Neutral Citation Number: [2017] EWCA Civ 1194

Case No: A2/2015/0106

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT QUEEN'S BENCH DIVISION
Sir David Eady (sitting as a High Court Judge)
HQ13D03108

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2017

Before :

LADY JUSTICE GLOSTER
LADY JUSTICE SHARP
and
LORD JUSTICE LINDBLOM

- -

Between :

Mr Sabby Mionis	**Appellant**
- and -	
(1) Democratic Press SA	**Respondents**
(2) Mr John Fillipakis	
(3) Mr Alexander Tarkas	
(4) Mr Andreas Kapsabelis	

- -
- -

Mr Richard Rampton QC and Ms Jane Phillips (instructed by **Mishcon de Reya**) for the **Appellant**
Mr Andrew Caldecott QC and Mr Adam Speker (instructed by **Howard Kennedy LLP**) for the **Respondents**

Hearing date: 26 October 2016

- -

Approved Judgment

Lady Justice Sharp:

Introduction

1. On 13 November 2013, in a settlement agreement, the terms of which were scheduled to a Tomlin Order, the parties to this appeal, with the benefit of expert legal advice, compromised libel proceedings brought by the appellant against the respondents. Within a relatively short period of time, the respondents published two articles, which the appellant claimed, and the respondents now concede, were published in breach of clause 3.2 of the settlement agreement.

2. On 5 December 2014, Sir David Eady, sitting as a High Court Judge, refused the appellant's application to lift the stay in the proceedings imposed by the Tomlin Order; he refused the appellant's application for an injunction to enforce clause 3.2 of the settlement agreement; and he also refused to make an order for an inquiry as to damages occasioned to the appellant by the breach of the terms of the settlement agreement.

3. The respondents do not seek to support the reasoning of the judge below that clause 3.2 of the settlement agreement was too vague and uncertain to be enforced by way of an injunction. Nor do they now contend, as they did below, that they did not breach its terms. Instead by their Respondents' Notice they argue that the court should uphold the judge's decision, because the terms of the relevant clause are too wide; and having regard to section 12 of the Human Rights Act 1998 ("the 1998 Act") and the importance of freedom of expression, it would be disproportionate and/or contrary to public policy to grant the appellant the relief that he seeks.

4. The appellant however argues that the settlement agreement was a contract freely entered into for good consideration, with the benefit of expert legal advice on each side; none of the recognised grounds for setting the contract of settlement aside are asserted, still less established, and the respondents chose to waive their Convention rights to freedom of expression. In those circumstances, the court has no role to play in determining the validity of the terms of the contract of settlement, whether by reference to section 12 of the 1998 Act or at all, and should now grant the injunctive relief that is sought.

5. The issue we have to resolve therefore, narrowly stated, is whether the judge was correct to find that the relevant clause of the settlement agreement was unenforceable; and to decline to lift the stay imposed by the Tomlin Order dated 13 November 2013 and refuse the application for an injunction. Underlying that issue, however, is how the court should approach the balance to be struck between the important public interests engaged in holding parties to a settlement agreement freely entered into, on the one hand, and the public interest in freedom of expression on the other.

Factual background

6. The appellant Mr Sabby Mionis, is a businessman and philanthropist who has dual Greek and Israel nationality. He lives in Tel Aviv and maintains a residence in London. Until 2009, he was the Chief Executive Officer of CM Advisors Ltd ("CMA"), which was the management company of CMA Global Hedge, an investment company listed on the London Stock Exchange. The respondents are all

connected to a Greek language newspaper, *Demokratia,* (the newspaper), which is published in hardcopy and online. The first to fourth respondents are respectively, the publisher of the newspaper, the Chairman of the first respondent, a journalist who writes for the newspaper and the newspaper's editor-in-chief.

7. In 2010 the former French Finance Minister Christine Lagarde passed a spread sheet (now known as the Lagarde list) containing the names of approximately 2000 Greek citizens linked to bank accounts held at the Geneva branch of HSBC, in confidence, to the Greek government, with a view to helping Greek officials identify individuals who had been involved in tax evasion. On 27 October 2012, the contents of the Lagarde list were published in print in Greece and online by *Hot Doc* magazine. It is common ground that the existence of the list, and issues surrounding it, were, as the appellant described it, in his pleaded claim for libel "a matter of intense public interest" in Greece, and elsewhere.

8. Between 29 October 2012 and 13 May 2013, the newspaper published a series of 18 prominent articles about the appellant (the original articles) and his connection with the Lagarde list. The original articles all appeared on the front page of the website edition, and most appeared on the front page of the hardcopy edition; six were accompanied by a cartoon of the appellant. I will limit my reference to the content of these and subsequent articles to matters it is necessary to outline for the purposes of this appeal.

9. The original articles repeatedly linked the appellant with a €500,000,000 bank account featured in the Lagarde list. For example, the first article, published on 29 October 2012, stated that a *"female secretary"* managed the €500,000,000 fund on the appellant's behalf. Another article published on 10 January 2013 referred to the appellant as *"the protagonist in the "Lagarde list""*. A third published on 22 February 2013 is titled *"Who does Mioni's half a billion lead to now!"*

10. The original articles published from 9 January 2013 added a further specific allegation, that the appellant quickly moved to liquidate CMA once his illegitimate activities had been revealed by the Lagarde list. For example, an article published on 10 January 2013 stated that CMA *"was liquidated in a haste of panic at the end of 2010, when the leak of data from the Geneva branch of the private HSBC bank was made known i.e. the data now known as the "Lagarde list"".* Another article published on 11 January 2013 stated that the appellant, along with a senior CMA employee, *"hastily liquidated CMA Global Hedge"*.

11. The appellant's denial of wrongdoing and explanation of both the fund and the winding down of CMA was reported in the newspaper with evident disbelief. An account of the appellant's denial in an article published on 3 December 2012 was headed *"What does the mysterious entrepreneur say about the account?"* In an article dated 6 March 2013, the appellant's explanation was reported as including a number of *"half truths"* and *"misrepresentations of reality"*.

12. A number of additional relevant features of the articles can be summarised as follows:

    a. Repeated description of the appellant as a *"businessman"*. These included numerous references to the appellant as a *"Greek-Israeli businessman"*.

b. Repeated references to the appellant's relationship with Mr Stavros Papastavrou, a lawyer known to have acted for the appellant. For example, in the article published on 29 October 2012, the appellant was reported as confirming that Mr Papastavrou was involved in handling the Lagarde list fund on his behalf. Articles published on 11 December 2012 and 6 March 2013 describe Mr Papastavrou as the vice-director and legal councillor of CMA. The 6 March 2013 article also reported the appellant as confirming that Mr Papastavrou operated one of the appellant's company accounts *"as a plenipotentiary for purely personal reasons of [the appellant's] own"*.

c. A reference to the fact that the appellant owned a house on the island of Antiparos.

d. References to Bermuda, including a number of references to *"the Bermuda Triangle"* and descriptions of CMA as *"CMA Bermuda"*. For example, an article published on 11 December 2012 stated that *"the CMA fund, based in Bermuda was headed by Mr Mionis and the legal councillor (as well as, for a period, vice managing director) was Mr St. Papastavrou"*. An article published on 3 December 2012 was titled *"Earthquake in the…Bermuda Triangle"*.

e. A number of descriptions of the appellant which he says have strongly anti-Semitic overtones. In an article dated 9 December 2012, the appellant was described as *"the characteristic type of Greek Jew entrepreneur who changes appearance depending on his business situation"*. The same article reports the appellant's school friends as describing him as *"devious"*. These were accompanied by the above-mentioned frequent references to the appellant as a *"Greek-Israeli businessman"*. The appellant was also variously described as *"the mysterious entrepreneur",* the *"mysterious Sabby Mionis of a thousand faces"* and *"*a *mysterious Greek-Israeli businessman"*.

13. The appellant's case from the outset was that, taken as a series, these articles falsely portrayed him as the 'chief fixer' of tax evasion on a huge scale who, in an effort to avoid detection once the Lagarde list became public, shut down CMA in an attempt to avoid his conduct being detected; and that the articles form part of a campaign against him which is, at least in part, motivated by anti-Semitism.

