IN THE SUPREME COURT
ON APPEAL FROM
THE COURT OF APPEAL (CIVIL DIVISION) A2/2009/1130 (A)
ON APPEAL FROM
THE HIGH COURT OF JUSTICE Claim No. HQ08X01759
QUEEN'S BENCH DIVISION
B E T W E E N:

(1) CRAIG JOSEPH
(2) JASON JOSEPH
(3) ANTHONY RAYMOND

Claimants/Respondents

- and –

(1) JASON SPILLER
(2) 1311 EVENTS LIMITED

Defendants/Appellants

APPELLANTS' WRITTEN SUBMISSIONS
FOR PERMISSION TO APPEAL

Summary

1. Freedom of expression is one of the fundamental freedoms. Fair comment is one of the fundamental rights of free speech. There are numerous judicial statements to this effect. In paragraph 151 of its Report on Defamation (1975) (Cmnd. 5909) the Faulks Committee recognised that: *"The very wide breadth of the main criterion for the defence of fair comment (could an honest albeit prejudiced person have expressed such an opinion) has stood for over a century. It is generally regarded as a bulwark of free speech"*. This criterion will be described below as the "honest person test", as "fair" is a misnomer.

2. The courts must be vigilant to ensure that the bulwark does not start to show cracks and that it can adapt to the contemporary demands placed on it, in particular relating to the internet. All too often, the lofty statements of principle are followed with a "but" and decisions based on the perceived factual merits of the particular case generate further technicalities. This has led the editors of the recently published 3rd edition of *Duncan & Neill* to conclude: "*There are many other judicial pronouncements stressing the fundamental importance and the*

breadth of the defence. Nevertheless it may be doubted whether English law has succeeded in avoiding the legal refinements against which Lord Denning MR cautioned. Some aspects of the defence remain unclear and defendants who have sought to defend their words as comment have, from time to time, found themselves embroiled in complex disputes of fact or law which suggest that, in practical terms, a defence of fair comment can sometimes be just as onerous as a defence of justification".[1]

3. The focus of the House of Lords in recent years has been qualified privilege, in particular the *Reynolds* form. *Reynolds* qualified privilege is directed to statements of fact and is unlikely to be usable by non-media defendants. Fair comment should be a more straightforward and user-friendly defence than justification and qualified privilege to media and non-media defendants, as it is directed to the protection of statements of opinion. Both English law and the Strasbourg jurisprudence recognise that statements of opinion should not be subject to the same level of proof as statements of fact.

4. Section 6 of the Defamation Act 1952 provides: *"In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved"*. Section 6 plays a vital part in ensuring that the defence of fair comment fulfils its role in protecting freedom of expression. The words *"if the expression of opinion is fair comment"* are equivalent to the honest person test.

5. At common law, where a defendant set out the factual basis for the comment in the words complained of, any inaccuracy was fatal to the comment. The obvious purpose of section 6 was to widen the range of factual material that could be relied on to support a comment and to permit considerable tolerance for inaccuracy in the supporting facts by focussing on what could be proved; not what could not. In accordance with section 3 of the Human Rights Act 1998, it needs to be construed generously, in a manner that is consistent with freedom of expression.

[1] At [13.05]

6. The construction placed on it by the Court of Appeal on the facts of the present case was plainly wrong and was not even the subject of argument during the appeal (or before Eady J at first instance). Pill LJ (with whom Hooper and Wilson LJJ agreed) concluded that the words *"following a breach of contract"* and *"have not been able to abide by the terms of their contract"* which were set out in the words complained of did not refer (within the meaning of section 6) to the breaches of contract on which the Appellants sought to rely. This was because neither the contract, nor the nature of the breach was identified in the words complained of. This construction conflates the distinction between "facts alleged" and "facts referred to", thereby substantially depriving the section of its liberalising intent. The Appellants were thereby precluded from relying on facts which could have adequately supported the comment. The fair comment defence was, in consequence, struck out, notwithstanding that the Court had found that the relevant words were comment.

7. It appears that in reaching its conclusion on section 6, the Court was heavily influenced by the obiter dicta of Lord Nicholls of Birkenhead in *Tse Wai Chun Paul v Albert Cheng* [2001] EMLR 31, a decision of the Hong Kong Court of Final Appeal. At [16] to [20] Lord Nicholls set out five ingredients of the defence of fair comment. These were cited at [32] in the judgment of Pill LJ, who clearly regarded them as authoritative. The fourth at [19] is:

   "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."

   Pill LJ applied this at [44] in order to reach his conclusion on the facts. It is submitted that the second sentence of *Cheng* [19], if treated as a requirement or a goal towards which the law should strive, would severely restrict the defence of fair comment. Moreover, it cannot apply to cases where a defendant is entitled to rely on section 6. Similarly, any obligation to *"explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made"* cannot be regarded as a qualification on or an additional hurdle to the section 6 test, which merely requires the facts to be *"alleged or referred to in the words complained of"*.

