

Approved Judgment

Neutral Citation Number: [2011] EWHC 1884 (QB)

Case No: HQ09X02550

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2011

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

Between :

SARAH THORNTON	<u>Claimant</u>
- and -	
TELEGRAPH MEDIA GROUP LTD	<u>Defendant</u>

Ronald Thwaites QC & Justin Rushbrooke (instructed by **Taylor Hampton**) for the
Claimant

David Price QC & Catrin Evans (instructed by **David Price Solicitors and Advocates**) for
the **Defendant**

Hearing dates: 4, 5, 6, 8 July

Judgment

Mr Justice Tugendhat :

1. Sarah Thornton makes two claims in this action: one in libel and one in malicious falsehood. Both claims arise out of a review (“the Review”) written by Lynn Barber of Dr Thornton’s book “Seven Days in the Art World” (“the Book”). The Review was published in the print edition of the Daily Telegraph dated 1 November 2008, and thereafter in the online edition until taken down at the end of March 2009. The Defendant is the publisher (“the Telegraph”).
2. The pre-action protocol letter written by solicitors for Dr Thornton is dated 23 March 2009. The first meaning complained of, as subsequently set out in the Particulars of Claim, was that Dr Thornton had dishonestly claimed to have carried out an hour-long interview with Ms Barber as part of her research for the Book, when the true position was she had not interviewed Ms Barber at all, and had in fact been refused an interview.

Approved Judgment

3. The second complaint, that of malicious falsehood, was that in the Review Ms Barber had stated that Dr Thornton gave copy approval to the individuals mentioned in the book whom she had interviewed, that is to say the right to see the proposed text in advance of publication, and to alter it, or to veto its publication. By the letter Dr Thornton complained that Ms Barber can only have made that statement without any honest belief in its truth, and that this was calculated to cause damage to Dr Thornton in her capacity as a freelance writer, ethnographer and former full time academic, who earned her living by regularly giving lectures and seminars, and by writing as a journalist.
4. These two complaints have been referred to as “the interview allegation” and the “copy approval allegation”.
5. By letter dated 3 April 2009 solicitors for the Telegraph made a qualified offer of amends under s.2 of the Defamation Act 1996 (“the Act”) in relation to the meaning complained of in respect of the interview allegation. The Telegraph made no such offer in relation to the copy approval allegation, which was at that time also complained of as a libel.
6. Dr Thornton did not accept the offer of amends. In s.4 of the Act provision is made as to the consequences of the failure on the part of a claimant to accept a Defendant’s offer of amends. It includes the following:
 - “(2) The fact that the offer was made is a defence (subject to sub-section (3)) to defamation proceedings in respect of the publication in question by that party against the person making that offer. A qualified offer is only a defence in respect of the meaning to which the offer related.
 - (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 and (b) was both false and defamatory of that party; but it shall be presumed until the contrary is shown that he did not know and had no reason to believe that was the case.
 - (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. If the offer was a qualified offer, this offer applies in respect only to the meaning of which the offer related.
 - (5) The offer may be relied on in mitigation of damages whether or not it was relied on as a defence”.
7. It follows that in relation to the interview allegation, if she is to succeed in her claim in this action, Dr Thornton must prove that, at the time when she caused it to be published, Ms Barber knew or had reason to believe that the interview allegation was false. There is no dispute that Ms Barber knew that it referred to Dr Thornton and

Approved Judgment

that it was defamatory of her. The Telegraph has relied on the offer of amends by way of defence.

8. Likewise in respect of the copy approval allegation, because the claim is in malicious falsehood, Dr Thornton must prove that, at the time when she caused it to be published, Ms Barber knew that the allegation was false, or was indifferent to whether it was true or false.
9. The Telegraph accepts that if Dr Thornton can prove this state of mind against Ms Barber then the Telegraph is liable.
10. There is a separate claim in relation to the online publication as from the 7 November 2008 alternatively 11 December 2008. On 7 November 2008 Dr Thornton complained directly to Ms Barber about the interview allegation. 11 December 2008 is the date of the letter of complaint written by Dr Thornton personally, in which she first complained to the Editor of the Telegraph, provided supporting evidence, and referred to the online publication.

THE WORDS COMPLAINED OF

11. The Review appeared on page 28 of the section of the newspaper headed “Review, Arts, Books and the Digital Life”. It covers those parts of the page which are not devoted to advertisements or illustration. There is a large and striking illustration which it is not necessary to refer to further. So far as relevant the words complained of are as follows:

“Seven Days in the Art World by Sarah Thornton: ...

Sarah Thornton is a decorative Canadian with a BA in art history and a PhD in sociology and a seemingly limitless capacity to write pompous nonsense. She describes her book as a piece of "ethnographic research", which she defines as "a genre of writing with roots in anthropology that aims to generate holistic descriptions of social and cultural worlds". She also claims that she practices [sic] "reflexive ethnography", which means that her interviewees have the right to read what she says about them and alter it. In journalism we call this "copy approval" and disapprove.

Thornton claims her book is based on hour-long interviews with more than 250 people. I would have taken this on trust, except that my eye flicked down the list of her 250 interviewees and practically fell out of its socket when it hit the name Lynn Barber. I gave her an interview? Surely I would have noticed? I remember that she asked to talk to me, but I said I had already published an account of my experiences as a Turner Prize juror which she was welcome to quote, but I didn't want to add to..."

Approved Judgment

THE TURNER PRIZE

12. In 2006 Ms Barber had been a member of the jury which decided who was to receive the Turner Prize in that year. The prize is one of the world's best known prizes for contemporary art. The Director of the Tate is Sir Nicholas Serota, and the decision as to who is to receive the prize is made by him and a jury of four.
13. On 1 October 2006 Ms Barber published in *The Observer* an article headed "How I Suffered for Art's Sake". The title reads:
- "When she was asked to be a Turner Prize judge for this year's competition, Lynn Barber was thrilled. A year later, that has changed. On the eve of the 2006 show she reflects on how months of seeing banal and derivative work has left her depressed about the state of contemporary art in Britain".
14. As that introductory description makes clear, the article was published before the prize had been awarded. It was a long article and it included a description of the stage which the deliberations of the panel had reached. The fact that she published the account of her experience at a stage before the jury had reached their decision caused annoyance to Sir Nicholas Serota and the other members of the jury.
15. Dr Thornton wrote a passage about this in the Book in terms which Ms Barber accepts are accurate. Dr Thornton had interviewed Sir Nicholas and all the members of the jury. One passage in the book is as follows:

"This year, the judges, whose combined personal preferences will create an objective winner, include a journalist and three curators. Lynn Barber, a columnist with the *Observer* is the only art world outsider. In October, two days before the exhibition opened, she published an account of her experience as a judge in an article entitled "How I Suffered for Art's Sake". "I hate to say it", she wrote, "but my year as a Turner juror has seriously dampened, though I hope not extinguished, my enthusiasm for contemporary art". Barber complained that her qualifications to be a judge were negligible, the prize's rules were "weird," and her judgement went "haywire". At the same time she asserted that while all four artists were producing "interesting work," one of them was so "outstanding" that she "would have thought the winner was blindingly obvious." In fact the problem started earlier during the process of shortlisting; Barber complained that her artist picks were so "brutally rejected" that she wondered whether she had been chosen merely as a "fig leaf" to cover the machinations of the art world.

The Tate's officials were privately furious. "Lynn's article will make it more difficult for the jury to work together", admitted Serota. "In the past, people have been able to speak their mind feeling pretty confident that what they say will not be written down and used in evidence against them." One of Barber's

Approved Judgment

accusations was that the jury didn't seriously consider nominations from the public. Serota disagreed. "The jury do take those nominations seriously." He raised his eyebrows and chortled silently. "But *not* to the point of doing *deep* investigations into an artist who has shown *once* in Scunthorpe!"

The other judges were dismayed as well. One of them, Andrew Renton, who runs the curating programme at Goldsmiths and also manages a private contemporary art collection, told me, "I fear she has shot her load. She has sidelined herself as a judge by going public before we have finished the process". Renton also said that Barber's inexperience had led her to put forth nominations that the others felt were "beyond premature". The Turner prize, like any other award that aims to stand for something coherent, needs to be controlled at the right time. As Renton explained, "to give the Turner nomination to someone who is straight out of art school is utterly irresponsible. By the same token it shouldn't become a mid-life crisis prize."...

16. The Book goes on to quote from interviews which Dr Thornton had had with two of the other jurors. The Book does not include a quotation from Ms Barber.

17. There then follows another passage referring to Ms Barber as follows:

"With a week to go before the ceremony Phil Collins hosted a press conference at a shabby guilt-and-mirrors hall in Piccadilly. As part of his piece *return of the real*, he invited a panel of nine people who had appeared on reality television programs to tell their stories to an audience of journalists, including Lynn Barber. One young man spoke about how humiliated he had been when he went to Ibiza as part of a reality TV competition to see who could date Miriam, only to learn that Miriam was a pre-op transsexual. Barber heckled from the audience "what did you *think* you were doing?" Collins, undaunted by her power over his fate, told her to shut up."

THE COMMUNICATIONS BETWEEN DR THORNTON AND MS BARBER

18. On 27 October 2006 Dr Thornton and Ms Barber exchanged five e-mails. Four are in a string with the same subject heading namely "interview request".

19. At 13:19 Dr Thornton wrote to Ms Barber. She started by explaining who had given her Ms Barber's e-mail address, and then continued:

"I am writing 6000 words on the Turner Prize for the New Yorker. The piece concentrates on the experience of the artists and the judges. I have either already interviewed or have appointments to see Nick Serota and the other three judges of

Approved Judgment

this year's prize. I read your funny engaging piece published in the Observer on 1 October and look forward to the next installment. I would very much like to meet you and in what I assume to be a challenge to my relatively dowdy research skills, interview you."

20. At 13:44 Ms Barber replied:

"Yes – though I can't tell you much more than appeared in my article. But anyway ring me any morning next week – [she gave her phone number] ... "

21. At 13:49 Dr Thornton replied asking if she could have a conversation in person, and stating that she could go to see Ms Barber on any of three days the following week. At 13:52 Ms Barber agreed saying she could do the following Tuesday and suggested a time. She gave her address and directions how to get to it. At 19:56, in an e-mail under the subject heading "Tues 31 Oct 4pm", Dr Thornton confirmed the appointment.

22. On 30 October 2006 Ms Barber had second thoughts. The two ladies exchanged three e-mails that day under the same subject headings as before. At 17:10 Ms Barber wrote:

"Sorry, but I don't think I want to do interview about Turner Prize after all. I've said everything I wanted to say in my Observer article (which you are welcome to quote as much as you like), and if I did decide to spill more beans, I should spill them in the Obs not New Yorker".

