



Neutral Citation number: [2018] EWHC 3960 (QB)

Claim No: HQ17M03785

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 December 2018

Before:

THE HONOURABLE MR JUSTICE NICKLIN

Between:

STEVE MORGAN CBE

Claimant

- and -

ASSOCIATED NEWSPAPERS LIMITED

Defendant

JUSTIN RUSHBROOKE QC and FELICITY MAHON

(instructed by **Himsworths**) for the **Claimant**

CATRIN EVANS QC and SARAH PALIN

(instructed by **Wiggin LLP**) for the **Defendant**

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Approved Judgment
.....

MR JUSTICE NICKLIN:

1. I have given two interim judgments in relation to this claim previously. The first, on 28 June 2018 ([2018] EWHC 1850 (QB)) in relation to the determination of meaning and whether the words complained of made allegations of fact or were expression of opinion (“the first judgment”). The second on 6 July 2018 ([2018] EWHC 1725 (QB)) in relation to serious harm (“the second judgment”).
2. The article that gives rise to this claim for libel is set out in [4] of the first judgment. The applications that I now have to deal with mean that it is convenient for me to set out the meaning that I found the article bore in its natural and ordinary meaning from [3] of the second judgment –

- “(a) the Claimant was able to take advantage of an opportunity to purchase six houses built by his company that were intended to be sold for less-well off buyers as affordable homes – but which had failed to sell - after his company had been successful in getting local authority planning rules changed;
- (b) he purchased the six properties at a substantial discount, £860,000 against a market value of £2.1m and, as a result, stood to make a very large personal gain; and
- (c) in consequence, the Claimant had exploited his position to line his own pockets in a greedy, unethical and morally unacceptable way.”

3. As to fact or opinion, I was satisfied that element (a) and (b) from that meaning were factual in nature and not themselves defamatory. I found element (c) to be an expression of an opinion based on the conduct of the Claimant in (a) and (b).
4. The Defendant filed a defence on 9 March 2018, that was before the court had determined meaning and the fact or opinion question. The reverberations of that decision continue to complicate matters as I shall explain below. In the original defence, the Defendant advanced substantive defences of honest opinion in paragraph 5 and truth in paragraph 6. The original meaning, "the *Control Risks* meaning", sought to defend as honest comment:

"The Claimant had put the staffing needs of his estate and hotel before the affordable housing needs of persons not employed by him and/or had acted in an unethical way that was worthy of public criticism when he –

- (a) took advantage of his position as chairman of Redrow to secure for himself six affordable homes at his company Stretton Green development,
- (b) which had been built under rules requiring his company to offer affordable homes and should have been sold to less well-off buyers in need of affordable housing until the rules were changed at the claimant's request so that the claimant could instead let the properties to the staff working on his nearby estate."

5. The *Control Risks* meaning was significantly different from the one found to be the single meaning of the article. In particular, no element of meaning (b) was to be found in the *Control Risks* meaning.
6. The facts the Defendant, at that stage, relied upon in support of its honest opinion defence was set out in paragraphs 5.1-5.25. Naturally, they directed at supporting the *Control Risks* meaning I have set out. In consequence, they did not include any factual averment as to whether the Claimant had purchased the relevant houses at a substantial undervalue.
7. The honest opinion defence has now been placed on a statutory footing. s.3 of the Defamation Act, 2003 provides, so far as material to this case,

"3. Honest opinion –

- (1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
 - (2) The first condition is that the statement complained of was a statement of opinion.
 - (3) The second condition is that the statement complained of indicated whether in general or specific terms the basis of the opinion.
 - (4) The third condition is that an honest person could have held the opinion on the basis of –
 - (a) any fact which existed at the time the statement complained of was published...
 - (5) The defence is defeated if the claimant shows the defendant did not hold the opinion."
8. Any facts relied upon under subsection 4(a) must be true facts that existed at the time the statement was published. The burden of establishing that is on the defendant. CPR Part 53, Practice Direction para. 2.6 provides:

"Where a defendant alleges that the words complained of are honest opinion, he must –

- (1) specify the defamatory meaning he seeks to defend as honest opinion [i.e. the *Control Risks* meaning], and
- (2) give details of the matters on which he relies in support of that allegation."

THE PRESENT APPLICATIONS

9. The original Application Notice of the Claimant, dated 18 May 2018, seeking to have meaning and fact and opinion determined as preliminary issues, additionally sought the following further orders –
 - "(a) a consequential order that paragraphs 5 and 6 of the Defendant's defence are struck out under CPR Part 3.4(2) because they disclose no reasonable grounds for defending the claim; and
 - (b) further alternatively, summary judgment for the claimant under CPR Part 24 on the ground that the Defendant has no real prospect of successfully defending the claim and there is no other compelling reason why the case should be disposed of at trial."
10. By order dated 19 June 2018, I directed that these issues would not be determined at the same time as the meaning and fact opinion preliminary issues. The reason for that was that the parties would, I thought, benefit from a period of consideration of where they stood following the determination of the preliminary issues.
11. Following determination of the preliminary issues, the consequent order provided for service of amended Particulars of Claim and the service by the Defendant of a draft amended Defence. This is the first of the reverberations that I referred to above. If the Defendant had not served a defence, then it would not have needed permission to amend. It would simply have served its Defence in response to the amended Particulars of Claim. Additionally, I ordered that, if the Claimant objected to any of the proposed amendments, such objections were to be indicated by the Claimant by 23 July 2018.
12. Given the state of flux, no Reply has yet been served. The extent to which there is a factual dispute as to the matters pleaded in the existing Defence is not clear on the face of the pleadings, but some of the issues of contention have become clearer as a result of the service of a large number of witness statements.
13. Objections were taken to some of the proposed amendments and so, on 17 October 2018, the Defendant issued an Application Notice seeking permission to amend its defence. Consequently, the applications I have to determine today are –
 - (a) the balance of the Claimant's applications from 18 May 2018 seeking the striking out of the honest comment defence and/or summary judgment of his claim under CPR Part 24; and
 - (b) the Defendant's application to amend its defence.
14. Strictly, the correct way to approach these two applications would be to deal with the application to amend first. However, for reasons that will become apparent, I have decided to deal with them together because there is a substantial overlap in the submissions that are made in support of and against the amendments sought in the context of the Claimant's application for summary judgment.

AMENDMENT APPLICATION

15. Before turning to the particular amendments for which the Defendant seeks permission, I need to summarise the factual case advanced on the existing statement of case.

