Neutral Citation Number: [2015] EWHC 807 (QB)

Case No: HQ13D02853

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2015

Before :

MR JUSTICE WARBY

- -

Between :

RICHARD RUFUS	**Claimant**
- and -	
PAUL ELLIOTT	**Defendant**

- -
- -

Jonathan Barnes (instructed by **Simon M Smith**) for the **Claimant**
David Price QC (of **David Price Solicitors and Advocates**) for the **Defendant**

Hearing date: 19 March 2015

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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.

.....

MR JUSTICE WARBY

Mr Justice Warby :

1. On 19 March 2015 I tried the issue of whether the words complained of by the claimant in this libel action are defamatory of him. I held that they are not. These are my reasons for reaching that conclusion.

THE CLAIM

2. The claimant (Mr Rufus) and the defendant (Mr Elliott) are both former professional footballers. Both have remained involved with football after their playing days. Mr

Rufus now helps the Charlton Athletic Community Trust. Mr Elliott has been an anti-racism campaigner for many years, and was a trustee of the "Kick it Out" anti-racism campaign of the Football Association. He has been awarded a CBE for his work on diversity and anti-racism. Mr Rufus and Mr Elliott were at one time friends and business acquaintances, but since 2013 they have been fighting this action.

3. The facts alleged by Mr Rufus, which for present purposes are assumed to be true, can be shortly summarised. In December 2012 a business dispute arose between the two men. On 11 February 2013 Mr Elliott sent Mr Rufus an offensive and aggressive text message. It included these words: "Ur a stupid man nigger … You dog. Ur history my friend". On 18 February 2013 the text message became public through an article in The Sun newspaper under the headline "N-word slur by CBE ace". The sub-headline was "A football anti-racism champion has sparked a race row after calling another black man 'n*****'". The article gave details of the words used in the text message.

4. The fact that Mr Elliott had sent such a text message to Mr Rufus was widely reported by third party media, and on chat forums, and on Twitter, on and between Tuesday 18 and Saturday 23 February 2013.

5. On Saturday 23 February 2013 Mr Elliott resigned his position as a Kick It Out trustee and participated in the issue of a press release (the Press Release), which was published via the organisation's website, containing these words:-

> "Today Paul Elliott CBE has resigned from his position as a Kick It Out trustee.
>
> He has released the following statement to clarify this decision:
>
> 'Earlier this week, a former friend and business colleague, made public a SMS text message I sent him, in which I used a term which is widely known as being derogatory to my own community.
>
> I regret using it; it is inappropriate and not part of my everyday vocabulary. As an advocate of high standards of public behaviour, and integrity in public life, I know the use of this word sends out mixed messages and contradicts my position as a Kick It Out trustee.
>
> I will continue to be active in other projects in what I believe to be a true and just cause.'
>
> Kick It Out extends its thanks to Paul for the key role he has played over the past 20 years, through his distinguished unpaid work, loyalty and devotion in helping the campaign in all areas of its work. His commitment to the aims and objectives of Kick It Out has inspired others everywhere."

6. The Press Release, or the gist of it, was widely republished in the national news media over that weekend and the following one. In addition, there was what is described by Mr Rufus as a "social media network frenzy" during which, according to Mr Rufus's case, a number of people posted messages "falsely insinuating and implying that the claimant had made the text message public as alleged by the defendant". The posting of those messages is said to flow from the publication of the Press Release. As is clear from this quotation, which comes from his Particulars of Claim, Mr Rufus maintains that it was not he who made the text public. That, however, is not before me for decision. The only issue is whether the Press Release defamed Mr Rufus in the eyes of ordinary reasonable readers.

7. In late February 2013 Mr Rufus complained through solicitors of libel and in May 2013, not satisfied with the response, he issued this claim for damages. Mr Rufus's case is that a large number of those who read the Press Release will previously have read the Sun article, or third party reports of the facts it contained; these readers will therefore have identified Mr Rufus as the "former friend and business colleague" referred to in the Press Release as having made public the text message. It is accepted by Mr Elliott that for these reasons at least some readers of the Press Release will have understood it to refer to Mr Rufus.

8. Paragraph 8 of Mr Rufus's Particulars of Claim asserts that the Press Release was defamatory of him. Paragraph 9 pleads that, by way of innuendo, the press release meant that Mr Rufus "*had acted dishonourably and betrayed the Defendant and deliberately harmed his reputation* by making public a private SMS Text communication sent by the Defendant to the Claimant which was inappropriate in that it contained a term that is widely known as being derogatory of the black community and which contradicted the Defendant's role as a Kick It Out trustee, *causing his resignation from it*".