23. Eleven minutes later at 17:21 Dr Thornton replied:

"I'm so disappointed.

Talking to me does not pre-empt spilling more beans in the Observer as my deadline is not until the first week of January and I assume that you'd want to publish a piece shortly after a winner is chosen in December.

Perhaps you'd be willing to talk to me after 4 December or after you've published your next piece?"

24. On the same day 2½ hours later at 21:50 Ms Barber relented and wrote:

"Yes, it would be fine to talk after we've chosen the winner in December, so try me again then".

25. On 4 December 2006 the name of the winner of the Turner Prize was announced. On 6 December 2006 Dr Thornton wrote to Ms Barber an e-mail under the subject heading "The New Yorker". She wrote:

"When we last corresponded you said that you'd be willing to talk to me after the prize was awarded. I understand that you

Approved Judgment

have a piece coming out in this Sunday's Observer. I will be in the US by then, but would be grateful if we could arrange a time to talk on the phone soon after that. Sound good?

I was glad to see you at Phil Collin's press conference and a little surprised not to see the other judges".

26. On 8 and 9 December the two ladies exchanged e-mails, fixing a date and time for the phone call which Ms Barber agreed to take from Dr Thornton when she was in the US.
27. In the issue of The Observer dated 10 December 2006 Ms Barber published a piece headed "My Turner's Over. Phew!".
28. On 11 December 2006 Dr Thornton called Ms Barber by phone as arranged. She had prepared notes of questions she was intending to ask, and one of these was why there had been so few women winners of the prize. In her notes of what was actually said in the phone call, Dr Thornton records Ms Barber saying that she did not detect a gender bias. The notes cover four pages of manuscript. Ms Barber also made a note of the conversation in her diary. It reads:

"New Yorker journo who has been pursuing me for weeks rang about the Turner Prize and I was mildly helpful but snotty. She had a tiresome theory that women discriminated against (Tomma is only the third to have won!) but I refused to support".
29. In the issue of the New Yorker dated 19 March 2007 there appeared an article about the Turner Prize by Dr Thornton headed "Reality Show". It covered over six pages. It included an account of Ms Barber's involvement which is similar to the account given in the Book.
30. In October 2008 the Book was published. In the issue of the Sunday Telegraph dated 19 October 2008 there appeared a review of the Book by a different reviewer.
31. On 20 October 2008 Ms Barber filed her Review with the Telegraph by sending it in the form of an e-mail to Mr Leith. The draft included an allegation that one of the other jurors had behaved improperly. The text of her e-mail was:

"The last sentence of the second para will come as juicy news to a few people in the art world but will produce hysterical screams and complaints from its subject,... If you can't be bothered with the fuss he is bound to make, just delete it. It is true though".
32. In another e-mail the same day Ms Barber wrote to Mr Leith, in response to an e-mail from him, that the juror concerned "is a bit cracked so it could be v tedious".
33. In the issue of the Daily Telegraph dated 1 November 2008 the Review appeared in the form in which it had been submitted by Ms Barber, save for the passage about the

Approved Judgment

other juror which had been altered. Ms Barber wrote in her diary that day: “They have toned down my exposé of ... - just as well probably”.

34. On 6 November 2008 the Review appeared on the website telegraph.co.uk. Dr Thornton was in New York at the time, but it came to her attention.
35. On 7 November 2008 at 11:48 Dr Thornton sent an e-mail addressed to Ms Barber copied to two people at her publishers, Granta, namely Pru Rowlandson and Sara Holloway. The subject line was “Telephone Interview”. Dr Thornton wrote:

“I’m sorry you don’t remember giving me an interview on the phone in early December 2006, shortly after the announcement that Tomma Abts had won the prize.

Do you take notes when you are the interviewee? As your interviewer, I did. I was writing up my research for The New Yorker (where it was first published) as well as for my book.

Yours sincerely”

36. On the same day 20 minutes later, Dr Thornton sent an e-mail to Drusilla Beyfus under the subject heading “Lynn Barber”. Ms Beyfus works for the Telegraph. The e-mail included a copy of what Dr Thornton had already written to Ms Barber. In the e-mail Dr Thornton wrote:

“Would you please do me a favour? I am in New York and just read Lynn Barber’s accusation in the Telegraph that I didn’t interview her. She obviously has memory problems. I interviewed her for over half an hour in early December 2006. (If I were at home near my notes, I could tell you the exact date and time).

Would you please forward this e-mail and the one below (that I just sent to Lynn)... to the editor who might have commissioned the book review? This is an appalling accusation...”

37. On 2 December 2008 Dr Thornton wrote again to Pru Rowlandson, including a copy of the e-mail of 7 November she had sent to Ms Barber. The text of the e-mail included:

“I think Sam [Leith] should know that Barber is criticized by Nick Serota and Andrew Renton on pages 129-130 of the book (although I remain dispassionate and just represent the debate). This is a conflict of interest that she conveniently failed to disclose to Sam or her readers. It is also a reason that she might want to kill the book.

Barber’s review is a wilful misrepresentation of the book’s contents. Her opening paragraph concentrates on what is basically an endnote. Contrary to her assertion, I interviewed

Approved Judgment

all four judges, not just one. And her reference to me as swallowing pee is extremely offensive.

I trust that Barber's apology will not include another unprofessional rant".

38. Ms Rowlandson replied that Mr Leith had been made redundant that morning, and that she would find out who was handling the work at the Telegraph. Ms Rowlandson took the matter up with Lorna Bradbury. She had been Mr Leith's assistant. On 5 December 2008 she wrote to Ms Bradbury thanking her for taking the matter on and asking her:

"Thank you for taking this on – this is the e-mail Sarah sent to Lynn shortly after the review appeared in the paper.

Please would you forward to her and print a correction/apology in the paper".

39. In a separate e-mail of 2 December 2008 Dr Thornton had sent to Ms Rowlandson a copy of the e-mail Ms Barber had sent to her on 8 December 2006 at 13:08 ("You can phone me any morning next week ..."). In a second e-mail of 5 December, Ms Rowlandson wrote to Ms Bradbury:

"... this is a piece of evidence that [Dr Thornton] sent in which Lynn agrees to be interviewed by Sarah. It would seem odd to agree to be interviewed and then not".

40. Dr Thornton received no response to any of these e-mails, whether from Ms Barber, Ms Bradbury, or anyone at the Telegraph.

41. On 11 December 2008 Dr Thornton sent a letter of complaint to the Editor of the Telegraph.

"Lynn Barber's review of my book *Seven Days in the Art World* (published in the *Telegraph* on 6 November 2008) contains two factual errors that are damaging to my reputation. It also contains further significant inaccuracies that undermine the authority of the review as a whole.

First, Ms. Barber claims that I never interviewed her. Second, she asserts that I gave "copy approval" to my interviewees. Both statements are false.

(1) I interviewed Lynn Barber on the phone on December 11th 2006 from Atlanta, Georgia. As I write on p.257 of my book, a "handful of interviews were done on the phone". Ms Barber's was one of the few.

I prefer to do interviews face-to-face, but Ms Barber cancelled our initial meeting at her house in ... N19 because, as she wrote in an e-mail, "I've said everything I wanted to say in my Observer article (which you are welcome to quote as much as

Approved Judgment

you like).” However, on 30 October, Ms Barber agreed to an interview after the winner of the 2006 Turner Prize was announced and then again, in an e-mail on 6th December, she specified when I should call. (Please find the complete e-mail correspondence confirming possible dates and times of the interview below.)

I persisted in obtaining an interview with Ms Barber because my editor at *The New Yorker*, Susan Morrison, was keen that I should interview *all* the judges (she had commissioned a version of the chapter, which appeared in the 19 March 2007 issue).

I called Ms Barber on 011 44... on Monday the 11th December. I took four pages of notes during the conversation. I wrote the date but not the time of the call, however, I am pretty sure it took place at around noon Atlanta time i.e. 5pm GMT, and lasted for 35-40 minutes. The interview was not very rewarding because Ms Barber mostly repeated what she had said in her two articles in *The Observer*. This is why the interview was not used in my *New Yorker* article or in the longer chapter version, which appears in *Seven Days in the Art World*.

Here are a couple of comments that Ms Barber made during the course of the conversation that should jog her memory.

Re the artist Phil Collins.

“I admired the karaoke work [*They Shoot Horses* but I was] not at all impressed by the reality TV stuff. It is no news to the British public that reality TV uses and manipulates people. It was making heavy weather of something familiar... It wasn't an art work”.

Re the artist Tomma Abts.

“[At first I thought Tomma's work was too lady-like ...Her work got bigger the more I saw it. [At first,] these small dull little canvasses... [Then] Wow. They're enormous.

“It is very easy to forget giving someone an interview, especially on the phone. Interviewees rarely take notes. Interviewers, however, do. I would have no need to put Ms Barber's name in my Acknowledgements if I had not interviewed her”.

(2) Ms Barber claims that I gave “copy approval and more specifically the “right to read what [I said] about them and alter it” to my interviewees. This is not true and it is a very harmful accusation. “Reflexive ethnography”, which I discuss in an

Approved Judgment

endnote, is a process by which researchers request feedback, which they can use or ignore as they see fit.

No one in the book was given the right to alter what I said about them. With so many conflicting opinions and definitions of art contained in the book, it would have been impossible to write it had I given copy approval to anyone.

As an example, one artist refused to let me reproduce her work as an illustration within the book because she didn't like what I said about her. She had requested, through her dealer, that I remove some information, but I refused.

There are many other significant factual inaccuracies in the review. For example, Ms Barber says that I do not "get round to meeting an artist until chapter 6, but the reader encounters artists" in every chapter of the book. Chapter 2, for instance, is almost entirely populated by artists. It is extremely damaging to the credibility of a book about the art world to say that it does not "get around to meeting an artist" until its sixth of seven chapters.

The fact that Sir Nicholas Serota and Dr Andrew Renton criticize Ms Barber's behaviour (as a judge of the Turner Prize) on pages 129-130 may have motivated these gross distortions of the book's contents. I would have thought that Ms Barber would have mentioned this conflict of interest in her review as a mark of openness and honesty with her readers.

Given the serious and injurious errors of fact in Ms Barber's review of *Seven Days in the Art World*, a complete correction and apology in print and online - agreed in advance with me - is appropriate..."