14. In accordance with the Pre-action Protocol for Defamation, the appellant's solicitors sent a letter before action to the respondents, dated 15 May 2013, complaining of both the online and hard copy publications of the articles in the jurisdiction. The letter before claim dealt in considerable detail with the substance of the allegations made against the appellant, saying for example, that CMA operated in accordance with the standard structure and operating procedures for the international fund management industry, with appropriate and independent governance at many levels, including a supervisory committee, a management committee and an investment committee. If what was said in the letter was correct, it followed that the allegation complained of was wholly false.

15. The respondents did not reply to that letter.

16. On 11 June 2013, the appellant issued proceedings for libel in respect of the publication in this jurisdiction of the articles, in both hard copy and online, claiming damages, including aggravated damages, and an injunction preventing the repetition of the defamatory allegations complained of. The claim for an injunction was framed in conventional terms to restrain the respondents "by themselves, or through others or by any means whatsoever, from publishing, or causing, authorising, procuring or facilitating the publication of the same or similar allegations defamatory of the claimant." The claim was limited to publications within this jurisdiction, as the place where the harmful event occurred.

17. In the Particulars of Claim, it was pleaded (as had been asserted in the letter before action) that the articles contained a wide range of wild and defamatory allegations about the appellant, as well as vicious and unpleasant personal abuse directed against him. However, it was said that, in the interests of proportionality and swift vindication of the most serious defamatory sting, the appellant would confine the meaning complained of to the central, repeated sting of the articles, and the most serious allegation they made against the appellant (whilst reserving the right to complain of the rest, if it became necessary to do so in due course). As foreshadowed in the letter of 15 May 2013 this was that the appellant had knowingly and dishonestly facilitated tax evasion on a huge scale, and was so worried that his conduct would be discovered following publication of the Lagarde list that he immediately sought to shut down his businesses in order to cover his tracks.

18. The claim for aggravated damages said that, by publishing the articles, the respondents were conducting a damaging and sophisticated campaign against the appellant, including assaulting him by reference to his nationality and religion; that the articles contained offensive anti-Semitic material targeted at the appellant; and made attacks which were gratuitous, deeply personal, and untrue. Three statements were highlighted in this connection. One stated, for example, that he knew and proposed common investments with Bernard Madoff, a financier notorious for his conviction for a massive financial fraud, when the appellant did not know, had never communicated with or proposed common investments with Mr Madoff, and had in fact, advised against investing with Mr Madoff or his vehicles.

19. It was further pleaded that the respondents had made no attempt or no real attempt to contact the appellant before publishing the articles; and that they had ignored the appellant's letter before claim, which was attached to the Particulars of Claim in an appendix (and thus attested to be true by the appellant).

20. On 10 July 2013, the respondents filed an acknowledgment of service in which they indicated an intention to contest jurisdiction; and on 24 July 2013 they issued an application for an order pursuant to CPR rule 11(1) declaring that the court had no jurisdiction to try the claim, or should not exercise its jurisdiction, and for the claim form to be set aside and the proceedings stayed. The respondents were by now represented by well-respected and expert London defamation solicitors, who have continued to represent them ever since.

21. The respondents' application was supported by a number of witness statements, including two from the respondents' solicitors (concerning the extent of publication within the jurisdiction); and one from the fourth respondent. The fourth respondent said, amongst other things, that the action was a disproportionate attempt to interfere

with the respondents' publication of matters of intense matter of public interest in Greece, by reference to a small number of publications in this jurisdiction.

The settlement agreement

22. The hearing fixed for the respondents' application did not take place because the parties compromised the proceedings, following negotiations conducted by their solicitors on their behalf. The compromise was in the form of the confidential settlement agreement ("the settlement agreement") of 13 November 2013.

23. The settlement agreement was scheduled to a consent order in the form of a Tomlin order also dated 13 November 2013. Paragraph 1 of that order stayed the libel proceedings upon the terms set out in the settlement agreement, except for the purpose of enforcing those terms. Paragraph 2 provided that each party had permission to apply to enforce the terms of the order without the need to bring a new claim.

24. The gist of the settlement agreement can be summarised as follows. The appellant undertook not to pursue his libel claims, and to bear his own costs. In return, the respondents undertook: (i) to take down the articles complained of from the newspaper's website; (ii) not to republish any of the allegations complained of; (iii) not to publish any reference to the appellant or his immediate family; and (iv) to publish an article, which was to be verified as true by the appellant and accompanied by a photograph of him. I set out the material provisions of the agreement in full below. References in those provisions to *"Party A"* are to the appellant, and references to *"Parties B-E"* are to the respondents.

25. The background to the agreement is set out in the Recital:

> A. Parties B-E caused to be published online and in print 18 articles in the Greek Language newspaper *Demokratia* ("**Demokratia**") between 29 October 2012 and 13 May 2013, as detailed in Claim number [HQ13D03108] issued on 11 June 2013 ("**the Articles**");
>
> B. Party A alleges that the Articles made a number of untrue and defamatory allegations against Party A, about which Party A has complained to Parties B-E, which are set out in the particulars and appendices to the Claim, number [HQ13D03108] issued in the English High Court on 11 June 2013 ("**the Dispute**"). Parties B-E do not admit that the Articles are defamatory, and they deny that the English court has jurisdiction to adjudicate on the Dispute; however, as set out in clause 12.2 below, they have agreed to submit to the English court's jurisdiction in respect of all matters relating to this Settlement Agreement;
>
> C. In order to achieve a final resolution of the Dispute the Parties have agreed the full and final settlement of the Dispute as set out in this Settlement Agreement.

26. The respondents' key undertakings are contained in clauses 2 and 3:

> **2. PUBLICATION**
>
> 2.1 *Demokratia* will publish in its Sunday edition on one of the four Sundays immediately following the execution of this agreement the photograph of Mr Mionis (with minimum dimensions of 9cm x 9cm, to show at least Party A's head and shoulders) and the article in the terms in the attached Schedule 1 (the "**Later Article**"):
>
> 2.1.1 in its newspaper, *Demokratia*, with reference to the title to the Later Article on the front page of the newspaper; and
> 2.1.2 on its website… (where it will remain thereafter).
>
> ..
>
> 2.2 The Parties agree and acknowledge that it is important that the contents of the Later Article be true and accurate and accordingly Party A hereby represents and warrants to Parties B-E that the facts set out in the Later Article are true and accurate in all material respects.
>
> **3. NO REPUBLICATION**
>
> 3.1 Party B undertakes to take down all the Articles from its website, Parties B-E undertake not to republish or cause the republication of the Articles, in hard copy, online or howsoever, and further undertake not to repeat or cause to be repeated the allegations complained of at paragraph 9 of the Particulars of Claim in the Dispute, subject to the provisions of clause 3.2 below.
>
> 3.2 Parties B-E undertake in all capacities not to report or otherwise publish, in any jurisdiction, any articles, or statements in any other form (either in print or online) which refer to Party A or Party A's immediate family, being his mother, father, brother or children, from the date of this Settlement Agreement, save only for the publication of fair and accurate reports of court proceedings in which Party A and/or any of those members of his immediate family is a claimant, defendant or witness; or parliamentary inquiries of which Party A and/or any of those members of his immediate family is the subject or in which he is called to give evidence.

27. It will be immediately obvious that the undertaking given by the respondents in clause 3.2 is extremely broad. On its face, it prevents the respondents from making any reference whatsoever to the appellant and his immediate family, in print or online, in

any jurisdiction, subject only to specified exceptions relating to their potential future participation in certain legal or parliamentary proceedings.

28. Clauses 5-6 deal with the Parties' mutual undertakings to release any claims which they hold against each other, and not to sue in respect of those claims:

> **5. RELEASE**
>
> 5.1 Except in respect of any breach of contract claim that any Party may hereafter have against any other Party for breach of any of the provisions of this Settlement Agreement, and subject to the provisions of clause 3 being met in full, this Settlement Agreement is made in full and final settlement of any and all claims which each Party has against any other Party in any jurisdiction arising out of or connected with:
>
> 5.1.1 The Dispute; and/or
>
> 5.1.2 the underlying facts relating to the Dispute.
>
> (collectively "**the Released Claims**").
>
> **6. AGREEMENT NOT TO SUE**
>
> 6.1 Each Party agrees, on behalf of itself and on behalf of its parent company, subsidiaries, assigns, transferees, representatives, principals, agents, officers and directors, subject to the provisions of clause 3 being met in full, not thereafter to sue or commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against any other Party, any claim, action, suit or other proceedings relating to the Released Claims, in this jurisdiction or any other.