9. This is quite an elaborate meaning. However, the words in the middle of it are drawn almost verbatim from the Press Release. Apart from the word "inappropriate", they are essentially descriptive. There is no real dispute that the Press Release conveyed a meaning to this effect. It is the parts of the meaning that I have italicised, and in particular the opening words, which are at the centre of the dispute between the parties.

10. The facts relied on in support of the innuendo are identified in paragraphs 10 and 11 of the Particulars of Claim. Paragraph 10 asserts that "The fact of the content of the Text Message and its sending by the Defendant to the Claimant" had been published in The Sun. Paragraph 11 pleads that "The fact of the content of the Text Message and the identity of the Defendant as its sender and the Claimant as its recipient were widely reported by third parties" in the media, chat forums and Twitter. No other features of the reporting by The Sun, or others, are relied on in support of the innuendo.

THE ISSUE

11. The parties agreed that the issue for my decision was whether the Press Release was defamatory of Mr Rufus. They disagreed, however, on the approach I should take to deciding the issue. To set that disagreement in its context it is appropriate briefly to describe and explain the slightly circuitous route by which the issue came before me.

12. On 23 October 2013 Dingemans J heard an application by Mr Elliott for rulings that the words complained of were not capable of being defamatory of Mr Rufus, or of meaning that he acted dishonourably, betrayed Mr Elliott or deliberately harmed his reputation, and for an order striking out the claim. The application, made under 53PD 4.1, took the form it did because at that time the law was that issues of fact arising in an action for libel had to be tried by jury, unless certain specified exceptions applied, provided that a timely application for jury trial was made: see Senior Courts Act 1981, s 69; CPR 26.11 (in its then form); and *Thornton v Telegraph Media Group Ltd* [2011] EWCA Civ 748, [2011] EMLR 29. Where a case would or might be tried by jury a judge could only decide the threshold question of whether a jury could reasonably find the words to be defamatory or to bear a pleaded meaning. Mr Elliott had wanted the actual meaning to be determined at that stage, but Mr Rufus would not agree. It is hard to see how any of the statutory exceptions to the presumption in favour of jury trial could ever have applied in this case.

13. On 1 November 2013 Dingemans J gave judgment, holding that the words were capable of defaming Mr Rufus, and dismissed the application: [2013] EWHC 3355 (QB). The Judge highlighted at [6] that his decision was no more than a threshold ruling, saying: "I should point out that this is an application about whether the words are capable of bearing a defamatory meaning. It is not the hearing of a preliminary issue for a determination as to the actual meanings of the words. That is because the actual meanings will be a matter for trial, which may (depending on directions), be a jury trial."

14. Permission to appeal against Dingemans J's decision was refused by him, and by Sedley LJ on paper, but the application was renewed, and granted by Maurice Kay LJ V-P and Rafferty LJ after an oral hearing. On 20 February 2015 however the Court of Appeal (McCombe and Sharp LJJ and Mitting J) dismissed the appeal: [2015] EWCA Civ 121. The judgment of Sharp LJ, with whom the other members of the court agreed, emphasised the "narrow compass" of the argument before the Judge, identifying as one good reason for that the fact that "the threshold of exclusion is a high one. The judge's task under 53PD 4.1 is no more and no less than to 'pre-empt perversity': see *Jameel v The Wall Street Journal Europe Sprl* [2004] EMLR 6.": [8]. This point was reflected at [25] where Sharp LJ gave this reason for dismissing the appeal: "It is possible (and no more) that those who read the Press Release thought both that the defendant should not have said what he did but the worse of the claimant for having made what was essentially a private row public, given the circumstances."

15. The Court ordered that there should be a preliminary "trial of actual meaning" before a judge on the first available date. It had been asked to, but was not able to decide actual meaning itself, as that is a fact-finding exercise outside its province: see [27]. The court was able to direct that the issue should be tried by a judge without a jury because by that stage Mr Rufus had agreed to that course. Without such agreement, the "old" law that continues to apply to this case might very well have meant that it was necessary to have a jury trial.

16. As Sharp LJ pointed out at [28], however, this sequence of events is highly unlikely to be repeated now that the reforms of libel law enacted by the Defamation Act 2013 are in force, including the removal of the presumption in favour of jury trial by s 11 of the Act. Under the reformed law, there would be no obstacle to an application for a judge to try at an early stage the issue that I have now decided, nearly two years after this

action began. The fact that the trial took place less than a month after the Court of Appeal's decision was handed down is an indication of how swiftly such hearings can be arranged, with co-operation from the parties. The hearing itself lasted just over an hour.