42. There is then set out the text of the e-mails sent on 6 December 2006 by Dr Thornton to Ms Barber, on 8 December at 18:08 by Ms Barber to Dr Thornton and on 9 December by Dr Thornton to Ms Barber. It is only in respect of the third of these that Dr Thornton reproduced the subject heading "Talk on phone: Monday"
43. Dr Thornton's e-mail of 11 December 2008 is timed at 11:06. Two minutes later the editor (or someone in his office) forwarded it to the Consulting Editor, Mr Rhidian Wynn Davies, and to the head of the legal department Mr Arthur Wynn Davies. Mr Arthur Wynn Davies is the father of Mr Rhidian Wynn Davies. I shall refer to them as Mr Arthur and Mr Rhidian. The message from the Editor to Mr Rhidian and to Mr Arthur was "over to you chaps please".
44. Half an hour later at 11:40 Mr Arthur forwarded Dr Thornton's letter of complaint to an addressee referred to as "Legal". This is an e-mail address accessed by members of the team of lawyers assisting Mr Arthur. At 12:09 Dr Thornton's e-mail was forwarded to Ms Barber for her comments.

Approved Judgment

45. The member of the legal team who dealt with the matter for the Telegraph was Mr David Philp. He is a barrister who was called in 1973. For much of his professional life he had been involved in legal advisory work for newspapers. By 1993 he was working for the Telegraph and continued to do so until his retirement last year in 2010. He worked on a freelance basis. The legal departments of national newspapers are always busy. The work of the legal advisers includes vetting copy for publication (that is pre-publication advice) and responding to complaints, as well as advising on other legal matters. The lawyers such as Mr Philp were advisers. They would draft letters, but the letters would be sent and signed by a person with the status of head of department or, in this case the Consulting Editor Mr Rhidian.
46. The letter to Dr Thornton that Mr Philp drafted, and that Mr Rhidian signed, acknowledged receipt of the letter of complaint and stated:
- “We will investigate the points raised in your e-mail and to that end Lynn Barber has been asked for her comments. You will have our full response as soon as practicable after we receive Ms Barber’s reply”.
47. That letter was e-mailed by Mr Philp to Dr Thornton as a pdf attachment at 16:49. Mr Philp has explained in his witness statement that it is customary for holding letters to include a paragraph referring to the fact that the publication online of an article complained of is being suspended pending an investigation, but that it is not an invariable practice. There is a subsequent letter dated 27 March 2009, written in response to the pre-action protocol letter from Dr Thornton’s solicitors, which includes what I take to be the standard paragraph that was not included in the letter dated 11 December 2008. In the letter of 27 March 2009 the paragraph reads:
- “In the meantime in accordance with our customary procedure on receiving a complaint alleging factual inaccuracy (and entirely without prejudice to the outcome of our investigation), we have suspended the website version of the above article”.
48. I shall return below to consider the evidence of Mr Philp as to the reason for not suspending the publication of the online article. At this stage it is sufficient to note that in his witness statement he states that having formed the view that the article should not be suspended, he mentioned this to Mr Rhidian as Mr Rhidian returned the signed letter to him prior to it being e-mailed. He does not recall whether Mr Rhidian said anything on that point to him at that time.
49. About a quarter of an hour later at 17:06 Dr Thornton e-mailed Mr Philp thanking him for the letter. She wrote:
- “I do hope that you will take the review off the website while the results of the investigation are pending”.
50. Mr Philp did not respond to that and he did not cause the Review to be taken off the website.
51. At 18:01 Ms Barber made her first communication with Mr Philp. Privilege has not been waived as to the contents of the communications between Ms Barber and Mr

Approved Judgment

Philp. The evidence relating to those communications is confined to the fact that they took place and the date and time.

52. In a letter dated 29 June 2011 by David Price Solicitors and Advocates to Dr Thornton's solicitors it is stated that there were further e-mail communications between Mr Philp and Ms Barber in relation to the substantive letter of response which was dated 18 December 2008, but that no communication between Ms Barber and Mr Philp has any reference to the continuing website publication. It is pleaded in the Re-Amended Defence that Ms Barber was provided with the text of the draft letter dated 18 December 2008 before it was sent, and she confirmed in evidence that she read and approved it.
53. In her diary entry for 11 December 2008 Ms Barber wrote:

“Didn't get home until 4.30 and found msg to ring Brian McArthur re legal complaint from Sarah Thornton – he told me to deal with lawyer direct so I did – she had kept all my e-mails but they confirmed my refusal to talk – however, she said she did talk to me on Dec 11 2006 so I looked up my diary wh[ich] records tiresome NY journo”.

54. Mr Philp states in his second witness statements that the letter dated 18 December which he drafted was ready for signature by Mr Rhidian on 17 December. The letter was in fact signed by Mr Arthur. Mr Philp had been unable to see Mr Rhidian that day. He had a brief conversation with Mr Arthur before he left the office on 17 December informing him that the letter should be sent the following day.
55. The letter of 18 December 2008 reads as follows:

“Dear Ms Thornton

Re: **“Seven Days in the Art World” - Lynn Barber review:
The Daily Telegraph – 1 November 2008**

We are now in a position to respond to your e-mail of 11 December.

In the Acknowledgements section of your book you list a number of people who are singled out as “interviewees” to whom you are “particularly indebted” “for being so generous with their thoughts”. Lynn Barber is one of those listed.

While acknowledging that a handful of interviews were conducted by phone you say that most were face to face sessions lasting about an hour and some contributed beyond that among this group. Readers of the book will not know which category applies to Ms Barber. However she was a central character in your account of the Turner prize jury (2006). It might appear that she was one of those who gave you such full co-operation that she merited inclusion in the list.

Approved Judgment

Ms Barber makes it clear in the review that you contacted her in 2006. She disputes that this contact amounted to an interview in any meaningful sense. As a well known and experienced journalist she has conducted many interviews over the years, published in a wide variety of leading newspapers and magazines, and as such she is well qualified to express a view as to what does or does not constitute an interview.

In the review she says that she told you she did not want to add to the account she had already published but said you were free to quote from it. In your account you refer to an e-mail in which she said the same thing. Then you cite a series of e-mails referring to a “talk” rather than a formal interview. You say that the “interview” was “not very rewarding because Ms Barber mostly repeated what she had said in her two articles in *The Observer*”. This is in contrast to your suggestion, by way of her inclusion in the list, that she had been being “generous” with her “thoughts”.

You say your editor at *The New Yorker* was keen for you to interview all the Turner Prize judges and indeed they are included in the book acknowledgements list without any differentiation. Yet it does not appear that Ms Barber made any significant contribution other than that derived from what she had already written. She had not wanted to give you an interview but to refer you to what she said previously and to say that she had nothing to add. You persisted for the reason given but to no productive effect. Indeed since people quoted in a particular chapter had the opportunity to read what had been written, Ms Barber must not have provided any new material or quotes worth including since she was not afforded that opportunity.

It would have been more accurate to have included Ms Barber among those mentioned in the first paragraph of page [2]57 – contacts that fell short of a proper interview.

As to “reflexive ethnography”, you relate how the feedback from people shown what you had written often led to a “richer and more accurate” account. It seems as if the individual concerned was afforded the opportunity to correct factual inaccuracies and to add “richer” material to the end result – in other words to alter what had originally been written. This lends itself to a comparison with “copy approval”.

It seemed to Ms Barber that your account of the Turner prize judging relied heavily on one judge’s account, and omitted some important information regarding remarks made to that judge by Mr Serota. She considered this underlined her criticism of “reflexive ethnography” by way of comparison to a more rigorous and sceptical journalistic approach to the subject.

Approved Judgment

Although we appreciate that it must have been disappointing not to have received a more positive review of your book, we do consider that it fell well within the limits of fair comment.

Yours sincerely

Rhidian Wynn Davies

Consulting Editor”.

56. As appears from Ms Barber’s diary entry for 11 December 2008, the letter of 18 December 2008 was written at a time when Ms Barber knew that her statement in the Review that Dr Thornton had never interviewed her was false. However, the letter does not address that point at all. Instead it embarks on a new and different attack on Dr Thornton, based on the argument (subsequently abandoned) that whether or not a conversation counted as an interview depended on the quality of the responses to the questions posed by the interviewer to the interviewee, and that Ms Barber “is well qualified to express a view as to what does or does not constitute an interview”.
57. The letter is argumentative in other respects. It takes the false point that Dr Thornton’s e-mails set out in her letter of 11 December refer only to a “talk” rather than a formal “interview”. The point is false because the subject line of the e-mails did indeed refer to the “interview request”. Dr Thornton did not set out the subject line in her letter of complaint dated 11 December 2008, and no one for the Telegraph or Ms Barber made any enquiries to establish the full extent of the e-mail exchange. There are other criticisms to be made of the letter.
58. Dr Thornton sought legal advice. On 23 March 2009 her solicitors wrote the pre-action protocol letter already referred to. As already noted, in a response dated 29 March 2009 the Telegraph informed Dr Thornton’s solicitors that the Telegraph had suspended the website version of the Review.
59. On 3 April 2009 the Telegraph made the qualified offer of amends. On 30 April 2009 Dr Thornton rejected the offer. In the light of the response of 18 December 2008 (and the lack of response) by Ms Barber to the complaints and requests for corrections that Dr Thornton had made personally on and after 7 November 2008, she was no longer prepared to accept that Ms Barber might have forgotten the interview which took place on 11 December 2006. She gave notice that she would assert that at the very least Ms Barber had reason to believe that the statement complained of was false, within the meaning of the Act s. 4(3), and that Ms Barber had been actuated by malice.
60. The Telegraph offered a form of apology in respect of the interview allegation, but not in respect of the copy approval allegation. In relation to the copy approval allegation the most that the Telegraph were prepared to offer was a statement of Dr Thornton’s position on the point. Dr Thornton was not willing to accept the form of apology offered in respect of the interview allegation.
61. On 16 June 2009 Dr Thornton issued her claim form. On 15 July 2009 she served her Particulars of Claim. On 15 September 2009 the Telegraph served a defence pleading the offer of amends in accordance with s.4 of the Act.

Approved Judgment

62. In the issue of the Telegraph dated Saturday 26 September 2009 the Telegraph published an apology (in a form not previously offered) as follows:

“Sarah Thornton – an apology

In her review of *Seven Days in the Art World* by Sarah Thornton (Nov 1, 2008) Lynn Barber took issue with Dr Thornton’s assertion that she (Ms Barber) was among the 250 people who had been interviewed for the book, either face to face or by telephone. In fact, Ms Barber did have a pre-arranged telephone interview with Dr Thornton two years earlier which lasted over thirty minutes. We and Ms Barber therefore now accept that it would be wrong to suggest that Dr Thornton made a false or dishonest claim to have interviewed Ms Barber and apologise to Dr Thornton for any distress caused by any contrary impression the review may have given.

In addition, the review commented on Dr Thornton’s use of a practice known as “reflexive ethnography” which Ms Barber equated to “copy approval”. Dr Thornton points out that she did not give interviewees the right to alter any material she had written about them and that she always maintained complete editorial control of the final product and used the feedback provided by her subjects entirely as she saw fit”.

