IN THE COURT OF APPEAL Appeal Court Ref 2009/1196
Case No HQ08X02657

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
The Honourable Mr Justice Eady [2009] EWHC 1101(QB)

B E T W E E N :-

SIMON SINGH

Appellant/Defendant

and

BRITISH CHIROPRACTIC ASSOCIATION

Respondent/Claimant

APPELLANT/DEFENDANT'S SKELETON ARGUMENT

Introduction

1. This is a libel action which has progressed to close of pleadings in respect of two sentences from an article published in The Guardian on 19 April 2008 **[tab 3 p 16]**.

> *"the litigation proceeds presumably on the footing that the appellant wrote what he honestly believed on a matter of public interest and for the purpose of serving the public interest"*[1]

It was directed, by agreement between the parties, that the action should be tried by Judge alone and that, before the case progressed further, the Judge should make final determinations, as preliminary issues, (a) as to the defamatory meaning(s) of the words complained of and (b) as to whether those words were defensible as comment **[tab 10 p 56]**. These issues were determined by the Judge at a hearing on 7 May 2009 in the Claimant's favour. The Defendant

[1] Laws LJ in giving permission to appeal **[Judgment ¶5 tab 5 p 20-5]**.

appeals with the permission of Laws LJ granted at an oral renewal hearing on 14 October 2009 [**tab 5 p 20-2**].

2. On the first issue, the Judge upheld the precise formulation of the defamatory meaning complained of by the Claimant [**PoC ¶6 tab 12 p 61**]. Turning to the second issue, he rejected the Defendant's contention that the words were comment [**Defence ¶8 tab 13 p 64**].

3. As summarised in the Grounds of Appeal [**tab 2 pp 10 - 15**], the Defendant contends that the Judge made errors in his identification and application of the relevant legal principles and that his decision was in any event plainly wrong. As a result, the Defendant's right of freedom of expression and the public's right to receive information and ideas on a matter of public interest have suffered an interference that is disproportionate to the legitimate aim of protecting this Claimant's reputation and is, for that reason also, unsupportable.

4. If the appeal is successful, the Defendant will invite the Court of Appeal to determine afresh the defamatory meaning(s) (if any) of the words and whether the words are defensible as comment.

The jurisdiction of this Court

5. The Judge's determinations on both issues are conventionally treated as findings of fact, being issues that are reserved to the jury (assuming a jury trial)[2]. The issues fell to be determined by the Judge because of the agreement of the parties as reflected in Master Fontaine's Order of 23 January 2009 [**tab 10 p 56**] that the action would, in any event, be tried by judge alone. The Judge made his findings after submissions, evidence being neither admitted nor admissible on either issue.

6. As to the approach in defamation cases where a final determination has been made by the Judge as to the natural and ordinary meaning of words, see *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 CA at p.177g per Diplock LJ.

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[2] If the rulings had been to the effect that the words were only capable of bearing the Claimant's meaning or only capable of being allegations of fact requiring justification, they would have been issues of law.

Significance of the issues

7. This Appeal raises important issues of principle as to the limits of free expression on matters of public interest, particularly in the context of the fair comment defence. These arise as part of the consideration of whether the Judge's conclusions were wrong. They include:

7.1 as identified in Ground 3.1, whether (if the defamatory sting was correctly determined by the Judge) statements that impute "the plainest allegation of dishonesty [that] accuses [the Claimant] of thoroughly disreputable conduct" is in principle capable of being defended by a fair comment defence;

7.2 as identified in Grounds 3.2 - 3.3, whether it is a correct test for distinguishing allegations of fact which must be objectively justified, from comment which the Defendant is not required to prove true or correct, to identify the defamatory sting of the words and then ask whether that defamatory sting is one of "verifiable fact";

7.3 as identified in Ground 3.4, whether and in what circumstances it is compatible with Article 10 and/or proportionate to require of a journalist/writer who contributes to discussion on a subject-matter of a public nature or in the public interest, that, as a condition of avoiding liability for defamation, he must prove as objectively true such matters as:

(1) statements upon a subject matter, like science or medicine, that is not static but subject to constant revision; where there is no absolute 'right or wrong; which depends upon the extent to which experimental trials or other investigations have been undertaken and published; and as to which a wide range of different opinions can legitimately be held;

(2) statements that relate to subjective state of mind and, in particular, statements that are deemed to impute a human state of mind to a corporate claimant.

Background

8. The Defendant is a writer, journalist and television producer on science, mathematics and medicine **[Defence ¶2 tab 13 p 63]**. He is the co-author of a book on complementary medicine: "Trick or Treatment? Alternative Medicine on Trial". He is an advocate of evidence based medicine and a critic of health practitioners who sell treatments to the public and promote claims that are not, in his judgment, underpinned by robust evidence of efficacy and absence of harm.

