IN THE SUPREME COURT UKSC 2019/0156
ON APPEAL FROM
IN THE COURT OF APPEAL (CIVIL DIVISION) Appeal Court Ref: A2/2018/0794
ON APPEAL FROM
THE HIGH COURT OF JUSTICE Claim No: HQ14D05024; HQ15D00344
QUEEN'S BENCH DIVISION
BETWEEN:

JAN TOMASZ SERAFIN

Claimant/Respondent

and

(1) GRZEGORZ MALKIEWICZ
(2) CZAS PUBLISHERS LIMITED
(3) TERESA BAZARNIK-MALKIEWICZ

Defendants/Appellants

CASE FOR THE APPELLANTS

Introduction

1. The Appellants' case on the law is set out in the Grounds of Appeal. This document will amplify on the legal principles to the extent that it appears necessary. It will seek to ensure that the Court has easy access to all relevant factual matters by setting them out in three Schedules.

2. The three main issues for determination in this appeal are[1]:

   2.1. Whether it was open to the Judge to uphold the s.4 defence.

   2.2. Alternatively, whether it was open to the Judge to find that the Respondent's reputation had been shot to pieces, thereby depriving him of any damages other than nominal, on the basis of what it had been open to the Judge to find had been proved.

   2.3. Was the Court of Appeal correct to find that the trial was unfair?

3. The first and second issues involve the law of defamation. They encompass the correct standard of appellate review, a question that has come before the Court on

[1] See [43] Statement of Facts & Issues

recent occasions in defamation and other contexts. The Appellants' case will be presented by David Price QC.

4. The third issue is not defamation-related and could arise in any civil litigation. The Appellants' case will be presented by Anthony Metzer QC, the only advocate appearing before the Court who appeared at the trial.

5. The third issue is conceptually distinct from the first and second. It should be approached from the perspective that the evidence entitled a judge to make the findings made by the Judge. The question is whether his conduct of the trial was such as to render it unfair, thereby vitiating all his findings.

6. The issues, in theory, give rise to the possibility of the Court finding that it was open to the Judge to award nominal damages, but leaving the public interest defence for determination at a new trial. There would be no benefit to the Appellants (or the Respondent) in a new trial limited to public interest. Nominal damages in a defamation claim amounts to a victory for the defendant, not the claimant.[2] Any further costs incurred by the Appellants at a new trial would almost certainly be irrecoverable. In those circumstances, the Appellants would consent to judgment for the Respondent with damages of 1p.

The standard of appellate review

7. In contrast to the two recent defamation cases in the Supreme Court brought by defendants, the Appellants won at trial. These submissions will focus on the correct standard of appellate review in the context of the legal principles applicable to the Judge's findings.

8. The short point is that the Judge at [310] applied the law on s.4 as stated by Warby J in *Economou v de Frietas* [2017] EMLR 4 (a judgment upheld by the Court of Appeal and with which the Respondent does not appear to take issue) and reached a non-perverse conclusion that the defence should succeed. The Court of Appeal was not entitled to substitute its preferred outcome. Its criticisms of the Judge were misplaced.

9. The point has even greater force in relation to the Judge's findings on the Appellants' truth defence, which led to his alternative conclusion that the

[2] See, for example, *Joseph v Spiller* [2012] EWHC 3278 (QB)

Respondent would be entitled to no damages. These were pure credibility findings based on the Judge's evaluation of the witness and documentary evidence. It is to be noted that the only finding under specific challenge relates to imputation 13(4) – skimming profits from the Jazz Café.

10. It is unprecedented for the Court of Appeal to overturn a finding at trial that a defamatory imputation has been proved substantially true. Overturning pure findings of fact is unusual in any context in civil litigation. In defamation, there are the additional concerns of false vindication and granting an injunction to prevent the publication of the truth.[3]

11. It is also unprecedented for the Court of Appeal to overturn an award of nominal damages in circumstances where a truth defence has partly, but not completely, succeeded. The award of nominal damages in such circumstances is quintessentially a matter for the tribunal of fact at trial. Even without taking into account the Jazz Café imputation, it was open to the Judge to find that the Respondents' reputation had been shot to pieces by what had been proved. For example, the Judge made detailed findings in relation to imputation 13(6)[4] which he was entitled to conclude had been proved and to describe as the most serious imputation.

12. It may not have been technically correct for the Judge to have stated that he would have awarded no damages, as libel is actionable per se.[5] But there is no practical difference between no damages and an award of 1p.

Section 4

A more favourable defence than Reynolds

[3] See, for example, the observations of Sir Thomas Bingham MR in *Basham v Gregory* (21 February 1996).
[4] "The Claimant, having dishonestly persuaded investors in his food business to part with their life savings, stole their money for himself and transferred it to Poland to use it to support a family construction project in Poland and to support his family there"
[5] See, for example, what occurred in *Reynolds* referred to at 134D.

13. There have been 5 other trials on s.4 and the appeal in *Economou.*[6] Other than *Economou* – a tragic and extreme case – the defences have all failed, in whole or part, due to some failing in the defendant's pre-publication enquiries. The low success rate and reasons for failure are similar to the pre-Act cases on *Reynolds*.

14. The s.4 cases have proceeded on the basis that it is essentially a codification of *Reynolds.* For the reason stated in [8] above, it is not necessary for the Appellants to challenge this approach in order to succeed in this appeal. However, it is not correct. It is evident from the wording of s.4, analysed in the Grounds of Appeal, that it is a more favourable defence.

15. A number of the cases refer to the Explanatory Notes to the Act.[7] These state that s.4 is intended to reflect *Reynolds* in its final iteration in *Flood v Times Newspapers Ltd* [2012] 2 AC 273.[8] A comparison of the wording of s.4 and the judgments in *Flood* demonstrates that this is not correct.[9]

16. The Explanatory Notes are not to be treated as reflecting the will of Parliament.[10] Further, the Explanatory Notes to the draft Bill are in similar terms and state an intention to codify the existing common law. Yet, the Act, as passed, is materially different to the draft Bill.

17. A further factor that has led to the equiparation of s.4 and *Reynolds* is the statement of Warby J in *Economou* (the first s.4 trial) at [241]: "I would consider a belief to be reasonable for the purposes of s 4 only if it is one arrived at after conducting such enquiries and checks as it is reasonable to expect of the particular defendant in all

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[6] *Economou v De Freitas* [2017] EMLR 4, *Turley v Unite the Union* [2019] EWHC 3547 (QB), *Burgon MP v News Group Newspapers Ltd* [2019] EWHC 195 (QB), *Doyle v Smith* [2018] EWHC 2935 (QB) *Hourani v Thomson* [2017] EWHC 432 (QB)

[7] See for example, *Economou v De Freitas* [2019] EMLR 7, at [77]

[8] See [29]-[35]

[9] Lord Phillips frequently referred to "responsible journalism" which is described as a "test" and asked at [55]: "Was it in the public interest that the "supporting facts" should be published?" Lord Brown's test [at 113] was: "could whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?". "Properly" is a higher hurdle than "reasonably". The test also appears to import a requirement to "guard so far as possible against the publication of untrue defamatory material". Although Lord Mance and Lord Dyson stress the respect to be given to editorial judgment the test is still responsible journalism in the public interest. Lord Clarke agreed with Lord Brown's test.

[10] See, for example, *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 [5] – [6]

the circumstances of the case". This statement has been cited and/or applied in the subsequent cases as part of the reasoning leading to the rejection of the s.4 defence.[11] In the present case, the Court of Appeal cited it in [64] as the first relevant principle in relation to s.4(1)(b). There was no suggestion that the Judge did not apply this test. The Court of Appeal merely disagreed with his affirmative answer.[12]

18. On one view, a requirement to conduct such enquiries and checks as is reasonable in "all the circumstances" is anodyne. For example, the circumstances could mean that it was reasonable for a defendant to make no enquiries. However, given the reliance that has been placed on Warby J's statement as a fundamental requirement of the defence, it is appropriate to draw attention to its incompatibility with s.4.

19. First, the question posed by s.4(1)(b) is whether there was a reasonable belief that publication was in the public interest. It can be stated in general terms that it is desirable for defendants to conduct reasonable enquiries and checks prior to publishing. Relatedly, there is a public interest in the protection of reputation and the public being able to identify "the good as well as the bad" in those who participate in the life of a community.[13] But s.4 is not a responsible journalism test. It is directed to the public interest in the specific publication complained of, viewed from the defendant's perspective in the round. A publication can serve a valuable public interest function – for example, by exposing a "bad" person – even if it could be said that further enquiries should have been made. This may arise with a community publication, which does not have the resources and support structure of a national newspaper, but has inside knowledge about the claimant and an important community role.

20. Second, it does not give sufficient credit to the subjective element of "reasonable belief". If the defence is to be conditional on the defendant conducting such pre-publication enquiries as is reasonable, a formulation more consistent with the

[11] *Turley* at [138 (xii)], *Doyle* at [91], *Hourani* at [173].
[12] At [82]
[13] See the speech of Lord Nicholls in *Reynolds* at 201A-C.

wording of s.4 would be whether the defendant reasonably believed that sufficient enquiries had been conducted.

21. [241] was cited with apparent approval by Sharp LJ in the Court of Appeal at [101]. There is nothing in her judgment to suggest that s.4 is more favourable to a defendant than *Reynolds.* At [109] reference was made to the difficulties in "mediating" between the protection of reputation and freedom of expression, invoking the dangers of false information in an era of distrust and "fake news" and the loss of vindication for a claimant. These dangers were said to be more serious now than when *Reynolds* was decided, due to the Internet. At [111] she observed that in order to hold an "appropriate balance" the "bar of "reasonable belief" should not be set too low.

22. In between, [110] restates the importance of freedom of expression.

23. There is detectable in [109] to [111] a concern that the reasonable belief standard may not provide sufficient protection to reputation.

24. The history of the *Reynolds* defence is that the desire not to deprive a claimant of vindication in relation to a defamatory imputation that may be untrue combined with distrust of the media (essentially the dangers referred in [109]) frequently drove the court to set the responsible journalism bar at a level that was criticised for being too high.

25. That was plainly the concern that motivated Parliament to discard the responsible journalism test and to lower the bar by permitting a reasonable (but possibly erroneous) public interest belief to suffice.

26. It was Parliament who mediated on the competing rights and the outcome is s.4(1)(b). The words chosen make no reference to the impact on the claimant's reputation, just as they make no mention of responsible journalism; they are only concerned with the defendant's belief.

27. It is not for the court to conduct a further mediation of rights. Its role is simply to apply the reasonable belief test without gloss or qualification.