63. The case has had a long and complicated procedural history which it is unnecessary to recite in this judgment. Judgments delivered include the following: [2009] EWHC 2863 (QB); [2010] EWHC 1414 (QB); [2011] EWHC 159 (QB); [2011] EWCA Civ 748.

THE OFFER OF AMENDS PROCEDURE

64. The legislative policy underlying the offer of amends procedure set out in s.4 of the Act, and the meaning of that section, are explained in detail by the Court of Appeal in *Milne v Express Newspapers* [2004] EWCA Civ 664; [2005] 1 WLR 772. In the judgment of the court handed down by May LJ, at para 36, the court stated that the words “reason to believe” in s.4(3) did not “apply to anything short of recklessness”. At para 45 the court stated the main parliamentary intention of the offer of amends procedure was promoting machinery to enable defamation proceedings to be compromised at an early stage without the expense of a jury trial. At para 46 the court noted that the procedure provided for appropriate vindication and compensation of a claimant, because if compensation was not agreed it was determined by the court on the same principles as defamation proceedings: see *Abu v MGN Limited (Practice Note)* [2003] 1 WLR 2201. Accordingly, s.4(3) sets a high hurdle and places the burden of surmounting it squarely on the claimant.
65. At para 49 the court said:

“There is, in our judgment a powerful reason why the words in question should be construed as importing recklessness in Lord Diplock’s sense. If a claimant establishes malice on the part of

Approved Judgment

a person who publishes a defamatory statement, he has the basis for a claim of aggravated, and possibly exemplary, damages. [Counsel for the claimant] accepted that, malice apart, compensation can be fully assessed and awarded under section 3(5). There would be little point therefore in relying on Section 4(3) unless the requirement there was to establish malice. Recognising that some claimants may prefer a jury trial cannot alone have been the parliamentary purpose”.

66. The definition of “recklessness” in this context is that given by Lord Diplock in *Horrocks v Lowe* [1975] AC 135, namely genuine indifference as to truth or falsity. At page 150 of that report Lord Diplock said:

“Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief". If he publishes untrue defamatory material recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed by all sorts and conditions of men. In affording them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest, the law must take them as it finds them.”

THE ASSESSMENT OF CREDIBILITY

67. Mr Price submits that the allegation that Ms Barber knew that what she was writing about Dr Thornton was false, or that she had reason to believe that it was false (in the sense that she did not care whether it was true or false), is one that the court should not accept.

11. He cited the well known guidance in *Re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563 586D-H:

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. ... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Approved Judgment

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

68. But I also remind myself of the words of Lady Hale in *Re B (Children)* [2008] UKHL 35; [2009] 1 AC 11 at para 72:

"As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."

69. I accept that the allegation against Ms Barber is tantamount to one of fraud. If the matter is considered in a vacuum, that is without at the same time considering all the other circumstances of the case, then when a person makes a statement which is later admitted to be false, the inherent probabilities are that the explanation is more likely to be forgetfulness or negligence than a deliberate intention to tell the falsehood, or indifference to whether the statement is true or false.
70. However, notwithstanding Mr Price's submission to the contrary, in my judgment in the present case the improbability that a statement by a reputable writer will be a deliberate falsehood is relevant to Ms Barber's state of mind in two ways. Since Ms Barber is a reputable journalist, it assists her (as Mr Price submits) in demonstrating the difficulty that Dr Thornton faces in proving that she wrote a deliberate falsehood in the Review. But in my judgment it assists Dr Thornton in proving that Ms Barber herself did not care whether her allegation of lying made against Dr Thornton was true or false. This is because the more serious the allegation a writer makes, the more readily will a court consider that a failure to carry out any check before publication is indicative of indifference to the truth, rather than to mere carelessness.
71. The point is put this way by the editors of *Gatley on Libel and Slander* para 17.16, by reference to the judgment of Gleeson CJ in *Roberts v Bass* [2002] HCA 57, 212 CLR 1 at [39]:

Approved Judgment

“Whether there is reckless indifference will also be affected by what the defendant knows of the contents of what he is publishing. If we return to the example of the leaflet distributor it would be difficult to say that he was recklessly indifferent if he failed to make any inquiry about charges in the leaflet that a candidate was incompetent or untrustworthy; it does not follow that the same should be true if the leaflet accused the candidate of serious crime”.

72. Mr Price also reminded me, rightly, that in deciding upon the credibility of a witness the court may have regard to the contemporaneous documents, following the guidance given in cases such as *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at [57].

73. There is great assistance to be obtained from extra-judicial writing of Lord Bingham in a chapter headed "The Judge as Juror: The Judicial Determination of Factual Issues" ("The Business of Judging", Oxford 2000, pages 3ff; Current Legal Problems, vol 38 Stevens & Sons Ltd 1985 page 1–27). Lord Bingham cited Sir Richard Eggleston QC *Evidence, Proof and Probability* (1978), 155 who set out the main tests to be used by a judge to determine whether a witness is lying or not.

- (1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;
- (2) the internal consistency of the witness's evidence;
- (3) consistency with what the witness has said or deposed on other occasions;
- (4) the credit of the witness in relation to matters not germane to the litigation;
- (5) the demeanour of the witness.

74. Lord Bingham then added these observations:

“In choosing between witnesses on the basis of probability, a judge must of course bear in mind that the improbable account may nonetheless be the true one. The improbable is, by definition, as I think Lord Devlin once observed, that which may happen, and obvious injustice could result if a story told in evidence were too readily rejected simply because it was bizarre, surprising or unprecedented....

... so long as there is any realistic chance of a witness being honestly mistaken rather than deliberately dishonest a judge will no doubt hold him to be so, not so much out of charity as out of a cautious reluctance to brand anyone a liar (and perjurer) unless he is plainly shown to be such.”

75. Mr Price submitted that there are what he referred to as artificial constructs which those attempting to prove malice may adopt: (a) hindsight bias (b) the conflation of the objective and the subjective and (c) the illogical jump from the future to the past. By the latter he explained that the evidence of how Ms Barber acted, or omitted to act, post-publication is an unreliable indicator of what was going through her mind at the date of publication.

Approved Judgment

76. Mr Thwaites submitted that the full text of the Review demonstrates Ms Barber's state of mind. The allegation that Dr Thornton did not get round to meeting an artist until after she had met auctioneers, collectors and others is a falsehood apparent from the Book itself which Ms Barber had read. So she was willing to tell a falsehood. But she was unrepentant when confronted with this in cross-examination. She was likewise unrepentant when confronted with the fact, as she accepted, that she had no basis for writing that Dr Thornton gave anyone a right, as opposed to an opportunity, to ask Dr Thornton to alter the text. Moreover, the Review is spiteful in its terms, from the opening words, which are personal and disparaging. A reviewer is entitled to be spiteful, so long as she is honest, but if she is spiteful, the court may more readily conclude that misstatements of fact are not honest, since spite or ill will is a motive for dishonesty.
77. Mr Thwaites submitted that the evidence showed that Ms Barber did not have the bad memory she claimed to have. But he also stressed the extent to which Ms Barber had claimed to have a bad memory, from which it must follow that she must have known that her lack of recollection of an interview (if in fact she did not recall it), provided no reliable basis for her to be confident that no interview had in fact taken place. On the contrary, he submitted, if she believed her memory was bad, then she would have to resort to checking the truth of the allegation before she could make it with confidence. But she chose to suggest to her readers, not that her memory might be at fault, but that she could be certain that there had been no interview. He also submits that there is an inherent implausibility in Ms Barber remembering in the detail with which she did remember part of the e-mail exchange she had had with Dr Thornton in October 2006, but forgetting that there had in fact been an interview. He also relied on her subsequent behaviour, and her having lied in the course of her oral evidence.

LIBEL: THE INTERVIEW ALLEGATION - did Ms Barber believe what she wrote to be true?

78. Mr Price submitted that the claim that Ms Barber knew that the interview allegation was false must fail. He submitted that she had been unshaken in cross-examination, that there was no reason why she should have written what she knew to be false, and that the contemporaneous documents were consistent with her evidence. Dr Thornton had herself (in her e-mails between 7 November and 11 December 2008) given Ms Barber the benefit of assuming that the explanation for the false statement was forgetfulness.
79. Mr Price pointed to the fact that when Ms Barber submitted her piece to the Telegraph she drew to the attention of Mr Leith the words she had inserted alleging bad behaviour on the part of the other Turner Prize juror, and added: "If you can't be bothered with the fuss he is bound to make, just delete it. It is true though". There is a similar entry in her diary, together with a second diary entry recording that the Telegraph had "toned down my exposé" of the other juror, with the comment "just as well probably". There is nothing similar in the e-mail or the diary relating to Dr Thornton. But the diary entry for 11 December 2008 records the complaint from Dr Thornton, to which Dr Thornton had by then added the date of 11 December 2006 for the interview, and Ms Barber records she looked up her diary and found that it "records tiresome NY journo". She wrote nothing in her diary to support the allegation that she knew the interview allegation to be false.

Approved Judgment

80. As to this point, Mr Thwaites pointed to the fact that Ms Barber also wrote to Mr Leith that the juror in question “is a bit cracked so it could be v tedious”. So, submits Mr Thwaites, what Ms Barber was warning Mr Leith about was no more than the risk that the other juror would sue on a true allegation. So that casts no light on why she did not draw to the attention of Mr Leith the allegation against Dr Thornton.
81. My findings of fact are as follows.
82. Ms Barber had in fact been interviewed by Dr Thornton. It follows that she knew she had been interviewed, unless she had subsequently forgotten about it. Ms Barber stated that she is interviewed on occasions about her own interviewing technique, but she had not been interviewed about anything else in 2006, so far as she could remember. So it is less likely that she had forgotten than it would have been if she was accustomed to being interviewed on such matters. As she put it in evidence:
- “I thought that if I had done an interview I would have remembered, because I am quite interested in being interviewed and noticing other people’s techniques”.
83. In the Book which Ms Barber was reviewing Dr Thornton states that she had interviewed Ms Barber. An author is not likely to include a person’s name in her Acknowledgements as having been interviewed if that is not true. The fact that Ms Barber read it in the Book was a good reason why Ms Barber should believe that the author’s claim was true. Ms Barber could suggest no reason why an author should make such a claim if it was not true.
84. Ms Barber had a clear memory of the e-mail of 30 October 2006 at 17:10 (“Subject: Interview Request”) because the words of the Review (“I remember she asked to talk to me, but I said I had already published an account of my experiences as a Turner Prize juror which she was welcome to quote”) are very close to the words of the e-mail (“Sorry but I don’t think I want to do interview about Turner Prize after all. I’ve said everything I wanted to say in my Observer article [dated 1 October 2006] (which you are welcome to quote as much as you like”). It is unlikely that she would have such a clear memory of the 17:10 e-mail, but have forgotten the e-mail at 21:50 the same day, in which she relented and said “Yes, it would be fine to talk after we’ve chosen the winner in December, so try me again then”. There is also the use of the same word “talk” both in the 21:50 e-mail and in the Review, which is consistent with her memory of the earlier e-mail in the exchange being good. It is also unlikely that Ms Barber would have so clear a memory of the 30 October 2006 17:10 e-mail, but no memory of the talk on 11 December 2006.
85. In her witness statement Ms Barber stated: “When I read the book I dimly remembered that Thornton had asked for an interview about the Turner Prize, but I thought I had given her the brush off”. That is not an accurate description of her memory. Her memory that Dr Thornton had asked for an interview was precise, not dim. And her description of her memory in the Review is of an unqualified memory: “I remember she asked to talk to me”. Her description of her memory of the brush off is even clearer: the terms in which she recounts the brush off in the Review are very similar to the words used in the e-mail of 30 October 2006.

