Neutral Citation Number: [2017] EWHC 2637 (QB)

Case No: HQ17D00558

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 October 2017

Before :

THE HONOURABLE MR JUSTICE NICKLIN

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Between :

Nicholas Brown	**Claimant**
- and –	
(1) Tom Bower **(2) Faber & Faber Limited**	**Defendants**

- -
- -

Adrienne Page QC and **Jacob Dean** (instructed by **Carter-Ruck**) for the **Claimant**
Andrew Caldecott QC (instructed by **Wiggin LLP**) for the **Defendants**

Hearing date: 17 October 2017

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Judgment Approved

The Honourable Mr Justice Nicklin:

1. This is a libel action. On 19 June 2017, following application by the Defendants, Warby J ordered that (a) meaning; and (b) whether the words were 'defamatory' at common law should be tried as preliminary issues ([2017] EWHC 1388 (QB) ("the First Judgment")).

2. This judgment follows the trial of those issues. The trial has been short, largely because no evidence is admissible in relation to the issues to be determined.

3. The Defendants had urged the Court also to direct trial of the issues of serious harm under s.1 Defamation Act 2013 and whether the claim was an abuse of process under the principles in ***Jameel -v- Dow Jones*** **[2005] 1 WLR 946**, but that application was refused.

4. I can gratefully adopt the background to the litigation and its procedural history from the First Judgment ([9]-[17]). I shall use the same definitions in this judgment.

5. Given their importance, it is necessary for me to set out the words in the Book that are the subject of the claim. The following appears on p.104 of the Book:

> "The imbroglio intensified after Blair was told that Ron Davies, the Welsh secretary, had been robbed by a male prostitute on Clapham Common. His instant resignation was praised in the media as 'the coming of age of the Blair government' – without their realising that Blair had concealed from the outset that Davies had been lying to the police about the circumstances of the incident. **In the ensuing discussion about gays in politics, journalist Matthew Parris declared on BBC TV that Mandelson was gay. Days later, Nick Brown, the new minister of agriculture was accused by the *News of the World* of paying £100 to rent boys in order to be kicked around a room, and admitted his sexuality.** A 'gay mafia' blared the *Sun*, was running the country. Next, Westminster gossipers blessed 'statesman-like' Mandelson and mentioned him as Blair's heir apparent."

The words complained of by the Claimant are shown in bold. I have included the balance to show their immediate context.

6. The meaning that the Claimant contends the words bear is:

"that the Claimant had been paying £100 a time to young male prostitutes to subject him to violent sexual acts or that there were strong grounds to so believe"

7. No Defence has been served, but in a letter from their solicitors dated 4 July 2017 the Defendants indicated that the meaning that they would invite the Court to find was:

"that there are grounds to suspect Nick Brown may have paid young men for consensual rough sex." ("the Defendants' Meaning")

8. I will deal with the meaning of the Book (so far as it concerns the Claimant) before turning to consider the second point, whether the meaning found is defamatory.

Meaning

9. There has been no dispute between the parties as to the approach I must adopt to determining meaning. Naturally, Ms Page and Mr Caldecott place emphasis on certain aspects, but there is no disagreement as to the basic approach. There is a dispute as to the 'repetition rule' and its proper application in this case, and I will come to that shortly.

10. My task is to determine the natural and ordinary meaning of the words complained of. That meaning is the meaning that the hypothetical reasonable reader would understand the words bear. In assessing meaning, no evidence beyond the words complained of is admissible: ***Charleston –v- News Group Newspapers*** **[1995] 2 AC 65**, **70** *per* Lord Bridge. The same case establishes the principle that the ordinary reasonable reader is taken to have read the whole of a publication; in this case, the whole of the Book. That is important, because the context in which the words complained of appear will often influence the meaning (see Paragraph 16 below).

11. By this process, the Court arrives at the single natural and ordinary meaning that the words complained of bear. It is well recognised that there is an artificiality in this process because individual readers may understand words in different ways: ***Slim –v- Daily Telegraph*** **[1968] 2 QB 157**, 173D-E *per* Lord Diplock.

12. It is common ground that in determining the single meaning, the Court is free to choose the correct meaning; it is not bound by the meanings advanced by the parties (save that it cannot find a meaning that is more injurious than the Claimant's pleaded meaning: ***Slim*** 175F *per* Lord Diplock).

13. There are several authorities which guide the Court as to the process of determining the single meaning. Drawing together earlier authorities, Sir Anthony Clarke MR in ***Jeynes –v- News Magazines Ltd*** **[2008] EWCA Civ 130** gave the following summary [14]:

> "(1) The governing principle is reasonableness.
>
> (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.
>
> (3) Over-elaborate analysis is best avoided.
>
> (4) The intention of the publisher is irrelevant.
>
> (5) The article must be read as a whole, and any 'bane and antidote' taken together.
>
> (6) The hypothetical reader is taken to be representative of those who would read the publication in question.
>
> (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the product of some strained, or forced or utterly unreasonable interpretation'
>
> (8) It follows that 'it is not enough to say that by some person or another the words might be understood in a defamatory sense'."