9. The Claimant ("the BCA") is a professional/trade association for a class of health practitioners numbering some 1,350 chiropractors, which the BCA claims represents about half of all those who practise chiropractic in the UK. The BCA appears to perform the usual functions of a trade or professional association, some of its principal activities being to raise awareness of and promote in the public consciousness a positive image of chiropractic and to be a pressure group for its members. It purports also to be a source of public health information relevant to and by way of promotion of the health services offered by its members **[PoC ¶1 tab 12 p 60; Reply ¶4(1) - (11) tab 16 pp 98 - 102]**.

10. The BCA publicly promulgates an annual event which it entitles "Chiropractic Awareness Week" with the aim of publicly promoting chiropractic as practised by its members **[Reply ¶4(10) tab 16 p 102]**.

11. The article complained of was the Defendant's response to Chiropractic Awareness Week 2008 (14 - 20 April 2008) and referred, amongst other matters, to statements put out by the BCA on its website advertising that its practitioners claim to be able to help treat through chiropractic certain childhood conditions unrelated to the back. The article appeared on 19 April 2008 in the Guardian's Saturday Comment & Debate section. It carried the heading of "Beware the spinal trap" and the sub-heading "Some practitioners claim it is a cure-all but research suggests chiropractic therapy can be lethal" **[tab 3 p 16]**. The article was also published in the online edition of The Guardian in the "Comment is Free" section.

12. The BCA could perfectly well have defended itself and its members by publishing on their website their members' refutation of the criticism of their claims and/or asking the Guardian to publish an opposing piece. Instead, the BCA demanded that the Defendant publicly acknowledge the falsity of his

words and withdraw them, undertake not to repeat them and pay damages and costs to the BCA, These were the demands made in the first letter of complaint to the Defendant dated 28 May 2008 **[tab 19 pp 142- 143]**. Unusually, the BCA did not then complain to the Guardian, even to seek the removal of the website publication. Even more unusually, the BCA has made no request of the Guardian for a correction or apology. Rather, it has been specific in addressing all threats and demands to the Defendant alone. The initial complaint was made four days after the Defendant' book "Trick or Treatment: Complementary Medicine on Trial" was reviewed in The Guardian, which may be significant. The letter before action contained this statement:

> "Your letter is part of the publicity campaign orchestrated by yourself and Professor Edzard Ernst to promote your recently published co-authored book Trick or Treatment *to denigrate the profession of chiropractic and those who practise it.*" (emphasis added)

The letter went on:

> "It is untrue and grossly libellous for you to allege that the claims made by our client 'happily promotes bogus treatment' for which 'there is not a jot of evidence' (*sic*). There is, as you are aware or should be well aware, a substantial body of evidence to support these claims.
>
> *Quite apart from the damage you are doing to patients who may not seek the treatment they need* because of your reckless scaremongering you have unjustifiably damaged our client's professional reputation by making this false allegation."

13. Moreover, in the correspondence that followed, the BCA's solicitors questioned the basis of the Defendant's claim as to the absence of evidence for chiropractic's efficacy but questioned not at all the basis for his supposed attribution to that organisation that it had conducted itself dishonestly (rather than, say, misguidedly).

14. The action has been brought in respect of two sentences extracted from a much longer article. These sentences are set in the wider context of the article as a whole, all of it devoted to the subject of chiropractic. The words also have an immediate context, to which the Judge made no reference in his judgment, which is as follows (with the words complained of italicised):

> "You might think that modern chiropractors restrict themselves to treating back problems, but in fact they still possess some quite wacky ideas. The fundamentalists argue that they can cure anything. And even more moderate chiropractors have ideas above their station. *The British Chiropractic Association claims that their members can help treat children with colic, sleeping and feeding problems, frequent ear infections, asthma and prolonged crying,*

even though there is not a jot of evidence. This organisation is the respectable face of the chiropractic profession and yet it happily promotes bogus treatments.

I can confidently label these treatments as bogus because I have co-authored a book about alternative medicine with the world's first professor of complementary medicine, Edzard Ernst. He learned chiropractic techniques himself and used them as a doctor. This is when he began to see the need for some critical evaluation. Among other projects, he examined the evidence from 70 trials exploring the benefits of chiropractic therapy in conditions unrelated to the back. He found no evidence to suggest that chiropractors could treat any such conditions."

15. The defamatory natural and ordinary meaning which the BCA has attached to the italicised sentences and the Judge upheld is **[PoC ¶6 tab 12 p 61]**:

"that the Claimant:

(a) claims that chiropractic is effective in helping to treat children with colic, sleeping and feeding problems, frequent ear infections, asthma and prolonged crying, although *it knows that* there is absolutely no evidence to support its claims; and

(b) by making those claims, *knowingly* promotes bogus treatments" (*Defendant's emphasis*).

