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Case No: HQ04X03970

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2006

Before :

THE HON. MR JUSTICE EADY

- -

Between :

Rupert Lowe	**Claimant**
- and -	
Associated Newspapers Ltd	**Defendant**

- -
- -

Desmond Browne QC and David Sherborne (instructed by **Mishcon de Reya**) for the **Claimant**
Victoria Sharp QC and Sarah Palin (instructed by **Taylor Wessing**) for **the Defendant**

Hearing dates: 15th, 16th and 19th December 2005

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE EADY

The Hon. Mr Justice Eady :

Introduction

1. On 15th December 2005 there were listed before me no less than 16 applications in this litigation, although it emerged that some of these were premature in the sense that the outcome could only be determined after others were resolved. On 19th December, I was able to give certain rulings, although I indicated that the reasons would follow in January. At that point, however, although Mr Browne QC, for the Claimant, was ready to proceed with his detailed points on the pleading issues, Miss Sharp QC appearing on the Defendant's behalf took the view that she had not had sufficient notice of some of Mr Browne's arguments to be able to address them adequately in the remaining time. Accordingly, with the parties' eventual agreement, I decided that I would resolve the outstanding issues in the light of any further written submissions which counsel wished to place before me, on a sequential basis, during the Christmas vacation. That round of submissions came in dribs and drabs, eventually petering out only on 30 January 2006.

The nature of the claim

2. The action was brought, by a claim form dated 8th December 2004, on behalf of Mr Rupert Lowe who is the chairman of Southampton Football Club. He sues Associated Newspapers Ltd in respect of an article published on 27th August of that year by Mr David Mellor under the heading "I'm giving you the Lowe down, Rupert's really lost it now". The words complained of are relatively short and, submits Mr Browne, correspondingly straightforward. He argues that the Defendant's case requires to be cut down to size because the issues raised are so complicated and extensive that they are out of all proportion to the allegations made. Naturally, it is always an attractive argument, in any libel action, that time and money could be saved by concentrating on the real issues and by the court exercising its case management powers. Unfortunately, questions of principle need to be given priority over case management, and arguments based on the "real issues" between the parties sometimes beg the question of what those issues are.

3. One of the difficulties about the present case is that the article is written in such an obscure way that it is difficult to divine its message or messages. At this stage, the court must address the issues of meaning, and any possible defences, in the light of *any* imputations which the words complained of are capable of bearing. When an article is opaquely written, therefore, allowance has to be made for this; defences may be advanced on the basis of any meaning which the words are reasonably capable of bearing. Although it may seem unattractive, it follows that an author or his publishers may sometimes take advantage of the lack of clarity in his writing to prolong and complicate the issues, should there be a claim for libel. That is unavoidable, although I am conscious that close scrutiny is required of any defence in order to ensure that impermissible advantage is not being taken.

4. The words complained of are as follows:

> "WHAT will Rupert Lowe do if Southampton are thrashed by Chelsea at Stamford Bridge tomorrow?

> 'Don't panic,' advised Corporal Jones, but Rupert doesn't listen. He couldn't wait to get rid of Dave Jones on the basis he couldn't handle the manager's job while he faced charges of alleged child sex abuse for which he later cleared his name.
>
> Sad, because Lowe has been on a surprising high for most of his time with the Saints. But his arrival at the club was hardly glorious. He reversed Southampton into a care home company he and a mate owned.
>
> A manoeuvre that struck many fans as just a repellent piece of financial chicanery. It worked because existing board members benefited more than they would have done if a rival bid from a far wealthier life-long fan, Gavyn Davies, had been accepted".

5. Thus, it can be seen that the offending allegations fall into two parts. First, there are those about the former manager, Mr David Jones, whatever they mean. Secondly, there is the plain accusation of "repellent" financial chicanery. The natural and ordinary meanings pleaded on the Claimant's behalf are that:

> "He had obtained ownership of Southampton by underhand and dishonest means, and he had acted in a wholly unreasonable manner by seizing the opportunity unilaterally to sack Dave Jones as Manager of Southampton using the fact that he was being investigated for charges of alleged child abuse as a false but convenient pretext."

The meaning with regard to the takeover had been expressed in different words in the letter of complaint dated 17 September 2004: "our client was only able to gain control of the Club through irregular means". It will be noted, however, that whichever formulation is used the defamatory sting in that respect is expressed generally by reference simply to "means". It is not confined to the mere use of a reverse takeover.

6. Secondly, although Miss Sharp says that the Claimant and his advisers did not appear to notice an implication of dishonesty at that time, I do not find any inconsistency. "Irregular" is undesirably vague in the context of defamation proceedings, but it is certainly capable of embracing dishonesty, according to context. If a defendant sets out to plead a case of "irregularity", whether in the context of justification or fair comment, it should be made clear whether dishonesty is alleged and, if not, precisely what is the defamatory sting (falling short of dishonesty) which it seeks to support.

The Defendant's pleaded case

7. The approach of the Defendant has been to advance its primary case on the basis of fair comment upon a matter of public interest. In the alternative, however, a defence of justification is advanced to meet the possibility that the court finds ultimately that the allegations consisted of fact rather than comment.

8. In paragraph 6 of the re-amended defence the Defendant has pleaded the following comments in accordance with *Control Risks v New English Library* [1990] 1 WLR 183:

> 6.1 The Claimant showed a lack of support and loyalty towards David Jones and acted precipitously in replacing him as manager while he faced charges of child sex abuse for which he later cleared his name;
>
> 6.2
>
> 6.2.1 That, by agreement with the board of Southampton Football Club Ltd, the Claimant obtained Southampton Football Club through a reverse takeover by his company, Secure Retirement plc; and that
>
> 6.2.2 This manoeuvre by those involved, including the Claimant, was a repellent piece of financial chicanery.

It is important to note, however, that the Defendant has gone so far as to plead in the alternative that it will defend, should it prove necessary, the Claimant's pleaded meanings (as set out above) on the basis of fair comment. This may be difficult to sustain, since "underhand and dishonest means" and "false but convenient pretext" would appear to be factual in character. Nevertheless, such a plea requires to be taken at face value and thus to be scrutinised in order to see whether the particulars are such that a person could indeed honestly come to the conclusion, in the light of them, that the Claimant had been dishonest.

9. In its current form, the alternative plea of justification is put forward in relation to the following *Lucas-Box* meanings:

> 9.1 That the Claimant showed a lack of support and loyalty towards David Jones and acted precipitously in replacing him as manager while he faced charges of sexual abuse of children for which he later cleared his name.
>
> 9.2 That the Claimant, together with the directors of Southampton football club, was involved in and responsible for a repellent piece of financial chicanery in that the reverse takeover by which he and his company took control of Southampton football club was an irregular, cunning and clever deal, dodge or manoeuvre which eventually benefited him, his company and the existing directors of Southampton football club, at the expense of the club and its fans. Alternatively that there were reasonable grounds to suspect the foregoing.

A considerable number of particulars are set out in the course of the pleading, which are relied upon for the purpose both of justification and fair comment.

The attack on the *Control Risks* paragraph

10. It is convenient to address first the application put forward by Mr Browne on the Claimant's behalf that the following words should be struck out of the Defendant's *Control Risks* paragraph, namely "the Claimant showed a lack of support and loyalty towards David Jones". It is said that there was no reference, explicit or implicit, in the words complained of to found this alleged meaning. In my judgment, however, this meaning should be permitted to stand as one which the words are at least capable of bearing. There is no doubt that Mr Lowe is being criticised, on some basis, for "getting rid of" Mr Jones. On the other hand, it is by no means crystal clear to the

reasonable reader precisely what the basis of that criticism is. It obviously relates to Mr Lowe's conduct as an employer towards an employee. It seems to be suggested that, at the material time (on or about 26th January 2000), he acted inappropriately towards him. Miss Sharp argues that the imputation, or at least a possible imputation, is that Mr Lowe "should have stood by his man". A reasonable reader might infer that Mr Lowe should have supported Mr Jones in his time of difficulty beyond the date of his suspension and that, in not doing so, he failed to give him the loyalty to which he was entitled. I cannot accept that the words are incapable of conveying that meaning.

11. Mr Browne also argues that Mr Mellor did not suggest in his article that "the Claimant and the old board of Southampton had entered into a collusive or corrupt conspiracy, whereby they deliberately collaborated to use a takeover mechanism which operated to the old board's personal advantage". It follows, he says, that such an allegation has no legitimate place in the particulars. He focussed especially on the words "those involved, including". Again, however, the obscure language of the article leads me to conclude that this is a possible meaning. The proposition that it "worked" because existing board members "benefited more than they would have done if a rival bid … had been accepted" is capable of meaning that this was the reason he was "allowed to get away with it". The court at this stage should only rule out such meanings as are the product of a strained, forced or unreasonable interpretation. The exercise is said to be one "in generosity, not in parsimony": *Berezovsky v Forbes Inc* [2001] EWCA Civ 1251 at [16] *per* Sedley LJ.

The relevance of the "single meaning" doctrine to fair comment

12. Next, I turn to one of the applications made on the Defendant's behalf. Miss Sharp asked me to rule that the "single meaning" doctrine has no application to the defence of fair comment. This is a novel submission and she invites me, in effect, to go further than the Privy Council in the recent case of *Bonnick v Morris* [2003] 1 AC 300, where their Lordships held that the doctrine could have no application in the context of the defence of privilege based upon *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. The matter was explained by Lord Nicholls at [21]-[22]:

> "… The 'single meaning' rule adopted in the law of defamation is in one sense highly artificial, given the range of meanings the impugned words sometimes bear: see the familiar exposition by Diplock LJ in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 171-172. The law attributes to the words only one meaning, although different readers are likely to read the words in different senses. In that respect the rule is artificial. Nevertheless, given the ambiguity of language, the rule does represent a fair and workable method for deciding whether the words under consideration should be treated as defamatory. To determine liability by reference to the meaning an ordinary reasonable reader would give the words is unexceptionable.
>
> At first sight it might seem appropriate to apply the same principle when considering whether *Reynolds* privilege affords a defence. This might appear to have the merit of consistency. But that would be to apply the 'single meaning' principle for a purpose for which it was not designed and for which it is not

> suitable. It is one matter to apply this principle when deciding whether an article should be regarded as defamatory. The question being considered is one of meaning. It would be an altogether different matter to apply the principle when deciding whether a journalist or newspaper acted responsibly. Then the question being considered is one of conduct".

13. Obviously, when the task before the court is to determine whether or not the journalist in question had a particular meaning in mind (whether as being intended or merely as a possible interpretation) at the time he published the words, there would be no point in having regard to the notional "single meaning" which operates in other contexts: see also the discussion in *Alexander v Arts Council of Wales* [2001] 1 WLR 1840 at [21]-[22] and [41]-[42].

14. Miss Sharp argues that the notion of a "single meaning" is equally inapplicable in the context of fair comment. There is no authority to support this proposition, and I do not find it surprising. It would be inconsistent with the long established objective tests applied in the context of fair comment (the rationale of which was explained by Lord Nicholls himself in the *Cheng* case, which I discuss below). There is no reason to suppose that English law in this respect is not compliant with Strasbourg jurisprudence. Nor is there any other basis on which a judge at first instance could make such a fundamental change to the common law.

15. When one is addressing the defence of fair comment, the test to apply is what the relevant defendant actually published, rather than what he intended or believed the meaning to be. As with any other defence, the first step is to identify the meaning of the words and then to consider whether the defence of fair comment has been made out. It would be hopelessly impractical to judge the validity of the fair comment defence by what the author of the words intended, thought or hoped they might convey.

