, who is the English solicitor who represented Mr Phillips and Mr Schlessinger in the post-match dispute and litigation between Mr Phillips and the respondent. The only document he was able to produce was a copy of a Fightnews article dated 15 April 2003 which referred to the role of SRLB but did not identify Mr Ron Katz as the individual concerned on behalf of SRLB. Ms Page notes that according to the article, in which Mr Schlessinger is extensively quoted, Mr Phillips originally agreed to fight Mr Hatton in England, for a US$50,000 purse, being "a deal made through his own promoter, Sugar Ray Leonard".

49. The claim form and particulars of claim were served on 21 December 2006; so all the investigations described above were based on the allegations in the letter before the action. There is no evidence of further investigation between the end of November 2006 and the making of the offer of amends on 7 March 2007, which followed a conference with junior counsel on 1 March. In the meantime, so it is said by the respondent, some 37,000 copies had been sold, principally over the Christmas period, and sales had dwindled to a mere handful by the date of the offer.

50. In his fifth statement Mr Mireskandari says that the appellant decided "on the basis of the information provided by Schlessinger and Phillips and the information contained in the article provided by Mr Cukier" that the information in the book was wrong, that there was no basis upon which it could be properly alleged that Mr Phillips had been lied to at the time he entered into the contract and indeed that in their discussions with Mr Mireskandari neither Mr Phillips nor Mr Schlessinger had so claimed. On that basis it was decided to make the offer of amends set out in the letter of 7 March.

51. In that letter SMB said that

> "our investigations have revealed that whereas pages 185-187 of the book accurately reflects the information provided by Vince Phillips to Ricky Hatton (via Paul Speak) the true sequence of events was as follows".

The letter then set out facts which were subsequently relied upon in the original defence as *Burstein* particulars. The facts alleged do not show the respondent in a very good light and that part of the letter concluded:

> "Whilst therefore, the facts as recounted in the book were incorrect and need to be corrected, it is clear that your client did try to exploit Vince Phillips by attempting to renege on payment of his fee for the fight."

In addition SMB said that the appellant was recalling the book and would pulp all remaining copies of it, that any future editions of the book would not contain the passage complained of, which would be corrected, and that the appellant would like to agree a suitably worded Statement in Open Court with the respondent.

52. As to Mr Sauer, Mr Mireskandari says in his fifth witness statement that, as at the date of the offer of amends, the appellant had no knowledge of his involvement, that they had no documents which disclosed or even hinted at his involvement, that neither Mr Phillips nor Mr Schlessinger had mentioned his involvement and that Mr Sauer was not the source of any of the information pleaded in the defence.

53. In response Ms Page submits that it is wrong to say that SMB had no documents which disclosed or even hinted at the involvement of Mr Sauer because the letter before action asserted that the agreement for the fight was negotiated through attorneys. Ms Page submits that, accepting that SMB and the appellant were unaware that Mr Sauer (or indeed Latham & Watkins) was Mr Phillips' attorney at the time, they were nevertheless aware that it was being said that the agreement had been negotiated through attorneys and that, if they had wanted to investigate the matter they could and would have found out who the attorneys were, identified who the individual concerned was and asked him for information. In the circumstances, Ms Page submits, the failure to identify Mr Sauer and obtain from him the information which was obtained much later was the result of the decision to carry out only a limited investigation.

54. We accept that submission. Mr Browne submits in response that that is to be wise after the event and that neither the appellant nor SMB is to be blamed for not taking that step. In our judgment, however, it is a matter not of blame but of choice. In a situation of this kind, it is plainly a matter of judgment in what depth to investigate the facts. As we see it, save perhaps in exceptional circumstances, it is a matter for the defendant in a defamation action of this kind to decide whether to make an offer of amends and to decide, before doing so, what investigations to carry out. It is not appropriate for a defendant to carry out a limited investigation, make a decision to make an offer of amends based on that limited investigation and then, when more facts come to light, rely on the product of further investigation after the offer has been accepted to say that it should be permitted to resile from the resultant application of

the statutory scheme. The risk of more facts coming to light is a risk which the defendant takes when it decides, no doubt for what appear at the time to be good reasons, not to investigate the matter further, but to make an offer of amends.

55. In the present case, there are further circumstances of some significance. On 8 March 2007 the court made an unless order that the defence be served on or before 12 March. On 12 March the appellant served the defence in which it relied both upon the offer of amends and upon extensive *Burstein* particulars. In Mr Mireskandari's fifth witness statement he says that the allegations contained in the defence, including the *Burstein* particulars, were based both on information from Mr Schlessinger and Mr Phillips and on the article provided by Mr Cukier. Ms Page submits that, whereas Mr Mireskandari says in his fourth statement that SMB's "original understanding" was that the agreement had been made on Mr Phillips' behalf by Mr Katz on behalf of Sugar Ray Leonard Boxing LLC (which we take to be the same as SRLB), there is no evidence that either Mr Katz or SRLB had been contacted before the defence was served. The first reference to Mr Katz was in the reply served on 18 April 2007. In response, Mr Browne appeared to submit to us that, in this regard Mr Mireskandari made a further unfortunate error and that SMB became aware of the identity of Mr Katz only upon receipt of the reply.

56. We should advert to another feature of the reference to Mr Katz in the reply. The pleading was:

> "During negotiations Ron Katz, who was acting on behalf of [SRLB], was aware that the fight would be shown on Showtime."

Later in the reply it was reaffirmed that:

> "Mr Phillips and his management knew at all times when agreeing the US$50,000 fee that the fight was due to be broadcast by Showtime."

In Gray II the judge observed that he did not accept that it was implicit in these sentences that the agreement between the respondent and Showtime for them to broadcast the fight had been entered into prior to the date of the respondent's contact with Mr Phillips, namely 25 January 2003. At the hearing before us neither side sought to support the judge's observation. Indeed Ms Page in effect confirmed to us that the respondent's agreement with Showtime did precede his agreement with Mr Phillips.