16. Paragraphs 5.1-5.2 set out matters relating to the Claimant; that he is the owner of Carden Hall Estate, which includes Carden Park a hotel with golf facilities and that he founded Redrow Homes Limited, said to be one of the UK's largest home builders. Specifically, it is contended that the Claimant is the Chairman of Redrow and has, "*overall responsibility for the management and governance*" of Redrow and is also a "*controlling shareholder*".
17. Some care needs to be taken about these corporate entities because there is a Redrow Plc and also a Redrow Homes Ltd. It is in relation to the former that I understand that the Claimant has management responsibility or control as alleged, not in relation to the latter company which is the company that built the homes that are at the centre of these proceedings.
18. Paragraphs 5.3-5.4 set out the basic legislative and policy framework arrangements for affordable housing. Specifically, it is contended that, "*the primary vehicle for the development of new affordable housing in the UK is by way of deed of planning obligations pursuant to s.106 of the Town and Country Planning Acts, 1990*", referred to as a s.106 agreement. Such agreements require a proportion of those homes built in private developments to be affordable housing as a condition of the grant of planning permission.
19. Paragraphs 5.5-5.6 set out the Defendant's case as to the particular needs for affordable housing in the Cheshire West and Chester area. Paragraphs 5.7-5.13 set out details of the Defendant's case as to the original grant of planning permission to Redrow in August 2012 to build 31 residential units on a site on the edge of the village of Stretton in Cheshire. The golf courses, part of the Carden Park Hotel, are said to be adjacent to the development site.
20. The original s.106 agreement agreed between Cheshire West and Chester Borough Council and Redrow contained terms as to the provision of affordable housing in the development. The Defendant alleges that the Council "*reluctantly*" agreed to the provision of 6 affordable housing units as part of the development. It is alleged that the Council's stated target is to ensure provision of a minimum of 35% of affordable housing in new developments. The original s.106 agreement provided that the 6 units were to be shared ownership which was required to be sold to a registered provider of social housing. Paragraph 5.11 identifies those who are registered providers and their duties and responsibilities. The registered provider was then required to sell the unit on a shared ownership lease basis for a minimum of 125 years to persons who were –
 - (a) unable to solve their housing situation in the locality within the existing housing stock, other than through a purchase at a price similar to that of the affordable housing, and
 - (b) met the Council's strong local connection criteria."
21. The original s.106 agreement defined the local connection criteria as those living in particular parishes, or those who had a strong local connection with those parishes. In the event that no applicants came forward from those groups, the geographical area could be progressively expanded.
22. Paragraphs 5.14-5.20 set out the Defendant's case as to the subsequent variation of the original s.106 agreement in around January 2016. It is alleged expressly that the variation was sought, "*in order to facilitate the claimant's purchase of the affordable homes and they are used by him as staff accommodation for his estate and hotel.*"
23. The Deed of Variation, dated 24 March 2016, it is alleged to –

- (a) afford a discretion as to whether the affordable housing was to be shared ownership or affordable rental at a rent capped at eighty per cent of the market rent or a combination thereof in the absolute discretion of the registered provider;
 - (b) approve the Claimant personally as a registered provider under the 106 agreement; and,
 - (c) to insert as a new class a prospective tenant with first priority on occupancy persons who are employed or had accepted an offer of employment on a permanent or temporary basis with the Claimant's hotel or estate with their occupation of the affordable units to run concurrently with their employment.
24. The Defendant contends that the variation was "*strikingly unusual*" and contrary to the social purpose of social affordable housing namely to provide affordable housing to local people who could not afford to rent or buy on the open market. It is contended that the effect of the variation was to enable the Claimant's employees to rent the affordable homes even though they might have had sufficient resources to access the local private sector rental market.
25. The Defendant also contends that the effect of the variation and particularly his being approved as a registered provider, was to leave the 6 affordable housing units outside the established regulatory and policy framework for the allocation of housing in the Borough and, in particular, the Claimant was not under a duty to cooperate with the Council in the implementation of its allocation scheme.
26. In the original paragraphs 5.21-5.23, the Defendant set out its case on the sale of the 6 affordable homes to the Claimant in June 2016. The original benefit that the Claimant was said to achieve was limited to –
- (a) obtaining an asset for his hotel business that was represented by having 6 homes on site which could be used as tied staff accommodation which was alleged to increase then the hotel and the estates' respective values;
 - (b) assuming control over the occupants of the homes and the basis on which they occupied it; and
 - (c) the ability to offer enhanced employment opportunities to potential staff at the estate or hotel, thus improving his recruitment and retention of staff.
27. Paragraph 5.23 drew together the strands of the Defendant's factual case in support of the honest opinion defence to allege that the Claimant –
- (a) unfairly prioritised employees of the Claimant's estate and hotel and removed any requirement for the newly inserted first place class of prospective tenants to demonstrate that they are unable to solve their housing situation in the locality within the existing housing stock other than through renting at a price capped below market rents;
 - (b) removed the mechanisms in place under the original s.106 agreement, which were intended to ensure that the beneficiaries of the affordable homes were persons in need of an affordable housing and who did not have sufficient resources to pay market rents or buy on the open market and that the homes were allocated openly and fairly;

- (c) deprived local people in need of affordable housing of the right to buy one of these affordable homes from a registered provider of social housing which would have given them the opportunity of getting onto the housing ladder and enjoying the stability of owning their own home;
- (d) removed the important safeguards in place under the original s.106 agreement for the properties to be made available only through a registered provider of social housing. Had a registered provider of social housing let the properties, they would have been allocated under a published allocation policy according to greatest need;

Further,

- (e) the variation relaxed the strong local connection requirement placed on persons eligible to rent the affordable housing units which was intended to ensure that local residents are prioritised to allow the claimant to use the properties to house any staff at his hotel and estate, even those only employed as temporary workers and thereby reduce the pool of affordable housing for local people in need; and
- (f) a scheme intended to help local people in need had been subverted for the benefit of the Claimant's estate and hotel.

It is clear that these contentions were directed at the original *Control Risks* meaning.