The criticisms of the plea of fair comment

16. The main outstanding issue between the parties, and certainly the most difficult, concerns the Claimant's attack upon the plea of fair comment. It gives rise to a number of fundamentally important issues in the law of fair comment which may not always have been fully or satisfactorily analysed in previous cases. It is necessary to consider these arguments before going on to determine the detailed complaints about the Defendant's pleading in the light of them.

17. Mr Browne launched a wholesale attack on the way the defence of fair comment was pleaded. He argued that "the plea is so fundamentally flawed that it is difficult to identify specific passages as being objectionable". He went so far as to suggest that the pleader would need to start afresh and re-formulate the plea before it could be pursued, if at all. (This is despite the fact that on 14 June 2005 Mishcon de Reya consented to the service of the amended defence.) His criticisms were directed to the way in which the Defendant had attempted to address both the David Jones allegation and that relating to the "financial chicanery". Until the defence is in its final form, it obviously will not be possible to determine the shape of the Claimant's reply; nor to resolve outstanding issues of disclosure. Such applications therefore need to be put to one side for the moment.

18. The nub of Mr Browne's complaint was encapsulated in his skeleton argument. He pointed out that, whilst the words complained of cover at most eight short sentences, the particulars of facts on which the comments were allegedly based stretch to 37 complex and detailed paragraphs (but even more sub-paragraphs) covering some 19 pages. Again, however, it is important not to confuse arguments based on case management or proportionality with Mr Browne's more fundamental submissions on the principles.

19. It is possible to identify two main strands of authority which require to be carefully examined at the outset. Mr Browne focussed particularly upon what he described as the "attempt to introduce a welter of alleged facts and material which is nowhere referred to or indicated in the text". The question needs, therefore, to be addressed in this case to what extent it is necessary for a defendant relying upon fair comment to be able to demonstrate that the facts upon which the comment was based are to be found in the text of the words complained of. Also important, although lurking more in the background of Mr Browne's argument, is the issue of how far such a defendant has to show that the author of the words complained of was aware, at the time of publication, of the facts sought to be relied upon in the defence to support the comment.

20. To some, it may be surprising that questions as fundamental as this to the important defence of fair comment should be open to doubt. Despite its significance for freedom of speech, and despite its being one of the principal mechanisms by which English law seeks to achieve compliance with the values and priorities enshrined in Article 10 of the European Convention of Human Rights and Fundamental Freedoms, this defence has not in recent years been the subject of much attention from the appellate courts. Be that as it may, I must now focus on these issues as best I can, since they are so central to the defence and to Mr Browne's vigorous criticisms of it.

The comment must be "on facts truly stated"

21. I turn first to the debate on whether or not a defendant can rely upon facts, in support of a plea of fair comment, if they are not "referred to or indicated" in the words complained of themselves. In this context, it is convenient to start with two modern statements of the law by Lord Nicholls. In *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 201 D-E, he explained the law briefly in these terms:

> "Freedom of speech does not embrace freedom to make defamatory statements out of personal spite or without having a positive belief in their truth.
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> In the case of statements of opinion on matters of public interest, that is the limit of what is necessary for protection of reputation. Readers and viewers and listeners can make up their own minds on whether they agree or disagree with defamatory statements which are recognisable as comment and which, expressly or implicitly, indicate in general terms the facts on which they are based".

A year later, in the Court of Final Appeal of Hong Kong, similar observations were made in *Tse Wai Chun Paul v Albert Cheng* [2001] EMLR 777 at [41]:

> "The purpose for which the defence of fair comment exists is to facilitate freedom of expression by commenting upon matters of public interest. This accords with the constitutional guarantee of freedom of expression. And it is in the public interest that everyone should be free to express his own, honestly held views on such matters, subject always to the safeguards provided by the objective limits mentioned above. These safeguards ensure that defamatory comments can be seen for what they are, namely, comments as distinct from statements of fact. They also ensure that those reading the comments have the material enabling them to make up their own minds on whether they agree or disagree".

Thus, in both cases, it can be seen that Lord Nicholls regarded it as important that readers of the words complained of should have sufficient factual material before them to make an assessment of the comment and, in particular, to decide whether or not they agree with it. It will be necessary to consider what is the source for this rationale. It is important to note, as Miss Sharp submits, that in neither of these cases did Lord Nicholls apparently have the benefit of considering the decision of the House of Lords in *Kemsley v Foot* [1952] AC 345.

22. In order fully to understand the point the Lord Nicholls was making in the *Albert Cheng* case, one needs to know what he meant by "the objective limits mentioned above". These had been identified earlier in his judgment at [16]-[21]:

> "*Fair Comment: The Objective Limits*
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> In order to identify the point in issue I must first set out some non-controversial matters about the ingredients of this defence. These are well established. They are fivefold. First, the comment must be on a matter of public interest. Public interest is not to be confined within narrow limits today: see Lord Denning in *London Artists Ltd v Littler* [1969] 2 QB 375 at 391.
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> Second, the comment must be recognisable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege. Much learning has grown up around the distinction between fact and comment. For present purposes it is sufficient to note that a statement may be one or the other, depending on the context. Ferguson J gave a simple example in the New South Wales case of *Myerson v Smith's Weekly* (1923) 24 SR (NSW) 20 at 26:
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> > To say that a man's conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment.

> Third, the comment must be based on facts which are true or protected by privilege: see, for instance, *London Artists Ltd v Littler* [1969] 2 QB 375 at 395. If the facts on which the comment purports to be founded are not proved to be true or published on a privileged occasion, the defence of fair comment is not available.
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> Next, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.
>
> Finally, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views: see Lord Porter in *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449 at 461, commenting on an observation of Lord Esher MR in *Merivale v Carson* (1888) 20 QBD 275 at 281. It must be germane to the subject-matter criticised. Dislike of an artist's style would not justify an attack upon his morals or manners. But a critic need not be mealy-mouthed in denouncing what he disagrees with. He is entitled to dip his pen in gall for the purposes of legitimate criticism: see Jordan CJ in *Gardiner v Fairfax* (1942) 42 SR (NSW) 171 at 174.
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> These are the outer limits of the defence. The burden of establishing that a comment falls within these limits, and hence within the scope of the defence, lies upon the defendant who wishes to rely upon the defence".

23. The main reason why Lord Nicholls was emphasising these "objective limits" was to underline that the touchstone for the defence of fair comment must be honesty of belief. He expressed the view that motive, even a spiteful motive, would not be sufficient to undermine a defence of fair comment – although sometimes it may provide evidence to undermine honesty of belief. His reasoning was expressed at [48]-[49]:

> "On reflection I do not think the law should attempt to ring-fence comments made with the sole or dominant motive of causing injury out of spite or, which may come to much the same, causing injury simply for the sake of doing so. In the first place it seems to me that the postulate on which this problem is based is a little unreal. The postulate poses a problem which is more academic than practical. The postulate is that the comment in question falls within the objective limits of the defence. Thus, the comment is one which is based upon fact; it is made in circumstances where those to whom the comment is addressed can form their own view on whether or not the comment was sound; and the comment is one which can be held by an honest person. This postulate supposes, further, that the maker of the comment genuinely believes in the truth of his

> comment. It must be questionable whether comments, made out of spite and causing injury, are at all likely to satisfy each and every [one] of these requirements. There must be a query over whether, in practice, there is a problem here which calls for attention.
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> Moreover, in so far as this situation is ever likely to arise, it is by no means clear that the underlying public interest does require that the person impugned should have a remedy. Take the case of a politician or a journalist who genuinely believes that a minister is untrustworthy and not fit to hold ministerial office. Facts exist from which an honest person could form that view. The politician or journalist states his view, with the intention of injuring the minister. His reason for doing so was a private grudge, derived from a past insult, actual or supposed. I am far from persuaded that the law should give the minister a remedy. The spiteful publication of a defamatory statement of fact attracts no remedy if the statement is proved to be true. Why should the position be different for the spiteful publication of defamatory, genuinely held comment based on true fact?"

Again, therefore, his Lordship expressly attached importance to the proclaimed principle that those to whom the comment is addressed should be able to form their own view on whether or not the comment was sound.

24. Miss Sharp does not shrink from questioning this proposition because she attaches importance to the fact that the reasoning of their Lordships in *Kemsley v Foot* was not taken into account. Her submission is that it is not necessary for those who hear or read the defamatory comment to have set out before them, incorporated within the words complained of, the facts upon which the comment is based. She argues that such persons need only to be able to recognise that a comment has been made, as opposed to an assertion of fact. It will often be easier to recognise a comment as such if the facts are set out, because the onlooker will realise that the commentator is expressing a view upon those facts. It is not, however, essential. She submits that this proposition is supported by the analysis of the House of Lords in *Kemsley v Foot*. In any event, taking Lord Nicholls' words at face value, it is not easy to see how readers would always be in a position to judge whether a comment is well founded if it only indicates the facts on which it is made "implicitly" or "in general terms".

25. Miss Sharp also drew my attention to another recent case, albeit only at first instance, which post-dated both of these statements by Lord Nicholls and took account of them. I believe she considers it to be an illustration of how deeply the heresy has taken hold in the minds of practitioners and judges; that is to say, the mistaken belief (as she submits) that it is a necessary ingredient in a defence of fair comment that the facts upon which the comment was based should be set out, at least in general terms, in the words complained of. She had in mind a particular passage in my judgment in *Branson v Bower* [2002] QB 737, 748 at [29]-[31]:

> "*The comment must be upon 'facts truly stated'*

> A commentator must not deliberately distort the true situation. That would be relevant on 'malice' even according to Lord Nicholls' criterion. It would not be honest. The matter of distortion (whether dishonest or otherwise) may also come into play, however, at the stage of the objective test, because one cannot decide whether a hypothetical commentator *could* hold an opinion in a vacuum. Even at this point, it is surely necessary to test the matter against some factual assumptions.
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> One area upon which counsel did agree was that, when applying the objective test, it is necessary for the judge (or jury as the case may be) to decide whether the hypothetical person could honestly express the commentator's views on the assumption that he knows (a) facts accurately stated in the article, (b) facts referred to in the article and (c) facts that are so well known that they may be described as general knowledge: see e.g. *Kemsley v Foot* [1952] AC 345. Lord Nicholls observed in *Cheng v Tse Wai Chun* [2000] 3 HKLRD 418, 425 that:
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> > 'the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.'
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> (See remarks to similar effect by Fletcher Moulton LJ in *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309, 319.)
>
> There is an apparent difficulty here. It might be thought to be imposing undue restrictions on free speech if a defendant only has the defence of fair comment in circumstances where he has remembered to identify, even perhaps in the heat of public debate, the facts which led him to hold those views about the claimant. That may be so, but at least the law is clear in this respect. It has long been recognised at common law. It is also apparently accepted in the modern human rights jurisprudence: see e.g. *Lingens v Austria* 8 EHRR 407, *Nilsen and Johnsen v Norway* 30 EHRR 878 and *Barfod v Denmark* (1989) 13 EHRR 493".

26. This aspect of the law was not considered any further on that occasion. Miss Sharp submits that, in so far as counsel were agreed on the proposition I identified in that passage, they were wrong to do so. We have all been labouring under a misapprehension as to the law in this respect. Moreover, she submits that it would indeed impose undue restriction on free speech if a defendant were required particularly in the heat of public debate, or when there is some other reason why he is prevented from setting out his observations in a careful and measured way, to identify the facts which led him to express the opinion in question: see e.g. *Nilsen & Johnsen v Norway* at [48] and [52]. Not only would it be unduly restrictive but, she argues, there is nothing in the law of England or in the European jurisprudence which has the effect of imposing such a burden.