14. In ***Simpson –v- MGN*** **[2015] EWHC 77 (QB)** [10], Warby J noted the following in relation to the third and sixth ***Jeynes*** principles.

> "As principle (3) indicates, the exercise is one of impression. As Eady J said in ***Gillick –v- Brook Advisory Centres*** (cited in ***Jeynes*** at [7]) '*Judges should have regard to the impression the words have made on themselves in considering what impact it would have made on the hypothetical reasonable reader*'. Principle (6) requires the court to form a view on how the representative hypothetical reader of the particular publication concerned would be likely to understand the words, bearing in mind where in the publication the words appear; the reader's familiarity with the nature of publication in question; and any expectations created by that familiarity: see ***John –v- Guardian Newspapers Ltd*** **[2008] EWHC 3066 (QB)**, [22]-[23], [32]. I would add, however, that this is an exercise which needs to be undertaken with care. The court can take judicial notice of facts which are common knowledge, but facts which are not need in principle to

be admitted or proved, not assumed. The court should beware of reliance on impressionistic assessments of the characteristics of a newspaper's readership."

15. In ***McAlpine –v- Bercow*** **[2013] EWHC 1342 (QB)** Tugendhat J dealt with the approach of the court where there are two (or more) rival meanings that are said to be the natural and ordinary meaning [66]:

> "… If there are two possible meanings, one less derogatory than the other, whether it is the more or the less derogatory meaning that the court should adopt is to be determined by reference to what the hypothetical reasonable reader would understand in all the circumstances. It would be unreasonable for a reader to be avid for scandal, and always to adopt a bad meaning where a non-defamatory meaning was available. But always to adopt the less derogatory meaning would also be unreasonable: it would be naïve."

16. The recent Court of Appeal decision in ***Bukovsky –v- Crown Prosecution Service*** **[2017] EWCA Civ 1529** [13]-[16] emphasises the importance of the court having proper regard to the context in which the words complained of appear. Sometimes, the context will clothe the words in a more serious defamatory meaning (for example the classic 'rogues' gallery' case). In other cases, the context will weaken (even extinguish altogether) the defamatory meaning that the words would bear if they were read in isolation (e.g. bane and antidote cases).

17. Finally, I need to refer to what are called the *Chase* levels of meaning. They come from the decision of Brooke LJ in ***Chase –v- News Group Newspapers Ltd*** **[2003] EMLR 11** [45] in which he identified three types of defamatory allegation: broadly, (1) the claimant is guilty of the act; (2) reasonable grounds to suspect that the claimant is guilty of the act; and (3) grounds to investigate whether the claimant has committed the act. In the lexicon of defamation, these have come to be known as the *Chase* levels. Reflecting the almost infinite capacity for subtle differences in meaning, they are not a straitjacket forcing the court to select one of these prescribed levels of meaning, but they are a helpful shorthand. In ***Charman –v- Orion*** **[2005] EWHC 2187 (QB)**, for example, Gray J found a meaning of "*cogent grounds to suspect*" [58]).

18. It is the Claimant's case that the meaning of the Book, as it refers to him, is *Chase* level 1. The Defendants' Meaning is a species of *Chase* level 2.

The Repetition Rule

19. The so-called 'repetition rule' is a principle "*deeply embedded*" in the law of defamation (*per* Hirst LJ in ***Shah –v- Standard Chartered Bank*** **[1999] QB 241, 261G**). It has two, quite distinct, applications. First, it is a rule relevant to the determination of the single meaning that a statement bears. Second, it serves to limit the evidence that is admissible to prove the truth of a defamatory imputation.

20. In tracing the history of the repetition rule, I start with ***Lewis –v- Daily Telegraph*** **[1964] AC 234** in which Lord Hodson (275) observed:

> "If one repeats a rumour one adds one's own authority to it and implies that it is well-founded, that is to say, that it is true. It is otherwise when one says or implies that a person is under suspicion of guilt. This does not imply that he is in fact guilty but only that there are reasonable grounds for suspicion, which is a different matter."

21. Similarly, Lord Devlin held (283-284):

> "… you cannot escape liability for defamation by putting the libel behind a prefix such as 'I have been told that…' or 'It is rumoured that…' and then asserting that it was true that you had been told or that it was in fact being rumoured. You have… to prove that the subject-matter of the rumour was true…. A rumour that a man is suspected of fraud is different from one that he is guilty of it. For the purpose of the law of libel a hearsay statement is the same as a direct statement, and that is all there is to it."

22. Later, at 285, Lord Devlin added, in a very famous passage:

> "It is not therefore, correct to say as a matter of law that a statement of suspicion imputes guilt. It can be said as a matter of practice that it very often does so, because although suspicion of guilt is something different from proof of guilt, it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done. One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man: you cannot make a rule about that."