- 28. The thrust of the original particulars was that the variation of the s.106 agreement had disadvantaged those who would have benefited from the provisions of the original s.106 agreement in the way set out in paragraphs (a)-(f) as I have set them out and to the Claimant's personal advantage.
- 29. The first paragraph to which the Defendant seeks to make amendment is paragraph 5.22. The alleged benefit that was obtained by the Claimant by the variation to the s.106 agreement is widened expressly to include "*material benefit to him*". Added to the three identified benefits is a fourth, alleged to be the ability "*to buy the six affordable homes at a lower price than he would have had to pay for the houses on the open market*". Two new paragraphs, 5.22A and 5.22B are then sought to be added by amendment under the new heading, "*Discount to their true value*" and they are in the following terms:

"5.22A The Claimant purchase the six affordable housing units at a substantial discount to their true value on the open market. On its own figures, Redrow attached an open market valuation to the houses as at February 2016 of £1.375 million in total (with the largest three-bedroom houses being worth just less than £266,000). Accordingly, had the Claimant bought these houses as tied staff accommodation for his nearby estate or the hotel on the open market, he would, on Redrow's own figures, have had to have paid approximately £1.375 million (or £229,000 on average per house) rather than the total price he paid of £860,000. While it is accepted that the affordable housing obligations oblige the Claimant to subsidise the rent and that the Claimant may only charge a rent capped at eighty per cent of market rent (see para.5.14 above) this nonetheless represents a considerable saving for the Claimant compared to what he would have had to pay to buy the homes as tied houses for staff on the open market.

5.22B Prior to the variation, registered providers of social housing made offers to Redrow (which were declined) for the six affordable housing units under the terms of the original s.106 agreement which obliged them to dispose of the houses on a shared ownership basis. Accordingly, the purchase price offered for the houses by the registered providers was at a discount to their open market value to reflect the affordable housing encumbrances. In procuring the variation, the Claimant had purchased six houses which could be let as affordable rental units outside of the Council's common housing register and West Chester homes allocation policy (see paragraphs.5.18-5.19 above) to any person or persons in need of affordable housing and meeting the local connection criteria, including and with first priority, the Claimant's permanent and temporary staff who did to have to demonstrate that they had insufficient resources to pay market rents. By the variation, therefore, save for the obligation to subsidise the rent, the affordable housing encumbrances had been substantially removed and the Claimant could effectively use the houses as tied staff cottages for his estate and hotel."

30. Finally, amendments are sought to be made to paragraph 5.23 to add the underlined words in the passage:

"The Claimant's purchase of the affordable homes was greedy, unethical and morally unacceptable on the grounds that the variation to the s.106 agreement...". Added to the list was a seventh alleged benefit obtained by the Claimant that, "enabled [him] to purchase six affordable housing units at a substantial discount to their true value on the open market as tied staff accommodation for his nearby estate and hotel."

31. As this is an amendment application, the Defendant has filed evidence upon which it relies: the fourth witness statement of Matthew Dando, dated 17 October 2018. Because of the sequence of events and applications, this witness statement comes in the midst of a series of evidential blows and counter blows starting with the Claimant's first witness statement of 14 May 2018 filed in support of his application for summary judgment and followed by the third witness statement of Mr Dando dated 19 June 2018, the second witness statement of the Claimant dated 23 November 2018, a witness statement of Ros Sandwell, Group Partnership director of Redrow dated 13 November 2018, a witness statement of Hamish Ferguson, Resort General Manager of Carden Park Hotel dated 12 November 2018 and a witness statement from Alan Miller, a former senior manager at Plus Dane Housing (a registered provider of social housing which had put in a bid for the 6 houses in the Stretton Green Development), dated 21 September 2018.
32. I cannot but express the view that much of this prodigious output of evidence would have been unnecessary had the preliminary issues been determined first and then the parties considered what consequences flowed from that. As it is, the determination of the preliminary issues arrived belatedly as a sort of unwelcome interruption and a row about the underlying facts. The consequences are very real however, the costs of both sides in getting this case to nearly the end of the pleadings are already in excess of £500,000. Because pleadings are not complete, there has been no formal costs budgeting, I required the filing of costs budgets for the hearing on 28 June 2018, but the matter came to court too late for any costs management order to be made.

33. What has been achieved in that period has been the determination of two preliminary issues which could have been determined in about a day at any time after the Particulars of Claim had been served. The parties are now deeply mired in arguments about the terms of amendments to a Defence that need not have been served prior to the determination of the preliminary issues.

PRINCIPLES TO BE APPLIED ON THE APPLICATION TO AMEND

34. The broad principle can be taken from the judgment of Peter Gibson LJ in *Cobbold v Greenwich London Borough Council* (“*Cobbold*”) (an unreported judgment of the Court of Appeal of 9 April 1999):

"The overriding objective of the CPR is that the court should deal with cases justly. That includes so far as practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed."

35. The commentary in *The White Book* draws attention to subsequent authorities that have reminded the court of other factors that need to be considered under the overriding objective when considering applications to amend.
36. The basic requirement that a party applying for permission to amend must show is that the proposed amendments have a real prospect of success. That is the same test as is applied when considering summary judgment.

PRINCIPLES TO BE APPLIED IN RELATION TO CPR 3.4(2) STRIKING OUT

37. CPR 3.4(2) provides, so far as material:

"The court may strike out a statement of case if it appears to the court –

- (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; [or]
- (b) that the statement of case is an abuse of the court's process or its otherwise likely to obstruct the just disposal of the proceedings."

38. Practice Direction 3A gives further guidance:

"1.6 A defence may fall within r.3.4(2)(a) where –

- (1) it consists of a bare denial or otherwise sets out no coherent statement of facts, or
- (2) the facts it sets out, while coherent, would not even if true amount in law to a defence to the claim.

1.7 A party may believe he can show without a trial that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the construction of a document). In such a case the party concerned may make an application under r.3.4 or Part 24 (or both) as he thinks appropriate."