MY APPROACH TO THE ISSUE

17. Conventionally, the question of whether words are defamatory is approached in two stages, by first identifying the single meaning which the words would convey to an ordinary reasonable reader and then determining whether that meaning is defamatory. This two-stage approach is reflected in PD53 4.1, which authorises the court to decide at any time "(1) whether a statement complained of is capable of having any meaning attributed to it in a statement of case; (2) whether the statement is capable of being defamatory of the claimant; …." I am not now concerned with whether the words are capable of bearing a meaning, or capable of being defamatory. I refer to this paragraph of the Practice Direction only to illustrate the conventional dichotomy.

18. It was clearly the intention of the Court of Appeal that this trial should encompass both meaning and defamation, and resolve for good the question of fact, whether the words complained of defame Mr Rufus. That was also the intention of the parties. The parties identified an agreed core meaning of the Press Release: that Mr Rufus had made public the text message. But beyond that, they disagreed on the right approach.

19. Mr Barnes, for Mr Rufus, submitted that the single issue was whether the Press Release was defamatory, but that the purpose of the trial was not to determine whether the agreed literal meaning was defamatory, shorn of any insinuations it contained or inferences that would be drawn. Rather, the question was whether in the context of the Sun article the article bore the meaning pleaded in the Particulars of Claim, or some other meaning defamatory of the claimant. He offered as an alternative encapsulation of the claimant's meaning the one he had advanced in the Court of Appeal: that Mr Elliott's resignation statement was defamatory of Mr Rufus "as it meant that [Mr Rufus] had made public the text message sent to him by [Mr Elliott] which was both disloyal and wrong." He recognised, and pointed out, that I was not bound by the pleaded case and entitled to find a different meaning.

20. Mr Price QC submitted on behalf of Mr Elliott that there was no real room for dispute about the meaning the Press Release would convey to readers who knew that the text message had been sent to Mr Rufus, and what that message said. The Press Release meant that Mr Rufus had made public a text message sent to him by Mr Elliott containing the n-word in circumstances where the two men were former friends and business partners, and had caused Mr Elliott's resignation from a position in an anti-racist organisation which has a zero-tolerance policy to the use of that word. The issue, he submitted, was whether that conduct would be regarded as "disloyal" or in any way blameworthy by society generally. The decision I had to make was therefore not a "meaning ruling", but a "defamation ruling".

21. In my view it is Mr Barnes' submissions that better reflect the right approach. The meaning of words is often a matter of subtlety, going well beyond what they literally say. As Lord Reid has explained, the defamatory sting of words often lies not so much in what the words themselves say but also "what the ordinary man will infer from them" (*Lewis v Daily Telegraph* [1964] AC 234, 258), and the ordinary reader

indulges in "a certain amount of loose-thinking" (*Morgan v Odhams Press Ltd* [1971] 1 WLR 1239, 1245). A statement may therefore insinuate or imply, to the ordinary reader, some facts or some other form of suggestion which the statement does not mention. An obvious example, even if commonplace in this context, is a statement about a police arrest, or "probe", which will often imply that the person arrested or under investigation has done something to justify reasonable suspicion of criminal conduct. Similarly, a statement might imply, without stating, that conduct which it describes is maliciously motivated. To this extent Mr Barnes' submissions are correct. It is therefore important in my judgment to begin by considering what the words complained of would suggest to the ordinary reader about the claimant.

22. It is once that determination has been made that the question becomes whether the attribution to the claimant of the particular behaviour or state of mind, or whatever else is suggested by the words, is defamatory. It is at this stage that the question arises of what the reader would think of a person who acted or thought in the way stated or implied by the words complained of; whether the reader would regard the claimant as having acted in a way that is "wrong", "deplorable", "culpable", "disreputable" or similar. Sometimes the distinction is blurred, because the words themselves expressly condemn the claimant's behaviour using some disparaging adjective or adverb, but that is not this case. Sometimes the distinction is blurred by the way the claimant's case is put, because words such as "wrong" or "disreputable" are incorporated into the pleaded meaning although not present in the statement.