8. In *Lowe v Associated Newspapers Ltd* [2007] QB 580 (which was not a section 6 case) Eady J took issue with [19] of *Cheng*:

   "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." [42]

"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." [57]

9. In *Telnikoff v Matusevitch* [1992] 2 AC 343, which was the last fair comment case to be heard by the House of Lords, Lord Ackner stated at 361C: *"In my judgment the defence of fair comment is not based on the proposition that every person who reads a criticism should be in a position to judge for himself"*. In *Telnikoff* the issue was whether the words were fact or comment and the House of Lords allowed the plaintiff's appeal from the Court of Appeal which had upheld the ruling of Drake J that the relevant words were clearly comment. Lord Ackner was in the minority on this issue, but it does not invalidate his observations in relation to whether it is necessary for a reader to judge whether what is held to be a comment is a well-founded one. Similarly, in the Court of Appeal ([1991] 1 QB 102) Woolf LJ observed at 123D that: "*The ability of the defendant to comment should not depend on whether or not the reader is aware of the material which is the subject of the comment. The defence of fair comment is based on the principle that you should be entitled to comment on a matter of public interest and the fact that the publication is limited does not affect the public interest*". The plaintiff eventually won the case, but the courts in Maryland (where the defendant was resident) refused to enforce the judgment because it was *"based on libel standards that are repugnant to the State of Maryland and the United States"*.[2]

10. The editors of *Duncan & Neill,* opine that the second sentence of [19] of *Cheng* "*is difficult to reconcile with the balance of authority and is, it is submitted, incompatible with the essential nature of the defence*". [3]

[2] *Matusevitch v Telnikoff* 877 F. Supp. 1; 1995 U.S. Dist upheld at 347 Md. 561, 702 A.2d 230.
[3] At [13.20]

11. The settled Strasbourg jurisprudence on this issue appears more straightforward. Where the words are recognisable as comment, the only requirement is that they have a "sufficient" factual basis.[4] Only a value judgment "without any factual basis to support it" may properly be the subject of a penalty by a Contracting State.[5] There is no requirement to set out the supporting facts in the publication complained of, nor that the reader should be in a position to judge whether the comment is well founded. Another overriding feature of the Strasbourg jurisprudence is that a defendant should not be required to prove the truth of a value judgment.

12. There is among practitioners considerable confusion as to the range of facts on which a defendant may rely to support his comment and the effect of factual inaccuracy. Moreover, the defence is bedevilled by outdated terminology, in particular "fair", that reflects an era when the expression of opinion was regarded as more of a privilege than a right. If the defence is to fulfil its vital role in protecting freedom of expression it needs to be user-friendly (i.e. friendly to those who express opinions) and comprehensible to a jury. In a fair comment case in 1965 Russell LJ observed: *". . . the law of libel seems to have characteristics of such complication and subtlety that I wonder whether a jury on retiring can readily distinguish their heads from their heels"*.[6]

13. The position has not improved. In particular, the relationship between comment and the supporting facts has become even more technical. Pill LJ accepted that he *"had more difficulty with this issue".* On 12 November Sir Charles Gray struck out a fair comment defence in relation to a book review for factual inaccuracy in reliance on [19] of *Cheng* while noting that: *"The defence of fair comment on a matter of public interest has not had an altogether easy ride over the years"*.[7]

14. The Court of Appeal judgment in the present case has created a further level of technicality, which is not only unnecessary, but also significantly inhibits the defence.

15. More generally, there is a lack of public confidence in English defamation law and procedure and a perception that it does not provide a fair balance between freedom of expression and

[4] See for example the recent decision of *Sorguc v Turkey* Application No. 17089/03 [2009] ECHR 979 at [29].
[5] See for example, *Jerusalem v Austria* [2001] ECHR 122 at [43]
[6] *Broadway Approvals Ltd -v- Odhams Press Ltd (No 2)* [1965] 1 WLR 805 at 825.
[7] *Thornton v Telegraph Media Group Limited* [2009] EWHC 2863 (QB) at [15]

the protection of reputation. There is an ongoing debate on the subject in Parliament and elsewhere. London is perceived to be the libel capital of the world because our law and procedure is or is perceived to be so claimant-friendly. The Court of Appeal's decision is a further shifting of the balance away from freedom of expression.

16. On one view, this claim is a "storm in a teacup". However, it is a paradigm of what is wrong with our law and procedure. With the proliferation of the internet, it is increasingly common for non-media defendants of limited means to be sued for defamation in relation to relatively small scale publications. The internet is the classic forum for the expression of all manner of opinions, often made spontaneously by people who do not have the same literary skills as a journalist, to much smaller audiences and without the benefit of pre-publication legal advice. The same difficult legal principles and disproportionate costs regime apply as to wealthy media defendants. In common with many such non-media defendants, the First Appellant risks bankruptcy as a result of the Respondents' legal costs if he unsuccessfully defends the claim. So for him it is an extremely important matter. As a result of the Court of Appeal's construction of section 6, he has lost one of his two defences and is now required to prove the truth of what the Court found to be value judgments. In contrast, the Respondents have the benefit of funding from Equity. No person in his right mind would seek to put his own money behind such a claim.

17. Moreover, the propensity of a defamation claim to give rise to legal issues of general importance is not limited by the importance of the claim itself. It only takes publication to one person to establish a defamation claim; the same legal principles apply. Section 6 is of potential application to all defamation claims, whether arising from a letter to one person or an article in a national newspaper read by millions. The legal issues arising from the Court of Appeal's decision are of general importance, even if they arise in the context of a claim which is relatively unimportant other than to the parties.

