Case No: HQ111D02770

Neutral Citation Number: [2012] EWHC 2606 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/10/2012

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

Irfan Qadir	**Claimant**
- and -	
Associated Newspapers Limited	**Defendant**

- -
- -

William Bennett (instructed by **Hamlins LLP**) for the **Claimant**
Mark Warby QC and Adam Speker (instructed by **Taylor Wessing LLP**) for the **Defendant**

Hearing dates: 26 and 27 July 2012

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Judgment

Mr Justice Tugendhat :

1. This libel action is brought in respect of two articles published by the Defendant ("ANL") in the Mail on Sunday. The first was published on 8 May 2011 ("Bank of Scotland Director 'drove us out with dogs'"). The second was published on 19 June 2011 ("Top banker named in mortgage fraud case"). The Claimant is the director or banker referred to in each of those articles. The defences in respect of the first article include qualified privilege (both under the Defamation Act 1996 s.15 and at common law), and justification (truth). The defences in respect of the second article include absolute and qualified privilege under the Defamation Act 1996 ss.14 and 15 and justification (truth), but that defence is only in relation to the repetition in the second article of the allegations in the first article. There are pleas of malice in each case.

2. On 2 April 2012 the Master directed a trial of a preliminary issue, namely all issues of privilege and malice. This is the judgment on those issues, and only on those issues. Depending on the outcome of this hearing, the court may or may not have to consider the defences of truth. At this hearing I have heard no evidence as to the truth or falsity of the two articles, and nothing in this judgment should be taken as a finding of fact by me on whether any of the allegations which Mr Qadir complains of is true or false. His case is that the defamatory allegations are untrue.

3. The publications complained of were in each case in two forms: both in the print editions of the Mail on Sunday and on the Mail Online website. So far as the second article is concerned, the reasons why both absolute and qualified privilege are pleaded is that absolute privilege is available only in respect of reports published contemporaneously with the legal proceedings in question. The online publication continued for some months. In relation to the both articles there are some differences in the text published in print and online. Further, not all the words complained of come within the various statutory privileges ANL relies on, and it is for that reason that it relies on common law privilege in addition to statutory privilege. For some purposes the print and online publications can be considered in this judgment together, but for others they must be considered separately.

4. I shall consider in respect of each article whether there is available to ANL a statutory defence of qualified privilege, or absolute privilege, or a common law privilege. If ANL cannot succeed at that point in its case, then whether or not Mr Qadir can prove malice would not need to be determined. But in so far as I need to consider Mr Qadir's case in malice, I will do it after considering the defences of qualified and absolute privilege.

THE FIRST ARTICLE

The words complained of

5. The words complained of in the first article are as follows (the numbers and underling are added, the underlining to mark the passages which Mr Qadir submits are extraneous information not derived from the Particulars of Claim in the action which the article describes ("the Penthouse action")):

“<u>Bailed-out</u> **bank boss accused of terror tactics by club trio suing for £3.5m** [*these words were only used in the print version*]

Bank of Scotland director ‘drove us out with dogs’

[1] It is one of London's hottest nightspots. The Penthouse, on the top floors of No1 Leicester Square, enjoys stunning views of the capital.

[*Caption beneath a photograph of the Claimant:*] **Demands:** Irfan Qadir took control of the Penthouse club in Leicester Square

[2] But the club's former owners now make the <u>extraordinary</u> claim that they were driven out in fear of their lives by an executive of one of Britain's <u>bailed-out</u> banks.

[3] The three owners say that Irfan Qadir, an <u>award winning</u> banker with Bank of Scotland, used a group of ten men with large dogs to frighten them into signing over their shares in the club and restaurant.

[4] Businessmen Mark Young, Paul Carew and Neville Mody have launched a legal battle for damages of £3.5m against Qadir and Bank of Scotland.

[5] In the lengthy writ the three say they feared not only for their own lives but also those of their families.

[6] They accuse Qadir of making false statements to win a court injunction and then trying to bankrupt their business by using his influence at the bank to block rescue loans.

[7] Qadir was the senior business director and lending manager at Bank of Scotland's City of London Corporate Centre at the time of their allegations.

[8] He is currently working for Bank of Ireland and <u>is on a list of the 50 most powerful Muslims in the UK, just above former Dragons' Den star James Caan.</u>

<u>[9] In 2003 Qadir won a Financial Excellence Award shortly after becoming one of the youngest directors of Bank of Scotland.</u>

<u>[10] The corporate division – headed by the now notorious Peter Cummings – was one of the engines of the credit boom, providing business borrowers with billions in risky loans.</u>

<u>[11] It left the group lumbered with massive bad debts and Cummings, once hailed as a banking genius, left in disgrace and has since disappeared from public view.</u>

[12] According to the writ, Qadir's activities went beyond incompetence. After the confrontation with the men and dogs, which took place in September 2005 according to the writ, Carew resigned, but licence holder Young and chief contact Mody were told they had to stay as directors despite signing over the shares.

[13] They were told to appear normal to the outside world and were warned that 'if they rocked the boat the consequences for them would be dire', the writ claims.

[14] The three had previously run the Elysium nightclub at the Cafe Royal in central London and were introduced to Qadir in 2002 by a solicitor and independent financial adviser.

[15] Qadir allegedly said he was able to lend money to businesses such as theirs without security and the three said they would contact him if they ever needed money.

[16] Two years later in 2004 they set up Aquarius Entertainments to buy a 30-year lease on The Penthouse club and restaurant on three floors in Leicester Square.

[17] At the time the credit boom was in full swing and they claim that Qadir offered them a £500,000 loan and said he had £100m to lend to new ventures.

[18] The Penthouse was valued at £2.5m and had a licence until 1am, but shortly after it opened in November 2004 that was extended to 3am, greatly increasing its value.

[19] Qadir offered to introduce investor Muhammad Aslam into the business and said he was willing to pay £175,000 for a 10% stake in Aquarius.

[20] He advised them to accept the offer, which they did, the writ says.

[21] The three said they handed him 225 shares in the name of the investor, Mr Aslam, but claimed that Qadir later said he had acquired the shares himself. The remaining shares were owned by the three and their friends.

[22] A month after opening, the three realised there would be a £300,000 shortage because of a delay in opening and stamp duty.

[23] Although Qadir promised to increase the loan, he told his assistant to delay it in an attempt to put the club into a precarious financial position, allowing Qadir and his associates to win control, the writ alleges.

[24] In March 2005, it is alleged, Qadir transferred the 225 shares in Aquarius into a non-existent company, Doyle Investments Ltd.

[25] Within months, the men had become desperate for money to pay the rent, but the loan they expected was not forthcoming.

[26] By this time Qadir had left Bank of Scotland and was head of business lending in London for Bank of Ireland.

[27] Qadir now told them he had arranged a short-term loan for £100,000 with Bank of Ireland, it is claimed. Later, saying that he needed security for the loan, he persuaded Young, Carew and Mody to sign various documents.

[28] Some of these turned out to be blank stock transfer forms, the writ says.

[29] It claims Qadir then completed the blank stock transfer forms, making them out to himself. This gave him control of the club on paper and Qadir argued that he was able to call an extraordinary general meeting and sack the three businessmen from their posts.

[30] It was at this point on September 2, 2005, that Qadir allegedly arrived at the club with ten men and large dogs. One man claimed that Doyle Investments owned the club with 60% of the shares, while another demanded the three resign, the writ says.

[31] Qadir, it is alleged, lied to win a High Court injunction requiring the men to leave the club and formally hand over control.

[32] Mr Justice Patten granted the injunction on the basis of Qadir's witness statement on September 9, 2005, according to the writ.

[33] The three say that because of Qadir's actions they lost the chance of selling the Penthouse to a company called Credon Ltd for £3.5m, which withdrew its offer.

[34] They also missed out on selling it to the Penthouse Group of America, which ended negotiations, and so lost the chance of turning the Penthouse into a successful business.

> [35] When Aquarius Entertainments was dissolved they were each left with large liabilities because of the guarantees they had given.
>
> [36] A spokesman for Bank of Scotland said: 'We can confirm that Bank of Scotland has been named as one of the defendants in a claim issued by LT Law. As the matter is currently the subject of legal proceedings, we are unable to comment, save to say that the claim will be vigorously defended.' All other parties declined to comment".

6. Mr Qadir attributes to the words complained of in the first article the following meanings:

> "In their natural and ordinary meaning the words complained of meant and were understood to mean that it is highly likely that the Claimant:
>
> 4.1 intimidated Mark Young, Paul Carew and Neville Mody with threats of violence to the point where the three men feared not only that he would have them murdered but their families also;
>
> 4.2 committed the criminal offence of perjury by lying to a High Court judge;
>
> 4.3 that he carried out the above acts as part of a fraud which resulted in the three men being forced, by reason of threats of violence, into signing over the ownership of their business to the Claimant; and
>
> 4.4 the Claimant therefore managed to steal a business which was worth up to £3.5m."

The factual background to the first article

7. The following is not in dispute. In 2005 Mr Qadir was employed by the Bank of Scotland. During that period he had dealings with three men, Mr Young, Mr Carew and Mr Mody. Through a company, they owned a nightclub in Leicester Square called the Penthouse. There had been litigation in 2005 which was settled. But on 3 February 2011 they issued a new Claim Form number HQ11X00386 (the Penthouse claim) with the Particulars of Claim attached, a document covering 11 pages. There were two defendants. The first was the Bank of Scotland plc and the second is Mr Qadir. The brief details of the claim are for damages and losses

> "following dishonest and fraudulent conduct of the defendants which resulted in the dissolution of Aquarius Entertainments Limited and losses to the claimants in respect of their business at the time. The defendants further breached its/their duty of care to the claimants as shareholders and directors of the company…"

8. On 13 March 2011 Mr Qadir filed an Acknowledgement of Service. He ticked the box indicating that he intended to defend all of this claim. The significance of this is explained in more detail below. But in brief, the fact that Mr Qadir did this meant that the court was required by law to make the Particulars of Claim available to the public when they would not otherwise have been.

9. On 30 March 2011 a freelance journalist requested documents from the court file. She has been referred to as a stringer. (Because she has been criticised by both parties to this action, but has not been present to defend herself, I shall refer to her in this judgment as S). She used a standard form available for this purpose. It is headed "Non-Party Office Copy Request Form Civil Procedure Rule 5.4 C 'Supply of documents from the court record'." It has boxes to be completed with information such as the name and the person making the request, and the case to which the request relates. The form lists the types of statements of case which may be made available under rule 5.4C, which include the Claim Form, the Particulars of Claim and the defence. S ticked the box for the Claim Form and Particulars of Claim, but no other box.

10. On 1 April 2011 Mr Qadir filed his Defence to the Penthouse claim. It is a closely typed two page document drafted and signed by himself acting in person. In it he denies the allegations against him.

11. On or about 12 April S telephoned Mr Watkins. He is the Deputy Editor of the Financial Mail on Sunday. S regularly searches the court records and tells Mr Watkins and others about stories which might be of interest to ANL. She informed him about the Penthouse claim.

12. On 12 April 2011 at 10.15 she sent an email to Mr Watkins and to Lisa Buckingham, the editor of the Financial Mail on Sunday. The subject is "Club Owners Sue Banker for 3.5 million". The email consists of what appears to be the draft of the first article. It starts "One of the UK's leading bankers accused of taking part in an extraordinary plot to take over a successful West End nightclub…" On the same day Mr Watkins sent an email to a Mr Hussain asking for pictures for a possible page three article. Mr Watkins identified the three claimants and the club in question as well as Mr Qadir. He gave Mr Qadir's home address. This was his address as it appears on the Claim Form. It is in London E14.

13. Mr Watkins stated in evidence that in respect of this article he acted in two capacities. He was both a reporter and he was the editor of the draft provided by S. He read the Claim Form and the Particulars of Claim as well as the draft that she had sent.

14. Mr Watkins stated in evidence that during that week he attempted to contact the lawyers for the three claimants and Mr Qadir himself. It is at this point that there arise issues of fact between the parties, mainly as to the truth or falsity of the last sentence in the first article: "All other parties declined to comment". It is common ground that Mr Watkins did not in fact speak to Mr Qadir before the publication of the words complained of. So if he did decline to comment, he did not do so explicitly.

15. Mr Qadir has at all times stated that he did not in fact receive any contact or message from ANL before it published the first article. So it was not true to write that he had declined to comment. ANL have questioned Mr Qadir's denial.

16. Mr Watkins states in evidence that he did make a number of attempts to contact Mr Qadir, all of them by leaving messages on a voicemail system to which he was directed after telephoning the main switchboard of the Bank of Ireland. Mr Qadir stated that he did not believe that Mr Watkins was telling the truth about that. Mr Qadir stated that he was on leave, and his own voicemail box was permanently diverted to voicemail boxes of his assistants, except for one period when, for technical reasons, it was not available at all. He stated that if a message had been left he is confident that that fact would have been communicated to him by one of his assistants.

17. Mr Watkins stated that his first attempt to contact Mr Qadir was between Tuesday 12 and Friday 15 April. He did not use the address of Mr Qadir which was given on the Claim Form. He telephoned the Bank of Ireland, which he understood was Mr Qadir's employer at the time. He asked to speak to Mr Qadir. He stated that he was put through to a voicemail with a message voice. He stated that he believed that to be the voice of Mr Qadir but cannot remember the wording, or whether a name was given to identify whose voicemail box it was. Mr Watkins had rung the switchboard at the bank and asked to be put through to Mr Qadir.

18. ANL produced Mr Watkins' hand written notes in the course of disclosure given on 15 May 2012. The involvement of Mr Watkins in the first action thus became known to Mr Qadir at a very late stage. Until then, the only person who Mr Qadir knew to have been party to the publication of the first article was S.

19. According to the notes disclosed, Mr Watkins left a message on two occasions at least. The number he called was The Bank of Ireland main switchboard. According to the email which he wrote to Lisa Buckingham on 15 April he had by that time left messages twice on the voicemail, but had never specified what he was calling about. He wrote that he had left messages with the claimant's solicitors but received no reply from them either. In that e-mail he speculated

> "maybe he is on holiday. But another call is probably merited to make sure we have given him an opportunity to comment".

20. Mr Watkins was himself on holiday between 17 April and 2 May. On 4 May he contacted the Penthouse claimants' solicitor and left a message. Shortly afterwards he called Mr Qadir again and left a message. According to his note, he called on a landline and his note records: "explicit about story". He also spoke to Sharon O' Donnell at the Bank of Ireland. He explained to her that he wanted to contact Mr Qadir.

21. In the week prior to publication of the first article Mr Watkins edited the original copy sent in by S. The final decision to publish the article was made by Ms Buckingham, probably about the preceding Thursday, that is 5 May 2011. On 6 May Mr Watkins exchanged emails with S about the drafting of the article. In an email timed at 16.37 she wrote to him:

> "He certainly sounds like a banker to avoid. I wonder if there will be any fall out from this story and if he will continue in his role with the BoI?"

Mr Watkins replied at 17.12:

> "… I have been unable to get any of the parties involved to even acknowledge my calls (except Bank of Scotland who gave the anodyne comment I included). So eventually I did ring Bank of Ireland to see if they would chivvy Qadir along to say something. They did not help much either, but I find it hard to believe they will want him on board for long unless he can show the claims in the writ are a complete fabrication ".

22. I accept the evidence of Mr Qadir that he did not in fact receive any message from Mr Watkins before the first article was published. I also accept the evidence of Mr Watkins that he did leave messages on what he believed to be the voicemail of Mr Qadir.

23. On 8 May the first article was published in print and online. The article made no reference to the fact that there was an Acknowledgement of Service or a Defence, nor of the gist of the Acknowledgement of Service, which was that there was to be a Defence.

24. I find that Mr Qadir had not in fact declined to comment. He had completed the Acknowledgement of Service, which is itself a comment in so far as it states that he is intending to defend that claim, and he had not had any opportunity to make a comment to ANL. Whether Mr Watkins believed that Mr Qadir had declined to comment is a different question. I shall return to that below.

25. On 17 June at 11.29 S emailed Mr Watkins saying that the court had confirmed that "there are defences available in the Qadir case filed on April 1 and May 4 by Qadir". She told him that she would order them. Mr Watkins states that this was the first occasion on which he became aware of the Defence to the claim. On 17 June at 11.32 am S sent an email to the court asking for a copy of the defences in the Penthouse case.

26. The online publication continued to be available until 8 September. Prior to its removal from the website no amendments were made to the article in order to reflect the existence of the Defence. This remained the case even after ANL knew that there was a Defence.

THE LAW RELATING TO THE FIRST ARTICLE

The Civil Procedure Rules

27. The statutory provisions relevant to the preliminary issues on the first article are to be found in the Defamation Act 1996 ("the 1996 Act") and the Civil Procedure Rules. The CPR provide what documents are to be made available from the court records, and in what circumstances. Different provisions apply, depending upon whether the person requesting the document is, or is not, a party to the litigation, or is, or is not, mentioned in the documents.

28. The provisions relevant to the present action are those relating to non-parties. These include members of the public generally, and journalists are included amongst these.

