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Case No: HQ17M02991/  
QB-2017-002631

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 11/02/2020

**Before :**

**THE HONOURABLE MRS JUSTICE STEYN DBE**

**Between :**

**(1) MAMADOU SAKHO  
(2) MS TOP LIMITED**

**Claimants**

**- and -**

**WORLD ANTI-DOPING AGENCY**

**Defendant**

**Julian Santos** (instructed by **Morgan Sports Law**) for the **First Claimant**  
**Guy Vassall-Adams QC** and **Victoria Jolliffe** (instructed by **Covington & Burling LLP**) for  
the **Defendant**

Hearing date: 16 January 2020

**Approved Judgment**

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

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THE HONOURABLE MRS JUSTICE STEYN DBE

**Mrs Justice Steyn :**

**A. Introduction**

1. The first claimant (“the claimant”), Mr Sakho, is a professional footballer who currently plays for Crystal Palace Football Club. Mr Sakho has brought a defamation claim against the World Anti-Doping Agency (“WADA”). This judgment addresses a preliminary issue as to the meaning of the words complained of by Mr Sakho. However, unusually, a prior issue arises as to whether I should determine the meaning only of the primary publications or also of certain republications.
2. The primary publications (“the Emails”) are:
  - i) An email sent at 18:02 on 23 August 2016 by Ben Nichols, WADA’s Senior Manager, Media Relations and Communications, to Ben Rumsby, a journalist at *The Telegraph* newspaper (“*The Telegraph* Email”); and
  - ii) An email sent at 21:26 on 20 April 2017 by Mr Nichols to Sean Ingle, a journalist at *The Guardian* newspaper (“*The Guardian* Email”).
3. Mr Santos, Counsel for Mr Sakho, contends that I should only determine the meaning of the Emails. Whereas Mr Vassall-Adams QC, leading Counsel for WADA, contends that I should also determine the meaning of two republications (“the Articles”), namely:
  - i) An article published in *The Telegraph* on 23 August 2016, bearing the headline “*Exclusive: Mamadou Sakho cleared of being a drugs cheat after the World Anti-Doping Agency choose not to appeal Uefa verdict*” (“*The Telegraph* article”), which includes the words of *The Telegraph* Email; and
  - ii) An article published in *The Guardian* on 20 April 2017, bearing the headline “*Uefa slams Wada over incorrect handling of Mamadou Sakho’s drug test*” (“*The Guardian* article”), which includes the words of *The Guardian* Email.
4. Accordingly, the issues are:
  - i) Should the meaning of the Articles be determined?
  - ii) What is the meaning of each of the Emails?
  - iii) If the answer to issue (i) is yes, what is the meaning of each of the Articles?

**B. Procedural history**

5. The defamation claim was issued on 17 August 2017. The claim form was amended on 17 November 2017 to add the second claimant.
6. The following statements of case have been filed and served:
  - i) Amended Particulars of Claim dated 30 July 2019;
  - ii) Amended Defence dated 19 September 2019; and

iii) Amended Reply dated 7 October 2019.

7. A Case and Costs Management Conference (“CCMC”) was held, before Master McCloud on 23 July 2019. Master McCloud made an order at the CCMC which includes the following:

“C. PRELIMINARY TRIAL ON MEANING

6. There shall be a preliminary trial of the issue of meaning (“the Meaning Trial”) to be listed for the first available date after 1 October 2019, before a specialist High Court Judge of the Media and Communications List, with a time estimate of one day. In terms of directions leading to the preliminary trial, the parties shall comply with paragraph 12.3 of the Queen’s Bench Guide.

7. No later than 14 days before the Meaning Trial, each party shall file and serve a list of statements which the party wishes the court to determine the meaning of.”

8. The parties duly filed and served the lists referred to in paragraph 7 of Master McCloud’s order. The claimant lists the Emails only. The defendant lists the Emails and the Articles.

**C. Issue (i): Should the meaning of the Articles be determined?**

9. *Gatley on Libel and Slander* (12<sup>th</sup> ed.) (“*Gatley*”) states at paragraph 6.52:

“Where a defendant’s defamatory statement is voluntarily republished by the person to whom he published it or by some other person, the question arises whether the defendant is liable for the damage caused by that further publication. In such a case the claimant may have a choice: he may (1) sue the defendant both for the original publication and for the republication as two separate causes of action, or (2) sue the defendant in respect of the original publication only, but seek to recover as a consequence of that original publication the damage which he has suffered by reason of its repetition, so long as such damage is not too remote.” (footnotes omitted)

10. This passage (as it appeared in 9<sup>th</sup> edition of *Gatley*, in substantially identical form) was cited with approval by the Court of Appeal in *McManus v Beckham* [2002] 1 WLR 2982 at [11] (Waller LJ, with whose reasoning and conclusions Clarke and Laws LJ agreed). There is no dispute between the parties that it is a correct statement of principle. The same point is made in *Duncan and Neill on Defamation* (4<sup>th</sup> ed.) (“*Duncan and Neill*”) at paragraph 8.16.
11. Mr Sakho has chosen the second option. That is, he has sued in respect of the Emails only; he has not sued in respect of the Articles as separate causes of action. The Articles are relied on by Mr Sakho “as republications of the words complained of, in

*support of the First Claimant's case on publication, serious harm and damages"* (Reply, para 49).

