Case No: A2/2013/0436

Neutral Citation Number: [2014] EWCA Civ 179

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE TUGENDHAT
HQ12X01690

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2014

Before :

LORD JUSTICE LAWS
LORD JUSTICE TOMLINSON
and
LADY JUSTICE RAFFERTY

- -

Between :

DATO WORAWI MAKUDI	**Appellant**
- and -	
BARON TRIESMAN OF TOTTENHAM	**Respondent**

- -
- -

Mr Andrew Gordard QC and Mr Simon Crawshaw (instructed by Watson, Farley & Williams LLP) for the Appellant
Mr Andrew Caldecott QC and Ms Clare Kissin (instructed by RPC LLP) for the Respondent

Hearing dates : 28 November 2013

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Judgment

LORD JUSTICE LAWS**:**

INTRODUCTION

1. This is an appeal, with permission granted by Maurice Kay LJ on 20 June 2013, against the judgment of Tugendhat J ([2013] EWHC 142) given on 1 February 2013 by which he struck out the appellant's claim in defamation and malicious falsehood and entered summary judgment for the defendant, the respondent in this court. Tugendhat J introduced the case at the beginning of his judgment as follows:

> "1… On 10 May 2011 the Defendant gave evidence to the Culture Media and Sport Committee of the House of Commons ('the CMSC'). I shall refer to this as the Parliamentary evidence.
>
> The claim is not brought on the Parliamentary evidence, and could not be, because anything said in Parliament is protected by absolute privilege. But the Parliamentary evidence has been referred to outside Parliament, and the claims in this action arise out of those subsequent references."

2. The principal question in the case is whether these "subsequent references" are immune to the appellant's claim by force of Article 9 of the Bill of Rights 1689. As is well known Article 9 provides:

> "That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place outside of Parliament".

THE FACTS

3. The respondent had been Chairman of the English Football Association (the FA) and also of the England 2018 Football World Cup bid. His appearance before the CMSC took place in the course of the Committee's inquiry into domestic football governance, which had been announced in December 2010 following the failure of the England bid. Tugendhat J set out material extracts from the evidence given by the respondent to the CMSC, as pleaded in paragraph 3 of the Particulars of Claim:

> "[The defendant]: … The second area is about the conduct of some members of the FIFA executive… I would, if it was thought helpful by the Committee, go to the specifics of some things which were put to me personally, sometimes in the presence of others, which in my view did not represent proper and ethical behaviour on the part of those members of the committee. If that is helpful it is probably high time it was ventilated.
>
> Q48 Chair: … That would be helpful, and I think the Committee would like to hear it.
>
> [The defendant]: … The fourth example to bring to your attentions, Chairman, is this. We had a number of conversations with [the claimant], telephone conversations for the most part. He was eager to secure a match between the England team and the Thai team. … [He] said it would be a great honour if England came, and we talked about the possibilities, how it would fit in at the end of the season, what arrangements might be with the clubs. But the one

thing that he did insist on was that one way or another the TV rights to the broadcast in the United Kingdom would go to him. I made the point that, broadly speaking, the right to games played overseas are owned by the federations or those in the countries where the game is played. It was not, in any case, in my view, something that we could or should organise, and I told him that. But that was what he believed was the critical thing to making the arrangement a success…

Q49 Chair: … How overt in your mind was the linkage in each of the four cases between what was being asked for and the promise of a vote for the England bid?

[The defendant]: In the first three examples they all took place absolutely in the context of formal approaches about the bid… I think that with [the claimant], it might be argued that the events were potentially different, but it is hard not to think that a member of the FIFA Executive Committee, who is potentially seeking what might be a very lucrative arrangement around a football match, is unaware of the idea settling in my mind, or in the minds of people in this country who are responsible for the bid, that these things would be linked…

Q52 Chair: So you felt that to make a complaint that some members of the Executive Committee were being unduly influenced by what can best be described as bribes, and to pursue that the only result would be to absolutely ensure England stood no chance at all?

[The defendant]: Yes Not only that, but when you listen to some of the things that members of the Committee said when The Sunday Times and then Panorama quite rightly, in my judgment, published the evidence they had about corrupt practices, the response was immediately that if we in England, including our media, behave like that, 'Then you cannot expect any support from us'…

Q54 Chair: On the basis of your experience, both in terms of your direct contact with certain members, and indeed from having observed the process, do you think that the outcome of the 2018 and 2022 contests was unduly influenced by improper behaviour on behalf of some members of the Executive Committee?