23. I have approached the issue for decision in the conventional two stages. I add one other point. When dealing with meaning it is right to make allowance for the fact that there may be different ways of putting what is essentially the same or a similar complaint. I do not, for instance, regard Mr Barnes' encapsulation as in any way straying outside the boundaries of the pleaded case. But it seems to me that the pleaded case must be treated as setting the parameters of what the claimant can say about meaning. In particular, my decision must be made on the basis of the innuendo case that has been pleaded, and not some different case.

MEANING

Legal principles

24. The essential principles were identified in *Gillick v Brook Advisory Centres* [2001] EWCA Civ 1263 by Lord Phillips MR, adopting part of the judgment of Eady J:-

> "the court should give the article the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once. Hypothetical reasonable readers should not be treated as either naive or unduly suspicious. They should be treated as being capable of reading between the lines and engaging in some loose thinking, but not as being avid for scandal. The court should avoid an over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or accountant would analyse documents or accounts. Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on

> the hypothetical reasonable reader. The court should certainly not take a too literal approach to its task."

This passage refers to an article, but the same principles apply to any published statement.

25. The same principles apply where the meaning complained of is an innuendo meaning. An innuendo meaning, in the sense the term is used in this case, is one that depends on the reader knowing some fact that is extraneous to the statement complained of, and not common knowledge. The pleading of an innuendo meaning must "identify the extraneous facts": 53PD 2.3(2). It must also explain how those facts became known to the reader. Often this second task is accomplished by relying on inference from third party media coverage, as in this case.

26. What may not be done, in reliance on an innuendo referring to third party media publication, is to incorporate in the claim some defamatory meaning which is conveyed only by the third party publication. It is the defendant's statement itself, and its implications and insinuations, for which the defendant is responsible and not any other defamatory material published by others on the same subject, unless he has adopted or repeated it: *Astaire v Campling* [1966] 1 WLR 34, CA. The reason is obvious: a person ought not to be held responsible for what others have published, if he has not adopted or referred to it in what he himself has said. As Davies LJ said in *Astaire* at 40, "statements made … in other articles in other papers, in this context seem to me not to be 'facts' within RSC Ord. 82, r. 3(1)" [(the predecessor of 53PD 2.3(2))].

The meaning of the Press Release

(i) The innuendo facts

27. The innuendo pleaded on behalf of Mr Rufus complies with the basic principles I have identified. It asserts that there were readers of the Press Release who already knew three things which are agreed to be facts: that (i) Mr Elliott had sent (ii) Mr Rufus (iii) an offensive text message containing the n-word. It explains that these facts were known to readers of the Sun article and other third party publications. It follows in my judgment that to those within these groups who read the Press Release, of whom there were admittedly some, the Press Release would mean at least this: Mr Rufus, a former friend and business colleague of Mr Elliott, had made public an SMS text message Mr Elliott had sent him, in which Mr Elliott had abused and threatened Mr Rufus, using the n-word.

28. Mr Barnes invited me to treat the Sun article as providing additional "context" for the Press Release, suggesting that the reader would, and that I should, take from the Sun article three further items of information in arriving at a meaning: (iv) that the text related to a business venture; (v) that neither party was prepared to comment on the argument or the insult; and (vi) that Mr Elliott had insisted that the term was not offensive because of the nature of the conversation and because it was between two black men. All those are factual assertions made in the Sun article.

29. However, this submission undoubtedly goes beyond the pleaded case. None of these matters are facts pleaded in the innuendo particulars in paragraphs 10 and 11 of the

Particulars of Claim. Indeed, I note that although item (iv) is pleaded in paragraph 3 of the Particulars as part of a narrative of events, there is no later reference to that paragraph, or that fact; and items (v) and (vi) are not asserted as facts anywhere in the Particulars.

30. Mr Barnes pointed to what he suggested was a concession in paragraph 5 of Mr Price's skeleton argument in the Court of Appeal, and to paragraph [6] of Sharp LJ's judgment, recording that it "appears to be common ground, again for present purposes, that the Sun article can be relied on as context." I do not, however, read either of these as involving anything more than a recognition that at that stage of the proceedings the Sun article had some relevance. That can be explained by the fact that it was relied on by way of innuendo in the way pleaded on behalf of Mr Rufus. In any event, I was not persuaded that the issue before me ought to be decided by reference to a concession that was made, if at all, on another occasion, especially when the nature and extent of the supposed concession are both debatable.