Some people want court documents for their own information. Some want them for the publication in the course of journalism. And in the days of the internet, some people want to broadcast them for purposes which cannot be described as journalism.

29. The CPR say nothing about the legal effect of the publication to the world of documents from the court records. Where a republication is said to be defamatory, the defences that may be available to a defendant are those set out in the 1996 Act, and those recognised by the common law of libel.

30. So far as relevant to the first article, the provisions of CPR r.5.4C relating to non-parties provide:

> "5.4C Supply of documents to a non-party from court records
>
> (1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of –
>
> > (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;
> >
> > (b) a judgment or order given or made in public (whether made at a hearing or without a hearing), subject to paragraph (1B).
>
> (1B) No document –
>
> > (a) relating to an application under rule 78.24(1) for a mediation settlement enforcement order; ... [and other documents relating to mediations] ... may be inspected without the court's permission…
>
> (2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.
>
> (3) A non-party may obtain a copy of a statement of case or judgment or order under paragraph (1) only if –
>
> > (a) where there is one defendant, the defendant has filed an Acknowledgment of Service or a defence;
> >
> > (b) where there is more than one defendant, either –
> >
> > > (i) all the defendants have filed an Acknowledgment of Service or a defence;..."

31. The CPR explains what is meant by a statement of case. It also explains how a claim form is issued to a claimant, and what options are available to a person who is made a defendant to a claim and served with the claim form and particulars of claim.

32. CPR r.7.2 provides that proceedings are started when the court issues a claim form at the request of the claimant. A claim form is issued on the date entered on the form by the court. There is a form N1A prescribed for use as a claim form, and provisions as to what information is to be entered on that form. The court does not normally do more than enter the date on the document submitted to it by the intending claimant. So the fact that a claim form is issued does not imply that the claim has been the subject of any review by the court. The court will only reject a document submitted to it if fails to comply with the requirements as to its contents, or if it is obviously and fundamentally defective for some other reason. Permission is not required to issue a claim form, except for example when it is for service out of the jurisdiction, or if the intending claimant is subject to a civil restraint order.

33. Particulars of claim may be contained in or served with the claim form. Particulars of claim are, along with defences and replies, included in the generic terms 'statements of case'.

34. CPR r.9 prescribes how a defendant is to respond to particulars of claim:

> 9.1 Scope of this Part
>
> (1) This Part sets out how a defendant may respond to particulars of claim.
>
> (2) Where the defendant receives a claim form which states that particulars of claim are to follow, he need not respond to the claim until the particulars of claim have been served on him.
>
> 9.2 Defence, admission or Acknowledgment of Service
>
> When particulars of claim are served on a defendant, the defendant may –
>
> (a) file or serve an admission in accordance with Part 14;
>
> (b) file a defence in accordance with Part 15,
>
> (or do both, if he admits only part of the claim); or
>
> (c) file an Acknowledgment of Service in accordance with Part 10.

35. The relevant provision in the present case is r.9.2(c) and r.10, which includes the following:

> "10.1 Acknowledgment of Service
>
> (1) This Part deals with the procedure for filing an Acknowledgment of Service....
>
> (3) A defendant may file an Acknowledgment of Service if –
>
> (a) he is unable to file a defence within [14 days]; or

> (b) he wishes to dispute the court's jurisdiction...
>
> 10.2 Consequence of not filing an Acknowledgment of Service
>
> If –
>
> (a) a defendant fails to file an Acknowledgment of Service within the period specified in rule 10.3; and
>
> (b) does not within that period file a defence in accordance with Part 15 or serve or file an admission in accordance with Part 14,
>
> the claimant may obtain default judgment if Part 12 allows it.
>
> 10.3 The period for filing an Acknowledgment of Service
>
> (1) The general rule is that the period for filing an Acknowledgment of Service is –
>
> (a) where the defendant is served with a claim form which states that particulars of claim are to follow, 14 days after service of the particulars of claim; and
>
> (b) in any other case, 14 days after service of the claim form....
>
> 10.4 Notice to claimant that defendant has filed an Acknowledgment of Service
>
> On receipt of an Acknowledgment of Service, the court must notify the claimant in writing.
>
> 10.5 Contents of Acknowledgment of Service
>
> (1) An Acknowledgment of Service must –
>
> (a) be signed by the defendant or the defendant's legal representative; and
>
> (b) include the defendants' address for service...

36. In summary, the effect of these provisions is that a non-party cannot obtain a claim form or particulars of claim from the court records if the defendant does not dispute the claim, or if there is a mediation, unless and until there is a judgment of the court. A non-party can only obtain a claim form or particulars of claim if the defendant is disputing, or wishes to dispute, the claim.

37. It is very common for a defendant who is served with a claim form either to admit the claim, or to reach an agreed settlement of the claim, without there ever being a judgment of the court. It is also very common for a defendant who does not admit a

claim to serve an acknowledgement of service rather than a defence, because 14 days is often too short a time for the preparation of a defence. Where a defendant does serve an acknowledgement of Service, he may, and often does, obtain an extension of time for service of the defence beyond the 14 days provided by the CPR.

38. It follows that, where a defendant serves an acknowledgement of service, a non-party who is familiar with the CPR, and who learns about the issue of the claim, will know both that the claim is not admitted at the time the acknowledgement of service is filed, and that the defendant wishes to serve a defence.

39. The court may, on the application of a party, or of its own motion, restrict the rights of non-parties to obtain statements of case from the court records. But the provisions of CPR r.5.4C give effect in part to the principle of open justice. So the court should not derogate from the rules except where it is necessary to do so in the interests of justice (*JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645; [2011] EWCA Civ 42).

40. It may be inferred that the purpose of the legislature in drafting r.5.4C was twofold. First, it was to protect the privacy of the parties to litigation up to the point at which, either (1) it becomes clear (on service of a defence or acknowledgement of service) that the claim is not admitted, or (2) the court makes an order. Until one or other of those stages is reached, the functions of the court are essentially no more than administrative, and do not involve any active intervention by the court such as might be properly described as the administration of justice. Once it appears that the court may be required to administer justice (as it does become apparent on service of a defence or acknowledgement of service), then the principle of open justice also becomes engaged. And it is for that reason that non-parties may become entitled to obtain the statements of case.

41. That this is the general legislative purpose of r.5.4C was submitted by Mr Bennett, and not contested by Mr Warby.

The Defamation Act 1996

42. As to the first article, the provisions of the 1996 Act on which ANL relies are:

> "15 Reports, &c. protected by qualified privilege.
>
> (1) The publication of any report or other statement mentioned in Schedule 1 to this Act is privileged unless the publication is shown to be made with malice, subject as follows.
>
> (2) In defamation proceedings in respect of the publication of a report or other statement mentioned in Part II of that Schedule, there is no defence under this section if the plaintiff shows that the defendant—
>
> > (a) was requested by him to publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction, and
> >
> > (b) refused or neglected to do so.

> For this purpose “in a suitable manner” means in the same manner as the publication complained of or in a manner that is adequate and reasonable in the circumstances.
>
> (3) This section does not apply to the publication to the public, or a section of the public, of matter which is not of public concern and the publication of which is not for the public benefit.
>
> (4) Nothing in this section shall be construed—
>
> (a) as protecting the publication of matter the publication of which is prohibited by law, or
>
> (b) as limiting or abridging any privilege subsisting apart from this section…
>
> SCHEDULE 1 Qualified privilege
>
> Part I Statements having qualified privilege without explanation or contradiction
>
> … 5. A fair and accurate copy of or extract from any register or other document required by law to be open to public inspection…
>
> Part II Statements privileged subject to explanation or contradiction
>
> 10 A fair and accurate copy of or extract from a document made available by a court in any member State or the European Court of Justice (or any court attached to that court), or by a judge or officer of any such court.

43. The difference between paras 5 and 10 is that para 10 extends to documents that are not required by law to be open to public inspection, but are in fact made available by a court in Europe. Where para 10 applies, the qualified privilege is subject to the claimant having been given the right to ask for opportunity to contradict or explain the document. In the present case I have not found it necessary to consider para 10. If ANL cannot defend itself by relying on para 5, neither can it do so by relying on para 10. It is not suggested that the court released any document to ANL when it was not required by law to do so. And Mr Qadir did not purport to exercise any right to contradict or explain the words complained of.

ISSUES ON STATUTORY QUALIFIED PRIVILEGE

44. ANL submit that the words complained of consist, for the most part, of an extract from the Penthouse Particulars of Claim, which it submits is fair and accurate, as well as being of public concern and for the public benefit. ANL accept that the words complained of also include words which are not an extract from those Particulars of Claim, including the last sentence of the first article. Mr Qadir submits that material parts of the words complained of are not an extract, or not a fair and accurate extract,

and that in any event the words complained of are not of public concern and for the public benefit.

45. So the questions which arise in relation to the first article are:

i) Are all of the words complained of within the definition of "an extract" from the Particulars of Claim in the Penthouse action (it is not suggested that they are a copy)?

ii) If so, are they are fair and accurate extract?

iii) If so, was the publication by ANL to the public of the words complained of the publication of matter which was of public concern and for the public benefit, as provided by s.15(3).

Were the words complained of an extract from the Penthouse Particulars of Claim?

46. According to the Oxford English Dictionary, an extract may mean "a summary" or "outline", or it may mean "an excerpt or quotation". In his written argument Mr Bennett submitted that the words complained of are not an extract because they do not include any text from the Particulars of Claim. But in his oral argument Mr Bennett did not submit that in the 1996 Act it is limited to a verbatim or word for word extract or quotation. He accepts that an extract may be less than a copy of a part of the document.

47. Mr Warby submits that a publication does not need to be verbatim: a condensed report or statement will be privileged provided that it gives a correct and just impression of what is in issue.

48. In my judgment to interpret an "extract" in the wider sense of summary or outline distinguishes the words "extract" from the word "copy". That appears likely to reflect the intention of Parliament, whereas "a narrow linguistic approach" would not (cf *Tsikata v Newspaper Publishing Ltd* [1997] 1 All ER 665 at p666j). In my view Mr Bennett is correct to accept that an extract does not have to be word for word. I proceed on that basis.

49. In my judgment the words complained of do not fail to qualify as an extract from the Particulars of Claim on the ground only that they are not word for word citations. Whether they are a fair or accurate extract is the next question.

50. Mr Bennett advanced a further argument that the words complained of are not an extract from the Particulars of Claim because ANL has intermingled information from the Particulars of Claim with extraneous material of their own. I shall deal with this argument under the next heading.

Were the words complained of a fair and accurate extract?

51. While fairness and accuracy are different, a number of considerations that apply to the one apply equally to the other.

52. Mr Bennett submits that the first Article is not fair or accurate for a number of different reasons: it includes extraneous matters not mentioned in the Particulars of

Claim; it purports to be the product of a journalistic investigation and not merely the publication of an extract of a public document, and it omits to state that the claim is disputed while falsely stating that Mr Qadir has declined to comment.

53. Mr Bennett submits that the words complained of include a sensationalised account of the claim. The extraneous matters not mentioned in the Particulars of Claim include: the accusatory headline; the reference to "terror tactics" (words not used in the Particulars of Claim); the words "drove us out with dogs" which are in quotation marks, but are not in fact a quotation from the claimants in the Penthouse action; the irrelevant inclusion of the fact that Mr Qadir is a Muslim (although that itself is not defamatory); together with the false statement that Mr Qadir had declined to comment.

54. Mr Bennett submits that article conveyed to the reader that what was published was not just the publication of an extract from a public document, but the product of a journalistic investigation. Mr Bennett further submits, the parts of the article indicating that there had been an investigation are: the reference in the title and para [2] to the Bank of Scotland having been "bailed out"; the description of the nightclub in para [1]; the details about Mr Qadir in paras [8]-[11]; and the quotation from the spokesman for the Bank of Scotland in para [36].

55. As to accuracy, in the Amended Reply the pleaded case for Mr Qadir includes the following:

> "6.1.3 The article was not a fair and accurate report of the Particulars of Claim in the Penthouse Action. In particular, it misreported the contents of those Particulars of Claim in the following material ways: …
>
> (b) The Particulars of Claim did not state that the Claimant "used a group of ten men with large dogs to frighten them into signing their shares in the club and restaurant" (§2 of the article). The allegation made in the Penthouse Particulars of Claim was that the Claimant "arrived at the Penthouse Club with about 10 very intimidating men and several large dogs" on or about 2 September 2005 (Penthouse Particulars of Claim §16(7)). The alleged transfer of shares had already taken place in August 2005 (see §16(4) of the Penthouse Particulars of Claim).
>
> (c) At §18 of the Penthouse Particulars of Claim it was alleged that: "By means of threats and intimidation Doyle Investments and its associates put the Claimants in fear not only of their own lives but also the lives of their families, and forced them to sign or hand over everything to them. The Second Claimant was permitted to resign as a director but the First and Third Claimants were told that, as they were respectively the licence holder and principle (*sic*) contact for the club's suppliers, they had to remain. The Claimants were told that all had to appear normal to the outside world and that if they "rocked the boat" the consequences for them would be dire." The Penthouse

> Particulars of Claim did not suggest that the Claimant took part in this alleged behaviour. However, … the article complained of suggest that the Claimant was involved in this activity and that he was responsible for putting Young, Carew, Mody and their families in fear of their lives. This was one of the most serious defamatory allegations made in the article against the Claimant. That allegation was made no less than four times. However, the Penthouse Particulars of Claim never suggested that the Claimant acted in this way…
>
> (e) The first article wrongly personalised the report by presenting the Penthouse Claim as being directed against the Claimant (rather than against the Claimant and his former employer, the Bank of Scotland) to a degree which was not apparent from the Penthouse Particulars of Claim."

56. Mr Bennett cites *Curistan v Times Newspapers Ltd* [2008] EWCA Civ 432; [2009] QB 231. In that case Arden LJ discussed substantiality in relation to a different paragraph of the Schedule, which related to a report of Parliamentary proceedings, rather than an extract. But what she said at paras [26]-[39] is of assistance:

> "26. There are a number of authorities on what constitutes a fair and accurate report. It need not be a verbatim report. It can be selective and concentrate on one particular aspect as long as it reports fairly and accurately the impression that the reporter would have received as a reasonable spectator in the proceedings: see generally *Cook v Alexander* [1974] QB 279, and *Tsikata v Newspaper Publishing Ltd* [1997] 1 All ER 655.
> 27. However, these appeals are principally concerned with the quality of fairness. Fairness in section 15 has been held to mean fairness in terms of presentation rather than fairness between the speaker and the subject of the statement (see per Lord Denning MR in *Cook v Alexander* at 289). A report does not cease to be fair because there are some slight inaccuracies or omissions (*Andrews v Chapman* (1853) 3 C & K 286 at 290). It follows that if there is a substantial or material misstatement of fact that is prejudicial to the claimant's reputation, the report will not be privileged. If the report refers to an accusation made on a privileged occasion which is in fact untrue, the defence of fair comment may be available if it is in terms which would be fair if the accusation were well-founded and provided that the comment is made in good faith and without malice (*Mangena v Wright* [1909] 2 KB 958, 977).
> 28. Fairness can also be lost by the presence of extraneous material. This proposition is supported by a memorable passage in the speech of Lord Denning in *Dingle* (see [33] below). In that case, the plaintiff complained of an article written in the Daily Mail which included the reporting of a report of a Parliamentary select committee. The reporting of the select committee's report was privileged under the Parliamentary Papers Act 1840. At trial the judge held that the part of the article which reported on the proceedings in Parliament was privileged. The remainder of the article was found to be defamatory and the judge then set about fixing the damages for

the libel. The case then went to this court and to the House of Lords (Lord Radcliffe, Lord Morton of Henryton, Lord Cohen, Lord Denning and Lord Morris of Borth-y-Guest). The issues before the House related to the assessment of damages. The House, dismissing an appeal from this court, held that the judge had wrongly taken into account evidence that the plaintiff's reputation had already been damaged by what had been said in Parliament or by what had been said on other occasions, and that the Daily Mail had subsequently published an article which vindicated the plaintiff's reputation….

39. … It is important to keep the two concepts [intermingling and adoption] separate. As *Buchanan* shows, the effect of adoption is that the defendant becomes liable (subject to any other defences available to him) for the tort of defamation for what he has said. The report (if it is itself privileged) continues to be privileged. Where intermingling occurs the legal consequence is different. Intermingling results in a loss of privilege for the report as well as liability in defamation (subject to any relevant defences) for statements which do not form part of that report. Intermingling and adoption can arise out of the same statement but *Buchanan* shows that they need not do so and that the concept of adoption can be applicable on its own."

57. Laws LJ referred also to embellishing extracts with other matter so as to produce "a critically different text", at para [87]-[88]:

"87. Finally I add these short comments about embellishment and adoption. It is plain that there will be no qualified privilege in an account of Parliamentary speech if the publisher has so embellished the material that it cannot be said to be a fair and accurate report. So much, I think, is shown by this passage from Lord Denning's speech in *Dingle* at 411:

"But if it [sc. the publisher] adds its own spice and prints a story to the same effect as the parliamentary paper, and garnishes and embellishes it with circumstantial detail, it goes beyond the privilege and becomes subject to the general law. None of its story on that occasion is privileged. It has 'put the meat on the bones' and must answer for the whole joint."