[The Defendant]: I think it will have been influenced to some extent…"

In the course of his evidence to the CMSC, at a stage after he had said what he said about the appellant, the respondent was asked whether he would take his concerns to FIFA. He agreed to do so (see Questions 59-61 and 98-99). In answer to Question 99 he described this promise as an "undertaking".

4. Almost immediately after the hearing before the CMSC the FA appointed Mr James Dingemans QC as he then was to conduct a review for the purpose of looking into the respondent's allegations. On 13 May 2011, three days after the CMSC had taken the respondent's evidence, the FA wrote to him referring to the allegations he had made and requesting his assistance at Mr Dingemans' review. They also asked whether he

had any further oral or documentary evidence. The respondent replied on 16 May indicating that he would be accompanied before Mr Dingemans by Baroness Scotland QC, and would not be supplying any "personal materials in advance of meetings". On 19 May the FA wrote again to the respondent, setting out a very detailed list of matters upon which Mr Dingemans would ask questions and giving warning of possible criticisms of the respondent which would be put to him. Mr Dingemans interviewed the respondent on 20 May 2011.

5. It is clear that in answering Mr Dingemans' questions the respondent was at pains not to exceed what he had said to the House of Commons Committee. Thus in his oral evidence we find these exchanges:

> "[Mr Dingemans]: Right, OK. And so far as this is concerned, this point against [the claimant], is there anything further in addition to your Commons committee evidence that you can assist with?
>
> [The defendant]: No. I don't think I can add to it."
>
> "Mr Dingemans]: … in relation to [the claimant], then, I just give you the same opportunity: is there anything else you want to say other than what is said in your Commons evidence?
>
> [The defendant]: No thank you."

And in the respondent's witness statement before Mr Dingemans, referring to his evidence to the CMSC (of which a transcript was exhibited to the statement):

> "I think that, if I try to add to it I may stray into territory not covered by Parliamentary privilege".

It is plain that the respondent was anxious not to lose the shield of absolute privilege which, of course, protects statements made in either House of Parliament.

THE CLAIM, THE JUDGMENT, AND THE GROUNDS OF APPEAL

6. In the action, in which the claim form was issued on 2 May 2012, the appellant complained of four publications: (1) the respondent's oral evidence given to Mr Dingemans on 20 May 2011; (2) the respondent's witness statement published to Mr Dingemans; (3) and (4) publications by Mr Dingemans himself to FIFA and the FA: these are said to be republications of (2) and (1) respectively, or parts of them. Publication (4) was apparently republished on the FIFA website.

7. The judge's conclusions on Article 9 arise out of his approach on the facts of the case to issues of qualified privilege and malice. At paragraph 94 he states that it is "as plain as could be" that all four publications complained of were made on occasions of qualified privilege. So much, although not formally conceded, had not been contested (see paragraph 92). There is no appeal against the finding of qualified privilege. The claim was and is therefore bound to fail unless the appellant has a case in malice fit to go to a jury (paragraph 95). At paragraph 101 the judge accepted two submissions advanced by counsel for the respondent: (1) that the court could not enquire into the appellant's state of mind before Mr Dingemans (in order to test the appellant's claim of malice) without also enquiring into his state of mind before the CMSC; but that

would violate Article 9; and (2) that an acceptance of the appellant's evidence at trial would not entail the conclusion that the respondent was dishonest: it would be equally consistent with his having been mistaken.

8. The appellant says that his claim is no affront to Article 9 of the Bill of Rights essentially on the ground that its target is not anything stated in Parliament but what the respondent said (or conveyed by reference) to Mr Dingemans. There are also other grounds of appeal: against the judge's conclusion that, assuming the appellant was believed at trial (a necessary assumption upon an application to strike out the claim), still malice would not be established (paragraph 101), and his finding that the pleaded case relating to the website publication was "too vague… to go forward on any basis" (paragraph 90). A further ground was advanced against the judge's conclusion that none of the four publications is capable of being reasonably understood to mean that the appellant "was actually guilty of corruption or actually guilty of any other reprehensible conduct" (paragraphs 79 and 87), but that is not pursued in light of certain limited concessions made by the respondent at paragraph 69 of counsel's skeleton argument.