The purpose of emphasising above the words *"it knows that"* and *"knowingly"* is to draw attention to the fact that these words formed no part of the Defendant's text or of the literal meaning of the words. The defamatory sting complained of arises indirectly, being derived from inferences that supposedly the hypothetical reasonable reader would have drawn from the statements in the article. As to the insertion of the words "*it knows that*", the Defendant's text read: "*even though there is not a jot of evidence*". As to the insertion of the word "*knowingly*" his text read: *"and yet [the BCA] happily promotes bogus treatments"*. Another difference between the text of the article and the pleader's paraphrase of it is that the paraphrase omitted the italicised words as follows: "the British Chiropractic Association claims *that their members* can help treat children...etc". Indirect and inferential meanings are, of course, very common. However, it is important when determining whether the statements are 'fact' or 'comment' to bear in mind whether the defamatory sting arises out of an inference rather than a direct allegation.

16. It is undisputed that, at the time of the article and whilst promoting Chiropractic Awareness Week on its website, the BCA also advertised on its website the claims for its members attributed to it in the article [**Defence ¶8(6) & (8) tab 13 pp 65 - 66; Reply ¶4(8)(e) tab 16 pp 101 - 102 and ¶9(6) p 108**].

17. The BCA has selected for complaint a defamatory sting that imputes to it a subjective state of mind as if it was a human claimant, although the BCA is a corporate Claimant. The incorporated status of the BCA was not mentioned in the article and that status would not have been suggested to readers by its name. But for its incorporation, the BCA could not have brought this libel action.

18. The BCA has not particularised in its statements of case the nature of the reputation which it claims to enjoy (as distinct from the chiropractors it represents) and which it says was capable of injury by the words complained of.[3] It does not claim any loss of membership or subscription income in consequence of the publication and as a corporate Claimant it has naturally not suffered insult or distress.

19. Until the decision below, the primary defence was fair comment. The BCA admits that its conduct is a matter of public interest" [**Reply ¶7(3) tab 16 p 104**] and has made no allegation that the Defendant wrote the words actuated by malice. The Defendant therefore meets the "cardinal test"[4] or the "touchstone"[5] of a fair comment defence.

20. As a result of the ruling below there now remains in the Defence only a plea of justification but, in the light of the Judge's determination of the defamatory sting, the pleading of this defence will, subject to this appeal, have to be revisited.

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3 In the PoC at ¶7 [**tab 12 p 62**] there is a purely formulaic general damage plea. The Reply is scarcely more informative, see ¶10(4) [**tab 16 p 124**].

4 per Lord Denning in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 170D; per Diplock J in his summing up to the jury in *Silkin v Beaverbrook Newspapers* [1958] 1 WLR 743 at 747.

5 per Lord Nicholls in *Tse Wai Chun Paul v Albert Cheng* [2001] EMLR 777 at [79].

The need to strike the correct balance

21. Journalism which involves a person writing *"what he honestly believed on a matter of public interest and for the purpose of serving the public interest"*[6] should be protected by any Convention compliant legal system, through the availability of defences such as fair comment. As Lord Bingham said in *McCartan Turkington Breen v The Times* [2001] 2 AC 277 at 291:

> *".....the Courts here and elsewhere have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to protect the legitimate object of the restriction."*

Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 1023B, expressed himself in this way:

> *"To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved."*

22. The "compelling countervailing consideration" relied upon in the context of defamation is a claimant's right to the protection of his reputation which, in Strasbourg jurisprudence, has been treated since 2003 as an aspect of the convention right protected by Article 8 and not merely one of the limitations on freedom of speech permitted by Article 10(2)[7]. However, in *Karako v Hungary App. No.39311/05* the ECHR decided that article 8 did not provide a right to a reputation save perhaps where the publication in question

> *"..constituted such a serious interference with his private life as to undermine his personal integrity."* [23]

Rather any violation of article 10 rights in such cases was to be gauged solely by reference to article 10, including 10(2) which provides that interference is permitted where "necessary"...for the protection of "the rights of others" and proportionate: [24-26].

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[6] Laws LJ in giving permission **[Judgment ¶5 tab 5 p 20-5]**

[7] Eg *Chauvy v France* 41 EHRR 610 at [70]; *Cumpana v Romania* 41 EHRR 200 at [91]; *Pfeifer v Austria* [2007] ECHR 935 at [35] - [38] and see Judge Jociene's partly concurring opinion in *Karako* [3-7]

23. It is hard to see how it could be said that the words complained of undermine the "personal integrity" (as opposed to the reputation) of the BCA, which is of course a body corporate. Thus, the decisions as to meaning of the words complained of and their character as fact or comment (and the obvious scope for either, or both in combination to curtail free expression) must be considered against the principles cited at ¶21 above by reference to article 10 alone.