28. The key free speech policy factor, which is not mentioned in [110], is the chilling effect of the requirement to prove truth. The costs and risks of investigative journalism become too prohibitive. The free speech benefits of a more generous public interest defence and the chilling effect of its absence are often not visible in the trial process. There is an inevitable judicial temptation to give vindication to a claimant who is perceived to be deserving. This is one reason why Parliament is generally a more appropriate forum than a court for making decisions of public policy involving the balancing of competing rights.

29. Without prejudice to the overriding point that Parliament has determined how the balance should be held, it may be questioned whether it is correct to state that concerns about false information and absence of vindication have become more serious since *Reynolds*. First, there are other remedies commonly used in relation to false information online, most notably under data protection legislation and, in the case of the media, a more robustly enforced accuracy obligation in the IPSO Editors' Code. Second, the failure to amend an online publication where a publisher is notified of material falsity can result in the s.4 defence not being available for the continuing publication.[14] Publishers commonly amend in such circumstances and/or offer a right of reply (as occurred in the present case), if that has not happened before publication. Third, the Internet provides an easily accessible means for a claimant to publish a rebuttal. Fourth, it is not immediately obvious that the remedy for fake news is more legal restrictions. There are a number of statements of high authority in the UK and elsewhere that the market-place of ideas provides the best forum for the truth to emerge.[15] Finally, history has shown on a number of high-profile occasions that adversarial defamation litigation, with its presumption of falsity and technical rules, does not necessarily always deliver reliable vindications.

30. In common with the serious harm requirement in s.1 of the 2013 Act,[16] it falls to the Supreme Court to ensure that Parliament's stated desire to rebalance defamation law in favour of freedom of expression is respected in relation to s.4. If not, the decisions on s.4 will continue in their current trajectory – of which the Court of

[14] As was the case in *Flood.*
[15] See, for example, Lord Steyn in *Reg v Home Secretary, Ex p Simms* [2000] AC 115 at 126.
[16] See *Lachaux v Independent Print Ltd* [2019] UKSC 27 at [16].

Appeal's decision in the present case is the most extreme – and the defence will be of limited practical benefit.

The standard of appellate review

31. There were relatively few appeals in *Reynolds* cases. *Flood* was the only case in which the Court of Appeal overturned a judge's finding in favour of a defendant. The judge's decision was restored by the Supreme Court. Lord Phillips noted at [100] to [106] that there had been some previous debate as to the appropriate standard of appellate review. He left the question open but appeared to favour limiting it to errors of law or unreasonable conclusions. He cited with approval Hoffmann LJ's statement in *In re Grayan Building Services Ltd* [1995] Ch 241 at 254: "generally speaking, the vaguer a standard and the greater the number of factors which the court has to weigh up in deciding whether or not the standards [i.e. the relevant legal standards or test] have been met, the more reluctant an appellate court will be to interfere with the trial judge's decision."

32. Subsequent to *Flood* there have been a number of Supreme Court decisions in defamation and other contexts which have limited the appellate power to intervene to errors of law or unreasonable conclusions.[17] There is no reason, in principle, to adopt a more interventionist approach to s.4.

33. In fact, there is a stronger case against intervention in relation to s.4 than *Reynolds*. "In the public interest" involves a greater number of factors than "responsible journalism". In addition, s.4 has an enhanced subjective element, affording greater advantage to the trial judge from seeing the defendant give evidence.

34. Further, it would be illogical for an appellate court to be more willing to intervene in a s.4 determination than other areas of defamation procedure, such as serious harm or defamatory meaning. The latter determination is easy to make, has a profound impact on a defamation claim and is solely paper-based. Nevertheless,

[17] See, for example, *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 and *Stocker v Stocker* [2019] UKSC 17, and the Privy Council decision in *Simon v Lyder* [2019] UKPC 38.

the Supreme Court has recently upheld a standard of appellate review based on error of law or perversity in this context.[18]

35. Where a judge has upheld a s.4 defence the claimant/appellant therefore faces a dual perversity hurdle (absent an error of law): to establish that the judge could not have reasonably concluded that the defendant reasonably believed that publication was in the public interest.

36. This is not satisfied by an appellate court incanting phrases such as "plainly wrong" or "could not properly have concluded", when the reality is that it merely disagrees with the judge's conclusions.[19]

37. The appellate court must also bear in mind the points made by Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360*,* 1372, cited in a number of subsequent authorities: reasons for judgments are always capable of being better expressed; narrow textual analysis should be avoided; and expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance. The appellate court should not be searching to find fault in order to substitute its preferred outcome.

Focussing on the positive

38. The need to avoid unjustified negativity applies both to the judge's reasons for upholding the s.4 defence and the defendant's reasons for publishing. Whether a defendant reasonably believed that publication was in the public interest should encourage a greater focus on the positive i.e. what good could the defendant reasonably believe would come about as a result of publication?

39. This is to be contrasted with a responsible journalism test which tends to encourage a focus on the negative, potentially exaggerated by hindsight bias in the trial process i.e. what could the defendant have done better?

[18] See *Stocker* above and *Lachaux v Independent Print Ltd* [2019] UKSC 27 at [21] in relation to s.1: "Findings of this kind would only rarely be disturbed by this court, in the absence of some error of principle potentially critical to the outcome".
[19] See *Simon v Lyder* at [30]

40. In this context, the Court of Appeal failed to engage with the Judge's key finding that "this was a piece that cried out to be published". The Appellants had credible evidence from a large number of sources over a long period of time that the Respondent was a charlatan who exploited his position within the Polish community, with obvious benefit to the latter from being warned of his activities. This factor alone justified a reasonable belief that publication was in the public interest.

41. More generally, the article was a "modern morality tale", "satirical, witty, allusive and intellectually sophisticated in style and tone"[20], of particular relevance to the Polish diaspora. Articles such as this contribute to readers' understanding of their world.

Alleged journalistic failings

42. Instead of focusing on what the Appellants had done and the value of the information they had obtained, the Court of Appeal appeared more concerned with what they had not done. Further, the Court's analysis at [76] to [82] of the Appellants' "failures" is flawed in numerous respects. This is particularised in Schedule A, which addresses the Court's criticisms of the Appellants' journalism and the Judge's assessment of it.

43. A feature of this case is that the Respondent had solicitors acting for him on a CFA prior to the trial, who then came off the record ostensibly because of an inability to find counsel willing to act on the same basis, leaving him to conduct the trial (but evidently advising him in the background).[21] After the trial the solicitors came back on the record with counsel (who had also previously acted for him), both on a CFA. Much of the criticism of the Appellants' conduct advanced on behalf of the Respondent and accepted by the Court of Appeal relates to factual or evaluative issues that were not advanced or put to them at trial, and does not fairly represent their evidence. It was wrong in principle and unfair to the Appellants, their witnesses and the Judge for them to be accepted. All the issues belatedly raised

[20] At [4]
[21] See the Judge's judgment at [90].

were capable of being satisfactorily answered at trial. A trial should be the "main event" rather than a "tryout on the road".[22]

44. More specifically in relation to s.4, an appellate court should only rely on alleged journalistic failures to overturn a judge's finding in favour of a defendant where the effect of such failures is that the judge could not have reasonably concluded that the defendant reasonably believed that publication was in the public interest. This requires active consideration of the perceived public interest benefit in publishing the statement.

The failure to contact the Respondent

45. The failure to contact the claimant was not fatal to a *Reynolds* defence. It cannot be treated, in practice, as fatal to a s.4 defence. Parliament chose to remove "whether the defendant sought the claimant's views on the statement before publishing it" as a relevant factor in s.4 and instead required the court to consider "all the circumstances of the case" and "make such allowance for editorial judgement as it considers appropriate".

46. It is a fundamental part of the legal process that judgments are not given without hearing both sides of a case, except in unusual and defined circumstances. This is not a reason for imposing an analogous requirement on journalists in order to make good a s.4 defence. It is to be noted that the IPSO Editors' Code of Practice does not impose any such obligation.[23] There is an obligation to "take care not to publish inaccurate, misleading or distorted information". The value of approaching a claimant to achieve such a purpose will vary depending on the circumstances.

47. At most, an unjustified failure to do so can be a factor to be "put in the balance on the claimant's behalf".[24] This can often be outweighed by "the [public] interest in the free flow of information".[25]

[22] See *Anderson v City of Bessemer* 470 US 564 (1985), 574-575, cited in McGraddie v McGraddie [2013] UKSC 58 at [3].
[23] Nor did its predecessor under the Press Complaints Commission.
[24] *GKR Karate (UK) Limited v Porch* [2000] EMLR 410 at page 428.
[25] At pages 429-430.

48. In the present case, the Appellants made an editorial decision not to contact the Respondent. For the reasons set out in Schedule A, it was not irrational. In any event, it was not unreasonable for the Judge to conclude that it should not result in them being deprived of the s.4 defence.

Section 4(1)(a) - on a matter of public interest

49. The Appellants' Case on this issue is set out in the Grounds of Appeal at [2]. Amplification on four points is provided below.

50. The Court of Appeal drew a distinction between "the Claimant's personal life, *mores* and conduct as a contractor, supplier and volunteer" to a charity and a community organisation and how they "were run as charities". The latter was accepted to be a matter of public interest, but the former was not. The distinction is misconceived for a variety of reasons. The way in which a charity performs its role depends on all those who are involved in it, not merely the conduct of its management. Contractors to charities receive charitable funds and there is a public interest in how such funds are spent. The Respondent was in a sexual relationship with the manager of Kolbe House, thereby blurring any potential distinction between "contractor, supplier and volunteer" and management. Kolbe House was a charity looking after elderly Poles who were potentially vulnerable to the Respondent's exploitative conduct, which was the subject matter of the article.

51. Even without the Respondent's involvement in a charity at the date of publication, there was a public interest in exposing his misconduct because of his record of involvement in the Polish community. The Respondent's pleaded case set out the roles that he had held and asserted that he had established a "public reputation" within the community.[26] Accordingly, there was a public interest in the community receiving information about his conduct in community roles and in his business life. This was fortified by the Respondent's reliance on his public role to advance his business interests.[27]

52. Even without the Respondent's involvement in a charity and record of involvement in the Polish community, the was a public interest in exposing his misconduct

[26] See, for example, the Amended Particulars of Claim at [2].
[27] See, for example, the Amended Defence at [14.26].

because he offered services to and engaged in business with the Polish community. There is no principled distinction in this regard between his position and that of the musicians in *Spiller v Joseph* [2011] AC 852.

Imputation 13(4)

53. As previously stated, overturning a judge's pure finding of fact based on an assessment of the witnesses is highly unusual. In the present case, the Court of Appeal not only set aside the Judge's finding, but substituted its own finding that imputation 13(4) was unproved, without seeing the witnesses or requiring a retrial.