18. It is submitted that the proposed appeal raises the following points of law of general public importance:-

    18.1. Whether [19] of *Cheng* is an accurate statement of English law. In particular, whether it is a requirement of the defence of fair comment that a publishee should be in a position to judge for himself how far a comment is well founded and whether any obligation to "*explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made" is a qualification on or an additional hurdle to*

section 6, which merely requires the facts to be "alleged or referred to in the words complained of". The Appellants' position is that [19] is not an accurate statement of English law and would significantly inhibit the defence of fair comment and that, in any event, it cannot apply in a section 6 case.

18.2. The extent to which it is necessary for a defendant to particularise the supporting facts in the words complained of in order to take advantage of section 6. The Appellants' position is that "referred to" in section 6 should be construed in the most generous fashion to allow a defendant to rely on the widest possible factual material to support a comment. Contrary to [42] of the judgment of Pill LJ, there is no requirement to identify or particularise the facts in the words complained of. The principal safeguard for the protection of reputation is that the defence only applies to statements of opinion. Once a statement has been characterised as opinion, the factual burden should be extremely limited.

18.3. Whether a material or fundamental inaccuracy in the facts stated in the words complained of is fatal to the defence where there are other facts stated or referred to in the words complained of which can be proved and on which an honest person could hold the relevant opinion. The Appellants' position is that, as far as fair comment is concerned, the only consequence of factual inaccuracy is that the defendant must find at least one other fact to support his comment. The principal safeguard for the protection of reputation is that where facts are stated in the words complained of and are defamatory, they will give rise to a claim independent of any comment. In order to defend such a claim, the defendant will have to prove that the facts are substantially true. However, the factual burden in relation to fair comment is much lower. A claimant should not be entitled to vindication in relation to any comment if there remains a sufficient factual basis for it, notwithstanding any falsely stated facts.

The facts and procedural chronology

19. When considering the facts of the case it is important to keep in mind that the claim comes before the Court at an interim stage pursuant to CPR 24. It is due to be tried by a jury. The Court's role at this stage is strictly limited to pre-empting perverse jury findings of fact.

20. The Respondents are members of the musical acts *The Gillettes* and *Saturday Night at the Movies*. They perform in venues across the country, including at wedding receptions and other events. The First Respondent is a singer in both acts and is described as their *de facto* manager. The First Appellant is one of two directors (the other being his wife, Christina) of the Second Appellant company, which at all relevant times, provided entertainment booking services and advertised acts and performers on its website http://www.1311events.net/index.html, for weddings, drinks receptions, corporate entertainment and other events.

21. On 13 October 2004 the First Respondent agreed to the acts being promoted by the Appellants. This involved completing an online agreement form. The agreement simply enabled the Appellants to promote the Respondents. It did not require the Respondents to take up any booking that was offered to them. The agreement form contained a link to the terms and conditions that would apply in the event that a booking was made.

22. Several performances were subsequently arranged by the Appellants. This included a booking at the Landmarc Hotel arranged in December 2005 ("the Landmarc booking"), which was subsequently cancelled by the First Respondent; on the Appellants' case simply because something better came along. On 19 April 2006 the First Respondent signed a booking agreement in relation to a performance on 31 December 2006 at Bibis, a restaurant in Leeds ("the Bibis booking"). The terms and conditions included a standard re-engagement clause, which provided that any further bookings at the venue in the following 12 months should be through the Second Appellant. The First Respondent arranged a further performance at Bibis on 9 May 2007 directly with the venue. He made a conscious decision not to inform the Appellants of the booking in the light of the re-engagement term. When the First Appellant discovered this on 27 March 2007 he sent an email to the First Respondent. The First Respondent's response on the same day prompted the First Appellant to publish a posting on the Second Appellant's website, which is the subject of the claim.

23. Only a small part of the First Respondent's email was set out in the posting and it was partially misquoted. However, the Appellants sought to rely on the entire email, set out below, in their particulars of justification and as a factual basis for the comment.
"Hi Jason

It appears you do not know the meaning of freelance, that is what all my shows are. You are part of a cog which supplies all agents and artitses [sic] alike with work, one does not work without the other.
You came to me Jason after viewing the quality of our show, your contract is mearly [sic] a formality and holds no water in legal terms. You should consider looking after your clients/ venueus [sic] better then maybe you would not lose them. Do not be fooled into thinking you can lose venues and reep [sic] the benefits from others hard work, that does not hold any legal value any more. You [sic] offer of work to my shows over the years was minimal and neither helped nor hindered our diary.
I am not performing in the show, and since your agreement and terms was with me there are no grounds for your terms or conditions.
Thers [sic] is one outstanding show with you guys Aug 4th o7 we will honour the show as we have all the other shows through your agency, providing you make sure the balance fee £900.00 + vat. TOTAL = £1057.50 is in our account 2 weeks prior to the show date, thus avoiding any cancelation [sic] of the show. Please confirm this can be organized within 7 days or I will cancel the date.
I look forward to any legal trysts.
Kind regards
Craig (On behalf of The Gillettes)."

24. The words of the posting were:-

"1311 Events is no longer able to accept bookings for this artist as The Gillettes c/o Craig Joseph are not professional enough to feature in our portfolio and have not been able to abide by the terms of their contract.