24. Accepting that this exercise will still require the same intense focus on the respective rights under article 10[8] the question that must be posed is whether in the light of what was published, in its proper context, it is both necessary and proportionate in a democratic society to require the Defendant, if he is to avoid liability to pay damages and costs to the BCA and an injunction against him, to prove as a matter of fact a dishonest state of mind in one or more persons unknown within the BCA (which of course can only act by natural persons) on matters such as the state (or absence) of medical evidence as to the efficacy of treatments which the BCA promotes to the public on behalf of its members.

25. The Defendant contends that, in imposing that burden upon him, the Judge's decision is both markedly out of step with the approach long adopted in Strasbourg, even before *Karako*. It is also impossible to reconcile with the post-HRA authorities in this jurisdiction even though as the editors of *Duncan & Neill* 3rd ed observe at ¶13.48 UK domestic case law has offered significantly less protection to comment because it has declined to categorise words as comment in situations where the ECHR would probably have done so. One aspect of the ECHR's approach of expecting parties to be more tolerant of criticism of them has been to look at the wider context in which the words are published. This has moved the focus from whether the words are "in principle" verifiable, to whether, in their proper context, it is disproportionate to demand that their truth *as fact* should be proved.

26. One example of this wider contextual view and its effect is *Nilsen & Johnson v Norway* (2000) 30 EHRR 878 to which the Judge referred in *Keays v Guardian Newspapers Limited* [2003] EWHC 1542 (QB) and to which he was taken again in the argument below. In *Nilsen*, the Strasbourg court at [52]

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[8] Per Lord Steyn in *In re S (a child)* [2005] 1 AC 593 [16-17].

(p.912) made observations in the context of that case, as it has done on other occasions, of the need for those who enter the public arena to be more tolerant of public criticism and of the domestic courts to take account of that public involvement when weighing the interests of free speech against those of protection of reputation under the necessity test in Article 10(2). One way in which that can be given effect to is by characterising as comment words which might, if published in the same form but of a claimant which had not entered the public arena, be characterised as fact and which the journalist could thus be required to prove. At [50] and [53] the ECHR characterised 4 of the 5 meanings at issue (set out at [25] on p.890) as comment, although containing imputations of improper motives or intentions. All save the express allegation of "a deliberate lie" (meaning 1.2) were so characterised because the interference to the applicants' article 10 rights that would result from not doing so was "not supported by sufficient reasons in terms of article 10 and was disproportionate to the legitimate aim of protecting the reputation of [the complainant]".

27. That a similar risk to freedom of expression by finding (or even allowing a claimant even to plead) an unreasonably "high" factual meaning was highlighted by Tugendhat J in *John v Guardian News & Media Ltd* [2008] EWHC 3066 (QB) at [17].

The principles for determining meaning

28. The principles governing the Court's approach to the determination of meaning on appeal from the final determination of a Judge sitting alone are well settled having been summarised by Lord Bingham MR in *Skuse v Granada* [1996] EMLR 278 at 285 - 287, and applied many times since. It is not anticipated that they will be the subject of any dispute.

29. The task of the tribunal of fact is to apply those principles to the ascertainment of the single objectively 'correct' meaning of the words. This is an artificial exercise that was much criticised by Diplock LJ in *Slim (ibid)* at 171D - 179D and there is a danger that, if the defamatory sting, arrived at by the single meaning rule, is the basis for determining whether words qualify as comment, this artificiality will lead to undue restriction on the availability of the fair comment defence (see ¶¶21-27 above).

The principles for identifying comment

30. The common law principles of the fair comment defence were summarised by Lord Nicholls in *Tse Wai Chen Paul v Albert Cheng* [2001] EMLR 777 at [16] - [21][9]. Lord Nicholls spoke powerfully of its purpose and of the importance of defending free speech in a passage at [41] - [46].

31. In *Clarke v Norton* [1910] VLR 494 at 499 Cussen J observed:

> "More accurately it has been said that the sense of comment is "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc"

This statement of the law by Cussen J was adopted by this Court in *Branson* at [12] and followed by the observation at [13], per Latham LJ, that:

> "Whilst an assertion as to motive may be capable of amounting to an assertion of fact, that depends on its context."

In this context, see also *Associated Newspapers Limited v. Burstein* [2007] EMLR 571 CA at [19].