9. I should also refer at this stage to the respondent's notice of 12 July 2013, which raises an alternative submission based on Article 9. This is how it is put (paragraph 2(f) of the notice):

> "If this action is triable, a parliamentarian will face the risk of defamation proceedings if he raises a misconduct issue in evidence to a parliamentary committee, in circumstances where he cannot reasonably refuse a request by that committee to enable or assist a subsequent investigation or enquiry outside Parliament. Such a principle is liable to inhibit or hinder freedom of speech in Parliament and would therefore infringe Article 9. Such a precedent may inhibit the parliamentarian from raising the matter at all or affect the way in which he presents it."

10. I will first address the issues on Article 9, as raised both in the appeal and the respondent's notice. The court has been assisted not only by the parties' arguments but also by written submissions helpfully provided by Speaker's Counsel on behalf of the Speaker of the House of Commons.

ARTICLE 9

The General Position

11. It is trite law that by force of Article 9 the courts will not entertain any challenge to anything said by a member of the legislature within Parliament itself. The learning is reviewed by Lord Browne-Wilkinson in *Prebble v Television New Zealand* [1995] 1 AC 321; the reasoning recalls Lord Browne-Wilkinson's treatment of Article 9 in the earlier case of *Pepper v Hart* [1993] AC 593. At 334 in *Prebble* he described the "basic concept underlying Article 9" as

> "the need to ensure so far as possible that a member of the legislature and witnesses before Committees of the House can

> speak freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect." (Lord Browne-Wilkinson's emphasis)

At 336 Lord Browne-Wilkinson said:

> "[T]he present case… illustrate[s] how public policy, or human rights, issues can conflict. There are three such issues in play in these cases: first, the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the courts. Their Lordships are of the view that the law has been long settled that, of these three public interests, the first must prevail…"

12. I should also notice the observations of Stanley Burnton J as he then was in *Office of Government Commerce v Information Commissioner* [2010] QB 98 at paragraph 46:

> "[T]he law of Parliamentary privilege is essentially based on two principles. The first is the need to avoid any risk of interference with free speech in Parliament. The second is the principle of the separation of powers, which in our Constitution is restricted to the judicial function of government, and requires the executive and the legislature to abstain from interference with the judicial function, and conversely requires the judiciary not to interfere with or to criticise the proceedings of the legislature. These basic principles lead to the requirement of mutual respect by the Courts for the proceedings and decisions of the legislature and by the legislature (and the executive) for the proceedings and decisions of the Courts."

Mr Caldecott QC for the respondent submits that the first of the principles there stated is reflected in the judge's conclusion at paragraph 101 of his judgment that Article 9 would be violated by enquiry into the appellant's state of mind before Mr Dingemans on the ground that that would also constitute enquiry into his state of mind before the CMSC; and that the second is reflected in the respondent's notice, asserting that where a member of Parliament (or witness) cannot reasonably refuse to co-operate with a subsequent investigation into an issue of misconduct raised by him before a Parliamentary Committee, his utterance at the later enquiry must be protected. He submitted also that "the first [principle] in part justifies the second". The relation between paragraph 101 of Tugendhat J's judgment and the point taken in the respondent's notice is important, as I shall show; with respect I think it is rather different from what was urged by Mr Caldecott.

13. In this case we have to decide to what extent, if at all, Article 9 immunises speech outside Parliament. Mr Goddard QC for the appellant submits that the answer is Never. Counsel's researches have revealed no case in the books in which Article 9 has been held to protect extra-Parliamentary speech. On the contrary, Mr Goddard insists, it has long been established that repetition outside Parliament, by a member of either House, of something earlier said by him or her in the House will not be saved by Article 9. *R v Lord Abingdon* (1794) 170 ER 337 and *R v Creevey* (1813) 105 ER 102 are venerable instances. In the first the Member chose to have his earlier speech in the House re-published "under his authority and sanction… and at his expense". In the second the Member sent a text of his Parliamentary speech to a newspaper in order to correct the version which the newspaper had previously published.

Buchanan v Jennings [2005] 1 AC 115

14. However the old cases do not plainly establish an absolute exclusionary rule to the effect that the scope of Article 9 is strictly limited to speech uttered in Parliament. Mr Goddard's assertion of such a rule depends heavily on Lord Bingham's reasoning in the Privy Council in *Buchanan v Jennings* [2005] 1 AC 115.