23. ***Stern –v- Piper*** **[1997] QB 123** is next. The Court of Appeal undoubtedly endorsed the repetition rule, but it is important to note that it is a case concerning the application of the repetition rule to particulars of justification not meaning (see 128G *per* Hirst LJ). Simon Brown LJ described the repetition rule as follows:

> "The repetition rule … is a rule of law specifically designed to prevent a jury from deciding that a particular class of publication – a publication which conveys rumour, hearsay, allegation, repetition, call it what one will – is true or alternatively bears a lesser defamatory meaning than would attach to the original allegation itself. By definition, but for the rule, those findings would otherwise be open to the jury on the facts; why else the need for a rule of law in the first place? Take the present case. If, as I would hold, the rule applies, it applies to prevent the defendants from pleading and then inviting the jury to conclude that their article is true because it does no more than recite what in fact is alleged in [the] affirmation, alternatively is less defamatory than [the] affirmation because it does not assert the truth of the affirmation but merely reports that it contains such allegations."

> Although expressed in terms of *meaning*, as is clear from the final two sentences (and indeed what next follows in the judgment), the Judge was here referring primarily to the repetition rule's impact on the parameters of a justification defence.

24. The Court of Appeal returned to consider the repetition rule in ***Shah –v- Standard Chartered Bank***. This again was a decision primarily concerning the rule's application to a justification defence (259Dff). The Court of Appeal did deal with meaning, but it was at an interim stage and the Court simply ruled that the words complained of were *capable* of bearing both the plaintiff's pleaded meaning of guilt and the defendant's *Lucas-Box* meaning of reasonable suspicion (see 257B-F *per* Hirst LJ).

25. Nevertheless, Hirst LJ described the impact of the repetition rule on both meaning and justification. The Defendant's counsel had argued that the repetition rule *only* applied to meaning (262A). Rejecting that submission, the Judge held (263B-C):

> "I have come to the conclusion that the repetition rule applies in the manner described by Mr Browne [for the plaintiffs] for the reasons he gave. Contrary to Mr Rampton's argument, I am satisfied that it is a rule of law which governs not only meaning, but also the pleading and proof of a defence of justification. ***Stern –v- Piper*** is a very good illustration, since the ultimate decision was that the defence of justification should be struck out. Moreover, I consider that the repetition rule reflects a fundamental canon of legal policy in the law of defamation dating back nearly 170 years, that words must be interpreted, and the imputations they contain justified, by reference to the underlying allegations of fact and not merely reliance upon some second-hand report or assertion of them."

Parties' Submissions on the application of the rule to this case

26. Ms Page, for the Claimant, submits that the charge against the Claimant, attributed by the First Defendant in the Book to the *News of the World*, is unequivocal. There are no qualifying words, no reporting of any denials, no suggestion of an antidote to the bane of the allegation, no suggestion that it was a case of suspicion only, no casting doubt over the credibility of the source, or any of the other devices which might reduce the full force of the repetition rule. As such, she submits that the effect of the application of the rule is that the Court should find that the meaning is *Chase* level 1. There is nothing, she submits, in the context (whether immediate or in the Book as a whole) that can lead a reader to understand that allegation made to be anything else but guilt.

27. Mr Caldecott, for the Defendants, contends that the repetition rule cannot be applied slavishly to produce a level 1 meaning and context be ignored. Under the first ***Jeynes*** principle the touchstone is reasonableness. The task is to ascertain the meaning that the ordinary reasonable reader would understand from the Book. That meaning cannot simply be arrived at by the application of a legal rule. He submits that, to result in a level 1 meaning, there must be a "bare repetition" of the defamatory allegation - "Y told me that X is a thief" - or some adoption of the allegation that is being repeated. In support of this he relies on a passage from the judgment of May LJ in ***Shah*** (266d-f):

> "The repetition rule in its simplest application is that, if you publish a statement that Y said that X is guilty, it is not a defence to an action for defamation to establish the literal truth of the publication, i.e. that it is indeed true that Y said that X is guilty. You are repeating **and endorsing** Y's publication and your justification must address the substance of what Y said, not the fact that he said it. The obvious underlying reason for this is that statements of this kind in substance restate the original publication. It is not, I think, helpful to suggest, as did Mr Rampton, that the rule operates as a blue pencil. It is rather a rule which encapsulates the fact that publications of the **bald kind** under consideration do in substance amount to a republication of the reported publication and that that is their meaning." (emphasis added)

Decision on Repetition Rule

28. The repetition rule clearly applies when the court is considering the meaning of words, but it takes its place alongside all the other matters to which the Court must have regard when determining meaning. The task is to determine what the ordinary

reasonable reader would understand the words to mean. The repetition rule cannot be applied mechanistically to the determination of meaning. If Ms Page's strict application of the repetition rule were correct, then it would make no difference to meaning whether the words complained of were: "X proved/alleged/suggested/hinted that Y was a thief". Although each of those four verbs is apt to convey a subtly different meaning, because each is a repetition of X's charge against Y, Ms Page's contention would mean that it would make no difference; applying the repetition rule, the resulting meaning would always be guilt.