88. Some care is I think needed in considering the concept of adoption, discussed by Arden LJ at paragraphs 37-40. In a sense the publisher who embellishes Parliamentary speech may be said to have adopted it: by "putting the meat on the bones" he has made the allegation his own. But I think it is misleading to characterise such a case as one of *adoption.* Rather than adopting what was said, the publisher has produced a critically different text. Since what he has produced cannot be said to be a fair and accurate report of Parliamentary speech, the law gives him no shield of qualified privilege. That is the whole analysis of the case; no recourse to any such idea as adoption is required."

58. Mr Bennett further submits that the first Article is not fair because it omits that Mr Qadir was disputing the claim, and, on the contrary states that he has declined to comment, when that was not true. He submits that in order to be "fair" or "fair and accurate" such an extract would have to report that a Defence had been served, and set out the denials contained within that Defence. If necessary, he would submit that paragraph 5 of Part I and paragraph 10 of Part II of Schedule 1 of the 1996 Act must be construed by the court in the manner set out in the previous sentence in order to give effect to a claimant's Article 8 right to reputation under the Human Rights Act 1998.

59. Mr Bennett also submits that even if the failure to refer to the Defence did not make the first Article unfair, it was in any event unfair because it did not even refer to the likelihood that the claim would be defended, and the very fact that the Particulars of Claim were available to the public meant that the claim would either be defended on its merits, or there would be a contest about jurisdiction. And given that all the parties to the Penthouse action were within England and Wales (as appeared from the addresses on the Claim Form), it was obvious that the claim was going to be defended.

60. Mr Bennett further relies on the citation from *Stern v Piper* [1997] QB 123 set out at para 91 below. While the words used by Hirst and Simon Brown LJJ appear to support Mr Bennett's submissions on whether the words complained of are fair and accurate, in my view the point they were addressing under that heading before the 1996 Act had been enacted is now better considered under s.15(3), as I do at para 93 below.

61. Mr Warby remarks that it is the last point (the extract could not be fair since it omitted to refer to his Defence) that was the first complaint raised on Mr Qadir's behalf in that part of his solicitors' letter of 1 July which referred to the first Article. He submits that I should accordingly approach the later complaints about the first Article with caution.

62. As to the failure to report Mr Qadir's Defence, Mr Warby submitted that this complaint fails to take into account that what is protected by the Schedule para 5 (and para 10) is an extract of a "document", in this case the Particulars of Claim. A defence would be a separate document. He relied on *Tsikata* where Neill LJ said at p667b-c:

> "for the purposes of paragraph 5, the fairness and accuracy of a report has to be measured by reference to that to which it purports to relate. Later events, whether a successful appeal or arising in some other way, may raise doubts as to the propriety of publishing a report and may be very relevant to the considerations which arise under section 7(3), but in my view they do not have an impact on the fairness and accuracy of the report itself."

63. The references are to provisions of the Defamation Act 1952. But nothing turns on that, since s.7(3) of the 1952 Act corresponds to s.15(3) of the 1996 Act. Mr Warby submits that there is no occasion here to introduce the HRA, as Mr Bennett submits.

64. In my judgment the submission of Mr Warby is correct. That is the natural meaning of para 5, and questions arising out of matters not to be found in the document from which the extract is made are to be considered under s.15(3), or, where applicable, under s.15(1) (which contains an express reservation for a plea of malice).

65. Mr Warby submits that in the 1996 Act Parliament specified categories of information (in addition to those previously specified in the 1952 Act) which it was in the public interest that the public should be told about. Parliament introduced new categories of statutory qualified privilege, but these were to be available in "certain closely defined circumstances", as explained by Lord Bingham in *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 (where the references are to the Northern Ireland statute) as follows at p290:

> "1. In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and enquiring. For this reason 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.
>
> 2. Sometimes the press takes the initiative in exploring factual situations and reporting the outcome of such investigations. In doing so it may, if certain conditions are met, enjoy qualified privilege at common law, as recently explained by this House in *Reynolds v. Times Newspapers Limited* http://www.bailii.org/uk/cases/UKHL/1999/45.html[2001] 2 AC 127. In the present case the role of the press is different. It is that of reporter. The press then acts, in a very literal sense, as a medium of communication. Since 1881 a series of statutory provisions cited above has granted newspapers* qualified privilege in relation to certain reports in certain closely defined circumstances [emphasis added]… The privilege is lost if malice is proved. By section 7(2) the enjoyment of qualified privilege is conditional on the grant of a right of reply to the complainant, if the case falls within Part II of the Schedule. By section 7(3) there is no privilege if the publication is of a matter the publication of which is prohibited by law, or if the matter published is not of public concern or if its publication is not for

> the public benefit. By section 7(4) any privilege enjoyed at common law is preserved. The reports of proceedings privileged under Part I of the Schedule have to be fair and accurate and have (subject to one very limited exception) to be of proceedings in public. … The grant of privilege inevitably deprives a complainant of a remedy he would otherwise enjoy if a defamatory statement is made concerning him, but section 7 and paragraph 9 give a very considerable measure of protection to those liable to be injured.
>
> 3. The effect of the legislation in 1955 was to grant qualified privilege to newspaper* reports of public meetings, subject to the stringent conditions just noted. This grant (as in 1881, 1888 and 1952) must have been intended to enable citizens to participate in the public life of their society, even if only indirectly, in an informed and intelligent way. Since very few people could personally witness any proceedings or attend any meeting in question, it was intended to put others, by reading newspaper* reports, in a comparable position. The privilege was not extended to newspaper* reports of the proceedings of private bodies and private meetings, because those are proceedings which by definition the public do not witness and to which the public do not have access: the object was not to put the newspaper* reader in a better position than one who was able to attend the proceedings or meeting in person".

66. I have put an asterisk against the word newspaper in that extract, and omitted a passage relating specifically to newspapers, because in the 1996 Act Parliament omitted any references to newspapers, thereby according to all persons engaged in the activity of journalism the privilege which had previously been available only to the proprietors of newspapers. So the passage should now be read as if the word newspaper was omitted wherever it occurs.

67. Mr Warby notes that the defendant bears the burden of proving the elements of the defences of statutory qualified privilege. So no further restrictions should be imported by the court into the defence, and there is no basis for submitting that the 1996 Act in this respect fails to strike a fair balance between the Art 10 rights of defendants and the Art 8 or reputation right of a complainant.

68. In my judgment Mr Warby is clearly correct on this point. What is fair and accurate is to be judged by comparing the words complained of with the document from which the words complained of are said by the defendant to be an extract. Where the complaint is of unfairness arising out of the omission to publish information extraneous to that document, such as another document or comments of the complainant, then that issue is to be decided under s.15(3) (public concern and public benefit) or s.15(1) (malice).

69. Mr Warby (citing Gatley on Libel and Slander 11th ed paras 13.37 to 13.41 and 16.4) submits that a publisher is entitled to be selective, but must be fair about the claimant, and that if the whole publication is substantially accurate the fact that there are a few slight inaccuracies or omissions is immaterial. He submits that a publication which

does not purport to be by a lawyer is not be judged by the same strict standards of accuracy as would a publication by a lawyer. Such differences as there are between the account in the Particulars of Claim and the words complained of are not material inaccuracies and are not unfair.

70. Further, Mr Warby submits that it is clear that the words complained of are not investigatory journalism, but reporting.

71. I accept that there are the differences between the Particulars of Claim and the words complained of identified by Mr Bennett. But in my judgment, these differences alone would not be of such materiality as to lead to the conclusion that the words complained of are not a fair and accurate extract from the Particulars of Claim. The Particulars of Claim in the Penthouse action refer to Doyle Investments Ltd as a non-existent company (para 16(1)), and they allege that it was Mr Qadir and his associates that gained control of the company that owned the nightclub. The precise order of the transfer of the shares and the other incidents is not material. (In fairness to Mr Qadir I record that it is his case that Doyle Investments Ltd is an offshore investment vehicle for a Mr Aslam based in Nevis).

72. But in my judgment Mr Qadir is on stronger ground with his point (made in the original Reply) that the words complained purport to be not just the publication of an extract from the "writ" (as the Particulars of Claim are referred to) but to be the result of a journalistic investigation as well.

73. In my judgment the first Article is in fact the product of a journalistic investigation, one part of which is a report of what is in the Particulars of Claim: it is not just a report of what was on the court file. This is clear from the extraneous information that is included, relating to Mr Qadir, and to the results of Mr Watkins' attempts to obtain comments from the three claimants and the two defendants.

74. I feel no hesitation in finding that the first Article is the product of an investigation, because that is how Mr Watkins treated it himself at the time. He did investigate. If the first Article had been no more than the publication of an extract from the court file, there would have been no requirement for ANL to approach the parties to the Penthouse litigation to verify whether what counsel, a solicitor or a witness had said was accurate. Mr Warby makes this point part of his submissions in another context, citing *Burnett & Hallamshire Fuel Ltd v Sheffield Telegraph & Star Ltd* [1960] 1 WLR 502, at p506. If a journalist reporting on a trial chooses to approach the lawyers, parties or witnesses, then he is carrying out his own investigation.

75. However, the parts of the first Article that are the product of the investigation do not themselves add to the sting of the libel, save for the final sentence "All other parties declined to comment". The other words underlined in para 5 above seem rather to be directed to explaining why the publication of the words complained was a matter of public interest, or, in the words of the 1996 Act, of public concern and for the public benefit.

76. It follows in my judgment that ANL has proved that the words complained of (other than the extraneous matter, and in particular the last sentence) are a fair and accurate extract from the Particulars of Claim in the Penthouse action which was a document required by law to be available to public inspection.

Was the publication of the words complained of of public concern and for the public benefit?

77. This seems to me to be the real issue in this case, so far as statutory privilege is concerned.

78. There is no dispute that what is or is not of concern to the public or for the public benefit is to be decided objectively. The test is not what the publisher thinks to be the case. It is a question of fact to be determined by the judge.

79. Nevertheless, it is relevant to look at what the publisher says about his belief. In his witness statement Mr Watkins stated that the extraneous matter explains the public concern and public benefit: the business of the lending division of one of the banks which, as he puts it, had become notorious for reckless lending during what has now become known as the credit boom, and the actions of a senior employee in that context. I do not question that these matters may be relevant to the question to be decided under s.15(3), but I do not need to make any findings about them, because it is not in relation to the subject matter of the first Article that the challenge from Mr Qadir is made. His complaint is that the first Article is one-sided and inaccurate in mis-stating his response to the claim.

80. Mr Warby submits that the publication of the words complained of was of public concern and for the public benefit. He submits that the contents of all statements of case that are made available for public inspection by law are matters of public concern, and that the principle of open justice implies that the publication of such material is for the public benefit. The rationale is that given by Lord Bingham in *McCartan* in the first of the two paragraphs cited in para 65 above. Publications such as the first Article make known to a wider section of the public what all members of the public are entitled to know, but cannot in practice know, from the fact that the particulars of claim are required to be available to the public.

81. However, the central point at issue is captured by what Mr Warby also included in his Skeleton argument: "What the public should not understand from the report is that [the content of the Particulars of Claim] is true or established or proven".

82. Mr Warby goes on to submit that if the "report" (more accurately the extract) is fair and accurate and if that is what the privilege attaches to, then the complaint that it is one-sided is irrelevant. He draws a comparison with reports of proceedings in court which last more than one day. The media (and others) are free to report the proceedings of only the first day, for example, and not the subsequent days. Such reports are commonly one-sided.

83. He submits that cases where publications of such matters will not be of public concern and for the public benefit are to be limited to cases where there has been an authoritative refutation of the purported information in question. He again refers to *Tsikata* where the words complained of were in substance the following three sentences:

> "In June 1982, three High Court judges were kidnapped and executed at an army shooting range. A special inquiry into the killings recommended the prosecution of ten people, including Flt. Lt. Rawlings' close aide, Captain (Retired) Kojo Tsikata,

> who was named as ´the master mind' of the plot. Five people were prosecuted and executed, but not Captain Tsikata".

84. In that case the report in question was the one made by the Special Investigation Board to the Attorney-General of Ghana. The report had named Captain Tsikata as the mastermind, and had recommended prosecution of Captain Tsikata. The Attorney-General had issued a document setting out the detailed reasons why he did not follow that recommendation. But the defendant newspaper made no mention of that document. So the publication was, in Ward LJ's words (at p670h) "half the truth about the matter in issue".

85. The relevant provision of the Defamation Act 1952 was in s7 (which is similar in terms to s.15 of the 1996 Act) and para 5 of Part I of the Schedule. It provided a defence of qualified privilege for:

> "5. A fair and accurate report of any proceedings in public of a body or person appointed to hold a public inquiry by the government or legislature of any part of Her Majesty's dominions outside the United Kingdom".

86. Neill LJ noted that although the report in question dated from 1982, the publication by the Defendant was in 1992. The question under s.7(3) was whether a report in 1992 was of public concern and for the public benefit. Two reasons are given by Neill LJ for saying it was. First, Captain Tsikata continued to be a member of the Government of Ghana (p667d). This point is also made by Ward LJ at 670j. Second (p667f-g):

> "A newspaper may not know what happened subsequently nor may a newspaper be in a position to assess the quality or effect of any denials or refutations"

87. Ward LJ also adopted Neill LJ's second point. He said at p671a:

> "To require a newspaper to investigate subsequent events and report them in order to place the whole picture before the public in order to exclude damage to individual reputation is to make unacceptable inroads into the press's role as the public watchdog. It transforms investigative journalism from a virtue to a necessity".

88. Mr Bennett submits that there is no presumption that publication of a report or extract of one of the kinds specified in the Schedule to the 1996 Act will satisfy the test in s.15(3). He submits that it is necessary to start the discussion by recalling a number of basic principles on which the law of defamation and freedom of expression is founded.

89. Mr Bennett submits that where a publication includes defamatory matter, the truth of which is not known to the publisher, there is no public benefit unless the publisher also publishes information from the same source about the response of any person defamed. There is no public benefit in non-parties to litigation being free to publish to all the world the defamatory allegations of a person with a grievance, merely because that person has chosen to put those allegations in a claim form or particulars of claim.

As Lord Nicholls stated in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at p200:

> "Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good".

90. This applies to those who hold responsible positions in society, including in a bank.

91. Mr Bennett cites *Stern v Piper* [1997] QB 123. In that case the defendants had published in the *Mail on Sunday* an article reporting on a claim brought in the High Court in which there were repeated allegations made in an affirmation which had not been used in open court (and which was not required by law to be available to the public). The defence was justification, on the basis that it was true that the allegations had been made in the affirmation (but not on the basis that the allegations were themselves true).

92. As Mr Warby points out, judgment was handed down on 21 May 1996 when (as appears from p136G) privilege was under fresh consideration by Parliament (shortly to result in the 1996 Act). There was no equivalent under the Defamation Act 1952 to the 1996 Act Schedule paras 5 and 10.

93. Hirst and Simon Brown LJJ held that the defence of truth should be struck out as incompatible with the repetition rule: p134E. But they went on to consider the relationship between justification and absolute or qualified privilege, saying this at p135A-E:

> "However I think it is significant that privilege only protects reports of proceedings taking place in open court, and that its foundation is that those proceedings took place in public, so that the public in general should have access to fair and accurate reports thereof: *Webb v. Times Publishing Co. Ltd.* [1960] 2 Q.B. 535. This is a consideration of public policy, and does not extend to court documents which have not been brought into the public arena.
>
> Gatley on Libel and Slander, pp. 265-266, para. 624 quotes a statement by Holmes J. in *Cowley v. Pulsifer* (1884) 137 Mass. 392, 394:
>
> > "It would be carrying privilege farther than we feel prepared to carry it, to say that, by the easy means of entitling and

> filing a statement of claim in a cause, a sufficient foundation may be laid for scattering any libel broadcast with impunity."

> This statement was made in the context of common law privilege, but I think it is none the less pertinent, and that if reports of affidavits, or other court documents, not produced in open court, were to have the protection of privilege extended to them, it could only be done by statute. .. in the … event of such a reform being attempted, it is unthinkable that considerations of accuracy and fairness would not require both sides' allegations to be reported, and not, as here, only one side's.

> It is indeed the one-sidedness of the present publication which to my mind vindicates the justice of applying the repetition rule to the present case, avoiding the unfairness similar to that identified by Lord Denning in *"Truth" (N.Z.) Ltd. v. Holloway* [1960] 1 W.L.R. 997 of a private court document emanating from one side being disseminated on a very wide scale to the public at large".

94. Simon Brown LJ added at pp 137-138A:

> "In my judgment these cases [*Cadam v. Beaverbrook Newspapers Ltd*. [1959] 1 Q.B. 413 and others] strike an acceptable balance between the public interest in freedom of speech - the right to disseminate and receive information - and the public interest in protecting peoples' reputations. If any different balance is to be struck, it should not be by expanding these exceptions to the repetition rule but rather, as Hirst LJ observes, by legislation. One can quite well understand, however, why the law of qualified privilege does not extend to the pre-trial reporting of allegations contained in court documents: it is one thing to report proceedings contemporaneously or even retrospectively - then both sides' stories are being, or will have been, told in open court; quite another to be privileged to do so when perhaps (as here) only one side's allegations are being related and at a time likely to be months or even years before the full picture will emerge in open court."