54. For an appellate court to set aside such a finding of fact requires more than it taking a different view "on the probabilities of the case" based on "the results of their own comparisons and criticisms of the witnesses".[28] It requires a finding that the witnesses for the respondent found to be truthful by the judge were incapable of belief. Alternatively, that the evidence found to be truthful was incapable of proving the imputation. Where the appellant relied on evidence in rebuttal, in order for that to justify overturning the judge's finding it must be both incontrovertible and if true, render the imputation incapable of proof.

55. The Court of Appeal did not approach the Judge's finding on imputation 13(4) by reference to these standards. It simply substituted its own view based on its assessment of the probabilities. Its analysis of the Judge's approach was flawed in a number of respects. This and the related issue of the evidence on which the Judge relied are particularised in Schedule B.

56. In summary, the Judge relied on the inadequacy of POSK's accounting practices and procedures at the relevant time which gave rise to the possibility for diversion of funds and admissions made by the Respondent to Waldemar Wegrzynowski and Renata Cyparska that he had profited from drink sales. Numerous witnesses testified to the Respondent placing cash paid for drinks into a wooden box under

[28] *Assicurazioni Generali SpA v Arab Insurance Group (B.S.C.)* [2003] 1 WLR 577 citing *SS Hontestroom v SS Sagaporak* [1927] AC 37 at p 47 per Lord Sumner: "None the less not to have seen the witnesses puts appellate Judges in a permanent position of disadvantage as against the trial Judge and unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at merely on the results of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."

the counter, which he denied doing. Why not put it in the cash register? The Judge was entitled to find that Mr Wegrzynowski and Ms Cyparska were telling the truth about what the Respondent had said to them and that his admissions were based in reality. The Court of Appeal relied on "strong evidence militating against the truth" of the imputation. On analysis, none of it was relevant to the imputation, let alone destructive of it. Much reliance was placed on the existence of the cash register and the bookkeeper not finding a discrepancy in its takings. This was irrelevant for the obvious reason that cash was being diverted from the register.

Reversal of the burden of proof

57. The Court of Appeal held that it was not possible to make any definitive finding on the Respondent's case on appeal that the Judge had generally reversed the burden of proof of truth.[29] It nevertheless suggested that the Judge's finding on imputation 13(4) may have been explained by this.[30]

58. There was no basis to suggest that the Judge failed to take into account that the burden of proof on truth was on the Appellants. He referred to it on four occasions.[31] He specifically relied on it to find against the Appellants on the alleged Facebook forgery[32] and one of the Kolbe House imputations.[33]

59. As the Judge correctly noted in relation to Polfood, the fact the burden of proof is on a defendant does not discharge a claimant from providing a credible rebuttal, where the defendant has raised a prima facie case to support the truth of the imputation.[34] Further, where the prima facie case has been raised, the tribunal of fact may draw any reasonable inference from the claimant's failure to produce a document that would be likely to exist if his account is true or to call a witness who would be able to corroborate it.[35] This does not amount to reversing the burden of proof.

[29] At [95-98]
[30] At [98]
[31] At [94], [150], [272] and [338]
[32] At [150]
[33] At [268-274]
[34] See, for example, [94]-[95]
[35] See [6] and [95]. See, for example, *Lewis v Eliades* [2005] EWHC 488 (Ch) at [60]-[63]

60. It was misconceived and unfair to the Judge to characterise his observations to the Respondent about the absence of documentation and its possible consequences as "demands that the Claimant prove matters to him by reference to documents which were not before the Court".[36] It was evident from the Defence that the Appellants were relying on the absence of accounts or documentation relating to payments to and from Polfood in support of their case of fraud.[37] The Respondent had the opportunity to provide them, if they existed, before the trial. It was unsatisfactory for the Respondent to state in the course of the trial that there were such documents.[38] The Judge was entitled, if not obliged to warn him that adverse inferences could be drawn. The judgment illustrates the care that the Judge took before drawing such inferences.[39]

61. The principles referred to in [59] above apply in civil litigation generally. They have particular force in defamation claims because of the impact on freedom of expression of a finding that an imputation is unproved. Placing the burden of proof on a defamation defendant is controversial in itself,[40] making it all the more important to ensure that the defendant is entitled to rely on all methods properly available to satisfy it. As Neill LJ noted in *McDonalds Corp v Steel* [1995] EMLR 527 at 535: "It is to be remembered that the defences of justification [truth] and fair comment form part of the framework by which free speech is protected. It is therefore important that no unnecessary barriers to the use of these defences are erected, while at the same time the court is able to ensure that its processes are not abused by irresponsible and unsupported pleadings".

62. *McDonalds Corp* involved an interim strike out application. But the issue was the same as the present case: whether an imputation was capable of proof on the basis of the evidential material that could be relied on by the defendant.

Nominal damages

[36] See the Respondent's Grounds of Appeal referred to at [29] and [103].
[37] See, for example, the Amended Defence at [14.17], [14.18], [14.25(2)], [14.36]
[38] See further in Schedule C.
[39] See, for example, [17(1)], [92], [95], [230], [238] & [239]
[40] See *Gatley* [11.4]

63. It appears to be common ground that if the Judge was entitled to find imputation 13(4) proved he was entitled to find that the Respondent's reputation had been shot to pieces, thereby depriving him of any damages other than nominal.

64. At [101] the Court of Appeal stated:

"If, however, as we have held, the Judge was wrong to find POSK allegation (4) proven by the Defendants, the landscape is markedly different. Whilst the Judge's findings as to the truth of the POSK allegations (1) to (3) and the Polfood allegations (5) to (7) (see above) remain undisturbed, nevertheless, it would not have been open to the Judge to say that the Claimant's reputation was "shot to pieces" absent the most serious allegation in relation to theft from the Jazz Club being proven."

65. No explanation is given as to why proof of the other imputations was said to be insufficiently destructive of the Respondent's reputation. The Court does not appear to have addressed the gravamen of 13(6), set out below, or considered its possible impact on the assessment of damages.

"(6) [The Claimant] having dishonestly persuaded investors in his food business to part with their life savings, stole their money for himself and transferred it to Poland to use it to support a family construction project in Poland and to support his family there."

66. The Court of Appeal characterised imputation 13(4) as "the most serious" of the imputations complained of. But the Judge had characterised 13(6) as "the most serious by far". The issue is not whether the Court of Appeal or the Judge was correct, but whether the Judge's conclusion was unreasonable, which it was plainly not.

67. It is also worth recording imputations 13(5) and (7), which were related to 13(6) and 13(1), the gravamen of which is similar to 13(4). All the imputations involve the Respondent acting in an untrustworthy manner for financial gain:

"(5) [The Claimant] conned a number of women into investing their life savings into his food business by leading each woman to believe she was the only one and with promises of a good life together with him;

(7) [The Claimant] defrauded his creditors and dishonestly circumvented the normal consequences of bankruptcy in order to retain for himself personal wealth, in the form of a BMW X5 car and real property that he pretended to sell, which should have been made available to satisfy the claims of his creditors;

(1) [The Claimant] abused his position as house manager of POSK in order to award himself or his company profitable contracts for maintenance work at POSK, avoiding the proper procedure for obtaining approval for tenders for such contracts"

68. The Judge was also entitled in any award of damages to take into account the lies told by the Respondent during the trial and his overall assessment of the Respondent from the trial process as someone who "pursues business and personal goals with a combination of tenacity and deceit", uses "his plausibility, charisma and personal charm" for these purposes and is "fundamentally untrustworthy".[41]

69. As Lord Hailsham observed in *Broome v Cassell & Co* [1972] AC 1027 at p 1071-2 approving the statement by Lord Esher M.R. in *Praed v. Graham* (1889) 24 QBD 53, 55:

"... in actions of libel ... the jury in assessing damages are entitled to look at the whole conduct of the defendant" (I would personally add "and of the plaintiff") "from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in court during the trial."

70. The issue on appeal should have been whether the Judge's conclusion on the destruction of reputation could reasonably have been sustained by the effect of imputation 13(6) and every other adverse finding in the judgment (apart from 13(4)). The answer is plainly, yes.

[41] At [91]

71. It would not be unreasonable to conclude that right-thinking people would not wish to do business with or involve in a community role someone who had behaved in such a manner. Alternatively, it would not be unreasonable to conclude that it would be "an affront to justice" to award anything other than nominal damages in these circumstances.[42]

72. Posing the same question from a slightly different perspective, if the Judge had rejected the s.4 defence and found imputation 13(4) unproved, but awarded nominal damages on the basis of imputation 13(6) and/or the other adverse findings which are not under specific challenge, and the Respondent's only appeal was in relation to the nominal damages award, could the award have been properly overturned on appeal? The answer is plainly, no.

Unfair trial

73. A civil trial can be rendered unfair by judicial conduct only if: (1) the judge has prejudged the case; and/or (2) a litigant is deprived of an adequate and proper opportunity to advance their case and challenge their opponent's. If the judge is rude, exceptionally that may support a case in relation to (1) and/or (2), but, of itself, is insufficient.

74. This case must be assessed in a context in which, over the last two decades since the Woolf reforms, civil judges have been encouraged to adopt an active case management approach[43]. A judge may also quite appropriately intervene when there are concerns about the administration of justice under its inherent jurisdiction, such as the convening of a *Hamid* Court[44].

75. Active case management necessarily includes the judge making sure that valuable court time is used efficiently and expeditiously, that issues are appropriately and proportionately ventilated and that the trial progresses effectively and within the allocated time. Case management requires each party having the opportunity to present their case properly and must ensure the fairness of the trial process. In the

[42] See Lord Bingham in *Grobbelaar v News Group Newspapers Ltd* [2002] 1 WLR 3024; [2002] UKHL 40 at para [24]: Bingham cited in *Joseph v Spiller* [2012] EWHC 3278 (QB) at [4].
[43] CPR r.3 generally and CPR r3.1 and r.3.3 specifically.
[44] *R. (on the application of Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin).

present case in accordance with those requirements, for example, the Judge raised with the Respondent his need to put his case to the one of the Appellant's witnesses.

76. When the passages relied upon by the Respondent are placed in their full context, it becomes apparent that the Judge's interventions were wholly justifiable. The Court of Appeal wrongly relied upon the passages in isolation, as outlined in Schedule C.

77. The Judge's conduct was objectively fair, based upon what was presented to him. The manner and approach adopted was appropriate towards a litigant who was seeking to vindicate his reputation in a defamation trial, after being accused of dishonest conduct, but who freely admitted that he had lied to his investors with the inevitable inference to his reputation for honesty.