29. By clause 7, each Party to the agreement undertook to bear its own costs of and in connection with the settlement agreement, the Dispute, and compliance with clause 3. Clause 9 contained a severability clause. It said:

> "9.1 If any provision of this Settlement Agreement is found to be void or unenforceable, that provision will be deemed to be deleted from this Settlement Agreement and the remaining provisions of the Settlement Agreement will continue in full force and effect.
>
> 9.2 The parties will use their respective reasonable endeavours to procure that any such void or unenforceable provision is replaced by a provision, which is valid and enforceable and which gives effect to the spirit and intent of the Settlement Agreement."

30. Clause 10 was an entire agreement clause.

31. Clause 12.1 provided that the agreement should be governed and construed in accordance with English law, and clause 12.2 provided that any dispute arising out of it should be subject to the exclusive jurisdiction of the English courts. Finally, under clause 11, the terms of the agreement were to remain confidential subject to a number of specific exceptions, which included such disclosure as was necessary to implement and/or enforce any part of the settlement agreement.

32. The Later Article, referred to in para 2.1 of the settlement agreement was then published in accordance with the settlement agreement, but its contents are not material for present purposes.

The proceedings below

33. The appellant's application to enforce the settlement agreement was precipitated by the publication of two articles in the newspaper: the first on 20 January 2014 and the second on 23 June 2014 ("the January and June articles"). The appellant and his brother Nissim Mionis were not mentioned by name in them. The appellant alleged however that their publication breached the settlement agreement because both articles referred to him, and the second referred to his brother, within the meaning of clause 3.2 in that, read against the background of the articles originally complained of, they contained a number of 'pointers' towards their respective identities, which would be understood by many readers as being indirect references to them (a point now accepted by the respondents, as I have already said, in this appeal).

34. The appellant's solicitors sent the respondents a warning letter after the publication of the January article, which said that any further breaches would result in steps being taken to enforce the settlement agreement by way of an injunction; and the application to lift the stay was duly issued on 22 July 2014, a month after the June article was published.

35. The hearing of the appellant's application took place on 12 November 2014 before the judge. The appellant's case was that there had been a straightforward breach of the terms of clause 3.2 of the settlement agreement, and in those circumstances he wished to enforce it by way of an injunction. The breach was deliberate and not inadvertent: that relating to the June article was particularly egregious as it made an entirely false (and fresh) allegation of fraud against the appellant and his brother, purporting to erect a wholly spurious connection to the Lagarde list. This was therefore precisely the sort of publication (and harassment) of the appellant and members of his family that clause 3.2 of the settlement agreement was designed to prevent. It was, in short, a continuation of the campaign that had led him to sue for defamation in the first place.

36. On the question of reference, it was said that the settlement agreement was required to be construed according to English law; it followed that reference ("refer to") for the purposes of clause 3.2 could be established by direct means (the use of a name) or the publication of identifying facts which meant reasonable third party readers would understand the words to refer to the relevant person specified in clause 3.2. In this connection, there were 20 statements from different individuals who said that they had read the June article and had understood it to refer to the appellant and/or his brother. In summary, it was said the wide publicity given to the defamatory

allegations in the original articles meant the identifying facts in the later articles had become very well-known among the appellant's friends, colleagues and business associates amongst others.

37. The respondents however denied they were in breach of the settlement agreement. In their evidence served shortly before the hearing, in particular in a witness statement from the second respondent, it was admitted that they intended to refer to the appellant and his brother in the June article. Their case was they had taken sufficient steps to disguise their identities to fulfil the obligations under clause 3.2 of the settlement agreement, which they believed only prevented them from referring to the appellant and his immediate family members by name, whilst fulfilling their obligations to keep the Greek public informed of a matter of public interest. It was also disputed that the references to the appellant were anti-Semitic or motivated by anti-Semitism. Further, it was asserted that the respondents' decision to settle the libel proceedings was purely a business decision made in Greece based on economic pressures the respondents were under, rather than anything to do with the legal merits of the appellant's claim. The Lagarde list, and the appellant's connection to it, were matters of the highest and continuing public interest in Greece. In this connection, the second respondent set out various allegations concerning the appellant's purported connection to these matters.

38. The appellant's evidence in reply said the contents of the respondents' witness statements were for the most part irrelevant to the issue for the court, which was whether the respondents were in breach of the settlement agreement; and the fact that he did not deal with the underlying matters was not an acknowledgement that there was any truth in what was said. However, the respondents' stance served to highlight why an inquiry into damages was necessary, as the respondents had undone one of the main benefits the settlement agreement was designed to achieve, namely to reduce the stress and anxiety of having to deal with the effect of the attacks by the respondents again, guaranteeing him freedom from their persecution and an end to the abuse and anti-Semitic innuendos. As for the circumstances in which the settlement agreement came to be made, the appellant pointed out that the respondents had not waived privilege, the settlement agreement was the subject of substantial negotiation and the respondents had been advised by experienced solicitors throughout. He said that he had entered into the settlement agreement on such modest terms in the hope he would be able to sleep well at night.

The judge's reasons for refusing relief

39. The judge said three arguments were relied on by the respondents before him: first, that clause 3.2 was too vague to be enforceable; secondly, if not, it should nonetheless not be enforced as a matter of public policy, having regard to the decision of the Court of Appeal in *Neville v Dominion of Canada News Co Ltd* [1915] 3 KB 556 and/or to the values enshrined in article 10 of the European Convention on Human Rights ("the Convention"); thirdly, in any event, on a reasonable construction of clause 3.2 neither the January nor the June articles amounted to a breach of the settlement agreement. Of these, he said, it was the first that seemed to him to be most significant (see para 12).

40. He said that it may be relevant to have article 10 in mind as an aid to construction if clause 3.2 was genuinely ambiguous or unclear: see e.g. *London Regional Transport v*

Mayor of London [2001] EWCA Civ. 1491; [2003] EMLR 88, and it might also be material as and when the court came to consider whether it would be appropriate to grant an injunction constraining a party's right of free expression: *ibid* at para 61.

41. He went on to find that the meaning of clause 3.2 was clear in that it embraced indirect reference (to the appellant and family members) as well as direct – that is by using their name, on the basis that the words "refer to" in a libel context accorded with ordinary usage (see paras 15 to 17). However, the clause needed to be interpreted in the context of what the contracting parties understood at the time of the agreement, and the relevant background to it. Part of this background was the duty the respondents had to report accurately and fairly on the developing story of the Lagarde list, and the difficulties this would give rise to (which were foreseeable when the settlement agreement was made) for the respondents in eliminating the risk that anything they did publish would be linked in the mind of the reasonable reader with the appellant, because of the allegations already published whether by the respondents or others, that he had played such a significant role in the investment or management of vast sums of money in the Swiss bank accounts (para 19).

42. The judge said he did not find it easy to identify an underlying common intention of the contracting parties, and he doubted whether they were *ad idem* on the scope of the restrictions to be imposed (para 22).

43. On the issue of vagueness, the judge said the appellant was likely to be closely linked with the Lagarde list, and with other individuals named in it, in the minds of reasonable readers. It would therefore be difficult for the respondents to decide what they could and could not report, and this would unduly restrict the respondents' ability to report on the Lagarde list which, as the appellant acknowledged, was a matter of legitimate public interest, and which they had a right and a duty to do. He said he had no doubt that it would be relatively easy to avoid any reference to the appellant, even indirectly, by erring on the side of caution, were it not for the fact, expressly acknowledged by the appellant, that the respondents had to go on covering the Lagarde story. The difficulties of interpretation which this would give rise to rendered clause 3.2 too vague and uncertain as to the scope of the obligation imposed, to be enforceable.

44. The judge said: "*What a contracting party is required to do or refrain from doing needs to be spelt out clearly; and especially so when it is sought to limit the right to communicate information and ideas. It follows that I cannot hold the defendants to be in breach of its terms in the light of the evidence adduced. So too, there would be a corresponding inhibition in granting an injunction to enforce it. Its terms would leave so many uncertainties as to how it was to be carried into effect that it would be unenforceable by process of contempt"* (see paras 23 to 24).

45. He went on to say that this did not mean, however, the whole agreement was unenforceable because of the severability provision in clause 9.1 of the settlement agreement (see para 26). Moreover, the appellant was not without a remedy in respect of the January and June publications since it would be open to him, subject to any jurisdictional challenge, to sue in separate libel proceedings (see para 28).