…

What we say:

The show is an enjoyable soul and Motown experience which is popular for many events throughout the UK. However, following a breach of contract, Craig Joseph who runs The Gillettes and Saturday Night At The Movies has advised 1311 Events that the terms and conditions of '… contracts hold no water in legal terms' (27.03.07). For this reason, it may follow that the artists' obligations for your booking may also not be met. In essence, Craig Joseph who performs with/arranges bookings for The Gillettes and Saturday Night At The Movies may sign a contract for your booking but will not necessarily adhere to it. We would recommend that you take legal advice before booking this artist to avoid any possible difficulties.

Instead, we recommend any of the following ***professional*** *bands and artists …"*

It is accepted that "*the terms and conditions of '… contracts hold no water in legal terms'"* is a misquotation from the email of 27 March. However, it is submitted that the significance of the misquotation is a matter for a jury, who should be entitled to view the email as whole in assessing whether the honest person test is satisfied.

25. The Appellants' evidence (which appears to be uncontradicted) is that the post was accessible for 6 weeks between April and May 2007 (the claim appears to relate solely to publication after 7 May 2007) when it was removed following a letter from Equity on behalf of the Respondents. It would appear that following its removal, Equity was not prepared to fund a defamation claim in relation to the 6 weeks when the posting was accessible. The post was inadvertently uploaded to a part of the site between February 2008 and April 2008, where it could, in theory, have been accessed. This apparently persuaded Equity to fund litigation, not least as the Respondents claimed that they had lost a booking, a claim which, for various reasons, appears highly suspect. In any event, notwithstanding that the posting was immediately removed following a solicitor's letter, proceedings were issued on 7 May 2008.

26. The First Appellant served a defence as a litigant in person on 1 July. An Amended Defence was served on 8 December with the benefit of legal representation. The two principal defences were justification and fair comment. The meaning sought to be justified was set out in paragraph 9:-

"9.1. The First Claimant on behalf of the Claimants has:-

9.1.1. Conducted himself in such a manner so as to entitle the Defendants to conclude that the Gillettes were not sufficiently professional to feature in the Second Defendant's portfolio.

9.1.2. Breached the terms of agreements with the Second Defendant.

9.1.3. Demonstrated a contemptuous, cavalier and unprofessional attitude to the contractual obligations as evidenced by his email of 27 March 2007.

9.2. In the circumstances, the Claimants may not necessarily adhere to the terms of booking agreements signed by the First Claimant."

27. The particulars supporting the justification defence were set out in paragraphs 9.3 to 9.15. They related to the Bibis booking (9.4 to 9.10), the email of 27 March (9.11 to 9.12) and the Landmarc booking (9.13 to 9.15). At the hearing before Eady J the Appellants were permitted to allege a further breach and evasion of tax ("the Coombes booking") as paragraph 9.16. At this stage, the Court must assume that a jury could find the meanings at 9.1 and 9.2 to be proved on the basis of the facts set out in paragraphs 9.3 to 9.16.

28. The fair comment defence was set out in paragraph 10. Paragraph 10.1 identified the words alleged to be comment:

"10.1. The following passages of the page are comment:-

"The Gillettes c/o Craig Joseph are not professional enough to feature in our portfolio.

For this reason it may follow that the artists' obligations for your booking may also not be met.
In essence, Craig Joseph who performs with/arranges bookings for The Gillettes and Saturday Night At The Movies may sign a contract for your booking but will not necessarily adhere to it.
We would recommend that you take legal advice before booking this artist to avoid any possible difficulties.""

29. Paragraph 10.2 stated the Appellants' intention to rely on the facts set out in paragraphs 9.3 to 9.15 to support the comments. Paragraph 11 stated their intention to rely, if necessary, on sections 5 & 6 of the 1952 Act.

30. The trial was listed to commence on 2 June 2009 with an estimate of 5 days. Instead of simply proceeding to trial and putting the matter before the jury, the Respondents issued an application for summary judgment, alternatively to strike out all or part of the Appellants' substantive defences, which was heard by Eady J on 12 May, with judgment handed down on 22 May. There was no reason why such an application could not have been made following service of the Amended Defence. The primary attack arose from the application of the Employment Agencies & Employment Business Regulations 2003 ("The Regulations"), of which both parties were unaware at the relevant time. The Respondents succeeded before Eady J in relation to the Regulations but his decision was overturned in the Court of Appeal and is not relevant to this application. In addition, the Respondents applied to strike out the fair comment defence on two grounds. Firstly, that the words were incapable of being comment and secondly, that the subject matter was not one of public interest. At this stage, there was no challenge to the particulars of fact relied on to support the comment, other than by reference to the Regulations.

31. Eady J upheld both grounds. He also noted in passing that there was an issue as to whether the facts had been truly stated. There had been no argument directed to this issue at the hearing. He said at [60]:

"(I have already referred to the misquotation from the First Claimant's email of 27 March, where the impression was given that he was speaking of contracts in general rather than of the particular re-engagement term sought to be imposed by the Defendants. This does not arise for consideration in the present context, although it would plainly be relevant if the plea of fair comment were to survive in determining whether or not it had been made with reference to "facts truly stated")."

His reference to *"if the plea of fair comment were to survive"* suggests that he regarded this as an issue that the jury would have to determine.

32. The Appellants sought permission to appeal in relation to the application of the Regulations and fair comment. In consequence of the imminence of the trial, the application was expedited. On 1 June permission was granted by Aikens LJ and the trial was vacated. On 26 June the Respondents served a Respondent's Notice (out of time). One of the grounds was:

    "The quotation attributed to the First Claimant (". . .contracts hold no water in legal terms") in the words complained of is unarguably false and thus, particularly given that it is fundamental to the words complained of, renders the fair comment defence unsustainable."