32. It follows that a comment can be made by stating a value judgment, and can also be made by stating a fact, if it is a deduction from other facts (per Gummow, Hayne and Heydon JJJ of the High Court of Australia in *Channel Seven Adelaide Pty Ltd v Dr Colin Manock* [2007] HCA 60; (2007) 232 CLR 245) at [35]).

33. The most common type of deductive/inferential statements which qualify as comment are those about the state of an individual's mind, including as to an individual's motives and as to whether someone has lied and/or acted dishonestly: see eg: *Slim v The Daily Telegraph (ibid)* per Lord Denning at 169D - 171B; *Jeyaretnam v Goh Chok Tong* [1989] 1 WLR 1109 (PC) at 1113B - G; *Nilsen and Johnsen v Norway (ibid)*; *Branson v Bower* [2001] EMLR 800 at [13]; *Burstein* CA *(ibid)* at [24]; *Keays (bid)* at [26] (ruling that the words were capable *only* of being comment).

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[9] In respect of [19] (the need for reference to facts on which the comment is based) the qualification of Eady J in *Lowe v Associated Newspapers Ltd* [2007] QB 580 [42] should be noted.

34. Eady J made observations to similar effect at first instance in *Branson* that were approved by this Court at *(ibid)* [13] and adopted in *Burstein* CA at *(ibid)* [24] per Keene LJ:

35. Statements that are "verifiable" are not excluded from being comment. Thus a statement may qualify as comment although it is a statement capable of objective justification (eg *Sutherland v Stopes* [1925] AC 47 HL and see *Gatley* 11th Ed at ¶12.3). This is certainly so where the "verifiable fact" is clearly an inference from other facts: *Duncan & Neill* 3rd ed ¶13.17 n2 making precisely this distinction in the context of the passage in *Hamilton v Clifford* [2004] EWHC 1542 (QB) on which the Judge relied in [14] of his judgment.

36. Relevant context for the purpose of deciding whether a statement is fact or comment certainly includes the location of an article in a Comment section of a newspaper and the labelling of an article as a comment piece (see *Keays (ibid)* per Eady J at [25] and [49])[10].

Defendant's case as to the meaning of the words and as to whether they are to be treated as 'fact' or 'comment'

37. This argument commences with a close linguistic analysis of the kind that was deprecated by Diplock LJ in *Slim* (*ibid*) at 179B – D but which remains routine in defamation cases, for determining the defamatory sting and, where applicable, whether words qualify as comment.

38. By embarking upon such a close analysis it is not intended to distract attention from the need for the words to be viewed in the broader context summarised in Ground 3.1 **[tab 2 p 11]**.

39. In addition to the wider context referred to above, any understanding of the two sentences complained of must be derived from *at the very least* the paragraph from which the two sentences complained of were extracted and the paragraph that followed (i.e. ¶¶ 3 and 4 of the article **[tab 3 p 16]**). The Judge erred in confining his analysis to just the two sentences complained of.

[10] The judge described these some of the "badges" of comment (eg at [35] & [36]).

"You might think that modern chiropractors restrict themselves to treating back problems, but in fact they still possess some quite wacky ideas."

40. "Wacky" is the language of value judgment. Moreover, it conveys eccentricity not dishonesty. "Ideas" conveys the sense of belief, which points away from dishonesty.

"The fundamentalists argue that they can cure anything."

41. "Fundamentalists" conveys belief in ideas and points to sincerity (whether extreme, misguided or wrong-headed) and away from dishonesty.

"And even the more moderate chiropractors have ideas above their station."

42. "Moderate" and "ideas" conveys belief (in less controversial ideas) and, as before, points to sincerity and away from dishonesty.

"The British Chiropractic Association claims that their members can help treat children with colic, sleeping and feeding problems, frequent ear infections, asthma and prolonged crying, even though there is not a jot of evidence."

43. This sentence juxtaposes two statements. The first is a statement of (uncontroversial)[11] fact as to the nature of the BCA's claims as to the childhood conditions that its members can help treat. The second statement is to the effect that there is no evidence for those claims, a statement which the Defendant goes on to support in the next paragraph by reference to Professor Ernst's point of view - a vital piece of context to which the Judge did not refer.

44. There is nothing in which the Defendant signals to readers that he has any greater knowledge or insight than he has disclosed as to how this state of affairs is to be accounted for. The readers are left to draw their own (or no) conclusion as to how it comes about that the BCA is making claims for its members for which the Defendant believes there to be no evidence. There are plainly a number of possibilities, but the language used in the preceding

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[11] **Defence¶8(6) & (8) tab 13 pp 65 – 66; Reply ¶4(8)(e) tab 16 pp 101 – 102 & ¶9(6) p 108.**

sentences positively points *away from* dishonesty as being the author's own 'take' (or his steer to the reader) on this.