The ambit of this appeal

46. The appellant was given permission to appeal by Christopher Clarke LJ on five grounds. These were (i) that the judge's decision that clause 3.2 of the settlement agreement was too vague and uncertain was wrong given, in particular, his finding that the disputed meaning of that clause (on the issue of reference) was clear, both as a matter of ordinary language and of law; (ii) once the judge had found the meaning of "refer to' in clause 3.2, included indirect as well as direct reference, and that the disputed articles referred in that sense to the appellant (and his brother) he was bound to conclude that clause 3.2 had been breached by the respondents; (iii) the judge failed to adopt the correct approach to the enforcement of contractual terms restricting freedom of expression freely entered, and to the decision of the Court of Appeal in *Warren v Random House (Nos 1-3)* [2009] QB 600 and overestimated the extent to which the respondents would be inhibited in their coverage of the Lagarde list by clause 3.2; (iv) the judge's decision that the parties were not *ad idem* on the scope of the restrictions to be imposed (at para 22) was not based on any evidence before the court. On the contrary, the respondents knew full well that their duty under the settlement agreement was not to refer to the appellant; hence their (failed) attempt to disguise the identity of the appellant and his brother; and (v) the judge's refusal to grant an injunction in the terms sought was wrong because he took an "all or nothing" approach to the grant of an injunction, and did not consider the fair and practical possibility that he could have limited the terms of the injunction (for example to any defamatory words that referred to the appellant or members of his family) even if he did not accept the precise terms proposed by the appellant.

47. In this appeal, we are concerned only with ground (iii). The appellant does not pursue ground (v), as it is accepted on his behalf that the only injunction a court could impose is one in the actual terms of the schedule to the Tomlin order itself, and it is not open to the court, without the consent of the parties, to rewrite the contractual terms of settlement, which could only be varied or revoked on grounds such as fraud, undue influence, misrepresentation or mistake: see *Community Care North East v Durham County Council* [2010] EWHC 959 (QB) [2012] 1 WLR 338; *Watson v Sadiq* [2013] EWCA Civ. 822 at 49 to 50 and *E. V. Phillips & Sons v Clarke* [1970] Ch. 222 at 325.

48. For their part, the respondents do not challenge the substance of grounds (i), (ii) and (iv). Thus, the respondents do not seek to uphold the judge's conclusion that clause 3.2 was too vague and uncertain to be capable of enforcement, nor his observations on whether the parties were *ad idem*. They do not challenge the judge's construction of clause 3.2 (on the meaning of "refer to") or his finding that the articles referred to the appellant (and the second one to his brother).

49. Instead, by a respondent's notice, the respondents focus squarely on the width of clause 3.2 and, they seek to uphold his judgment on the additional ground that clause 3.2 is void as being contrary to public policy.

50. The respondents served further evidence shortly before this appeal. However, Mr Caldecott QC for the respondents described it as "fall back" evidence; no satisfactory explanation was advanced as to why it had not been served earlier, and in the event he did not refer to it or rely on it for the purposes of the appeal.

The arguments for the parties

51. In the light of the concessions made by the respondents, the arguments before us proceeded principally by reference to the points raised in the Respondents' Notice.

52. Mr Rampton QC for the appellant submitted the overriding principle is that a party to an agreement is bound by it. This in itself is a matter of public policy, but there is an additional public policy consideration where the agreement in question is an agreement to settle a dispute. A party may by agreement voluntarily waive his Convention rights (whether under article 6 or article 10); and if he does so, he will be bound by that agreement. As the judge in this case recognised, a settlement agreement may properly contain terms that go beyond the scope of legal remedies obtainable from the court. And in a publication case, which has been settled by an agreement, the considerations that might otherwise arise under sections 12 and 6 of the 1998 Act have no application because there is no potential for unlawful interference by the Court with the defendant's rights under article 10. Thus, Mr Rampton submitted the analogy the respondent seeks to draw with the approach that the Court is constrained by statute and case law to adopt in a case where an injunction is applied for *de novo* is false. Once it is apparent that the defendant has voluntarily agreed to restrictions on what he may publish, then, absent one or more of the established grounds for permitting him to resile from that agreement, that is the end of the matter.

53. Mr Rampton further submitted that, even if it was the case however that the respondents have found difficulty in complying with clause 3.2, that is a difficulty they voluntarily accepted when they agreed to the clause. Further, the extent to which the appellant and his supposed implication in the Lagarde list affair might be thought to be a matter of public interest is the sole (and wholly foreseeable) consequence of the respondents' sustained attempts to plant that implication in the public mind. Since that implication is entirely false, there can be no public interest in its interminable repetition. It is to be noted that in the four years since the Lagarde list came to light, the appellant has never been accused, still less convicted, of tax evasion by the Greek (or any other) authorities; nor has there been any challenge to his status as an Israeli (rather than a Greek) tax resident. Moreover, the factual basis for contesting the enforceability of clause 3.2 on the ground that it is difficult to comply with, are illusory. This can be shown in two ways. First, the breach in the June article was neither innocent nor accidental; it arose in circumstances where the respondents intended to refer to the appellant and his brother and had merely been unsuccessful in disguising their identities. Putting the January and June articles to one side, the respondents had evidently found it entirely possible to report on matters of public interest, including those in connection with the Lagarde list in the three years since the settlement agreement was made.

54. Finally Mr Rampton submitted that, even if contrary to the appellant's primary contention, it was open to the respondents to argue that clause 3.2 constituted a disproportionate interference with their article 10 rights, and those of their readers, that argument must fail on the facts. The reasons why the appellant sought the protection of clause 3.2 are compelling. That he was fully justified in this has been retrospectively shown by the second breach article whose allegations of fraud against the appellant's brother and himself are not only false but make a wholly spurious connection with the Lagarde list affair. There were very considerable benefits for the respondents in agreeing to clause 3.2. There is no public interest in the publication of

articles consisting of yet further, false and damaging statements about the appellant and his family.

55. The argument for the respondents however starts from an entirely different position. Mr Caldecott submitted that before granting any relief of the kind sought, notwithstanding what is said in the settlement agreement, the court is required by section 12 of the 1998 Act to consider the public interest in freedom of expression, enshrined in article 10 of the Convention. Further, whilst Mr Caldecott accepted that a party may limit its article 10 rights through the settlement of litigation by contractual agreement, and that there is a public interest in enforcing such settlement agreements in the event of a breach, he submitted that the restriction must be certain, necessary for the pursuit of a legitimate aim and proportionate. In this respect, he argued, there is little difference between the requirements of article 10, and those of the common law, in relation to freedom of expression including where the injunction sought is directed to the enforcement of contractual rights.

56. In this case, Mr Caldecott submitted it is pertinent that the restrictions placed on the press are in connection with political speech and therefore any interference with article 10 calls for the closest scrutiny of the court. Having regard to all these matters, clause 3.2 is wholly disproportionate and does not pursue any legitimate aim. It is void and unenforceable in particular because it relates not merely to the appellant but to other members of his family, and it applies to any information whether defamatory or not, and without limit of time. Further the proviso to clause 3.2 is wholly inapt to allow proper public interest coverage of the Lagarde list; it is highly likely to restrict full coverage of public interest issues, including issues concerning third parties, whose mention may point to the appellant or relevant members of his family, and is wholly unnecessary for the protection of the appellant's right to reputation. Finally, given the wealth, prominence and extensive business interests of the appellant, and at least some members of his immediate family, it is almost inevitable that public interest issues will arise in the future which it will be impossible to cover fully or at all without offending against clause 3.2. There is also potential for considerable uncertainty in deciding in advance, whether any particular publication might breach any order.

Discussion

Section 12 of the 1998 Act and waiver

57. The Convention arguments in this appeal relate only to article 10. It was accepted before the judge that the appellant's article 8 rights were not engaged, presumably because he is not in the jurisdiction of any contracting party to the Convention for the purposes of article 1 of the Convention: and no argument to the contrary was advanced before us: see further, *OPO v MLA* [2015] EMLR 4 at para 114.

58. Article 10 of the Convention protects the right to freedom of expression. It provides as follows:

> **Article 10: Freedom of expression**
>
> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart

> information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, and for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

59. The right to freedom of expression, which includes the right to receive and impart information, is undoubtedly one of the foundations of a democratic society. The importance of this right, has been repeatedly emphasised both in the common law, and in Strasbourg jurisprudence. The public interest in freedom of the press, subject to proportionate restrictions, which are necessary to protect the rights of others, is also firmly established at common law and in Convention jurisprudence. See for example, the decision of the Grand Chamber in *Axel Springer AG v Germany* [2012] EMLR 15, reiterating a number of important principles, regarding freedom of expression, including the essential role played by the press in a democratic society and the right of the public to receive information from the media.