31. Mr Barnes pointed out that the material on which he sought to rely was not defamatory, and thus not ruled out by *Astaire v Campling*. It seemed to me however that this was an attempt to introduce into the assessment of meaning additional factual elements contained in a third party publication which formed no part of the statement complained of or, strictly speaking, its context, and which are not pleaded either as context or as innuendo facts. I do not think that either the pleaded case, or principle, would allow me to have regard to what the Sun, or third parties, told their readers about these issues, other than the three facts specifically alleged in the Particulars of Claim.

(ii) Discussion

32. I approached the task of deciding meaning by reading the words complained of and the claimant's pleaded case, and forming my own impression, before reading the parties' skeleton arguments and the other materials provided. I have however paid attention to each party's submissions about meaning.

33. I have already indicated above my response to Mr Price's submission that there is no room for dispute about meaning. In seeking to persuade me that the Press Release bore the meaning pleaded in paragraph 9 of the Particulars, or something similar, Mr Barnes made three main submissions. First, he argued that it was made clear to the reader that it was the making public of the SMS that had caused Mr Elliott's resignation. He pointed out that the resignation statement contained within the Press Release was expressly aimed at clarifying the reasons for Mr Elliott's resignation, and began with a reference to the SMS. Mr Barnes referred to Mr Elliott's statement that the use of the n-word sends "mixed messages and contradicts my position as a Kick It Out trustee" and submitted that it was wrong. The SMS did not contradict Mr Elliott's position, for so long as it remained on Mr Rufus's phone. If he had not disclosed the message (as the words complained of suggested he had) there would have been no mixed messages and no contradiction.

34. This is not at all the impression that I gained on reading the words before the hearing and, having now heard the argument, I reject it. On the contrary, in my view the resignation statement read as a whole gives the impression that Mr Elliott felt it right to resign because of his use of the n-word. It is that which was, he admitted,

"inappropriate", regrettable, and in conflict with his public position as a trustee. On the face of it, he was saying the resignation was justified by his behaviour in sending the text, and not because it had been made public. The publicity was referred to, as a significant part of the context in which the resignation took place, but it was not presented as the reason for the resignation. This is a natural reading of the words, and indeed is what the ordinary reader would expect. Mr Elliott was clearly *not* saying in his resignation statement that his behaviour had been acceptable and was only a resigning issue because it had been made public, or anything like this.

35. Secondly, Mr Barnes submitted that the reference to a "former friend and business colleague" led to a defamatory sting of dishonour and betrayal, implying that the duties of friendship and loyalty had been broken. Again, I disagree. The facts are stated blandly and neutrally. It is easy for the reader to understand why the two are not friends any more, and the reader would detect and understand a degree of annoyance on the part of Mr Elliott at the making public of the text. But the words do not in my view convey the impression that Mr Elliott is, in the course of confessing his own faults, complaining of dishonour or disloyalty by his former friend. I do not agree, either, with Mr Barnes' third point. This was that the statement implied an accusation that Mr Rufus deliberately set out to harm Mr Elliott's reputation. Making all due allowance for loose thinking, this is far too strained a reading in my opinion.

(iii) Conclusion

36. In my judgment the Press Release meant by way of innuendo that Mr Rufus, a former friend and business colleague of Mr Elliott, had made public an SMS text message which Mr Elliott had sent him, in which Mr Elliott, a trustee of the Kick It Out campaign and a long term anti-racism campaigner, had abused Mr Rufus by calling him a nigger and threatened him; and that as a result of the disclosure Mr Elliott had resigned his position as trustee because, as he acknowledged, his use of the n-word was inappropriate and in conflict with his public position. The Press Release did not bear the meaning complained of, nor did it mean that Mr Rufus had acted disloyally.

WAS THE PRESS RELEASE DEFAMATORY OF MR RUFUS?

37. This question has to be answered by reference to the meaning I have identified, applying well-established principles. Those principles, to which I shall come shortly, involve identifying and applying the standards of right-thinking people generally. That is a fact-finding exercise. However, evidence is not normally adduced on the issue. Subject to a point which I shall deal with at the end of this judgment, neither side has suggested that any evidence other than the Sun article and the Press Release is relevant or admissible in this case. If the issue were tried by jury, the jurors would be told what the relevant principles are and directed that, having decided on meaning, they should apply those principles to the case, using their own knowledge and experience to reach a conclusion on what are the relevant standards of right-thinking people generally, drawing whatever help they might gain from the arguments advanced. I adopt the same approach.