45. In his judgment at [12], the Judge said this:

> "What the article conveys is that the BCA itself makes claims to the public as to the efficacy of chiropractic treatment for certain ailments even though there is not a jot of evidence to support those claims. That in itself would be an irresponsible way to behave and it is an allegation that is plainly defamatory of anyone identifiable as the culprit."

That the BCA would have been behaving in an irresponsible way is not derived directly from any statement by the Defendant. If it arises, it is the readers' own conclusion from what they have been told. Accordingly, insofar as 'irresponsibility' is the defamatory sting that would have been conveyed by the words, it is an inferential or indirect meaning and, moreover, should be seen, quite plainly, as a comment, being an inference, deduction, observation or conclusion from the matters set out (see eg *Clarke v Norton* [1910] VLR 494 at 499, referred to at ¶31 above).

"This organisation is the respectable face of the chiropractic profession and yet it happily promotes bogus treatments."

46. It was on the basis of this sentence that the Judge promoted the defamatory sting from one of irresponsibility to one of dishonesty. He held that the Defendant had in some way unequivocally ruled out for his readers any explanation whether innocent or culpable short of dishonesty, holding instead that the Defendant had made "the plainest allegation of dishonesty" [13].

47. To this the Judge added at [13]: "indeed it accuses them of thoroughly disreputable conduct". If correct, that too is not a direct allegation by the Defendant and, in any event is surely in the nature of a comment or value judgment (see eg *Kemsley v Foot* [1952] AC 345 at 356, per Lord Porter).

48. In order to arrive at his conclusion, the Judge not only injected a great deal of his own interpretation in the view he took of the words "happily promotes" and "bogus", but he did so upon considering the sentence in isolation from its context, which the Defendant says was an error.

49. What the Defendant is drawing attention to in these passages is an apparent inconsistency between the moderate image of those chiropractors who group themselves under the umbrella of the BCA and the BCA's advertising of

its members' ideas for chiropractic that are more readily associated with the wacky or fundamentalist end of the profession. The Defendant makes no suggestion to his readers (or no direct suggestion) as to how this state of affairs is to be accounted for and the Judge did not suggest otherwise.[12]

50. As to the meanings the Judge attached to the words actually used by the Defendant: "happily" does not of itself convey "dishonestly". It must depend upon the context and there is no context here from which it is reasonable to impute "dishonestly" to the BCA. The word and its context could convey to the reasonable reader the exact opposite: for example: sanguine; a cheerful ignorance; blithely; a confident but misguided faith in the "wacky ideas" of some of the BCA's members; a misjudgement about the interpretation of the available evidence. It is unreasonable (and certainly unnecessary) to read into this choice of words anything more than that the BCA is apparently untroubled by the adequacy of the evidential basis for the claims, for whatever reason. There was no need for the Judge to impute to the word "happily" anything beyond the fact that the BCA engaged in such promotion and was happy with what it was doing (let alone to impute an allegation of dishonesty). This falls foul of the injunction in the authorities to treat the hypothetical reasonable reader as a man who is not avid for scandal and someone who does not and should not select one bad meaning where other non-defamatory (or, of course less defamatory) meanings are available.[13]

51. Instead of focussing upon the exact words used, the Judge paraphrased the sentence in his judgment at [12] and, in the process, the sense of the words used may have become slightly altered. The Judge's paraphrase was to this effect:

> "It is said that despite its outward appearance of respectability, *it is happy to promote* bogus treatments". (emphasis added)

"Happily promotes bogus treatments" and "happy to promote bogus treatments" are not quite the same thing. Although the difference is slight, it is not without significance. The latter more readily lends itself to the Judge's

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12 Compare *Branson v Bower CA (ibid)* [13]; *Keays v Guardian (ibid)* [49] and *Rath v Guardian News & Media* [2008] EWHC 398 (QB) [64] – [65].

13 See the summary of the principles at ¶28 above. This particular element is from *Capital and Counties Bank Ltd v Henty* (1882) 7 App. Cas. 741, 744 –745, 785 – 786, 790 – 793.

interpretation, that the BCA knows the true significance of what it is doing and is happy to proceed upon that basis. In the case of the former, the BCA may very well not know the significance of what it is doing (or at least not see it in the same light as the Defendant) and is, for that reason, happy with or untroubled by what it is doing.

52. However, there is no indication to the reader that the Defendant is privy to facts about the BCA's state of mind unknown/undisclosed to the reader. If the Defendant has implied dishonesty on the part of the BCA, the only suggested basis for it is fully revealed in the words themselves viz. the fact that it advances these claims for its members which are unsupported by the available trial evidence (as ascertained by Professor Ernst). That would be no more than a deduction or inference on the part of the Defendant, which qualifies as comment.