12. There was a dispute, addressed in the skeleton arguments, as to whether it was clear on the pleadings which of the two options Mr Sakho had chosen to pursue. However, at the hearing, Mr Vassall-Adams acknowledged that it is now clear that Mr Sakho has not sued on the Articles as separate causes of action. That is plainly right. As the dispute has fallen away, it is unnecessary for me to determine whether WADA ever had good cause to be uncertain. It suffices to say that the position was made clear in the Reply.

### ***The claimant's submissions***

13. The claimant contends that, as he does not rely on the Articles as giving rise to separate causes of action, there is no basis for determining the meaning of the Articles.
14. Mr Santos relied primarily on the decisions of the Court of Appeal in *Slipper v BBC* [1991] 1 QB 283 and *McManus v Beckham* [2002] 1 WLR 2982 as demonstrating that provided a republication (a) conveys the sting of the original, whether in whole or in part and (b) a reasonable person would have appreciated that there was a significant risk of repetition, the republication may be relied on to increase the damages flowing from the primary publication.
15. He submitted that in the present case, where WADA's words were repeated verbatim in the Articles and WADA plainly intended their words to be republished by the newspapers to which the Emails were sent, the Court is unlikely to have any real difficulty in satisfying itself that the test for reliance on a republication to increase damages is met.
16. Mr Santos submitted that Stocker LJ's judgment in *Slipper* at 296A demonstrates that republications (where not sued on as separate causes of action) are to be considered at the damages stage of the trial (as opposed to during a preliminary trial on the issue of meaning). Referring to the reliance placed in *Slipper* and in *McManus* on *Speight v Gosnay* (1891) 60 LJQB 231, Mr Santos submitted that determining the meaning of the Articles in this case would "*alter the approach adopted by the Court in dealing with republications for over 120 years*" and should be resisted. If (which the claimant denies) the republications have any mitigating impact, that should only be considered when assessing damages.
17. Mr Vassall-Adams relied on *Economou v De Freitas* [2016] EWHC 1853 (QB), per Warby J at [17]:

"The fact that the ordinary reasonable reader is assumed to read the whole of the article or other publication complained of can cause complexities if, as in this case, the claimant sues a defendant for being a source of and causing a media publication. A media publication will often include some material for which the source bears responsibility and some for which he bears none. That is true of the first six of the publications complained of in this action. Such additional

material is likely to affect the meaning of the publication. The additional material may make things worse in which case the source cannot be blamed; or it may make the meaning less damaging, or even innocent, in which case the claimant must take the meaning as it emerges from the entire publication. A source or contributor cannot be sued for a defamatory meaning which only arises from part of the media publication to which he has contributed: see *Monks v Warwick District Council* [2009] EWHC 959 (QB) [12-14] (Sharp J).

18. There is, Mr Santos submitted, no support in any of the authorities or textbooks for the defendant's approach. The defendant's reliance on *Economou v De Freitas* and *Monks v Warwick* is misplaced because the claimants sued on the republications as separate causes of action. Further, Practice Direction 53B (Media and Communication Claims) paragraph 6.1 states that the court may determine the meaning of "*the statement complained of*" at any time. It does not make any reference to determining the meaning of a republication which the claimant relies on only as adding to his damages for the primary publication.
19. Mr Santos sought to refute the defendant's contention that the introduction of the serious harm threshold provides any reason to determine the meaning of republications which are not relied on as separate causes of action, citing *Monir v Wood* [2018] EWHC 3525 (QB) and *Suttle v Walker* [2019] EWHC 396 (QB) as examples of cases since the introduction of s.1(1) of the Defamation Act 2013 ("the 2013 Act") in which the meanings of the republications were not determined.
20. Finally, Mr Santos contended that the defendant's approach is inherently inconsistent because Mr Sakho relies on eleven republications of *The Telegraph* Email and eight republications of *The Guardian* Email (identified in schedules 3 and 4 to the Amended Particulars of Claim), yet the defendant only asks the court to determine the meaning of two of these nineteen republications.

### ***The defendant's submissions***

21. The defendant's skeleton argument states:

"In a nutshell, it is WADA's case that where a claimant sues upon a statement provided to a media organisation as the "primary" publication, but brings his case on publication, serious harm and damages in respect of the wide foreseeable republication of that statement in an article, the Court should, in addition to determining the meaning of the "primary publication", determine the meaning of those words in the context of the article so as to be able to assess whether the republication repeats the sting or part of the sting of the original article."

22. Mr Vassall-Adams submitted that the issue the defendant is raising is one of practice, not of substantive law. He contended that the issue arises in this case because of a combination of factors, most notably:

- i) the introduction of the serious harm threshold in s.1(1) of the 2013 Act;
- ii) the close link between the Emails and the Articles, the latter being the means by which the Emails were published beyond a few journalists;
- iii) the claimant's reliance on the Articles in support of his case on publication, serious harm and damage; and
- iv) the substantial difference between the meanings, and the gravity, of the Emails compared to the Articles; and
- v) the recognition that, in accordance with the overriding objective, it is important to resolve at an early stage issues as to the meaning which have a significant impact on whether serious harm can be demonstrated and on the value of the claim.