78. Furthermore, it was incorrect of the Court of Appeal at [116] to characterise the intervention of leading counsel as being an attempt to row the Judge back as he was aware that the Judge's conduct was or was becoming impermissible. The interjection was solely in order to progress with his cross-examination.

79. There was never a suggestion made throughout the trial that the Judge had either prejudged matters, or that the Respondent was unable to put his case or challenge the Appellants' witnesses.

80. The authorities confirming that a judge should not descend into the arena are predominantly criminal cases, with the exception of one civil case: *Jones v National Coal Board* [1957] 2 QB 55 (cited in *Michel v The Queen* [2009] UKPC 41, another criminal case). *Jones* held at 111:

"The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of evidence, applies no less to civil litigation than to criminal trials."

81. Judicial interventions inevitably fall on a spectrum, ranging from no intervention by not asking any questions or making any observations at all right through to interfering with a party being able to put their case or make submissions. What is

wholly proper is for a judge to ask a witness to clarify their answer; to ask any party to confirm or clarify their case; to highlight to them the legal ramifications of a piece of evidence or a concession apparently made; or to give a provisional indication of his/her view on a particular issue. None of those constitute failing to "remain aloof from the fray and neutral". Provided the judge does not demonstrate a lack of neutrality and does not essentially descend into the arena becoming effectively an (extra) advocate for one party and thereby compromising the just disposal of the proceedings, judicial interventions are acceptable and appropriate. The principle in *Jones* is accepted but should not be construed as being a ban on a judge from intervening in the manner which the Judge did in the trial. *Jones* was also a case, far removed from the present one, in which it was found that neither side had the opportunity to put their case properly.

82. Consequently, phrases such as "descending into the arena" and "remaining aloof from the fray" are ultimately unhelpful if they are taken to imply a ban on a judge, managing a civil trial, from intervention as suggested above. They do not clearly nuance and delineate what is permissible judicial intervention in a civil trial. What is not permissible, for example, is a judge conducting their own cross-examination; prejudging the issues; or preventing a party from putting or making submissions about their case.

83. In the present case, when it became apparent that the Respondent had lied to investors, in a defamation trial where his reputation was stake, the Judge was rightly ensuring that the Respondent was fully aware of the potential legal implications of his own evidence upon the merits of his case, mindful that he was acting in person.

84. It is a remarkable feature that this is a case where the Court of Appeal made effective findings of actual, not apparent, bias and maintained that the Judge had an animus towards the Respondent rendering the trial process unfair. "Animus" may be described as a hostility towards a party with a malicious intention to do them down by making adverse findings against them. This approach is to be contrasted with the perfectly proper and necessary requirement for the judge to prefer the evidence of one party over the other in order to resolve the dispute. The Judge may have been robust, brusque and impatient, but there is no reasonable

basis to infer that he either prejudged the issues and/or prevented the Respondent from presenting his case properly/contesting the Appellants' case, His overall conduct of the trial did not render the trial unfair.

85. Exceptionally, excessive judicial rudeness and aggression may so intimidate a litigant (or his or her advocate) that they become unable to pursue their case properly. Judges are used to tempering their manner to the apparent fragility of those appearing before them and backing down if it appears to be having an adverse impact. The Respondent is a robust and confident individual. Nothing happened at the trial to suggest that anything said or done by the Judge prevented him from advancing his case to the best of his ability and his case on appeal did not allege that he had been deprived of that opportunity.

86. The Court of Appeal's finding that the Judge was partisan and biased is an extremely serious one to make. He is a highly regarded High Court Judge with considerable civil experience both in practice and since his appointment to the High Court bench. The finding is tantamount to a conclusion that the Judge breached his judicial oath. The ramifications of the Court of Appeal's findings, if undisturbed, will have a chilling effect upon practitioners contemplating applying to sit in the High Court.

Assuming new trial – issues for determination

87. In the unfortunate event of a new trial on the basis of judicial unfairness, it appears to be common ground that all the issues that were live before the Judge would remain live save to the extent that they have been definitively determined in the appeal process.

88. In written submissions following hand down, the Appellants contended that they should be entitled to advance a truth defence even if imputation 13(4) was not available. This was rejected by the Court of Appeal without giving any reasons. If necessary, the Appellants would rely again on those submissions. The agreed issues for the appeal include: "[if the trial was unfair], should the Appellants be entitled to advance defences under s.2 and/or s.4 at a new trial?"[45]

[45] At [45.4]

89. Since the fact and ambit of any new trial depends on the disposal of the appeal, it does not appear profitable to debate it any further at this stage.

Conclusion

The Appellants submit that the appeal should be allowed for the following reasons:

1. It was open to the Judge to uphold the s.4 defence.

2. Alternatively, it was open to the Judge to find that the Respondent's reputation had been shot to pieces, thereby depriving him of any damages other than nominal, on the basis of what it had been open to the Judge to find had been proved.

3. The trial was not unfair.

David Price QC
Anthony Metzer QC
Dr Anton van Dellen
4 February 2020
For the Appellants/Defendants

Schedule A

Analysis of the findings of the Judge and the Court of Appeal in relation to s.4

90. In considering the submissions made below, the observations of Lord Hoffmann in *Biogen Inc v Medeva Ltd* [1997] RPC 1, 45 should be kept in mind:

> "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance. . . of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

91. Each of the subject areas in the Court of Appeal's judgment is addressed below. The passage from the judgment is set out followed by the Appellants' comments.

The Failure to contact the Respondent [68]-[72].

"68. The judge accepted the Defendants' three reasons for not contacting the Claimant before publication which he summarised as follows:

"[326]. The First Defendant's reasons for not contacting the Claimant before the article was published were that he had not complained about previous articles and letters published in Nowy Czas, he did not believe that he would respond for comment, and that the Third Defendant has been warned that the Claimant was a violent and co-operative liar." [sic]"

92. [326] is a summary of the Appellants' evidence and does not convey the following matters:

92.1. A fuller explanation was given in the Third Appellant's witness statement of the Respondent's threats of violence:

> "79…..I was also mindful of Ms Wozniczka, Dr Kondycka and Mr Malevski's comments about the Claimant being potentially violent. I was aware that already a key witness to events had refused to talk to us and I was afraid that if the Claimant knew about the story prior to the publication, he might seek to intimidate our sources. I had in mind his threats to Ms Wozniczka (to "rip her head off with her lungs"); to Dr Kondycka (to burn her house down), and Mr Wegrzynowski ("I was trained to kill people")."

92.2. The reasoning is not irrational. The motive for intimidation is greater prior to publication than after. The Appellants' confidential sources at Kolbe House were in a vulnerable position and the Respondent was in a relationship with the Manager, Beata Parylak. Ms Wozniczka gave evidence of the threat made

to her, as was recorded in [139] in the judgment below. This was because of its relevance to the truth defence. The information acquired by the Third Appellant in relation to this and the other threats, on which she was not cross-examined, was relevant to her state of mind at the date of publication.

92.3. Mr [Marek] Malevski is a journalist and regular contributor to Nowy Czas who worked on the story and a number of previous articles about the Respondent and POSK. He told the Appellants that the Respondent had never responded to him when he had sought to obtain comments.[46]

92.4. A number of the previous articles and letters related to the imputations in the article about the Respondent and POSK, neither of whom had responded before or after publication.

"69. In our view, however, there is little substance in any of these three reasons. As to the first reason, that the Claimant had not complained about previous articles written about him in "Nowy Czas": since none of the articles or letters could be said to be comparable in their tenor or content to the present article, it is difficult to see why this was relevant."

93. It is accepted that this article was more substantial and had new content. But it was not irrational to take into account, in conjunction with other factors, that the Respondent had a pattern of not responding to enquiries and had not sought to rebut previous articles on POSK.

"As to the second reason, that the Defendants thought it was unlikely that the Claimant would respond: the First Defendant said when cross-examined by Claimant: "I admit I didn't ask you because I knew I wasn't, it wasn't likely for me to get an answer" and "We gave you a chance to reply to the article after publication" (Day 3, p.113)). However, the mere fact that a journalist thinks that the subject of a defamatory article might not respond to allegations, is no reason to deprive that person of the opportunity of denying them so that such denial can be published within the article."

94. It is evident from the transcript that the cross-examination is directed to what was written about POSK, in relation to which see [92.3 & 4] above. Further, the First Appellant was about to continue his answer ("And I…113E) when interrupted by the Respondent.

"As to the third reason, it is difficult to see on what basis the Judge gave credence to the Defendants' assertion that the Claimant was a "violent and co-operative liar [sic]": there was no evidence that the Claimant had ever been, or was likely to be, violent; and, in any event, there was no reason why the Defendants could not have contacted the Claimant by phone or in writing in advance of publication to ask for his comments regarding the various allegations."

[46] Amended Defence [15.12.2]

95. Paragraphs [92.1 & 2] above are repeated. The Appellants had credible information that the Respondent had made threats of violence. They were not cross-examined on the factual basis for their concerns or that it formed part of their decision-making.

96. The final sentence misses the point. The concern was not that the Respondent would be violent to the Appellants.

97. More generally, the protection of sources is vital to a journalist. A judge has no practical experience of gathering material for publication and should be wary of substituting his view for that of the defendant as to the extent and means necessary to avoid potential intimidation.

72. [*Having cited Economou in [71]*] No similar factors apply in the instant case. The "Nowy Czas" article complained of in the present case did not raise issues of public importance; it was all about the Claimant and targeted directly solely at him and included a photograph of him; the Defendants could not have relied on anyone else to verify the allegations; there was no urgency about publication; the tone of the article was gratuitously offensive; and, in the premises, reporting the Claimant's side of the story was of primary importance.

98. This paragraph primarily concerns matters addressed in the body of the Case or below in relation to the *Reynolds* factors. In relation to verification, the Appellants had credible information from a variety of sources in relation to the information to be published.

The failure to contact others [76]-[80]

76. Further, the Judge appears to have paid little or no regard to the fact that the Defendants appear not to have contacted anyone else who could or might have given another side of the story; or that they failed to speak to many of those who could be expected to have had first-hand knowledge of the truth or otherwise of published allegations.
77. In relation to POSK, the Defendants made no attempt to contact people who worked at POSK or held official management positions who could have given evidence as regards the allegation that the Claimant had unlawfully defrauded POSK. Indeed, none of the Defendants' sources had any official link or position with POSK but were merely members or visitors. When questioned in cross-examination by the Claimant about this, the First Defendant gave answers which were vague and unsatisfactory:
"Claimant: Why did you not speak to bookkeeper or treasurer to corroborate your story and particularly regarding to the cash register?
First Defendant: I spoke to several people. I said I cannot, well, it's very easy to point out, there is, particular person. That's a way of manipulating [inaudible] which is very harsh to publishers, and we did everything possible to justify what I was going to publish. We spoke to numbers of people, of people regarding research.
Claimant: Why you didn't approach the bookkeeper or treasurer to clarify that? You were talking to wider people who may or may not [inaudible]. This is a government of POSK [inaudible].
First Defendant: I spoke to, I spoke to people who are very important in POSK. I verified all that information and just, tell me, show me one sentence about POSK which is not true in my article.
Claimant: All of them are not true and I will prove it to you…"

99. As the First Appellant stated in the passage cited above and elsewhere in his cross-examination and witness statement, he spoke to people who were “very important” and “prominent” in POSK. There was no basis for the Court of Appeal stating: “Indeed, none of the Defendants' sources had any official link or position with POSK but were merely members or visitors”. The First Appellant’s response was not vague and unsatisfactory.