95. Many of the categories of documents and types of events referred to in the Schedule to the 1996 Act are ones which are particularly likely to contain allegations defamatory of someone. In the case of many documents or other occasions, including particulars of claim, the documents will include a partisan account of a highly contentious matter, where that account has not been subject to review or control by the court or any other impartial body.

96. As Arden LJ stated in *Curistan v Times Newspapers Ltd* [2008] EWCA Civ 432, [2009] 2 WLR 149 at paras 2 and 25:

> “The repetition rule has the effect that "[f]or the purpose of the law of libel a hearsay statement is the same as a direct statement..." (per Lord Devlin in *Lewis v Daily Telegraph* [1964] AC 234, 284). The purpose of the rule is to protect the individual's right to his reputation: "repeating someone else's libellous statement is just as bad as making the statement directly" (per Lord Reid in *Lewis* at 260). In *Stern v Piper* [1997] QB 123, this court applied the rule to the situation where the defendant contended that it had simply made a statement that an allegation had been made. Thus the policy of the rule appears potentially to apply in all circumstances and irrespective of whether the meaning of a statement is that the publisher is only reporting that a statement has been made without adopting or endorsing it. But an important inroad was made in *Al-Fagih v H.H Saudi Research Marketing (United Kingdom) Ltd* [2002] EMLR 13, where this court declined to apply the repetition rule where statements that allegations had been made were made on a privileged occasion...
> 25. As Simon Brown LJ observed in *Stern v Piper* at page 137 (and again in *Al-Fagih* at [35]), the law of statutory privilege presupposes the existence of the repetition rule,…
> 59. … Put another way, the clear intention of section 15 is at minimum to disapply the repetition rule as it would otherwise apply to the fair and accurate report”.

97. Mr Bennett reminds the court of the words of the Strasbourg court in *Times Newspapers (Nos 1 and 2) v UK (Applications 3002/03 and 23676/03)* [2009] ECHR 45; [2009] EMLR 14, para [42]:

> “…the Court reiterates that Article 10 does not guarantee a wholly unrestricted freedom of expression to the press, even with respect to press coverage of matters of serious public concern. When exercising its right to freedom of expression, the press must act in a manner consistent with its duties and responsibilities, as required by Article 10(2). These duties and responsibilities assume particular significance when, as in the present case, information imparted by the press is likely to have a serious impact on the reputation and rights of private individuals. Furthermore, the protection afforded by Article 10 to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with responsible journalism”.

98. In my judgment the present case is distinguishable from *Tsikata*. In the present case the fact that Mr Qadir was disputing the claim would have been known to any non-party who applied to the court for a copy of the particulars of claim (for otherwise there would be no point in applying: the court could not supply the document). That a defendant is disputing a claim is implicit in his having filed an Acknowledgement of Service. And the fact that he had filed a Defence should have been known, as Mr Watkins accepted in evidence (discussed below). In *Tsikata* counsel for the newspaper

submitted that the findings in the report in question “stood on their own” (p666c). It was not suggested that a person who obtained the report of the SIB could know from the fact that it was publicly available that there was another side of the story (as is the case for a person who obtains a document made publicly available by the High Court under CPR r5.4C). That is why Neill LJ ended his judgment saying (in a reference to the plea of malice in that case):

> “The care which was exercised in relation to this publication and the reasons why, as it could be said, only one side of the story was told will no doubt require careful examination”.

99. In my judgment s.15 reflects the need to have regard both to the public interest in freedom of expression and to the public interest that an individual’s right to his reputation be not interfered with otherwise than for a legitimate aim and when it is proportionate to do so. Parliament has itself carried out the balancing exercise in part. Where a defendant has filed an admission, a non-party has no right to obtain the claim form or particulars of claim, so Schedule 1 para 5 will not apply at all. Where a defendant has filed a defence or an acknowledgement of service, then that will necessarily state or imply that the defendant disputes the claim.

100. In my judgment it follows that, as a general rule (that is one to which there may be exceptions) it will not be for the public benefit to publish any defamatory allegations made in a claim form or particulars of claim available to the public from the court under CPR r.5.4C without at the same time publishing the fact that the defendant has denied, or is disputing, the allegations, as the case may be. The effect of s.15(3) is to give the court trying a defamation action the power and duty to consider a balancing exercise on the particular facts of the case. In effect in that, and in the predecessor legislation, Parliament has required the court to carry out a balancing exercise similar to the one which has now become familiar under the HRA, namely Art 10 and Art 8 (see *Re S (A Child) (Identification: Restrictions on Publication*) [2005] 1 AC 593, Lord Steyn at [17]).

101. I find it hard to envisage any circumstances in which there would be a public benefit in publishing defamatory extracts from a claim form or particulars of claim without there being included in the publication a statement that the allegations are disputed, or, if it be the case, denied. It is the very fact that the allegations are disputed or denied that provides the condition, set out in para 5 itself, which gives rise to the legal requirement that the court make the document available to the public. In the present case I see no public interest in ANL publishing a defamatory extract from the Penthouse Particulars of Claim which omitted a statement that the claim is disputed.

102. In the present case ANL is in a weaker position than it would have been if it had simply omitted to publish that the allegations were disputed. It has misleadingly published that Mr Qadir declined to comment. That suggests that he was not disputing the very serious allegations which ANL were publishing. There can be no public benefit in publishing that misinformation.

103. Before reaching this conclusion I have considered the impact that it might have on the practice of journalists, and so upon freedom of expression. I am fortified that it is the right conclusion to reach by the evidence of Mr Watkins. He agreed in evidence that he had an editorial role in approving the article for publication. He agreed that it

would be the proper thing to do, given the steps he was about to take, to check whether a defence had been filed or not. He stated that he assumed that that would have been done, and that S, acting as a responsible journalist, ought to have done that.

104. ANL has not called S as a witness. Whether or not a witness is called is the choice of the parties, not of the witness. She has had no opportunity to defend herself from this serious charge. So I make no finding of fact against her. But I do not need to. The important point is that Mr Watkins' evidence is that the proper thing to be done on behalf of ANL on the particular facts of this case was to check whether a defence had been filed or not, and that is what responsible journalistic practice required in this case. Whether the failure was his own, or S's, makes no difference to the outcome of this case, although it may be very important as between the two journalists.

105. In any event, Mr Watkins thought it appropriate to undertake a more onerous task than checking with the court whether a defence had been filed. He attempted to contact the parties, including Mr Qadir, and to obtain his comments.

106. Mr Qadir makes a further or alternative submission in relation to the online publication of the first article. Mr Qadir's further or alternative case is that, even if privilege initially existed, it ceased to exist for those publications which took place from the moment when ANL knew that a Defence had been served and placed on the court file (which was some time before 17 June 2011) or when a copy of the Defence was obtained by it. Even if earlier publications were of public concern, or for the public benefit, subsequent publications were neither.

107. This point depends upon what was known to ANL. In my judgment the test under s.15(3) is objective, and does not depend upon what is known to a defendant. What is known to a defendant becomes relevant, if at all, in considering malice under s.15(1) of the 1996 Act. But once a defence has been filed it is obviously likely to be more difficult for a defendant to establish a defence of qualified privilege under para 5 if he has not mentioned that fact.

108. For the avoidance of doubt, nothing in this judgment should be taken as in conflict with what the Court said in *Tsikata* at p671a (para 87 above). Mr Bennett does not suggest that ANL should have carried out investigations as to subsequent developments. In so far as he relies on subsequent developments, they are the filing of the Defence, as to which there is no dispute, first, that it was filed, and, second, that ANL came to learn that it had been filed.

COMMON LAW PRIVILEGE AND THE FIRST ARTICLE

109. The form of common law privilege relied on by ANL in this case is derived from *Tskikata* at p667j-668a. In that case there was one sentence which was not a report, and which closely resembles the last sentence in the first Article in the present case. The sentence was: "Five people were prosecuted and executed, but not Captain Tsikata". The difference is that in *Tsikata* that sentence was true, whereas in the present case the last sentence of the words complained was false as it concerned Mr Qadir. So in *Tsikata* no consideration was required of the conditions under which the common law privilege in question might arise where the words complained of were, or might be, false.

110. What Neill LJ said at p667j-668a is:

> "I turn now to the third sentence in the words complained of and the question of qualified privilege at common law.
>
> The decision of the Privy Council in *Perera v. Peiris* (supra) provides guidance as to the scope of the qualified privilege which exists at common law for reports of the proceedings of this nature. Parliament, however, has conferred a statutory privilege in certain circumstances by the provisions enacted in the Act of 1952. In these circumstances the fact that the first two sentences of the words complained of might have been protected by common law privilege is no longer of importance except in so far as it throws light on the possible protection of the third sentence.
>
> I have come to the conclusion, as did the judge, that if the facts stated in the third sentence had any defamatory meaning the publication of them was prima facie protected by qualified privilege as being part of the matters relating to the proceedings which the public were entitled to know. I would therefore hold that the third sentence was protected by qualified privilege at common law".

111. Ward LJ said this of the third sentence and common law privilege at p 671c:

> "This can only enjoy a common law privilege if publication is in the public interest. The information conveyed by this sentence is so closely related to the first two that the same considerations will apply to protect it".

112. Of course, *Tsikata* was decided well before the decision of the House of Lords in *Reynolds*. It is not clear that there is today any need for a separate form of common law privilege of the kind upheld in *Tsikata*.

113. In my judgment the common law privilege applied in *Tsikata* does not apply to the information that Mr Qadir had declined to comment. There was no public interest in the publication of that false information, and it was not the product of responsible journalism.

114. It follows that the defence of qualified privilege fails in respect of the first Article.

115. Before leaving the first Article, there is one point that I have not dealt with. I have not considered whether the reference to Mr Qadir as a Muslim banker was relevant to fairness. This is because I was not asked to, and for good reason. It is not defamatory of a person to say that he is a Muslim, any more than it is defamatory to attribute to a person adherence to Christianity. Whether or not ANL should have mentioned Mr Qadir's religion in this context is not an issue in this action. If it is an issue to be raised at all, it is to be raised elsewhere.

THE SECOND ARTICLE

The words complained of in the second article

116. The words complained of in the second article are as follows (the numbers are added):

> "Top banker named in mortgage fraud case
>
> **Ex-BoS boss linked to pair sentenced to 20 years' jail** [*included as a sub-heading in the print version and as a caption to an image of the Bank of Scotland logo in the web version*]
>
> [1] A former Bank of Scotland executive was named in court last week as a central figure in Britain's biggest mortgage fraud, though he has not been charged with any offence.
>
> [2] Irfan Qadir was senior business director at the bank and later worked at Bank of Ireland's London office when a series of fraudulent mortgage deals were agreed.
>
> [3] He has never been charged, but a senior lawyer in the case said he was 'intimately involved'.
>
> [4] The mortgage fraud centred on £49million worth of loans based on fraudulent property valuations. Qadir was named in Southwark Crown Court on the final day of the long-running trial as two defendants were sentenced to a total of 20 years.
>
> [5] Property developer Saghir Afzal was sentenced to 13 years and Ian 'Flash' McGarry, a surveyor for property consultancy Dunlop Haywards, was jailed for seven years for taking bribes from Afzal to provide false valuations.
>
> [6] In mitigation, Mohammed Khamisa QC, for McGarry, said the Judge should take account of the role of other individuals in the case and named Qadir as someone who had been 'intimately involved'.
>
> [7] He said: 'The man who appears at the centre is Mr Qadir. He was involved in a large number of the transactions, he went to the Bank of Ireland and has been suspended. My understanding is there is an investigation into his conduct as a banker.'
>
> [A lawyer acting for Qadir said last night the comments were unjustified, and pointed out that not only had Qadir not been charged with any offence, he had not even been called as a

witness in the case. – *these words were not included in the web version until on or about 2 July 2011*]

['Our client does not agree with the accuracy or legitimacy of any of the comments,' said the lawyer. – *these words were not included in the web version until on or about 2 July 2011*]

[8] Bank of Ireland and Lloyds Banking Group, which took over Bank of Scotland during the financial crisis, refused to comment.

[9] It is understood that Qadir made no lending decisions at either bank linked to the Dunlop Haywards case. Mr Khamisa said: 'There had to be someone who had a detailed knowledge of the institutions and who knew what the banks would tolerate, and that had to be a senior executive at the lending institution.'

[10] As Financial Mail reported last month, Qadir is already being sued by four entrepreneurs who claim they were driven out of their London nightclub and tricked into handing over ownership of the property.

[Last night Qadir's lawyer described those allegations as 'spurious'. He said: 'An application is likely to be made to strike out the claim as an abuse of process.' – *not included in the web version until around 2 July 2011].*

[11] Ironically, Qadir launched his own legal claim in Pakistan last year, claiming he had been hounded out of a property in Islamabad.

[12] The Dunlop Haywards case saw lenders make loans against properties against false valuations.

[13] The single biggest loan of £11.5million was made by Cheshire Building Society against a former brassworks in Birmingham, which McGarry had valued at £16million.

[14] In fact the site was worth less than £2million.

[Richard Dyson – Page 78 – these words were not included in the web version]"

117. Mr Qadir attributes the following meanings to the words complained in the second article:

"In their natural and ordinary meaning the words complained of meant and were understood to mean that it was highly likely or there were reasonable grounds to conclude that the Claimant:

6.1 had been a central figure in a criminal conspiracy to defraud banks of £49 million by giving crucial "inside"

> assistance at banks which were lending money to the two main protagonists, who were then obtaining loans from those banks based on false property valuations;
>
> 6.2 he ought to have been tried and found guilty for these criminal acts; and
>
> 6.3 he had form for criminal activity: he is believed to have driven four entrepreneurs out of their nightclub and fraudulently obtained ownership of it for himself."

The factual background to the second article and the claim

118. On 27 May Mr Watkins and S exchanged emails about the time it was taking to get documents from the court records. This exchange of emails does not appear to be specifically related to the present proceedings.

119. S there made clear that both she and Mr Watkins understood that a statement of case could not be made available by the court to a member of the public before the defendant had acknowledged service. She wrote:

> "… we've been speaking to the court manager and are trying to arrange a meeting with the Senior Master to iron out a few problems but essentially, we are not allowed to order writs until either the defendant has acknowledged service with the court, or …. Not like the old days when I just grabbed a handful of freshly issued writs before even the court staff!"

120. On 14 June 2011 in the Crown Court at Southwark before HHJ Beddoe there took place the hearing at which Saghir Afzal and Ian McGarry were sentenced. Mr McGarry was represented by Mr Mohammed Khamisa QC. No one for ANL was present for the hearing and ANL did not, before these proceedings, have a copy of any transcript. But there is a transcript now before the court covering some 146 pages including the Judge's sentencing remarks. As the Judge described it, Saghir Afzal was at the head of a team intent on committing mortgage fraud on a huge scale with a substantial degree of sophistication. Saghir Afzal had pleaded guilty on the day of his trial. He and McGarry had submitted dishonest valuations of the properties in question. He had pleaded guilty well before the date appointed for the trial. The Judge sentenced Saghir Afzal to 13 years imprisonment in total. He sentenced McGarry to 7½ years imprisonment.

121. The transcript records that during his plea of mitigation Mr Khamisa and the judge spoke the following words:

> "MR KHAMISA: But we respectfully submit that it would be entirely artificial for the court to look at Mr McGarry and Mr McGarry alone without some degree of examination and analysis of a number of features. Obviously first of all, in particular, how it is that Mr McGarry became involved and how his company becomes involved, then how he becomes involved with the Afzals, if I can put it that way. But you

cannot ignore, in our respectful submission, having presided over the trial, the role of the intermediaries, brokers, nor, with respect, the responsibilities of the lenders and their own conduct. In reality, if your Honour stands back and looks at the roles of each one of these groups, there had to be, we respectfully submit, someone with a detailed knowledge of the way in which the standing instructions of lending institutions work and what banks will tolerate in order to push a deal through. There had to be at some stage somewhere a senior employee within the lending institution, whichever one it is, that one examines.

JUDGE BEDDOE: Let me assist you and not assist you, Mr Khamisa… First and foremost, this fraud, on the evidence that I heard in the trial, could not have happened without the complicity of your client providing the valuations he did. Full stop. It just could not have happened. That is not possible. The second thing, whether it is helpful or not, is this. The complicity or otherwise of anyone else, as you are intimating that others may be have been complicit, I cannot possibly determine and I should not try to determine and it seems to me it is not relevant to assessing your client's responsibility for the offences to which he has pleaded guilty.

MR KHAMISA: Your honour, of course, he is complicit. He has pleaded guilty and –

JUDGE BEDDOE: What I said was without him it could never have happened.

MR KHAMISA: I am not sure I agree with that, with respect but I have a difficult task and I do not deviate from my task.

JUDGE BEDDOE: No.