29. It seems to me that, as is nearly always the case in determining meaning, context is everything. It is easy to imagine cases where a publication refers to an allegation because the author wants to establish the fact that the allegation was made rather than any suggestion on her part that the allegation is true. Borrowing from Lord Devlin's analogy, it may be difficult to repeat the allegations of others without suggesting to the reader that the allegations are true, but it can be done. "*One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man: you cannot make a rule about that*" (the final important sentence from the quotation in paragraph 22 above).

30. In my judgment, to produce a *Chase* level 1 meaning, the *effect* of the publication (taken as a whole) has to be the adoption or endorsing of the allegation. That adoption or endorsement may come from "bald" repetition (as May LJ observed in ***Shah***) or it may come from other context which signals to the reader that the allegation is being adopted when it is repeated. The converse is also true. The context may signal to the reader that the allegation is not being adopted or endorsed. Sometimes allegations are repeated to criticise the person who made them. When doing so, prudent publishers often expressly state that the allegations were "baseless", but whilst no doubt sufficient (in most cases) to prevent the publisher being found to have adopted the allegation by repetition it is not necessary in all cases for this to be stated expressly. It all depends upon the context. As the New South Wales Court of Appeal put it, succinctly, in ***Wake –v- John Fairfax & Sons Limited*** **[1973] 1 NSWLR 43**, **49-50**: "*There can be little doubt that the nature and quality of the defamatory publication may vary, dependent upon whether it is a report of what another has said and whether it is adopted, repudiated or discounted.*" In ***John Fairfax Publications Pty Ltd –v- Obeid*** **[2005] NSWCA 60**; **(2005) 64 NSWLR 485** McColl JA analysed the authorities ([98]-[102]) before concluding [119]:

"This review of the authorities demonstrates that:

(a) Republication of defamatory hearsay constitutes adoption of the defamatory statement — using 'adoption' in the primary sense;

(b) As a general rule the republisher is liable in defamation as if the author of the defamatory hearsay;

(c) To determine what, if any, defamatory imputations are conveyed by the publication in which the defamatory hearsay appears, the matter complained of must be viewed as a whole. Relevant indicia will include whether the defamatory hearsay is approved, reaffirmed and/or endorsed (adopted in the secondary sense), repudiated or discounted and the purpose of the republication."

31. To like effect, I note the observations from the Court of Appeal in ***Curistan –v- Times Newspapers Ltd*** **[2009] QB 231** of the application of the repetition rule. Arden LJ's judgment contains the following:

> "[54] A feature of the repetition rule is that it applies irrespective of the defendant's position in relation to it. As Simon Brown LJ said in ***Stern –v- Piper***, at p.138, the repetition rule dictates the meaning to be given to the words used. In ***Mark –v- Associated Newspapers Ltd*** **[2002] EMLR 839**, Simon Brown LJ (with whom Mummery and Dyson LJJ agreed) went on to say that the assumed meaning accorded with reality. Thus he said, at para. 29:
>
> 'that [i.e. that the repetition rule dictates the meaning to be given to the words used] is by no means to say that the meaning dictated is an artificial one. Rather the rule accords with reality. If A says to B that C says that D is a scoundrel, B will think just as ill of D as if he had heard the statement directly from C.'
>
> [55] I venture respectfully to think that Simon Brown LJ was not here saying that in every case where a person reports that someone has made an accusation that that person is himself necessarily to be understood as underwriting the truth of the accusation, but rather that he must take responsibility for its further dissemination."

32. I agree. Taking responsibility for its further dissemination means, in this context, liability for republication of the allegation, but it does not mean that the Court is bound to find that the defamatory meaning that attaches to the repetition is, in all cases, the same level as the original allegation. When the authorities speak of rejecting submissions that words repeating the allegations of others bear a lower meaning than the original publication that is a rejection of the premise that the statement is less defamatory (or not defamatory at all) *simply* because it is a report of what someone else has said. That kind of reasoning is what the repetition rule prohibits when applied to meaning. The meaning to be attached to the repetition of the allegation has still to be judged, applying the rules of interpretation I have set out above, looking at the publication as a whole.

Argument on meaning

33. The Claimant's principal submissions on meaning are:

    i) The words complained of appear in a chapter entitled "*A government adrift*" which details several scandals and failures by the Blair government, including cash for access and lying cabinet ministers (page 98). The words complained of are preceded by an account of the "*imbroglio*" concerning a loan to Peter Mandelson for a house purchase. This was said to have "*intensified*" when Ron Davies was "*robbed by a male prostitute*" on Clapham Common and resigned. Even then it was said that Davies had been "*lying to the police*". Immediately before the words complained of it is said that Matthew Parris "*declared*" on television that Mandelson was gay. Immediately afterwards comes the suggestion that Mandelson's "*secret loan*" would be "*exposed*". On the next page the book talks about newspapers investigating "*other allegations of sleaze and cronyism*". Alastair Campbell is said to have described the period

as "*A wall-to-wall disaster area*". Over the page the book talks about "*the sight of Labour's halo turning into a noose*".

ii) The natural and ordinary meaning of the statement that the Claimant was "*accused by the News of the World of paying [etc.]*" is a claim that he was accused *in print*.

iii) The fact that the allegation is given the imprimatur of the *News of the World* in print would indicate to the ordinary reader that the allegation was true, or at the very least that the *News of the World* believed and had been advised it had the evidence to defeat a libel action brought over the allegation. An ordinary reader, with a knowledge of the First Defendant as a reputable biographer, would have expected, had the story been denied, that the First Defendant would have said so. To the contrary, the statement in the Book that, as result of the News of the World story, the Claimant "*admitted his sexuality*", indicates that the *News of the World* had uncovered something true about the Claimant and that he had been forced to admit it.