57. In the reply the respondent accepted the offer of amends. As a result, in its allocation questionnaire the appellant specified that quantum on the issue which was the subject of the offer of amends would be determined by judge alone. This was of course by contrast with the other issues, which would be decided by a jury. Some correspondence followed as to agreement of the terms of the Statement in Open Court.

58. On 7 June 2007 the parties exchanged lists of documents which were the subject of standard disclosure on 27 June. The respondent disclosed five documents which identified Mr Sauer as the attorney who had acted for Mr Phillips in the course of the

negotiation of the agreement to fight Mr Hatton. The documents also disclosed that Mr Katz was named on the draft agreement. The appellant disclosed some press cuttings but (Ms Page submits) no document which demonstrated the basis of the *Burstein* particulars.

59. On 18 June 2007 SMB wrote to C-R. They did not seek to resile from the fact that their offer of amends had been accepted but, while they disagreed that it was appropriate to have a Statement in Open Court which might prejudice the issues in the main action, they accepted that the Statement should be negotiated in terms that would not prejudice those issues. On 20 July the appellant issued an application for further disclosure. It has maintained throughout that the respondent's disclosure was and is inadequate. That may be so but does not seem to us to be germane to the question whether the appellant should be permitted to resile from an agreement freely entered into.

60. On 1 August 2007 SMB returned to C-R a duly signed copy of the consent order agreeing to the terms of the Statement in Open Court in these terms:

> "Upon the Claimant accepting the Defendant's Offer of Amends in relation to the [Phillips allegation]
>
> It is ordered by consent that
>
> 1. Permission be given to read the attached Statement in Open Court in relation to [the Phillips allegation].

On 14 August C-R notified SMB that the reading of the Statement had been listed for 4 October. In the meantime witness statements were due to be exchanged for the trial of the action, which had been fixed for 26 November 2007. No such exchange took place and at a contested hearing on 6 September the trial date was adjourned on the basis that Mr Hatton was not available.

61. Meanwhile, on 2 August 2007, the respondent had disclosed to the appellant what Mr Browne describes as the "all-important" letter. It was a letter dated 18 March 2003 from Mr Sauer to an officer within the respondent's organisation. At the outset Mr Sauer explained the purpose of the letter as being to raise a number of issues on behalf of Mr Phillips relating to his impending fight with Mr Hatton. Mr Sauer proceeded to identify one of the issues as follows:

> "The agreement and the purse amount for this fight was originally negotiated based on your representation that Showtime was not interested in doing the fight. We now understand that Showtime will carry the bout … This means more money for [the respondent]. [Mr Phillips] believes it would be fair and a show of good faith if [the respondent] were to increase his purse for the bout."

At the end of the letter Mr Sauer requested that the response to it should be sent to Mr Schlessinger. Thus in Mr Sauer's letter, says Mr Browne, there was a clear suggestion that the respondent had represented to Mr Phillips that Showtime was not interested in broadcasting the fight. When married to the concession in the reply that

the respondent's contract with Showtime was by then already in existence, the apparent representation became, says Mr Browne, an apparent misrepresentation. So it was at this point, says Mr Browne, that the appellant began to consider that the Phillips allegation might have been true after all.

62. In his fourth witness statement, which was available to the judge before he reached the conclusions which led to Gray I, Mr Mireskandari said that in September 2007 he learned that one of his partners, Ms Razwana Akram, who is not a litigation specialist, was due to be in Los Angeles in the early part of October. He asked her to speak to Mr Phillips and Mr Schlessinger. Mr Mireskandari also says in that statement that, as Mr Sauer was based in Los Angeles, he contacted him by fax on 26 September and spoke to him on the telephone on 28 September and secured his agreement to meet Ms Akram. That was the first time that Mr Mireskandari had been in contact with Mr Sauer.

63. The Statement in Open Court in its agreed form was read to Eady J on 4 October 2007. Ms Akram met Mr Sauer in Los Angeles on the next day. On 9 October she met Mr Schlessinger and on the following day he provided her with 88 documents, which were subsequently disclosed by the appellant by supplementary list on 31 October. In the meantime a draft statement was prepared for Mr Sauer, counsel for the appellant considered the position and Mr Sauer signed a statement on 1 November. One of the documents which he exhibited to it was a letter to Mr Schlessinger (which the latter had provided to SMB) from the respondent dated 20 March 2003 in response to Mr Sauer's letter dated 18 March. In the letter the respondent refused to renegotiate the fee but did not deny that he had made the representation which Mr Sauer had alleged. In the text of his statement Mr Sauer said that, in the negotiations with the respondent which he had conducted on behalf of Mr Phillips and which had led to the contract dated 25 January 2003, the respondent, by his representative, had expressly denied to him that it was even possible that Showtime would broadcast the fight.

64. At about the same time, Ms Page, who had been instructed on behalf of the respondent on 19 September 2007, was also considering the position generally, and on 29 October C-R applied to the court for an order that numerous paragraphs of the defence, including all the *Burstein* particulars, be struck out.

65. On 1 November 2007 Mr Mireskandari signed his third witness statement, which (along with the statement of Mr Sauer) was served on C-R on 5 November. It is that third statement upon which the appellant wishes to rely in order to resile from the agreement to make amends. On 6 November, which was the morning of the hearing fixed before Eady J of the respondents' strike-out application, the appellant served (without prior notice) the draft amended defence (being the subject of the application to amend ultimately issued on 12 November 2007) in which it sought to plead justification of the Phillips' allegation and to withdraw its offer of amends and the *Burstein* particulars referable to it. Eady J adjourned the hearing to the next day.

66. On the next day, 7 November 2007, Eady J recused himself (as stated earlier) and the matter came before the judge (ie Gray J) on 20 November. In the meantime, at the respondent's request that the appellant should explain the late application for permission to plead justification, the appellant served the fourth witness statement of Mr Mireskandari. On 21 November, Mr Mireskandari made and disclosed his fifth

statement, which was given to the judge. The judge heard further argument that morning and at 2pm he indicated that he proposed to refuse the application. On 22 November the judge heard argument on an alternative submission made on behalf of the appellant that, if it was not permitted to amend the defence to allege justification, it should be permitted to advance many of the same matters by way of *Burstein* particulars. It is that application and the judge's refusal of part of it which forms the basis of Gray II and the appellant's second ground of appeal. As stated above, the judge handed down judgments Gray I and Gray II on 5 December 2007.