15. In *Buchanan* the defendant Mr Jennings was a member of the New Zealand Parliament. In the course of a Parliamentary debate he made defamatory observations about the actions of an official of the Wool Board, who was identifiable as the plaintiff Mr Buchanan. Public interest in the matter subsided, but Mr Jennings sought to revive it by a press release in which he renewed, although in less specific and more impersonal terms, his attack on the Board. Mr Buchanan issued proceedings. He pleaded Mr Jennings' words used in the House on 9 December 1997, adding that at trial he would refer to and rely on the full text in the Hansard report to "establish as an historical fact" that the words had been spoken by Mr Jennings. He also pleaded that Mr Jennings, by saying what he had to the reporter, had "adopted, repeated and confirmed as true" what he had said in the House. Mr Jennings admitted that he had used the words attributed to him in the House. He pleaded that they had been spoken under the protection of parliamentary privilege and that the claim against him infringed the protection given to him by Article 9 of the Bill of Rights, which has effect in the law of New Zealand. At first instance Mr Buchanan's claim succeeded ([2001] 3 NZLR 71). He was awarded $50,000. The award was upheld in the Court of Appeal by a majority ([2002] 3 NZLR 145).

16. At paragraph 13 of the judgment of the Board Lord Bingham said this:

> "It is common ground in this appeal that statements made outside Parliament are not protected by absolute privilege even if they simply repeat what was said therein. That proposition, established by *R v Abingdon* (1794) 1 Esp 226, 170 ER 337 and *R v Creevey* (1813) 1 M & S 273, 105 ER 102, was more recently applied by the High Court of Ontario in *Stopforth v Goyer* (1978) 87 DLR (3d) 373 and the Supreme Court of the United States in *Hutchinson v Proxmire* 443 US 111, 126 et seq (1979). In such a case there will inevitably be an inquiry at the trial into the honesty of what the defendant had said, and if the defendant's extra-parliamentary statement is found to have been untrue or dishonest the same conclusion would ordinarily,

> although not always, apply to the parliamentary statement also. But such an inquiry and such a conclusion are not precluded by article 9, because the plaintiff is founding his claim on the extra-parliamentary publication and not the parliamentary publication. The crucial distinction between such a case and the present, in the submission of the Solicitor General, is that Mr Jennings did not repeat his parliamentary statement, but confirmed it by reference only. Therefore it was necessary for Mr Buchanan to rely (as he did) on what Mr Jennings said in the House. That, it was said, infringed the protection afforded by article 9."

17. Mr Goddard refers also to these passages:

> "17… The right of Members of Parliament to speak their minds in Parliament without any risk of incurring liability as a result is absolute, and must be fully respected. But that right is not infringed if a member, having spoken his mind and in so doing defamed another person, thereafter chooses to repeat his statement outside Parliament. It may very well be that in such circumstances the member may have the protection of qualified privilege, but the paramount need to protect freedom of speech in Parliament does not require the extension of absolute privilege to protect such statements.
>
> 18. It is, again, an important principle that the legislature and the courts should not intrude into the spheres reserved to another. Thus if, as may happen, the absolute privilege of Parliament is abused, procedures exist… to afford a remedy to a person defamed, and it is not the function of the court to provide one. In a case such as the present, however, reference is made to the parliamentary record only to prove the historical fact that certain words were uttered. The claim is founded on the later extra-parliamentary statement. The propriety of the member's behaviour as a parliamentarian will not be in issue. Nor will his state of mind, motive or intention when saying what he did in Parliament. The situation is analogous with that where a member repeats outside the House, in extenso, a statement previously made in the House. The claim will be directed solely to the extra-parliamentary republication, for which the parliamentary record will supply only the text."

18. There are at once two striking features of *Buchanan.* The first is that the argument critically depended on the difference between *repetition* of and *reference* to the earlier Parliamentary statement (see Lord Bingham's report of the Solicitor General's submission at paragraph 13). It is therefore with respect no surprise that the case contains little by way of reasoning as to the scope of Article 9 as a matter of principle. Secondly, there is a conflation of the role of Article 9 with that of absolute privilege; the two are treated indifferently though the emphasis is on absolute privilege.