39. The general approach is that evidence is not considered when an application to strike out under CPR 3.4(2) is made. Unless demonstrably and patently hopeless, the Court proceeds on the assumption that the relevant factual averments will be established by evidence at trial. A claim or defence should not be struck out unless the Court concludes either that it is bound to fail, or that the relevant factual averments do not disclose a proper basis of claim or defence. Where a statement of case is found to be defective, the Court should consider whether the defects might be cured by an amendment and, if it might be, the Court should consider refraining from striking it out without first giving the party concerned an opportunity to amend: *Soo Kim -v- Youg* [2011] EWHC 1781 (QB).
40. I consider that, in the exercise of its case management powers, the Court can and should utilise CPR 3.4(2)(b) to strike out parts of a case that are likely to obstruct the just disposal of the case. In defamation cases, that principle finds clear expression in the requirements that where misconduct is alleged against a Claimant, particulars of truth must be set out with the precision of an indictment: *Higginbotham -v- Leech* [1842] 10 M&W 361, 363.
41. Historically, one of the reasons for keeping tight control of a statement of case in libel proceedings was because they were usually destined to be tried by a jury. The pleadings not only set out the issues, but they were the gateway to disclosure and then to evidence. The objective of keeping libel actions within proportionate bounds started with making sure that the statements of case were clear and contained only matters relevant to the fair adjudication of the claim. Juries may have gone now, but pursuit of the same principle remains a requirement of proper case management under the overriding objective.
42. That principle from *Higginbotham* was held to apply equally to particulars under a plea of honest opinion by the Court of Appeal in *Ashcroft -v- Foley* [2012] EMLR 25. The case clearly sets out the principles to be applied and the reason why the court insists on precision and clarity in pleadings. Echoing the principle from *Cobbold*, at first instance, Eady J noted –
- "There is no doubt that if there is a viable defence of justification or fair comment in relation to these very important and serious allegations then it is in everyone's interest that it sees the light of day and can be properly addressed on a fair and open basis. What is not, however, either in the public interest or to the advantage of either of the parties is for the case to proceed on a muddled basis with the claimant and his advisors not being aware of the case they have to meet either at the stage of disclosure of documents or at the trial itself. That is why the current pleas of justification and fair comment should be struck out."
43. When meaning was at large, pending determination by the jury, the Defendant had an opportunity to cast its own *Control Risks* meaning and then provide particulars to support it. The more general the meaning, the greater the parameters of what could be pleaded in the particulars. Of this, the Court of Appeal said:

"[49] ... [T]he vice of a vague and general meaning is that it is liable to lead to a loose and ineffective pleading with excessive and

irrelevant particulars, a state of affairs which is not permissible and which has been deprecated, particularly in libel actions, for many years: see for example, *Associated Leisure -v- Associated Newspapers Ltd* [1970] 2 QB 450 and *Atkinson -v- Fitzwalter* [1987] 1 All ER 483. Particulars provided in support of a plea of justification must be both sufficient and pleaded with proper particularity. The former requirement is met if the (properly pleaded) particulars are capable of proving the truth of the defamatory meaning sought to be justified. The latter requirement is a factor to be judged not by the number of particulars provided, but by the pleading of a succinct and clear summary of the essential (and relevant) facts relied on, enabling a claimant to know the precise nature of the case against him, and providing him with sufficient detail so he can meet it. As Lord Woolf pointed out in *McPhilemy -v- Times Newspapers Ltd* [1999] All ER 775, 793c, a loose and ineffective pleading can achieve directly the opposite effect from that which is intended by obscuring the issues rather than providing clarification. In our judgment this is what has happened here, and we do not think the problem is curable by a request for further information or by simple pruning.

[50] There are difficulties in managing a case justly to which a loose and ineffective pleading will give rise at each stage of the litigation. These include at the reply stage when a claimant must specifically admit or deny the allegations against him, giving the facts on which he relies: see CPR 53 PD para.2.8, when disclosure takes place, when witness statements are prepared, and at the trial itself which may take place before a jury. Time and money will almost inevitably end up being wasted over matters which have little to do with the overall merits of the litigation.”

44. As to the application of the requirement of precision to particulars to support a defence of honest opinion the Court of Appeal said:

“[60] It was suggested ... that it was particularly inappropriate to rely on this rule in the context of the defence of honest comment ... given the nature of that defence and its importance in the context of freedom of expression. We do not think it was. The point at issue in this case was one of clarity. Defendants are required to set out the facts on which they rely to 'warrant' the comment; see CPR 53PD para 2.6(2), and further *Cunningham-Howie -v- Dimpleby* [1951] 1 KB 360 and *Lord -v- Sunday Telegraph* [1971] 1 QB 235...” ...

[71] A defendant relying on a defence of honest comment has to identify the facts on the basis of which it is said a person could honestly express the relevant comment. The importance of the defence in relation to freedom of expression and its breadth having regard to the objective test of the 'fairness' of the comment i.e. whether any person, however prejudiced, exaggerated or obstinate his views, could have honestly expressed it on the proved facts or on alleged facts protected by privilege, does not however obviate the need for the facts which are relied on to be properly pleaded in

accordance with the normal requirements of clarity, nor does it alter the judge's task in ensuring that cases are fought in a proportionate way on the matters which are in issue between the parties as some of the defendants' submissions have tended to suggest. In short, it does not follow from the breadth of the defence of honest comment that a defendant is entitled to advance a loose and ineffective pleading, and we repeat what we have said earlier in relation to the need for specificity and what we have said at [60]."

45. Mr Rushbrooke QC has also referred me to a paragraph from Eady J's judgment at first instance in *Ashcroft v Foley* [2011] EMLR 30 [38], referring to the importance of the meaning pleaded by the defendant:

"The draftsmen are trying to make it wide enough to embrace a whole range of possible scenarios but, in their concern to leave nothing out, have presented the claimant and his advisers with a moving and indistinct target. It cannot suffice to put forward a case to the effect that the claimant simply must have been involved in some way or other. They need to come off the fence and decide exactly what the charge against the claimant is."

THE PRINCIPLES UNDER CPR PART 24, SUMMARY JUDGMENT

46. The parties are agreed that the principles are conveniently summarised by Lewison J in *Easyair Ltd (t/a Openair) -v- Opal Telecom Ltd* [2009] EWHC 339 (Ch) [15] (approved by the Court of Appeal in *AC Ward and Son -v- Catlin (Five) Ltd and Others* [2009] EWCA Civ 1098; [2010] Lloyd's Rep. IR 301 [24]):

- “(i) The court must consider whether the claimant has a ‘realistic’ as opposed to a ‘fanciful’ prospect of success: *Swain -v- Hillman* [2001] 2 All ER 91;
- (ii) A ‘realistic’ claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products -v- Patel* [2003] EWCA Civ 472 at [8];
- (iii) In reaching its conclusion the court must not conduct a ‘mini-trial’: *Swain -v- Hillman*;
- (iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products -v- Patel* [10];
- (v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust -v- Hammond (No. 5)* [2001] EWCA Civ 550;

- (vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: **Doncaster Pharmaceuticals Group Ltd -v- Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63**;

- (vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: **ICI Chemicals & Polymers Ltd -v- TTE Training Ltd [2007] EWCA Civ 725**.

PARTIES' SUBMISSIONS

47. Mr Rushbrooke, for the Claimant, has set out in his skeleton argument his submissions in a nutshell –
- (a) Without amendments, the defence of honest opinion discloses no reasonable grounds for defending the claim because the facts relied upon would not otherwise come close to providing a sufficient factual foundation for the defamatory opinion found by the court.