33. It appeared from the skeleton argument in support of the Respondents' Notice that the Respondents merely sought to rely on the inaccuracy as being relevant to whether the words were fact or comment. In other words, it was being used as a further argument to support Eady J's construction of the words complained of as being incapable of being comment. Moreover, at no stage did the Respondents seek to allege that any of the facts set out in paragraphs 9.3 to 9.15 were not referred to in the words complained of. The only reference to section 6 was in paragraph 67 of the Respondents' skeleton argument: *"The Ds cannot rely upon s.6 of the Defamation Act 1996* [sic] *because it is not concerned with the construction of the wco*". In consequence, the issue was not addressed in the supplemental skeleton argument lodged by the Appellants in relation to the Respondent's Notice. It was merely noted in passing that: *"At this stage, the court must assume that the jury will conclude that the facts in 9.3 to 9.15 are true and were sufficiently referred to in the words complained of"*.

34. The appeal was heard on 30 July. The Respondents were given permission to rely on the matters set out in the Respondents' Notice. Oral argument was directed to the consequence of the misquotation of the email. In summary, the Appellants submitted that section 6 required the jury to look at what a defendant could prove, not what he could not prove. Accordingly, the relevant question was whether a jury could properly conclude that an honest (but possibly prejudiced and obstinate) person could hold the opinions set out in paragraph 10.1 of the Amended Defence on the basis of all the facts set out in paragraphs 9.3 to 9.15. At no point was it argued by the Respondents or put by the Court to the Appellants' advocate that the Appellants would be unable to rely on paragraphs 9.3 to 9.15

because they were not referred to in the words complained of (or for any other reason). Shortly after the hearing it was felt appropriate to draw the Court's attention to *Rath v Guardian News & Media Ltd* [2008] EWHC 398 (QB). This was directed to the effect of inaccuracy in the supporting facts, not to whether the supporting facts had been referred to in the words complained of.

35. The draft judgment was circulated on 14 October. The Court found that the Bibis breach of contract was not referred to in the words complained of and therefore could not be relied on to support the comments. On 15 October, the Appellants pointed out that this had not been argued at the appeal and requested that the handing down of judgment be delayed and further submissions received. A summary of potential submissions were set out in relation to the proper construction of "referred to" in section 6, but it was made clear that these were simply for the purpose of identifying arguments that could be made. The Respondents' counsel responded on 20 October contending that there were only very limited circumstances in which the Court would hear further argument. He did not, however, claim that the point had been argued, nor did he seek to make any substantive submissions on section 6. The Appellants' advocate responded the same day referring to the judgment of Smith LJ in *Egan v Motor Services Bath Ltd* [2008] 1 WLR 1589 at [51] in which one ground for hearing further argument was: *"if the judge has decided the case on a point which was not properly argued"*. In such a case the appropriate course: *"will be to ask him/her either to reconvene for further argument or to receive written submissions from both sides"*. On 21 October the parties were informed that the judgment would be handed down the following day. No reasons were given for refusing the Appellants' request. On 22 October the Appellants' submitted the grounds on which permission was sought to appeal to the Supreme Court. On 23 October the parties were notified that permission to appeal was refused. No reasons were given.

Fair comment – the law in relation to supporting facts

36. In *Cheng* Lord Nicholls referred to five ingredients of the defence of fair comment. The first two, public interest and the fact / comment distinction are no longer in issue in this case and are relatively straightforward in application. The third, fourth and fifth relate to the factual basis for the comment. They are in issue and are conceptually potentially more problematic.

"18. 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.
19. 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.
20. 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:"

37. It is submitted that the final question posed by Lord Nicholls – the honest person test - is really the only one that needs to be asked, once it has been determined that the words are comment and the subject matter is one of public interest. It is the "main criterion" referred to by the Faulks Committee. But the question cannot be asked in a vacuum. The comment must be judged by reference to its factual basis. In order to determine whether an honest person could hold the opinion it is necessary to consider what facts the notional honest person is entitled to rely on as the basis for his opinion and whether they have been proved to be true.

38. This is apparent from the wording of section 6 which can be broken down into 3 elements:
    38.1. What facts were alleged or referred to in the words complained of ("the factual pool")?
    38.2. What facts from the factual pool have been proved ("the proved facts")?
    38.3. Could an honest person (prejudiced, obstinate and prone to exaggeration) hold the opinion on the basis of the proved facts ("the honest person test")?

    These are all questions of fact for the jury. So at the interim stage the Court can only intervene where a jury would be perverse to reach a particular conclusion.

39. It follows that where section 6 applies, the only relevance of a false allegation of fact in the words complained of, as regards fair comment, is that it requires the defendant to resort to at least one other provable fact from the factual pool on which an honest person could base the comment.

40. The effect of section 6 is that a defendant who alleges or refers to facts in the words complained of is accorded the same latitude as under the common law where the facts are

not set out in the words complained of. The position under the common law in 1951 was explained by Lord Porter in *Kemsley v Foot* [1952] AC 345 at pages 357-358:

"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".

41. In *Lowe* Eady J questioned whether "*such a stark distinction would be drawn today between facts stated and those pleaded*".[8] However, as Tugendhat J recognised in *Rath*, the question posed in *Lowe* does not have to be answered in a section 6 case.[9] Where section 6 is applicable a defendant can allege or refer to nineteen false statements of fact in the words complained of but if there is one true fact that is sufficient to sustain the comment, the defence will succeed.