27. Before I consider the speeches of their Lordships in *Kemsley v Foot*, it is necessary to refer briefly to the factual background and to some observations made in the Court of Appeal: [1951] 2 KB 34. Complaint had been made of an article by Mr Michael Foot appearing in the *Tribune* in March 1950. It was the heading which particularly gave offence, and which simply said "Lower than Kemsley". The criticism was directed towards an article in the *Evening Standard*, with which the plaintiff had no connection. His name was being used, he suggested, really as a byword for irresponsible journalism of a particular kind. No doubt partly because the name was so well known, no facts were stated by Mr Michael Foot to support the comment involving "Kemsley".

28. The headnote is brief and to the point. It would appear to lend some support to Miss Sharp:

> "Criticism of a newspaper proprietor directed to the manner in which news is presented in papers by him is to be treated on the same lines as criticism of a book or a play or other matters submitted to the judgment and taste of the public, and the critic is not to be shut out from the plea of fair comment because in his criticism he had not given or referred to examples of the conduct criticized, *so long as the subject-matter of the comment is plainly stated*" (Miss Sharp's emphasis).

29. It is worth noting some remarks of Birkett LJ at p48:

> "It is clear, therefore, and indeed it was not contended otherwise, that ALL the facts need not be stated, but when the matter is submitted to the judgment of a jury particulars of the facts relied on must be supplied".

A little further on, at p51, he added these words:

> "I do not think it is possible to lay down any rule of universal application. If, for example, a defamatory statement is made about a private individual who is quite unknown to the general public, and he has never taken any part in public affairs, and the statement takes the form of comment only and is capable of being construed as comment and no facts of any kind are given, while it is conceivable that the comment may be made on a matter of public interest, nevertheless the defence of fair comment might not be open to a defendant in that case. It is almost certain that a naked comment of that kind in those circumstances would be decided to be a question of fact and could be justified as such if that defence were pleaded. But if the matter is before the public, as in the case of a book, a play, a film, or a newspaper, then I think different considerations apply. Comment may then be made without setting out the facts on which the comment is based if the subject-matter of the comment is plainly stated. This seems to me to accord with good sense and the true public interest".

30. In the present case, Miss Sharp argues that at the time of the takeover of the Southampton Football Club (over seven years before Mr Mellor's article was published), and at the time of Mr Jones' suspension (well over four years before Mr Mellor's article), those facts would have been well known to the public, and in particular to those interested in football, at least in general terms. To some extent, it would appear that each of these incidents has crept into folklore among football fans and commentators, with the result that even at the time of Mr Mellor's article among a readership of that kind it would have been known, broadly, what he was referring to. To an extent, therefore, it is possible that there may be an analogy with the fact that "Kemsley" was a household name in 1950. Whether that is so or not, Miss Sharp's main point is that Mr Mellor (or, more particularly, the Defendant) should not be precluded from advancing a defence of fair comment because, both with reference to Mr Jones and the reverse takeover, the *subject-matter* was indicated. Mr Browne has potentially significant points to make on the inaccuracy of the article, particularly with reference to the takeover, but that is a separate point.

31. When the case reached the House of Lords, as Miss Sharp points out, nothing was put forward to cast doubt on the authority or "good sense" of what Birkett LJ had said.

32. Miss Sharp placed reliance on certain passages in the speech of Lord Porter. It is interesting to note how, at p354, he encapsulated the issue before their Lordships:

> "The question for your Lordships' decision is, therefore, whether a plea of fair comment is only permissible where the comment is accompanied by a statement of facts upon which the comment is made and to determine the particularity with which the facts must be stated".

This corresponds to the very issue now under consideration.

33. Lord Porter expressed the view that Mr Foot's article could be construed as containing an inference that the Kemsley Press was of a low and undesirable quality and that Lord Kemsley was responsible for its tone. That was an inference which could be drawn from the three words "Lower than Kemsley". The facts relied upon by the defendants in their pleading to support that brief comment consisted of "excerpts from the plaintiff's newspapers and allegations of certain respects in which they were inaccurate or untruthful together with complaints of their tone and the impropriety of their methods of dealing with the news in them, even when it was accurate": see the summary at p346. It was held in the House of Lords that the defendants were entitled to plead and rely upon that material.

34. The applicable law was explained by Lord Porter at pp357-358:

> "In a case where the facts are fully set out in the alleged libel, each fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails in his defence. Does the same principle apply where the facts alleged are found not in the alleged libel but in particulars delivered in the course of the action? In my opinion it does not. Where the facts are set out in the alleged libel, those to whom it is published can read them and may regard them as facts

> derogatory to the plaintiff; but where, as here, they are contained only in particulars and are not published to the world at large, they are not the subject-matter of the comment but facts alleged to justify that comment.
>
> In the present case, for instance, the substratum of fact upon which comment is based is that Lord Kemsley is the active proprietor of and responsible for the Kemsley Press. The criticism is that that press is the low one. As I hold, any facts sufficient to justify that statement would entitle the defendants to succeed in a plea of fair comment. Twenty facts might be given in the particulars but only one justified, yet if that one fact were sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the defendants' plea".

35. Whether such a stark distinction would be drawn today between facts *stated* and those *pleaded* is open to question. I should be surprised if it were now to be held that the omission to establish one important fact would lead to overall failure merely because it had been stated in the article. That would appear to be inconsistent with the policy underlying the rule, with regard to justification, that the words complained of need only be shown to be *substantially* accurate. I can see no principled distinction in this respect between the two defences. Moreover, I should be surprised if the proposition were to be found compatible with Article 10 and the Strasbourg jurisprudence, which generally allows leeway for journalists in the exercise of their trade, so as to accommodate a degree of inaccuracy and exaggeration.

36. Fortunately I do not need to determine this issue on the present application. I simply note, in passing, that if Lord Porter's proposition were correct it might, at a later stage, be of considerable assistance to the Claimant in relation to the "chicanery" allegation, since the very brief facts alleged in the article would appear to be substantially inaccurate. For example, Secure, the company which was the vehicle for the reverse takeover, was concerned with development, not with running care homes. Mr Browne points out that its principal sphere of activity was accordingly germane to the then needs of Southampton Football Club and the proposed building of new premises. Nor was the company owned by the Claimant and a "mate". He and Mr Cowen (almost certainly the "mate" referred to) owned only a small proportion of the issued share capital. These points are for later. I only mention them at this stage to illustrate how the facts of this case, and the fairly commonplace article which is its subject-matter, give rise potentially to far reaching-issues in the law of defamation.

37. As I have already acknowledged, however, there is one issue that I cannot conveniently side-step even at this stage. I must decide whether, in relation to Miss Sharp's pleaded allegations of fact, it would be a sufficient ground to strike any of them out that it had not been mentioned (at least in general terms) in Mr Mellor's article. That is Mr Browne's primary case, and it would appear to be supported by the earlier citations from Lord Nicholls in *Cheng* and *Reynolds*. If it is well founded, it would be of major significance in the case because, as Miss Sharp naturally accepts, the vast majority of the "welter of alleged facts and material" is not to be found in the published text. It is thus crucial to the present application that I attempt to grapple with the apparent inconsistencies in these expositions of high authority.

38. In order to assist me in my task, I turn to consider other speeches from *Kemsley v Foot*. There is no doubt that there was unanimity. Lord Radcliffe contented himself by expressing agreement, without adding observations of his own, and Lord Goddard CJ simply expressed his agreement from afar, by asking Lord Porter to record his agreement. Lord Tucker added only one paragraph at p.362, but it clearly supports Miss Sharp's submissions:

> "I also desire expressly to state my concurrence in [Lord Porter's] opinion that where the facts relied on to justify the comment are contained only in the particulars it is not incumbent on the defendant to prove the truth of every fact so stated in order to establish his plea of fair comment, but that he must establish sufficient facts to support the comment to the satisfaction of the jury".

He too, therefore, was endorsing the distinction between facts stated in the article and those adduced later in the pleading.

39. Lord Oaksey made the following observation at pp360-361:

> "The forms in which a comment on a matter of public importance may be framed are almost infinitely various and, in my opinion, it is unnecessary that all the facts on which the comment is based should be stated in the libel in order to admit the defence of fair comment. It is not, in my opinion, a matter of importance that a reader should be able to see exactly the grounds of the comment. It is sufficient if the subject which *ex hypothesi* is of public importance is sufficiently and not incorrectly or untruthfully stated. A comment based on facts untruly stated cannot be fair".

40. There is no doubt that *Kemsley v Foot* is a decision of the highest authority and one which is directly in point. It is thus binding on lower courts and should be followed (subject to any possible argument as to compatibility with the European Convention). I should therefore, if Lord Nicholls' observations in *Cheng* are inconsistent with the *ratio*, resist the inclination to be guided by what he said. It is obviously true that *Reynolds*, too, is an authority binding on lower courts, and indeed a more recent one which would appear to be Convention compliant (even though it pre-dated the enactment of the Human Rights Act 1998).

41. The question arises as to whether Lord Nicholls' observations on fair comment form part of the *ratio*. The case is known, of course, primarily for its relevance to the law of privilege. Its *ratio* was summarised by Lord Cooke in the later case of *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 300D:

> "The main principle for which the *Reynolds* case stands is that the classical interest-duty test is adaptable to a great variety of circumstances".

A decision of the House of Lords may of course have more than one *ratio decidendi*. I would not accept, on the other hand, that what Lord Nicholls had to say, by way of

background, on the law of fair comment could be accorded that status. Fair comment did not arise as an issue before the House of Lords. Indeed, one of the original grounds of appeal was that the summing up might have misled the jury into thinking that the words complained of could be defended as fair comment. If I am correct in that respect, it would follow that I am bound under the traditional principles of *stare decisis* to give priority to the unanimous decision of their Lordships in 1950.

42. I am also required by the Human Rights Act to take into account Article 10 and the jurisprudence associated with it. Having regard to those considerations, I am left in no doubt that the right to comment freely on matters of public interest would be far too circumscribed if it were a necessary ingredient of the English common law's defence of fair comment that the commentator should be confined to pleading facts stated in the words complained of. It would be more consonant with Article 10, and the rights of a free press in a democratic society, if the restriction were expressed in terms of the "subject-matter", as did Lord Porter. He did so not only at p358 (already quoted) but also at p357, where he formulated the nature of the inquiry as being:

> "Is there subject-matter indicated with sufficient clarity to justify comment being made?"

So too (in the passage at p51 cited above) did Birkett LJ in the Court of Appeal. I am therefore inclined to adopt his statement of the law in these terms (as cited above); namely that comment may be made, if the matter is already before the public, without setting out the facts on which the comment is based - provided the subject-matter of the comment is plainly stated.

43. Here, it may be said, the "matters" both of Mr Jones' suspension and ultimate departure from Southampton in 2000, and of the reverse takeover in 1996-1997, were already "before the public" and had remained, in broad terms, in the consciousness of many football fans (and readers of Mr Mellor's article). At least, for present purposes, I should make that assumption. Since the article at least identified those two heads of criticism, it would appear that Miss Sharp is entitled in principle to plead facts in support of the comments, even though they are not set out in the body of the article.

44. There may arise issues as to what is meant by "before the public" and, for example, when some piece of news might have sufficiently faded from public consciousness so as no longer to warrant that classification. But considerations of that kind would not affect my decision on an interlocutory application as to the permitted scope of particulars.

45. Needless to say, there may yet be other valid reasons to strike down parts of the pleading relating, for example, to relevance or proportionality. Nonetheless, I reject Mr Browne's principal ground of general criticism.