34. Ms Page's principal submission is that the meaning is guilt. Very much as a fall-back, she submits that it must bear a meaning of "strong grounds to suspect". She objects to the way the Defendants' Meaning is phrased. Although it looks like a *Chase* level 2 meaning, two elements have the effect of downgrading it to a *Chase* level 3 meaning. This is because, first, the meaning is expressed as bare "grounds to suspect" (not "*reasonable* grounds to suspect") and, second, because what is said to be suspected is that the Claimant "*may have* paid young men etc." (not "*did* pay"). If the grounds for suspicion are not reasonable, and what is suspected is not that the conduct took place but only that it may have taken place then, despite it not being expressed as such, she submits this is properly to be seen as no higher than a *Chase* level 3 meaning, which cannot be the meaning of the words.

35. The Defendants submit that the context of the words complained of, both immediately and as part of the Book as a whole, demonstrates that the Book is not adopting or endorsing the allegation. The ordinary reasonable reader, it is submitted, would understand that this was a book authored by an "*investigative historian*" (back inside of the dust-cover). It is an account of the difficulties of the Blair government. Mr Caldecott suggests that readers would expect a detailed chronicle of events and exhaustive research. There is reference in the introduction (p. xxi) to the First Defendant having had access to "*politicians, officials and military officers*" who were "*only now giving candid explanations about their role in the New Labour era*". The fruits of this access leads, in some parts of the Book, to detailed accounts being given of alleged wrongdoing.

36. The Chapter in which the words complained of appear is titled "*A Government Adrift*". He submits that the words complained of form part of a section of the chapter that starts, on p.103, with the sentence: "*The consequences of Blair's disorderliness erupted just before Christmas*". What follows is a chronological account of a series of problems or difficulties for the Prime Minister and his government. A running theme is negative press coverage. Reference is made to an undeclared loan from Geoffrey Robinson to Peter Mandelson for the purchase of a house in Notting Hill Gate. The Prime Minister is said to have 'toughed-out' the calls for Robinson's resignation. It is at this point that the paragraph I have set out in Paragraph 5 above appears. On p.105,

Alastair Campbell is quoted as describing the media hostility over a five-day period as a "*wall-to-wall disaster area*". The casualties of this disaster area are identified; Ron Davies is noted as having resigned and Blair is recorded as having decided that Robinson, Whelan and Mandelson "*would all have to go*". Mr Caldecott points to the fact that the Claimant is not one of the casualties and that readers later learn (at p.199) that he is still the Minister of Agriculture. Much detail is provided as to the 'wrongdoing' of the others who gave up or lost their positions; there is nothing that suggests to the reader that there was any substance to the newspaper report about the Claimant.

Decision as to meaning

37. The submissions of the parties have been very detailed and probably breach the prohibition on the Court being too analytical in its approach. I have to determine the impression that would be conveyed to the ordinary reasonable reader reading the relevant passages once. The words complained of are contained in two sentences.

38. In my judgment, the immediate context can be summarised as: the Blair government was coming under media pressure about the loan from Robinson to Mandelson which was in part being driven by supporters of Gordon Brown who wanted to cause damage to Blair by attacking two of his key lieutenants. Just as this issue was gaining traction, there was a series of other incidents that increased the media pressure on the Blair government. The robbery of Ron Davies by a male prostitute ushered in "*a discussion about gays in politics*" which led to Matthew Parris revealing on BBC television that Peter Mandelson was gay. "*Days later*", the News of the World accused the Claimant of "*paying £100 to rent boys in order to be kicked around a room*". In consequence, it is said that the Claimant "*admitted his sexuality*". The *Sun*'s response to these events was to claim that the country was being run by a "*gay mafia*". Focus in the chapter immediately then turns back to the Mandelson loan issue and how it ultimately came to a head with both Robinson and Mandelson being sacked by the Prime Minister.

39. In context, the reader would understand that the reference to the Claimant having "*admitted his sexuality*" was an admission of being gay, not that he was admitting the allegation made by the *News of the World*. That is obviously the meaning because it is prefaced by the robbery of Ron Davies and Matthew Parris' television revelation about Peter Mandelson's sexuality. These three matters then form the platform on which the Sun then makes the "*gay mafia*" allegation. In context, the reference would not be understood to be an adoption of the allegation made by the *News of the World*, but to show that he was one of the three people whose sexuality had been revealed leading to the *Sun's* suggestion that there was a "*gay mafia*" running the country. That seems to me to be reinforced by the casual and quite colloquial way in which the *News of the World* article is described. In context, it is not being marked for the reader as an example of "sleaze". Had it been, the reader could have expected that it would be dealt with more seriously and with more detail (as was the case with other "sleaze" allegations which were being levelled at Blair government and its members). In this respect, the absence of any reference to what happened to the Claimant after the *News of the World* publication is also significant.