42. It follows that it is necessary to insert an "all" between "If" and "the facts" in Lord Nicholls's third factor in *Cheng*, if it is to be of universal application: "*If [all] 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*". Similarly, the reader cannot be in a position to judge whether a comment is well-founded if it is permissible, as it clearly is, for nineteen of the facts to be misstated but the one remaining fact to be capable of sustaining an unfounded, prejudiced, exaggerated and obstinate belief. The reader will not know which facts are true or which facts are false, just as much as he will not know the factual basis for the comment in cases such as *Kemsley* where they are not set out in the words complained of.

[8] At [35]
[9] At [84]

43. As soon as it is permissible to rely on facts merely "referred to" and to permit factual inaccuracy, as Parliament intended when enacting section 6, it becomes impossible for the reader to judge how well-founded the comment is. A mere reference to a fact does not give the reader the means to make such a judgment.

44. Moreover, the Strasbourg Court has emphasised on a number of occasions that the form in which ideas or information are expressed is generally for the author to decide, without interference from the domestic courts.[10] Any requirement to set out the facts sufficiently clearly to enable a reader to judge whether a comment is well-founded would be a considerable fetter on an author's style and give rise to legalistic and turgid writing. Commentators would have to engage in a detailed exposition of the facts before they could get to the comment. Moreover, all the facts that might bear on the validity of the comment would have to be set out. A reader can just as easily misjudge the validity of an opinion by being given a selective choice of true facts as opposed to a false fact. In general, the validity of an opinion ought to be tested in the "market place" by encouraging further debate, not by defamation litigation.

45. If the defence of fair comment is to remain as the "bulwark of free speech" in the age of the internet, it must be sympathetic to such a mode of publication. The internet is the classic forum for the expression of opinion by ordinary members of the public through a variety of sites that allow direct input from users. It is in the nature of such publications that they will contain statements of opinion but will not necessarily set out the all or any of the facts on which they are based.

46. For completeness, it should be noted that the need for the reader to be in a position to judge the comment was repeated by Lord Nicholls at [40] of *Cheng.*

"40… The purpose the defence of fair comment exists is to facilitate freedom of expression by commenting on 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."

[10] See for example *Jersild v Denmark* [1994] ECHR 33 at [31], which although referring to journalists is equally applicable to any exercise of the Article 10 right.

47. It is submitted that the real safeguard for the protection of reputation is that the defence only protects words that are recognisable as comment. As Bingham LJ stated in *Brent Walker Group Plc v Time Out Ltd* [1991] 2 All ER 753 at 760b:

"The civil law of libel is primarily concerned to provide redress for those who are the subject of false and defamatory factual publications. Thus in the simplest case A will be entitled to relief against B if B publishes a defamatory factual statement concerning A which B cannot show to be true. The law is not primarily concerned to provide redress for those who are the subject of disparaging expressions of opinion and freedom of opinion is (subject to necessary restrictions) a basic democratic right."

48. It should also be kept in mind that section 6 only applies in *"an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion"*. It is in the nature of a defamation claim that the allegations of fact will often be defamatory in their own right. If so, they will need to be justified and fair comment will not assist the defendant. However, this does not mean the expression of opinion within the words complained of also needs to be stigmatised or made subject to the same high level of proof as a justification defence. In sections 5 & 6 of the 1952 Act Parliament gave a defendant two get out clauses where facts were misstated. It is notable that section 5, relating to justification, is much less tolerant of factual error than section 6.

49. It is not the purpose of the civil law of defamation to punish a defendant for getting something wrong or to set standards of writing in public debate to enable people to make informed judgments. It is to provide vindication to a claimant. Any curtailment on freedom of expression can go no further than is strictly necessary for the protection of reputation. Where an opinion has a sufficient factual basis but the court prevents the defendant from relying on it to support his comment, the jury will be bound to award damages as if the supporting facts did not exist and the claimant will be vindicated on a false basis.

The honest person test

50. Having identified which facts can be relied on and proved, the next (and final) obligation on a defendant is to persuade the tribunal of fact that an honest (but possibly prejudiced and obstinate) person could hold the relevant opinion on the basis of those facts.

51. This is an extremely low hurdle for a defendant to surmount. This is particularly so at the interim stage where the issue is whether a reasonable jury could properly conclude that an honest person could hold the relevant opinion. As the Faulks Committee recognised, it is the latitude given to the notional honest person to express unfair and unreasonable opinions which enables the defence to perform its role as a bulwark of free speech. People can honestly believe many things on a very scant factual basis without any form of rational thought, particularly if they are prejudiced or obstinate, as they are entitled to be.

Application of the law to the facts

52. At [30] Pill LJ found that the words sought to be defended as comment "were comment". (In fact, the test at this stage is whether they are capable of being comment). This analysis will proceed on the footing that the jury will find the relevant words to be comment.

The factual pool

53. As previously stated, there were three factual sources for the comments. First, the Bibis breach, second, the entire email of 27 March and third, the Landmarc breach. It is submitted that the first question to be asked at the interim stage is whether a jury could without being perverse find that they were alleged or referred to in the words complained of.