67. Ms Page submits that by the time that the appellant made its application for permission to amend the defence, which should perhaps have been an application for permission to resile from the effects of an acceptance of an offer of amends under section 3 of the 1996 Act, the appellant (a) had agreed to the terms of the Statement in Open Court after it had received documents disclosing that Mr Sauer was the attorney who had advised Mr Phillips when he made the agreement with the respondent and (b) had made the agreed Statement in Open Court on 4 October to Eady J after SMB had spoken to Mr Sauer. It was only on 6 November, the date fixed for the hearing of the application to strike out the *Burstein* particulars, that SMB notified C-R that it proposed to seek to resile from the offer of amends by serving a draft amended defence.

68. Those factors seem to us to be further considerations which lead to the conclusion that there were and are no special or exceptional circumstances here of the kind that Potter LJ had in mind in *Di Placito v Slater* which might lead the court to allow the appellant to resile from the position which it had freely taken in March and which led to the acceptance of the offer of amends, with its consequences under section 3 of the 1996 Act. In short, the circumstances are not so different now from those contemplated when the agreement was made that it would be just to allow the appellant to resile from it. It ought to have been foreseen at the time the decision was made to make the offer that, given that only limited investigations had been carried out, further investigation, notably of the representatives of Mr Phillips when the agreement for the fight was made, might have yielded further information. Yet, although it was known that Mr Phillips was advised by attorneys and by SRLB, no steps were taken to identify the individuals concerned and seek information from them. If such steps had been taken they would be likely to have led to Mr Sauer and Mr Katz being identified and to the information in what Mr Browne describes as the "all-important" letter coming to light before the decision whether to make an offer of amends was made. Subsequently, even when they were identified, but apparently before the appellant had ascertained precisely what they might say, the appellant made the Statement in Open Court apologising for the passage complained of.

Conclusion on ground 1

69. In all these circumstances, we reject the submission that the respondent's case is based on hindsight. The appellant could have investigated the matter further before making the offer of amends but chose not to do so. We conclude that there were no special circumstances sufficient to allow the appellant to resile from the statutory consequences of the acceptance by the respondent of the appellant's offer of amends which was freely made on legal advice after a decision not to identify or speak to those advising Mr Phillips at the critical time. It follows that we dismiss the part of the Gray appeal which we have described as Ground 1.

Ground 2 of the Gray appeal: the Burstein particulars

70. In relation to the judge's determination of compensation (if any) payable by the appellant to the respondent pursuant to its offer of amends made in relation to the Phillips allegation, as also to any judge's or jury's assessment of damages for libel generally, the appellant is entitled to plead, and to seek to establish, facts directly relevant to the contextual background of the publication: see the decisions of this court in *Burstein v. Times Newspapers Ltd* [2001] 1 WLR 579 and *Turner v. News Group Newspapers Ltd* [2006] 1 WLR 3469, which we will consider in more detail at [78-82] below. In its original defence the appellant pleaded certain *Burstein* particulars and, by its application dated 12 November 2007, it sought to amend its defence in order to alter and in particular to enlarge them. In his application dated 29 October 2007 the respondent sought to strike out the *Burstein* particulars pleaded in the original defence and he opposed the appellant's application to amend the defence so as to alter and enlarge them.

71. The effect of Gray II was, first, to allow the appellant to plead a limited amount of the *Burstein* particulars which it aspired to plead, both by the judge's refusal to strike out some of the particulars which it had already pleaded in its defence and by his grant of permission to amend its defence so as to include other such particulars; but, second, to refuse to allow it to plead a substantial amount of further such particulars, both by his striking out some of them and by his refusal to grant permission to amend so as to include others.

72. The respondent brings no cross-appeal against what the judge allowed the appellant to plead in this regard. In summary, what he allowed, essentially by way of permission to amend, were allegations that:

(a) on about 16 March 2003 Showtime announced that it was going to broadcast the fight between Mr Phillips and Mr Hatton;

(b) Showtime's interest in the fight was almost entirely due to the participation in it of Mr Phillips as a U.S. citizen;

(c) thereupon Mr Sauer, on behalf of Mr Phillips, asked the claimant by letter to increase the fee of US $50,000 payable to Mr Phillips;

(d) Showtime paid to the respondent a very substantial sum for the right to broadcast the fight;

(e) accordingly he had a moral obligation to increase the fee;

(f) but he refused to increase the fee; and

(g) the fee was pitiful.

73. It is convenient compendiously to describe the above allegations of the appellant as the averment of a 'moral obligation'. By an amended reply dated 4 January 2008 served pursuant to the permission of Eady J dated 20 December 2007, the respondent *inter alia* denied that the fee payable to Mr Phillips was pitiful, alleged that he, the respondent, considered it to be reasonable, denied that he had a moral obligation to

increase it and made no admission that Showtime paid him a very substantial sum for the right to broadcast the fight.

74. We turn to the further purported *Burstein* particulars, still controversial, which Gray J refused to allow the appellant to plead. At one stage in his judgment he described them as relating to "the allegedly illegitimate and dishonest deductions from Mr Phillips' purse". Although they extend beyond that topic, the judge's description was reasonable shorthand.

75. The particulars which the judge struck out of the original defence were, in summary, that:

(a) only days prior to the fight it became apparent that Mr Phillips was alleged to owe US $19,000 in respect of child maintenance and that, unless it was paid, he would not be permitted to leave the U.S. and thus to participate in the fight;

(b) the respondent thereupon agreed with Mr Schlessinger, on behalf of Mr Phillips, that, in addition to the agreed fee of US $50,000, he would pay the debt referable to child maintenance and a fee of US $40,000 to Mr Schlessinger;

(c) on the evening of the fight, contrary to the instructions of Mr Schlessinger that such be paid in cash or by bankers' draft, the respondent paid his fee of US $40,000 to him by cheque;

(d) a dispute thereupon arose, to which Mr Phillips was himself a party, but it was resolved by an assurance on behalf of the respondent to Mr Schlessinger that he would not stop the cheque;

(e) the respondent subsequently stopped the cheque;

(f) following the fight the respondent, instead of paying the agreed fee to Mr Phillips, presented him with an account by which he alleged that, as a result of sums allegedly deductible from the fee and otherwise due to him from Mr Phillips, the latter owed him US $12,000;

(g) Mr Phillips subsequently sued the respondent in respect of the agreed fee and, in settlement, received a substantial payment from him; and

(h) in the light of the above the respondent had attempted dishonestly to avoid paying the agreed fee to Mr Phillips.