MR KHAMISA: I would respectfully submit that the court would be entirely wrong to ignore the part played by banks, brokers and other professionals within this fraud. The Cheshire, for instance, was not going to lend £10 million of its £11 million profit that brought that institutions into difficulty but without having done its own due diligence and, if it did not, what was it that led it, other than McGarry's valuation, to lend £10 million of the £11 million before (inaudible)? And what was it, if not an employee of the Bank of Scotland who was intimately involved in arranging the advances with the Afzals (his name has been mentioned in court as Mr Irfan Qadir)? How was it that the banks were able to lend this money without the assistance of their own introducers within the bank? It would be entirely folly, with respect, and I have to argue it here because, because if I do not argue here and I complain in the Court of Appeal, then I will be criticised and I respectfully

submit that you will be sentencing McGarry in a vacuum. I am not asking you to make a finding. Of course I am not because you have the advantage of having heard the evidence but you cannot ignore, with respect, the background here or the firm involved or the banks because what has happened is that the man who appears at the centre of a lot of cases, and is alluded to, who worked for the Royal Bank of Scotland, was dismissed by the bank in 2005. That is Irfan Qadir. He was involved in a large number of transactions. He went to the Bank of Ireland with other employees for the Royal Bank of Scotland and has there been suspended. And my understanding is that there is an investigation into his conduct as a banker and so –

JUDGE BEDDOE: Mr Khamisa, I am very concerned about this and I do not want you to be on the wrong foot. Just in case I do not in my sentencing remarks deal with this, I will deal with it now so, if this matter does go further, it will not be said that the judge did not consider it. Irfan Qadir did not lend any of the money, from the evidence I have heard, advanced by any of the financial institutions. That decision was made by the credit committee of the banks or the building societies concerned. And there is no suggestion that any of them were complicit in any of the evidence I have heard with any of the conspirators. And, secondly, from the evidence I heard in the trial from (inaudible) banks, they, as you say, relied on the propriety of the information that they were being given in relation to the applicant and they relied on the performance of their solicitors. It may or may not be the case but it is not for me to judge. I know that there was litigation. It may or may not be the case that some employees of the banks were negligent. It may or may or may not be the case that some of the solicitors that the banks or building societies engaged were negligent. As I say, I am aware there has been litigation in that respect and some of it, as I understand it, is ongoing but, if the occupier of a house leaves his back door open, it does not mean that the burglar is any more entitled to go in and steal the occupant's goods. So I am not sure that this is of actually any assistance to you to suggest to me parties who are not here, not in a position to defend themselves, may have been complicit in the offence. I am quite sure that there were many people complicit in this offence but what I want to finish with is a matter that you need to address. The evidence given before me in the trial on behalf of those lending institutions was that fundamentally what caused them to loan the money were the valuations supported by the leases and those two items, as I say, unless you want to call evidence or deal with it, I proceed to this matter that Mr McGarry knew that those leases were fake, for the reasons in part indicated. He knew that the valuations were completely and utterly bogus. There is no issue that he does not do anything other than accept and the

> evidence in the trial was that was what caused the banks to lend the money, however careless they may have been, however careless their lawyers may have been. So I come back to the point that I cannot see how I can sentence Mr McGarry on any other basis other than that without him it could not have happened.
>
> MR KHAMISA: And without the involvement of the others.
>
> JUDGE BEDDOE: Lots of other people played very necessary parts, I agree; all the stooges who went to the solicitors' offices and pretended to be the bona fide purchaser.
>
> MR KHAMISA: And what I am trying to do is Mr McGarry is naturally extremely concerned because of the verdicts that he can (inaudible) fixing, he does not wish to enter those kind of discussions that, because he is effectively the only professional in the dock, the court does not come down on him in a disproportionately harsh manner. I reassured him and the only way we can do justice in his position is to try to explain to the court that he is but a player, and I acknowledged right at the outset the importance of his role, and I am merely trying to put it into correct context. May I move to another point.
>
> JUDGE BEDDOE: I just want to make a point. Forgive me, sir. I do not like interrupting your flow but, in fairness to your client, there are occasions when he needs to know the approach I am taking and the reasons for it, and that is the only reason why I did it and I say it now. Mr McGarry's sentence will only reflect what I consider his contribution to the offending is concerned and it will not be a sentence that in anyway compensates for what I may or may not think was the responsibility of other people".

122. I interpose in this narrative to say that, like HHJ Beddoe, I too am concerned that Mr Khamisa should have mentioned the name of Mr Qadir in court in what the Judge made clear was a submission that was not only irrelevant, but was also unsupported by any evidence. Mr Khamisa was able to respond to HHJ Beddoe, but he is not able to respond to this judgment, so I say no more about what he did.

123. As Mr Warby has pointed out, the damage that can be done to non-parties by counsel naming them in court has long been a matter of public concern. It may be that a reporting restriction could have been ordered to protect Mr Qadir, pursuant to s.58 and 59 of the Criminal Procedure and Investigations Act. So far as relevant, s.58 provides that the trigger for such an order arises as follow:

> "(1) This section applies where a person has been convicted of an offence and a speech in mitigation is made by him or on his behalf before—

> (a) a court determining what sentence should be passed on him in respect of the offence, …
>
> (4) Where there are substantial grounds for believing—
>
> (a) that an assertion forming part of the speech or submission is derogatory to a person's character (for instance, because it suggests that his conduct is or has been criminal, immoral or improper), and
>
> (b) that the assertion is false or that the facts asserted are irrelevant to the sentence,
>
> the court may make an order [under s.59, restricting reports] … in relation to the assertion".

124. I add in fairness to Mr Qadir, that although ANL plead truth in relation to the second Article, ANL do not plead that what Mr Khamisa said is true. What ANL allege is true about the second Article is confined to para [10] only, namely that there were reasonable grounds to suspect that Mr Qadir had driven entrepreneurs out of their London nightclub and tricked them into handing over ownership of the property.

125. On 16 June at 09.43 S emailed Mr Watkins. She had not been present at Southwark Crown Court and had not seen any transcript. She wrote:

> "… Had an interesting call as a result of the Irfan Qadir nightclub story. Apparently he was suspended and has now been sacked from the bank and is being investigated over an alleged £50 million mortgage fraud… thought you would be interested to know!"

126. At 10.14 Mr Watkins replied:

> "Yes very interested. Can you tell me who called you? Or if not do you have any more details before I charge in and telephone Bank of Ireland…"

127. At 15.02 S replied:

> "Qadir and his employers haven't filed a defence to the writ, apparently. But the court says there's no judgment yet either. 'weird'".

128. At 16.03 Mr Watkins emailed Sharon McDonald of the Bank of Ireland. He referred to previous conversations which he had, with her as he thought, about the Penthouse claim. He wrote:

> "In the end he did not return any calls. I understand that Irfan no longer works for BoI and there is an internal enquiry underway into some of his work. I wondered if you could give me a call as I had a few queries regarding the manner of his departure from BOI".

129. At 16.13 Sharon McDonald replied "we have no comment to make on this". In another e-mail he pressed her again, but she repeated the bank would make no comment. At 18.12 he wrote:

> "I genuinely don't mean to be a pain on this, but I also do not want to make any factual errors in any story I write. Last month when I attempted to get hold of Irfan at BoI's London office I was put through to his voicemail. I was also told by the BOI press office that you could not really help as it was a matter for Irfan whether he chose to reply to my query. Absolutely fair enough. I was not told he had left the company. When I called today there was no voicemail for him and I was told that he had left the company. I have to conclude from this that he was still an employee of BoI when I called in early May but he has left the company since then and that is what I will assume for the purposes of any article I may write about Irfan Qadir. If this is incorrect in any way I would be grateful if you could tell me".

130. Either on that day, or on 17 June, there appeared on the website FT Adviser.com an article starting with the words "Two men have been sentenced for a total of 20 years at Southwark Crown Court after admitting their role in a £49 million mortgage fraud….". It consists of 21 short paragraphs. It stated that the sentencing followed a Serious Fraud Office decision to drop a retrial into three accused solicitors (who are identified) who the jury could not agree a verdict on, and that three other defendants have been acquitted.

131. In his witness statement Mr Watkins says that although he cannot now be certain, "I may also have read the Advisor article either shortly before or shortly after reading' the email from [S] at 9.43 am on 16 June".

132. The paragraphs relevant to the present proceedings read as follows (with the numbering added):

> "[7] Delivering mitigation at Southwark Crown Court for surveyor Ian McGarry – jailed for seven years after pleading guilty to providing inflated valuations in the fraud – Mohammed Khamisa QC said the court could not ignore the role of other intermediaries and brokers, naming one such person as Irfan Qadir.
>
> [8] He said to the court: 'Having presided over this trial, you cannot ignore the role of intermediaries, brokers, the responsibility of the lenders and their own conduct.
>
> [9] 'If you look at each of these core groups, there had to be someone who had a detailed knowledge of the institutions and who knew what the banks would tolerate, and that had to be a senior executive somewhere at the lending institution'.

> [10] Mr Khamisa said the court would be wrong to look at McGarry's actions in a vacuum, and ignore the part played by brokers, banks and other professionals.
>
> [11] He said the Cheshire Building Society would not have lent money without doing due diligence and claimed Mr Qadir who worked for the Bank of Scotland at the time but was not implicated in the case was 'intimately involved'.
>
> [12] He said: ' the man who appears at the centre is Mr Qadir. He was involved in a large number of the transactions, he went to the Bank of Ireland and has been suspended. My understanding is that there is an investigation into his conduct as a banker'.
>
> [13] However the judge rejected the claims stating that Mr Qadir did not lend any money, adding that the banks relied on Mr McGarry's valuations.
>
> [14] Mr Khamisa said Mr McGarry had spent 5 ½ years with his life on hold and had been through 'hell and back' struggling for work and becoming a house husband. The court heard witness statements from his mother in law and friends about the effect on the family and his remorse, adding that he had tried to help the prosecution's case after pleading guilty.
>
> [15] Mr Khamisa said McGarry was taken in by the Afzal's just like other individuals, including an MP, at which point the judge stopped the barrister and said he was going 'off course'...".

133. On 17 June S told Mr Watkins about the Defence, as stated above.

134. Mr Watkins contacted Mr Dermot O'Sullivan, of the Group Corporate Responsibility Department of the Bank of Ireland head office in Dublin. He emailed Mr Watkins stating that, having checked with a colleague, the bank had no comment to make on his query. Mr Watkins pursued his investigations with Mr O'Sullivan writing an email at 12.33 as follows:

> "Thanks for that. I am sorry to keep at you… obviously in early May we wrote about the legal claim against Irfan Qadir and Bank of Scotland by several businessmen over the Penthouse nightclub.
>
> Now Irfan has been named extensively in connection with the Dunlop Haywood fraud case where individuals were sentenced this week.
>
> Giving a plea in mitigation Mohammed Khamisa QC representing one of those sentenced (Ian McGarry) said the case had failed to take into account the wider context and the

> role of others in the event. He said in open court that Qadir was intimately involved.
>
> And he further said:
>
> 'The man who appears at the centre is Mr Qadir. He was involved in a large number of transactions, he went to the Bank of Ireland and was suspended. My understanding is that there is an investigation into his conduct as a banker'.
>
> I have spoken with Irfan Qadir who said he is still employed by Bank of Ireland, but has declined to make any further comment. When I called the Bank of Ireland's London office yesterday I was told by the switchboard that he no longer worked for the bank. I am making further enquiries to him through his solicitor."

135. Before 12.30 on 17 June Mr Watkins made telephone contact with Mr Qadir. Mr Qadir said he was employed by the Bank of Ireland, and that he had filed a defence. Mr Qadir referred him to a solicitor, Mr Desai.

136. On 17 June at 12.54 Mr Watkins sent an email to Mr Desai. He set out a number of questions. One of these was:

> "what comment can you make on the Penthouse case? Mr Qadir said to me that the claims made were '110% incorrect'. Does that mean he disputes all the facts as presented in the claim form?"

137. Mr Watkins emailed a copy of that email directly to Mr Qadir. In that email he said:

> "on the phone you said you denied any involvement in the Dunlop Haywood case. I will include that comment in any article we publish but if you wish to make any further comment then please come back to me."

138. On 18 June at 12.33 another solicitor, Mr Khan, replied by email to Mr Watkins to answer the questions posed in the email sent to Mr Desai. He stated that the first article had been a factually incorrect one without giving a proper opportunity to Mr Qadir to comment. Mr Watkins replied to that saying:

> "thank you very much for your prompt reply. It is always my aim to give all parties in any story an opportunity to comment and we do make strenuous efforts to contact people who might be the subject of any article."

139. On 19 June the Defendant published the second article.

140. On 23 June Mr Watkins received a copy of Mr Qadir's Defence in the Penthouse claim.

Procedural history

141. On 1 July Mr Qadir's present solicitors wrote a letter of complaint to ANL. In that letter the solicitors complained that the allegations in the second article were false and never should have been published. They quoted a passage from the email from Mr Khan of 18 June which included the following:

> "Parties in the case to which you refer had been found guilty of a series of offences. Whatever comments they made in mitigation of their sentence were unsuccessful and were rejected by the Judge as it appears they received lengthy prison terms. Our client does not agree with the accuracy or legitimacy of the comments to which you refer… their pleas were obviously rejected by the Judge who imposed lengthy prison terms".

142. The solicitors complained that the second article had not included statements made by the Judge in response to the allegations of Mr Khamisa. The solicitors referred in particular to some of the passages quoted in the *Estates Gazette* on 18 June. The solicitors had at that stage no reason to know that Mr Watkins had based his article on the FTAdvisor.com article.

143. The solicitors went on to complain separately about the first article. They said this failed to convey Mr Qadir's side of the story despite his Defence being available on the court file from April 2011. The solicitors also complained that the article falsely claimed that Mr Qadir had declined to comment, and that even on 18 June the Defendant had failed to review the Defence in that action. The solicitors asked for the immediate removal of the second article from the website and other matters.

144. On 14 July ANL sent a substantive response. It rejected the complaint about the second article. It quoted back to Mr Qadir's solicitors a passage that they had quoted from the article in the *Estates Gazette,* which in turn quoted the following words spoken by the Judge to Mr Khamisa:

> "The complicity or otherwise of anyone else I cannot possibly determine".

145. ANL said that what the judge had done was to dismiss Mr Khamisa's comments about Mr Qadir on the basis that they were not relevant mitigation points for Mr McGarry. That, said ANL, was not a finding that Mr Qadir was not involved. It noted that the second article had included the denial of Mr Qadir's solicitors.

146. On 18 July solicitors for Mr Qadir wrote a detailed response. They concluded by demanding the immediate removal of both articles from the website, amongst other matters. The articles were eventually removed by 9 September 2011.

147. On 1 August Mr Qadir served the Particulars of Claim in this libel action. On 27 October the Defence was served. On 21 December the Reply was served. An Amended Defence was served on 2nd May 2012. A Rejoinder was served on 9 May 2012. A draft re-Amended Reply was served on 13 June 2012.

148. In the draft re-Amended Reply Mr Qadir enlarged the malice plea in respect of the first article, and introduced a plea of malice for the first time in respect of the second article.

149. On 2 July 2012 Mr Qadir issued an application notice asking for permission to make that re-amendment. On 3 July the Defendant issued an application notice asking for an order that the parts of the Amended Reply which included the malice plea be struck out as an abuse of the process of the court, and for further directions. Those two applications came before me on 11 July. After hearing argument I adjourned both applications to be heard by the judge assigned to try the preliminary issue on 26 and 27 July, as that Judge might direct. I gave my reasons in a judgment which I handed down in writing on 23 July [2012] EWHC 2064 (QB).

150. On 25 July Mr Watkins signed the witness statement which formed his evidence in chief on 26 July. At the start of the hearing on 26 July Mr Warby indicated that he would not oppose the re-amendment to the Reply for which Mr Qadir asked permission. But he made clear that he maintained the objections which he had sought to have determined on 11 July. These were that both the original plea of malice and the draft amended plea of malice were defective and should be struck out, or not permitted. However he accepted that a convenient course would be for the court to hear the evidence of Mr Watkins before ruling on that, and for the court to rule on all his points on the plea of malice in the judgment handed down at the end of the case. That is how the matter proceeded.

151. There had also been an issue between the parties before 26 July as to whether Mr Qadir could or should give evidence. The position adopted by ANL was that he had no relevant evidence to give on any matter relating to the preliminary issues or the plea of malice. Mr Qadir on the other hand wanted to give evidence so that any report of this case would include the fact that he had stated in court that he disputed the allegations against him, even though the issue of justification was not now before the court. In the event Mr Warby proposed certain redactions from the witness statement that had been prepared for this trial by Mr Qadir and Mr Qadir gave evidence in accordance with the witness statement as thus redacted. Mr Warby then cross-examined Mr Qadir for some three quarters of an hour as to his allegations of malice.

THE LAW RELATING TO THE SECOND ARTICLE

152. As to paras [1] to [7] of the second article ANL relies on the 1996 Act s.14 and s.15 (which is cited above) and on paragraphs from the Schedule Part II. These read as follows:

> "14 Reports of court proceedings absolutely privileged.
>
> (1) A fair and accurate report of proceedings in public before a court to which this section applies, if published contemporaneously with the proceedings, is absolutely privileged…

> (3) This section applies to— (a) any court in the United Kingdom, …
>
> SCHEDULE 1 Qualified privilege
>
> Part I Statements having qualified privilege without explanation or contradiction …
>
> 2 A fair and accurate report of proceedings in public before a court anywhere in the world".