### *Analysis*

23. In support of the contention that I should determine the meaning of the Articles, WADA draws attention to the claimant's reliance on the Articles in support of his case on (i) publication, (ii) serious harm and (iii) damage.
24. In my judgment, the fact that Mr Sakho relied on the Articles to demonstrate that the Emails were published does not provide any support for WADA's contention that I should determine the meaning of the Articles. First, publication is no longer in issue. WADA admits that it published the Emails: Amended Defence, paragraphs 43 and 44. Mr Sakho relied on the Articles to establish the fact of publication of the Emails before that fact was admitted by WADA and copies of the Emails were disclosed. Secondly, even if publication were in issue, it would not be necessary to determine the meaning of the Articles in order to decide whether the Emails were published as alleged by Mr Sakho.
25. Whether publication of the Emails "*has caused or is likely to cause serious harm to the reputation of the claimant*" is a live issue on the pleadings. According to the Amended Defence, each of the Emails was published to two journalists (giving a total of four people who received either *The Telegraph* or *The Guardian* Email). Although Mr Santos has made clear that the claimant contends that publication of the Emails to these four people alone meets the serious harm threshold, the claimant also relies on the republication of WADA's words in the Articles to "millions of readers of *The Telegraph* and *The Guardian*".
26. The effect of s.1(1) of the 2013 Act is that "*the defamatory character of the statement no longer depends only on the meaning of the words and their inherent tendency to damage the claimant's reputation*": *Lachaux v Independent Print Ltd* [2019] UKSC 27, [2019] 3 WLR 18, per Lord Sumption JSC at [17]. Establishing that a statement has caused serious harm "*depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated*" (*Lachaux* at [14]). The reference to harm which is "*likely*" to be caused is also a proposition of fact, referring to "*probable future harm*" (*Lachaux* at [14]).

27. The gravity of the libel and the extent of publication are key factors in assessing whether the serious harm threshold is met. If, for example, an email published to one person conveys an allegation that ‘*X is guilty of Y*’, and the words of the email are then republished to one million people in a form and context conveying the meaning that ‘*there were grounds for suspecting X of Y, but following a hearing he has been acquitted*’, in undertaking the assessment required by s.1(1) of the 2013 Act, it would be factually incorrect to treat the allegation that ‘*X is guilty of Y*’ as having been published to one million people. If publication of ‘*X is guilty of Y*’ to one person has not (on its own) caused, and is not likely to cause, serious harm to X’s reputation, it would be necessary to consider the inherent tendency of the words conveyed far more widely by the republication. The starting point is the meaning of those words.
28. In my judgment, in a case such as this, where it is said that the primary publications were to four people, whereas the republications were published to millions, it is important to determine whether there is, as the defendant contends, a stark difference in the level of gravity of the imputations conveyed by the republications compared to the primary publications.
29. As no evidence, beyond the publication itself, is admissible in determining the natural and ordinary meaning of the words complained of, meaning can readily be determined as a preliminary issue. In my judgment, in the circumstances of this case, determining the meaning of the Articles manifestly accords with the overriding objective.
30. I acknowledge that the statement in paragraph 6.1 of Practice Direction 53B that, at any time, “*in a defamation claim the court may determine (1) the meaning of the statement complained of*” does not refer to republications which are not sued on as a cause of action. But nothing in that Practice Direction (or Practice Direction 53 which applies to this claim as it was issued before 1 October 2019) precludes the court from determining the meaning of a republication as a preliminary issue.
31. I also accept that there does not appear to be any precedent for determining the meaning of a republication that has not been sued on as a separate cause of action. However, that appears to be because the issue has not arisen.
32. Section 1(1) of the 2013 Act came into effect on 1 January 2014. Many of the authorities to which I was taken pre-date the introduction of the serious harm threshold. Such cases may be relevant when considering the claimant’s reliance on the Articles in support of his case on damage, but they do not affect my analysis of the relevance of the meaning of the Articles in determining whether the serious harm test is met.
33. The issue also appears not to have arisen in *Monir v Wood* and *Suttle v Walker*, two cases post-dating the commencement of s.1(1) on which the claimant relied. Mr Santos correctly observes that in *Monir v Wood*, although reliance was placed on republications of the “*4 May Tweet*”, Nicklin J only determined the meaning of that Tweet. However, the republications relied on were (see [201]):
  - i) a WhatsApp message which consisted of a screenshot of the 4 May Tweet (see 128[v]); and

- ii) a Facebook post about which Nicklin J said at [128vi(b)] “*The language and contents of the Eddie English Facebook post are almost identical to the 4 May Tweet*”.

There was no suggestion in *Monir v Wood* that the republications bore a significantly different and less grave meaning than the 4 May Tweet. Similarly, *Suttle v Walker* appears to be a case of further publication very largely in the form of sharing of the original publications (see [46]).

34. On the face of it, as Mr Santos submitted, there is an inconsistency in the fact that the defendant only asks for the meaning of two of the nineteen republications to be determined. If the meaning of the Articles is relevant to the assessment of serious harm, as a matter of logic, the meaning of the other republications would be, too. Mr Vassall-Adams has explained that the defendant has limited its request for meaning determinations to the Articles in the interests of proportionality and because the defendant considers that will be sufficient to resolve, or at least largely resolve, any disputes between the parties as to meaning. In circumstances where the Articles have not been chosen arbitrarily from amongst the republications, but are clearly more prominent in the claimant’s pleadings than any others, and there are sound reasons to limit the determinations sought, I am not persuaded that the apparent inconsistency is a reason not to determine the meaning of the Articles.
35. Does Mr Sakho’s reliance on the Articles as adding to his claim for damages provide a further reason to determine the meaning of the Articles as a preliminary issue?
36. In *McManus v Beckham*, as in this case, the claimants sued the defendant in respect of the original publication only, but sought to rely on republications as causative of loss. Waller LJ observed at [13]:

“I accept that if the press articles were not publishing any part of the sting of the alleged slander and/or had no causative link with the alleged slander, it would be wrong to allow the paragraphs to be pleaded. But the argument so far as the articles are concerned, was that they should be struck out because the articles were not repeating the *full* sting of the alleged slander. The distinction being drawn was between an allegation that the claimants sold fakes generally on a habitual basis and an allegation asserting only a part of that whole sting, i.e. that the claimants habitually sold fake David Beckham autographed memorabilia. It seems to me that when one is not concerned with separate causes of action but is concerned with whether damage flowed from the original publication, even a partial publication of the original sting can be causative of damage.”  
(original emphasis)

37. In this case, the words of *The Telegraph* Email were reproduced in *The Telegraph* Article and the words of *The Guardian* Email were reproduced in *The Guardian* Article. Although the defendant contends that the gravity of the allegations conveyed by the Articles is lower than that conveyed by the Emails, it is admitted that the Articles are defamatory at common law. In these circumstances, it is not necessary to determine the meanings of the Articles in order to ascertain that they convey the sting,



at least in part, of the Emails and so (subject to the actionability point to which I refer below) may be relied on to increase the damages flowing from publication of the Emails. I agree with Mr Santos that any mitigating effect of the Articles would fall to be considered at the stage of assessment of damages.

38. WADA has raised defences of truth and public interest in respect of the Articles (as well as the Emails). If WADA is entitled to meet the claim for damages in respect of the Articles with such defences, irrespective of the fact that Mr Sakho has chosen to rely on the Articles in support of his case on damages and not as separate causes of action, this would show that the meanings of the Articles are relevant to further issues in the case. However, the claimant contends that I am bound by *Slipper v BBC* to accept that he does not have to establish that he could successfully sue on the Articles in order to rely on them as adding to the damage flowing from the Emails.
39. In *Slipper v BBC*, the claimant was not precluded (on a strike out application) from relying on the effect of newspaper reviews of a defamatory film as damage flowing from the broadcast of the film. Bingham LJ (as he then was) said at 296G-H:

“The plaintiff in this consolidated action founds his claim for damages on two allegedly libellous publications of this film: the first to representatives of the press on 3 November 1988 and the second to members of the public on 11 November 1988. He does not, and in my view plainly could not, found on the reviews of the film published in various newspapers as amounting to publication or republication of the libel by the defendants.” (emphasis added)

40. At 299F-300A Bingham LJ continued:

“Mr. Gray submitted that the plaintiff’s claim was bad in principle because he was seeking to recover against the defendants for damage caused by tortious conduct (the publication of statements defamatory of the plaintiff in the newspaper reviews) for which the defendants were not liable as publishers or republishers and could not have been successfully sued. This is an attractive submission and underlines the need for great caution in considering claims of this kind. But I do not think the claim is for this reason bad in principle. The Home Office (in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004) could not have been sued for trespass to the goods of the Dorset Yacht Ltd, nor Moss (in *Scott’s Trustees v Moss*, 17 R 32), for the trespass by the crowd which damaged the crops and fences of Scott’s trustees. Those who did the damage could have been sued. But this did not, in principle, prevent recovery by the injured party against the party whose conduct had led to the causing of this damage by third parties as a natural and probable consequence. The plaintiff’s case may well fail on the facts but I am not persuaded that it must fail as a matter of law.”

41. With reference to these passages, the authors of *Gatley* observe at paragraph 6.52:

“Read at its widest, this might seem to suggest that damages can be recovered for the republication regardless of whether the later publication would be actionable by the claimant. Thus, even if the publisher of the later publication would have had a defence, or had been released as a joint tortfeasor, in respect of that publication, damages may still be recovered by the claimant for the republication. As Eady J pointed out in *Baturina v Times Newspapers*, the juridical basis of the proposition that a claimant can recover damages flowing from a publication in respect of which he could not establish primary liability on the part of the defendant is difficult to ascertain. It is submitted therefore that the correct view is that where no claim would lie against the defendant in respect of the later publication, the claimant should not as a matter of principle be allowed to recover damages in respect of that publication. If the later publication is not actionable then, even if it was caused by the original publication, it would be unjust to make the defendant liable for any harm caused by that publication. If that is right, then regardless of whether a claimant relies on a republication as a cause of action or in aggravation of damages, a defendant would be entitled to meet the claim in respect of that publication with any relevant defence. That is not to say however that the original statement must be repeated word for word in the republication. Provided a media report of the initial publication conveys the sting of the original, in whole or in part, it may be relied on to increase the damages flowing from the initial publication even if it cannot be said to “repeat” what was then said.”

42. A footnote to this passage (fn. 418) states:

“In both *Baturina v Times Newspapers* [2010] EWHC 696 (QB) at [53] and *Budu v BBC* [2010] EWHC 616 (QB) at [65] the judges suggested that the Court of Appeal in *Slipper v BBC* recognised implicitly that it would have been open to the claimant to sue in respect of the reviews in so far as they simply republished the words of the libel itself”.

43. I agree with Eady J’s observation in *Baturina* at [52] that it seems difficult to reconcile the court’s premise that it was capable of being proven at trial that (i) the reviews repeated the film’s defamatory sting and (ii) that it was reasonably foreseeable that they would do so, with Bingham LJ’s assertion that the claimant could not have sued the BBC on the reviews.