76. The particulars which the judge refused to permit the appellant to include by amendment of the defence were, in summary, that:

(a) on 1 April 2003 the respondent in writing agreed:

(i) to pay the alleged debt for child maintenance on the basis that it would be reimbursed to him once Mr Phillips had established that it had not been properly payable and had secured his entitlement to a refund;

(ii) to pay the agreed sum of US $40,000 to Mr Schlessinger by bankers' draft; and

(iii) to provide two first class air tickets from Los Angeles to Manchester;

(b) in the course of the dispute on the evening of the fight Mr Phillips was about to leave the venue;

(c) in the statement of account by which, following the fight, he contended that Mr Phillips owed him US $12,000, the respondent illegitimately and dishonestly sought to debit Mr Phillips with:

(i) the tax allegedly due on the payment to Mr Schlessinger;

(ii) the cost of the airline tickets and of an upgrading of the hotel for occupation by and on behalf of Mr Phillips;

(iii) the payment made by the respondent of the alleged debt for child maintenance; and

(iv) the cost to the respondent of arranging for another boxer to fight Mr Hatton were Mr Phillips to fail to do so;

(d) in due course the respondent removed the stop which he had placed on the cheque payable to Mr Schlessinger;

(e) Mr Phillips lodged a complaint with the British Boxing Board of Control ("the Board") that the respondent had wrongfully failed to pay his agreed fee (other than US $10,000 paid in advance) and the respondent lodged complaints with the Board against Mr Phillips and Mr Schlessinger, all of which were, by agreement, withdrawn on the basis that it would be open to the complainants to take legal proceedings against each other;

(f) subsequently, in the High Court, the respondent sued Mr Phillips for £45,000, the latter counterclaimed for US $32,000 and a settlement was reached whereby no payment was made by Mr Phillips upon the claim and a substantial payment was made by the respondent upon the counterclaim;

(g) the settlement demonstrated that there had been no justification for any of the four debits specified at (c) above.

77. By his reply dated 18 April 2007 the respondent contended that none of the matters then particularised in the defence as admissible under the *Burstein* principle was thus admissible. On any view it is unfortunate that for more than six months the respondent failed to pursue his contention by issue of an application to strike the particulars out. Instead he pleaded to them in some detail in his reply; in May 2007 a case management conference was held in which, so far as we can see, resolution of the issue as to their admissibility was not canvassed; and in June 2007 the respondent's disclosure included a number of documents relevant to them, such as his letter of complaint to the Board against Mr Phillips and Mr Schlessinger. Nevertheless Mr Browne has never seriously argued that the respondent had waived his right to pursue the application, ultimately issued, to strike the particulars out. His delay in that regard seems to have informed the judge's decision to award him only 75% of his costs of that aspect of his application.

78. The decision of this court in *Burstein*, cited above, established two important interlocking propositions:

(a) In relation to the court's assessment of damages for libel it is open to a defendant to seek to rely upon such facts as fall within the "directly relevant background context" to the defamatory publication. See in particular the judgment of May LJ at [42].

(b) It is illogical and undesirable that a defendant can seek to rely upon such facts in relation to such assessment only if he has presented them as part of a substantive defence to liability, in particular within a plea of justification of the publication. He can rely upon them as free-standing matters pleaded as relevant only to the assessment of damages. See in particular the judgment of May LJ at [47].

79. The central decisions of this court in *Turner*, cited above, were only that its decision in *Burstein* had not been reached *per incuriam* and, inevitably in the light of s.3(5) of the Act of 1996, that the decision applied as fully to the determination of compensation by a judge under the subsection following acceptance of an offer of amends as to assessment of damages by the court in the ordinary way. But, although we are clear that the "directly relevant background context" is the best encapsulation within a single phrase of the criterion for admissibility, we agree with the observations of Moses LJ in *Turner*, at [87-89], to the effect that, taken on its own, it would give insufficient guidance to judges called upon to apply it. There is no substitute for examination in each case of whether the material qualifies as background context directly relevant to the assessment of the damage sustained by the claimant as a result of the publication, in particular the damage to his reputation in the sector of his life to which it relates and the injury to his feelings. Indeed, as Keene LJ pointed out in *Turner*, at [60], the claimant's reputation should largely have been repaired by publication of the correction and apology which attends acceptance of an offer of amends, with the result that injury to feelings tends to play an especially prominent part in determination of compensation under the Act. Keene LJ also called for caution in the application of the principle. Then he stated, at [56]:

> "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 sensibility in that part of his life that there would be a real risk of the [court's] assessing damages on a false basis if [it was] kept in ignorance of the facts to which the evidence relates."

80. It is illustrative of the *Burstein* principle to note this court's application of it to the facts of the two cases.

81. In *Burstein* the defamatory allegation was that the claimant was "an aggressively self-righteous, rather slushy composer who used to organise bands of hecklers to go about wrecking performances of modern atonal music". The defendant did not seek to justify the allegation that the claimant organised the wrecking of such performances. It was held, however, that, in relation to the jury's assessment of damages, the trial judge had been wrong not to allow the defendant to adduce evidence that:

(a) the claimant was associated with, indeed had claimed to be the co-founder of, a group of militant campaigners against atonal music called "The Hecklers";

(b) on the day of a performance of *Gawain* by Birtwistle at the Royal Opera House, "The Hecklers" publicly invited the audience to join them in booing at the end of the performance;

(c) the claimant attended the performance and at the end joined others in booing and hissing.