 - (b) The new case the Defendant seeks to introduce is patently lacking in clarity and particularity, fails to reflect the gravity of the defamatory imputation that the Court has actually found the article to bear and is, in material respects, either incoherent or has no real prospect of success as a matter of fact.

 - (c) Further, and in any event, the Defence suffers from fatal defects, both as a matter of pleading obligations in that it is lacking in due clarity and particularity and contains matters which are incoherent and/or irrelevant and/or in that it raises issues on which the Defendant has no real prospect of success.

48. Putting it more colloquially he says, "*the defence is on analysis a matter of smoke and mirrors*". As to the underlying facts he submits that the true position is simple and incontrovertible –
- (a) The Claimant bought the six properties at a price which was no lower than the market value (and probably higher as it happens). On no realistic view could it be said that he was guilty of "*lining his own pockets*".
 - (b) Ever since the acquisition, the properties have been rented out to local people, some of them staff of the Carden Park Hotel or Carden Hall Estate being in all cases permanent employees, others unconnected to the hotel or estate but all at affordable rents within the meaning of the s.106 agreement made between Redrow and the local Council and within the government's definition of affordable housing, i.e. no more than 80% of the local market rent.
 - (c) Save for the variation of the s.106 agreement to permit affordable rental units, in addition to shared ownership units there was no substantial dilution of the encumbrances to which the properties were subject when the Claimant acquired them and in any event, no variation that would come close to justifying the criticism that the Claimant behaved in a greedy, unethical or morally unacceptable way.
 - (d) The Defendant therefore has no realistic basis, and none has been articulated or proposed by way of amendment, for defending the criticism that the Claimant was guilty of exploiting his position to line his own pockets in a greedy, unethical and morally unacceptable way.
49. He also makes further discrete points as to particular paragraphs of the defence. In relation to the proposed amendment to paragraph 5.22, Mr Rushbrooke submits that the amendments are a recognition that the key factual component of the meanings found by the Court, indeed, the central premise of the article, namely the proposition that the Claimant purchase the 6 properties at a substantial discount to their market value, is false. It is in consequence of this fact (meaning (b)) that the Claimant is accused of exploiting his position to "*line his own pockets in a greedy, unethical and morally unacceptable way*" in meaning (c).
50. He contends that, absent any attempt to prove this fact, the honest opinion defence will be bound fail because it would be impossible for the Court to hold, for the purposes of s.3(4) of the Act, that an honest person could have held the opinion at meaning (c) on the basis of the other facts pleaded, whether alone or in combination. There would have been no lining of the Claimant's own pockets, let alone exploitation by the Claimant of his position so as to do so.
51. Further, he submits that the allegation that the properties were purchased "*at a substantial discount*" is lacking in clarity and particularity and to the extent that it is clear what is being alleged, it is qualified in such a way that it manifestly falls short of being a coherent case as to the market value of the houses.
52. He draws attention to what he says are three different relevant allegations in this regard: paragraph 5.22(4), which contends that the Claimant "*was able to buy the six affordable homes at a lower price than he would have had to pay for the houses on the open market*"; paragraph 5.22A, which contends that the purchase price of £860,000 paid by the Claimant "*represented a considerable saving for the claimant compared to what he would have had to pay to buy the houses as tied houses for staff on the open market*" and paragraph 5.23(7), which pleads that the price represented "*a substantial discount to their true value on the open market as tied staff accommodation for his nearby estate and hotel*".

53. Mr Rushbrooke argues that the Defendant has failed to spell out what price it contends the Claimant would have had to pay for the houses on the open market. He complains that Mr Dando's fourth witness statement in support of the amendment application dismisses these objections by stating simply that there is:

"...disagreement between the parties as to the right approach to measuring the value of the properties...it is accordingly obviously that an amendment (or summary judgment) application is not the occasion to determine these issues. They will require disclosure and evidence as to the terms and effect of the amended s.106 agreement and the valuation of the properties. The claimant's contentions, if persisted in, would be more suitable set out in his reply which he has still not served."

54. Secondly, Mr Rushbrooke submits that the Defendant's case is not improved where Mr Dando then states in his witness statement that the Defendant contends that:

"Had the claimant bought these houses on the open market as tied staff accommodation for his nearby estate or hotel he would, in effect, have had to pay £1.375 million (or £229,000 on average per house)".

55. However, Mr Rushbrooke argues that this contradicts the pleaded case, at paragraph 5.22A, which indicates that the true value of the homes lies somewhere between £860,000 and £1.375 million without saying where. This inconsistency only adds to the obscurity of the case that he says the Claimant would be facing were the amendments to be permitted.

56. Finally, on this point, he submits that even if the Defendant were now to re-amend its case to plead that the "*true value*" of the houses was in fact £1.375 million, such a case would have no real prospect of success. His skeleton argument sets out by reference to the evidence which I have been taken through, why the figure of £1.375 million could not remotely be regarded as the true market value of the houses.

57. Certainly, on the evidence that I have seen it does appear that £1.375 million could only be regarded as the notional value before any allowance was made for the impairment of value as a result of the encumbrances placed on them by the s.106 agreement.

58. Mr Rushbrooke also raises a series of further points that can be summarised as follows –

- (a) The Defendant has set out only a vague case as to what benefit the Claimant received so as to provide a foundation for the comment that he was, "*lining his own pockets*". There is an unparticularised allegation that the availability of accommodation for workers would increase the value of the hotel and/or estate and that the Claimant would benefit from the fact that employment there would be more attractive if it came with accommodation.
- (b) The defence does not identify the conduct of the Claimant that founds the basis of the critical opinion. A substantial part of the existing defence concentrates on the variation of the s.106 agreement, yet the only part of the averment in the defence that this had anything to do with the Claimant is in para.5.14 when it is alleged that Redrow "*at the behest of the Claimant*" sought and obtained a variation to the 106 agreement.