Approved Judgment

86. Ms Barber had a good memory of the events concerning the Turner Prize, which occurred in 2006 in the weeks just before the interview. She gave a detailed account of some of those events in the draft of the Review which she sent to Mr Leith on 20 October 2008. In that draft Ms Barber said of another juror that, on the same occasion on which she had apologised for her behaviour, Sir Nicholas Serota questioned the other juror at length about his behaviour (which she explains in detail). She recalled those events concerning the other juror, because she noticed that Dr Thornton had not included them in the Book. Ms Barber wrote in the Review that Dr Thornton's account of those events was "a very partial account". She wrote it was partial in the sense that Dr Thornton included matters to her (Ms Barber's) discredit, but did not include matters which were to the discredit of the other juror. As Ms Barber confirmed in cross-examination, there was no inaccuracy in what Dr Thornton had written about her in the Book. And she had had to apologise to the other jurors who were annoyed at her indiscretion in publishing in The Observer an account of the deliberations of the jurors before they had reached a decision as to who was to be the winner of the Turner Prize.
87. What Ms Barber called this "partial" account by Dr Thornton of her involvement in the Turner Prize was a motive for Ms Barber making the damaging allegations which she did make against Dr Thornton. Ms Barber referred in evidence to these as "disobliging remarks".
88. In her first response to Dr Thornton's complaint, that is in the letter of 18 December 2008, Ms Barber caused Mr Philp to write:
- "It seemed to Ms Barber that your account of the Turner prize judging relied heavily on one judge's account and omitted some important information regarding remarks made to that judge by Mr Serota".
89. In her witness statement Ms Barber wrote that she:
- "found the section on the Turner Prize judges' meeting particularly irritating because I was a participant and knew it to be partial ... Thus she included the fact that at the start of the final judges' meeting I had to make an apology for writing an article in the Observer about my trials as a judge, but not what happened next. Nick Serota asked ... [and she recounts the alleged misbehaviour of the other juror].
90. This complaint of partiality is a surprising one, because Ms Barber accepts that she had not herself informed Dr Thornton about the alleged misbehaviour of the other judge. She explained that she would not have given this story gratis to another journalist.
91. Ms Barber wrote in her witness statement in a number of places that she has a notoriously bad memory. In reading the documents and in listening to her oral evidence, I did not see any sign that that was true. On the contrary, her memory of events in 2006, as recounted in the Review, and her memory of events when she gave evidence, seemed to me to be normal or in some respect better than might be expected. I do not accept the accuracy of her statement that her memory is bad.

Approved Judgment

92. Ms Barber introduced into her witness statement her own book “An Education”, published in 2009. She did that to illustrate what she claimed to be her bad memory. In it she states her age to be 65, and she lists a number of matters which she says she can no longer remember. So far as I can judge, they appear to me to be matters which a 65 year old person with a normal memory would no longer remember. She says she “can’t even always remember whether I’ve interviewed someone”. She is a professional interviewer. Professional people cannot normally remember all the people with whom they have had professional talks. She writes that she used to be able to do shorthand at 100 wpm but cannot now. That is normal. She writes that she got top marks in A-level Latin, but cannot now translate a line of Horace. That is normal. However, Ms Barber remembers enough of Horace to make an elegant literary reference. She wrote in her book: “Eheu fugaces, I can’t translate a line of Horace now”. So she remembered the two opening words of a famous poem by Horace lamenting the speed with which years pass by and we grow old. The purpose of introducing into her own book the claim that she has had “a flaky memory all my life” appears to me to be a literary device to warn the reader that the memoir does not purport to be completely accurate.
93. At the start of her cross-examination Ms Barber accepted that if someone asked her a series of questions over the telephone, which she answered, then that was an interview. She could hardly have responded otherwise to Mr Thwaite’s question. It is the ordinary meaning of the word interview that one person asks questions of another so as to elicit an answer. She confirmed that she accepted that Dr Thornton had interviewed her by telephone, by arrangement, for a period of 35 to 40 minutes.
94. But on more than one occasion Ms Barber has suggested that whether or not she had an interview with Dr Thornton is arguable because whether or not a talk is an interview depends upon how helpful or informative the answers are. She first suggested that in what she said to Mr Philp who included it in his draft of the letter of 18 December 2008. She reverted to that in her cross examination. She said “we can argue forever, and probably will, about ... whether she did interview me”. I cannot accept that.
95. It is not arguable, and I cannot accept that Ms Barber believed, that a pre-arranged telephone call lasting over half an hour, following requests for an interview, at which Dr Thornton asked questions and Ms Barber gave answers (which Ms Barber described in her diary as “mildly helpful”) is anything other than an interview.
96. Mr Thwaites challenged Ms Barber to explain why she had not checked to see whether or not Dr Thornton had interviewed her. Her first answer was her main response to this point. It was: “I didn’t believe she’d interviewed me. I was pretty sure about that”. But Mr Thwaites then asked how she could be sure enough not to check, given what she was claiming about her flaky memory. Under that pressure, she told what is certainly a lie. She said: “I was confused anyway, because the person I think I exchanged e-mails with was a New Yorker journalist; is that right? And here it was for a book. I wasn’t quite sure that she [Dr Thornton] was the same person”. She had to accept this was a lie, because the first paragraph of the Review identifies Dr Thornton as the person who had asked for an interview.
97. It was true that, in the e-mails Dr Thornton had exchanged with Ms Barber in 2006 under the subject heading “Interview request”, Dr Thornton had written that she was

Approved Judgment

writing for the New Yorker. And Ms Barber had recorded in her diary for 11 December 2006 that Dr Thornton was a New Yorker journalist. It was not true that Ms Barber had ever been confused as to whether the person with whom she exchanged the e-mails was the author of the Book.

98. Ms Barber confirmed in cross-examination that she used a computer to write her articles and to access the internet, including for research, as well as for e-mails. She said she had also briefly written a blog, and had used Twitter for a time. She said she no longer had the e-mails she exchanged with Dr Thornton in 2006, but she was vague as to when she claimed to have deleted them. She said she did not know at the time she wrote the Review that it would be published on the Telegraph website. She accepted that her reviews for the Telegraph had been published on its website since September 2004. She said she did not discover that until 11 December (the date of Dr Thornton's e-mail which referred to the website publication).
99. I did not find convincing Ms Barber's evidence as to when she deleted her e-mails. Nor did I find convincing her claim that she did not know that her book reviews were published on the Telegraph website.
100. There is a further reason for concluding that Ms Barber knew that what she wrote about the interview was false. Dr Thornton claims that the review contained other false statements. One of the statements that Ms Barber had to accept was false was the statement that:

“she talks to auctioneers, collectors, art historians, academics and critics before she finally gets round to meeting an artist”.
101. However, there are references in almost every chapter to artists that Dr Thornton has met. Chapter 2 is about a seminar at the California Institute of the Arts, and the persons mentioned in it are all artists. Ms Barber accepted in evidence that she should not have said that in the review. She refers to that chapter in the Review.
102. The manner in which Ms Barber behaved on receipt of Dr Thornton's e-mails, in which she asserted that there had been an interview, is significant in assessing Ms Barber's state of mind. The allegation that Dr Thornton lied in claiming to have interviewed Ms Barber is so serious, that it might be expected that Ms Barber would take very seriously the claim made by Dr Thornton on 7 November 2008 that there had indeed been an interview. But Ms Barber did not respond to the e-mail of 7 November at all. Asked if this was an important e-mail to her, Ms Barber replied that it was not at all. She said she did not understand what Dr Thornton was asking for, and she did not pass the complaint on to the Telegraph. She said: “It is mad to complain to me. She had to go through the literary editor”.
103. I find Ms Barber's lack of reaction to Dr Thornton's initial complaint made on 7 November 2008 to be consistent with Ms Barber knowing already that her allegation that she had not been interviewed was untrue.
104. Ms Barber's explanation of the letter of 18 December 2008 is also significant as to Ms Barber's state of mind when she wrote the Review. Exactly how that letter came to be compiled is not known to me because the Telegraph did not waive privilege. I accept that the draft was written by Mr Philp. But the greater part of the letter conveys

Approved Judgment

information which is attributed to Ms Barber, which can only have been derived from what she said to Mr Philp, and which she agrees she approved before the letter was sent. The letter does not address at all the substance of the complaint, namely that it was a factual error on the part of Ms Barber to write that Dr Thornton had never interviewed her. That is passed over in silence. So Ms Barber impliedly admitted it, but did not address the point. I interpret that in the same way as I interpret Ms Barber's lack of response to the e-mail of 7 November.

105. However, the letter of 18 December then goes on to raise for the first time the denial that "this contact amounted to an interview in any meaningful sense". Of course, Ms Barber did not thereby mean to convey that, when she had written the piece in October, that is what she had had in mind. This is a new attack on Dr Thornton. It was apparently prompted by Dr Thornton's acceptance in her letter of 11 December that the interview was not very rewarding. Ms Barber is not saying in the letter of 18 October that Dr Thornton should not have mentioned Ms Barber's name in the Acknowledgments at all, but that she should have mentioned Ms Barber's name in a different part of the Acknowledgements. Moreover, Ms Barber caused Mr Philp to raise in the letter of 18 December what Mr Thwaites puts forward as her motive for having accused Dr Thornton of lying (see the passage quoted in para 89 above).
106. I have also considered the manner in which Ms Barber gave evidence. While the demeanour of a witness is not the best guide to whether the witness is lying or not, in this case I found nothing in her demeanour which suggested to me that she cared one way or another whether the interview allegation was true or false. She manifested no sign of caring at all.
107. It is a very serious matter for a judge to find that a witness has lied. In this case it is a charge that the witness has already admitted to in another context.
108. The cross-examination ended with the following exchange:
- "Q. In your book, *An Education*, at page 76, do you describe yourself in these terms:
- "I had become a proficient liar in my years with Simon and had found it hard to break the habit. I was also apt to do bad things if I could get away with them."
- I'll provide some context to that if you wish it. It is in relation to meeting your husband, who you describe as someone who was good?
- A. Yes.
- Q. And this episode in your life is when you were a teenager and pursued by a married man who was considerably older and was a con man –
- A. Yes.
- Q. -- in addition.
- A. Yes.
- Q. But is that the truth, that you had become a proficient liar?
- A. While I was with Simon. But the point I was -- I mean, it is unfair to quote it without the context, because what I'm then

Approved Judgment

saying is that I had the good luck to marry a very good, honest man, and I think improved myself as a result.”