Such evidence was admissible because it was directly relevant to the damage caused by the publication to the claimant's reputation (per May LJ at [42]). Sir Christopher Slade added, at [59], that it showed that the claimant had deliberately courted a reputation as a militant opponent of atonal music. Indeed the defamatory publication was part only of a single sentence which, without such explanatory context, was – so it seems to us – hardly susceptible to a reasoned award of damages. On the other hand the judge had been right not to allow the defendant to adduce evidence that the claimant had made grandiose comparisons of his own compositions with those of great romantic composers such as Brahms and Puccini (per May LJ at [41]).

82. In *Turner* the defamatory allegation was that the claimant had taken his wife to a wife-swapping club and had prevailed on her, against her wishes, to have sexual intercourse with various men. It was held that, in determining compensation, the trial judge had been right to allow the defendant to adduce evidence:

(a) that the claimant and his wife had been members of a fetish and swingers' club and had attended "fetish nights" on four or five occasions; such was relevant to the extent of the injury to his feelings (per Keene LJ at [62]) and of his alleged embarrassment (per Moses LJ at [84]);

(b) that the claimant had acted – and was widely known to have acted – as his wife's manager or agent in her activity as a professional model in explicit, pornographic poses, including with other women; such was relevant to the extent of the damage to his reputation (per Keene LJ at [62]) and also to his feelings (per Moses LJ at [84]); and

(c) that the claimant had publicised the breakdown of his marriage in the press, alleging that the wife was a "Page 3 Thai girl" who had married him for immigration purposes; such was relevant to his alleged distress at the infringement of his privacy (per Keene LJ at [64] and Moses LJ at [84]).

In that, as Keene LJ in effect accepted at [63-64], it is impossible to regard the material at (c) as forming any part of the directly relevant background context of the defamatory material, it seems to us that that part of the decision was not based on the *Burstein* principle but has to be regarded as specific to the extra strand of the claimant's pleaded case as to the value which he placed upon his privacy and thus to his distress at its infringement.

83. In Gray II the judge introduced his analysis of the issue in relation to the appellant's pleaded and proposed *Burstein* particulars by saying that it raised "an essentially procedural case management question". We have some sympathy with Mr Browne's

complaint about that denomination of the issue, which related not to the manner in which the appellant should be allowed to present its case but to the nature of the case which, in relation to the claim for compensation, the law permitted it to present. We agree with Mr Browne that it would be misleading, if not wrong, to describe the decision of the judge as discretionary. Nevertheless the appellant has positively to establish that the judge's decision was wrong; and, in that it was that of a specialist in the field, it is certainly entitled to our respect.

84. In Gray II three reasons were given for ruling that the particulars which we have set out at [75-76] above were inadmissible under the *Burstein* principle:

(a) in the words of which the respondent complained there was no reference to the argument about deductions from Mr Phillips' fee (nor, one might add, to the conflict surrounding the payment to Mr Schlessinger) and so the appellant was seeking to move away from the subject-matter of the claimant's complaint;

(b) the appellant was attempting to achieve indirectly what the judge had ruled that it could not achieve directly, namely by a plea of justification; and

(c) investigation of the issues raised by the particulars, highly contentious but ultimately peripheral, would enlarge the enquiry into compensation in a way which was disproportionate to their significance.

85. We would not associate ourselves with the judge's second reason: the fact that it is no longer open to the appellant to deploy material as part of a substantive defence to liability would seem to us to be no reason to debar it from deploying it in relation to the determination of compensation if legal principles were otherwise so to permit. But we see considerable force in the judge's first and third reasons.

86. Both in its grounds of appeal and in Mr Browne's skeleton argument the appellant's central complaint was that "the judge failed to take into account that the essence of the libel complained of was that the [respondent] was guilty of a dishonest attempt to avoid paying Vince Phillips his contractual fee for the bout with Ricky Hatton". In our view such is, with respect, a surprising mischaracterisation of the essence of the libel. For its essence related not to the respondent's alleged attempt to avoid payment of the low contractual fee but to the means by which he had secured a contract for payment of so low a fee, namely by an allegedly fraudulent misrepresentation. We would not suggest that the word "background" in the encapsulation of the *Burstein* principle necessarily confines admissibility to material relating to events which had occurred prior to, or circumstances which obtained at the time of, the negotiations referable to the contract in January 2003. But we do consider that the temporal factor, namely that the material sought to be pleaded relates to events on the day of the fight on 5 April 2003 and in particular to the conflict in relation to deductions which arose shortly thereafter and continued throughout the following year, raises a substantial question-mark as to the strength of its connection to the libel. Indeed in our view these doubts are reinforced by the fact that, as Ms Page stresses, the material does not necessarily betoken dishonesty on the part of the respondent. It certainly suggests that he is a hard man. But, even assuming (contrary to the submissions of Ms Page) that the settlement of the litigation with Mr Phillips indicates that the deductions which the respondent made were in breach of contract, it does not necessarily follow – and could not, without elaborate enquiry, be established – that he made them dishonestly.

87. For the above reasons we conclude that the judge was right to rule that the material controversial in this appeal fell outside the *Burstein* principle.

88. The appellant also submitted to Gray J that the respondent's pleaded inclusion of a claim for aggravated damages and for an injunction against further publication should entitle it to plead the controversial particulars even if they were to fail to qualify under the *Burstein* principle. Indeed, in such part of the proposed amended defence as was responsive to the claim for aggravated damages, the appellant also included an assertion that "the allegations complained of by the claimant are true". It seems to us that the latter proposed response was different from, and even bolder than, its bid to plead the controversial particulars; and that the appellant's apparent elision of its two different aspirations has given rise to some confusion.

89. The judge did not even refer to such part of the submission as was founded on the pleaded claim for an injunction. And for good reason. The effect of section 3(2) of the Act of 1996 is that the respondent's acceptance of the offer of amends was to preclude him from continuing with the proceedings and that he was thenceforward confined to the path of enforcing the offer set by the later subsections. As we have observed at [12] above, these do not provide for the grant of an injunction; and it is agreed that no injunction can now be granted in the current proceedings. Mr Browne asks us to contemplate further proceedings in which the respondent might seek an injunction, whether *quia timet* or otherwise, against the appellant; and to consider possible anomalies between the ambit of any such proceedings and that of the present proceedings if confined in accordance with the two rulings of Gray J. But in our view the court should address the proper ambit of any further proceedings only within them if they are brought; and that the spectre of them, real or unreal, cannot impinge upon the proper ambit of the present proceedings.