DISCRETE OBJECTION TO PARAGRAPHS 5.24-5.25 - THE REACTION OF OTHERS TO THE "CLAIMANT'S APPLICATION"

59. In paragraphs 5.24 and 5.25 of the original Defence, the Defendant relied upon the reaction of locally elected representatives, including a named counsellor who was alleged to have described the Claimant's conduct as "*immoral*". Mr Rushbrooke submits that these paragraphs are illegitimate and should be struck out because they are of no legal relevance to the issue of honest opinion. The test under s.3(4) of the 2013 Act is an objective one, and the Court can derive no assistance on the issue from the criticisms voiced by others, whether locally elected representatives or not. He submits that the position is made even worse by the fact that those criticisms were elicited, he says, by the Defendant on the basis of what, on the Claimant's case, was a materially false account of the facts surrounding the Claimant's purchase. Finally, the alleged criticisms were not directed against the Claimant but against Redrow.
60. Ms Evans for the Defendant summarises her response in support of the application for permission to amend as follows –
- (a) Paragraphs 5.22A and 5.22B consist of a brief summary of additional facts which existed at the time of the publication. She contends on the basis of these facts, or in combination with the other facts pleaded in the particulars under paragraph 5 of the Defence, an honest person could have held the opinion expressed.
 - (b) The amendments were put forward after the 28 June hearing because –
 - (i) it was revealed in the claimant's own evidence in support of his summary judgment application that Redrow itself in 2016 provided an open market valuation to the registered providers of social housing and,
 - (ii) the Defendant wishes to include these facts pursuant to s.3(4)(a) Defamation Act 2013 following the ruling on meaning and opinion since they plainly come within, or have a real prospect of coming within, that sub-section.
 - (c) The Claimant's objection as to 5.22A and 5.22B is that they are, "*unclear, lacking in particularity, factual unsustainable (and demonstrably so) and would not, even at their highest, support an honest opinion defence in respect of the meaning of the article*" and they seek to add "*further defective contentions*". However, the Claimant has not convincingly explained what are the so-called defects in paragraphs 5.22A and 5.22B.
 - (d) The Claimant, through his solicitors' correspondence, has been arguing about the true open market value of the 6 affordable homes since before the issue of these proceedings and long before the draft amendments were served. There is a dispute between the parties as to what is the right approach to measuring the value of the affordable homes. The Claimant believes that the only relevant valuation is of the houses as encumbered by affordable housing obligations, whereas the Defendant contends that it is more complicated than this in light of the fact that the variation, in effect, achieved a substantial removal or diminution of those encumbrances. An amendment, or summary judgment, application is not the occasion to determine these issues. They will require disclosure and evidence, including potentially expert evidence as to the terms and effect of the variation or the valuation of the properties. The Claimant's contentions would more suitably be set out in his Reply, which he has still not served.

- (e) The open market valuation provided by Redrow in February 2016 was £1.375 million in total, with the largest three-bedroom units being worth almost £266,000 each. The Defendant relies on this in support of its contention that had the Claimant bought these houses on the open market as tied staff accommodation for his nearby estate or hotel he would, in effect, have had to pay around £1.375 million or £229,000 on average per house. This is considerably more than what the Claimant in fact paid for them, £860,000.
- (f) Proceedings are still at an early stage and therefore, no prejudice will be caused to the Claimant by the amendment being allowed. The two new paragraphs arise out of information provided by the Claimant are related to the Defendant's original case on the benefits to the Claimant of the variation and do not extend the scope of the action or the issues to be investigated at trial to any significant extent. The question as to the extent to which the Claimant financially benefited from the purchase of the houses at the expense of those less well-off will be before the court in any event. See for example the summary in paragraph 5.22 of the Defence.

61. As to the parameters of the statutory defence of honest opinion, Ms Evans argues –

- (a) Pursuant to s.3(4)(a) Defamation Act, 2013, a defendant is entitled to rely upon any fact which existed at the time the statement complained of was published, to show that an honest person could have held the opinion in question on the basis of that fact or that fact in combination with other facts that existed at the material time. She submits this is a very broad provision and permits a defendant a correspondingly wide margin of discretion as to the facts to rely upon for this purpose.
- (b) According to paragraph 22 of the Explanatory Notes to s.3:

"This section broadly reflects the current law while aiming to simplify the law by providing a clear and straightforward test. In condition two and condition three in subsection 4 this is intended to retain the broad principles of the current common law defence as to the necessary basis for the opinion expressed but avoid the complexities which have arisen in case law, in particular, over the extent to which the opinion must be based on facts which are sufficiently true and as to the extent of which, the statement must explicitly or implicitly indicate the facts on which the opinion is based."

The Explanatory Notes further state, in paragraph 23:

"Condition 3 is an objective test and consists of two elements. It is enough for one to be satisfied. The first is whether an honest person could have held the opinion on the basis of any fact which existed at the time the statement was published (in subsection (4)(a)). The subsection refers to 'any fact' so that any relevant fact or facts will be enough. The existing case law on the sufficiency of the factual basis is covered by the requirement that 'an honest person' must have been able to hold the opinion. If the fact was not a sufficient basis for the opinion, an honest person would not have been able to hold it. ...

And in paragraph 28:

“Subsection (8) also repeals section 6 of the 1952 Act. Section 6 provides that ‘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’. This provision is no longer necessary in light of the new approach set out in subsection (4). A defendant will be able to show that conditions 1, 2 and 3 are met without needing to prove the truth of every single allegation of fact relevant to the statement complained of.”

- (c) Under s.3 the first question is therefore whether the facts relied upon by the Defendant both existed at the time of the publication and are objectively true. The second question is whether an honest person could express the opinion in question upon any of those facts. If that test is passed, then the third question would arise whether the Defendant holds the opinion expressed, an issue to be assessed subjectively.
- (d) In relation to the requirements of factual accuracy, Ms Evans submits that prior to the 2013 Act coming into force, inaccuracy in the facts stated in the words complained of was not fatal to the defence of honest comment where there were other facts stated or referred to in the words complained of which could be proved and upon which an honest person could hold the relevant opinion. That was the effect of s.6 of the Defamation Act, 1952 she contends.
- (e) The obvious purpose of s.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 focusing on what could be proved not what could not. Section 6 has now been repealed (s.3(8) of the Defamation Act) on the grounds, according to the Explanatory Notes, that it is no longer necessary given the new approach to the objective test.
- (f) The result of this, Ms Evans argues, is that the only consequence of a factual inaccuracy now is that a defendant must have at least one other fact that supports the opinion. The principal safeguard for the protection of reputation, she submits, is that where facts are stated in the words complained of and they are defamatory, they will give rise to a claim independent of any opinion expressed. In order to defend such a claim, the defendant will have to prove the facts are substantially true. However, the factual burden in relation to honest opinion is much lower. A claimant should not be entitled to vindication in relation to any comment if there remained a sufficient factual basis for it notwithstanding any falsely stated facts.
- (g) Accordingly, a defendant may plead and prove "*any facts*", which existed at the time the statement complained of was published, and upon which an honest commentator could have held the opinion that found by the Court in its ruling that, "*the claimant had exploited his position to line his own pockets in a greedy, unethical and morally unacceptable way*". Pursuant to s.3(4)(a) of the Act she submits, the Defendant is not limited to relying on facts stated in the Article, they just have to be facts which satisfy the test in s.3(4)(a). If a defendant proves a fact, or, if he relies on more than one fact or at least one of those facts, sufficient to satisfy the objective test then, subject to the fourth condition, the defence succeeds irrespective of whether facts set out in the publication or the facts pleaded in the defence were not proved or were misstated.