153. As already noted, so far as relevant to this case, the difference between the absolute privilege under s.14 and the qualified privilege under s.15 Sch para 2, is that the absolute privilege under s.14 is available only to reports published contemporaneously.

154. As to para [10] of the second article, which refers to the first article, ANL relies on the same defences as it relied on for the first article. The difference is that in the second article ANL did not state that Mr Qadir had declined to comment, and, as from 2 July 2011, but only from then, and only in the online version, ANL did include Mr Qadir's denial expressed through his lawyer (although it made no mention of the Defence which, by then, ANL knew Mr Qadir had served).

155. ANL also rely on the ancillary common law privilege referred to in *Tsikata*.

156. It is common ground that, in order to qualify as fair and accurate, a report does not have to include the full extent of any proceedings. I repeat the passage from the judgment of Arden LJ in *Curistan v Times Newspapers Ltd* [2008] EWCA Civ 432; [2009] QB 231 cited above:

> "26. There are a number of authorities on what constitutes a fair and accurate report. It need not be a verbatim report. It can be selective and concentrate on one particular aspect as long as it reports fairly and accurately the impression that the reporter would have received as a reasonable spectator in the proceedings: see generally *Cook v Alexander* [1974] QB 279, and *Tsikata v Newspaper Publishing Ltd* [1997] 1 All ER 655.

157. It is also common ground, as Lawton LJ said in *Cook v Alexander* at p291, that:

> "It is important to remember, however, that the balance must be in relation to the plaintiff's reputation".

158. But a defendant may lose the privilege by omitting facts. Mr Warby cited *Burnett & Hallamshire Fuel Ltd v Sheffield Telegraph & Star Ltd* [1960] 1 WLR 502, at p504-5, where Salmon J directed a jury as follows:

> "… supposing a case has gone on for a whole day, and during part of the day counsel on one side or the other has said something, upon instructions, highly defamatory about one of the parties to the case but the evidence given later in the day entirely fails to support what counsel has said. The newspaper, in reporting the case next day, is entitled to report the opening

> and the evidence, but not the opening alone, for to leave out the evidence would give an entirely unfair slant to the whole report.
>
> An even stronger case – and there have been such – is where a judge or a jury has found that there is nothing in the allegations made against one of the parties, and yet a newspaper in reporting the case has reported the allegations but not the finding. In such a case you would have no difficulty – and no jury could have any difficulty – in saying that that report was unfair and inaccurate".

159. The fact that Mr Khamisa was making an irrelevant submission defamatory of Mr Qadir does not mean that it was impossible to write a fair and accurate report of the proceedings that day in Southwark Crown Court. There can be a fair and accurate report of matters stated in court which should not have been stated, but the fact that derogatory matters were irrelevant, or false, may be relevant to the fairness of any report of the proceedings which includes them. And if what is stated in court should not have been stated, then that may be relevant to the question under s.15(3), namely public concern and public benefit, where that section applies.

160. The fact that no one from ANL was present in Southwark Crown Court does not bear on the question whether the report was fair and accurate. As Mr Warby put it, if a reporter does not attend (or, I would add, leaves court early), and takes information from someone who was present, then he takes the risk that the report might be unfair even if the reasons are unknown to him. In the present case the reasons why, as Mr Bennett submits, the report is not fair and accurate were known to ANL, because the judge's interventions were reported by FTAdvisor.com. But again, whether or not some other reporter included information is irrelevant to the question whether ANL's report was fair and accurate.

161. Mr Bennett cited Carter-Ruck on Libel and Privacy, 6th ed, paras 11.48-11.62, which I found to contain a most helpful summary of the case law.

ISSUES IN RELATION TO THE SECOND ARTICLE

162. As to absolute privilege under s.14, there is no dispute that the print version and the earliest publications online were all contemporaneous. It is not necessary in this judgment to decide precisely at what point (if at all) the online publications ceased to be contemporaneous. Mr Warby submits that online publications which were originally contemporaneous do not cease to be so, for the purposes of this defence, merely because they remain accessible see Gatley para 16.4, where the editors cross refer at footnote 37 to a related issue discussed in *Bray v Deutsche Bank AG* [2008] EWHC 1263 QB; [2009] EMLR 12. In my judgment he is right on this point, but he also made submissions on the alternative supposition that there came a point when they did cease to be contemporaneous.

163. The central issue under both s.14 and s.15 in relation to the second article is the same: was the part of the article which related to the hearing in Southwark Crown Court a fair and accurate report of those proceedings? The case for Mr Qadir pleaded in his Amended Reply is that the second Article was not, and did not include, a fair and

accurate report of the proceedings because it did not report that the trial judge had interrupted Mr Khamisa to state that:

i) "Qadir did not lend any of the money, from the evidence I have heard, advanced by any of the financial institutions. That decision was made by the credit committee of the banks or the building societies concerned. And there is no suggestion that any of them were complicit in any of the evidence I have heard with any of the conspirators";

ii) "The complicity or otherwise of anyone else, as you are intimating that others may be have been complicit, … is not relevant to assessing your client's responsibility for the offences to which he has pleaded guilty."

iii) And because it did include the material in paras [10]-[12] of the article which were extraneous to any report of the proceedings at Southwark Crown Court, but which added to the defamatory sting of the words complained of.

164. In relation to any publications to which the only defence is qualified privilege under s.15 (because they were not contemporaneous), Mr Bennett submits in the alternative that they were not a matter of public concern or for the public benefit, because the report does not contain the Judge's interventions set out above. He submits that the inclusion of the denials by Mr Qadir's lawyer does not assist ANL on the issue of the fairness and accuracy of the report. Those denials were not part of the proceedings to which the statutory privilege might in principle attach. Nor does it assist ANL on s.15(3), because the denials by a lawyer do not carry the same weight as the remarks of the Judge hearing the case.

165. Mr Warby accepts that ANL omitted the judge's words. But he submits that that was fair. He illustrated this by observing that ANL also omitted Mr Khamisa's statement that Mr Qadir had been dismissed by the Bank of Scotland. Moreover, the words of the judge, he submits, did not acquit Mr Qadir of the wrongdoing alleged by Mr Khamisa. The judge himself said:

> "The complicity or otherwise of anyone else, as you are intimating that others may be have been complicit, I cannot possibly determine and I should not try to determine…"

166. Mr Warby submits that Mr Khamisa had not alleged that Mr Qadir was a lender, and so that the judge's remarks about the lenders was irrelevant to Mr Qadir. He submits that Mr Khamisa had alleged that Mr Qadir was involved in some other way.

167. In his witness statement Mr Watkins states that he did include a reference to the judge's intervention, and he cites the words "It is understood that Qadir made no lending decisions at either bank linked to the Dunlop Haywards case". The difficulty with that explanation, and the reason I reject it, is that those words are not attributed to the judge, and do not purport to be a part of the report of the proceedings. And for that reason they are so weak that they are incapable of making fair what, apart from those words, is not a fair report.

168. Mr Bennett submits that any member of the public who had been in Southwark Crown Court would have heard both Mr Khamisa's defamatory statements about Mr Qadir and the judge's response, which was at considerable length.

169. In my judgment that part of the second article which is a report of the proceedings in Southwark Crown Court is not a fair and accurate report.

170. It is true, as Mr Warby submits, that the remarks of the judge are not the findings of fact by a court such as are referred to in the example given to the jury by Salmon J in *Burnett*. But that was just an example. What is important in this case is that HHJ Beddoe stated that he had heard evidence in the case, and stated very clearly that Mr Qadir had not lent any money, and that there was no suggestion in any of the evidence he had heard that any of those who had lent were complicit with any of the conspirators in the fraud.

171. As to what Mr Khamisa was alleging Mr Qadir had done, I find Mr Warby's submission too subtle. It is true that on a careful reading of the transcript it is not clear what Mr Khamisa was alleging or intending to allege, other than that Mr Qadir was in some way "intimately involved in arranging the advances with the Afzals". The judge attempted to stop Mr Khamisa from explaining, albeit he had great difficulty. He did that because the submission was irrelevant and unfair and damaging to Mr Qadir, who was not there to defend himself. In my judgment a person in court listening to Mr Khamisa could well have understood that Mr Khamisa was alleging that Mr Qadir was involved in the lending decision. That is what the judge appears to have understood the allegation to be, for otherwise he would not have refuted it as he did. In any event, the question whether the report is fair and accurate is not to be considered so analytically. What is under consideration is a report in a newspaper, not a legal document.

172. The position in law is no different following the insertion of the additional text in the online article on 2 July (as set out in paragraph 116 above). The statement by the judge was part of the proceedings (unlike the statement from Mr Qadir's lawyer) and carried significantly greater weight than any statement from a lawyer. The omission seriously unbalanced the report, to the extent that the privilege, whether absolute or qualified, cannot be relied upon by ANL.

173. As to the inclusion of the matters set out in paras [10]-[12] of the second article, in my judgment these would not make the report unfair, if it were otherwise fair.

174. If an online publication of the second article is not to be treated as contemporaneous, so that ANL must satisfy s.15(3) in relation to these reports then, whether or not I am right in saying that the report in the second article was not fair and accurate, I conclude that it was not of public concern or for the public benefit for ANL to continue to publish Mr Khamisa's allegations while omitting to publish the judge's remarks.

175. As to the qualified privilege in relation to the reference back to the first article, the words added to para [10] of the second article would, in my judgment, be a sufficient statement of Mr Qadir's side of the story for ANL for the requirements of s.15(3) to be satisfied, if ANL were otherwise entitled to rely on the statutory qualified privilege under para 5 of the Schedule. However, that paragraph applies to an extract from a

document, and para [10] of the second article is plainly not an extract from a document. ANL does not rely on *Reynolds* common law privilege. So the defence of common law privilege fails in relation to para [10] of the second article.

176. It follows that ANL's defences of absolute and qualified privilege, whether statutory or at common law, all fail. It also follows that in relation to the second article, save for the limited plea of justification to para [10], there is no defence to the words complained of in paras [1] to [9].

MALICE

177. In these circumstances the question of malice does not arise in relation to qualified privilege. It remains an issue in relation to damages, but damages are not within the scope of the preliminary issue which I have tried.

178. However, given the circumstances in which the plea of malice was advanced, and the basis upon which the trial has proceeded, as explained in para 150 above, it is right that I should rule on whether the plea of malice is properly on the record, or whether it should be struck out.

The plea of malice in relation to the first article

179. The plea of malice in relation to the first article, as amended, is set out in the Re-Amended Reply as follows:

> "11. The first article was published maliciously in that it was published recklessly and/or with wilful blindness. As stated in paragraph 6.2.1 above, the rationale of the statutory privilege is to facilitate public access to documents kept on the court file so that the public may scrutinise the administration of justice. It is a misuse of that privilege to report on the contents of one document making accusations without also reporting upon either the existence of a Defence to those allegations and/or the gist of the contents of a Defence to those allegations.
>
> 11.1 On or before 30 March 2011 [S], who at all material times was acting on behalf of the Defendant, ascertained that the Claimant had acknowledged service in Claim No HQ11X00386 ("the Penthouse Claim"). It is implicit from the filing of an acknowledgement of service that a defendant intends to contest the claim by either defending all or part of it or by contesting jurisdiction.
>
> 11.2 [S] regularly obtains statements of case from the court records and is familiar with the fact that Particulars of Claim (particularly where there has been an acknowledgement of service) will be followed by a Defence. At all material times she knew that it was likely that a Defence would be served to the Penthouse Claim and that, if served, she could obtain a copy of it from the court office upon request.

11.3 The Defence to the Penthouse Claim was duly served on 1 April 2011 and was available from the court file from that date upon request. [S] ought to have checked whether a Defence was available from the court before finally submitting her draft article to the Defendant for publication on 8 April 2011. It was reckless of her not to have done so and, furthermore, constituted wilful blindness.

11.4 The final editorial decision to publish the first article was taken in the week prior to 8 May 2011. Simon Watkins and/or [S] ~~and/or~~ each person ~~involved in the editorial decision to publish~~ (each of whom was acting on behalf of the Defendant) knew that it was highly likely (particularly given that there had been an Acknowledgement of Service by the Claimant) that the Claimant would have served a Defence to the Penthouse Claim yet no attempt was made to check if a Defence had been served, to obtain a copy of it and to summarise its contents in the first article. Each individual identified in this paragraph was thus reckless and each individual was wilfully blind by reason of their failure to take steps to check whether a Defence was available on the court file.

11.4A Simon Watkins knew that the Claimant had not "declined to comment" but nevertheless included or approved the inclusion that statement knowing that it was false.

11.5 As set out at paragraph 7 above:

11.5.1 the Defendant, in the form of Simon Watkins and/or [S] ~~and/or the person and/or the persons who took the decision to publish,~~ was positively aware of the existence of the Defence from some time prior to 17 June 2011 and yet it never updated the online article in order to reflect this important fact.

11.5.2 The Defendant, in the form of Simon Watkins and/or [S] ~~and/or the person and/or the persons who took the decision to publish,~~ obtained a copy of the Defence in the week commencing 20 June 2011 and yet failed to update the article in order to reflect its contents.

11.6 The Defendant continued recklessly and/or with wilful blindness to publish the first article, without an amendment even to reflect the fact that a Defence existed, on the website until 8 September 2011".

180. There are thus distinct allegations of malice relating to

i) S alone (paras 11.1 to 11.3), S with Mr Watkins (para 11.4, 11.5), Mr Watkins alone (para 11.4A) and ANL (para 11.6);

ii) different time periods: up to 17 June (paras 11.1 to 11.4A), 17 to 20 June (para 11.5.1, 11.6 and 11.4A) and 20 June onwards (11.5.2, 11.6 and 11.4A)

iii) the omission to check whether the Defence that was to be expected following the Acknowledgment of Service had been filed (paras 11.1 to 11.4), and the continued publication of the statement that Mr Qadir had "declined to comment" (para 11.4A)

iv) the print and the online versions of the article: paras 11.1 to 11.4A relate to both, paras 11.5 and 11.6 relate only to the online version.

The case law on the meaning of malice

181. Mr Warby submits that this plea of malice fails because it has been established by the House of Lords in *Horrocks v Lowe* [1975] AC 135 that the malice which defeats qualified privilege can only be established by proof of a dominant improper motive, but that is not pleaded. Knowledge of falsity, or recklessness, are not variants of malice, he submits, but rather matters proof of which generally demonstrate dominant improper motive, at least in those cases where there can be no proper motive for publishing falsehoods. But Mr Qadir does not make the allegations of publishing the words knowing them to be false or with reckless disregard for their truth or falsity, from which such a motive could be inferred. Accordingly the pleas of malice should all be struck out (and in retrospect, the amended plea which I permitted to be made at the start of the hearing should not have been permitted).

182. Mr Warby submits that Mr Qadir's allegations of malice are circular and pointless. The allegations are based on the alleged unfairness or inaccuracy of the report of the Particulars of Claim in the Penthouse action without a report of the Defence. But if the court finds that the report was unfair or inaccurate, the defence of qualified privilege will have failed at that point, and nothing will be added by a finding as to the state of mind of the journalist, such as a finding that he knew the report was unfair. The issue of malice will not arise. In the alternative, Mr Warby submits that the evidence does not establish (as it would have to) that it is more probable than not that there was malice.

183. Both counsel agree that this is the first time that a court has had to determine what constitutes malice under s.15(1) of the 1996 Act in relation to an extract from the contents of a document which the court is required to make available to a non-party to an action.

184. Mr Bennett also cites *Horrocks*, while submitting that what that case demonstrates is that it is misuse of the occasion which constitutes malice, and that is to be inferred from the circumstances. He submits that there is a danger of misreading what Lord Diplock said, because that was a case of common law privilege, where the basis of the privilege is the defendant's duty or interest. In that, and other cases where the publisher's duty or interest are the basis of the privilege, the publishers will normally be using the occasion to state what they believe to be true. So malice may be inferred from proof of lack of belief or recklessness as to the truth or falsity of the words complained of. In cases under s.15 of the 1996 Act the occasions of the privilege are different from those considered in *Horrocks*, since a journalist or publisher will not normally have a view one way or another as to the truth of the substantive allegations

contained in the document in question. It follows that proof that the defendant did not believe in the truth of what he published would not assist in proving malice.

185. The passage Mr Bennett cites is the following, at p149D-E:

> "With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit - the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege". (emphasis added).