90. The pleaded basis of the claim for aggravated damages consists, almost entirely, of a complaint that, notwithstanding that, by their letter before action dated 9 October 2006, the respondent's solicitors informed the appellant that the allegation of a dishonest misrepresentation on his part to Mr Phillips about Showtime was entirely untrue, the appellant did not withdraw the book from sale nor take steps to amend it nor apologise. The complaint is that such conduct on the part of the appellant demonstrated a callous disregard for the injury which it caused both to the respondent's reputation and to his feelings and that such injury was continuing; it is clear that, at trial, the period of the appellant's allegedly culpable inaction about which the respondent will complain will primarily extend only until 7 March 2007, when it made the offer of amends and recalled all unsold copies of the book.

91. We are clear that it is not open to the appellant to respond to the claim for aggravated damages by pleading that the Phillips allegation is true. For such is a defence to substantive liability; and the court's assessment of damages, or its determination of compensation, is predicated upon the establishment of liability and thus upon the fact either that such a defence has failed or that, as in this case, the defendant has not put it forward at the requisite stage. Subject thereto, however, the allegedly aggravating feature relied upon by a claimant will draw the contours of the defendant's permissible response. Thus, in that the respondent's claim is founded upon what he contends to have been the appellant's callous disregard for the injury caused to him by the publication between October 2006 and March 2007, the contours of its permissible response surround its state of mind during those months. In particular it

would be relevant for the appellant to establish, if it could, that at that time, notwithstanding the contents of the letter before action, it both believed and had reason to believe that the Phillips allegation was true. In *Gatley* on *Libel and Slander*, 10th ed., §33.27, it is stated, albeit hesitantly, that evidence of such a character can be given notwithstanding that its effect might be to prove the truth of the allegation. In our view the proposition seems clearly to be correct; but we consider, with respect, that the appellant entirely misreads it in suggesting that it entitles it to plead not to its state of mind but to the truth of the allegation *simpliciter*.

92. It remains only to consider whether the judge was right not to allow the appellant to plead the other controversial particulars in opposition to the claim for aggravated damages. The question is whether they relate to the appellant's belief in the truth of the Phillips allegation during those months; and the answer is that they do not do so. The essence of the allegation is a fraudulent misrepresentation; and knowledge of the respondent's later dispute with Mr Phillips and with Mr Schlessinger about what he owed to them cannot reasonably have informed any belief about its truth. On the contrary, as we have pointed out at [50] above, the appellant concedes that, at any rate by November 2006, it had concluded that there was no basis upon which it could properly allege that the respondent had lied to Mr Phillips at the time of entry into the contract and that, in their discussions with Mr Mireskandari, neither Mr Phillips nor Mr Schlessinger had so claimed. For all the above reasons we dismiss the part of the Gray appeal which we have described as Ground 2.

Ground 1 of the Eady appeal: disclosure

93. The appellant applied to Eady J for an order against the respondent for specific disclosure of his contracts with Showtime and with BSkyB for the right to broadcast Mr Hatton's fight with Mr Phillips. Its argument was that they were relevant to its averment of a moral obligation which had been permitted by Gray II; and specifically that, in relation to the averment, it was important to discern the extra revenue generated for the respondent by his contract with Showtime beyond (and in comparison with) that generated by his contract with BSkyB.

94. Eady J refused the application. He stated that:

(a) the appellant had almost persuaded him that the contracts should be disclosed; but

(b) the issue whether in March 2003, by reference to the recent announcement that Showtime would broadcast the fight, the respondent had a moral obligation to increase Mr Phillips' fee should be judged according to what Mr Sauer might have been able to negotiate on his behalf; and

(c) in the course of such a negotiation Mr Sauer would not have been able to call for the contracts or otherwise procure access to them.

95. In relation to this narrow issue the judge had a wide discretion but ultimately we feel driven to conclude that the consideration which he identified as the determinant was, with respect to him, irrelevant. Moral and legal obligations exist on different levels; the level upon which lawyers found their negotiations is that of legal rights and obligations; and the existence of a moral obligation is not to be measured by what a

lawyer can achieve in negotiation, still less by his ability or otherwise in law to achieve the facility to inspect a document not voluntarily made available to him. Indeed the irony is that we know that Mr Sauer achieved precisely nothing when he sought to assert that the respondent's contract with Showtime gave rise to a moral obligation to increase the fee: see his letter dated 18 March and the letter in response dated 20 March 2003. Were Mr Sauer's ability to secure an increase to be the measure of the respondent's moral obligation, the permission granted to the appellant to aver it would have been futile.

96. Accordingly we consider that it falls to us to exercise the discretion whether to order disclosure of the contracts. In our view the existence or otherwise of the respondent's moral obligation is likely to prove of limited significance in the determination of compensation. Disclosure referable to it thus has to be proportionate to its likely limited significance. We have no doubt that we should refuse disclosure of the BSkyB contract. The alleged foundation of the moral obligation is such extra revenue as was generated for the respondent by the contract with Showtime; and we do not think that it should be rewritten as such extra proportion of his overall revenue as was generated by the contract with Showtime. Even in relation to the Showtime contract, we have misgivings. Ms Page tells us, for example, that there is no contract between the respondent and Showtime referable only to the fight with Mr Phillips and that the contractual documents which include the right to broadcast it may well pose more questions than they answer. Our instincts are that it would be disproportionate to accede to any future application for yet further disclosure designed more clearly to identify the respondent's extra revenue from Showtime. Nevertheless, with the court's permission, the appellant asserts the respondent's moral obligation to raise the fee above US$50,000 by virtue of his contract with Showtime, whereby (so it says) he was paid a very substantial sum referable to the fight; and in reply the respondent asserts that he considers the fee to have been reasonable and makes no admission that Showtime paid him any such very substantial sum. Our conclusion is that the court will not be able to make headway in appraising these issues without at least a broad understanding of the dimension of extra revenue generated for the respondent by his contract with Showtime, such as may be expected to be gleaned from the contractual documents. To that extent, therefore, we allow the part of the Eady appeal which we have described as Ground 1 and we dismiss the balance of it.