100. The First and Third Appellants’ witness statements detailed their considerable interaction with POSK over the years and the available sources of information.

101. The Third Appellant’s witness statement included at [22] that “POSK is a very closed organisation and it is difficult to obtain information from usual journalistic enquiries.” She was not cross-examined on this. The Judge noted at [196]: “The picture I have is that POSK was a somewhat secretive organisation when it came to financial matters, and that there was a lot of in-fighting with various individuals and factions vying for control”.

102. The previous stories on which POSK had not commented before or after publication included in relation to the cash takings at the Jazz Café.

103. [77] was directed to the imputation that the Respondent was secretly skimming profits from the Jazz Café. As it proved at trial, the bookkeeper and a senior officer did not have relevant evidence to give.

104. More generally, it is wrong, in principle, for an appellate court to focus on one answer in cross-examination to overturn the Judge’s finding that the Appellants had credible sources for the information that they published in relation to the Respondent and POSK. The Judge was entitled to make the finding on the totality of the evidence before him.

78. In relation to Kolbe House, the Defendants failed to check their allegations with the manager or any other members of senior management to get their input before publication. The Third Defendant gave the reason for not having contacted the management of Kolbe House being that because the Claimant was in a relationship with the manager of Kolbe House, so she would therefore not have been a "reliable source". In cross-examination on this issue, the Third Defendant said:
"Because if we asked, you just go with this answer which we got today and that article would never, never appear and you would still be there." (Day 3 p.97A-B).
On the face of it, this answer suggests a lack of journalistic objectivity and a troubling reluctance to contact anyone who might gainsay the story. Indeed, it suggests that publication of the article was dependent on the fact that no one contradicted the allegations.

105. The starting point in relation to reasonable belief is the credibility of the information that the Appellants *had* acquired and the research work that they *had*

done. Any alleged failure to contact anyone else has to be seen in this context. The Judge's findings as to the credibility of the information acquired by the Appellants in relation to Kolbe House were set out at [332], having recited the facts on which they were based at [318] to [322] and [329]-[330]. These paragraphs are not under direct challenge, nor could they be.

106. The citation in [78] of the Third Appellant's reasons for not contacting management is taken from [329] and is partial. [329] also records: "We believed that our confidential sources were credible, and they had been backed up by other independent sources. The employees also stressed that before turning to us for help they had tried, in vain, to complain to the management of Kolbe House."

107. [329] is derived from [42] of the Third Appellant's witness statement. There is further relevant information in [43]:

> 43. I think it is important to say here that the original e-mail sent to us by Kolbe House employees was provided by Carter-Ruck to the Claimant's solicitors as a response to a Request for Further Information on 15 June 2016. On 4 July we were informed by our confidential Kolbe House sources that Ms Parylak had hung the English translation of that original e-mail on the notice board in Kolbe House and angrily told staff that those who wrote that e-mail would be named and shamed. There is no other explanation for her to have obtained this document than if the Claimant provided it to her having been shown it by his solicitors. This is evidence of the approach of the Manager of Kolbe House and I therefore maintain that it would not have been appropriate or reasonable to have fact checked the article with Ms Parylak before publication.

108. The passage from the cross-examination refers to "you just go with the answer we got today". The "you" can only be reasonably understood as the Respondent. "The answer we got today" is reasonably to be understood as something that was said by Ms Parylak, who had given evidence earlier in the day. It seems to suggest that the Respondent will use something to stop the article being published. The Third Appellant's answer is unclear and was not clarified by the Respondent. It can, at a minimum, be reasonably understood as relating to her concerns about intimidation of sources, a subject which the Court of Appeal did not grasp.

109. In any event, it is wrong in principle for an appellate court to take an extract from cross-examination and place an interpretation on it, based on how it appears to them as the grounds to make criticism of a witness, in circumstances when neither the interpretation nor the criticism were put to her in cross-examination. The point applies with greater force where English is not the first language of the witness or the cross-examiner.

79. It is noteworthy that, following publication, the Kolbe House Committee of Management wrote to the editor of "Nowy Czas" on 2nd November 2015 complaining about the article which

they said was "littered with inaccuracies", complaining that the magazine should have "checked and verified the facts" and said the editor's actions reflected "neither responsible nor professional journalism".

110. It is difficult to see the relevance of the letter (which the Appellants published) to their state of mind at the date of publication.

80. In relation to Polfood, the Defendants failed to speak to the Claimant's former partner and the company secretary of Polfood, Ms Elizabeth Howard, despite knowing of her existence and the fact that she had been romantically involved with the Claimant and had lent him money. She was, therefore, clearly a potentially important source of information in relation to the Polfood allegations. It is noteworthy that the Defendants regarded her as a sufficiently important witness to have served her with a witness summons to attend trial.

111. The points made above in relation to POSK and Kolbe House also apply to this alleged failure. There was some cross-examination of the First Appellant in relation to Ms Howard, but it is not clear what was being put to him.[47]

112. The observation in the last sentence of [80] is wrong in principle. One of the reasons for a strong public interest defence is the difficulty in proving the truth of an imputation by admissible evidence. The point was well made by the Judge at [338].

> 338. The reason why the defence of truth has failed in relation to virtually all the Kolbe House allegations does not cast doubt on the integrity of the Defendants or their journalistic credentials. The explanation is that their sources were not as objective as they thought; or, put more neutrally, I have reached a different conclusion on all the evidence, applying familiar forensic tools and mindful of the burden of proof. These resources, including the possibility of cross-examination, were simply not available to the Defendants.

Other journalistic failures [81]

81. Further, when considering the reasonableness of the Defendants' belief as to the public interest, the Judge failed to take into account other unsatisfactory aspects of the article and the Defendants' lack of journalistic standards. First, despite the fact that (as the Defendants well knew) by the time the Claimant worked for Kolbe House he was no longer bankrupt, the article nevertheless alleged that the Claimant concealed his status as a bankrupt from Kolbe House and Ealing Council (see paragraphs [M] and [N] of ANNEX A and allegations (10), (11) and (13)).

113. It is established that a defendant's reasonable belief must be directed to the meaning intended for by him.[48] The point has greater force where the words used are in a foreign language, the imputations complained of are inferential and the alleged falsity is technical.

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[47] Day 4, p10 to 15.

[48] See, for example, *Economou* in the Court of Appeal at [85] referring to *Bonnick v Morris* [2002] UKPC 31, [2003] 1 AC 300.

114. Imputations (10), (11) and (13) were the Respondent's inferential meanings from the words set out in [M] and [N].

115. The criticism in [81] relies heavily on the words from the translation "being a bankrupt". The substantive point is that the Respondent remained subject to the restrictions under the Bankruptcy Restrictions Order. The Judge addressed this issue at [305]-[306] in the context of the honest opinion defence. He referred to a letter from the Insolvency Service to Ms Wozniczka's solicitors dated 8th January 2013, which stated that "the effects of a Bankruptcy Restrictions Order are largely the same as those an individual is subject to under bankruptcy".

116. The Appellants were not cross-examined on the basis that they ought to have known that they were conveying a material untruth, let alone that they did so knowingly.

Second, as the Judge himself found, whilst the Defendants did not have an evidential base for the allegation that the Claimant had accessed the confidential information of residents of Kolbe House [330], the article nevertheless stated that the Claimant had "full access to confidential documents concerning residents" (paragraph [K]).

117. The Judge referred to a "possible *lacunae*", which he felt obliged to raise because there had been no cross-examination on it. He stated that he did not believe that there was any reference to accessing confidential information on the transcript of the September 2015 meeting. There is reference to it in the email of 13 February 2014[49] ("Every day he sits in the office of Mrs. Parylak at her computer, where he can view the personnel records. He knows how much we earn. The personal data of residents is also on the computer") and elsewhere.

Third, as the Judge himself again found, the Defendants did not have an evidential basis for their imputation that the Claimant replaced bathroom equipment at Kolbe House unnecessarily [330].

118. The Judge was even more tentative on this subject: "the issue may well have been covered either in the October 2015 meeting, which has not been transcribed, or in the various emails, some of which have not been translated". The Third Appellant's witness statement refers to a meeting with informants on 24 April 2016 in which there was discussion of "unnecessary and expensive renovation work".[50] It is also referred to in the email of 13 February 2014 and elsewhere.

Reynolds factors [83]

[49] The email is referred to in the judgment at [318].
[50] See [37]-[38].

119. The submissions below should be read in the context of the points of principle raised in the Grounds of Appeal in relation to the *Reynolds* factors. The present case is a good example of how the factors, designed for an English national media publication, can result in inflexibility and obscure other factors relevant to the particular case.

83. Finally, by way of a checklist, it is useful to consider the Reynolds factors seriatim:

(1) The seriousness of the allegation(s). As the Judge held, most of the numerous allegations made in the article were self-evidently serious and reputationally damaging to the Claimant, in particular, the allegation of stealing from the Jazz Club bar.

120. This is accepted, subject to the point made in Case [66] in relation to imputation 13(6) (stealing investors' life savings). The seriousness of the allegations is often a factor supporting the public interest because of the benefit of exposing a wrongdoer.

(2) The nature of the information, and the extent to which it is a matter of public concern. As explained above, the information in the article was of no, or limited, public interest.

121. This has been addressed previously.

(3) The source of the information. The sources of the published allegations included (a) people who had axes to grind (who had lost money as a result of their business dealings with the Claimant, e.g. Mr Wegrzynowski and Ms Cyparska, or who had lent the Claimant money or who had split up with the Claimant on bad terms, e.g. Ms Wozniczka); (b) people who wanted to remain anonymous (employees of Kolbe House); and (c) people who were not in management positions in the organisations concerned (and therefore had limited direct knowledge of the facts).

122. The sources "included" people who could be said to fall within such categories. The phrase "axe to grind" is pejorative. Exposure of a fraudulent person will usually require the co-operation of people who have been defrauded and therefore feel hostility. The fact that a source wishes to remain anonymous does not cast doubt on credibility. The issue of management position and direct knowledge of the facts proposed to be published has been addressed above.