186. Other passages where Lord Diplock states that it is misuse of the occasion which constitutes malice are:

> p150E-F "Even a positive belief in the truth of what is published on a privileged occasion - which is presumed unless the contrary is proved - may not be sufficient to negative express malice if it can be proved that the defendant misused the occasion for some purpose other than that for which the privilege is accorded by the law. The commonest case is where the dominant motive which actuates the defendant is not a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill will towards the person he defames. If this be proved, then even positive belief in the truth of what is published will not enable the defamer to avail himself of the protection of the privilege to which he would otherwise have been entitled. There may be instances of improper motives which destroy the privilege apart from personal spite. A defendant's dominant motive may have been to obtain some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege. If so, he loses the benefit of the privilege despite his positive belief that what he said or wrote was true.
>
> p153D "It was no misuse of the occasion to use the Bishops Road fiasco in an attempt to obtain the removal of Mr. Horrocks from the Management and Finance Committee even though the prospects of success may have been slender"

187. Mr Warby relies mainly on the passage immediately following on pp149F-150A:

> "So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of

the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. 'Express malice' is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests.

The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person".

188. The facts as recited at the start of the report are:

"The plaintiff, at all material times a councillor of Bolton Town Council, by his statement of claim alleged that the words of a speech delivered by the defendant at a meeting of the council on November 5, 1969, and a report of the council meeting published on November 6, 1969, in the 'Bolton Evening News' were calculated to disparage him in his office and business. By his defence the defendant, inter alia, claimed that the words were spoken to persons having a common interest and in pursuance of a duty without malice in the honest belief that they were true, and on an occasion of qualified privilege. By his reply the plaintiff claimed that in publishing the words complained of the defendant was actuated by express malice."

189. Lord Diplock cited with approval two statements of the law on malice which Lord Esher had made, first as Brett LJ in *Clark v Molyneux* (1877-78) LR 3 QBD 237 and later in *Royal Aquarium and Summer and Winter Garden Society Limited v Parkinson* [1892] 1 Q.B. 431. In *Clark* at p246-7 he had said:

"If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive. If the indirect and wrong motive suggested to take the defamatory

> matter out of the privilege is malice, then there are certain tests of malice. Malice does not mean malice in law, a term in pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false, no one need inquire further."

190. In *Royal Aquarium* at p444 Lord Esher MR again spoke of malice as abusing an occasion, as did Lopes (in a passage cited in Gatley at para 17.4 footnote 29) and Fry LJJ at pp 454 and 455. Lord Esher MR said:

> "Therefore, though what is said amounts to a slander, it is privileged, provided the person who utters it is acting bonâ fide, in the sense that he is using the privileged occasion for the proper purpose and is not abusing it. It is sometimes said that he must be acting bonâ fide and not maliciously; but I do not think that that way of expressing the rule is quite exhaustive or correct. I think the question is whether he is using the occasion honestly or abusing it."

191. Up to this point in the argument, in my judgment Mr Bennett is correct. The plea in para 11 that ANL has misused the occasion is, so far as it goes, a good plea of malice. It is not necessary to plead in addition that ANL or one of its employees or agents had an improper motive. That is implicit in the plea of misuse of the occasion. But I accept Mr Warby's submission that misuse, or abuse, in this context require proof that the purpose, reason or motive of the defendant must be his dominant one before malice can be proved.

192. It is true that in citing the passages from *Clark* and *Royal Aquarium* Lord Diplock was directing attention not to the definition of malice (misuse or abuse of an occasion), but to the test used to prove malice in the duty/interest form of qualified privilege in question in those cases, namely by asking whether it is proved that the defendant did not honestly believe what he said was true. But there can be no doubt that Lord Diplock was approving the definition of malice as misuse or abuse of the occasion, that is, using it for a purpose other than that for which it was accorded. He was also saying that that must be the dominant purpose, or motive. In these discussions of malice the courts appear to use the words purpose, motive and reason interchangeably.

193. I also accept that the test approved by Lord Diplock is not directly applicable in the present case.

194. The statutory privileges, absolute and qualified, relied on by ANL are plainly accorded for occasions where the publisher need not be acting out of any duty or interest, and where the publisher is not required to have any belief in the truth or falsehood of the document of which he is publishing an extract, or of what is said by counsel or anyone else in the course of the proceedings of which he is publishing a report. Lord Diplock referred in passing at p150A to "the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person". But he did not refer to the occasions which are the norm, not the exception, in statutory privilege, where the publisher (being under no duty) chooses to pass on, without endorsing, defamatory statements in which he has no

belief. In statutory privileges it is the public interest that provides the basis of the legislative purpose, not the interests of the publisher, still less any duty of the publisher.

195. This gives rise to the question: since a person's motives will normally be inferred from what he does, and since absence of belief in the truth of what is published is not the test, from what can malice be inferred in the case of statutory qualified privilege?

196. Mr Warby submits that it is unclear what test Mr Bennett is contending for. But he does not make an affirmative case on what the test might be in cases of statutory privilege, other than the test in *Horrocks v Lowe*, which he submits is the only test.

197. Apart from the lack of authority, there is a practical difficulty for counsel and the court in approaching this question. As Mr Warby points out, if the defence of qualified privilege has failed, the question of malice does not arise. Earlier in this judgment I have found that the defence of qualified privilege does fail. So counsel and the court must approach the issue of malice on the footing that the conclusions reached earlier in the judgment are wrong. But if so, the error could be at any of the stages of the argument, and it is difficult to consider all the multiple possibilities. The issues raised by malice in this case are already complicated enough, as set out in para 180 above.

198. It may be, however, that I should consider the position on the footing that the reasoning in para 98 above is wrong in assuming at that stage of the inquiry knowledge on the part of the defendant. This case would be closer to *Tsikata* if a copy of the Particulars of Claim obtained by ANL had come into its hands as a stranger who did not know that it had been obtained under CPR r.5.4C, and so neither knew or nor ought to have known that it was implicit in its being available that the claim was disputed by the defendants to the Penthouse action. That did not seem to me to be the right approach, not least because a person who obtained the Particulars of Claim and published an extract from them, without knowing that they had been made available under CPR r.5.4C, would be publishing without knowing that he might have a defence under s.15 of the 1996 Act. It would have to be assumed that he had only discovered the source of the document after publication, and obtained the statutory defence as a windfall. In *Tsikata* the high status of the report in question was apparent from its content. It was the product of an inquiry, not the untested partisan allegations of a claimant.

199. If that alternative analysis be the right one (and not the one on which I found the defence of qualified privilege to fail), then the fact that S and Mr Watkins did know that the document had been obtained under CPR 5.4C would become relevant to malice. It is, of course, Mr Bennett's primary case that malice should not arise in the present case because the defence of qualified privilege fails at an earlier stage.

200. Mr Bennett submits that if malice does arise, then the test for malice in the statutory privilege here in question can be derived from adapting the test in the duty/interest cases. He takes the following text from *Roberts v Bass* [2002] HCA 57, 212 CLR cited in Gatley para 17.16 and adapts it as follows:

> "Failure to inquire is not evidence of recklessness unless the defendant had some indication that ~~what he or she was about to~~

> ~~publish might not be true~~ <u>the summary of the contents of a Particulars of Claim, which he or she is about to publish, might be contradicted in a defence</u>".

201. In the case of a particulars of claim obtained following the service of an acknowledgement of service, there will always be such an indication. Mr Bennett then argues that a failure to act as a responsible journalist should suffice to prove malice in this context. For this he cites from the decision of the New Zealand Court of Appeal in *Lange v Atkinson* [2000] NZCA 95, paras [45] to [48] which were cited by Eady J in *Lillie & Reed v Newcastle City Council* [2002] EWHC 1600 (QB) at para 1292, the conclusion of which is:

> "No consideration and insufficient consideration are equally capable of leading to an inference of misuse of the occasion. The rationale for loss of the privilege in such circumstances is that <u>the privilege is granted on the basis that it will be used responsibly</u>".

202. Mr Bennett submits that there is a wide spectrum of states of mind: dominant improper motive at one end and recklessness/lack of positive belief in the allegation complained of at the other.

203. Mr Warby submits that reference to these two cases is of no assistance. Neither is authority for the proposition that failure to act as a responsible journalist is malice.

204. I turn to the discussion in Gatley. The editors discuss malice in the context of statutory privilege at para 17.6, and again under the heading "Reports" at para 17.15.

205. The paragraph 17.6 is as follows:

> "The approach which rests malice upon improper motive perhaps makes it easier to explain why mere absence of positive belief in truth is not malice (there must be knowledge of or reckless indifference as to falsity) and why, although the intention of the defendant is not determinative of the meaning of the words complained of, that intention does govern the question of whether he was malicious. The reason why the significance of improper motive has come to be questioned may be the frequency of litigation against the press. Malice is of no significance in cases about the "media privilege" created by *Reynolds v Times Newspapers Ltd*, where the main issue is reasonable conduct. Where the press relies on "traditional" qualified privilege it is likely to be of the variety (predominantly statutory) which is concerned with reporting official or quasi-official decisions and determinations. There is a basic requirement that the report be fair and accurate but once that is shown it is rather unlikely that a case of malice could be made out anyway. The newspaper is not likely to have reason to believe that what it reports may be untrue, nor to have a purpose of injuring the claimant (as opposed to reporting news). Indeed, even if the newspaper is conducting a

"campaign" against the claimant it is thought that the courts should not be receptive to argument that it was actuated by an improper motive except in the clearest possible case, since there is a clear Parliamentary intention that it is in the public interest that material of this type should be made widely known. In other words, in media cases we have (1) a new type of privilege to which malice is irrelevant and (2) a "traditional" privilege which is theoretically qualified but in practice is close to absolute."

206. The paragraph 17.15 is as follows:

> "The object of the qualified privilege which attaches by common law and by statute to a fair and accurate report is the information of the public. [*Annaly v Trade Auxiliary Co* (1890) 26 L.R.Ir. 394 at 403]
>
> > "But if you can infer from the circumstances attending the publication that it was really made not with a view to the information of the public, the publisher will be liable in damages to the person whose character he has injured." [Hannen J. *in Salmon v Isaac* (1869) 20 L.T. 885 at 886.]
> >
> > "If a newspaper publishes a correct report, but not *bona fide*, for the purpose of injuring a person, and thus with malice, the publisher is liable." [*Hutchison v Robinson* (1900) 2 N.S.W.L.R. 130 at 145]
>
> As is explained below, the traditional concept of malice is nowadays of limited significance in media cases. [para 17.21] However, where the defendant assumed the character of a reporter, and sent to several local newspapers a report (containing matter defamatory of the plaintiff) of a case in which he had acted as solicitor for the other party, and the jury found that the defendant, in sending the report to the newspapers, was activated by malice towards the plaintiff, it was held by the Court of Appeal (affirming Cockburn C.J.) that the plaintiff was entitled to judgment, although the jury found also that the report "was in substance a fair report". [*Stevens v Sampson* (1879) 5 Ex D 53] Similarly, the privilege attaching to the publication of a fair and accurate copy of a register open to public inspection [see paras 15.35 and 16.11] will be destroyed on proof that the defendant published the copy or extract:
>
> > "from an indirect motive, *e.g.* for the purpose of extorting money, or if there were any actual malice, *e.g.* if the publication were to gratify a feeling of revenge … but as long as the publication is *bona fide* and without actual malice it is privileged." [*Searles v Scarlett* [1892] 2 QB 56 at p60]"

207. *Stevens v Sampson* (1879) 5 Ex D 53 was decided at a time when absolute privilege applied to words spoken in court, but not to reports of proceedings in court (p55). Reports were protected only by qualified privilege. The passage in Gatley para 17.6 may suggest that the case should be decided differently today. In *Stevens* the report is short, and since it was a jury trial, it is not said what facts had been found. The evidence of an improper motive appears to have been no more than the simple fact that the defendant had been solicitor acting for the plaintiff in the proceedings the subject of the report, while the plaintiff in the libel action was the debt collector employed by the other party to that case. But it may be that there was other evidence before the jury.

208. There is a further passage from Gatley which is included in para 16.4, which relates to fairness and accuracy. The editors add:

> "However, there is no requirement of contemporaneity under the Schedule. In that context it seems that the requirement of fairness and accuracy is to be determined solely by reference to the time at which the matter reported first appeared. It might be argued that if there is a subsequent republication which is misleading in the light of subsequent developments the protection of privilege is lost because such a "partial" publication may not be for the public benefit or there might be evidence of malice, though care is needed not to impose unreasonable burdens on the holder of widely accessible information [footnote 42]."

209. Footnote 42 includes this example:

> "C is convicted of fraud and his trial is widely reported. Six months later his conviction is overturned because he was the victim of perjured evidence. D out of spite then publishes an accurate account of the original trial. That is clearly malice. But it may be unreasonable to expect the holder of widely accessible but out of date information to be in possession of all subsequent relevant information (*e.g.* where the matter took place abroad) or to expect him to do anything about it."

210. There is another related passage in Gatley at para 14.16, to which there is a cross reference in para 16.4, one of the paragraphs relied on by Mr Warby. In para 14.16 headed "Existence of Privileged Occasion to Be Judged at Time Statement Is Made" the editors refer to *Bray v Deutsche Bank AG* [2008] EWHC 1263 QBD and comment at footnote 118:

> "The material appears to have been on the defendant-originator's website. If at the time of the republication it could be shown that he had discovered it to be untrue that should be malice".

211. I accept Mr Warby's submission that there is little help to be derived from *Lange*.

212. In my judgment the statement of the law in Gatley, as set out above, is correct. If the tests in the Schedule to the 1996 Act (fairness and accuracy) in s.15(3) (public concern and public benefit) were satisfied in this case, contrary to what I have decided above, then malice could be established in principle by proof that ANL knew that the claim was disputed but knowingly published the false statement that it was not disputed, or if ANL knew that the form in which it reported the extract from the Particulars of Claim (or, in the case of the second article) the hearing at Southwark Crown Court was misleading or unfair. There is no suggestion in the present case that anyone had a motive such as revenge or extortion or anything of that kind, so I leave aside consideration of cases such as those discussed in Gatley at para 17.15.

213. The 1996 Act s.15(1) makes clear the intention of Parliament that malice should still be available to a claimant to rebut statutory privilege. Paras 11.4A to 11.6 do plead actual knowledge, so I would not strike out those paragrapshs in any event. Paras 11.1 to 11.4 do plead recklessness, which in law amounts to the same thing. But in any event, given the fact that there is no authority on the meaning of malice in s.15(1), or the test for proving it, I would not consider it right to strike out the plea of malice in this case. It follows that, with hindsight, I consider that permission to amend was rightly given.

The position up to 17 June 2011

214. The plea of malice for the period up to 17 June includes the following two bases. In para 11 it is pleaded that the misuse of the statutory privilege was that ANL reported on the contents of the Particulars of Claim in the Penthouse action while omitting to report upon either the existence of a Defenceor the gist of it. The second basis, in para 11.4A, is that Mr Watkins knew that Mr Qadir had not "declined to comment", but nevertheless published that he had declined to comment.

215. The Acknowledgement of Service and the Defence are separate documents. In para 11.1 of the Particulars it is correctly pleaded that it is implicit from the filing of an Acknowledgment of Service in accordance with the CPR that a defendant intends to contest the claim either by defending all or part of it, or by contesting jurisdiction. In the Rejoinder ANL does not specifically address this with either an admission or a denial, but it pleads that S knew that often, but not always, a defence would be served. I accept that plea as factually correct, in that it is common for a defence not in fact to be served after an Acknowledgment of Service. This may be either because the claim is abandoned or settled out of court, or because the defendant (having investigated the facts, or taken advice) comes to realise that he is not in a position to serve a defence as he wished or believed that he could.

216. In paras 11.2 to 11.4 the plea of malice focuses on the Defence, which had been filed on 1 April, some five weeks before the publication complained of. In the Rejoinder it is admitted by ANL that there was no attempt prior to the initial publication, by S or any other member of ANL's employed staff, to check whether a defence had been served. Here Mr Watkins has very properly admitted that it was irresponsible for ANL not to have obtained the Defence from the court. The fact that he attributes the fault to S does not mean that I also must attribute it to S (and I do not do so). For the purposes of the plea of malice against ANL, it does not matter which of them was at fault, since one of them admittedly was.

217. But irresponsibility is not of itself malice, even though it can in some cases be evidence from which malice may be inferred. In this case there is no evidence that anyone acting for ANL knew before 17 June that the Defence had been filed. I find that they did not know before that date.

218. So in order to succeed Mr Qadir must prove that someone acting for ANL was reckless, in the sense of not caring whether it was true or false whether a Defence had been served. Mr Bennett points to the serious harm that would be likely to follow publication, and to the e-mails of 6 May which show that S and Mr Watkins appreciated the significance of the allegations for Mr Qadir's career (para 21 above). He also points to the e-mail of 6 May in which Mr Watkins expresses the view that Mr Qadir will have to serve a defence ("I find it hard to believe they will want him on board for long unless he can show the claims in the writ are a complete fabrication").

219. In my judgment the evidence does not establish recklessness, however serious the mistake. Mr Watkins went to some trouble to contact Mr Qadir and other persons involved in the Penthouse claim. I find that he did care that what he was about to publish should be true. I think it likely that S also cared. The fault was irresponsibility, which in this case I equate with carelessness, not recklessness. Recklessness in this context is not an extreme form of carelessness, but the state of mind in which a person is indifferent to whether something is true or false.