40. In my view, the meaning that the ordinary reasonable reader would understand the Book to bear is that, at the date the allegation was made by the *News of the World*,

there were grounds to suspect that the Claimant had paid young male prostitutes to subject him to consensual rough sex.

41. I should briefly explain my reasons for particular elements of this meaning.

i) First, it seems to me that the consequence of the repetition rule is that the time at which the grounds to suspect are said to exist is the date when the *News of the World* made the allegation. The Defendants are not, in this passage, saying that such grounds existed at the date of publication of the Book. The Defendants have not adopted and endorsed the *News of the World* allegation as their own, but they "*take responsibility for its further dissemination*" in the meaning that I have found.

ii) I have accepted the Defendants' submissions that the meaning should include reference to the fact that the 'rough sex' was consensual. No reasonable reader could conclude that it was non-consensual. If that were part of the meaning, it would completely change its gravity. As this is the definitive ruling on the meaning of the words, I should (where possible) resolve any ambiguity that might lurk within the meaning itself.

iii) I have not qualified the grounds to suspect with an adjective such as "*reasonable*" or "*strong*" (as the Claimant urged). On the information available, the reader simply cannot assess the strength of the case that the *News of the World* was making against the Claimant. The suggestion that the newspaper's potential vulnerability to a libel action would indicate that the *News of the World* would have "*strong grounds*" before they would publish such an allegation is far too analytical, and probably would occur to only a very small percentage of readers. It is not the natural meaning of the words.

iv) As the words complained of make clear, it is not being suggested that it was the Claimant who subjected the other parties to 'rough sex', it was the other way around. I have used the words 'rough sex' to capture the nature of the sexual acts. The actual words used: "*in order to be kicked around a room*", would not be taken literally by the reader (they suggest no sexual act at all). They would be understood as a colloquial reference to indicate that the sexual acts engaged upon had an element of violence involved.

v) I have not included the Defendant's formulation "*may have paid*". The uncertainty in the reader's mind as to whether the Claimant did act in this way alleged is catered for in the "grounds to suspect". Inclusion of the further "*may*" in the meaning is unjustifiable. Conceptually, I have difficulty in what "*grounds to suspect*" that a person "*may*" have done something actually means. Either the "*may*" is redundant, or (I infer) it is designed to introduce a lower threshold of proof for any truth defence. If it is the former, its inclusion in the meaning is unnecessary; if it is the latter, its inclusion is impermissible.

vi) I have used the term "*young male prostitutes*" as that is clearly the meaning of "*rent-boys*". It is important that the meaning reflects that what was being alleged was a commercial transaction with sex workers.

Is the meaning defamatory at common law?

42. Under the order directing the trial of preliminary issues, it was envisaged that, having found the single meaning, the Court would then determine whether that meaning was defamatory at common law. This was a matter of dispute between the parties. In their solicitors' letter of 10 April 2017, the Defendants made their position clear: they did not accept that "*the words in their proper context are defamatory of [the Claimant], applying the common law test… For the avoidance of doubt, we do not consider that – judged by the standards of 2016/7, which it must be – the reference to paying rent boys for rough sex would substantially affect in an adverse manner the attitude of reasonable readers towards [the Claimant], or have a tendency to do so.*"

43. The last sentence quoted was a reference to the test of whether an allegation is defamatory as propounded by Tugendhat J in ***Thornton -v- Telegraph Media Group Ltd*** **[2011] 1 WLR 1985** [90]-[93]. The contention that the issue should determined by the standards of 2016/7 was a reference to the principle that, to be defamatory under common law, an allegation has to be one that reduces the estimation of the claimant in the minds of 'right-thinking people generally'. In ***Monroe -v- Hopkins*** **[2017] EMLR 16** [50]-[51], Warby J summarised this well-established principle as follows:

> "… a statement … is only defamatory if it… would lower a person in the estimation of 'right-thinking people generally'. This old phrase is of course about people who think correctly, and it refers to common standards. It also covers left-thinking people, and those in the middle. In a diverse society, there are many views of which some people approve and some disapprove. The demands of pluralism in a democratic society make it important to allow room for differing views to be expressed, without fear of paying damages for defamation. Hence, a statement is not defamatory if it would only tend to have an adverse effect on the attitudes to the claimant of a certain section of society. The classic example, though far from this case, is a statement that someone is a 'grass' who informs on criminals. That is not defamatory because informing on criminals is generally considered to be a good thing. The Judge's task [when determining whether a statement is defamatory] is not to impose his or her own views. It can be put this way: to determine whether the behaviour or views that the offending statement attributes to the claimant are contrary to common, shared values of our society. This again is a matter for judgment, not a matter for opinion polls or other evidence. It can be difficult. But one test is whether the conduct or view in question is illegal, or by the standards of society as a whole, immoral."