(4) The steps taken to verify the information. As explained above, the journalistic standards and the steps taken to verify the information were inadequate. Notably, at no stage prior to publication did the Defendants contact the Claimant for his comment about the allegations.

(5) The status of the information. See (3) above.

123. Both these factors have been addressed previously.

(6) The urgency of the matter. It is common ground that there was no urgency in publication. Many of the allegations related to conduct years in the past. This is not a case in which news could be said to be a perishable commodity.

124. Urgency is only relevant where the defendant relies on it as a reason for not doing something that he would otherwise have done. It is not relevant to the present case.

(7) Whether comment was sought from the claimant. It was not.
(8) Whether the article contained the claimant's side of the story. It did not.
(9) The tone of the article. The tone of the article was snide and disparaging of the Claimant. It portrayed the Claimant as a despicable and reprehensible character. It included a photograph of the Claimant which, as the Judge found, was "an effective and cogent means of portraying the Claimant as not giving two hoots for his creditors" [343]. The article presented the allegations as hard fact.
(10) The circumstances of the publication, including the timing. See above.

125. The general principle in domestic and Strasbourg jurisprudence is that a journalist has a wide discretion in relation to the language employed to convey ideas and information.[51]

126. The present case involved a specialist foreign language publication where the Court should be even more wary of being critical of the language.

127. The Judge found that the article was “satirical, witty, allusive and intellectually sophisticated in style and tone”.[52] This conclusion is not perverse.

128. The article did not present “hard facts”. That was not its style. The imputations complained of are inferential.

129. The fundamental point is that the Judge found that the Appellants had credible evidence the Respondent was indeed a “despicable and reprehensible character”. After hearing the evidence at trial, the Judge found that this was a substantially true description. Neither conclusion was perverse. In the circumstances, how the Appellants chose to convey the Respondent’s character to their readers was a matter of editorial discretion.

[51] See, for example, *Jersild v Denmark* (1994) 19 EHRR 1 , para 31, referred to in *Flood* at [134].
[52] At [4]

Schedule B

Analysis of the findings of the Judge and the Court of Appeal in relation to imputation 13(4)

130. The words used were: “Everything indicated that it would be an easy way to make money, with great profits and loyal, reliable customers — Poles will not drink English beer. Janek knew that. There were two options: wholesale or retail, but he didn't hesitate. He went for wholesale, leaving retail for his supposed community activities, in the jazz cellar bar, where he supervised the supply of alcohol and ensured that goods would not be registered on the cash register. Cash register? What for?”

131. The imputation complained of was: “In the course of supplying alcohol for retail sale in POSK's Jazz Café, the Claimant dishonestly ensured that money taken from sales would by-pass the cash register in order to obtain unlawful and fraudulent profit from those sales.”

132. The observations of Lord Hoffmann in *Biogen Inc v Medeva Ltd* [1997] RPC 1 set out in Schedule A [90] are equally apposite.

133. It is appropriate to start by considering the relevant evidential material that was before the Judge in relation to imputation 13(4).

134. The Claimant ran the Jazz Café between 2007 and 2012 with Mr Marek Greliak, who is deceased. This was common ground.

135. A number of witnesses who purchased drinks stated that they saw the Respondent place the cash they had used to make the purchase in a wooden box or drawer under the counter.

136. The Respondent’s evidence was that all cash from purchases was placed directly in the cash register. He initially denied that there was any drawer or box by the counter. In cross-examination, he accepted that there was a box behind the counter into which the proceeds of the cash register would be placed at midnight on closing.[53]

137. The Appellants advanced a positive case that there was no cash register until 2012 and a cash box was used. The relevant issue was whether the Respondent was skimming cash off the receipts. The fact that there was a cash register

[53] Transcript 30/10/17 at 69A-H

arguably assists the Appellants' case. If there is a cash register, why place cash takings elsewhere?

138. Waldemar Wegrzynowski, a former business partner and neighbour of the Respondent, gave evidence of conversations in which the Respondent claimed that he and a friend personally profited from the takings of the Jazz Café. He stated that Renata Cyparska, his partner, was present at some of the conversations. Ms Cyparska gave evidence to like effect.

139. The Respondent's pleaded case was that he had no conversation with Mr Wegrzynowski on the subject and avoided speaking to him.[54] The topic was not addressed in his witness statement for trial. In cross-examination the Respondent accepted for the first time that the conversations took place but claimed that the profit to which he was referring was that made by the Jazz Café, not him.[55]

140. The Appellants also relied on the Respondent's modus operandi (as evidenced by his abuse of position as chair of the house committee of POSK, the Polfood frauds and his dishonesty in the bankruptcy) and the fact that he was in serious debt at the relevant time.

141. The Respondent called Maria Stenzel, POSK's bookkeeper, who stated that there was a cash register from the outset, albeit unsophisticated, and that there were no discrepancies in the accounts or takings or evidence that any money had gone missing.

142. The Respondent called Dr Leszek Bojanowski, a of POSK's Executive Committee who gave evidence that the Respondent had never had sole charge of the bar and he [Dr Bojanowski] had occasionally helped out. He regarded the Respondent to be as an honest man.

143. The Judge's findings are set out below:

> "208. The fourth meaning is that, in the course of supplying alcohol for retail sale in POSK's Jazz Café, the Claimant dishonestly ensured that money taken from sales would by-pass the cash register in order to obtain unlawful and fraudulent profit from those sales.
> 209. The evidence is that the Claimant ran the Jazz Café between 2007 and 2012 with Mr Marek Greliak, who is now deceased. Had the Claimant been making a personal profit out of the Jazz Café, it is reasonable to infer that Mr Greliak would have known about it. The absence of any evidence of complaint by him suggests that either the Defendants' case is wrong, or that he participated in the fraud.
> 210. A number of witnesses told me that there was no cash register in the Jazz Café; or, at the very least, they did not see one. It is unnecessary to list them all, but these

[54] Amended Reply [10.9.1]
[55] Transcript 30/10/17 at 67B

witnesses include the First and Third Defendants, and Mr Wegrzynowksi. There was convergent evidence from witnesses about a drawer or wooden box under the counter into which cash was placed. Ms Wozniczka gave evidence about giving the Claimant £50 for a round of drinks and no change or proper account was provided.

211. Dr Bojanowski told me that there was a cash register in the Jazz Café from the outset. Specifically:

"The issue of the cash register was discussed at one of the Executive Committee meetings as I raised concerns about not being able to see what was written on the keys of the register. The Committee decision was for Mr Greliak to buy a more suitable cash register. The Executive Committee was also clear that it wanted to have proper accounts."

Under cross-examination he added that the money for the bar food, as opposed to the drinks, was kept in a box in a drawer. He did not specify its exact location.

212. I heard similar evidence from POSK's book-keeper, Ms Maria Stenzel. Her evidence was that in 2007 the cash register could not specify what drinks were purchased; only the price could be keyed in. She was able to reconcile the cash takings with what appeared on the till roll. She was unaware of Moneygram receipts being given to customers on request (an example was put to her in cross-examination). Ms Stenzel also agreed that monthly stock checks were started more or less at the same time as the cash register was changed.

213. Neither Dr Bojanowski nor Ms Stenzel was cross-examined on the basis that there was no cash register until 2012. In any event, the Claimant's case is not that the article stated that there was no cash register; rather, that it was by-passed. Even so, given the weight of evidence bearing on this point, I feel that I should deal with it. Mr Metzer submitted that Ms Stenzel was an unreliable witness because her witness statement included the assertion that no cheques were ever issued to "A. Serafin" or "A. Serafin Project Co Ltd" – as far as she was concerned, she added in cross-examination, they never worked for POSK. I agree with Mr Metzer that this was surprising evidence, but in my judgment it does not undermine her testimony about the cash register. I find that there was a cash register at all material times; that it was somewhat inadequate at the start; that it was not readily visible to customers; and that it was replaced in 2012.

214. The real issue is whether the Claimant made a clandestine profit from his joint running of the Jazz Café. He could have done so by ensuring that cash by-passed the cash register and went into a wooden drawer or cash box.

215. The evidence of Mr Wegrzynowski and Ms Cyparska went broadly speaking along the same lines. As far as they were concerned, the Claimant purchased alcohol from a Polish wholesaler and paid about £10 a bottle for spirits. These were then sold at £3.50 a shot, i.e. approximately £70 for a whole bottle. The Claimant boasted that he would easily make £300-400 every Friday and Saturday night, that he was working with a friend, and "each of them would make a few hundred pounds each weekend". Mr Wegrzynowski was cross-examined about this evidence but Ms Cyparska was not.

216. The Claimant denied under cross-examination that he bought alcohol wholesale: he mentioned "Booker" and "Hoti", the latter being a retailer run by Indians. He denied that there was any drawer under the counter for coins and notes.

217. The theft of monies from a charitable organisation such as POSK would be, if proved, a serious matter. The imputation contained in the article that the Claimant did precisely that is very serious. There is absolutely no love lost between Mr Wegrzynowski and Ms Cyparska, and the Claimant, and their evidence was not properly tested on this issue. The Claimant's cross-examination of the former witness was carried out under quite difficult circumstances: there was evident hostility shown by Mr Wegrzynowski, and his command of English was far from perfect. There was no Polish interpreter available.

218. In my judgment, POSK's accounting practices and procedures before the cash register was upgraded in 2012 were inadequate, and the possibility for diversion of funds clearly existed. I am satisfied that there was a drawer into which money was placed. I was not impressed by the Claimant's evidence that he did not buy alcohol wholesale. In my view, he could and should have done so, and it was more natural for him to use the Polish

wholesaler referred to by Mr Wegrzynowski. The latter's evidence, and the evidence of Ms Cyparksa, was convincing as to its level of detail, including the reference to the Claimant's friend, whom I infer was Mr Greliak.

219. The possibility clearly arises that the Claimant was boasting to Mr Wegrzynowski and Ms Cyparska about siphoning money out of the Jazz Café because he thought that might impress them in some way. I have already said that there is an element of the Walter Mitty about the Claimant, and that he is all about self-promotion. If he was really taking out such substantial sums, one would have thought that POSK would have noticed. Ms Stenzel was a reasonably truthful and reliable witness whose evidence was not undermined in all respects by her ill-advised attempt to help the Claimant in relation to Mrs Serafin's professional services. Overall, I do not think that the Claimant could have taken out of the Jazz Café as much money as he saw fit to brag about.

220. The article does not specify particular amounts. I remain conscious that this is a serious matter. I am driven to conclude that the Claimant did not properly account to the Jazz Café and POSK for all payments received, and that the fourth meaning is substantially true."