The lying allegation

Ground 2 of the Eady appeal: the ambit of the plea of justification

97. By the second part of his order dated 20 December 2007 Eady J struck out parts of the defence and refused certain amendments referable to the lying allegation. The context of the allegation was a dispute between the respondent and Mr Hatton as to the existence of a contract between them by which the respondent asserted that he was entitled to promote Mr Hatton's next three fights, and by which Mr Hatton responded that there was no such contract. It was said that other proceedings by the respondent claiming the existence of the contract were discontinued in September 2006 with the respondent paying the costs.

98. The relevant publication relied on by the respondent as defamatory was on pages 246-247 of the book as follows:

> "Frank then accused me of being greedy in his column in the *News of the World*. He said he had made me £6 million in the ring from 39 fights and now, just as I was making some serious money, I had pulled the plug on him. The whole basis of the piece was how Frank had been wronged by a greedy, ungrateful, selfish little tosser like me, who would never have made it in boxing without his faithful, guiding hand. I found his comments unbelievable. I don't really want to go into detail about what I have earned from boxing, but, believe me, it is nowhere near £6 million. Billy gets 10 per cent of what I earn and dad looks after the rest. That's all I know."

The pleaded natural and ordinary meaning of these words is that the respondent had lied to the readers of the News of the World in order to do down Mr Hatton when he had informed them that Mr Hatton had made £6m. in the ring from 39 fights.

99. In support of his claim for damages, including aggravated damages, the respondent pleaded that the appellant was aware that the relationship between the respondent and Mr Hatton ended in acrimony, there being numerous references to it in the book. But the appellant failed to take proper precautions to ensure that Mr Hatton did not use the book unjustly and one-sidedly to vent his spleen against the respondent.

100. The defence, in paragraph 5(2), sought to justify a *Lucas-Box* meaning of the words complained of to the effect that the respondent had engaged in a public campaign (including using his column in the News of the World) to promote knowingly false and misleading information about Mr Hatton in support of his dishonest claim to have had a contract to act as Mr Hatton's promoter, during which campaign he wrongfully revealed in the media highly confidential information about Mr Hatton's alleged earnings. The judge struck this paragraph 5(2) out with its supporting particulars in so far as these referred to the contractual dispute.

101. The words complained of appear in a chapter entitled "The Break-up". The chapter is some 23 pages long. It includes a discursive account of a disagreement between Mr Hatton and his father, on the one hand, and the respondent, on the other, about whether Mr Hatton had a contract with the respondent. This arose shortly after Mr Hatton had beaten Kostya Tszyu. Mr Hatton, who states that he had better offers elsewhere, asserts in forceful obscene terms that he had no contract. The words complained of follow about half a page later in a passage complaining that the respondent was unfairly plastering Mr Hatton's private business all over the newspapers to get his own back. The respondent is said to have got the hump when Mr Hatton left him because he was his regular business. Mr Hatton decided to break with the respondent and he got significantly more for his next fight. The respondent took legal action, but did not proceed with a threatened application for an injunction to stop a subsequent fight.

102. The principle on which the judge struck out the *Lucas-Box* meaning and the particulars is that a claimant is entitled to confine his complaint to a published defamatory meaning, and that a defendant is not then entitled to enlarge the ambit of the contest by asserting and seeking to justify a separate and distinct meaning, in the sense that the defamatory imputation is different, of which the claimant does not complain and which is not embraced within a common sting of the publication

complained of. An example of this would be if a publication asserts that the claimant is a thief, and the defendant seeks to assert and justify a quite separate meaning to the effect that the claimant is an adulterer. By contrast, provided it is not oppressive to do so, a defendant is entitled to justify a common sting derived from parts of a publication, taken as a whole, of which the claimant does not complain, in so far as they are relevant to the meaning of the words complained of and to the sting of the alleged libel. The claimant is not entitled to use a blue pencil on the words published of him so as to change their meaning and then prevent the defendant from justifying the words in their unexpurgated form. Whether a defamatory statement is separate and distinct is a question of fact and degree in each case. The action should concern itself with the essential issues necessary for a fair determination of the dispute between the parties. The classic exposition of these principles is in the judgment of O'Connor LJ in *Polly Peck (Holdings) plc v. Trelford* [1986] 1 QB 1000.

103. Eady J's judgment may be found at [2007] EWHC 3062 (QB). He emphasised that a governing principle is that the court should seek to ensure that the case is confined to the real issues between the parties. It is sometimes necessary to look behind the statements of case to identify the true issue. It was important to determine whether the respondent's confined defamatory meaning was truly severable and distinct from that which the appellant wished to justify. The judge cited at some length from *Polly Peck*, and then referred to *Waters v. Sunday Pictorial Newspapers Ltd* [1961] 1 WLR 967 and *S. & K. Holdings Ltd v. Throgmorton Publications Ltd* [1972] 1 WLR 1036 for the then contemporary propositions that the jury will see the whole of the publication complained of; and that particulars justifying any meaning which the words are reasonably capable of bearing will not be struck out. More recently, however, the court had adopted a more restrictive approach.