44. I also observe that even if the effect of *Slipper v BBC* is that a claimant may recover damages flowing from republications in respect of which *the defendant* could not have been successfully sued, it does not inexorably follow from Bingham LJ’s judgment that damages would be recoverable even if a successful action could not have been brought in respect of the republications against either the publisher *or the republisher*. The analogy drawn in *Slipper v BBC* at 299H to the *Dorset Yacht* and *Scott’s Trustees* cases, in which as Bingham LJ noted “[t]hose who did the damage

*could have been sued*”, would appear to fall away in a defamation case where the republisher would have had a defence.

45. Nevertheless, as I have said, the defendant submits that the issue raised is a question of practice not of substantive law. The defendant does not ask me to determine whether, in principle, it would be unjust to hold a defendant responsible for damages caused by a republication, in circumstances where the publisher/republisher would have had a defence if the republication had been sued on as a separate cause of action.
46. There is a dispute between the parties as to whether the defendant is entitled to meet the claim for damages in respect of the Articles with any relevant defence or whether damages can be recovered in respect of the Articles irrespective of whether they would be actionable. The most that can be said at this stage is that, if the meanings of the Articles are the same as the meanings of the Emails, this dispute would appear to fall away, whereas it will remain live if the meanings differ significantly. In these circumstances, the claimant’s reliance on the Articles in support of his damages claim is not a significant factor weighing in favour of determining the meanings of the Articles.
47. In conclusion, I consider that the meanings of the Articles are relevant to the determination of whether publication of the words complained of has caused or is likely to cause serious harm to the claimant’s reputation; and determining their meanings at this stage is in accordance with the overriding objective.

#### **D. Meanings**

##### ***Meaning: The Law***

48. There was no disagreement between the parties as to the applicable principles regarding the determination of the natural and ordinary meanings of the words complained of.
49. The Court’s task is to determine the single natural and ordinary meaning. The focus is on what the ordinary reasonable reader would consider the words to mean. That is the touchstone. It is the “*court’s duty to step aside from a lawyerly analysis*”: see *Stocker v Stocker* [2019] UKSC 17, [2019] 2 WLR 1033, per Lord Kerr of Tonaghmore JSC at [37] to [38].
50. The key principles derived from the authorities were conveniently re-stated by Nicklin J in *Koutsogiannis v The Random House Group Ltd* [2019] EWHC 48 (QB) at [12]:
  - “i) The governing principle is reasonableness.
  - ii) The intention of the publisher is irrelevant.
  - iii) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone

who does not, and should not, select one bad meaning where other non-defamatory meanings are available. A reader who always adopts a bad meaning where a less serious or non-defamatory meaning is available is not reasonable: s/he is avid for scandal. But always to adopt the less derogatory meaning would also be unreasonable: it would be naïve.

iv) Over-elaborate analysis should be avoided and the court should certainly not take a too literal approach to the task.

v) Consequently, a judge providing written reasons for conclusions on meaning should not fall into the trap of conducting too detailed an analysis of the various passages relied on by the respective parties.

vi) Any meaning that emerges as the produce of some strained, or forced, or utterly unreasonable interpretation should be rejected.

vii) It follows that it is not enough to say that by some person or another the words might be understood in a defamatory sense.

viii) The publication must be read as a whole, and any 'bane and antidote' taken together. Sometimes, the context will clothe the words in a more serious defamatory meaning (for example the classic "rogues' gallery" case). In other cases, the context will weaken (even extinguish altogether) the defamatory meaning that the words would bear if they were read in isolation (e.g. bane and antidote cases).

ix) In order to determine the natural and ordinary meaning of the statement of which the claimant complains, it is necessary to take into account the context in which it appeared and the mode of publication.

x) No evidence, beyond publication complained of, is admissible in determining the natural and ordinary meaning.

xi) The hypothetical reader is taken to be representative of those who would read the publication in question. The court can take judicial notice of facts which are common knowledge, but should beware of reliance on impressionistic assessments of the characteristics of a publication's readership.

xii) Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader.

xiii) In determining the single meaning, the court is free to choose the correct meaning; it is not bound by the meanings

advanced by the parties (save that it cannot find a meaning that is more injurious than the claimant's pleaded meaning).”

51. In relation to the third principle, I bear in mind that modern readers should be treated as having more discriminating judgment than has often been recognised: see *John v Times Newspapers Ltd* [2012] EWHC 2751 (QB), per Tugendhat J at [19] and *Allen v Times Newspapers Ltd* [2019] EWHC 1235 (QB), per Warby J at [14].
52. Mr Santos emphasised that “*the Court’s function at a trial such as this is to identify ‘what is the natural and ordinary meaning of the Article, as it relates to the claimant’*”: *Spicer v The Commissioner of Police of the Metropolis* [2019] EWHC 1439 (QB), per Warby J at 15 (emphasis added).
53. As Warby J said in *Allen* at [16]:

“In the light, in particular, of principles (v) to (x) and (xii), it is common practice among judges dealing with issues of meaning in defamation claims to read the article complained of and form a provisional view about their meaning, before turning to the parties’ pleaded cases and the arguments about meaning.”
54. That is the approach I have taken to this trial of meaning. I read the Emails and the Articles before turning to the parties’ skeleton arguments, pleadings or any other documents.