144. The Court of Appeal's analysis of the Judge's findings are set out below followed by the Appellants' observations.

145. They should be read in conjunction with the legal principles referred to in the main body of the Case at [54] relating to the restrictions on appellate review of findings of fact based on credibility assessment.

"90. There are a number of matters which served seriously to undermine the reliability of Mr Wegrzynowski's and Mrs Cyparska's evidence."

146. This does not amount to a finding that their evidence was incapable of belief. There would be no basis for such a finding. The Court of Appeal is not entitled to substitute its view on credibility and probability.

147. Further, the Court's approach lacks focus. Is it being suggested that they have made up the conversations with the Respondent or are merely mistaken as to what the Respondent said about the profits from the bar? As indicated above, the Respondent eventually admitted discussing the subject with Mr Wegrzynowski.

148. The Court then set out 5 credibility points, none of which come close to being destructive of their evidence. Most warrant the response: "so what?"

"First, their statements bore a remarkable similarity: they were not independent witnesses but had been in relationship together since 1998."

149. They were recounting the same conversations and the witness statements were not identical.

"Second, they had a serious axe to grind with the Claimant: they had had a major business dispute with the Claimant."

150. The Judge took into account that there was no “love lost”. His findings in relation to Polfood demonstrated that their sense of grievance was justified.

> “Third, at no stage did Mr Wegrzynowski ever report any concerns or suspicions to POSK during the previous 10 years, and Mrs Cyparska spoke to a member of the POSK council (it is not clear when) but took the matter no further.”

151. The fact that Ms Cyparska reported her concerns is, if anything, probative of her telling the truth, yet the Court regarded it as a factor against her, because she did not take it further. Why should she, especially given the nature of the organisation? There was no reason for Mr Wegrzynowski to report the same conversation. In any event, whether they reported the matter to POSK is, at best, of peripheral relevance. They had no obligation to do so.

> “Fourth, both said there was no cash register at the Jazz Club but the Claimant was adamant that there was a cash register (Day 1, p.60) and the Judge was eventually constrained to find (on the basis of Ms Stenzel's unimpeachable evidence) that there was a cash register [213], albeit one which was "upgraded" in 2012 [218]”

152. The pejorative words “eventually constrained” do not reflect the Judge’s finding on this issue. He also found that the cash register was not “readily visible” and a box or drawer under the counter was used. In the circumstances, it is difficult to see how the presence of a cash register can be used to attack the credibility of Mr Wegrzynowski and Mrs Cyparska.

> “Fifth, Mr Wegrzynowski's and Mrs Cyparska's evidence was not properly tested in cross-examination (as the Judge himself accepted [217]).”

153. This is not relevant to whether the Judge’s acceptance of the evidence should be overturned on appeal. Litigation is an adversarial process and the trial judge must make a binary decision on the balance of probability in the light of the evidence before him. The Judge was evidently alive to the seriousness of the allegation and the difficulties he faced in the trial process. He was entitled to find that the evidence of Mr Wegrzynowski and Ms Cyparska was convincing as to its level of detail.

> “91. Furthermore, there was strong evidence militating against the truth of the Defendants' allegation that the Claimant had stolen from the Jazz Club.”

154. The observations as made in [147-8] above apply in reverse. The evidence, if true, is nowhere near destructive of the truth of the imputation. Most of it fails to address the finding, which the Judge was entitled to make, that cash for drinks was not put in the cash register. Credibility factors against the Respondent’s witnesses are ignored.

"The Claimant himself gave evidence strenuously denying dishonesty. He explained he was one of several volunteers who worked at the Jazz Café. He explained that the price for the drinks was always the same for everyone and set by the Jazz Club not him (Day 1, p.72B). He explained that they had accounts with two wholesale alcohol suppliers (Day 1, p.72D-G). The Claimant therefore admitted that he (or the club) did buy wholesale."

155. The Respondent was not a mere volunteer. He ran the Jazz Café with Mr Greliak. None of the evidence as to the way in which the bar was run is inconsistent with the Respondent bypassing the cash register.

156. It appears that the Judge made an error in his passing reference at [218] to the Respondent denying that he bought alcohol wholesale. There were many genuine erroneous denials by the Respondent over the trial and two in relation to imputation 13(4), referred to in [137] and [140] above. It does not appear that the Judge gave any particular weight to his observation about buying wholesale. It is evident that his finding on imputation 13(4) was based on cash regularly bypassing the register (despite the Respondent's denial) and the admissions made to Mr Wegrzynowski and Ms Cyparska (first completely denied and then partially admitted).

"The Claimant called Ms Stenzel, who had responsibility for dealing with the Jazz Club takings and reconciling the till rolls. She gave evidence that there was a cash register from day one (Day 2, p.106A). In cross-examination, she did not say that there had been any discrepancies in the accounts or takings from the Jazz Club. There was no evidence that any money had gone missing. We find the Judge's observation, "I was not impressed by the Claimant's evidence that he did not buy alcohol wholesale" [218], difficult to follow in the light of Ms Stenzel's evidence."

157. The fact that Ms Stenzel did not find any discrepancies in the accounts or takings is not inconsistent with the Respondent by-passing the cash register. More generally, the Judge was entitled to find that POSK's accounting practices and procedures at the time were inadequate and the possibility for diversion of funds clearly existed.

158. In terms of credibility, given what was said about the Appellants' witnesses, it would have been appropriate to draw attention to the fact Ms Stenzel might well feel that it would reflect badly on her if the imputation was proved and therefore might to be inclined to believe and assert that everything was in order. The Judge had also been entitled to find at [219] that she had made an "ill-advised attempt to help the Claimant in relation to Mrs Serafin's professional services". In any event, the more fundamental problem with her evidence is its lack of relevance to what the Judge found to be true.

"The Claimant called Dr Leszek Bojanowski, POSK's health and safety adviser until 2005, and thereafter a member of its Executive Committee. He gave evidence that the Claimant had never had sole charge of the bar and he himself had occasionally helped out at the

Jazz Club. He said he knew some of the volunteers that worked there and regarded Claimant as an honest man."

159. This is even less relevant to the Judge's findings than Ms Stenzel's evidence. Further, there is greater scope for questioning his credibility. The Judge rejected his evidence in relation to the refurbishment of the basement which involved "attempts to protect" the Respondent which were "partly self-serving".[56]

"94. The evidence of Ms Stenzel and Dr Bojanowski stood in stark contrast to that of the witnesses called by the Defendants; both had worked at the Jazz Club or POSK, and had direct knowledge of its operations; and neither had an axe to grind (unlike Mr Wegrzynowski and Mrs Cyparska)."

160. The points made above are repeated.

[56] At [195]: "Dr Bojanowski's attempts to protect the Claimant in regard to Antec the Builder were also, at least in part, self-serving. The Claimant's effusive thanks to him in the POSK yearbook support that latter inference. Although Dr Bojanowski's credibility was enhanced by his early recognition that the Claimant's oral evidence gave cause for concern, him having sat through the cross-examination, his objectivity remained in question. I prefer Mr Lozinski's evidence on this subject."

Schedule C
Analysis of the Material relied for the Unfair trial finding

Set out below is Annex C from the Court of Appeal's judgment together with the Appellants' comments on each extract from the transcript relied on by the Respondent. Where a relevant passage is omitted from the extract reproduced in Annex C it is added in non-italics.

ANNEX C
EXTRACTS FROM THE TRANSCRIPT OF THE TRIAL
(taken from the Claimant's Skeleton Argument (para. 56ff.) (underlining added).
[Mr Justice Jay ("J"); the Claimant ("C")]

56. Day 1, p.95G (the afternoon of Day 1):

*J: **I am not sure I understand this at all, but you owed Rofood around £100,000?***
C: No, that was slightly before when I have £100,000 in debt with him, he didn't allow us anything without paying. ….
AM: Well I'm sure that is wrong.
[Crosstalk]
AM; Sorry, My Lord
[crosstalk]
*J: what about the first bit – the general observation on the clarity of his evidence **There is always a lack of clarity with your evidence which I am finding irritating**.*

Comment: (1) Judge attempting to clarify C's evidence, C having previously admitted owing £100,000 (p.95A) and then appearing to backtrack.
(2) Judge is short with C, but not rude.
Factual issue: C draining money from Polfood business accounts and was accused of cheating at a meeting of all the investors in Polfood (p.93B-D). Polfood owed debt to Rofood of around £100,000 (p.95A). C initially not answering Judge's question about whether Polfood owed Rofood £100,000, but C conceded that it did (p.96A-C). References to Rofood in the judgment are at [20], [113] and [175-7].

57. By the end of the first day [Day 1 p.99C], when the Claimant was mid-way through being cross-examined, the Judge indicated his hostility to the Claimant and Claimant's case, remarking:

*J: **It is not very ethical business behaviour this, but we will see where the weight of the evidence is leading. Because if I concluded that you are acting unethically as a businessman, I am not sure of the precise terms of the defamations are going to matter to you much. Do you understand? You will lose, but there is a lot more evidence yet.***

Comment: Judge is explaining the possible legal ramifications of acting unethically as a businessman in circumstances where all the imputations complained of concern a pattern of exploitation and untrustworthiness in a defamation trial where the Claimant is seeking to vindicate his reputation. The Judge acknowledges that there is a lot more evidence to follow.

Factual issue: Although he denies making the promise, C's position is that it is Rofood's risk to trade with him without a written guarantee (p.98D-E) and he agreed that he did this with Rofood as he did with many people (98E).

58. The Judge made repeated peremptory demands that he (the Claimant) produce documents the Judge wanted to see, supported by threats. He admonished the Claimant for not having all the documents and information the Judge needed in order to prove the Claimant's innocence:

See Day 2 p.11; Day 2 p.6: the Judge demands more documents; when the Claimant says he has "*five boxes, 14,000 receipts*" and he has no idea how to do it, the Judge retorts that he can "***do that by tomorrow morning***"; also Day 4, p.22; and Day 2 p.16:

J: ***Yes, well it is very simple. Where are the documents to show your investment of £365,000?***

C: I'll try to find that in a second, but-

J: ***Well, it should not take you a second. It should take you a nanosecond, because it is obvious that this point would be raised. Where are the documents? In the bundle?***

C: In the bundle, yes.

J: ***It should be at your fingertips*** *[Pause]* ***Well, you can deal with in re-examination I suppose, otherwise we will be here all day….***

J: I am warning you, you find that after lunch-

C: Yes.

J. – ***during lunch, and I want to see them at one minute past two, the page. If you do not show them to me, I will draw inferences. Do you understand what that means?***

C: Yes, I do.