60. Despite the high importance attached to the right to freedom of expression, the right was never regarded as absolute in domestic law, and the European Convention similarly recognises it is not absolute. It is plain from the language of article 10(2) that any national restriction on freedom of expression can be consistent with article 10(2) only if it is prescribed by law, or directed to one or more of the objectives specified in the article and is shown by the state to be necessary in a democratic society. One must consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under article 10(2): see *R v Shayler* [2003] 1 AC 247 at para 23.

61. Section 12 of the 1998 Act provides as follows:

> **"12. Freedom of expression**
>
> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied –
>
> (a) that the applicant has taken all practical steps to notify the respondent; or

> (b) that there are compelling reasons why the respondent should not be notified.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to –
>
> (a) the extent to which –
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any relevant privacy code.
>
> (5) In this section –
>
> "court" includes a tribunal; and
>
> "relief" includes any remedy or order (other than in criminal proceedings)."

62. Section 12 reflects the central importance which attaches to the right to freedom of expression: per Lord Bingham of Cornhill in *R v Shayler* at para 22. It was enacted to buttress the protection afforded to freedom of speech at the interim stage: see the observations of Lord Nicholls in *Cream Holdings Ltd and anor. v Banerjee* [2004] UKHL 44 at para 15. It is plain from the wording of subsections (1) and (5), however, that it applies where the court is considering whether to grant *any* civil remedy or order, including therefore a permanent injunction, which might affect the Convention right to freedom of expression.

63. Section 12(4) requires the court to have particular regard to the importance of the Convention right to freedom of expression where section 12(1) applies. Importantly for present purposes, section 12(4) "puts beyond question the direct applicability of at least one article of the Convention as between one private party to litigation and another - in the jargon, its horizontal effect": per Sedley LJ in *Douglas v Hello! (No 1)* [2001] QB 967, at 1003. See further, *London Regional Transport v The Mayor of London* [2001] EWCA Civ. 1429; [2003] EMCR 4 at para 61.

64. The phrase "must have particular regard to" in section 12(4) does not indicate that the court should place extra weight on the matters to which the subsection refers. Section 12(4) "does no more than underline the need to have regard to contexts in which that jurisprudence has given particular weight to freedom of expression, while at the same time drawing attention to considerations which may nonetheless justify restricting that right" per Lord Phillips MR, *Ashdown v Telegraph Ltd* [2001] EWCA Civ. 1142 at para 27. One such context is where the proceedings relate to journalistic material, in which case the court must have regard to the extent to which it is, or would be in the public interest for the material to be published: see section 12(4)(a)(ii) of the 1998 Act.

65. The argument for the appellant is, as I have said, that the respondents have voluntarily limited their rights to publish to the extent specified in clause 3.2 of the settlement agreement, and have thus waived their right to freedom of expression. It follows, so it is said, that article 10 of the Convention and section 12 of the 1998 Act, are irrelevant to the issues raised in this appeal, and the issue between the parties is a straightforward one of contractual enforcement. I am unable to accept that argument.

66. It is well established in Strasbourg jurisprudence that some of the rights safeguarded by the Convention can be waived, and some cannot be: see *Albert and Le Compte v Belgium*, App. Nos. 7299/75 and 7496/76, 10 February 1983, 5 EHRR 533, para 35. Most of the Strasbourg jurisprudence on waiver (and in this jurisdiction for that matter) concerns waiver of fair trial rights in relation to article 6. In that context, where it is said that a settlement has deprived a party of the right of access to the court, the court has said a thorough analysis is required to determine whether a friendly settlement has been reached, or whether it is tainted by constraint, see for example, *Deweer v Belgium* 6903/75 [1980] ECHR 1; *Pailot v France* RJD 1998-II 787; *Richards v France RJD* 1998-II 809. See further *Hakasson and Sturrenson v Sweden* (1991) 13 EHRR 1 at [66] where it was said that a waiver must be made in an unequivocal manner and must not run counter to any important public interest. It has not been clearly stated whether the important public interest is one that is determined by reference to the facts, or by reference to the nature of the right under consideration. So far as this case is concerned however, the parties referred to no case where waiver has been specifically considered in relation to article 10 or where it has been said that wherever article 10 is engaged, the right to freedom of expression cannot be waived, because waiver would be contrary to an important public interest. In one Strasbourg case, *Rommelfanger v Germany* (1224286) (1989) 62 DR 151, the Commission decided on the facts, that a contractual relationship between an employer and an employee was not sufficient in itself to result in a waiver of the employee's right to freedom of expression; but that in principle, parties could freely make such an agreement.

67. In this jurisdiction, however, section 12 explicitly requires the court to consider the Convention right to freedom of expression, before granting relief which may affect the exercise of that right, and in my judgment it does so, notwithstanding the relevant restriction appears in a contract between private parties. Mr Caldecott submitted that a contrary interpretation would imply a substantial and unwarranted limitation on the scope of section 12, and I agree. The court has a duty as a public authority to refrain from acting in a way that is incompatible with Convention rights, and section 12 imposes an obligation on the court to uphold Convention rights when exercising its discretionary powers in the circumstances delineated in section 12. The court has, as Mr Caldecott put it, a policing jurisdiction on the face of the legislation, from which the parties cannot derogate, including in circumstances such as those arising in the present case. In this respect, the court can take account of the public interest in receiving information, as well as the rights of the parties. However, the fact that the parties have entered into an agreement voluntarily restricting their article 10 rights can be, and in my judgment in this case is, an important part of the analysis which section 12 then requires the court to undertake. Whilst each case must be considered on its facts, where the relevant contract is one in settlement of litigation, with the benefit of expert legal advice on both sides, particularly where article 10 issues are in play in that litigation, it seems to me that it would require a strong case for the court to

conclude that such a bargain was disproportionate and to refuse to enforce it other than on ordinary contractual or equitable principles.

68. In *London Regional Transport* the claimants appealed against the decision of Sullivan J to discharge an interim injunction restraining the defendants from publishing a redacted report that was critical of the proposed public private partnership (PPP) for London's underground. The claimants' claim was for breach of confidence. The report had been based on commercially sensitive information disclosed by private sector bidders, in respect of which, the second defendant had entered into confidentiality agreements*;* and part of the claimant's case to the judge, which he did not accept, was that because of those agreements, the court had no option but to prevent disclosure. The defendants' case was that redactions had been made from the report to preserve genuine commercial confidences, and there was a strong public interest in its publication. As part of the appeal, the claimants argued the judge had erred in embarking on a balancing exercise and in relying on article 10 of the Convention, in a case where there were express contractual obligations of confidence, and he had failed to give proper weight to the confidentiality agreements.

69. The Court of Appeal (Aldous, Robert Walker, Sedley LLJ) held there was no basis for the claimants' contention that a breach of a contractual duty of confidence was more serious, and was to be approached differently, as regards injunctive relief, than other breaches of confidence; and that there had to be proportionality in any restraint on freedom of expression if the restraint was to be justifiable under article 10(2) of the Convention.

70. At para 46 Robert Walker LJ said:

> "46. Sir George Jessel MR's observations about the sacredness of freedom of contract in *Printing and Numerical Registering Co v Sampson* (1875) 19 Eq 462, 465 are an echo of the high Victorian age in which freedom of contract was regarded with a special awe. No authority has been cited to the court establishing that an apparent breach of a contractual duty of confidence is more serious, and is to be approached differently (as regards injunctive relief) than other apparent breaches. Indeed in many cases (of which *Lion Laboratories* is an example) the defendants include ex-employees who had been in contractual relations with the claimant, and representatives of the press who were not bound by contract, but the court adopts the same approach to both. That is in line with the principles stated in the judgment of Bingham LJ in *Spycatcher* (para 39 above); and see *Saltman Engineering Co v Campbell* [1948] 65 RPC 203."