220. Para 11.4A of the particulars of malice was, as I have found, also false in that Mr Qadir had not declined to comment in response to Mr Watkins telephone messages. He had not received the messages. But in the period up to 17 June in my judgment Mr Watkins was not being either dishonest or reckless. He was careless. He jumped to a conclusion which was wrong, and which was irrational and reached without adequate inquiry and on insufficient evidence (*Horrocks* p153A).

221. If Mr Watkins had been more careful he could have written that Mr Qadir could not be reached for comment, rather than that he had declined to comment. That would have been the correct thing to say about the attempts Mr Watkins had made to obtain Mr Qadir's comments, although that would not have cured the omission to mention that the claim was disputed, as was implicit from the Acknowledgement of Service.

The position after 17 June 2011

222. The plea of malice in relation to the period after 17 June is set out in paras 11.5 and 11.6 of the Amended Reply. The facts are not in dispute. In the Rejoinder ANL admits that by its employed staff it was aware of the existence of the Defence from 17 June 2011, and that it obtained a copy of the Defence in the week commencing 20 June 2011, but did not update the online version of the article to reflect this, but continued to publish the first article unamended until 8 September.

223. This is not a case of an event occurring subsequent to the initial publication of words complained of which renders the initial publication inaccurate. This case is not comparable with cases (referred to by Ward LJ in *Tsikata* at p671a, para 87 above and the passage from Gatley cited at para 209) where, for example, an allegation made on the first day of a trial, and reported in a newspaper on the second day, is admitted to be false on the third day. What happened in the present case is that the initial

publication was false and misleading by omission at the time when it was initially published, but the publisher only came to know of the falsity on a subsequent date.

224. The plea in paras 11.5 and 11.6 is that ANL knew as from 17 June that what it had already published, and was continuing to publish online, was false. It cannot be said of a defendant who has filed a defence that he has not commented upon the allegations in the Particulars of Claim.

225. Mr Watkins gave evidence to explain this. Mr Watkins states in his evidence that he became aware of the existence of the Defence on 17 June. S had e-mailed him to that effect on that day that she had learnt from the court that the Defence was filed on 1 April. Moreover, as recounted above, Mr Watkins was actively investigating the position on 17 and 18 June while preparing for the publication of the second article on 19 June, which refers back to the first article.

226. First Mr Watkins stated that in the print version (but not the online version) of the second article he had ensured that ANL did publish the words which appear above under para [10] of the second article ("Last night Qadir's lawyer described those allegations as 'spurious'").

227. These words were added to the online version on 2 July. But even then ANL did not publish that a Defence had been served, although by that time Mr Watkins had received and read a copy of it. Mr Watkins was asked what he had done to correct the online version of the first article. To this question he replied:

> "MailOnline is a complete distinct entity within Associated Newspapers. I have no role there or authority there and practically zero contact with MailOnline".

228. Mr Bennett pressed Mr Watkins suggesting that it was his duty as a responsible journalist to tell MailOnline that Mr Qadir had in fact filed a Defence. Mr Watkins answered:

> "… I know this is [sic] obviously seems odd to you, but the contents of MailOnline… in my day to day life are simply not my concern. I am working for the Mail on Sunday, and I am sorry, I can't …And I am saying that if it had crossed my mind then I would agree with you that I should do something. It genuinely did not cross my mind what is going on on MailOnline".

229. I accept Mr Watkins' evidence as truthful in that it did not cross his mind to tell MailOnline what had happened. But I do not accept that that assists ANL.

230. This does not establish what motive he may have had for doing nothing about the mistake that he now knew that he had made. And as Mr Warby has observed, an improper motive is not pleaded. It is not apparent to me what motive Mr Watkins may have had for doing nothing when something needed to be done. But in my judgment it was more than "odd": it was recklessness on his part. But I do not need to find what his motive was. For whatever reason, he did not care whether MailOnline continued to publish the first article in a form which, through want of responsible journalism,

continued to state falsely that Mr Qadir had made no comment on the allegations in the Penthouse claim.

231. The plea of malice succeeds on this point for the period from 17 June. This is a very serious finding to make. But I do not consider that it is a finding which interferes with a journalist's right to freedom of expression. People in positions of responsibility are often reluctant to admit that they have done wrong. It is a characteristic of all institutions, and many individuals, to act as if the good reputation of the institution or individual is best preserved by not admitting failings, rather than promptly and candidly owning up to them, and, where appropriate, apologising. It is thanks to the press fulfilling the watchdog function which is so important in a democracy that the public know how reluctant some people in a position of responsibility are to admit that they have done wrong. It is one of the common practices of the press, including ANL in particular, to run a series of articles on a particular wrong attacking those responsible until they frankly admit their responsibility. But journalists and newspaper publishers are themselves in a position of responsibility. And unfortunately the press are as susceptible as any other institution, to the failing of not admitting that they have done wrong. ANL has exhibited this failing in this case, continuing to publish after 17 June what by that date Mr Watkins knew to be false until the first article was eventually taken down on 8 September. And there is a particular mischief in this institutional failing in the case of the press. It derives from the fact that, with some honourable exceptions, journalists are less inclined to pursue this failing when it is demonstrated by fellow news publishers and journalists than when it is demonstrated by other institutions or individuals. So the press may get away with refusing to admit they have done wrong, when others would not get away with it. Those whose reputations have been wrongly damaged in such circumstances are left with the daunting prospect of suing for libel, as Mr Qadir has in this case. And the public interest is damaged by misinformation as to the reputation of those who might otherwise be thought fit to carry out duties of benefit to the public.

232. Para 11.4A of the particulars of malice contains the allegation that Mr Watkins knew that Mr Qadir had not declined to comment. I have found that Mr Qadir had not declined to comment in response to Mr Watkins telephone messages. He had not received the messages. But I accept that Mr Watkins did believe at all material times that Mr Qadir had declined to comment, albeit in my judgment he had no evidence to support that belief. So the plea of malice does not succeed on this point.

233. I find that the position after 20 June is the same as that in the period 17 to 20 June, save that Mr Qadir's case is stronger in so far as Mr Watkins had read the Defence.

234. It follows from the above that in respect of the online edition the case in malice succeeds for the period from 17 June onwards, but not in relation to the period up to 17 June. It was wrong of ANL not to correct the online version of the first article to make clear that Mr Qadir had served a Defence denying all the allegations made against him in the Penthouse action.

The plea of malice in relation to the second Article

235. The plea of malice in relation to the second article, as amended, is set out in the Re-Amended Reply as follows:

"**69B** Neither Simon Watkins, the author of the article, nor any other journalist employed by or acting as an agent for the Defendant attended the court hearing upon which the second article was purportedly based.

69C Mr Watkins based the article upon information gained from an article called "*Wider role of professionals cannot be ignored: court*", published on www.ftadviser.com ("FT Adviser"), and/or from an article published by the *Estates Gazette* about the prosecution of Mr McGarry. Alternatively, he was in possession of both articles and had read them at the time when he wrote the second article.

69C.1 The FT Adviser article reported some of the comments made by Mohammed Khamisa, however, it also reported that Judge Martin Beddoe: "rejected the claims, stating that Mr Qadir did not lend any money, adding that the banks had relied on McGarry's valuations."

69C.2 The Estates Gazette article reported some of the allegations made by Mr Khamisa against the Claimant but also reported statements made by Judge Martin Beddoe which contradicted them. These were:

(a) "Interrupting that submission Judge Martin Beddoe said: "This fraud could not have happened without the complicity of your client providing the valuations he did. The complicity or otherwise of anyone else I cannot possibly determine."

(b) "Interrupting Khamisa again, the judge said: "Irfan Qadir did not lend any of the money advanced on these deals; that decision was made by the credit committee of the banks. And from the evidence I heard that committee relied on the propriety of information given to them by Mr McGarry and the solicitors."

69D Despite Mr Watkins' knowledge of those matters set out in paragraphs 69C.1 and 69C.2 above, he deliberately or recklessly excluded them from the second article. He thus deliberately wrote and published or recklessly wrote and published a false and/or a misleading report about what had happened during the court hearing by excluding the authoritative rebuttal by the trial judge of the allegations made by Mr Khamisa. In doing so Mr Watkins was actuated by malice:

(a) He deliberately and knowingly published a false report of the court hearing which was unfair to the Claimant rather than a balanced report which was fair to the Claimant.

(b) Alternatively, he acted recklessly, not caring whether what he published was true or false, or with wilful blindness, ignoring the exculpatory statements made by the trial judge.

> **69E** It is a misuse of the type of qualified privilege relied upon by the Defendant to use it to report upon one-sided allegations made in court when the writer and/or publisher knows that those allegations were tempered by balancing statements made by the presiding judge. Mr Watkins deliberately gave an unfair and inaccurate report of what had been said in court about the Claimant. In this respect, he was further actuated by malice."

236. The law is as discussed above in relation to the first Article.

237. Mr Watkins states that he learnt of Mr Khamisa's allegations on 16 June when S informed him of them. She did not provide any further contribution to the second article which is material to the issues I have to decide. No complaint is made against her in relation to the second article.

238. Mr Watkins states that the *Mail on Sunday's* personal finance team had been following the Dunlop Haywards case and reporting on it, but not on the mention of Mr Qadir. Mr Watkins saw an article from the FTAdvisor and he made the connection with the lead that S had given him. This article had been published on Thursday16 June. He states that he based the second article on the FTAdvisor article. His witness statement includes the following:

> "37. The key elements in my mind when I wrote the second article were that (i) Mr Qadir had not been charged with any offence related to the Dunlop Haywards case (we made this clear in the opening paragraph), (ii) he had been named as being involved in various fraudulent transactions, although it was not clear how he was allegedly involved, (iii) the allegations were made by the defence barrister in mitigation, and (iv) the Judge made comments that went to the question whether such allegations were relevant to McGarry's mitigation, but not whether the allegations were true or false".

239. Mr Watkins goes on to say this about the Judge's words quoted by FTAdvisor:

> "I included a reference in the article to the Judge's comment that Mr Qadir made no lending decisions, as follows: 'It is understood that Qadir made no lending decisions at either bank linked to the Dunlop Haywards case'. This point was therefore addressed in the article. In terms of the Judge rejecting the claims made by Mr Khamisa, I was aware that the claims were being made in the context of Mr McGarry and Mr Afzal's sentencing hearing. Mr Qadir was not a party to those proceedings, and so the truth or otherwise of Mr Khamisa's claims were clearly not an issue that the court had to decide. My view from reading the FT Adviser article was that the

> Judge was merely saying that such claims were not relevant to the matter in hand – McGarry's sentence – and not that they were untrue. As such I did not believe that the comments made by the Judge answered the allegations made by Mr Khamisa. This is why I did not include a direct reference to them. I did, however, include Mr Qadir's lawyer's denial of the allegations from when I contacted him… I therefore believed that I had given Mr Qadir's side of the story in the article".

240. Mr Watkins denies that he deliberately or recklessly wrote and published a false and/or misleading report about what had happened during the court hearing. He states that the reality is that he simply made an editorial judgment about what it was relevant to include, with the intention of making a fair and accurate contemporaneous report of the court proceedings. He states that he still believes that the article is accurate and balanced.

241. Mr Bennett cross-examined Mr Watkins on the words in the FTAdvisor article which appear in para [13] of that article, cited in para 132 above ("However the Judge rejected the claims…"). Mr Watkins replied that because it was a sentencing hearing the Judge was rejecting the claims only as relevant to mitigation.

242. Mr Bennett challenged Mr Watkins saying that was an explanation made up after the event. Mr Bennett suggested that the explanation in para 37(iv) of his witness statement came from the *Estates Gazette*. Mr Watkins denied having read the *Estates Gazette*. However, I note, although it was not put to Mr Watkins, that the relevant words from the *Estates Gazette* were quoted to ANL by Mr Qadir's lawyers in their letter of 1 July 2011, as cited in para 144 above, together with ANL's response cited in the next paragraph, which is to a similar effect as Mr Watkins witness statement of June this year. No similar words appear in the FTAdvisor article. Mr Watkins stated that he was aware of these words in the *Estates Gazette* article, because that article was included with the documents disclosed in this action by Mr Qadir.

243. In considering whether the report of the proceedings in Southwark Crown Court was fair and accurate it was necessary to compare the report with the transcript of the hearing. The fact that neither Mr Watkins nor anyone else from ANL was present in court is irrelevant. If they chose to rely on a secondary source, they were entitled to do so, but at the risk that if the secondary source was unfair or inaccurate, that would be no defence to ANL. But in considering whether Mr Watkins was malicious what matters is his own state of mind. So for this purpose it is necessary to consider what he had before him. I accept his evidence that he worked from the FTAdvisor article, and did not read the *Estates Gazette* until after he had written the second article.

244. Mr Bennett submits that para 37(iv) of Mr Watkins witness statement cannot be correct. What he states there is "(iv) the Judge made comments that went to the question whether such allegations were relevant to McGarry's mitigation, but not whether the allegations were true or false". That cannot be correct because the FTAdvisor article contains nothing which leads the reader to understand that the Judge made comments which did relate to whether the allegations were true or false. Only the *Estates Gazette* article, and thus the letter from Mr Qadir's lawyer on 1 July contain words which suggest that.

245. Mr Warby submits that the omission to report the Judge's remarks to Mr Khamisa is at least equally consistent with an honest editorial decision made on the grounds Mr Watkins gave in evidence as it is with an intention to publish an unfair report. Mr Warby also submits, correctly in my view, that Mr Watkins is correct in law in saying that the Judge was not making a finding of fact in favour of Mr Qadir. But what the Judge was doing was trying to put right an unfairness by stating facts, which he knew as the trial judge in the earlier trial, which stated the case for Mr Qadir.

246. In my judgment Mr Watkins' explanation of why he did not report the Judge's statement that "Mr Qadir did not lend any money" is not credible. There was nothing in the information before him at the time he wrote the article to suggest that the Judge rejected Mr Khamisa's submission only on grounds of relevance. If relevance to mitigation had been the Judge's only objection to Mr Khamisa's allegations, for him to say that "Mr Qadir did not lend any money" would itself have been irrelevant to his objection.

247. Nor do I find credible Mr Watkins' explanation:

> "I included a reference in the article to the Judge's comment that Mr Qadir made no lending decisions, as follows: 'It is understood that Qadir made no lending decisions at either bank linked to the Dunlop Haywards case'. This point was therefore addressed in the article."

248. The words "it is understood" do not purport to be a report of the Judge's words. Rather they are a description of Mr Watkins' state of mind derived from a source which is not identified. The argument is that words that do not purport to be a report of proceedings can be relied on as making fair a report which is otherwise unfair. I do not accept that that can be right, at least on the facts of this case.

249. The fact is that whatever Mr Watkins chose to write he wrote deliberately. What he wrote is notably less fair to Mr Qadir than would have been a report that included the Judge's words.

250. There is much force in Mr Warby's submission that where a decision is an editorial one it is difficult for the court to be satisfied that a journalist has been deliberately unfair.

251. But the second article in general, and the omission to report the Judge's words, do not stand alone in this case. By the time the second article was published on 19 June Mr Watkins had found out about ANL's earlier mistake in which he was involved, namely to state that Mr Qadir had declined to comment when in fact he had filed a Defence. But in the second article Mr Watkins did not include a candid correction of that error, and he never caused it to be corrected on MailOnline. There is no suggestion that anyone other than he could have had the knowledge required to cause a correction to be included in the MailOnline version.

252. Looking at the evidence as a whole, again I find that Mr Watkins was deliberately publishing a report that was unfair to Mr Qadir in omitting to attribute to the Judge the statement that "Mr Qadir did not lend any money".

253. In the event, if my finding that the report was not fair is correct, then a finding that it was written with deliberate unfairness adds nothing to the preliminary issue that I have to decide.

CONCLUSION

254. As to the First Article the defence of qualified privilege fails under both under the 1996 Act s.15(3) and the common law because the words complained of were a matter which was not of public concern and publication of which was not for the public benefit in that they omit to state that the claim is disputed, and include the misinformation that Mr Qadir had declined to comment: paras 101 to 102 and 113 to 114 above.

255. As to the Second Article, the defence of absolute privilege fails because that part of the article which is a report of the proceedings in Southwark Crown Court is not a fair or accurate report: see paras 169 to 172 above. And if, contrary to my view, the defence of absolute privilege ought to fail in respect of the non-contemporaneous online report of those proceedings on the ground that it was not contemporaneous, then the defence of qualified privilege would fail under the 1996 Act s.15(3) because the words complained of were a matter which was not of public concern and publication of which was not for the public benefit in that they omit what the Judge said in rejecting counsel's submission: see para 174 above. And in so far as the Second Article contains a reference back to the First Article, the defence of qualified privilege ought to fail because the Second Article is not an extract from the Penthouse claim. It therefore follows that, save for the limited plea of justification in respect of the reference back to the First Article, there is no defence to the words complained of in the Second Article.

256. If these conclusions are correct, then the question of malice does not arise. But in case these conclusions are held in another court not to be correct, I make the following findings. As to the First Article, the plea of malice succeeds in respect of Mr Watkins for the period from 17 June (but not in relation to the period ending 17 June): see para 234 above. As to the Second Article the plea of malice succeeds for the reasons set out in para 252 above.