Legal principles

38. The test of what is defamatory is now partly statutory, by virtue of s 1 of the Defamation Act 2013. But this case must be decided by reference to the common law. In any event the issue here is not the one dealt with by s 1, namely whether the statement is harmful enough to be actionable. Rather the issue is whether it is defamatory at all. The applicable test is a common law test that is unaffected by the 2013 Act.

39. A convenient statement for present purposes is provided by Sir Thomas Bingham MR in *Skuse v Granada Television Limited* [1996] EMLR 278, 286:

> "A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally."

40. This statement, which was relied on by Dingemans J with the approval of the Court of Appeal, draws together syntheses of previous authorities proposed by Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237, 1240 and by the Faulks Committee (Report of the Committee on Defamation Cmnd 5909, March 1975) at para 65: see the analysis of Tugendhat J in *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB), [2011] 1 WLR 1985 at [29](3) and (6) and [56]-[57]. The word "estimation" now has a slightly archaic feel, and can be treated as synonymous with "esteem" or "opinion".

41. The word "generally", which appears twice in the citation from Sir Thomas Bingham MR, is important. It reflects the fact that a statement which tends to lower a person, or would be likely to affect them adversely, in the esteem or opinion of a section of society only is not a defamatory statement. To put it another way, the standards to be applied in assessing whether the offending statement is damaging to reputation in a way that is legally actionable must be collective standards of society generally, that are shared and agreed upon by society at large, and not just by a part of society.

42. Perhaps the best known expression of the principle is that of Greer LJ in *Tolley v Fry* [1930] 1 KB 467, 479: "Words are not actionable as defamatory, however much they may damage a man in the eyes of a section of the community, unless they also amount to disparagement of his reputation in the eyes of right thinking men generally". The application of the principle is perhaps most vividly illustrated by three cases, which were considered by Dingemans J and the Court of Appeal: *Mawe v Pigott* (1869) Ir.R 5 C.L. 54, *Myroft v Sleight* (1921) 90 LJKB 883, and *Byrne v Deane* [1937] 1 KB 818. The common theme of the first and third of these cases is that the statements complained of were held not to be defamatory because they attributed to the plaintiffs conduct of which right-thinking people generally would approve, or at least not disapprove, however much it might involve disloyalty that would be disapproved of by a sector of society.

43. Thus, a priest could not complain of being accused of informing on disloyal and criminal classes: *Mawe v Pigott*, where Lawson J agreed that the priest might be exposed to "great odium" amongst certain classes who were themselves criminal, but

held that "we cannot be called upon to adopt that standard." Nor can a golf club member sue, as in *Byrne v Deane*, for an allegation that he has reported the club to the police for having illegal gaming machines. The plaintiff complained of a rhyme posted on the club wall containing, he said, an implied imputation of "underhand disloyalty." Slesser LJ's view was that the meaning of the words was that the plaintiff had reported the crime to the police (p832), which could not possibly be defamatory, tested by the standard of "what a good and worthy subject of the King would think of such a person" (p833). Greene LJ also did not regard the rhyme as conveying the meaning complained of, but rather as meaning simply that the plaintiff had given information to the police (p839). But even if the statement could suggest to his fellow club members that he had been disloyal to them, his view was that this did not make the statement capable of being defamatory in law: (p840).

44. *Myroft v Sleight* was not an informer case, but it has this in common with the other two cases: it involved an accusation of disloyalty. The plaintiff was a trawler skipper, and a trade union member, who had voted for a strike. He was accused by a fellow skipper, a union committee member, of attempting to secure a ship to go to sea. The allegation was held to be defamatory. McCardie J identified the charge as one of "trickery or of underhand disloyalty or of hypocrisy" (It seems likely that the plaintiff's legal team in *Byrne v Deane* drew on these words for the meaning complained of in that case.) McCardie J held that the behaviour attributed to the plaintiff would be condemned by "a just, fair-minded and reasonable citizen."

45. An allegation of disloyalty therefore may or may not arise, and if it does it may or may not be defamatory, depending on the context, and on the relevant collective standards of members of society at the time and place of publication. The principle that underlies the two informer cases is not that the reporting of wrongdoing is lawful, though of course that is so, as a rule. It is not the law that an imputation is not defamatory merely because the conduct it attributes to the claimant is lawful: see Sharp LJ's judgment in this case at [24]. The principle is that the question of whether a statement is defamatory must be answered by reference to the shared reasonable standards of society. Those standards may place the duty or responsibility to report unlawful conduct above any duty of loyalty that might be owed by the informer. If so, any imputation of disloyalty will not be a defamatory one. As Greene LJ put it in *Byrne v Deane* at p839, "if the allegation that he reported the matter to the police is not defamatory, in my judgment the allegation that in reporting the matter to the police he was guilty of disloyalty cannot be defamatory."