71. However, the underlying point in relation to confidence, as the passage referred to in the judgment of Bingham LJ, makes clear, is that:

> "… the duty of confidence does not depend on any contract, express or implied, between the parties. If it did, it would follow on ordinary principles that strangers to the contract would not be bound. But the duty "depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it". *Seager v Copydex Ltd* [1967] 1 WLR 923 at 931 per Lord Denning

> MR. "The jurisdiction is based, not so much on property or on contract, but rather on the duty to be of good faith": *Fraser v Evans* [1969]1 QB 349 at 361 per Lord Denning MR."

72. Robert Walker LJ went on to reject the claimants' argument that the framework for the test of confidentiality when considering what was proportionate, was the confidentiality agreements:

> "49. … counsel for the claimants has accepted the need for proportionality in any restraint on freedom of expression if the restraint is to be justifiable under Article 10(2) of the Convention. But she has submitted that the express terms of the confidentiality agreements, and the express and limited purposes for which they authorised disclosure of information, provide the right framework for the test of confidentiality. Otherwise, she has said, the matter comes down to an *ad hoc* redaction exercise with no guiding principle.
>
> 50. That submission calls for serious consideration, but I do not accept it. The guiding principle is to preserve legitimate commercial confidentiality while enabling the general public (and especially the long-suffering travelling public of London) to be informed of serious criticism, from a responsible source, of the value for money evaluation which is a crucial part of the PPP for the London Underground. That is a very important public interest ... and it is the interest which must go into the scales on proportionality."

73. Sedley LJ agreed with Robert Walker LJ's reasoning and conclusions. At para 53, he said that there was nothing of genuine commercial sensitivity in the redacted version of the report and nothing therefore to justify the stifling of public information and debate by the enforcement of a bare contractual obligation of silence. He went on to say:

> "55. Whether or not undertakings of confidentiality had been signed, both domestic law and Art.10(2) would recognise the propriety of suppressing wanton or self-interested disclosure of confidential information; but both correspondingly recognise the legitimacy of disclosure, undertakings notwithstanding, if the public interest in the free flow of information and ideas will be served by it.
>
> 56. The difficulty in the latter case, as [counsel for the claimant's] argument has understandably stressed, is to know by what instrument this balance is to be struck. Is it to be, in Coke's phrase (4 Inst. 41), the golden and straight metwand of the law or the uncertain and crooked cord of discretion? The contribution which Art.10 and the jurisprudence of the European Court of Human Rights can make towards an answer is, in my view, real.
>
> 57. It lies in the methodical concept of proportionality…"

74. Aldous LJ agreed with both judgments, which he said, the court regarded as making a modest extension to the law.

75. In *Associated Newspapers Ltd v HRH Prince of Wales* [2006] EWCA Civ. 1776; [2008] Ch. 57; [2007] 3 WLR 222, the appellant newspaper appealed against an order granting summary judgment in respect of part of the claim of the Prince Charles for breach of confidence and infringement of copyright, relating to handwritten journals kept by him recording his impressions and views in the course of overseas tours made by him between 1993 and 1999. The court regarded the fact that confidential information had been disclosed to a newspaper by a disloyal employee, in breach of her contract of employment, as a separate and important factor adding to the weight when applying the test of proportionality.

76. At paras 66 to 69, Lord Phillips MR giving the judgment of the court said:

> "66. There is an important public interest in the observance of duties of confidence. Those who engage employees, or who enter into other relationships that carry with them a duty of confidence, ought to be able to be confident that they can disclose, without risk of wider publication, information that it is legitimate for them to wish to keep confidential. Before the Human Rights Act came into force the circumstances in which the public interest in publication overrode a duty of confidence were very limited. The issue was whether exceptional circumstances justified disregarding the confidentiality that would otherwise prevail. Today the test is different. It is whether a fetter of the right of freedom of expression is, in the particular circumstances, 'necessary in a democratic society'. It is a test of proportionality. But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. To take an extreme example, the content of a budget speech is a matter of great public interest. But if a disloyal typist were to seek to sell a copy to a newspaper in advance of the delivery of the speech in Parliament, there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech.
>
> 67. For these reasons, the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public…
>
> ……

> 69. In applying the test of proportionality, the nature of the relationship that gives rise to the duty of confidentiality may be important. Different views have been expressed as to whether the fact that there is an express contractual obligation of confidence affects the weight to be attached to the duty of confidentiality. In *Campbell v Frisbee* [2002] EWCA Civ 1374; [2003] ICR 141 at paragraph 22 this court drew attention to this conflict of view, and commented:
>
> > "We consider that it is arguable that a duty of confidentiality that has been expressly assumed under contract carries more weight, when balanced against the right of freedom of expression, than a duty of confidence that is not buttressed by express agreement"
>
> We adhere to this view. But the extent to which a contract adds to the weight of duty of confidence arising out of a confidential relationship will depend upon the facts of the individual case."

77. Lord Phillips MR went on to say at para 71:

> "71. The information in the Journal was disclosed to the Newspaper by [the employee]. She was employed in Prince Charles' Private Office in circumstances and under a contract that placed her under a duty to keep the contents of the Journal confidential. [Counsel for the Prince of Wales] emphasised in his submissions to the judge the strong public interest in preserving the confidentiality of private journals and communications within private offices. He was right to do so. There is an important public interest in employees in the position of [the employee] respecting the obligations of confidence that they have assumed. Both the nature of the information and of the relationship of confidence under which it was received weigh heavily in the balance in favour of Prince Charles."

78. The case on which the appellant's argument on waiver is founded is *Warren v Random House (Nos 1-3)*.

79. In *Warren* the claimant accepted an offer of amends relied on by the defendant in its defence to a claim for defamation (made in respect of the third of three passages sued on from a book) pursuant to section 4(2) of the Defamation Act 1996 and the parties agreed the terms of an apology in relation to the relevant passage, which was read in open court. The defendant had pleaded justification in respect of the other two passages sued on. Gray J subsequently refused the defendant permission to amend its defence to plead justification in relation to the third passage holding that a binding and legally enforceable contract had come into existence on acceptance of the offer of amends, which bound the defendant, and that the defendant's inability to plead justification did not breach its rights to a fair trial or to freedom of expression under articles 6 and 10 of the Convention: see [2007] EWHC 2856 (QB).

80. The Court of Appeal (Sir Anthony Clarke MR, May, Wilson LJJ) dismissed the defendant's appeal.

81. First, the court was not persuaded that the principles relating to late amendments applied without modification to a case in which the dispute has been settled by the acceptance of an offer of amends, especially where the agreement, whether a contract or not, had been part performed by the making of an agreed apology; and where the whole point of the statutory procedure was that the action comes to an end and is replaced by an entirely new procedure: see para 20. It said those general principles apply no more to this situation than they would after acceptance of a Part 36 offer, or, indeed, after a settlement agreement reached outside the Civil Procedure Rules: see para 21.

82. The court accepted it had a residual discretion to permit a defendant to resile from an offer of amends made and accepted under the Defamation Act 1996, but the discretion was not broad, and would be exercised rarely in special or exceptional circumstances. The court thought the relevant considerations to which the court should have regard when requested to exercise that discretion were similar to those which applied when a party sought the release or modification of an undertaking voluntarily given in the course of litigation, as Sir Anthony Clarke MR, giving the judgment of the court explained at paras 24 to 27:

> "24. [Counsel for the claimant] draws our attention in particular to the decision of this court in *Di Placito v Slater* [2003] EWCA Civ 1863, [2004] 1 WLR 1605, where the court was considering the correct approach to the release or modification of an undertaking voluntarily given in the course of litigation. Potter LJ, with whom Laws and Arden LJJ agreed, said at [31] that he thought that the test of special circumstances was appropriate in order to emphasise that the discretion is not simply at large, but is to be exercised only in a situation where circumstances have subsequently arisen which, by reason of their type or gravity, were not circumstances which were intended to be covered or ought to have been foreseen at the time the undertaking was given.
>
> 25. At [32] Potter LJ identified three matters of particular importance. The first was the context. The second was whether the undertaking was given to the court independently of the agreement of the other party or as part of a collateral bargain, "as for example as part of, or pursuant to, the freely agreed compromise of an action". He added that in the former case, the court would be concerned with questions of judicial policy and the importance of ensuring that an undertaking solemnly given to the court is observed unless and until the court releases or discharges the undertaking. As to the latter case, he said this:
>
> > "… the court will be primarily concerned with the issue of justice as between the parties and the fact that, by granting release from or modifying the injunction, the court will deprive the beneficiary of the undertaking of the benefit of a bargain voluntarily made."