104. In *United States Tobacco Inc. v. BBC* [1998] EMLR 816, the claimants complained of a publication which was said to raise distinct and separate allegations concerned with (a) health risk of oral tobacco and snuff, and (b) marketing it to children contrary to an agreement with the Department of Health not to do so. The claimants confined their complaint to the second allegation and wished to prevent the defendant from seeking to justify the first. It was held that the meanings were separate and distinct in the sense that proof that the product posed a serious risk to health would not afford a defence if the defendant failed to prove marketing and promotion to children. But Nicholls LJ did not consider that the charges were wholly independent, since part of the sting of the marketing allegations lay in the nature of the product. The sting lay in the allegation that the product, to the knowledge of the claimants, was dangerous to health. However, the claimants offered to make limited admissions to the effect that their product was alleged by many doctors to pose serious risk to health (including a possible risk of cancer of the mouth) and by some to be addictive; that the claimants knew of these allegations; and that there was a considerable scientific controversy about whether or not smokeless tobacco posed a serious risk to health. Eady J said that this was something of a compromise and not entirely logical. But Nicholls LJ thought that the justice of the case would be met if the jury were made aware of the limited admissions. Even if the admissions did not exactly match the defendant's allegation, the court was concerned to see whether it was sufficiently close for it to be unnecessary for the defendant to be permitted to proceed with the full allegation in the face of the admission. In that case, fairness did not require that the defendant should be free to pursue the full health risk issue. Eady J also referred to other decisions of

this court where one of the concerns had been to control the scope of this type of litigation.

105. Eady J observed that, by contrast with the facts in *US Tobacco*, the words complained of by the respondent did not say anything about the contractual dispute or the conducting of a public campaign. Ms Page, for the respondent, submitted that the pleaded *Lucas-Box* meaning was an example of creative pleading designed to shift the ground away from the respondent's actual complaint and onto a different issue.

106. The judge said, with reference to an earlier decision of his (*McKeith v. News Group Newspapers Ltd* (2005) EMLR 780), that, to define the real issue, the court 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. In the present case, it might be possible to tell the jury that there had been a dispute about the existence or otherwise of a contract; and that there had been litigation which concluded with the respondent's claim being withdrawn and his paying Mr Hatton's costs. Ms Page had offered such a concession. But it was questionable whether the jury needed to know this at all. It might, however, become relevant to explore why the respondent would wish to do down Mr Hatton and the contractual dispute could be relevant to that. But it would be unnecessary for the jury to go into detail – still less to determine where the merits lay. It would be a matter for the trial judge to determine what, if anything, the jury should be told about the contractual dispute.

107. The judge was satisfied that the defamatory sting of which the respondent complains is distinct from anything to do with the contractual dispute and whether or not the respondent was conducting a public campaign about it. The allegations do not overlap at any point. It would be perverse for the jury to find that the words complained of themselves carried the wide *Lucas-Box* meaning. The allegation of lying about Mr Hatton's earnings was relatively straightforward and inexpensive to resolve. It would be disproportionately expensive to have to litigate the wider side issue about the contractual dispute. The court must be astute to prevent misuse of its process.

108. The grounds of appeal contend that the judge was wrong to decide as he did, and that he failed to consider the words selected for complaint in their context. The words complained of were a narrow and trivial part of a chapter which complained at length that the respondent had wrongly claimed to have had a contract with Hatton. The judge accepted that the contractual dispute was a motivation for the respondent doing down Mr Hatton and that the fact of the contractual dispute could be relevant. He should not have left to the trial judge the task of deciding whether and to what extent the jury should be told of it. The judge over-concentrated on case management and was wrong not to permit the appellant to defend the sting of all the allegations made in the chapter. He wrongly applied *US Tobacco* in that no sufficient admissions had been made to enable the court to do justice to the appellant. He failed also to examine the limited extent to which the additional material relied on by the appellant would enlarge the case.

109. Mr Browne's submissions, both written and oral, elaborated these grounds of appeal. In addition he submitted that paragraph 29 of the reply put in issue the dispute whether there had been a three fight contract. Paragraph 29 sought to rebut an allegation in the appellant's particulars that there had been a breach of confidence by

saying that the respondent was entitled to reveal payments he had made to Mr Hatton to defend himself against accusations by Mr Hatton and his father that he had exploited Mr Hatton. We do not consider that this allegation entitles the appellant to advance a meaning of the publication complained of which the words themselves cannot bear. Nor will it support particulars of justification which are directed only to that meaning.

110. Ms Page submits that the passage selected for complaint comprises a self-contained allegation unconnected with the dispute about the existence of a contract. This is not, she says, a blue pencil case where, by taking words out of their proper context, the respondent has distorted their meaning. The *Lucas-Box* meaning seeks to introduce a separate question which has nothing to do with the allegation of false information in the News of the World. The allegation about a bogus contract is not that which is complained of, and there is no common sting. Quixotically, the *Lucas-Box* meaning contends for a greater meaning than that contended for by the respondent. None of the proposed particulars relates to the words complained of. None of them is derived from the book. The book does not allege a public campaign. The proposed meaning and particulars are entirely removed from the real issue in the case. Ms Page submits that the appellant is attempting to move from the real issue onto different ground, so that the litigation would address allegations which the appellant would prefer to contest. The *Lucas-Box* meaning has been artificially cast into a convoluted mouthful to introduce extraneous material in justification with a view to reducing the damages. The judge was correct to note that the appellant sought to justify the words complained of in the meaning contended for by the respondent, so that there was no need to go into other matters. Importantly, there is no common sting. What is in the reply does not justify a meaning which the words cannot bear nor the introduction of the particulars relied on as justification for that meaning. We have already indicated that we agree with this last submission.

111. In our judgment, the appellant's contentions confuse reference to context for the purpose of qualifying or explaining the meaning in context of the words complained of; and reference to context to show other separate matters which the chapter as a whole may contain. Certainly, there is reference in the chapter to the contractual dispute. But the words complained of, which are not artificially attenuated as if by blue pencil, do not comprise and are not capable of comprising a meaning which refers to or embraces the contractual dispute. The contractual dispute is therefore separate and distinct.

112. There is, in our view, a degree of circularity in looking to the real issue between the parties to determine whether a proposed meaning should be excluded because it is separate and distinct. But the real issue between the parties is whether the words complained of, read in their proper context, are capable of bearing the *Lucas-Box* meaning contended for. In our view, the judge was correct to conclude that the words complained of are not capable of bearing the enlarged meaning which seeks to introduce the contractual dispute as an element of the meaning of the words. The fact that other parts of the chapter refer to the contractual dispute does not import an added element of meaning which the words themselves simply cannot yield.

113. For these reasons we dismiss the part of the Eady appeal which we have described as Ground 2.

Conclusion

114. For the above reasons we dismiss the appeals save to the extent indicated in [96] above.