- (h) As to the extent that a claimant may rely on different facts so as to argue that on a "*full view*" the opinion defence fails the objective test, Ms Evans refers to two passages in *Duncan and Neill* (4th Edition) in paragraphs 13.24-25 that:

"Read literally [s.3(4)(a)] represents a significant extension of the latitude conferred on defamatory expression of opinion by the common law"

and that:

"The injustice that such construction is act to cause to the claimant in such a case may mean that the courts will look for a less strict approach, for example by allowing the introduction of other relevant facts for the purpose of showing that the facts relied upon by the defendant are, in all but the most literal sense, not true or perhaps that true or false, they are in any event an insufficient basis for the opinion."

62. Ms Evans argues that the section is clear. A defendant can succeed by proving a single fact regardless of the broader factual context, otherwise the intended liberal approach to the sufficiency of the factual basis will be diluted.

DISCUSSION AND DECISION

63. I shall start by dealing with the point on the proper ambit of the facts that can be relied upon to support a defence of honest opinion. The points argued by Ms Evans as to the proper construction of s.3 are interesting. An alternative view is argued by the authors of *Blackstone's Guide to the Defamation Act, 2013* (Oxford University Press) in paragraphs 4.47-4.50.
64. I do not need to decide the point, but I would be inclined to accept the view of the authors of the *Blackstone's Guide*. If the section now permits a commentator to get all the facts to the publication wrong and yet still to have available a defence of honest opinion if another entirely unrelated fact could be proved true and upon which an honest person could express the opinion, this would represent a radical change in the law. Paragraph 22 of the Explanatory Notes as I have already noted states that condition three under s.3 was "*intended to retain the broad principles of the common law defence*" not overturn them in key respects.
65. I recognise, as the Court of Appeal did in *Ashcroft*, that the defence of honest opinion is one of the ways that English law protects freedom of expression. The immediate practical effect of the defence is that it relieves the commentator of the obligation to show that his or her opinion is correct. There must be a factual foundation for the opinion, but a very wide ambit is then given to express opinions based upon those facts.
66. The common law was progressively widened to allow a defendant to rely upon facts about which he was unaware at the time. That development is reflected in s.3. The requirement, now found in s.3(3), that the statement complained of should indicate whether in general or specific terms the basis of the opinion is an important safeguard for reputation. As His Honour Judge Parks QC noted in *Burki -v- Seventy Thirty Ltd & Ors* [2018] EWHC 2151 (QB) [228], this requirement, which mirrored requirements in the common law, was "*not so that readers can judge for themselves whether or not it was well-founded, but so that they can understand what the comment is about*". It requires there to be a nexus between the opinion and the subject upon which it is expressed.

67. Ms Evans has not gone so far as to suggest that an honest opinion defence could be advanced on facts entirely unrelated to those stated in the article. She accepts that a plea of honest opinion which did not address meanings (a) and (b) would fail at this hurdle. But she contends the defence does so. Meanings (a) and (b) do not limit, she says, the facts upon which the Defendant can rely, but it seems to me that they, or something very close to them, are required to be proved if the defence of honest opinion can have a real prospect of success.
68. Ms Evans accepts that there has to be some nexus, but she argues that the court should be careful not to constrain the parameters of an honest opinion defence to the facts stated in the article.
69. I think there is some force in Mr Rushbrooke's argument that the meaning that the article has been found to bare is not disjunctive, to be separated out into constituent parts that can stand in isolation. Meaning (c) starts with the words, "*in consequence*". That is an essential part of the meaning. It was the fundamental and expressed factual premise of the criticism that the claimant had "*lined his own pockets*".
70. I would be inclined to accept Mr Rushbrooke's submission, but not deciding the point, that for any defence of honest opinion to have a real prospect of success it must have, as one of the supporting facts, the factual averment that the claimant stood to make, "a very large personal gain" from his purchase of the houses from Redrow. Without that, the central premise of the criticism is missing. There is a permissible ambit for other facts to be relied upon as demonstrating this personal gain and how it was obtained, so long as, in the final assessment, the facts have a real prospect of demonstrating that an honest person could express the view in meaning (c) that, "*in consequence the Claimant had exploited his position to line his own pockets in a greedy, unethical and morally unacceptable way*".
71. The reason that I do not need to decide the point today is that I have reached the very clear view that the current defence should be struck out and the amendments refused, with the Defendant having the opportunity to reconsider the pleading of the honest opinion defence with a blank sheet. However, I cannot at this stage reach the conclusion that the honest opinion defence has no real prospect of success. I therefore refuse the summary judgment application and my reason for these decisions are as follows.
72. One of the problems with the defence is that it was originally drafted to support a meaning that the words have not been found to bare. Indeed, it was so far adrift the only commonality between the two was a contention that the Claimant had "*acted unethically*". Instead of reflecting upon the meaning found by the court, the Defendant has deleted practically nothing from the original pleading and simply grafted on some additional particulars purporting to defend the expression of the opinion that "*the Claimant had exploited his position to line his own pockets in a greedy, unethical and morally unacceptable way*".
73. The current pleading in my judgment presents a similar vice to that identified by the Court of Appeal in *Ashcroft -v- Foley*. In material respects, the current particulars fail to provide "*a succinct and clear summary of the essential and relevant facts relied upon*". As presently drafted and advanced, the particulars are loose and ineffective. They fail to concentrate upon, and particularise properly, the important facts. Instead, they advance loose factual assertions, the effect of which is to obscure the real issues. It is not easy clearly to identify which facts are said to support which parts of the opinion set out in meaning (c).
74. In their present form, if allowed to form the basis of this case, they would be likely to produce the results identified in [50] of the *Ashcroft* decision. The Claimant is entitled to expect, and

the court will insist upon, clarity and precision. That is presently absent in key respects from the current pleading.