53. If one takes the approach set out by Eady J at first instance in *Branson, Keays* and *Hamilton (ibid)* (see ¶33 above) the imputation of dishonesty is not a tenable one because the imputation is unverifiable, perceived by any reasonable reader to be in its nature subjective and, as the reader would see straight away from the nature of the allegation, the Defendant could not have direct knowledge, and accordingly he must have been expressing his own views or inferences (see eg *Hamilton (ibid)* at [56], [58] and [59] at ¶¶64-6 below).

54. As to "bogus" the Judge, whilst making no reference to the following paragraph in the article, said at [12]:

> "Everyone knows what bogus treatments are. They are not merely treatments which have proved less effective than they were at first thought to be, or which have been shown by the subsequent acquisition of more detailed scientific knowledge to be ineffective. Bogus treatments equate to quack remedies; that is to say they are dishonestly presented to a trusting and, in some respects perhaps, vulnerable public as having proven efficacy in the treatment of certain conditions or illnesses, *when it is known that there is nothing to support such claims.*"

This, of course, begs the fundamental question which is whether *the person presenting the treatments* at issue knows that there is nothing to support the claims made. "Bogus" is defined as "spurious or counterfeit; not genuine" (taken from Collins 3rd ed), especially in the context of counterfeit money. But just as a counterfeit bank note can be passed onto others as genuine by innocent members of the public so a bogus treatment can be innocently recommended or dispensed by a sincere but mistaken health professional. Thus, a bogus

chiropractic treatment could be "happily" promoted to the public by the BCA either without the knowledge of the detailed study undertaken by Professor Ernst, or with knowledge of the study but on the basis of a difference of opinion as to its conclusions[14].

"I can confidently ..... He found no evidence to suggest that chiropractors could treat any such conditions."

55. The Judge disregarded the entirety of ¶4 of the article in which the Defendant explained to readers why he had chosen to "label" as "bogus" the treatments of the BCA's chiropractic members. This was vital context which, like the preceding context, points away from dishonesty being imputed by the Defendant to the BCA.

56. The Defendant's explanation to the readers of his use of the word "bogus" reveals that his choice of the word was directed at chiropractic treatments themselves and not at anything said or done by, the BCA. On the contrary, the Defendant's explanation relates entirely to his understanding, as co-author with Professor Ernst, of the state of the evidence as interpreted by Ernst from his own investigation of chiropractic.

57. This paragraph sets out the factual basis for any defamatory imputation that the reader may infer and this makes the words a prime candidate for a fair comment defence. In a nutshell what the Defendant is saying to his readers is this: the BCA makes claims on behalf of its members for treatment which, based on the critical evaluation of chiropractic carried out by Professor Ernst, to which I have had access as his co-author, I consider to be bogus.

58. Further, this paragraph explains the basis of the Defendant's statement that "there is not a jot of evidence", namely Ernst's conclusion drawn from an examination of the evidence from 70 trials exploring the benefits of chiropractic therapy in conditions unrelated to the back. The phrase "not a jot of evidence" is an example of speech that, although literally containing an assertion of fact that conveys "absolutely no evidence" is clearly expressing a point of view.

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[14] And see *Dakhyl v Labouchere* [1908] 2KB 326 HL (note) addressing the same issue concerning the term "quack".

Errors of principle/law below

Grounds 3.5 & 3.6: meaning

59. The matters at ¶¶ 28, 29 & 37-58 above are relied upon.

Grounds 3.1 - 3.4: fair comment

60. At [14] of his judgment, the Judge disposed of the fair comment defence in just one sentence:

> "I therefore would uphold the claimant's pleaded meanings. It will have become apparent by now that I also classify the defendant's remarks as factual assertions rather than the mere expression of opinion."

Beyond his finding as to the defamatory sting, the Judge offered no separate analysis of the words by way of support or explanation for his finding that they were not defensible as comment. He did not allude to the fair comment authorities or any aspect of the context in which the two sentences complained of had been published (apart from the reference in the penultimate sentence of [14] of his judgment to the general heading Comment and Debate of the page where the article appeared) or the Defendant's arguments.

61. Moreover, in the passage immediately following that just quoted, the Judge fell into error by treating as the test for answering the question "fact or comment?" whether the defamatory sting is one of "verifiable fact" He appears to have adopted the approach, as a matter of principle, that a "verifiable fact" can only be defended by a plea of justification:

> "Miss Rogers reminded me, by reference to *Hamilton v Clifford* [2004] EWHC 1542 (QB),[15] that one is not permitted to shelter behind a defence of fair comment when the defamatory sting is one of verifiable fact. Here the allegations are plainly verifiable and that is the subject of the defence of justification. What matters is whether those responsible for the claims put out by the BCA were well aware at the time that there was simply no evidence to support them. That is an issue capable of resolution in the light of the evidence called. In other words, it is a matter of verifiable fact. That is despite the fact that the words complained of appear under a general heading "comment and debate". It is a question of substance rather than labelling."