19. The latter point is, I think, of some importance. Absolute privilege is a common law rule affording a defence in those defamation cases to which it applies. Its scope is strictly defined by reference to the setting in which the words complained of were uttered: Parliament; the Queen's courts. Once publication in the prescribed setting is established, the privilege attaches. But the reach of Article 9 is not, at least not obviously, so clear-cut. What is meant by "impeached or questioned"?

The Reach of Article 9

20. In the Report of the Joint Committee on Parliamentary Privilege (Session 1998-9, HL Paper 43-1, HC 214-1; chaired by Lord Nicholls) it is suggested (paragraph 36) that "possible meanings include *hinder, challenge or censure*". The first – "hinder" – sits well, I think, with Lord Browne-Wilkinson's *dicta* in *Prebble*, which I have noted: "the need to ensure so far as possible that a member of the legislature and witnesses before Committees of the House can speak freely without fear that what they say will later be held against them in the courts"; and "the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information". The first of these *dicta* seems to me encapsulate the concrete benefit which Article 9 confers; the second expresses the strategic public interest which renders that benefit necessary. Thus members and witnesses speaking in either House or in Committee are not to be vexed by the fear of litigation, for if they are, the functions of Parliament itself will be inhibited. It is clear that the protection afforded by Article 9 is not given for the sake of the individual member, but for the integrity of the legislature's democratic process.

21. Accordingly a member who for his own purposes chooses to repeat outside Parliament, whether by quotation or cross-reference, what he has said within its walls has no claim to the protection of Article 9. He does not deserve it for himself, and the integrity of Parliament's process does not require it. *Lord Abingdon*, *Creevey* and *Buchanan* (so far as they address Article 9 distinctly, as opposed to absolute privilege) are all readily explicable on this basis.

22. But not all such repetitions are the gratuitous choice of the speaker. There will be occasions when it will be in the public interest that he should repeat or refer to his earlier utterance in Parliament; and it may be a public interest which he ought reasonably to serve, because of his knowledge or expertise as a Parliamentarian, or an expectation or promise (arising from what he had said in Parliament) that he would do so. In those circumstances it is by no means obvious that his later speech should lack the protection of Article 9.

23. However it is in my judgment clear, with respect to Tugendhat J, that the issue of Article 9 protection in such cases cannot be concluded in favour of the speaker *merely* by a finding of fact such as the judge made at paragraph 101 of his judgment, namely that Article 9 would be violated by enquiry into the speaker's state of mind outside Parliament on the ground that that would also constitute enquiry into his state of mind when he spoke within Parliament. Such a state of affairs might readily be proved in a case like *Lord Abingdon*, *Creevey* or *Buchanan*, as Lord Bingham suggested ("if the defendant's extra-parliamentary statement is found to have been untrue or dishonest the same conclusion would ordinarily, although not always, apply to the parliamentary statement also": *Buchanan* paragraph 13). But in such cases, as Lord Bingham made plain, an identity of motive or purpose as between the speaker's

utterances within and outside Parliament will not justify Article 9 protection. It will be roundly held that the claim (against the speaker) is "directed solely to the extra-parliamentary republication" (*Buchanan* paragraph 18) and it is only the speaker's state of mind on that later occasion that matters.

24. Equally, in my judgment Article 9 will not bite *merely* because there is a public interest, which he ought reasonably to serve, in the speaker's repeating or referring to what he had earlier said in Parliament. The later, extra-Parliamentary occasion might be quite remote from the earlier utterance. The public interest in his repeating what he had said might be different from the whys and wherefores of the Parliamentary occasion. When speaking in Parliament, he might have no reason to apprehend that he might be required (or think himself obliged) in the public interest to repeat on a later occasion what he had said. In short the integrity of the legislature's democratic process may not need the protection of Article 9 at all.

25. I accept, however, that there may be instances where the protection of Article 9 indeed extends to extra-Parliamentary speech. No doubt they will vary on the facts, but generally I think such cases will possess these two characteristics: (1) a public interest in repetition of the Parliamentary utterance which the speaker ought reasonably to serve, and (2) so close a nexus between the occasions of his speaking, in and then out of Parliament, that the prospect of his obligation to speak on the second occasion (or the expectation or promise that he would do so) is reasonably foreseeable at the time of the first and his purpose in speaking on both occasions is the same or very closely related. The first element reflects the respondent's notice. The second in part reflects paragraph 101 of Tugendhat J's judgment. This is the true relation between these two aspects of the respondent's case.