109. I repeat that it was Ms Barber herself who introduced her own book into evidence.

LIBEL: THE INTERVIEW ALLEGATION - reasons why, if she did not know the truth, Ms Barber was reckless

110. If I accepted the passage in her witness statement in which she states that she “dimly remembered” being asked for an interview and “thought she had given her the brush off”, then I could not accept that she had that degree of confidence in her memory such as might credibly explain why, if she was an honest person, she failed to check whether her allegation of lying against Dr Thornton was correct. If her memory was only dim, and she only thought she had given Dr Thornton the brush off, then that would be a reason for saying that she was reckless in not checking.

111. In the Preface to her own book (“An Education”), Ms Barber states that:

“This is all by way of warning that you are in the hands of a deeply unreliable memoirist whose memory is not to be trusted. Where possible I have checked facts either against my diaries or articles, but I’m never exactly a slave to facts at the best of times. But does it matter?”

112. If she knows that her memory is “not to be trusted”, then she cannot claim the reliability of her memory as a credible explanation for her not having checked whether Dr Thornton had interviewed her or not. In her witness statement she said that when she saw her name in the Acknowledgements section of the Book it did not cross her mind that she may have forgotten. The more she claims to have a bad memory, the less credible her assertions that she was so confident in her memory that there had not been an interview that it did not cross her mind that she might be wrong.

113. In her own book Ms Barber recorded that she had kept a detailed diary since she was aged 30 and used it to check facts where possible.

114. A further reason Ms Barber gives in her witness statement as to why she should not have checked with Dr Thornton whether they had talked or not was that for a reviewer to get in touch with the author of a book under review “would be a very peculiar thing for a book reviewer to do”. But I do not understand her to suggest that that was a reason which influenced what she did at the time, because she goes on to say in her witness statement “But in any case, it did not cross my mind that Thornton had interviewed me”.

115. However, since she mentions the point, I must say that in my view it is not a reason which she can plausibly pray in aid. Ms Barber also accepted in her oral evidence that if Mr Leith had realised before she received the Book that she was herself referred to in it, then he probably should not have given it to her to review. Her understanding as to why Mr Leith might have objected to her writing a review is that he might have thought the review would “get personal”. The review was in fact as personal as it could be. The opening lines refer to the author’s physical appearance and academic

Approved Judgment

qualifications, and do so in terms which Ms Barber described to me as slightly pejorative or disparaging, and a personal insult.

116. I accept that it would be a very peculiar thing for a book reviewer to get in touch with the author of a book. But the reason why it would be peculiar does not apply to the facts of this case. Where a journalist contemplates publishing a statement of fact which is defamatory of the subject of the statement, it is a requirement of responsible journalism that the subject should be invited to comment upon that statement before it is published. This is a requirement of responsible journalism both because it promotes accuracy and because it promotes fairness. The fact that the journalist is proposing to include the defamatory statement of fact in a piece which would normally consist mainly of opinions does not excuse the journalist from doing what she would be required to do if the defamatory statement of fact were intended for a news article. It is the nature of the defamatory statement, not the type of piece in which it is to be included, that gives rise to the requirement to check the facts and give the subject an opportunity to comment upon the allegation.
117. Ms Barber accepted in evidence that she knew that the allegation that Dr Thornton had not interviewed her, as Dr Thornton claimed in the Book, was a damaging allegation to make against someone in Dr Thornton's position. She accepted that she was accusing Dr Thornton of lying about the interview. And the fact that Ms Barber realised the dangers of the review being written in terms more personal than the literary editor would expect was a further reason why she should have checked her facts.
118. A further reason Ms Barber gave for not checking whether or not she had been interviewed was that she was probably working to a deadline. Again this is not a reason which she said that she recalled influencing her decision at the time. It was speculation. This reason could not be a credible explanation why, as an honest person, she did not check so serious an allegation. She did not have to include the interview allegation in the Review. And in any event there was a period of some ten days between her submission of the piece to the Telegraph on 20 October and its first publication in the issue of 1 November. So there was on any view time to check before the distribution to the public.
119. Ms Barber also suggested that it would have been difficult for her to find an entry in her diary, when she did not know what she was looking for. But the words of the Review make clear that Ms Barber knew in October 2008 that the exchanges that took place between Dr Thornton and Ms Barber before the interview were exchanges which post dated Ms Barber's article in the issue of The Observer dated 1st October 2006. That is clear from the fact that Ms Barber states in the Review that she remembered telling Dr Thornton that she was welcome to quote from that article. I do not accept she believed that it would have been difficult for her to read her diary from 1st October 2006 onwards in order to see if there was an entry relating to Dr Thornton.
120. The failure to check an allegation that is so serious that a check is to be expected is consistent with knowledge that the allegation in question is false. A person does not need to check if she already knows what a check would reveal.
121. None of the reasons suggested by Ms Barber as to why she should not have checked to see if the interview allegation was true or false are at all convincing as an

Approved Judgment

explanation of why she did not check. If (contrary to my finding) Ms Barber did not know that the interview allegation was false, then in my judgment the probable explanation is that she was indifferent to the truth or falsity of the allegation.

122. The subsequent behaviour of Ms Barber is not only consistent with Ms Barber being indifferent to the truth or falsity of the allegation. In my judgment it is probative that she was indifferent.
123. Ms Barber's reaction to Dr Thornton's e-mail of 7 November 2008 demonstrates indifference to the truth or falsity of the interview allegation as at that date. An honest person who cared whether what she had written was true or false would have wanted to know whether or not she had made a false accusation of lying against Dr Thornton. It is no answer to say, as Ms Barber did in evidence, that it was not clear what Dr Thornton was asking for in that e-mail. In her witness statement of 12 June 2011 she stated in respect of the complaint of 7 November 2008: "I still do not think that it called for a reply". At best that demonstrates her indifference to the truth or falsity of what she had written.
124. Ms Barber's reaction to Dr Thornton's e-mail of 11 December 2008, as recorded by her in her diary, demonstrates her indifference to the truth or falsity of the interview allegation as at that date also. An honest person who cared whether what she had written was true or false, and who had discovered that what she had alleged was false (as Ms Barber had by then discovered, if she did not already know), would have felt concern, and expressed it. Instead, as appears from the letter of 18 December 2008, she decided to attack Dr Thornton on a new basis, claiming in effect that the word "interview" meant what she, Ms Barber, said it meant, and referring again to her own grievance that Dr Thornton had not included in the Book a mention of what Ms Barber considered to be the misbehaviour of the other juror, notwithstanding that she had not told Dr Thornton about this herself.
125. The fact that Ms Barber demonstrated indifference to the truth or falsity of the interview allegation upon receipt of Dr Thornton's e-mails of 7 and 11 December 2008 is relevant to the finding that I must make as to her state of mind when she wrote the Review in mid October, less than eight weeks earlier. On receipt of the e-mail of 7 November Ms Barber can have had no reason to believe that the interview allegation was true, and on receipt of the e-mail of 11 December 2008 she knew it was false. But she remained indifferent.
126. Mr Price relies on the diary entries for 20 October and 1 November concerning the allegation about the behaviour of the other juror which Ms Barber had included in the Review, but which had been edited by the Telegraph. He submits that these two entries demonstrate a general anxiety and implicit sense of responsibility not to get into legal difficulties. In my judgment they provide a striking contrast with the entry for 11 December. They invite an explanation of why she did not record in her diary her concerns about Dr Thornton, unless the explanation be that she had no concerns about Dr Thornton.
127. It is with some hesitation that I reached the conclusion that Ms Barber knew the interview allegation was false at the time she wrote the Review. I have had no hesitation in reaching the alternative conclusion that (if she did not know it was false) she was reckless, that is indifferent as to whether it was true or false.

Approved Judgment

CONCLUSION ON THE CLAIM FOR LIBEL

128. It follows from the conclusions that I have reached, that the offer of amends provides no defence to the claim for libel.

LIBEL: THE CLAIM IN RESPECT OF THE WEBSITE

129. There is a claim for libel in respect of the website publication alone which is maintained on a different basis. This difference turns on the states of mind not only of Ms Barber, but also of Mr Rhidian, Mr Arthur and Mr Philp. Nothing turns on this different basis of the claim, if I am right in my conclusions as to the state of mind of Ms Barber when she wrote the Review in October 2008. But in case I am wrong in any of my conclusions, I shall consider this alternative way of putting the claim.
130. The fact that gives rise to a separate argument in relation to the website is that on 11 December 2008 Ms Barber had seen Dr Thornton's complaint of that date, checked her diary and found that it was true that Dr Thornton had spoken to her by arrangement on 11 December 2006, and that Dr Thornton had asked her questions, and that she had been "mildly helpful". It follows, so Mr Thwaites submits, that from that point onwards Ms Barber, and so also Mr Philp, Mr Rhidian and Mr Arthur, knew that the interview allegation was false, or had reason to believe that it was false, within the meaning of s.4(3).
131. In the Amended Particulars of Claim and the Re-Amended Defence the pleadings in relation to the website publication mirror the pleadings in respect of the hard copy publication. Publication of the Review is admitted. The difference emerges in the Amended Reply. In para 4.10A it is pleaded that by the 11 December 2008 letter Dr Thornton made the Telegraph aware of the falsity of the interview allegation, and specifically requested publication online of a correction and apology, and, by her later e-mail that day, suspension of the Review from the website. It is pleaded that that letter was read by Mr Rhidian, Mr Arthur and Mr Philp. The same allegation is made against Ms Barber, save that in her case it is pleaded that she knew of the falsity from 7 November.
132. The Amended Reply then pleads that neither of the three named gentleman, nor anyone else at the Telegraph took any action to amend or remove the Review from the website, although they knew that it was there. So it is said that they were each "knowingly responsible as a matter of law for the continuing publication of the" Review.
133. Thus, it is said, the Telegraph knew as from those dates that the Review was false or had reason to believe that it was false and defamatory of Dr Thornton, within the meaning of s.4(3) of the Act. So, it is said that in respect of the website publication the offer of amends provides no defence in respect of publications after those dates.
134. There being no Rejoinder, the case for the Telegraph is set out in a Skeleton argument prepared for the trial. Mr Price accepts that it is obvious from the letter of 11 December 2008 that there was a conversation between Dr Thornton and Ms Barber on 11 December 2006. But he submits that an honest reader of the letter of 11 December could conclude that the conversation in December 2006 did not amount to an interview, and that each of Ms Barber and the three gentleman believed that it did not

Approved Judgment

amount to an interview, or in the case of the three gentlemen, that Ms Barber was entitled to and did hold that view.