> 26. As Potter LJ expressly recognised at [34], that is an important point. Other things being equal parties should be kept to their bargain, at any rate unless there are contractual grounds for avoiding them, which there were not here. The third matter identified by Potter LJ, at [33], was that the question is whether there were 'special circumstances' in the sense of circumstances so different from those contemplated or intended to be governed by the undertaking at the time that it was given that it is appropriate for the undertaker to be released from his promise.
>
> 27. Similar considerations appear to us to be relevant here. As we see it, those considerations emphasise the rare nature of the case in which it is likely to be appropriate to relieve a party of the consequences of his bargain if, as here, it was freely entered into. Thus, as Potter LJ recognised in his case, it is not a broad discretion. Thus it is not a discretion of the kind conferred on the court by CPR rule 14.1(5) to permit a party to amend or withdraw an admission. The critical reason for the distinction is that the parties have reached agreement with important and well-understood consequences. The offer of amends scheme has been a very valuable addition to the resolution of claims of this kind, in that it has benefits for both sides in defamation proceedings, as both the judge in this case and Eady J in *Nail* and other cases have emphasised. No judge has greater experience of this class of dispute than they have and we have concluded that the correct approach is to limit the circumstances in which the court should interfere."

83. Secondly, the court held the defendant's inability to plead justification following an acceptance of its offer of amends did not deprive it of a right to a fair trial of the action under article 6 of the Convention, since the defendant had, on the basis of highly qualified legal advice, waived that right when it had freely chosen to settle the action by making an informed and unequivocal offer of amends which it had not withdrawn before acceptance, and there was no relevant public interest or other principle which led to the conclusion that the appellant has been deprived of a right to a fair trial: see paras 31 to 34. As to that the court referred to:

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

84. Thirdly, the court held there was no interference with the defendant's article 10 rights to freedom of expression, since the offer of amends and its acceptance did not prevent the defendant from repeating the words complained of or from pleading justification in any future libel action which the claimant might bring; accordingly there was no incompatibility with the 1998 Act and no need to read down the relevant provisions of

the Defamation Act 1996. See para 12 and then paras 35 to 38, where Sir Anthony Clarke MR said this:

> "*Article 10*
>
> 35. It is not in dispute that the right to the freedom of expression in article 10(1) is of considerable importance, as has been stressed many times, both in the ECtHR and in these courts. Moreover, it includes the right both to receive and impart information. Under article 10(2), any limitations on the right must be such as are prescribed by law and necessary in a democratic society, they must be proportionate to the legitimate aim pursued and they must be relevant and sufficient and based on an acceptable assessment of the relevant facts.
>
> 36. We accept [counsel for the claimant's] submission that, in so far as there is any interference with the appellant's right of expression, it arises only because it has made an offer of amends which has been accepted. In this regard the position is no different from a case in which the claimant has accepted an offer to settle made under CPR Part 36 or, indeed, an offer made outside Part 36. In the case of an offer made outside Part 36, where the court has no further part to play, the rights of the parties to the settlement agreement are entirely contractual and, subject to any contractual defences, would be honoured by the courts. We see nothing disproportionate about this approach.
>
> 37. In the case of an accepted offer of amends, again as stated above, although the defendant has to pay compensation in accordance with the statutory scheme, there is nothing to prevent him from repeating the words complained of and, in such a case, nothing to prevent him from pleading justification in any future libel proceedings which the claimant might bring.
>
> 38. In these circumstances, while we recognise the importance of the right of freedom of expression enshrined in article 10, the application of the principles set out above does not, in our judgment, interfere with that right.
>
> *Other considerations*
>
> 39. In these circumstances, as we see it, there is no question here of the court reading down the provisions of the 1996 Act to make them compatible with the Human Rights Act 1998 because the approach we have outlined is already consistent with the Act. Equally we do not think that cases in which it has been held the courts will or may now approach the enforcement of contracts differently from the way in which they did before the Human Rights Act came into force assist the appellant. We were referred for example to *London Regional Transport v Mayor of London* [2001] EWCA Civ. 1491, [2003] EMLR 88. Such cases do not assist the appellant because, for the reasons we have given, the principles we have outlined do not infringe a defendant's rights under the ECHR."

85. There can be no doubt that what is said in *Warren* suggests the court's role in relation to a contract of settlement is a confined one; and that subject to contractual defences, such a contract will be honoured by the court. However, the following points should be noted.

86. First, as can be seen, the court's decision on waiver, and its reference to Strasbourg jurisprudence concerned article 6 and not article 10 of the Convention. Secondly, the issue that arises in this case did not arise for decision in *Warren.* The court said it was inclined to think the statutory offer of amends regime, whilst it had many of the attributes of a contract, was not one, because it contained certain express provisions and the court retained a role: see para 17. In any event, the court made it clear in para 39 of its judgment, cited above, that it did not need to consider how the 1998 Act affected the enforceability of contracts (or therefore by implication, the applicability of section 12) in the light of its conclusion that the offer of amends regime was compatible with article 10. In this connection, as already indicated, the court said it considered it important that making an offer under that regime, with the advantages to the defendants that flowed from that, did not subsequently prevent the defendant from repeating the libel or pleading justification: para 12. It follows that the observations in *Warren* on the court's role where there is a contract of settlement were, strictly, obiter.

87. Nonetheless the court in *Warren* plainly thought that however a settlement was reached, whether through statutory mechanisms, the rules of court or through the private agreement of the parties, there were powerful and common underlying reasons which made it right to uphold such a bargain, save in exceptional circumstances; and its views on the significance to be attached to such contractual settlements are important and highly persuasive.

Settlement in this case

88. There were obvious advantages to both sides to this litigation, in reaching a settlement, as there are for litigants more generally. As Lord Bingham of Cornhill put it:

> "The law loves a compromise. It has good reason to do so, since a settlement agreement freely made between both parties to a dispute ordinarily commands a degree of willing acceptance denied to an order imposed on one party by a court decision. A party who settles foregoes the chance of total victory, but avoids the anxiety, risk, uncertainty and expenditure of time which is inherent in almost any contested action, and escapes the danger of total defeat. The law reflects this philosophy, by making it hard for a party to withdraw from a settlement agreement, as from any other agreement, and by giving special standing to an agreement embodied by consent, in an order of the court." See the introduction to *Foskett on Compromise* (4th edition).

89. I would add that settlement does not only serve the private interests of the litigants, but the administration of justice and the public interest more generally, by freeing court resources for other cases. The law therefore encourages and facilitates the

mutual resolution of disputes by various means, for very sound reasons of public policy; and there is obviously an important public interest in the finality of settlement.

90. The parties in this case decided, with the benefit of expert legal advice on each side, to enter into a contract that compromised their legal proceedings. They chose to do this, using the settlement mechanism of a Tomlin Order, and thus converted their putative rights and/or liabilities in the litigation into a contract. The implications (and advantages to litigants) of using the mechanism of a Tomlin Order are easy to comprehend: settlement is facilitated as it can be on confidential terms which go beyond the boundaries of the claim; and in the event of a breach of those terms, enforcement can take place within the existing action by a summary procedure, in which an application can be made to convert the contractual obligations into ones enforceable by judicial process. If the order made by the court is breached, then enforcement can follow in the usual way. It is generally no part of that enforcement process to litigate or revisit the underlying merits of the dispute that gave rise to the litigation in the first place.

91. Parties are of course generally free to determine for themselves what primary obligations they accept; and legal certainty requires that they do so in the knowledge that if something happens for which the contract has made express provision, then other things being equal, the contract will be enforced (*pacta sunt servanda*). This is a rule of public policy of considerable importance. Furthermore, the principled reasons for upholding a bargain freely entered into, obviously apply to one that finally disposes of litigation with particular force.

92. As part of their bargain, the parties in this case agreed contractual terms that went beyond the ambit of the dispute. It is reasonable to suppose that both parties knew this; and of course it is settled law that a Tomlin Order allows for the enforcement of obligations which could not have been enforced in the original action, and arose for the first time under the compromise: see *E.F Phillips & Son v Clarke*, at 325, and *Foskett on Compromise*, 7th edition at paras 9-21 to 9.23.

93. It is not in dispute in this appeal that the meaning of the terms on which the parties contracted were objectively clear (including the meaning of "refer to" in clause 3.2). In any event, it is settled law that the court adopts an objective approach to the construction of the terms of a Tomlin Order by asking what a reasonable person would have understood the parties to have meant by the language used: see *Sirius International Insurance Co. (Publ. v FAI General Insurance Ltd* [2004] UKHL 54, [2004] 1 WLR 3251.