62. Such a test is in conflict with domestic and ECHR authorities, as appears from ¶¶ 31-36 above. In particular:-

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15 This was a reference to *Hamilton* [60].

62.1 An imputation of fact, including a verifiable fact, may be a comment. It is therefore not correct that a verifiable fact is susceptible only to a defence of justification.

62.2 In the case of a verifiable fact which also qualifies as comment, the Defendant can choose to rely on justification or fair comment or both.

62.3 An imputation of fact as to state of mind (including honesty) should be treated as a comment on the premise that readers perceive such statements to be subjective and/or would see straight away that the author must have been expressing his own views or inferences precisely because an imputation of fact as to state of mind is generally unverifiable: see Duncan & Neill 3rd ed ¶13.17 n2.

62.4 According to Strasbourg jurisprudence, the press has a duty to impart information and ideas on all matters of public interest and the public has a right to receive them. The journalist's freedom also covers possible recourse to a degree of exaggeration, or even provocation. A domestic law requirement on the press to prove the objective truth of a value judgment is impossible to fulfil and is an infringement of the Article 10 right.[16]

62.5 In the overall context of this publication, including the words used, the actions of the BCA and the importance of the topic addressed Strasbourg jurisprudence requires that the Defendant not be required to prove as fact any part of the meaning which the words bear (as opposed to a sufficient degree of underlying fact to render the comment "objectively fair").

63. It is not apparent how the Judge arrived at this test. It is incompatible with his own approach in earlier cases as affirmed by this Court in *Branson CA (ibid)*. It is as if the Judge was invoking this test as the 'other side of the coin' to the Strasbourg principle that a domestic law requirement to prove the truth of a value judgment is an infringement of article 10. It simply does not follow that if its truth can be proved the defence of comment is precluded.

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16 See eg *Jerusalem v Austria* No 26958/95 at [43]; *De Haes and Gijsels v Belgium* (1998) 25 EHRR 1; *Prager and Oberschlick v Austria* (1996) 21 EHRR 1; *Selisto v Finland* [2005] EMLR 178.

64. An argument to the effect that a verifiable fact can only be defended by a plea of justification was advanced, but not accepted by Eady J, in *Keays* [30-34] *(ibid)*. Rather, Eady J applied a test to determine whether the words were eligible for a fair comment defence which depended upon whether the statement is one upon which different conclusions or opinions are possible. He appears to have rejected (at least implicitly) a test that depends upon whether the statement is one of "verifiable fact". The Defendant contends he was correct to do so. Moreover, in both that case and in *Branson* the allegations about the subject's state of mind were not a matter of implication from the words used (as here) but were the subject of direct statements by the author.

65. The Judge's finding that the BCA's state of mind was a verifiable fact at all (even if an inference from other facts) is also difficult to reconcile with the approach he adopted in previous decisions, namely, *Branson v Bower (No.2)* [2002] QB 767 [1 & 27], *Keays (ibid)* [49] and *Hamilton (ibid)* [56-60]

66. As well as applying a test unsupported by any authority, the Judge was wrong, on the basis of his conclusion as to the defamatory sting (elements of which were inferential), to exclude comment without a separate consideration of whether the words qualified for comment having regard to the surrounding sentences or the wider context of the subject-matter, nature and contents of the article and its allocation to the comment section of the newspaper.

Striking the Balance - Grounds 3.7 & 3.8

67. Looking at the burden of justification imposed upon the Defendant in consequence of the Judge's rulings, it is clearly both unnecessary and disproportionate:

> 67.1 to require, in the context of the subject-matter of the article, that the Defendant must prove the objective state of mind of a corporate Claimant as a condition of resisting the BCA's claim about the efficacy of the treatments they promote. That is a matter which, *even if* capable of being objectively ascertained, is information plainly not within his knowledge or obtainable by him. It is entirely within the knowledge of the individuals who represent the relevant controlling minds within the BCA, as are the identities of those individuals; and
>
> 67.2 to require of the Defendant that he prove there is "absolutely no evidence" to support the claims of the BCA when he has expressly

pinned the absence of evidence on the clinical trials that Professor Ernst was able to access. It is obviously within the knowledge of the BCA or its chiropractic members (to which the BCA has access) on what evidential basis they say their claims are supportable. Either way, these are matters of judgment and point of view which depend entirely upon the individual's approach as to what is 'evidence' or acceptable 'evidence' upon which to sell a health treatment to the public.

Adrienne Page QC

William McCormick

5 November 2009