46. Before I turn to deal with the individual criticisms, I should pause to consider whether there is any explanation for how this "heresy" appears to have taken hold. I suspect it is connected with the oft-quoted shorthand proposition that a defence of fair comment must be based "on facts truly stated". This has been interpreted from time to time by practitioners as meaning that a defendant must confine his defence to those facts which are truly stated *in the words complained of*. It is necessary, however, to bear in mind the words of Lord Oaksey in *Kemsley v Foot* and p361:

> "What is meant in cases in which it has been said comment to be fair must be on facts truly stated is, I think, that the facts *so far as they are stated in the libel* must not be untruly stated". (emphasis added)

This is consistent with the other statements in *Kemsley v Foot*: it clearly contemplates that other facts, not stated in the libel, would be admissible. Moreover, on the same page, Lord Oaksey made a further statement to similar effect:

> "A defendant who has made a defamatory comment on a matter of public importance must be entitled to adduce any relevant evidence to show that the comment was fair, and in order to do so must be entitled to allege and attempt to prove facts which he contends justify the comment".

Naturally, in that context, the reference to the comment being "fair" would relate to the objective test; that is to say, the jury would be invited to determine whether the comment was such that a person could honestly express it upon the relevant facts.

47. I turn next to another formulation of principle, in the speech of Lord Porter himself which, if taken out of context, could be construed as supporting Mr Browne's proposition. At p356 he said this:

> "The question, therefore, in all cases is whether there is a sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action …".

It is important to note, however, the passage which follows, which makes it clear that his Lordship had in mind a sufficient substratum to enable readers to recognise that the words complained of consisted of comment rather than fact:

> "… and I find my view well expressed in the remarks contained in Odgers on Libel and Slander (6th ed., 1929), at p166. 'Sometimes, however,' he says, 'it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that "such conduct is disgraceful," this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables the readers to judge for themselves how far his opinion is well founded; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth. The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference without the facts on which it is based, such inference will be treated as an

> allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment. But even in this case the writer must be careful to state the inference as an inference, and not to assert it as a new and independent fact; otherwise, his inference will become something more than a comment, and he may be driven to justify it as an allegation of fact.'
>
> But the question whether an inference is a bare inference in this sense must depend on all the circumstances".

48. The distinction being drawn in that passage may be illustrated, perhaps, by reference to the facts in the present case. The Claimant seems to be accused of repellent financial chicanery, but that is not in context to be taken as a bare assertion of fact – for the reason that Mr Mellor indicated in the article that he was referring to the reverse takeover of Southampton Football Club seven years before. Mr Browne would wish to argue that, in seeking to support that comment, the Defendant is confined to the facts stated in the article (some of which are factually inaccurate). According to Mr Browne, it would only be legitimate to point to three primary facts for that purpose namely (a) the mechanism of a reverse takeover, (b) the proposition that the other company was involved in running care homes, and (c) that it was owned by the Claimant and a "mate". As it happens, it is almost certain that the second and third facts are simply wrong. Moreover, the first fact could not in itself conceivably support the proposition that there had been financial chicanery, let alone conduct that was "repellent". This tends to show how important for the present case the issue of law may be. If Mr Browne is correct, he would probably have a clear run on that defamatory allegation. But I am satisfied that there is nothing in *Kemsley v Foot* which would support the restrictive approach for which Mr Browne contends.

49. I should now consider the decision of the Court of Appeal in *Hunt v Star Newspaper Co Ltd* [1908] 2KB 309, which has also been taken as supporting Mr Browne's proposition. For example, at p320 Fletcher Moulton LJ stated the law in these words:

> "… in order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails".

He considered the principle to be well established and cited the summing up of Kennedy J in *Joynt v Cycle Trade Publishing Co.* [1904] 2KB 292, 294 as an accurate statement which had frequently been approved. Kennedy J, in turn, had founded himself on the judgments in *Campbell v Spottiswoode* (1863) 3 B & S 769, which was described by Fletcher Moulton LJ as "a case of the highest authority".

50. The material words used by Kennedy J in his summing up were these:

> "To sum it up, no doubt very imperfectly, it represents to my mind this – that the comment must be such that a fair mind would use under the circumstances, and it must not misstate facts, because a comment cannot be fair which is built upon

> facts which are not truly stated, and further, it must not convey imputations of an evil sort, except so far as the facts truly stated warrant the imputation".

51. I go back a stage further to *Campbell v Spottiswoode* when the distinction between fair comment and privilege as separate defences had not fully emerged. The members of the court on that occasion were all agreed on the following principle, as expressed at p779 by Crompton J:

> "It is the right of all the Queen's subjects to discuss public matters; but no person can have a right on that ground to publish what is defamatory merely because he believes it to be true. If this were so, a public man might have base motives imputed to him without having an opportunity of righting himself".

Earlier, at p778, Crompton J had also emphasised that a *bona fide* belief that he is publishing what is true would not provide a defendant with an answer to an action for libel, where he has attributed "base and sordid motives *which are not warranted by the facts*" (emphasis added).

52. The same proposition was expressed by Cockburn CJ at p777:

> "I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately *out of his conduct* so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable" (emphasis added).

He went on to stress that mere suspicion does not justify assailing a man's character as dishonest.

53. There is nothing in the judgments in *Campbell v Spottiswoode* to suggest the proposition that a defendant relying upon fair comment may only adduce "facts" or "conduct" which he has expressly identified in the words complained of. Moreover, although Kennedy J in the later case of *Joynt* said that facts must not be misstated (as did Lord Porter half a century later), he did not preclude reliance on particulars extraneous to the words complained of.

54. Indeed, it is illuminating in this context to return to the judgment of Fletcher Moulton LJ in *Hunt v Star Newspaper Co Ltd* in order to see how he expressed himself at p319:

> "If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent be negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally

> suppose that the injurious statements are based on *adequate grounds known to the writer though not necessarily set out by him.* In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of *extrinsic facts which the writer considers to warrant the language he uses*" (emphasis added).

55. I conclude, after considering these older authorities in some detail, that they are consistent with two particular principles which I have already highlighted in the House of Lords' speeches in *Kemsley v Foot*:

    i) If facts are stated in words complained of, and are wrongly stated, this will undermine the defence of fair comment;

    ii) A defendant is not precluded from pleading extrinsic facts in support of a plea of fair comment.

    They also appear to support the proposition that the readers need to be able to distinguish facts from comment for the defendant to be permitted to rely upon the defence of fair comment. A bald comment, made in circumstances where it is not possible to understand it as an inference, it is likely to be treated as an assertion of fact which will only be susceptible to a defence of justification or privilege.

56. Where facts are set out in the words complained of, so that the reader can see that an inference or opinion is based upon them, then the defence of fair comment will be available; but the defendant is not tied to the facts stated in the article. He may invite the jury to take into account extrinsic facts "known to the writer" as part of the material on which they are to decide whether a person could honestly express the opinion or draw the inference.

57. Whilst it is necessary for readers to distinguish fact from comment, it is not necessary for them to have before them all the facts upon which the comment was based for the purpose of deciding whether they agree with the comment (or inference). I draw that conclusion with all due diffidence, since Lord Nicholls has twice expressed the opposite view, but it does seem consistent with principle and, in particular, with the undoubted rule that people are free to express perverse and shocking opinions and may nevertheless succeed in a defence of fair comment without having to persuade reasonable readers, or the jurors who represent such persons, to concur with the opinions. It is difficult to see why it should matter whether a reader agrees; what matters is whether he or she can distinguish fact from comment. Sometimes that will be possible, as it was in *Kemsley v Foot*, without any facts being stated expressly, because either they are referred to or they are sufficiently widely known for the readers to recognise the comment as comment.

58. I can give examples of each situation:

    i) The minister is unfit to hold public office because he lied to the House of Commons;

ii) The minister is unfit to hold public office because of what he said in the House last week;

iii) Mr A [who is widely known to have pleaded guilty to perjury] is unfit to hold public office.

Obviously, in the first example the fact is stated, in the second it is referred to, and in the third the facts are notorious.

59. Finally, upon re-considering the three Strasbourg cases to which I made passing reference in *Branson v Bower*, I can say that while they may provide examples of opinions being published on the basis of facts which happened to be expressly stated, none of them would afford any support for a *rule* that a defendant should be restricted from pleading any facts which he had not remembered to identify at the time of publication. Indeed, as I have said earlier, I would find that difficult to reconcile with Article 10.

60. My ruling on this point of law clearly would have an impact on the content of the defence and as to certain parts of the reply.

To what extent may facts be pleaded of which the commentator was unaware?

61. At the outset (see [19] above) I referred to "two main strands of authority" requiring close examination. The second is that linked to the Court of Appeal's decision in *Cohen v Daily Telegraph* [1968] 1 WLR 916. This is authority for the propositions that (1) a defendant may not rely, for a plea of fair comment, upon facts post-dating publication, and (2) a man may comment on existing facts without having them all in the forefront of his mind at the time. It is interesting to note also in this context what was said in Chapter 6 of the Report of Sir Neville Faulks' committee, Cmnd. 5909 (1975), as to their understanding of the law in this respect: "For the defence to apply the defendant must establish that:- … (d) the facts relied on as founding the comment were in the defendant's mind when he made it". Although this corresponds largely with my own understanding I would, with respect, have substituted "the *commentator's* mind".

62. As Lord Denning MR observed in *Cohen* at pp918-9, "No ordinary human person can look into the future and comment on facts which have not yet happened". So far so good. But what is less clear, and has puzzled me from time to time, is whether the defendant or author of the words complained of must have known the facts, pleaded as particulars, prior to publication – even if they do not have to be in the forefront of his mind at that time. Must they have been known at some time? Or can he rely on existing facts to support the comment even if they only came to his attention later – for example, when his solicitor was carrying out research to answer the claim? Logic would appear to suggest that one can hardly comment on matters of which one knows nothing, any more than one can comment on facts which have not yet happened. These problems, of course, do not arise in relation to justification. If the issue is truth, one can rely on any relevant facts if they are only discovered after publication and even, in some instances, if they only occurred afterwards.

63. Lord Denning referred, at p919, to a passage in the then current edition of Gatley on Libel and Slander (6th edn.) which asserted:

> "The facts which the defendant seeks to prove as the basis of his comment must have been known to him when he made his comment".

64. In his (*ex tempore*) judgment, the Master of the Rolls merely said, "I do not know that I would go quite so far as that". If he doubted the proposition, so clearly stated, he must have been contemplating at least the possibility that a defendant could rely on facts which had *not* been known to the commentator prior to publication. The matter was left in the air unfortunately. Merely to say that a man may comment on facts "without having them all in the forefront of his mind at the time" does not assist. One can forget facts, or half forget them, or they may be at the back of one's mind when the comment is expressed. Yet it still may be true to say that the comment is at least partly based upon them. But that is very different from suggesting that one may rely on facts altogether outside one's knowledge at the time of the comment.

65. I note that one member of the court in *Cohen*, Russell LJ, recorded (at p921) that counsel for the defendants did not dispute that "the facts on which the defence of fair comment is based can only be *those known at the time of publication*" (emphasis added). Moreover, the court was not concerned in that case with a situation (such as may arise in the present case) where the defendant wished to plead existing facts which were unknown to him, but rather with the *Daily Telegraph*'s reliance on facts which occurred after publication. The present issue was therefore not directly determined by the court, and did not need to be.

66. It was observed by Davies LJ (at p920 G-H) that:

> "There is a singular absence of English authority on this point, and it may be that the reason for that is that it is so obvious that authority is not required".

As I understand this passage in the judgment, the proposition which Davies LJ took to be "obvious" was that a defendant is not permitted to rely on facts only occurring subsequent to publication. On the critical question, however, of whether a defendant is precluded from relying on facts existing at that time, but unknown to the commentator, Davies LJ (like Lord Denning) merely contented himself with saying that "it is not necessary to go quite as far as that". Pleaders have thus been left in a state of uncertainty, and indeed confusion, for nearly 40 years. Davies LJ referred to the Scottish case of *Wheatley v Anderson & Miller* 1927 SC 133, where Lord Anderson had stated a clear principle:

> "The jury are entitled to know what was in a defender's mind at the time he made the comment, or otherwise they will not be properly equipped for the discharge of their duty. It seems to me, however, to be quite incompetent for a defender, in support of a plea of fair comment, to aver and substantiate facts which were not in his mind at the time the comment was made, but which were discovered at a later date".