44. This case is a good example of the difficulty in trying to determine whether certain conduct is, viewed by the standards of society as a whole, immoral. There is no suggestion that the allegation being made against the Claimant involves conduct that would be illegal. The Claimant contends that the conduct alleged against him was immoral and so was defamatory. The Defendants contended that it did not and was not. That was the position when the matter came before Warby J (see [45]) and he acceded to the Defendants' application that meaning and whether it was defamatory should be resolved as preliminary issues.

45. It was, therefore, an unexpected development when, on 12 October 2017, the Defendants' solicitors made two concessions: first, that the Defendants' Meaning was defamatory at common law and, second, that this meaning was "*serious*" (in the sense meant by the Court of Appeal in ***Lachaux –v- Independent Print Limited & Others*** **[2017] EWCA Civ 1334** [69]-[70]). The Defendants' position, as I understand it, is that the Claimant will ultimately fail in demonstrating that publication of the book has

caused serious harm to his reputation (as required by s.1 Defamation Act 2013). Given that the Court's role is to resolve disputes, there is nothing to stop parties from agreeing issues. Where that reduces the need for the Court to resolve matters it is to be encouraged.

46. The issue of whether it is defamatory to say of someone that s/he has paid individuals (male or female) for consensual sex is controversial. Judged by 2017 standards, do 'right-thinking people' regard such a statement as defamatory? Ms Page has referred me to the decision of ***AVB –v- TDD*** **[2014] EWHC 1442 (QB)** in which Tugendhat J noted that Parliament certainly considered that prostitution was immoral [86], but he did so very much on the basis that the immorality came from exploitation. Indeed, the Judge had noted [73]: "*if the statement about sexual conduct also involves some further imputation, such as hypocrisy or exploitation, the statement may well be held to be defamatory.*" A little earlier, he also cited a passage from Browne-Wilkinson V-C (as he then was) in ***Stephens –v- Avery*** **[1988] Ch 449, 453-4**:

> "But at the present day the difficulty is to identify what sexual conduct is to be treated as grossly immoral. In 1915 there was a code of sexual morals accepted by the overwhelming majority of society. A judge could therefore stigmatize certain sexual conduct as offending that moral code. But at the present day no such general code exists. There is no common view that sexual conduct of any kind between consenting adults is grossly immoral…. If it is right that there is now no generally accepted code of sexual morality applying to this case, it would be quite wrong in my judgment for any judge to apply his own personal moral views, however strongly held, in deciding the legal rights of the parties. The court's function is to apply the law, not personal prejudice. Only in a case where there is still a generally accepted moral code can the court refuse to enforce rights in such a way as to offend that generally accepted code."

That, of course, was a decision from 1988.

47. By the same token, judged by 2017 standards, do 'right-thinking people' regard as defamatory an allegation that someone has or enjoys 'rough sex' (in the sense of consensually violent)?

48. If neither of these statements on its own is defamatory, does alleging them in conjunction change the position and make the overall statement defamatory? These are difficult questions. Ultimately, if they arise, their resolution is a matter of law to be determined by applying the tests as set out by Warby J (in paragraph 43 above). Whatever the Court's decision on these questions were to be, it may prove to be controversial. There may be people who would disagree (perhaps very strongly) with a decision either way. That is the nature of pluralism in a democratic society but it tends to show that, on this topic (and in the words of Browne-Wilkinson V-C in ***Stephens***), there is no "*generally accepted code of sexual morality*".

49. The parties' agreement on this issue means that the Court is not required to resolve it. But it creates some potential difficulties. If the Claimant is ultimately successful and the Court comes to the stage of awarding damages, it must do so reflecting the seriousness of the allegation and the harm it has done to the Claimant's reputation. It is axiomatic that a claimant in a defamation claim is only entitled to be compensated for the damage to reputation caused by defamatory allegations and not by non-defamatory allegations. Therefore, it seemed to me to be quite important, as

the issue was not being adjudicated upon by the Court but agreed by the parties, that the nature and extent of that agreement was clear.

50. I therefore asked both parties a series of questions designed to understand what in the meaning supplied its defamatory character. Both parties agreed that an allegation that the Claimant was gay or that he had had sex with men was not defamatory. As such, although I have included it in the meaning, the gender of the prostitutes is not material for the purposes of assessing the defamatory nature of the meaning.

51. I then asked whether it was defamatory of the Claimant to say: (1) that he had paid for sex; (2) that he had visited or used the services of prostitutes; (3) that he enjoys violent or rough sex; or (4) that he has asked to be subjected to violent or rough sex.

52. The Claimant said that the answer to all of these was "yes". The Defendants said that they were defamatory of the Claimant but only in the context of his being a Minister of the Crown.