135. Further Mr Price submits that, for the purpose of s.4(3), the individual who has the relevant state of mind must also make a conscious decision in bad faith to continue the publication, and that none of the individuals concerned acted in bad faith. For this proposition he argues from the legislative purpose of the offer of amends procedure, and cites *Shapiro v La Motta* [1923] 40 TLR 201. That case concerned a poster referring to the plaintiff which was not taken down after she had pointed out that the information in it about her was incorrect. The claim failed because the information was not defamatory, and there was no intention to injure, and the damage claimed was in any event too remote. I do not find this case of assistance.
136. Mr Price goes on to submit that the only person who made any conscious decision was Mr Philp, so that even if he had made that decision in bad faith, his decision would not defeat the offer of amends, because he was working freelance, as an independent contractor. He cites *Duncan & Neill on Defamation* at para 18.28.
137. Mr Thwaites submits that the position of Mr Philp as an independent contractor does not affect the Telegraph's liability, in so far as he was an agent for the Telegraph if he made the decision in question. Further, he submits that the ordinary rules in relation to responsibility for publication apply, and he cites from *Bunt v Tilley* [2007] 1 WLR 1243 at para 21 where Eady J said:

“If a person knowingly permits another to communicate information which is defamatory, when there would be an opportunity to prevent the publication, there would seem to be no reason in principle why liability should not accrue”.
138. I turn now to consider the facts relevant to this part of the case, in so far as they are not already set out above (see para 43 above and following).
139. Mr Rhidian, Mr Arthur and Mr Philp all gave evidence in the form of witness statements, but only Mr Arthur and Mr Philp were required to submit to cross-examination by Mr Thwaites.
140. Mr Philp's first witness statement was made for an interlocutory application and dated 10 December 2009, and relates only to the letter of 18 December 2008. He said that he sought information from Ms Barber before drafting the letter of 18 December, as he would from the author of any article which was the subject of a complaint, and that the wording of the letter was approved by Mr Rhidian. The letter referred to what Ms Barber had in mind in December 2008, not what she had in mind at the time she wrote the Review.
141. Mr Philp's second witness statement is dated 17 June 2011. He had not been asked to address his mind to the reason why the website publication was not suspended until 2011. By that time he could not remember what information was available to him when he drafted the letter of 11 December 2008 in response to Dr Thornton's complaint of that day. He could recollect that he thought that the complaint was weak. He consciously decided not to state in his letter of 11 December that the online publication would be suspended.

Approved Judgment

142. He then set out what he believes his thought processes were. He believed he thought that Dr Thornton's statement in her letter, that her conversation with Ms Barber was not very rewarding, was not materially different from Ms Barber's statement in the Review about not wishing to add to her published account. He believed he was influenced by the Review being a comment piece, and by Ms Barber expressing the opinion that her contact with Dr Thornton did not amount to an interview. It did not occur to him that the Review was accusing Dr Thornton of dishonesty: that was not suggested until the letter from Dr Thornton's solicitors.
143. Mr Philp stated that he assumed that his draft letter of 18 December 2008 had been approved by Mr Rhidian. But he was later informed that that letter had in fact been signed by Mr Arthur on behalf of Mr Rhidian. After learning that, he recalled that he had had a brief conversation with Mr Arthur after learning that he was unable to see Mr Rhidian.
144. In cross-examination Mr Philp said that he gave no further thought to suspending the website publication when he received the later e-mail from Dr Thornton on 11 December, nor at any time thereafter. After he had sent the letter of 11 December 2008 to Dr Thornton he was busy dealing with copy being prepared for publication in the next day's paper. He would have printed out the e-mails and put them in a file.
145. He did recall speaking to Ms Barber following receipt of Dr Thornton's letter of 11 December. He communicated with Ms Barber about it by e-mail between that date and 18 December. He sent a copy of Dr Thornton's letter of 11 December to Ms Barber. As a result of information received from her he believed that there had been a conversation between Dr Thornton and Ms Barber on 11 December 2006. He had no evidence to contradict that. But he did not believe that it was an interview. His view was influenced by the fact that (as set out in her letter of 11 December 2008) the e-mails Dr Thornton had exchanged with Ms Barber in 2006 were not headed "Interview", and by the fact that in chapter 4 of the Book there was no reference to there having been an interview, but only to articles by Ms Barber. What Ms Barber was saying to him was that whatever contact she had had with Dr Thornton, it was not an interview.
146. Mr Philp said that the letter of 18 December was drafted to a layperson and intended to make the Telegraph's point as diplomatically as possible. At one point he said:
- "... in considering the piece at the time that is the judgment view I came to. Whether that was right or wrong is another matter".
147. From Mr Philp's demeanour I was left with the impression that he did not consider that the view he had taken of the complaint from 11 to 18 December was one that he ought to have taken. He came very close to accepting that it was not.
148. Whether or not Mr Philp was careless in what he did and did not do is not relevant to this action. Nothing in this judgment should be taken as a finding of a breach of a professional duty of care by Mr Philp or Mr Arthur, since no issue as to that has been put before me to decide. The only question is whether Mr Philp or Mr Arthur knew that what was published about the interview on the website was false, or was indifferent to whether it was true or false. Mr Philp's position was different from that

Approved Judgment

of Ms Barber. She had been a party to what she referred to as the talk in December 2006. He had not. She had given him her opinion that it was not an interview.

149. I find that Mr Philp was mistaken in the view he took, and in omitting to advise that the website publication be suspended. But he did not know the interview allegation to be false. He accepted Ms Barber's claim that, in her opinion, the conversation which had undoubtedly taken place was not an interview. It follows that the defence of offer of amends would not be defeated only on the basis of Mr Philp's state of mind.
150. However, should the point be of relevance in the future, I do find that the decision not to take the Review off the website was a deliberate decision. Mr Philp deliberately drew to the attention of Mr Rhidian his opinion that it should not be taken off the website. This opinion was accepted by Mr Rhidian.
151. In his witness statement Mr Rhidian states that he has no recollection of what happened in the handling of Dr Thornton's complaint in December 2008. He would not have kept the Review on the website if he had believed it was false and defamatory. He would have trusted Mr Philp's opinion. He was not cross-examined. It follows that on the basis of Mr Rhidian's state of mind alone, the defence of offer of amends would not be defeated.
152. In his witness statement Mr Arthur states that he has no recollection of signing the letter of 18 December. He accepted that he must have read Dr Thornton's letter of 11 December, but he would have trusted Mr Philp and would have been very busy. He would not have recommended the retention on the website of an allegation that was false and defamatory. He repeated this in cross-examination. He had been party to the decision to make the offer of amends, with the concession that involved as to the allegation being false and defamatory. He was clearly embarrassed, but did not accept that he had known that the interview allegation was false. He accepted with the benefit of hindsight that the complaint could have been handled better.
153. My conclusion in relation to Mr Arthur's state of mind is similar to that in relation to Mr Philp's, as set out in para 149 above.
154. In my judgment, if the claim in libel based on the state of mind of Ms Barber did not succeed in relation to her state of mind before 7 November (as in my judgment it does), then it would succeed in relation to the website publications after that date, and, if not after that date, then certainly after 11 December. Although she persuaded the lawyers that the interview allegation could be defended on the basis that the admitted conversation did not amount to an interview in her opinion, I have found that that was not in fact her opinion. And I have found that she knew that the Review was on the website, and that if she had candidly admitted the truth, namely that Dr Thornton had interviewed her as Dr Thornton said she had, then the website publication would have been suspended. What she told Mr Philp had the direct result that the website publication continued, when it would otherwise not have done.
155. I accept the submission of Mr Thwaites on the basis of *Bunt v Tilley* that all that it is necessary for Dr Thornton to prove is that Ms Barber is a publisher in the ordinary sense of that word in the law of libel. That she was a publisher in that legal sense of the word is not in dispute. But on the facts the result would be the same if what had to

Approved Judgment

be proved was a deliberate decision. Ms Barber did make a deliberate decision to mislead Mr Philp.

MALICIOUS FALSEHOOD: THE COPY APPROVAL ALLEGATION – did Ms Barber believe what she wrote?

156. When Ms Barber wrote the Review she had no information about Dr Thornton’s techniques other than the information that Dr Thornton gave in the Book. So the copy approval allegation is unlike the interview allegation, in that the interview allegation purports to be based on Ms Barber’s own personal knowledge derived from a source other than the Book itself.

157. In the second paragraph of the Review Ms Barber wrote of Dr Thornton:

“She also claims that she practices reflexive ethnography, which means that her interviewees have the right to read what she says about them and alter it. In journalism we call this ‘copy approval’ and disapprove”.

158. The e-mails exchanged between Ms Barber and Dr Thornton before the interview contained no mention of copy approval or any other right of approval to be given by Dr Thornton to Ms Barber. The only source which Ms Barber had for these words was in the Book at p257. Dr Thornton had there written:

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

159. Dr Thornton first complained of the copy approval allegation in her e-mail of 11 December 2008. She complained of it as one of the two factual errors damaging to her.

160. In drafting the letter of 18 December 2008 in response to that complaint Ms Barber and Mr Philp recognised the distinction between a right and an opportunity:

“It seems as if the individual concerned was afforded the opportunity to correct factual inaccuracies and to add ‘richer’ material to the end result – in other words to alter what had originally been written. This lends itself to a comparison with ‘copy approval’”.

161. In cross-examination Ms Barber accepted that an ‘opportunity’ is not a right. She accepted that she should not have said that Dr Thornton gave people a right to alter what she had written.

162. As discussed in my judgment in this case ([2010] EWHC 1414 (QB)), it is not defamatory of a writer to say that she practises copy approval. It is a right given, for example, by the writers of authorised biographies, which are a normal and reputable form of writing. But as Ms Barber also accepted, it is damaging to attribute the

Approved Judgment

practice to a person who is writing for journalism in a serious newspaper, or for academic readers.