### ***The Telegraph Email***

55. On 23 August 2016, Ben Rumsby of *The Telegraph* asked Ben Nichols whether WADA was appealing the Sakho case. Mr Nichols replied that WADA “*reviewed the case, but decided not to appeal*”. Mr Rumsby sent a further email asking, “*Where does this leave your position on the substance he took, you clearly thought it should be banned. Will you have to review that position in the light of this?*”
56. In response, Mr Nichols sent *The Telegraph Email*, which is in these terms:

“With the support of its List Expert Group, WADA thoroughly reviewed the full [Sakho] case file along with recently published articles on higenamine. WADA supported the List Expert Group’s unanimous view that higenamine is a beta2-agonist and does indeed fall within the S3 class of the Prohibited List.

However, after careful review of the specific circumstances of the case, WADA decided not to appeal. Mr. Sakho had already served a provisional suspension of 1 month and, given the circumstances of the case, it is uncertain whether a significantly higher sanction would have been justified and obtained based on the Code and, more specifically, Mr. Sakho’s degree of fault.

Regarding possible legal action, you would need to speak to the club or player.”

57. Mr Sakho’s pleaded meaning is:

“The First Claimant was guilty of culpably and/or recklessly taking a prohibited, performance-enhancing substance which fell within the S3 class of the World Anti-Doping Agency’s Prohibited List, in breach of the WADA Code, and his conduct and degree of fault was such that justified a sanction of at least one month’s suspension, and possibly a significantly higher sanction.”

58. WADA’s pleaded meaning is:

“the First Claimant was guilty of taking Higenamine, a prohibited substance which fell within the S3 class of WADA’s Prohibited List, in breach of the WADA Code. However, WADA had decided not to appeal UEFA’s decision, as it was uncertain if this code violation would justify a sentence of significantly more than one month’s suspension based on the WADA Code and the First Claimant’s low degree of fault.”

59. In my judgment, the meaning of *The Telegraph* email is:

“The First Claimant was guilty of taking a prohibited, performance-enhancing substance which fell within the S3 class of the World Anti-Doping Agency’s Prohibited List, in breach of the WADA Code. However, his low degree of fault was such that it was uncertain whether it would justify more than the one month’s suspension he had already served voluntarily.”

60. I have accepted the claimant’s submission that the natural and ordinary meaning includes the fact that the substance Mr Sakho took was “*performance-enhancing*”. Although the hypothetical reasonable reader may well be aware that a sportsman, such as Mr Sakho, would be tested not only for performance-enhancing substances but also for illegal drugs (such as cannabis), the reader would be highly likely to infer that a substance called higenamine, which is described as a beta-2-agonist, and is on WADA’s Prohibited List, is a performance-enhancing substance.

61. I have not accepted the claimant’s inclusion of the words “*culpably and/or recklessly*” or the way in which the claimant describes the level of fault. The hypothetical reasonable reader, with some interest in sport, would not need any detailed knowledge of disciplinary proceedings to be aware that a suspension of a professional sportsperson for one month for taking a performance-enhancing drug is a minimal sanction, indicating a low degree of fault.

*The Guardian Email*

62. *The Guardian* Email, which was sent by Mr Nichols to Sean Ingle of *The Guardian* on 20 April 2017, was in these terms:

“We read your article earlier about higenamine and the Sakho case:

<https://www.theguardian.com/football/2017/apr/20/mamadou-sakho-liverpool-positive-test-uefa-wada>

Here is our response, should you wish to incorporate this:

Higenamine has been considered prohibited ever since the 2004 Prohibited List, however it was expressly named (for the first time) on the 2017 List as an example of a selective and non-selective beta-2-agonist.

With regards to the case of Mr Mamadou Sakho, WADA, with the support of its List Expert Group, thoroughly reviewed the full case file along with recently published articles on higenamine. WADA supported the List Expert Group’s unanimous view that higenamine is a beta-2-agonist and does indeed fall within the S3 class of the Prohibited List. It was decided, however, after careful review of the specific circumstances of the case, that WADA not lodge an appeal.

Whilst higenamine has been considered prohibited since 2004, its prevalence within dietary supplements has surfaced more recently. Therefore, in early August 2016, WADA requested its network of accredited laboratories to implement systematic testing for higenamine; although it is clear that some laboratories already conducted routine testing for higenamine before this date.”

63. Mr Sakho’s pleaded meaning is:

“The First Claimant was guilty of culpably and/or recklessly taking a prohibited, performance-enhancing substance which had been prohibited since 2004 and fell within the S3 class of the World Anti-Doping Agency’s Prohibited List, in breach of the WADA Code, and his conduct merited a finding of guilt and a sanction.”

64. WADA’s pleaded meaning is:

“the First Claimant was guilty of taking Higenamine, a prohibited substance which fell within the S3 class of WADA’s Prohibited List, in breach of the WADA Code.”

65. In my judgment, the meaning of *The Guardian* Email is:

“The First Claimant was guilty of taking a prohibited, performance-enhancing substance which had been prohibited

since 2004 and fell within the S3 class of the World Anti-Doping Agency's Prohibited List, in breach of the WADA Code. This conduct was culpable.”