26. I do not mean to suggest a hard and fast rule. There may be instances which justify the protection of Article 9 which do not precisely demonstrate these two characteristics. The notion of public interest is not, I acknowledge, sharp-edged. Nor is the category of cases in which a member of Parliament or witness ought reasonably to serve such a public interest. As always, the common law will proceed case by case.

27. I would wish to emphasise as firmly as I may that these cases will be infrequent and the courts will look for a very strong case on the facts if Article 9 is to run. They will be concerned to see that the protection of the Article is not extended to speech outside Parliament more than is strictly necessary, given the high importance of the two other public interests which must take second place to the legislature's untrammelled freedom of debate: "the need to protect freedom of speech generally [and] the interests of justice in ensuring that all relevant evidence is available to the courts", as Lord Browne-Wilkinson described them in *Prebble.*

28. It will be apparent that this approach attaches no significance to the distinction between repetition of what was said in Parliament and adoption of it without repetition (or "effective repetition": an expression coined in the course of argument). I acknowledge, of course, that there may be a nice question whether a mere reference to an earlier Parliamentary statement is to be taken as a fresh publication of it (compare *Byrne v Dean* [1937] 1 KB 818, cited by the judge below at paragraph 71). But that is essentially a question of fact. In this case the judge concluded (paragraph 75) that the appellant's assertion that the respondent had adopted before Mr Dingemans (and so republished) his Parliamentary evidence was not so lacking in

merit that it fell to be struck out. That seems to me to be entirely right on the facts of the case. More generally, however, in my judgment the distinction between repetition and reference (assuming the latter to amount to republication) is not in principle significant for the purpose of ascertaining the reach of Article 9.

Article 9 – This Case

29. Mr Goddard did not accept that enquiry into the appellant's state of mind before Mr Dingemans would also constitute enquiry into his state of mind before the CMSC. He submitted that it was significant that the respondent had declined to produce his diary or other documents at the request of the FA. He said that the respondent's state of mind might have been affected by events between the CMSC meeting and his interview by Mr Dingemans, such as the very fact that he was asked for documents. I consider this to be a fanciful submission. The appellant's participation in Mr Dingemans' enquiry flowed directly from the undertaking he gave to the CMSC and the invitation he received from the FA very shortly after he had given his evidence. Mr Goddard also submitted (skeleton argument paragraph 44) that "the respondent's intention in agreeing to be interviewed by Mr Dingemans… not to add to [his evidence before] the CMSC… tends to undermine [the contention that he] felt that he could not refuse the CMSC's request that he would present his evidence… to the FA". But to my mind it is obvious that the respondent was at pains before Mr Dingemans to restrict himself to what he had said to the CMSC in order, as he saw it, not to lose the shield of privilege. There is no reason to doubt the judge's finding of fact (for that is what it is) at paragraph 101.

30. Looking at the case in the round, in my judgment it possesses both of the characteristics which I have sought to describe. There was plainly a public interest in Mr Dingemans' enquiry, which would be served by the respondent's contribution. Equally plainly, there was a very close nexus between his evidence to the CMSC and his interview with Mr Dingemans. The prospect that he might be called on to repeat his allegations was not only reasonably foreseeable but actually foreseen: he undertook, in effect, to do so. And the judge's finding at paragraph 101 points to an identity between his state of mind on the two occasions of his speaking.

31. For all these reasons, in my judgment Article 9 prohibits an examination in this action of the respondent's assertions to Mr Dingemans.

MALICE

32. If my Lord and my Lady agree, that suffices to dispose of the appeal in the respondent's favour. But in case my conclusions on Article 9 are wrong, and out of respect for the argument, I will address the two remaining grounds of appeal. The first is that the judge was wrong to hold (paragraph 102) that there was no case in malice to go to a jury. It will be recalled that the judge so found for two reasons, both set out in paragraph 101. The first was that the court could not enquire into the appellant's state of mind before Mr Dingemans without also enquiring into his state of mind before the CMSC, and that would violate Article 9. I have accepted that, as I have explained. The second was that an acceptance of the appellant's evidence at trial would not entail the conclusion that the respondent was dishonest: it would be equally consistent with his having been mistaken. I will deal shortly with this second aspect.