54. The relevant findings of Pill LJ were as follows:-

54.1. The Bibis breach was not referred to ([42] of the judgment). It is submitted that this was plainly wrong. Moreover, Pill LJ did not apply the perversity test and took it upon himself to decide an issue of fact reserved for the jury.

54.2. The Landmarc breach was also not referred to in the words complained of ([43-46] of the judgment). Pill LJ's reasoning is not entirely clear on this issue. On one reading he appears to be suggesting that the Appellants were only seeking to rely on the Landmarc breach for the purposes of section 6. At [46] he stated: *"The words "following a breach of contract" in the words complained of cannot be taken as referring to the December 2005 breach* [i.e. the Landmarc breach]*. Nor, in my judgment, can the later words in the defendants' comments"*. The Appellants have never submitted that the words *"following a breach of contract"* refer to the Landmarc breach; they clearly refer to the Bibis breach as it was this breach that immediately preceded the sending of

the email. It is the words "*have been unable to abide by the terms of their contract"* which the Appellants contend are capable of referring to both the Bibis and Landmarc breaches (see further below). These words appeared at the commencement of the posting and before *"following a breach of contract"*.

55. Pill LJ's reasoning in relation to the Bibis breach was set out in a single sentence: *"The contract is not identified in the publication, still less the term allegedly breached"* [emphasis added].

56. As a matter of ordinary language, "to refer" means to allude to. It is simply a link between the referring words and the matter referred to, which may be extremely brief and uninformative as to the nature of the matter referred to. It could be a veiled reference or an explicit one. To refer to something requires significantly less information to be provided than to state it, to allege it or (to use the words of Pill LJ) to identify it. There is no requirement that the reader of the referring words must have pre-existing knowledge of the matter referred to or be in any position to know anything about it merely from the reference (or even to recognise that a reference is being made). Indeed, the ordinary reader of the posting could well have asked himself "what was that breach of contract that 1311 Events were referring to when they said "following a breach of contract"?

57. Section 6 emphasises the point by drawing a clear distinction between facts "alleged" and facts "referred to". Both may be relied on to support a fair comment defence. Parliament must have intended a mere pointer to the relevant facts in the words complained of to be sufficient without any requirement to identify them. Moreover, sections 3 and 12 of the Human Rights Act 1998 require section 6 to be construed generously to a defendant in order to enable him to draw from the widest possible factual pool to support a comment and so far as possible, to couch his language in words of his choosing. But even without reliance on section 3, it is clear that, as a matter of ordinary usage, the words "following a breach of contract" are an explicit reference to a breach of contract by the Respondents. The fact that the reader may not know that the Appellants were referring to the Bibis contract or the nature of the breach does not mean that the Appellants did not refer to it.

58. A requirement to identify the contract and the breach in order to be able to rely on it to support a fair comment defence is capable of general application, no matter how serious the breach. The Respondents appear to contend that the breach of a re-engagement term is not very serious. But suppose the breach had been the failure to turn up when booked to play at a large wedding party? The same principle would apply if the contract and the breach had not been identified in the words complained of.

59. The only possible justification for equating "referred to" with "identified" is to enable the ordinary reader to be in a position to judge for himself how far the comment is well founded. For the reasons previously stated, this is not a requirement of the defence of fair comment nor a realistic or desirable aim.

60. Pill LJ did not ask himself whether the email of 27 March was referred to in the words complained of. The focus was simply directed at the short extract from the email that was "alleged" in the posting but which was partially misquoted. However, it was apparent from paragraphs 9.11 and 9.12 of the Amended Defence that the Appellants were intending to rely on the entire email as capable of supporting the comments about the Respondents' approach to contractual obligations. The words "*your contract is mearly [sic] a formality and holds no water in legal terms",* although misquoted in the posting, were material on which an honest person could form a view about the First Respondent's approach to contractual obligations. It appeared to be a way of getting round a contract; no rational explanation was given as to why the contract was a "formality" (whatever that meant) or why it held "no water in legal terms". Moreover, even though he was a performer in the band and was willing to sign on behalf of himself and the rest of the band, the First Respondent claimed: *"I am not performing in the show, and since your agreement and terms was with me there are no grounds for your terms or conditions*". The Appellants alleged that this was a *"dishonest and brazenly cynical attempt on the part of the First Claimant to wriggle out of the Claimants' responsibilities under the agreement"*. A jury could properly conclude that an honest man might hold such a view.

61. Had the Court asked itself whether a jury could reasonably conclude that the email of 27 March was referred to in the posting, the only possible answer would be in the affirmative. It was obvious from the posting that reference was being made to a communication between

the First Respondent and the Appellants – "*following a breach of contract, Craig Joseph who runs The Gillettes and Saturday Night At The Movies has advised 1311 Events…"*. Moreover, the date of the email was set out in the posting - "*(27.03.07)"* - thereby providing a further point of reference.

62. It follows that the Appellants should be entitled to rely on the entire email as part of the pool of factual material to support the comment. In accordance with section 6, the focus of the jury must be directed to what an honest albeit prejudiced person might think about the First Respondent for sending the email, not what he might think about the First Appellant for misquoting it.

63. Finally, Pill LJ was wrong to exclude the Landmarc breach from consideration. The posting stated that the Respondents were "unable to abide by the terms of their contract". This is, at the very least, capable of referring to more than one breach. The Landmarc breach is an example of the Respondents not abiding by the terms of their contract. It would be artificial and contrary to the purpose of section 6 if, in the case of serial wrongdoing, a defendant was unable to defend his comments because the one example that he cited in the words complained of could not be proved. Moreover, it is inconsistent to permit it to be relied on as a particular of justification, but not in support of the comment defence.