46. The need for the values that are applied in deciding whether a statement is defamatory to be values shared by society at large – what might be termed the consensus requirement - has been emphasised in more recent authorities: see *Ecclestone v Telegraph Media Group Ltd* [2009] EWHC 2779 (QB) [17] (Sharp J), *Thornton v Telegraph Media Group* (above), and *Modi v International Management Group (UK) Ltd* [2011] EWCA Civ 937, [30]-[33] (Thomas LJ). *Thornton* provides a particularly clear example of the application of the consensus requirement. One allegation complained of by the claimant, a writer, was that she had given 'copy approval' to a source. This was a practice of which both she and the defendant strongly disapproved. The allegation was however held not to be defamatory. Tugendhat J held at [98] that "the fact that the two parties to an action may both be members of a section of society holding particular views does not relieve the court of the obligation to try the case by

the standards of society generally." He concluded that by those standards it was not defamatory to attribute this practice to the claimant.

Application of principles

47. In my judgment the Press Release is not defamatory of Mr Rufus, because the conduct that it attributes to him by way of innuendo is not conduct that would lower him in the esteem or opinion of right-thinking members of society generally. It is not the case that right-thinking members of the public generally would disapprove of that behaviour, which revealed the use of an unacceptable racist term by Mr Elliott, a trustee of an anti-racist organisation. That is so even though, in doing so, Mr Rufus disclosed a private message sent to him.

48. Mr Price characterised Mr Rufus's position on this issue as involving the proposition, "You shouldn't do anything to the detriment of your former mates". That was a parody, which did not do full justice to the argument. However, Mr Barnes did argue that the behaviour attributed to Mr Rufus was in breach of a "societal norm" not to betray or dishonour. Of course, such a norm exists, but I do not accept the argument that it places the duties implied by friendship above the desirability of holding to account a public figure whose private behaviour contradicts his public stance.

49. I add that if, contrary to that view, this conduct would be regarded as involving disloyalty, then even so it is disloyalty of a kind that is not in my view considered culpable or blameworthy by society in general.

50. There is today a strongly held consensus view in our society that discrimination against a person based on their race or colour is deplorable, in all its forms. The use of abusive discriminatory terms tied to race or colour such as, and perhaps especially, the word nigger is not tolerated but strongly disapproved of by society generally. That attitude extends to the use of the word by older people in society, who grew up at a time when different standards applied. They are expected at the very least to refrain from using unacceptable language with discriminatory overtones. There are few contexts in which society would regard the use of the word as acceptable. It will be apparent that in my view one such context is in a public judgment, in which it is important to state the facts with clarity and without euphemism. There are no doubt a number of others, but it is not easy to think of many.

51. It is an indication of the high degree of sensitivity attached to the use of the word generally that it only appeared in The Sun with asterisks. Mr Elliott used no asterisks in his text message. In my judgment society's disapproval of the use of the term extends to its use by one black person to another in many, albeit not all contexts. Those contexts include its use in the "–er" spelling, as a term of abuse designed to cause offence, in an aggressive message, as was the case here.

52. The words used by Mr Elliott in the Press Release reflect these points, in my view. He did not use the n-word itself, or even use asterisks. He referred to "a term which is widely known as being derogatory to my own community", and expressed his regret at its use. He described it as "inappropriate" and as sending out mixed messages. Reasonable members of the public at large would in my view have seen this as understating the position to a degree. Mr Rufus's own case is that Mr Elliott's use of the term "called into question the defendant's continued employment in a number of

positions, including as a trustee of the Kick It Out campaign." Reasonable members of the public would, in my judgment, agree with that. So far as Kick It Out is concerned, they would share the somewhat stronger view expressed by Mr Elliott in the Press Release: that his use of the word "contradicts my position as a Kick It Out trustee". It is this inconsistency, and not the public exposure of his behaviour, to which the Press Release attributed his resignation. It would not be considered surprising, inappropriate, or wrong by the reasonable member of society that Mr Elliott felt compelled to resign from that position on account of having used the word towards Mr Rufus. The consequence could only follow if the private use of the word was made known in some way.