66. For the reasons I have given above in respect of *The Telegraph* Email, I consider that the hypothetical reasonable reader would readily infer that the substance taken was performance-enhancing. The combination of the reference to higenamine having been prohibited since 2004, and the lack of any indication that the “*specific circumstances*” referred to concerned lack of, or a low degree of, fault on the claimant's part, would imply to the hypothetical reasonable reader that the claimant's conduct was culpable. The additional words “*and his conduct merited a finding of guilt*” are superfluous and, in my view, the hypothetical reasonable reader would not read this email as saying anything about what, if any, sanction was merited.

### *The Telegraph Article*

67. The headline of *The Telegraph* Article published on 23 August 2016 states:

“Exclusive: Mamadou Sakho cleared of being a drugs cheat after the World Anti-Doping Agency choose not to appeal Uefa verdict.”

68. Under a photograph of the claimant, there is a photo caption which says:

“Wada has left itself open to being sued by Sakho and Liverpool over the extraordinary chain of events.”

69. The article is in these terms:

“The threat of Mamadou Sakho serving a full drugs ban was lifted once and for all on Tuesday night (<http://www.telegraph.co.uk/football/2016/07/08/liverpool-defender-mamadou-sakho-cleared-by-uefa-after-doping-ca/>) after the World Anti-Doping Agency confirmed it had chosen not to appeal against Uefa's decision to absolve him of taking a banned substance.

Wada left itself open to being sued by Sakho and Liverpool over the extraordinary chain of events which led to the France defender missing last season's Europa League final and European Championship.

*Telegraph Sport* exclusively revealed last month that the agency was reviewing the decision by Uefa's control, ethics and disciplinary body to clear Sakho, with a view to lodging a possible appeal. On Tuesday night, it finally confirmed it had chosen not to do so, despite standing by its position that the 26-year-old had taken a banned substance.

The outcome of the Sakho case threatens to shatter confidence in Wada's ability to lead the fight against drugs in sport, the



credibility of its science department already in question over its handling of the Meldonium debacle.

A source close to the Sakho proceedings told Telegraph Sport last month: “The way in which Wada managed this case is unacceptable, absolutely unacceptable.”

Wada was said to have intervened in the case after the player tested positive for a substance called Higenamine following the second leg of Liverpool’s Europa League tie against Manchester United on March 17.

The prosecution collapsed after the end of last season when his lawyer, world-renowned specialist Mike Morgan, demonstrated to Uefa’s satisfaction that the science that could reasonably lead Wada to class Higenamine as a banned substance – a so-called beta2-agonist – was not robust.

Sakho had already served a voluntary provisional ban at that stage, including missing the Europa League final, while France did not select him for the Euros.

A Wada spokesman said on Tuesday night: “With the support of its List Expert Group, Wada thoroughly reviewed the full case file along with recently published articles on Higenamine. Wada supported the List Expert Group’s unanimous view that Higenamine is a beta2-agonist and does indeed fall within the S3 class of the Prohibited List.

“However, after careful review of the specific circumstances of the case, Wada decided not to appeal. Mr. Sakho had already served a provisional suspension of one month and, given the circumstances of the case, it is uncertain whether a significantly higher sanction would have been justified and obtained based on the [Wada] Code and, more specifically, Mr. Sakho’s degree of fault.””

70. Two further photographs within the article bear the captions: “*Sakho was forced to sit out Liverpool’s Europa League final and the Euros*” and “*Sakho tested positive after Liverpool’s Europa League clash with Man Utd*”.
71. The claimant contends that the meaning of *The Telegraph* Article is materially the same as the meaning of *The Telegraph* Email. Mr Santos submitted that there is no basis for reducing the *Chase* level given that the email is reproduced and it is a self-contained statement by WADA, the world’s leading anti-doping authority, which creates and oversees the Prohibited List. He also objected to WADA’s meanings on the basis that they focus on what the Article says about WADA, whereas the task is to consider the natural and ordinary meaning of the Article, as it relates to the claimant.
72. WADA’s pleaded meaning is:

“in spite of the fact that UEFA had acquitted the First Claimant and rejected the science behind WADA’s classification of Higenamine as a banned substance, there were reasonable grounds to suspect that the First Claimant was guilty of taking Higenamine, a prohibited substance which fell within the S3 class of WADA’s Prohibited List, in breach of the WADA Code. However, WADA had decided not to appeal UEFA’s decision, as it was uncertain if this Code violation would justify a sentence of significantly more than one month’s suspension based on the WADA Code and the First Claimant’s low degree of fault.”

73. However, in his oral submissions, Mr Vassall-Adams submitted that WADA’s pleaded meaning is too high. WADA has pleaded a *Chase* level 2 meaning (“*reasonable grounds to suspect*”), whereas the overall thrust of the article is that Mr Sakho is in the clear, which he submitted would be better reflected by a *Chase* level 3 meaning (“*grounds to investigate*”).

74. I agree with the claimant that WADA’s meaning does not focus sufficiently on the meaning of the words as they relate to the claimant. But the claimant’s meaning fails to recognise that the words complained of have to be read in the context of the whole article, the essential thrust of which asserts that the claimant has been cleared/absolved. The statement of WADA’s position at the end of the article comes across as an attempt by a litigant whose case fell apart at the hearing to justify the stance it had taken.

75. In my judgment, the meaning of *The Telegraph* Article is:

“The First Claimant has been absolved of taking a prohibited, performance-enhancing substance after a positive test gave rise to grounds to investigate whether he had done so. WADA maintains that the substance he took falls within a class which is on the Prohibited List, but when their position was tested it failed to stand up to scrutiny and WADA are not appealing the verdict.”