163. When asked by Mr Thwaites what explanation she had for altering ‘opportunity’ to ‘right’, other than resentment at what Dr Thornton had written about herself, Ms Barber replied with a question of her own: “Why would I feel resentment towards her? I have never met her”. She gave no explanation for the alteration, other than that she considered that, on being given an opportunity to send feedback to Dr Thornton, people would be almost bound to ask to alter things. She said “I suspect that she did alter things on the basis of her feedback”.
164. In an article in the Observer on 27 January 2002 (“Caution: big name ahead”) Ms Barber expressed clear views on the different forms of approval that subjects may ask for when being invited to agree to being interviewed. She discussed in detail “copy approval”, “picture approval”, and “writer approval”. In each case her use of the word “approval” denoted a right given by the interviewer or writer to the subject to see the material proposed to be published in advance of publication, and to delete or veto anything that the subject did not like. The meaning of “copy approval” as understood by journalists and academic writers was not in dispute in this action.
165. Ms Barber had also had personal experience that was relevant. She had herself acquired a right to see but not to alter what Nick Hornby was to write in a script for a film about herself. As she described it on page 3 of her own book published in 2009, but relating to events some time before that:
- “Luckily, I had the nous to put a clause in the contract saying I was allowed to see and comment on (but not alter) any script Nick Hornby wrote”.
166. She accepted in cross-examination that Nick Hornby did occasionally do things with the feedback that she gave to him.
167. On the basis of the Book itself, there was no material upon which Ms Barber could dispute Dr Thornton’s evidence that what Ms Barber had written about her giving a right of copy approval was false. Moreover, on the basis of the Book, which was the only material she had before her at the time she wrote the Review, I find that Ms Barber had no reason to believe and did not believe that Dr Thornton had given a right of copy approval to the people she quoted. She understood very well that an opportunity was not a right, and believed that what she had written was false. In reaching this conclusion I have taken into account the conclusions I have reached on the interview allegation.
168. However, at a late stage before the trial the Telegraph sought to amend its Defence and denied (instead of just not admitting) that the copy approval allegation was false. The Telegraph asked for disclosure of further documents. What prompted this was the contents of the witness statement of Dr Thornton dated 16 May 2011. After denying that any individual was offered (or asked for) copy approval, Dr Thornton wrote:
- “With respect to this, I made clear in advance to interviewees, when requesting an interview, that I would obtain their express permission to attribute a quote. Again there is no issue about

Approved Judgment

this, and it is a distinction readily understood by those who have practised in this field. ... This quote checking process undoubtedly improved the clarity and crispness of the quotations ... Many interviewees improved their grammar and word choice or, at my instigation, added an illuminating metaphor. If the interviewee was nervous about something they had said but I thought the wording was true and important, I worked hard to keep it. In an extreme case, if an interviewee refused permission to attribute words that I wanted to keep, I would use the quote in unattributed form”.

169. In seeking an interview with some interviewees (but not with Ms Barber) Dr Thornton had written: “I conduct all my interviews off the record and would obtain your express permission to attribute a quote”. In the Book Dr Thornton makes clear that a number of the quotes are attributed to individuals referred to by pseudonyms.
170. Mr Price attacked Dr Thornton’s claim on this point in two ways. First, he submitted that the documents exchanged between Dr Thornton and a number of interviewees from whom Dr Thornton sought quote approval, showed that in practical terms quote approval was really the same thing as copy approval. Second he submitted that Dr Thornton had in practice granted copy approval. He argued that, without permission to use quotes, there could be no book.
171. Dr Thornton rejected these contentions. She pointed out that she had in fact used pseudonyms in a number of cases, and said she could have done so in more cases. As she said, the “Book is not a series of celebrity profiles ... My chief purpose is to understand the way the art world works, not to profile people”. So there was nothing to stop her using the quotes in unattributed form, even if the people quoted did not give approval to an attribution.
172. There are a very large number of individuals to whom quotes are attributed in the Book. But the disclosed material related to very few.
173. The disclosed documents reveal that in a small number of cases Dr Thornton did alter quotations and other parts of the text in response to feedback. They also disclose that in other cases she was asked to alter the text and declined to do so.
174. The onus of proving that the copy approval allegation is false lies on Dr Thornton. But once Dr Thornton had asserted in evidence that she did not give copy approval, and in the absence of documents showing that she had, the Telegraph sought to discharge the evidential burden of demonstrating that the allegation was true.
175. There was an obvious difficulty which Mr Price acknowledged. Simply to show that Dr Thornton had offered an individual an opportunity to give feedback, that the individual had given feedback, and that Dr Thornton had altered the text as a result, would not prove that Dr Thornton had given the individual a right of any kind. Such a scenario is equally consistent with Dr Thornton’s account of the matter.
176. When asked about specific changes to the text that Dr Thornton had made in response to requests from a handful of individuals, Dr Thornton responded that she had made the changes on the grounds of accuracy, or because she thought it appropriate to do

Approved Judgment

so, in some cases out of courtesy. Examples were when she removed a reference to a person's age or hairstyle, or a comparison between the appearance of an individual and that of a well known actor.

177. In my judgment Mr Price's challenge to Dr Thornton's case on falsity in relation to the copy approval allegations was always likely to be difficult on the limited material he had available to him. In fact it proved impossible to make good.
178. As Mr Thwaites pointed out in submissions, judges send the draft of judgments to the parties for their advisers to submit editorial corrections and to draw attention to obvious errors. Counsel may in a few cases contend that the draft judgment does not accurately record their submissions. In very rare cases counsel may point out that words used by a judge could be misunderstood, or that they reflect adversely upon a third party when it is unnecessary and inappropriate to do so (see eg *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 158, [2010] 3 WLR 554 at para [5]). Judges commonly accept corrections and alterations requested by counsel, but no one could suggest that what the judge is offering is a right of approval, as opposed to an opportunity to submit feedback. The concern of the judge is to achieve fairness and accuracy, so far as possible, in his recitation of the facts and the submissions of the parties.
179. In my judgment, there is, as Ms Barber well understood, a distinction between quotation approval and copy approval, and no equivalence between them which is material to this case. Dr Thornton has satisfied me that she did not grant copy approval. The allegation that she did so is false, and Ms Barber knew that it was false. Ms Barber did not believe that there was any material similarity between what Dr Thornton granted to her interviewees and copy approval.

DAMAGES

180. I did not understand Ms Barber to dispute that the copy approval allegation was calculated to cause pecuniary damage to Dr Thornton. On the evidence of Dr Thornton's professional activities as a journalist and academic that conclusion would in any case be inevitable. It is clear from the Review and Ms Barber's other writings, referred to above, that journalists, and editors, take a strong view against giving such a right of approval.
181. Witnesses for Dr Thornton explained in their witness statements that this was so. Examples are Ms Rocco and Mr Guarino. Mr Price objected to this evidence on the grounds that it was expert evidence for which permission had not been obtained. Both of these witnesses spoke about journals for which Dr Thornton has actually written, *The Economist* and *Artforum International Magazine* respectively. The objection seemed to me to be technical in the extreme, given Ms Barber's own views of the matter expressed in the Review. But if I have to rule on the objection, I would reject it. These witnesses were speaking of whether their publications would accept further work from Dr Thornton if she gave copy approval. That is not opinion. It is evidence of their intentions as to the conditions under which they would be willing to make agreements with Dr Thornton in the future. Ms Rocco made a clear distinction between quote approval, which she characterises as a form of fact checking, and copy approval, which she describes as surrendering editorial control.

Approved Judgment

182. However, the copy approval allegation is far less serious than the interview allegation. The interview allegation does not relate merely to professional practice. It is an attack on Dr Thornton's honesty. I accept Dr Thornton's view that there could hardly be more serious an allegation to make against someone in her profession.
183. In these circumstances, it is difficult to make separate awards of damages.
184. Other factors relevant to damage are the circulation of the Review, both in hard copy and on the website. The circulation of the hard copy of the Telegraph is in excess of one million copies. Not all readers would have read the Review, but in the case of some copies there is likely to have been more than one reader. There is evidence which was not disputed of at least 700 website readers. In addition it is probable that there were republications on other websites and blogs.
185. Dr Thornton spoke of professional colleagues who mentioned the Review to her, and others who manifested signs of having read it or known of it. She was able to deny the truth of the allegations, but did not feel that she had always convinced her colleagues. She had had the humiliation of having to discuss it with some people with, or for whom, she worked, such as Ms Rocco, who did accept what she said.
186. The malice that I have found on the part of Ms Barber is a serious aggravating factor. And the manner in which her complaint was dealt by her, and by the Telegraph generally, is a further aggravating factor. In ordinary language she was fobbed off. It is clear that Mr Philp drafted the letter of 18 December in a different style from that which is to be expected of an experienced newspaper lawyer. But Dr Thornton's complaint, although obviously not written by a lawyer, was clear and fully reasoned. It called for an equally clear and reasoned reply. The reply of 18 December was high handed. It suggested that Ms Barber was the authority on what was or was not an interview, and it criticised Dr Thornton for not including in the Book the allegation of misbehaviour against the other juror which Ms Barber had initially put in her Review (but which she had accepted should be edited out), and which she had deliberately not told Dr Thornton about. The letter was offensive to Dr Thornton. This is an aggravating factor.
187. There was an apology by the Telegraph, about ten months after the first publication, and about six months after the Review had been removed from the website. An apology is always some mitigation. But to be effective in vindication of a person's reputation, and so mitigation of damage, an apology must be prompt. This apology was not prompt, and so counts for much less than it would have done if it had been made in late 2008 or early 2009. There was no apology for the copy approval allegation.
188. The cross-examination was also an aggravating factor. Mr Price persisted at length in putting to Dr Thornton that she did in fact grant copy approval. And he asked some intrusive questions about the financial affairs of her husband and father, which had no relevance to the case, but which served to humiliate.
189. In my judgment the least award of damages that is necessary in this case is one of £65,000. If it has to be split between the libel and the malicious falsehood, I would attribute £50,000 to the libel and £15,000 to the malicious falsehood.

Approved Judgment

190. If it has to be split between the print edition and the online edition, I would apportion one half to each. The website publication is more limited in numbers, but lasts much longer, and is likely to be seen by persons using search engines to find out about Dr Thornton. That is a common practice for people considering dealing with one another and wanting to know more about the other person.

THE APPLICATION FOR SUMMARY JUDGMENT

191. On 29 June 2011 The Telegraph issued an application for summary judgment on the basis that the allegations of malice had no real prospect of success. Mr Price did not pursue these, but asked me to state in my judgment what I would have decided.
192. This is not a satisfactory way of proceeding. If the Telegraph had wished to call no evidence at the close of Dr Thornton's case, that is a course that would have been open to them. If they had done that the claim would have succeeded. For the reasons stated above, the evidence in support of the claim raised a case to answer. So if the application for summary judgment had been pursued, it would have failed.

CONCLUSION

193. For these reasons this claim succeeds.