67. This statement would appear to accord with logic. It also leaves less room for uncertainty than the judgments in *Cohen v Daily Telegraph*, but it does not provide automatic answers for all pleading problems that arise in practice.

68. In the present case, I have no evidence as to Mr Mellor's state of knowledge at the time of publication – in particular, so far as the details of the takeover are concerned. If the current (re-amended) form of defence is verified by a statement of truth, one ought to be able to conclude that this implicitly confirms that the particulars pleaded *were* known by Mr Mellor when he wrote the article ("without having them all at the forefront of his mind"). I readily acknowledge, however, that this might be to read too much into such an endorsement (especially since the endorsement on the amended defence, containing the relevant particulars, was that of the Defendant's solicitor, rather than by Mr Mellor himself). But, as a matter of good practice, there is much to be said for a rule requiring a statement of truth to confirm all essential ingredients in the plea or pleas relied upon. If the author's knowledge is such an ingredient, as Lord Anderson emphatically held, that should be formally affirmed. More generally, because the extent of the commentator's knowledge may sometimes be important to a defence of this kind, it would surely be desirable for it to be pleaded expressly, rather than being left to implication.

69. Even if Lord Anderson's unequivocal statement of the law does represent the position in England, as well as in Scotland, there would still be uncertainties. I propose to identify some specific hypothetical examples, whilst recognising that they would not cover all eventualities.

70. First, a City commentator expresses the view that Mr X is not a suitable person to become chief executive of a company. At the time of writing he recalls no more than that Mr X was convicted, 10 years before, of certain criminal offences. If he is then sued for libel, is he confined to pleading that general fact? Or can he, having researched the detail, list the convictions? Could he go further and plead the underlying evidence relied upon by the prosecution, in the light of which Mr X had been convicted. Suppose they were sample counts, would it be permissible to set out some of the other disreputable behaviour not expressly referred to in the criminal proceedings?

71. Second, suppose the commentator remembers that he had, years before, concluded that Mr X was unfit to run a company and repeats that view because he is once again in the news. If sued, would he have to show exactly what the facts were on which he formed his original view? Would he be confined, after such an archaeological exercise, to relying on what he knew at the time, but had since forgotten? Or could he rely on examples of misconduct of a similar kind? If he genuinely could not recall how much detail had come to his attention at the time, when he formed his view, does that preclude him from relying on anything other than the bare fact of the conviction(s)?

72. Thirdly, suppose the commentator did not even know of the convictions, and simply expresses an opinion based on received wisdom (or even rumour) but, when challenged, finds that there is ample material upon which he could have based his opinion in the form of criminal convictions or (say) the findings of a DTI inspector. Is he precluded from reliance on those matters?

73. The position in English law is by no means clear. Yet the present case requires that at least some of these questions be answered. Lord Anderson's formulation would have the consequence that the commentator is *not* permitted to rely on the fruits of his researches for the purposes of fair comment. That may seem surprising and unjust. It

may also appear to have a considerable "chilling effect" on the exercise of free speech. On the other hand, the consequences might not be as drastic as would first appear, simply because none of these considerations would inhibit a defence of justification. For that purpose, as I have already noted, a defendant is entitled to rake over the claimant's past and build up a picture of which he had been previously unaware. I am only concerned here with the very specific question as to what may be pleaded as particulars supporting the different defence of fair comment. It may be legitimate, on grounds of public policy, to take a much more restrictive approach in this context purely as a matter of logic. It simply makes no sense for a person to express an opinion upon, or to draw an inference from, facts he knows nothing about. Yet, as the learned editors of *Duncan & Neill* (2nd edn) have submitted (at para. 12.34), it would arguably restrict the right of fair comment unduly to place upon a defendant the burden of proving that he had at one time known each of the facts upon which he places reliance in his defence (without having them all in the forefront of his mind).

74. At this point I need to state my conclusions on the legal requirements as to the commentator's state of knowledge at the time of publication. There is no authority directly in point, but I owe it to the parties to make clear the principles I have sought to apply on the strike-out application. I have taken into account the authorities I have cited and the need also to interpret English law compatibly with the requirements of the European Convention:

1. Any fact pleaded to support fair comment must have existed at the time of publication.

2. Any such facts must have been known, at least in general terms, at the time the comment was made, although it is not necessary that they should all have been in the forefront of the commentator's mind.

3. A general fact within the commentator's knowledge (as opposed to the comment itself) may be supported by specific examples even if the commentator had not been aware of them (rather as examples of previously published material from Lord Kemsley's newspapers were allowed).

4. Facts may not be pleaded of which the commentator was unaware (even in general terms) on the basis that the defamatory comment is one he *would have* made *if* he had known them.

5. A commentator may rely upon a specific or a general fact (and, it follows, provide examples to illustrate it) even if he has forgotten it, because it may have contributed to the formation of his opinion.

6. The purpose of the defence of fair comment is to protect honest expressions of opinion upon, or inferences honestly drawn from, specific facts.

7. The ultimate test is the objective one of whether someone could have expressed the commentator's defamatory opinion (or drawn the inference) *upon* the facts known to the commentator, at least in general terms, and upon which he was purporting to comment.

8. A defendant who is responsible for publishing the defamatory opinions or inferences of an identified commentator (such as in a newspaper column or letters page) does not have to show that he, she or it also knew the facts relied upon – provided they were known to the commentator.

9. It is not permitted to plead fair comment if the commentator was doing no more than regurgitating the opinions of others without any knowledge of the underlying facts – still less if he was simply echoing rumours.

In the context of the present case, it may be critical to the defence of fair comment that the pleaded particulars can be shown to have been within Mr Mellor's knowledge, to the required extent, in August 2004.

75. It would plainly be unacceptable to dredge up a "welter" of factual allegations after the event, of which he knew nothing at the time and upon which he might have written a different article – if only they had been drawn to his attention. Nor, as a matter of principle, can it be right to find the material for one's comment *ex post facto* by interrogating the Claimant or by obtaining orders for disclosure, whether from him or from third parties.

"Relevance" in the context of a fair comment defence

76. I have already indicated that particulars may be struck out as "irrelevant", whatever view one takes on the points of general principle. Nevertheless, as Miss Sharp submits, they can impact upon this issue also. She argues that a very generous view should be taken when deciding whether to "pre-empt perversity" (in the words of Simon Brown LJ in *Jameel v Wall Street Journal Europe* [2004] EMLR 6). After all, one has to remember that the objective test requires the judge (or jury, as the case may be) to determine whether a person *could* honestly express the views in question – however prejudiced or irrational the commentator may be. It will not do to apply too strict a test in determining whether an opinion would be perverse: see e.g. the observations of Diplock J in *Silkin v Beaverbrook Newspapers* [1958] 1 WLR 743, 747. The requirements of Article 10 of the European Convention would surely underline the need for a generous approach in this context.

The detailed criticisms of the particulars: (1) Mr Jones

77. I turn now to consider the individual complaints made about the particulars. It is always necessary to have in mind that there has been no evidence based application for summary judgment.

78. Paragraph 6.3: *the general turnover of managers at Southampton*.

The very first sub-paragraph of particulars, specifically in relation to Mr David Jones, concerns the number of managers at Southampton between 3rd July 1996 and 6th December 2004. Mr Browne submits that the allegations about other managers are irrelevant, having regard both to the words complained of themselves and to the Defendant's pleaded meaning. He suggests, further, that the circumstances of each of the managers would have to be investigated, by way of a mini-trial, and that this would be time-wasting and disproportionate. Thus, he objects both on principle and on case management grounds.

79. It is true that one of the managers in question, who had apparently departed four days before Mr Mellor's article, is mentioned in his first column (albeit not part of the words selected for complaint). It contains the sentence:

> "Unseating Paul Sturrock, a shambling stack of spuds from the lower end of the Nationwide League, and then replacing him with a man without even that modest pedigree, always looked distinctly dodgy".

There is also reference to Gordon Strachan, the manager from 22nd October 2001 to 13th February 2004, who was described as being "pushed out with haste". This was obviously four years after the material events concerning Mr Jones.

80. I should be very reluctant to allow these extended enquiries into other managers, and the circumstances of their departure, as a matter of proportionality, but it seems to me that the first test to apply is whether it is relevant to the pleaded issues. I agree with Mr Browne that these broad topics do not arise on either party's pleaded meaning. Miss Sharp points out that in the Claimant's solicitors' letter of 17 September 2004 the complaint had been expressed more widely. The article was said to convey the meaning, *inter alia*, that "our client has been ruthless in his treatment of managers". But that has not been pursued in the particulars of claim, and I should focus on the pleadings and the current complaint, as narrowed. The circumstances of Mr Jones' departure were unique to him, and Mr Lowe is entitled to single out that particular charge in Mr Mellor's article without having to go into the history of all the others. I have in mind such authorities as *US Tobacco Inc v BBC* [1998] EMLR 816 and *Bookbinder v Tebbit* [1989] 1 WLR 640.

81. Paragraph 6.4: *Mr Jones' background.*

There is a brief description of Mr Jones' previous post and of his contract with Southampton. The point is taken that these details are not to be found in the article, but I have held above that this in itself is not a valid basis for objecting. It seems to me that this is harmless background narrative.

82. Paragraph 6.5: *Southampton's results 1997-1999.*

There is reference to Southampton's position in the Premier League at the end of the 1997-1998 and 1998-1999 seasons. Again, the point is taken that these details "are neither referred to nor indicated in the words complained of". That is not a valid objection in itself and, although not directly relevant, it is arguable that this material is part of the context in which any criticism of Mr Lowe's treatment of Mr Jones needs to be judged. Nor would it take up a great deal of time to go into what are matters of record. The central point in Mr Lowe's case, as I understand it, is that he made a judgment (without the hindsight now available) as to what was best for the Club and Mr Jones as at January 2000. He thought (a) that the anxiety of the build up to the trial *might* affect Mr Jones' work and (b) that it was fairer to him to let him concentrate on preparing himself for the case. The Defendant wishes to attack his good faith. But, whatever the merits of that argument, it should not take very long.

83. Paragraph 6.7 (second sentence): *Mr Jones' public denials.*

It is common ground that Mr Jones had various sexual offences hanging over his head for some 18 months and that he was, in December 2000, eventually acquitted. Ms Sharp wishes to rely upon Mr Jones' public denial of those allegations and his statement that he would be concentrating on his work for Southampton. Although they are not referred to or indicated in the words complained of, I am inclined to leave the sentence in as simply part of the context against which his suspension was announced in January 2000.

84. Paragraph 6.8–6.12: *Details about Mr Jones' trial timetable and his replacement by Mr Hoddle.*

These sub-paragraphs contain various details, which were canvassed at considerable length in Mr Lowe's action last year against Times Newspapers Ltd. They include such matters as Mr Lowe's behaviour towards Mr Jones and the support he gave him between June and December 1999 following his arrest; Mr Jones' committal hearing on 20th December 1999 and the timescale of his criminal proceedings; a brief summary of Southampton's fortunes between November 1999 and January 2000 on the football field, and the figures relating to a similar period in the 1998-1999 season; Mr Lowe's approach to Glen Hoddle in January 2000; the fixing of Mr Jones' criminal trial for 27th November 2000 (on 26th January 2000) and Mr Hoddle's agreement, at about the same time, to stand in as a temporary manager for Southampton for 12 months.