53. There is a suggestion in the Particulars of Claim that this is also the position of the Claimant. In paragraph 9.2 of the Particulars of Claim, he has set out a case that "*he was a in a position of political power and elected public responsibility… [and] had obtained for himself a position in public life in which high standards of character and behaviour were properly to be expected*". This is actually pleaded in support of the Claimant's case on serious harm. It forms no part of the Claimant's case on meaning. It was open to the Claimant to plead a meaning that contained these elements but he did not do so.

54. It was submitted in argument that it is exploitation which gives the meaning its defamatory character. In her Skeleton argument, Ms Page submitted:

> "The question of buying into the shadowy quasi-legal work of commercial sex work only arises if the person is a professional prostitute. Prostitutes (of either gender) are at risk of exploitation in the way an ordinary person may not be."

This rather supports the view that whether paying for sex is regarded by 'right-thinking people' as defamatory very much depends upon what is being alleged. The Claimant's pleaded meaning did not contend that the Book meant that, by the conduct alleged, he had been guilty of exploitation (which for the reasons set out in paragraph 46 may provide a defamatory connotation) and I have not found it to be part of the meaning that the Book bears. The words complained of do not suggest (or imply) exploitation. If a reader infers such a meaning, that is as a result of application of his/her own value judgment about the nature of what is being alleged. Such inferential meanings (that depend upon – and vary between – each individual reader's moral judgment) are *not* part of the natural and ordinary meaning of words (see discussion in ***Amalgamated Television Services Pty Limited –v- Marsden*** **(1998) 43 NSWLR 158**, **166f-167g** *per* Hunt CJ).

55. The Defendants' position is that the four statements I have set out in paragraph 51 are defamatory only in relation to the Claimant because he was a Minister of the Crown. That raises an interesting point. Is it possible for the same natural and ordinary meaning (which makes no reference to the status of the Claimant) to be defamatory of one citizen but not defamatory of another? I am inclined towards the view that it is

not. Equality before the law seems to me to demand that the standard is the same for all citizens. Differentiation of meaning depending upon extrinsic facts is the realm of innuendo meanings. If a claimant alleges that words are defamatory of him because of a position that he holds then he either must spell out why the statement is defamatory of him in a natural and ordinary meaning (e.g. lacking in judgment that would be expected in that role but not generally) or he must plead an innuendo meaning (e.g. breach of a relevant code of conduct). Here, neither is alleged.

56. Paragraph 9.2 in the Particulars of Claim shows that the Claimant also intends to advance a claim, in relation to damage and/or serious harm, that seeks to put forward a meaning in materially more serious terms; that he had been driven to "*extreme recklessness*", had poor judgment and had potentially exposed himself to blackmail. It does not seem to me that it is open to the Claimant to run his case in this way as this would mean interpreting the meaning that I have found to insert elements that I have not found and that I was not asked to find.

57. The Court is left in the very unsatisfactory position that the parties' agreement - that the meaning I have found is a defamatory meaning - may (unwittingly) conceal important elements that are still in dispute and highly material to any assessment of serious harm under s.1 and/or damages (if relevant).

58. The parties submit that their agreement that the meaning I have found is defamatory means that the Court should not rule on the issue. Until very recently, the Defendants were arguing that the meaning I have found (or something very close to it) was not defamatory. That contention was seriously advanced and is not manifestly unsustainable. As I have indicated, its resolution would raise difficult questions as to contemporary social values. The Defendants told me during the hearing that their concession that the meaning was defamatory was born of a pragmatic desire to avoid a potential appeal. That is understandable, but the consequence is that, if the Court had ruled that the meaning was not defamatory, the action would have been dismissed. As such, the parties' agreement has the potential to keep alive an action which, if the outcome of the determination of whether the meaning is defamatory were adverse to the Claimant, would otherwise have been brought to an end. That is not reducing the workload of the Court by agreement, it is adding to it.

59. In ***Jameel –v- Dow Jones & Co Inc*** **[2005] QB 946** [54] the Court of Appeal warned:

> "It is no longer the role of the court simply to provide a level playing-field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice."

60. With that in mind, I considered whether I should, notwithstanding the agreement of the parties, nevertheless go on to determine the second preliminary issue; whether the meaning I have found is defamatory. I have decided not to do so. The Defendants (whose concession is material) are advised by a very senior and one of the most experienced defamation silks. Although the spectre looms of continuing a claim that might involve the litigation (even a trial) of a non-defamatory meaning – with consequent waste of costs and court resources - ruling on the matter now risks wasteful expenditure of costs and court resources on an appeal. In light of that dilemma, I consider that I should only embark on ruling at this stage on the issue of

whether the meaning is defamatory if the argument that it was not was overwhelming. That is not the case. As I have said, it raises difficult issues that would require very careful consideration before a ruling was made.

61. Nevertheless, the parties' agreement is born of expediency; it is a matter of judging their own best (private) interests. I am not being asked to make a ruling – based on the agreement – that the meaning is defamatory. That is a matter of law, so it is not a matter that is disposed of by the parties' agreement. The best course, it appears to me, is to make no ruling and to adjourn the question of whether the meaning I have found is defamatory. It can be revisited, and if necessary resolved, later in the proceedings should any of the points of difficulty I have identified arise.