75. The Defendant may have a viable plea that the effect of the variation to the s.106 agreement was to enable the 6 properties to be removed from the available housing stock in the locality and given to the employees of the Claimant - on the Defendant's case even temporary employees. There are arguments as to the proper construction of the variations and their effect, but Mr Rushbrooke argues strongly (1) that the Claimant was not involved in the negotiations that led to those variations; and (2) in practice, this is not what has happened. At least two of the properties have been rented out to lower income families. These are not matters that I can resolve now.
76. However, in order for this factual case to have a real prospect of supporting the opinion that the Claimant had exploited his position, the Defendant needs to allege clearly and precisely what the Claimant is alleged to have done. In argument, Ms Evans said that this was a matter of inference: that the variation was made in the terms it was because this is what the Claimant wanted. As an inference, that might be viable, but it is not presently pleaded, and it is denied by the Claimant. It is for the Defendant to assess whether it can legitimately advance that inference verified by a statement of truth against the Claimant's denial in his witness statement.
77. As to the alleged 'benefit' that the Claimant obtained, the fundamental issue is that the current particulars, including those sought to be added by amendment, do not clearly state *what* benefit the Claimant obtained from the variations to the s.106 agreement. There appears to me to be presently two contentions advanced in the current defence as to the 'benefit' that the Claimant obtained that are *capable* of supporting the opinion that he had "*lined his own pockets*". The first is the alleged sale of the properties to him at an under-value, the second is the value that these houses represented to the Claimant as being available to him to accommodate workers from his estate or hotel.
78. Mr Dando is right in his witness statement to the extent that there is clearly a dispute between the parties as to the proper valuation of these properties, but that does not excuse lack of clarity as to how the Defendant puts its case. This is an area that is highly likely to need expert evidence. That, more than ever, requires precision as to what the expert evidence is directed at. Currently, as the issues are so ill-defined and appear to be a moving target, that this is a recipe for confusion and the clear risk of substantial costs will be wasted.
79. In any revised Defence, the Defendant must make its case perfectly clear. The valuation of these houses is subject to parameters. They were in perpetuity to be sold with restrictions on their sale and rental. To that extent, any reference to their market value must take that into account. Evidence of what these houses are worth unencumbered is almost entirely irrelevant; they could not have been sold on that basis.
80. Equally, the case as to the valuation of the 'benefit' to the Claimant of obtaining what are described as "*tied houses*" requires a clearly particularised case. If it is premised on the contention that the existence of the tied houses enhanced the value of the hotel and/or the estate, then that must be pleaded clearly. How does it enhance the value and by how much? If it is to be premised on the contention that, having acquired the six houses, the Claimant avoided having to acquire accommodation for his workers, then the case needs to be set out clearly. What would the capital cost of buying suitable accommodation have been, alternatively, could the claimant have rented accommodation for his employees, if so at what cost?

81. Ms Evans suggested during argument that the Defendant has not had enough material upon which to ascertain evidence of the calculation of benefit. Mr Rushbrooke responded that this was an attempt by the Defendant to reverse the burden of proof. He took me through the large number of documents that had been put into evidence which provide a very firm basis upon which to ascertain at least the true market value of these six houses.
82. I consider that Mr Rushbrooke is largely correct in his submissions. It is for the Defendant to advance a clear and specific case. I am sceptical that the Defendant does not have sufficient information and evidence to instruct an expert now to value these properties. Nevertheless, if an expert instructed by the Defendant were to identify further information that s/he required, I should expect the Claimant would readily provide it.
83. One of the consequences of the diffuse nature of the case against the Claimant is, as the evidence deployed for this hearing has demonstrated, that he has sought to disprove a series of hypotheses that may lurk within the vague pleading of the alleged benefit to him. That is, indeed, to reverse the burden of proof.
84. It is not for me to tell the Defendant how to plead its defence, but the objective is clear. The particulars must be clear and precise; they must demonstrably be capable of supporting or providing a realistic basis of supporting the opinion in meaning (c). A good start would be having headings in the pleadings setting out the facts relied upon to the case: (1) that the Claimant had exploited his position; and (2) had lined his own pockets, i.e. the very large personal gain it is alleged he stood to make. It should not require a substantial skeleton argument to explain how the particulars do, in fact, support the honest opinion defence. It should be plain on the face of the pleading.
85. I have considered whether this is a case where I could refuse these amendments and let the Defendant have another attempt, if it can, to produce an amended pleading that complies with these rules. In the end, I have reached the same conclusion as the Court of Appeal in *Ashcroft*. This is not a case where either pruning or a request for further information will solve the problem. In respect of the latter, I am quite sure that further information would not provide clarity. The pruning should, in fact, have been done by the Defendant as part of carrying out a full reappraisal of his its particulars of honest opinion following the determination of meaning. The 'graft on' approach was inappropriate, and it has failed.
86. The Defendant should return to the drawing board with a blank page and then, if it can, set out particulars of its defence of honest opinion from scratch, consistent with the Court's ruling as to the proper parameters of that defence.
87. I also strike out paragraphs 5.24 and 5.25 on the basis advanced by Mr Rushbrooke. It is entirely irrelevant what other people thought of what the Claimant had done. The test is objective. These paragraphs or anything similar must not reappear in any amended Defence.
88. Finally, there has been some argument about the issues of serious harm that arises from some of the amendments to paragraphs 7 and 8. I have ruled in the second judgment that the seriousness of the defamatory meaning has raised the inference of serious harm. The Claimant does not need to demonstrate, by evidence, anything further. If he chooses to do so, this goes to the issue of damages, not to s.1.
89. It is open to the Defendant, in theory, to attempt to rebut the inference of serious harm, but in mass media publications this is virtually impossible. If the Defendant intends to take on that burden then it must set out its case clearly, lest this turn out to be another area of imprecision

which risks the expenditure of costs that are out of all proportion to the ultimate importance of the issue and the bearing it will have on the final result.

90. Insofar as paragraph 8 responds to the Claimant's case on damages generally, then provided that is made clear it would be permissible.
91. The final result of my decision for the reasons I have given is as follows –
 - (a) subject to the point of clarification regarding para.8, the Defendant's amendment application is allowed save for the amendments to para.5 which are refused.
 - (b) Paragraph 5 of the defence is struck out.
92. The Defendant can have a further opportunity, if it can, to replead its honest opinion defence consistent with this ruling. If the repleaded particulars advance a valuation of the properties, then the application to amend must be supported by proper evidence of that valuation. On an amendment application the court must be satisfied that, evidentially, the factual case being advanced has a real prospect of being established at trial. I will hear further submissions on how long should be allowed for that process.
93. Finally, I refuse the summary judgment application. I cannot, at this stage, conclude that there is no real prospect of a defence of honest opinion succeeding if it can be put properly in shape.

CERTIFICATE

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