85. There is obviously no issue estoppel as between these parties arising from the earlier libel action, in which the very same issues were canvassed, and the Defendant is entitled to rely on these matters in supporting the *Control Risks* meaning (which I have already permitted to go forward). Yet again, the objection is taken that the particulars were not referred to or indicated in the words complained of. I reject that ground for the reasons I have already given. On the other hand, it would be necessary for the Defendant to establish that these facts were known by Mr Mellor, at least in general terms, at the time of publication. The extent of his knowledge is a matter yet to be clarified. It would not be right, at least at this stage, to strike any of the particulars out on that basis.

86. Paragraph 6.14: *The meeting at Mr Jones' house on 27th January 2000.*

Reference is made to the arrangements whereby Mr Lowe visited Mr Jones in his home on 27th January 2000 and broke the news to him that he was being suspended for 12 months and replaced on a temporary basis by Mr Glen Hoddle. Those events are potentially material to whether or not there is substance in the criticisms of Mr Lowe. Once again, the points were canvassed in great detail before the jury in the action against Times Newspapers Ltd. Not only did Mr Lowe give evidence, but so did Mr and Mrs Jones and Mr Cowen, who was also present. Again, it is no valid objection that the detail was not canvassed in Mr Mellor's article. There may, however, have to be some enquiry in due course as to the extent of his knowledge of these matters in August 2004.

87. Paragraph 6.15-6.17: *Further material on the treatment of Mr Jones.*

These paragraphs deal with Mr and Mrs Jones' reaction to the suspension; the fact that he had been given no advance warning of it by Mr Lowe; the outcome of a game

against Everton on 22nd January 2000; and the terms of a press announcement on 28th January 2000, dealing with the appointment of Mr Hoddle and the suspension of Mr Jones. None of these details were contained in the article complained of but, again, that is not a well founded ground of objection. It is possible, I suppose, that there may be points on the extent of Mr Mellor's knowledge, but that would have to be considered later.

88. Criticism is made of the club's announcement on 28th January 2000 for the reason that it did not unequivocally state its opinion as to Mr Jones' innocence. That seems to me to make no sense. It was by no means the business of Southampton Football Club, or Mr Lowe, to pronounce on the guilt or innocence of someone who was the subject of serious pending criminal charges. For that reason, I consider that the third sentence of paragraph 6.17 should be struck out.

89. Paragraph 6.19: *Signings made by Mr Jones and the club's performance after his departure.*

This paragraph, rather confusingly, elides assertions about Southampton's position in the league at the end of the 1999-2000 season (i.e. after Mr Jones' suspension) and details of two specific signings during his period as manager (out of "a number of astute signings for the club"). If Mr Lowe is to be criticised for disloyalty, surely his conduct must be judged at the time of the suspension rather than by subsequent events. Nor can I see that the astuteness, or otherwise, of the signings has anything to do with the criticisms being laid at Mr Lowe's door in Mr Mellor's article. In any event, it would be a potentially time-consuming distraction at the trial to attempt to make judgments about the performance of Southampton or the quality of its players, since in coming to any definitive conclusion there would no doubt be many other factors to be taken into account, apart from the performance of Mr Jones or the behaviour of Mr Lowe. I therefore rule against it.

90. Paragraph 6.20: *A sweep-up.*

Paragraph 6.20 appears to be an attempt to summarise what has gone before, by way of a series of six sub-paragraphs, as the basis to support the comment that the Claimant failed to show support or loyalty for Mr Jones, and acted "precipitously" in replacing him with Mr Hoddle, while his criminal charges were pending.

91. It is necessary to set out some of the sub-paragraphs in full, in order to assess whether they have a legitimate place in this pleading. Sub-paragraph (i) would read as follows:

> "By reason of Southampton's unremarkable results, of which similar poor results previously had not led to Mr Jones' replacement, the Claimant failed to show support or loyalty for Mr Jones and acted precipitously …".

I am not sure that this, as it stands, is comprehensible. In any event, "similar poor results previously" cannot really help on the issue of whether Mr Lowe was disloyal in suspending Mr Jones on 26th January 2000. I am wary of the trial being diverted into a series of subjective arguments about the consistency or quality of the club's results. It should therefore come out.

92. I turn next to the last sub-paragraph (vi). This would read as follows:

> "By reason of the team's only moderate improvement from 17th to 15th place in the Premier League following Mr Jones' replacement the Claimant failed to show support or loyalty for Mr Jones and acted precipitously in replacing Mr Jones with Mr Hoddle …".

Again, this does not seem to make very much sense. I do not understand how the Claimant's failure to show support or loyalty could be demonstrated by a moderate improvement in the club's position after his departure. This sub-paragraph too should come out. Mr Lowe had to judge matters at the time.

93. The criticisms contained in sub-paragraphs (ii) to (v) are very similar to those canvassed in the *Times* litigation, where they were given short shrift, but I see no reason why the Defendant should not be allowed to develop those points for what they are worth. The ultimate outcome may simply be the aggravation of damages, but that is for the Defendant to judge. The only exception concerns sub-paragraph (v). This would read as follows:

> "By reason of his insensitive and disingenuous handling of Mr Jones and his family in informing them and the public of Mr Jones' suspension and replacement the Claimant failed to show support or loyalty for Mr Jones and acted precipitously in replacing Mr Jones with Mr Hoddle …".

I am troubled by the words "and disingenuous". If it is being suggested that, in some way, Mr Lowe was being dishonest in his conduct, this should be spelt out and particularised. In the meantime, I would strike out those two words.

94. I turn to the parts of the defence dealing with the reverse takeover allegation.

The detailed criticisms: (2) The takeover

95. Paragraphs 7.2-7.5: *The general background.*

These paragraphs set out some background as to the Southampton Football Club and the role of the Premier League. It is true that the details were not contained in Mr Mellor's article, which was written for those interested in football and assumed a certain amount of knowledge. Nevertheless, the subject-matter of Mr Mellor's opinions (assuming, for the moment, that they consisted of comment rather than fact) was indicated – quite simply the takeover of the club. I imagine (although it will be a matter for evidence in due course) that Mr Mellor was aware of the facts in these sub-paragraphs, at least in general terms. I will assume that he knew that BSkyB signed a lucrative contract with the Premier League Clubs for television rights. He may or may not, in August 2004, have been able to recall that the material agreement was signed in 1996, that it was for a four year contract, and that it was worth £670m. As I have already indicated, however, I believe that any defendant in such circumstances is permitted to fill in the detail in making good the general fact. Similarly, he was plainly aware that the mechanism which had been used was that of a reverse takeover. He almost certainly would not have known, or recalled in August 2004, the details of

how that was carried into effect. No one could be expected to do so. But that in itself would not prevent a defendant from going into more detail in the defence.

96. I can see no objection to paragraphs 7.2-7.5, which do no more than lay the ground for describing the circumstances of Southampton at the time of the takeover.

97. Paragraph 7.6: *Reference to the merger intentions of the Southampton board.*

I see no substantial objection to most of this paragraph, again by way of background, but the first sentence does seem to me to be questionable:

> "In 1996 there had been widespread speculation that Southampton was in debt and the Board were looking to merge as a way of improving the club's fortunes, to generate money for investment in the team and to fund a new stadium".

I do not see how "speculation" can be relevant in itself, and I would therefore delete this sentence.

98. Paragraph 7.7: *A list of individuals and consortiums who expressed interest.*

It is pleaded that by mid-December 1996 the Southampton board were aware of at least four approaches from investors willing to buy or invest in the club. Apart from a consortium led by Sir David Frost and Gavyn Davies, reference is made to the Secure offer itself and to other offers made in October 1996 by an Israeli consortium and by Matthew Harding "shortly before his death". Mr Browne argues that the content of the paragraph is irrelevant, save possibly for the reference to Sir David Frost's consortium which is, at least, referred to in the words complained of. It is also obvious that Mr Mellor knew, at least in general terms, about that expression of interest. Whether he knew about the Israeli consortium and the approach from Matthew Harding is less clear. What matters, however, is that I cannot see how those are relevant to the words complained of, or to either the Claimant's or the Defendant's meaning. I would therefore remove the passages numbered (ii) and (iii).

99. Paragraph 7.9: *Discussion of the Claimant's lack of football experience.*

It is alleged that the Claimant and the board of Secure had no experience of professional football and that the Claimant had been to his first Southampton football match in 1996. These are not matters referred to in the words complained of, but that in itself does not matter. I cannot see how these points have any bearing on "financial chicanery", but I am inclined to allow them to remain in as uncontroversial background. They could hardly be said to reflect on the Claimant's character.

100. Paragraph 7.10.5-7.10.6: *A summary of the arrangements proposed by Secure.*

It is pleaded that Mr Askham would remain as chairman of the Football Club and become deputy executive chairman of Southampton Leisure (the new company), and that three other individuals were to stay on as non-executive directors of that company. (Mr Browne urges me not to lose sight of the fact that the Frost/Davies proposal would also have involved Mr Askham staying on.) Reference is also made to the salary, pension contributions and share options to be accorded to the Claimant and

Mr Cowen. The objection taken by Mr Browne is that these matters are not referred to in the words complained of, but that is not necessarily decisive. I am doubtful as to their relevance, but I can see that they may have some role to play in setting up a case on "financial chicanery". I would not necessarily accept that the points have any force, in that context, but they are at least pleadable. The extent of Mr Mellor's knowledge of these issues at the time might be a matter to be explored in due course. I think they should be allowed to remain, at least for the time being.

101. Paragraph 7.11: *The points on the valuation of the Club.*

It is pleaded that the club was heavily under-valued by reference, at least in part, to the valuation of assets by the Southampton board and its accountants. It is said on the Claimant's behalf that this is irrelevant to any allegation against him (his duty being to act in the best interests of Secure and its shareholders, so as to obtain the best deal for them in any commercial transaction). The point is also made that, since the agreement was for an "all paper acquisition", the former board members were giving the club's shareholders an opportunity to participate in the revaluation of the merged company by the stock market. I agree that valuation by the board and/or its accountants could not support any defamatory sting against the Claimant ("chicanery" or otherwise) and that the plea is, to this limited extent, therefore strictly irrelevant. But I will leave the paragraph, which is to be read in conjunction with paragraph 7.12, because it seems to be part of the background against which the Defendant wishes to invite an inference of skulduggery between Mr Lowe and the former board members. I do not suggest that it has any validity, but it should not be excluded. Much of this material ought to be capable of agreement. Needless to say, all of this is subject to any argument as to Mr Mellor's state of knowledge.

102. Paragraph 7.12: *Reference to the Claimant's knowledge as to the club's value and to later public statements by him.*

It is pleaded that the Claimant must have known that the Club was "heavily under-valued" and reliance is placed upon his letter to the shareholders of Secure dated 20th December 1996 recommending the offer. It is not necessarily, as Mr Browne submits, an objection that these matters are not referred to in the words complained of. Nonetheless, there may be the usual point to be raised in due course as to whether or not Mr Mellor knew, at the time he made his observations, of the existence or contents of this letter. It is also pleaded on the Claimant's behalf that the allegation about his own acquisition of shares in misconceived. That may very well be so, but I am not inclined to strike it out at this stage as it may conceivably be relevant to supporting "financial chicanery" (subject, again, to Mr Mellor's state of knowledge). It could hardly suffice to establish the case on its own.