33. The submission for the respondent which the judge upheld was expressed as follows at paragraph 100 of the judgment:

> "There is another possibility, no less probable than that the defendant was dishonest. It is that he was mistaken, or that he misinterpreted what the claimant had been saying to him during a telephone conversation, whether or not he was being unreasonable if he did that. There is no plea of any motive or other matter which might make dishonesty more likely than the absence of dishonesty."

34. As the judge observed (paragraph 96), the fact that malicious falsehood was pleaded meant that the appellant's case on malice was set out in the Particulars of Claim; if the only cause of action were defamation, it would appear in the Reply. Paragraph 12 gives "Particulars of Falsity", and then under "Particulars of Malice" merely repeats the particulars of falsity and asserts that "[i]n the premises, the defendant published or caused to be published the words complained of knowing them to be false or recklessly…". No facts are pleaded to support the allegation of malice beyond the assertion that the statements sued on are untrue, despite the requirement of CPR PD 53 paragraph 2.9 that a claimant should "give details of the facts and matters relied on" to establish malice.

35. Mr Goddard is however right to submit that an ulterior motive does not necessarily have to be pleaded and proved to support a case of malice (skeleton paragraph 45). He also relies on the observation of Eady J in *Seray-Wurie v Charity Commission* [2008] EWHC 870 at paragraph 31:

> "It is accepted that the court should be wary of taking away an issue such as malice without its coming before a jury for deliberation. This step should only be taken where the court is satisfied that such a finding would be, in the light of the pleaded case and the evidence available, perverse."

Mr Goddard says that in this case (assuming, as a strike-out application requires, that the appellant's evidence will be accepted) there is really no room for mistake, certainly not a reasonable mistake, as to what he did or did not say to the respondent; and it is to be noted that the respondent himself appears to rule out the possibility of mistake at paragraph 12 of his witness statement ("I have no doubt that the claimant understood what he was saying to me when he spoke to me and that he meant what he said").

36. But as Mr Caldecott submitted, there is no plea whatever by the appellant as to what actually passed between him and the respondent. There are no details at all – motive, any history of bad feeling, or anything to support the possibility that the respondent's attitude before Mr Dingemans might have hardened since his evidence to the CMSC. In those circumstances I agree with the judge that, quite aside from Article 9, there was no case in malice to go to a jury.

THE WEBSITE

37. There remains a complaint that the judge should not have struck out the allegation that publication (4) (a republication of the respondent's oral evidence given to Mr Dingemans) appeared on the FIFA website. At paragraph 90 of his judgment the judge said:

> "The allegation of the publication on the website is in a different category. The basis on which this is said to give rise to a cause of action against the defendant was not addressed in the Particulars of Claim, nor in the arguments before me. The Particulars of Claim do not set out the words said to have been published on the website. Nor is there any pleading as to who may have read what was on the website. This is too vague an allegation to go forward on any basis. I would strike out the claim based on the website publication for lack of particularity, independently of any other ground."

38. Mr Goddard says that the plea in paragraph 15 of the Particulars of Claim, referring to the publication on the website of the summary report which Mr Dingemans had prepared, perfectly properly refers to the more detailed allegations of defamatory statements by the respondent at paragraph 10; and the judge should have allowed any deficiency to be cured by further particulars.

39. The difficulty, though it is not articulated by the judge, is that the reference to the summary report on the website (which provides a link to the summary itself) appears under a heading "No evidence on allegations made against FIFA Executive Committee members at the House of Commons". The text includes the statement that "FIFA has found no elements in [Mr Dingemans' report] which would prompt the opening of any ethics proceedings". Mr Caldecott submits that in reality no one could access the summary report without first reading the exoneration, at least as it is set out in the headline; and on that basis no reasonable reader could have concluded that the publication alleged guilt. He submits also that the words in the summary which are relied on are nowhere set out in the pleading; that matters, because the summary does not merely cite the Parliamentary evidence *verbatim*. Nor is there any plea to support the necessary allegation that the respondent authorised any publication of what he had said on the website, or intended that that should happen.

40. Though the judge's reasoning in paragraph 90 is exiguous, these points amply justify his conclusion that the reference to the website publication "is too vague an allegation to go forward on any basis". The defects are in my judgment too substantial to be cured by particulars.

CONCLUSION

41. I would dismiss the appeal.

LORD JUSTICE TOMLINSON:

42. I agree.

LADY JUSTICE RAFFERTY:

43. I also agree.