94. The settlement in this case was made without admission of liability. However, settlement is, as it has been described, a form of risk management, and the respondents had a number of options short of settlement. They could have pursued their jurisdictional challenge and applied to strike the case out on *Jameel* principles as an abuse of the process: see *Jameel (Yousef) v Dow Jones & Co. Inc.* [2005] EWCA Civ. 75; [2005] QB 946; [2005] 2 WLR 1614. They could have used the offer of amends procedure contained in sections 2 to 4 inclusive of the Defamation Act 1996, as the defendants did in *Warren* with the particular benefits that making such an offer brings (see *Warren*, paras 14 to 15). They could have made a Part 36 offer under the Civil Procedure Rules, or an open or without prejudice offer outside those provisions. They could have taken the case to trial and defended the allegations they had made

against the appellant on a range of defences that might have been available to them (and accompanied these substantive defences, with steps taken to protect their position on costs). The defences put forward, if there was evidence to support them, could have included truth or fair comment or *Reynolds* privilege (responsible journalism on a matter of public interest); or the equivalent defences under the Defamation Act 2013. If the respondents had taken that course, the merits or otherwise of such defences and such issues of public interest as they wished to advance, in relation to the appellant and his connection with the Lagarde list, could have been properly investigated and tested in court on the facts.

95. In deciding to settle, however, the respondents consciously agreed to forgo those options and agreed to abide by terms of settlement that expressly limited what they could publish in the future. In return, the appellant gave up his right to pursue the litigation, to the obvious benefit of the respondents, and it has not been suggested that the appellant can revive that right. The argument now advanced for the respondents, involves the proposition that they should nonetheless be entitled to publish precisely what they agreed not to publish as part of this bargain. And they advance in support of that position matters regarding the public interest in the Lagarde issue that it would have been open to them to pursue in the litigation for which they agreed to substitute contractual rights. Further, it is contended that it would be contrary to the public interest and an infringement of their article 10 rights if they were to be prevented from publishing what they agreed not to publish; and that the appellant should be refused the injunctive relief which it was foreseeable he would apply for under the terms of the Tomlin Order, if they breached the terms of settlement.

96. If there is a hint in the respondents' evidence that they did not fully understand what they were letting themselves in for, or of oppression, it can and should be discounted. The respondents have not waived privilege as to the advice they received before entering into the settlement agreement, and have said (as the judge recorded) that they did so for economic reasons. However, this is not a case where there is an obvious inequality between the status of the parties, since there is a well-resourced claimant on the one hand, and media defendants on the other, each of whom entered into the settlement with the benefit of separate expert legal advice, after a substantial negotiation conducted through lawyers. Further, the courts would not review the fairness of the parties' contractual bargain, either at law or in equity, unless there are grounds which might cast doubt on the reality of contractual consent, such as fraud, undue influence, misrepresentation and mistake – and this is not suggested here.

97. In these circumstances, there is no reason to doubt the validity of the settlement agreement on ordinary contractual principles or that the parties, who were on an equal footing for this purpose, went into it voluntarily with their eyes fully open, both as to their obligations under the contract and the potential consequences of any breach. Since the respondents eschew any suggestion that they entered into the settlement agreement in bad faith, it should also be assumed that each side intended to comply with it, and therefore believed at the time of contracting that they could do so.

98. Having regard to the features of the settlement in this case, I think its facts are very different to those of *Neville v Dominion of Canada News Company Limited* [1915] 3KB 556, an authority on which the respondents particularly rely.

99. In *Neville* the defendants held themselves out as supplying honest advice to intending purchasers of Canadian land in a weekly magazine. The plaintiff, who was a director of a company engaged in selling land in Canada, had lent them £1,490. The plaintiff and the defendants entered into an agreement by which plaintiff agreed with the defendants that he would accept £750, in full satisfaction of the debt, but the full sum would become payable if the defendants breached the terms of the agreement. One of those terms was that the defendants should not publish any comment on the plaintiff's company, its directors, business or land. The plaintiff's claim for the full sum on the ground that the defendants had breached the agreement by publishing comments about him was dismissed on the ground that the relevant term was in restraint of trade and contrary to public policy.

100. It is true that the Court of Appeal (Lord Cozens-Hardy MR, Pickford and Warrington LJJ) dismissed the plaintiff's appeal in strong terms, on the grounds that the agreement was unenforceable for two reasons: (i) the term in question was in restraint of trade and wider than was reasonably necessary for the protection of the plaintiff; and (ii) the term was void as being against public policy as it was not consistent with the proper conduct of the newspaper in the public interest: see the observations of Lord Cozens-Hardy MR at 564, Pickford LJ at 565-6 and Warrington LJ at 568. However, this was not a case where there was an arm's length contract of settlement, which sought by its terms to address and compromise a genuine underlying dispute between independent parties. On the contrary, despite the careful language used by two members of the court, it is reasonably clear that the court was concerned by what appeared to be an attempt by the plaintiff to shut down criticism of his shady business practices by a paper he had more or less controlled up to the time of the agreement, after those ownership arrangements were changed, by what was tantamount to a bribe in the agreement: see in particular the observations of Warrington LJ at 567-8.

Conclusions in this case

101. It is common ground that the judge fell into error (see paras 47 to 50 above). It therefore falls to this court, to decide whether an injunction should be granted to enforce clause 3.2 of the settlement agreement, having regard to the court's obligations under section 12 of the 1998 Act. Obviously there are two important elements in deciding the question: the right to freedom of expression on the one hand, and the contractual rights of the parties in relation to the settlement on the other.

102. As to the first of those elements, it is axiomatic, as set out above, that the right to freedom of expression is a Convention right of fundamental importance. It has been consistently recognised as such both in Strasbourg and domestic jurisprudence. The courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction: see *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, per Lord Bingham of Cornhill at 290-291. Further, special emphasis is placed on the protection of statements of a political nature, as well as statements on wider issues of legitimate public concern, to which the court must have particular regard by virtue of section 12(4) of the 1998 Act. Accordingly, close attention must be paid to those rights, and in particular to the extent that the respondents' participation in a free press permits and requires them to exercise those rights.

103. However, article 10(2) permits restrictions on those rights for the protection of the reputation *and rights of others*, which includes, in this case, the private rights of the parties under an otherwise validly constituted contract of settlement. This is something to which the law attaches considerable importance and save in well-defined circumstances, such contracts would normally be enforced. The issue thus resolves itself into one of proportionality, and in particular, whether the restrictions in clause 3.2 are a disproportionate interference with the respondents' article 10 rights.

104. The wording of section 12 requires a consideration of article 10, because the court is being asked to grant an injunction that affects freedom of expression. However, in my view, the analysis after a settlement agreement has been freely entered into, and the parties have waived their respective rights, is not the same as that which arises at the interim stage say, in a contested privacy or defamation action. That is to ignore the importance in the public interest of parties to litigation, including this kind of litigation, being encouraged to settle their disputes with confidence that, if need be, the court will be likely to enforce the terms of a settlement freely entered into on either side. I have set out above the facts that gave rise to the litigation and the circumstances of the settlement and need not repeat them. In my judgment, to echo the words used in *Warren* at para 37, there is nothing disproportionate on the facts, in holding the respondents to their bargain. It is true that in *Warren* the court had in mind the ability of the defendants to repeat the libel if they wished to do so, but that factual circumstance reflected what the parties had agreed to by using the offer of amends procedure. Here the parties agreed to something completely different.

105. There is no doubt that an injunction to enforce contractual rights must be sufficiently certain as to its scope to be enforceable: see for example, *O (A Child) v Rhodes and anor. (English Pen and others intervening)* [2015] 2 WLR 1373 at para 79. However, in my view, that applies to clause 3.2 and the difficulty of enforcement has been considerably overstated. Indirect reference is a concept that is well understood in libel and normally presents no difficulty on the facts. Tangential or remote indirect references to the appellant or his family are unlikely to result in an application to commit, or one with even a remote chance of success.

Outcome

106. I would allow the appeal, grant an injunction in the terms sought by the appellant and remit the application for an inquiry as to damages to the High Court.

Lord Justice Lindblom:

107. I agree.

Lady Justice Gloster:

108. I also agree.