103. Paragraph 7.13: *Reference to the value of the offer for the Southampton directors.*

This sets out the Defendant's case on why it should be inferred that their personal benefit motivated the Southampton directors to accept the Secure offer. Mr Browne's argument is that the paragraph is irrelevant to any defamatory sting relating to the Claimant. But the opaqueness of the article leads me to conclude that it is (just) possible to read into it that the nub of the Claimant's supposed "financial chicanery" was that he had persuaded the existing board members to go along with the Secure offer because they would benefit personally at the expense of the Southampton

shareholders. I am not suggesting that there is any merit in that proposition, and no evidence of impropriety has emerged hitherto, but it seems to be something which the Defendant wishes to put forward. I am inclined, therefore, not to strike the first part of the paragraph out. But this central thesis must be spelt out with the particularity of an indictment: see e.g. *Hickinbotham v Leach* (1842) 10 M&W 361. I have not lost sight of Miss Sharp's contention that "the article could not have conveyed to the ordinary reasonable reader the meaning that Mr Lowe had been guilty of dishonesty". She says that the defence is focussing, accordingly, on "irregular means" rather than dishonesty. I nevertheless have difficulty in understanding how the Defendant can disavow any accusation of dishonesty when, at the same time, it is part of its case that Mr Lowe was collaborating with the Southampton directors in a course of action in which it was inherent that they were to breach fiduciary duties for personal gain.

104. Mr Browne argues that the last sentence is a complete *non sequitur* "both in logic and in fact". It reads at follows:

> "Given the failure of the Board to find out whether Secure's offer could be bettered it is to be inferred that Secure's acquisition of a major football club was accepted by the Southampton board because it personally benefited Southampton board members more than bids by Gavyn Davies or any other rival bid".

Mr Browne states that prior to 10 December 1996 the board had already considered other expressions of interest. More importantly, however, it seems to me that the Defendant must identify why it is said that the personal benefit to the directors (as opposed to all shareholders) was greater than would have been the case with regard to any other specific bid/expression of interest. It will not do merely to invite an inference to that effect. If that is established, then it *may* be possible to invite the inference that self-interest led the board to accept the Secure bid. But that is a distinct point, and the groundwork must be laid. For the moment, therefore, the sentence should come out.

105. Paragraphs 7.14–7.16: *The confidential nature of the negotiations.*

The Defendant pleads in these paragraphs that the Secure discussions took place in secret between October and December 1996. Many Southampton shareholders, it is said, were unaware of the proposals: so too were the manager, players and supporters' associations. It is suggested that the secrecy provided a substantial advantage to the Claimant and Secure but a disadvantage to Southampton. The consequence was that the Southampton board "tied themselves to a bid which substantially undervalued Southampton". What is alleged is that an opportunity was lost to ascertain the market value of the shares and to test "the validity of Secure's offer by inviting other bids". The general point is expanded by citing particular examples in sub-paragraphs 7.15 and 7.16 of individuals or groups who were "kept in the dark".

106. None of this was mentioned in the article and it may be questionable how much Mr Mellor actually knew of these details in August 2004. Nevertheless, I do not think it appropriate to strike these passages out. They represent part and parcel of the Defendant's case that the Claimant went to great lengths to keep the deal secret in order to achieve an advantage for himself and the Southampton directors. It appears to

be the Defendant's case that not only was this to the disadvantage of Southampton shareholders and supporters but that it was in some way "inappropriate" or "improper". It may need to be fully particularised, and at the moment one may be sceptical about the thread of the argument, but I am not sure that it is a matter for strike-out. There is again the question of Mr Mellor's knowledge to be explored in due course.

107. Paragraphs 7.17-7.18: *Reference to irrevocable undertakings obtained by Secure on 9th December 1996.*

There are nine sub-paragraphs dealing with irrevocable undertakings obtained by the Claimant and Secure, which are said to constitute a violation of the Southampton directors' fiduciary duties to shareholders. That is to say, undertakings were obtained that Secure's offer should be accepted prior to the public announcement. It is suggested that this was done in order to avoid other offers being made which would have been more advantageous to Southampton by way of a higher valuation of the club's assets or the prospect of more cash investment. It is naturally for the Defendant to plead and demonstrate at trial that such undertakings were irregular.

108. There is much force in Mr Browne's submission that the Claimant's obligation was to the shareholders of Secure, but I understand the nub of the Defendant's allegation, in this context, to be that the Claimant was in some way inducing or conniving at the Southampton directors' supposed breaches of duty. Mr Browne's objection has been put primarily on the basis that none of this was referred to in the article complained of, which is certainly true. On the other hand, I would be more concerned to know the extent to which the supposed "inducement" or "connivance" on the Claimant's part was something in Mr Mellor's mind at any relevant stage. At the moment I simply do not know. Especially where the allegation is so serious, it would be quite inappropriate to allow it to be slipped into the pleading if it had no connection with Mr Mellor's expression of opinion. Unless and until that is clarified, the passages should come out. Thus far, that essential ingredient is missing.

109. Paragraphs 7.19-7.21: *The supposed advantages of the Gavyn Davies consortium proposal*.

The numbering has gone awry in the draft amended defence placed before me at the hearing. There is duplication of the use of numbers 7.18 and 7.19. The second paragraph 7.18 corresponds to the former paragraph 7.20, and the second paragraph 7.19 to the former 7.21.

110. At all events, there are five sub-paragraphs setting out the supposed advantages to Southampton of the "bid by a consortium led by the broadcaster Sir David Frost and Gavyn Davies …". Mr Browne has a number of points relating to this plea. First, by the time the Secure bid was accepted on 10th December 1996, there had been no more than an expression of interest by the Frost/Davies consortium. Secondly, the mere fact that their proposal would have been more advantageous to Southampton (a big assumption in any event) would not support any defamatory sting of impropriety against the Claimant. Thirdly, the pleading (by contrast with the words complained of themselves) does not make the allegation that the Secure bid gave rise to greater personal benefit for the Southampton board members than the consortium proposal. That would, presumably, be a crucial element in any plea on the Defendant's part to

the effect that an inference should be drawn that the Claimant was in a quasi-conspiracy with the board members (at the expense of those to whom they owed fiduciary duties).

111. Because the allegation would appear to be serious, in so far as it suggesting some sort of improper conspiracy between the Claimant and the Southampton board members, it is vital that every element within it should be spelt out clearly. The nature and extent of any "benefit" to the board members, therefore, needs to be clearly identified. At paragraph 7.19 (formerly 7.21) it is pleaded that:

> "The Consortium's bid valued the club at £11.92m and offered to invest £7 million cash in exchange for an issue of shares by Southampton, such that the Consortium would own 37% of the enlarged share capital. The consortium considered their bid offered Southampton a better deal because it (i) valued Southampton 51% above the Secure offer; (ii) offered the certainty of cash; (iii) provided £4 million more cash; (iv) provided £6.7 million cash on acquisition; (v) lent greater credibility to growth plans and (vi) created a stronger company for stock market listing."

This appears to be advancing a case, as to which there is no doubt considerable scope for disagreement, to the effect that the offer which the consortium would have made was of greater benefit to *the club*. That, of course, in itself does not support the defamatory sting against the Claimant. In any event, as Mr Browne points out, it is a different allegation from that contained in the article; namely, that the Secure bid was of greater benefit to the Southampton board members. One could conceivably invite an inference, if that were so, that the Claimant was collaborating with them improperly by offering them personal inducements, but it would hardly be possible to make such an inference on the basis of the facts pleaded at paragraph 7.19 (formerly 7.21). I am inclined to leave it nevertheless, because it might (just) provide some support for the proposition that the board members were motivated by some considerations other than the club's best interests. But the supposed advantages of the Consortium's bid must be pleaded directly – not by reference to what the Consortium "considered". On such a critical part of the Defendant's case, I do not consider it satisfactory to take the line, as Miss Sharp did in her supplementary submissions, that it is open to the Claimant to make a request for further information. The obligation is to plead any allegation of misconduct "up front".

112. Paragraph 7.22 and 7.23 (wrongly numbered 7.20 and 7.21 in the recent draft): *Allegations o f dishonesty against the Claimant.*

By way of amendment, it is alleged that the Claimant had been party, dishonestly, to a misleading joint statement on 24 December 1996 in respect of the irrevocable undertakings. It is said to have been misleading "because the Claimant had tied the Southampton directors' hands by irrevocable undertakings to recommend in breach of their fiduciary duties". It is not spelt out, but I infer that what is intended here is the suggestion that the directors were effectively bribed by the Claimant (and his associates) with financial advantages, personal to them, to recommend the Secure offer to their own shareholders contrary to *their* best interests. That is to say, the

directors were being "sweetened" with advantages which would not have accrued to them from any other bid which might have been in the offing.

113. Later, it is said, the Claimant also misrepresented (again dishonestly) the nature of the Secure transaction as "the clearest, fairest deal that's ever happened". He is also criticised for being "apparently content" that four of the Southampton directors should serve on the board of the enlarged Secure (i.e. despite their alleged breaches of fiduciary duty).

114. Again, one comes back to the recurring void in the Defendant's case. What was the personal advantage *to the Southampton board members* which was unique to the Secure deal? It is a serious allegation and, so far as this part of the defence is concerned, it would appear to be fundamental to the Defendant's case. It does need to be unequivocally identified. Despite the attempts at tidying up through amendment, this has not been achieved. It may well be, as Mr Browne suggests, that the Defendant is unable to do so. For the present, however, I will not strike out the unparticularised allegation but, if it cannot clearly be stated what the "bribe" was, the allegation may well fall. Thus, as with paragraphs 7.19–7.21, these two paragraphs can only survive if the missing information is clearly set out.

115. Paragraph 7.24: *The alleged under-valuation of the club*.

This paragraph (significantly augmented by the addition of four sub-paragraphs by way of amendment) is concerned with an allegation that, because the enlarged Secure was valued at £40m following flotation on the stock market on 14th January 1997, there must have been a serious undervaluation of the Southampton Football Club.

116. Mr Browne's first point is that this is not referred to or indicated in the words complained of, which is true. That in itself, however, is not fatal for the reasons explained above. It may well be, on the other hand, that the state of Mr Mellor's knowledge in August 2004 in respect of these matters will need to be considered in due course.

117. Mr Browne also makes the point that the Claimant's duty, or at any rate primary duty, was to the shareholders of Secure. He is not to be blamed for having negotiated a deal whereby the Secure shareholders may have obtained an advantage through under-valuation of the Club. The Defendant's case became more focussed, however, in the light of the amendment. The nub of these allegations is perhaps to be found in paragraph 7.24.2:

> "The Claimant knew that the deal seriously undervalued Southampton. He had also secretly 'locked up' the directors by virtue of irrevocable undertakings in breach of their fiduciary duties to Southampton shareholders. He had thereby prevented Southampton shareholders from obtaining a fair deal, let alone the best deal, contrary to the representation made in the fairness option given in the offer document, which the Claimant and his advisers knew to be misleading".

The thrust of the criticism would thus appear to be, first, that Mr Lowe was party to a conspiracy with the former Southampton board members whereby he arranged a

personal advantage for them in breach of their fiduciary duties; and, secondly, that a representation in the offer document was known by him to be misleading at the time it was issued. Whether Mr Mellor knew or recalled anything about this at the time of his article is no doubt open to question.

118. Mr Browne submits that, in any event, the Defendant's reasoning is flawed, and that the true relative positions of the two sets of shareholders, after the takeover, must be measured by reference to share dilution. He argues that there is no evidence, and indeed nothing pleaded, which would demonstrate any difference in share dilution as between the Secure bid and the intentions of Sir David Frost and Mr Davies. This may be a matter for argument and expert evidence in due course. I accept that the fact that Gray J gave permission for experts on 21 June 2005 does not resolve questions on the scope of the pleading, as Mr Browne submits, but I do not believe it would be right to determine this matter summarily on a Part 3 application.

119. It is pleaded by way of the amendment that the Secure shareholders received substantially more of enlarged Secure than if the deal had been based on a fair valuation of the two entities concerned. "Secure therefore took value from Southampton and 'planted it' into their own shares to the detriment of Southampton shareholders". It is said, moreover, that there was nothing in what Secure brought to the deal to justify that outcome. It is, as ever, important to distinguish between an allegation to the effect that the original Secure shareholders gained more from the deal, relatively, than the original Southampton shareholders (which would not in itself involve any impropriety on Mr Lowe's part) and, on the other hand, an allegation that the former Southampton board members personally profited at the expense of their fellow shareholders, in breach of their fiduciary duties, and with Mr Lowe's connivance. Whereas the latter allegation albeit not referred to in Mr Mellor's article, could possibly support a comment to the effect that conduct of Mr Lowe amounted to "repellent financial chicanery", the former arguably could not. It will be important for the jury to know exactly what is relied upon.