53. Society generally respects the privacy and confidentiality of private communications such as text messages, and friends – even former friends – are regarded as owing some obligations to one another. But I do not believe there is any consensus view that private messages to friends must always, in all circumstances, be kept secret or protected. On the contrary, there can be no doubt in my view that members of society generally believe that there are circumstances in which the ties of friendship, and a person's right to respect for the privacy of their communications, are overridden by other, more important considerations. Put more shortly, the consensus view is that it can sometimes be right to "out" what a person has said privately, and to do so in or through the news media. This is particularly so where the person is a public figure and/or has taken a public position on an issue which is at odds with their private behaviour.

54. Recent history includes a number of instances of sexist or racist language or conduct on the part of prominent figures being exposed in this way, several in the football context. Such exposés often involve suggestions of an inconsistency between a public stance and private behaviour, though that is not always the case. These are matters of fact, and do not necessarily say a great deal about the standards of right-thinking people generally. In my view, however, it is the consensus of reasonable members of the public generally that where the private conduct of an individual in a public position contradicts that person's public stance it is usually legitimate to disclose the private facts.

55. The present case is one in which Mr Elliott held a public position, as a Kick It Out trustee, explicitly endorsing an anti-racism campaign. His private use of language towards Mr Rufus would be viewed by reasonable members of society generally in the same way that Mr Elliott himself regarded it: inconsistent with that public position. I am confident that the consensus of "right-thinking" people would be that the disclosure of Mr Elliott's unacceptable private behaviour to the Kick It Out campaign, and to any other anti-racism organisation in which he played a role, would be legitimate and proper. The importance of integrity in public life and the maintenance of high standards would be seen as amply justifying such disclosure, even though the message was private and not intended by Mr Elliott to have any wider audience.

56. Some would take the view that disclosure should have stopped there, and not included the general public via the pages of The Sun. I do not, however, consider that this position is one that holds sway as a general consensus view. I do not consider that right-thinking members of the public generally would disapprove of "blowing the whistle" publicly on the use of an unacceptable racially offensive term by Mr Elliott,

a public figure in his capacity as a trustee of an anti-racist organisation; and that is so, even though the message was sent to another black man and the disclosure (according to the words complained of) revealed details of a private message. Moreover, as Mr Price pointed out, this point would not lend support to the "disloyalty" point which is at the centre of the argument for Mr Rufus. The disclosure of the private message would have been deplorably "disloyal" on Mr Rufus's argument, even if it had only been made to Kick It Out.

READER RESPONSES

57. Mr Rufus's pleaded claim for damages relied on the content of a variety of messages that appeared on social networks after the Press Release was published. Some of these condemned Mr Rufus as "cynical" or as having "let down" Mr Elliott. In his skeleton argument Mr Barnes relied on such messages, as he did before Dingemans J and the Court of Appeal, as evidence that his client's case that the words defamed him was reflected in the response of "some at least apparently reasonable readers and followers of the story". Dingemans J took no account of these messages: see his judgment at [34]. The Court of Appeal made no reference to the point. Mr Price argued, as he had before, that such material was irrelevant and inadmissible.

58. I would be inclined to agree with Mr Price. Assuming evidence on meaning is admissible in principle in an innuendo case (a proposition doubted by Sedley and Hooper LJJ in *Baturina v Times Newspapers Ltd* [2011] EWCA Civ 308, [2011] 1 WLR 1536 [56]-[57]), I would question whether the court should rely on hearsay evidence from individuals, often unidentified, in circumstances where it is almost bound to be unclear quite what the individuals have relied on in forming the views expressed. I do not, however, need to resolve the issue of principle because, having read the material relied on, I concluded for two main reasons that it gave me no help in deciding the issues in this case.

59. The first reason is that in this case, probably more than others, the factual situation is far too complex to enable the court to make any reliable assessment of whether the comments represent the meaning or inferences that would be drawn, or the viewpoint of, the hypothetical reasonable person who read the Press Release knowing only the three facts relied on from the Sun article. This point is illustrated by one pseudonymous reader comment relied on by Mr Rufus, which responded to an article in The Telegraph, saying of Mr Rufus "If you read the story his motives are clear". Which "story" is unclear.

60. The second reason is that the selection of comments is just that: selective. This is inevitable given its purpose, but I note that even amongst the material put in evidence by Mr Rufus there is some that expresses the views that the use of discriminatory language is unacceptable regardless of context and made Mr Elliott's position untenable; and that it is no bad thing for the 'yen' of the British public to be for zero tolerance of racial epithets used in anger. In my view, the only fair and practicable way to reach a conclusion on the issues in this case is to do so without regard to material of this kind, and that is what I have done.