### ***The Guardian Article***

76. The Guardian Article published on 20 April 2017 bears the headline “*Uefa slams Wada over incorrect handling of Mamadou Sakho’s drug test*”. Under this the brief summary states: “*Liverpool defender tested positive for substance not on Wada banned list. Report describes ‘gaps in communication’ at world anti-doping agency*”.

77. The article continues:

“Uefa has heavily criticised the World Anti-Doping Agency for wrongly flagging up a positive drugs test by the Liverpool defender Mamadou Sakho after he took a fat-burner without the club’s knowledge last year.

Sakho, who is now on loan at Crystal Palace, was suspended at the end of April 2016 after testing positive for higenamine following the second leg of Liverpool's Europa League last-16 tie against Manchester United the previous month. However, in early June Uefa's disciplinary body absolved Sakho of taking a performance-enhancing drug and on Thursday European football's governing body went further still, releasing a damning report point out that higenamine is not specifically listed on Wada's prohibited list.

The report also suggested there are significant doubts among experts about whether higenamine is among a group known as B2-agonists, all of which are banned by Wada – and pointed out that Wada's laboratories do not routinely test for the substance and if Sakho's sample had been handled by the Lausanne laboratory and not Cologne's then it would not have been tested for higenamine.

The Uefa report added: "Higenamine is not expressly mentioned by name on Wada's prohibited list. The fact that the Cologne laboratory tested for higenamine but had to check with Wada before making a determination indicates a problem, as does the fact that the Lausanne laboratory does not test for higenamine at all.

"In this regard, Dr Saugy [giving evidence] explained that he has not received any formal instruction from Wada to test for higenamine and explained that the Lausanne laboratory would not start testing for higenamine until such communication is received."

It continued: "The onus is clearly on Wada to communicate to its laboratories what is and what is not on the prohibited list. There are clearly gaps in communication with regard to higenamine, something which also tends to support the suggestion that Wada's own internal procedure and analysis in respect of this substance is incomplete."

Sakho was suspended by Liverpool when Jürgen Klopp, their manager, and the club's owner, Fenway Sports Group, agreed it would be prudent to omit him from games while the investigation commenced, and he was then provisionally suspended by Uefa. Among the games he missed was the Europa League final, which Liverpool lost 3-1 to Sevilla after leading at half-time, and he was also omitted from France's squad for Euro 2016.

At the time Michele Verroken, Director of Sporting Integrity and formerly in charge of anti-doping in the UK, said she advised athletes against using any substances described as fat-burners. "What is causing that fat to burn is that these

supplements contain a form of stimulant,” she said. “They are not regulated products. It’s just too big a risk. I warn against any weight-loss products. It’s probably going to be a prohibitive supplement.”

Sakho fell out with Klopp having been sent home from a pre-season tour for reporting late for a series of team meetings during the trip to the United States, after which he was accused of displaying “a lack of respect”. But having missed the early part of the season with an achilles injury he has prospered after joining Palace in January.

However Wada spokesman Ben Nichols insisted that many of Uefa’s criticisms were misplaced. “Higenamine has been considered prohibited ever since the 2004 Prohibited List, however it was expressly named [for the first time] on the 2017 List as an example of a selective and non-selective beta-2-agonist.

With regards to the case of Mr Mamadou Sakho, Wada, with the support of its List Expert Group, thoroughly reviewed the full case file along with recently published articles on higenamine. Wada supported the List Expert Group’s unanimous view that higenamine is a beta-2-agonist and does indeed fall within the S3 class of the Prohibited List. It was decided, however, after careful review of the specific circumstances of the case, that Wada not lodge an appeal.”

He added: “Whilst higenamine has been considered prohibited since 2004, its prevalence within dietary supplements has surfaced more recently. Therefore, in early August 2016, Wada requested its network of accredited laboratories to implement systematic testing for higenamine; although, it is clear that some laboratories already conducted routine testing for higenamine before this date.””

78. The claimant took the same position in respect of *The Guardian* Article as he did in respect of *The Telegraph* Article (see paragraph 71 above), contending that *The Guardian* Article bears the same meaning as *The Guardian* Email.
79. WADA’s pleaded meaning is:

“In spite of the fact that UEFA had acquitted the First Claimant and seriously criticised WADA for classifying Higenamine as a banned substance and WADA had decided not to appeal UEFA’s decision, there were reasonable grounds to suspect that the First Claimant was guilty of taking Higenamine, a prohibited substance which fell within the S3 class of WADA’s Prohibited List, in breach of the WADA Code.”

80. Mr Vassall-Adams' oral submissions in respect of *The Telegraph* Article (see paragraph 73 above) applied equally to *The Guardian* Article and I have taken the same approach in respect of both Articles.

81. In my judgment, the meaning of The Guardian Article is:

“The First Claimant has been absolved of taking a prohibited, performance-enhancing substance after a positive drugs test was wrongly flagged up. Grounds to investigate arose when the First Claimant took a fat-burner which resulted in one of WADA's laboratories finding he had higenamine in his system. However, the substance is not specifically named on the Prohibited List or consistently tested for by the laboratories and even the experts were unsure whether it falls within a prohibited class. WADA maintains that the substance the First Claimant took has been on the Prohibited List since 2004, but it is not appealing.”

### **E. Conclusions**

82. For the reasons I have given, I have determined the meanings of both the Emails and the Articles, as set out in paragraphs 59, 65, 75 and 81 above.