120. Accordingly, for the moment, there is a deal of uncertainty about this aspect of the case – both with regard to the state of Mr Mellor's knowledge in August 2004 and to the true nature of the case the Defendant is intending to make against the Claimant.

121. As I have already said, it seems to be integral to the Defendant's case that the former Southampton directors profited personally more from the Secure takeover than would have been the case if the Frost/Davies bid had been allowed to take place, and that this was part of the motivation for the secrecy of the Secure negotiations with the Southampton board and the inappropriate irrevocable undertakings that were obtained on 9th December. It is thus important that the Defendant should not only show (as is alleged in paragraph 7.25) that the Southampton directors "profited at an incredible level"; it is also to be demonstrated that this would not have occurred if the Frost/Davies bid had been made earlier, and there was an opportunity for the board to give it full consideration.

122. Paragraph 7.25: *The Southampton directors' "incredible" overnight gains.*

Reference is made to the acquisition of shares by the former Southampton board members who, at the time of the takeover, apparently held 27.7% of Southampton's

issued share capital. This, it is said, reflected after the acquisition and flotation about 17.51% of the issued share capital in the enlarged Secure.

123. It is alleged that the value of their shareholdings increased by nearly 500% to approximately £7m. Moreover, Mr Guy Askham and Mr Keith Wiseman on the basis of their investments, respectively, of £3,500 and £2,000 subsequently had shareholdings worth £1.3m and £750,000.

124. These matters are certainly not referred to in the words complained of but, more to the point, the substantial gains (if accurately pleaded) would not in themselves reflect adversely upon Mr Lowe or go to support "financial chicanery", unless it is to be demonstrated that their gains were disproportionate to gains of other shareholders and/or they did better personally than would have been the case following an acquisition by the Frost/Davies consortium. Only then would the foundation be laid for the inference that the Defendant seeks to draw; namely, that Mr Lowe had been in some form of improper collusion with the Southampton board members to undermine the interests of the Southampton shareholders in circumstances which would have given rise to breach of fiduciary duties. It may be possible to re-plead the allegations, but I do not think they should survive in their present form.

125. Paragraph 7.26: *Details relating to Mr Raingold's shareholding*.

There are allegations (added by way of amendment) about Mr Gerald Raingold, the deputy chairman of Dawnay Day Corporate Finance Ltd, which was the financial adviser to the Southampton board on the takeover. It is said that he owned 7,500 shares in Secure Retirement directly before the takeover and, following the acquisition, sold 6,500 shares at a substantial profit. That was certainly not referred to in the words complained of, and I doubt whether Mr Mellor had this even at the back of his mind when he wrote the article of August 2004. Mr Browne submits that this is a trivial matter which gave rise to no real conflict of interest and "plumbs the bottom of the barrel".

126. The allegations have recently been supplemented by including the assertion that Mr Lowe and his advisers were aware that Mr Raingold had a direct financial interest in the outcome of the deal and that he stood to gain. This information about a conflict of interest was never, however, disclosed to the Southampton shareholders.

127. Reliance is placed on Principle 6 of the Securities and Futures Authority ("SFA") Rules then applicable:

> "A firm should either avoid any conflict of interest arising [where] or, where conflicts arise, should ensure fair treatment of all of its customers by disclosure, internal rules of confidentiality, declining to act, or otherwise".

Mr Lowe is criticised, together with his advisers, for not disclosing in the listing particulars or the offer document Mr Raingold's interest in Southampton. This seems to be part of the more general allegation that Mr Lowe was party to a corrupt conspiracy, effectively bribing those who had the power to influence the acceptance of the Secure offer. The pleas can remain for the moment, although without prejudice to any points which may later be made about Mr Mellor's state of knowledge.

128. Paragraph 7.27 (as renumbered): *Complaints by former Southampton shareholders over acquisitions by the board.*

This relates to complaints made by former Southampton shareholders about their own shares, or shares belonging to family members, having been acquired secretly by members of the board for £1 each. It is said that they were acquired by people who knew that they were worth far more, and they felt cheated. In April 1997, it is said, Mr Askham stood down as chairman following protests by fans in relation to the takeover.

129. Mr Browne's primary objection is that acquisitions by the board prior to the Secure bid could not be relevant to any allegation against the Claimant. That must be right. I cannot see that this has a proper place in the defence.

130. Paragraph 7.28 (as renumbered): *No financial benefits for the Southampton football club*.

It is alleged that the takeover and flotation enriched the existing Southampton board, Mr Lowe and the Secure shareholders without bestowing any comparable financial benefit upon the club. Reference is made also to a claim by the Southampton board in a letter of 20th December 1996, recommending the bid to shareholders, suggesting that it would be better able to purchase talented players and maintain the club's position in the Premier League.

131. It is said that this paragraph is simply irrelevant, since it does not support any allegation against Mr Lowe. In any event, Mr Browne points out, it is not pleaded here that the Secure bid benefited the former Southampton directors to a greater extent than would have been the case with the Frost/Davies bid. Since it does not appear to relate to Mr Lowe, I take the view that it should come out.

132. Paragraph 7.29 (as renumbered): *Claims by Mr Lowe in his letter to Secure shareholders of 20th December*.

It is difficult to understand how the statement in the letter of 20th December 1996 supports any criticism of Mr Lowe on a particular allegation of "financial chicanery". It is not suggested that what he said was dishonest. There is no indication that this was referred to in the article or that Mr Mellor had it in mind when he wrote it. It seems to me that it should come out.

133. Paragraph 7.30 (as renumbered): *The supposed advantages described by Mr Askham*.

Reliance is placed on the allegation that Mr Askham in December 1996 informed Southampton supporters that the Secure offer, if accepted, would provide (i) a stock exchange listing, (ii) access to future funds for a stadium and team development, and (iii) would make the company stronger and give access to immediate funds. Again, I cannot see how this would support an allegation against Mr Lowe.

134. Paragraph 7.31 (as renumbered): *Inadequate funding for the team after the takeover.*

It is true that this is not mentioned in the words complained of, whether as a comment in itself or as supporting some other comment. More significantly, it seems to me to

be irrelevant to "financial chicanery" what happened afterwards unless, perhaps, it were relied upon in some way as evidence of the particular form of chicanery alleged. At the moment, I cannot see that it has a legitimate place.

135. Paragraphs 7.32-7.33 (as renumbered): *Club transfers and funding for players 1996-1999.*

These paragraphs contain considerable detail about the Claimant's role in setting a recruitment budget in the summer of 1997 *after* the acquisition; the dissatisfaction and resignations of Mr Souness and Mr McMenemy over that issue; the transfer record up to 1999, said to be "pitifully low" for a Premiership club, compared to other clubs. These allegations are not referred to in the article, and are said to be irrelevant for similar reasons to those given above. I agree.

136. Paragraphs 7.34-7.35 (as renumbered): *FA Rule 34 and the remuneration of Mr Lowe and other directors.*

It is said that, by creating a plc holding company which owned the club as a subsidiary, the Claimant was able to circumvent Rule 34 of the Football Association, which was designed to limit the profit motive on the part of those acquiring shares in football clubs, and upon directors, as well as discouraging asset-stripping. Mr Lowe is said to have benefited personally thereby and also to have facilitated a salary increase, pension contributions and share options for Mr Cowen. This also enabled payments to be made to Mr Askham, Mr Richards, Mr Wiseman and Mr Hunt which would otherwise not have been permitted. Reference is also made to what Mr Lowe and Mr Cowen received as late as 2003.

137. Mr Browne argues that none of this is referred to in the words complained of. That is true. Also, I do not know whether Mr Mellor knew of any of this at the relevant time. In any event, it is all said to be irrelevant (presumably to the allegation of "financial chicanery"). I am inclined to leave this in the pleading for the moment, since it is conceivable that the creation of a plc holding company was part and parcel of the supposed "chicanery" associated with the reverse takeover. Likewise it might be relevant to the inference invited as to doing a deal with the former Southampton directors so that they could reap those financial advantages.

138. Mr Browne argues, with some force, that Rule 34 was anachronistic at this time, and was duly abolished in February 1998. More directly relevant, however, is the point that it was generally more honoured during this period more in the breach than the observance and would, in any event, have been an integral part of the Frost/Davies bid. I should be wary, on the other hand, of determining matters of evidence at this stage.

139. Paragraph 7.36 (as renumbered): *The drawing together of the threads.*

Here are set out eight sub-paragraphs referring back and summarising the Defendant's case. It is necessary to adopt an approach consistent, in each case, with that taken to the corresponding allegations above.

140. The key allegation is at 7.36(ii), namely that the deal was accepted because "it personally benefited the Southampton board members more than rival bids". That needs to be fully particularised, as the foregoing paragraphs do not as yet support it.

141. I will leave these sub-paragraphs for the moment, but subject to the need of particulars and to substantiating the extent of Mr Mellor's knowledge.

The outstanding applications

142. The applications so far unresolved may be addressed, in so far as they survive, once these rulings have been considered and (subject to any appeal) the pleadings correspondingly adjusted.

143. In relation to the latest version of the plea of justification, however, Mr Browne has made his position clear as to the *Lucas-Box* meaning, for which permission was sought by way of re-amendment, at para. 9.2. I should say a little about it at this stage. It is pleaded that the Claimant, *together with the directors of Southampton football club*, was involved in and responsible for a repellent piece of financial chicanery in that the reverse takeover by which he and his company took control of Southampton football club was "an *irregular*, cunning and clever deal, dodge or manoeuvre which initially *benefited him, his company and the existing directors of Southampton football club, at the expense of the club and its fans*". Alternatively, it was pleaded in the draft that there were "reasonable grounds to suspect the foregoing". The same facts are relied upon as those already considered in the context of fair comment.

144. There is no doubt that this form of words is such as to alert the suspicions of anyone used to reading libel pleadings. Mr Browne with his customary bluntness says: "This is not just objectionable for using three words where one will do, it is also so obscure as to be meaningless". He finds himself also in the dark as to whether there is any attempt to justify the Claimant's meaning of "underhand and dishonest means". As always, it has to be remembered that if dishonesty is to be pleaded it should be stated in unequivocal terms.

145. The proposed plea does appear circumlocutory and obscure. The word "dishonest" does not appear. Yet the thrust of the plea does appear to entail an improper collusion with the Southampton directors. As Mr Browne points out, "clever" of itself could hardly be defamatory, whether one couples it with "manoeuvre" or "deal". I accept, of course, that a "clever dodge" could be defamatory, but it requires to be spelt out exactly what the Claimant was "dodging" (e.g. a legal or regulatory obligation of some kind). He also queries why the word "initially" appears to qualify the benefits accruing to the various persons identified. Greater clarity would therefore certainly be desirable. Again, if one applies the standards of an indictment, the accused person (Mr Lowe) is left in considerable doubt as to the case he has to meet. Although I gave permission for the amendment on 19 December 2005, that is without prejudice to the need for further clarification.

146. Moreover, the "reasonable grounds to suspect" formula should not be used as a device in cases where the real sting is a direct allegation of "guilt", so as to admit particulars which are incapable of establishing guilt but might serve to raise a miasma of general suspicion. (I was reminded in this context of the words of Simon Brown LJ in *Stern v*

Piper [1997] QB 123, 135H-136A.) This is why I declined permission for this part of the proposed re-amendment.