What facts can be proved?

64. Once the factual pool has been determined, it is necessary to consider what facts can be proved. There has never been any suggestion that the facts set out at paragraphs 9.3 to 9.15 of the Amended Defence cannot be proved. Accordingly, at this stage the court should proceed on the footing that they will be proved.

Could a jury properly hold that an honest person could hold the opinions on the basis of the facts?.

65. Having concluded that the Bibis breach was not referred to, Pill LJ did not go on to ask himself whether the honest person test could have been satisfied if it had been.

66. Having not asked himself whether the email of 27 March was referred to in the words complained of, Pill LJ did not ask himself whether it could have satisfied the honest person

test either in isolation or in combination with the Bibis breach. The only findings that were made in relation to the email were as follows:-

"38. I have had more difficulty with an issue raised in the respondent's notice. The statement of fact in the words complained of, namely that the claimants had 'advised' the second defendant that ". . . contracts hold no water in legal terms" (20.03.07) is plainly false. The first claimant's email referred not to contracts in general but to a particular contract, that between the claimants and the second defendant. A jury could not properly hold that the statement was true."

"42. …Moreover, the single specific allegation of fact in the words complained of is plainly untrue."

67. It is self-evident that the email was misquoted. It follows that no reasonable jury could have concluded that it was accurately quoted. However, as previously stated, what is relevant in relation to fair comment is what an honest man could conclude about the Respondents' conduct from the entire email.

68. In relation to the Landmarc breach, Pill LJ did appear to ask himself whether it, alone, would have been a sufficient basis for the comments and concluded that it would not:

"46. The breach of contract relied on for present purposes is of a contract with a hirer in 2005. As between the claimants and defendants, there were no repercussions in that contractual relations proceeded without complaint until March 2007. The words "following a breach of contract" in the words complained of cannot be taken as referring to the December 2005 breach. Nor, in my judgment, can the later words in the defendants' comments. In my judgment, a jury could not properly base a finding of fair comment against the claimants, given the nature of the comment, upon a breach of contract in December 2005 14 months before the breach which led to the publication. On this ground, the judge's decision to strike out the defence of fair comment is to be upheld."

69. The correct question to be asked at the interim stage on the facts of the present case is as follows:- "Could a non-perverse jury conclude that an honest (but possibly prejudiced and obstinate) person could hold any or all of the opinions set out in paragraph 10.1 of the Amended Defence on the basis of the facts set out in paragraphs 9.3 to 9.15?". As previously stated, it is an extremely low hurdle.

70. That question was not asked by the Court of Appeal, nor have the Respondents ever contended that it should be answered in the negative. Indeed, the only possible answer is in the affirmative. It is common ground that paragraphs 9.3 to 9.15 are capable of justifying a meaning to the effect that the First Respondent has demonstrated a contemptuous, cavalier

and unprofessional attitude to the contractual obligations. It would be absurd if they were not capable of being sufficient to sustain statements of opinion relating the First Respondent's approach to contractual obligations.

The relevance of the misquotation

71. It follows that the misquotation of the email is not the trump card that is alleged by the Respondents. The Respondents' Notice states that quotation is "fundamental" to the posting. However, section 6 does not discriminate between facts that are fundamental or those that are not, in the same way that it does not discriminate between facts alleged or facts referred to. It is clear that Parliament intended that the honesty test should be judged simply on the basis of *"such of the facts alleged or referred to in the words complained of as are proved"*.

72. In any event, a non-perverse jury could conclude that the misquotation was not fundamental. Different people can have different views of the significance of any inaccuracy to the validity of an opinion. It is a classic jury question. Where the opinion is based on words attributed to the claimant, a layman may not attach the same significance as a lawyer to any misquotation; the overall thrust of the claimant's words may be of greater significance.

73. Any rule that prevented a defendant from advancing a fair comment defence simply because he had misstated a fact (whether fundamental or otherwise) would be inconsistent with section 6. In practice, it would make fair comment a harder defence to establish than justification. In justification, a defendant can rely on any facts which are capable of supporting any meaning that the words are capable of bearing, whether or not they were referred to in the publication complained of, were known to the defendant or were even in existence at the time of publication. The failure to prove a fact that is fundamental to the publication is irrelevant if there are other facts that can prove the substantial truth of the meaning conveyed.

74. In contrast to the liberty given to a defendant in pleading justification, the law of fair comment has arguably developed legal refinements, particularly in relation to the factual basis for the comment which "*suggest that, in practical terms, a defence of fair comment can*

sometimes be just as onerous as a defence of justification".[11] The present case is a good example. The misquotation from the email was held to be fatal to the fair comment defence, while the justification defence survived intact.

75. English law and the Strasbourg jurisprudence recognise that defamatory opinions should not be subjected to the same level of proof as defamatory facts. This can only be achieved if the defendant is given latitude in relation to the range of supporting facts on which reliance may be placed and shown tolerance in relation to factual error. This is what section 6 sets out to achieve. Parliament's intention should not be thwarted by a narrow construction or additional hurdles.

David Price
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19 November 2009

[11] *Duncan & Neill* at [13.05] cited at [11] above