Comment: The Judge is not making a demand for disclosure, but is pointing out the consequences for C of not providing a document. It is appropriate, indeed commonplace for the judge to draw such inferences in such circumstances (see [59-60] of the Case above).

Factual issue: C had told investors in Polfood that he would make a substantial personal investment in Polfood and C's case was that he had (pp.16, 24, 125-9). As referred to in the previous page of the transcript (p.15) and Judgment [127], the demand for the documentary evidence to support the alleged £385,000 had been longstanding. On p.15 C was cross-examined on Mrs Paczesny's complaint to the Insolvency Service which stated: "*Complaint: Mr Jan Serafin claimed £385,000 investment but never shown documentation to prove it*". C appears to be suggesting that the documents to prove it are in the bundle.

59. Day 2, pp.26-27; a portion of which is reproduced here:

AM: Or is the truth another £70,000-odd, £71,000 has been taken out of Polfood, taken back to Poland in ways which are non-traceable.

C: No it never happened like that. Whatever was taken to Poland was always traceable.

AM: Well we haven't found it.

J: ***You see, you knew these questions would be asked of you, because one thing you are not is stupid, okay? So, why are you not here today with all of this on***

your fingertips, saying, 'There is £31,500 which is not accounted for through the Sami Swoi facility. It was paid to X, Y and Z, and here is proof of it'? Why have you not got that for me, or do I just have to take your word for it every single time?
C: [No audible reply].
J: ***Are you going to be able to find it for me, in the documents?***
C: If they are taken from money to Poland, I'd have had to sign something which is sending it to Poland, but definitely is going to suppliers.
J: ***Well, you say that, but what is being suggested is not that you are funnelling money out of the company, probably to go to your family in Poland.***
C: No, that's not true. [Inaudible].
J: ***Well, I need it – I am not going to take your word for it, okay? I need you to prove it to me. A bunch of assertions is not going to cut any ice. I need proof. Strictly speaking, the burden of proof is on the defendant to prove that under the Defamation Act, but it is not going to work like that in the sense that I will draw inferences. So, you can get it over lunch. You can prove to me where these monies went.***

Comment: The points set out above are repeated.
Factual issue: C was accused of taking about £71,000 out of Polfood to Poland in a non-traceable way (p.26C). There was evidence to support the *prima facie* case that C was funnelling money out the company. The absence of documentation concerning the money taken out of Polfood was highlighted in the Defence and admitted in the Reply, but C appears to be suggesting that everything was traceable. The Judge's actual findings on this aspect of the case are careful and unimpeachable (see, for example, at [239]).

60. Day 2, p.36: When the Claimant was being cross-examined by the Defendants' Counsel (Mr Metzer QC) to the effect that the Claimant was dishonest, the Judge asked the Claimant:

J: Is this going to be more work over lunch, finding these accounts?
C: No.
J: But why do you not have them at your fingertips?
C: [inaudible]
J: Also, I want proof that they were filed at Companies House, documented proof.
C: I'll try to find out. I'm not quite sure that there's anything about it in the documents that they were filed.
J: Well, it is up to you. If you fail to provide it, I can draw an inference again.

Comment: The points set out above are repeated.
Factual issue: C withdrew £120,000 from Polfood (p.35C), but no accounts were filed with Companies House (p.35G). C insisted that the first year's accounts were there (p.35G-H). However, C was unable to find the accounts and also unable to find proof that they were filed at Companies House (p.36A-D). The absence of documentation concerning the money taken out of Polfood was highlighted in the Defence and admitted in the Reply.

61. The Judge joined in with cross-examination, not questioning the Claimant in a neutral way in order to understand his case, but with hostility, as an adversary.

See e.g. Day 2 p.45, when the Claimant was cross-examined by Ds' counsel about what he had told investors at a meeting. The Judge intervened as follows:

J: ***<u>This does not look great, frankly, because either you were lying to the investors, or you are lying to me. If you are lying to me, the consequences can be really awful, because you understand, I do not like being lied to. Which is it? Who were lying to?</u> Were you telling the truth to the investors and therefore lying to me, or were you lying to investors and telling the truth to me?***

C: That's accurate. I was lying to the investors. Because the documents that she lended (sic) the company, I don't – I can't dispute that. …..

AM: But you do understand that she [Henryka Wozniczka] says you're not telling the truth about what is was – she disagrees with you about whether it was a private loan or a loan to Polfood. You understand that the case against you –

C: She disagreed now, but she never disagreed before.

J: ***But do you understand what this is about, Mr Serafin? That you are bringing proceedings in the High Court-***

C:Yes.

J: ***-taking 10 days, and however long it takes for me to write the judgment. It will take some considerable time, seeking to uphold your reputation. <u>But your reputation is already beginning to fall to pieces, because you are a liar, and you do treat women in a frankly disgraceful way, on your own admission</u>. Have you thought through this carefully what you are trying to protect?***

C:[No audible reply].

J: ***It is up to you. We will carry on. You carry on asking questions, Mr Metzer.***

(The "frankly disgraceful way" of treating women referred to the fact that the Claimant had carried on relationships with two women at one time.)

<u>Comment</u>: The points set out above are repeated.

<u>Factual issue</u>: In a transcript of a recording of a Polfood investors meeting in September 2010, C states that a loan made by Henryka Wozniczka was to him, not the company (p.42H). His case and evidence to the court was that the loan was to the company (p.43A). After much obfuscation, C finally makes the admission that he was lying to his investors as indicated above.

"*The frankly disgraceful way*" of treating women was evidently far more than just having a relationship with two women at the same time. The Judge recognised in his judgment at [88] that it was not about C's sexual mores. The imputation was that he had exploited his hold on them for financial gain and had stolen their life savings. To add insult to injury, he suggested that Ms Wozniczka was lying when claiming that that the loan was private – the very claim he had made to the investors – as is apparent from the full extract of the transcript cited above.

62. Day 4 p.14: the Claimant wanted to cross-examine D1 as to the fact that he (the Claimant) had paid back all the money he owed Mrs Howard. The Judge stopped him, implying it was irrelevant, when in fact the loans to Mrs Howard were part of Ds' case (Amended Defence 14.21) and the fact that the Claimant had repaid her in full was part of C's case pleaded in the Amended Reply at paragraph 18.18.3.

Comment: The Judge can and should, as part of case management. control the relevance of questions by a party when determining what the disputed issues are.
Factual issue: D1 had no personal knowledge about whether money had been paid back by Ms Howard. He had not given any evidence about it. Whether or not the issue on which C wishes to ask questions was part of Ds' pleaded case is irrelevant. C had also been suggesting that "*we*" in the document refers to the Polish community (p.13F), but conceded that the document used "*I*" twice (p.13G) and also conceded that he had written it (p.14A). As a consequence, C was part of the process that selected Antec the Builder, the dormant company (p.14A-B). C was also trying to question a witness about something that was not in his pleaded case (p.14C-D).

63. When it came to light during Day 4 that an annex of a Bankruptcy Restrictions order was missing, the Judge asked Ct why they did not have it. When the Claimant said that he did not know where it was, the Judge's retort was accusatory, unjustified and wrong in law (in informing the Claimant that he should have disclosed "all relevant documents") [Day 4 p21E]

J: ***You are under an obligation to – You have not given proper disclosure in this case. You are under an obligation under the rules to give disclosure of all relevant documents. There are many documents which are relevant that I have not seen. Your failure to disclose them will give rise to an adverse inference. Do you know what that means?***
C: No.
J: ***I will hold things against you. You should have disclosed things. It is only fair. The same would apply the other way round, if the defendants did not give proper disclosure.***
C: I am missing what I can say, only that evidence was exchanged by my previous-
J: ***I am not accepting you blaming them.***
C: No. Just was missing a few things, not that many.
J: ***It is more than a few things.*** *…*

Comment: See above in relation to warnings as to adverse inferences. The warning was not just in relation to the annex to the BRO, as is evident from what the Judge said in the parts immediately following on from the above passage: documents relating to the fraudulent transfer of money from Polfood to Poland (p.22A, p.22D). C admitted that he had not disclosed invoices (p.22E). Judge confirms that there is no evidence of receipts (p.22G). The Judge made no criticism of C in relation to the non-disclosure of the annex. It was not wrong in law for the Judge to say that this document should have been disclosed.

64. At the time disclosure had been given, both sides had been represented by solicitors and counsel and no application for further disclosure had been made.

Comment: This misses the points set out above. It was evident from Ds' case that they were relying on the absence of proper accounting, among other matters, to draw the inference of improper conduct in relation to Polfood. As noted, C was represented by solicitors and counsel and could and should have disclosed such documents as he relied on at standard disclosure in opposition to Ds' case. It was not necessary for Ds to make an application for specific disclosure.

65. When an issue arose as to two discrepant emails – one produced by Ds and another copy in the trial bundle - the Judge threatened the Claimant with prosecution and imprisonment for forgery even before he had investigated the matter or permitted the Claimant to explain: Day 2 p.88D:

Mr Metzer QC: -and you, on oath, have said that you have not changed the document, you realise you could be liable for perjury?
C: Yes, I realise that, but I never changed any document. This is an email between her and me, and I'm not quite sure I've still got it. I had special file for those documents.
J: ***Well, I think this is so important that we should make available the electronic copy, because you understand what the consequences are. If I think that you are lying, I will send the papers to the Director of Public Prosecutions, and if you are found guilty by a jury, of perjury, you will go to prison. Do you understand?***
C: Yes, I do.
Mr Metzer QC: So, do you want to just-
J: ***Has the penny dropped? You understand?***
C: I do.

Comment: Judge is properly warning C of the risk of contempt of court.
Factual issue: There are two version of the email and C is accused of forging a version which paints Ms Wozniczka in an unattractive, aggressive light (p.87D-H). Ds' counsel was pointing out to C that if he states under oath that he did not change the document, that he could be liable for perjury (p.88C-D). There was a credible case that C had been guilty of forgery (see Judgment [142]-[150]). This part of the cross-examination was on the issue that is referred to at [143]-[145], where the version of the message in the bundle (emanating from the Claimant) appeared to have been altered from the original and C had given varying explanations for this.

66. Later, the Claimant explained that the emails were two different emails, which why the version he had produced was discrepant from Ds' copy. Even then the Judge treated the Claimant's explanation with hostility, scepticism and rudeness, telling him that he (the Claimant) "would have to demonstrate" that it was just a printing error.

Comment: It is necessary to consider the entire transcript on this subject. The Judge did not treat C's explanation with hostility and rudeness and was entitled to be sceptical. It was not unreasonable for the Judge to ask C to demonstrate that his explanation was true, as it would have been easy for him to do so. Ultimately, the Judge found in favour of C on this important and highly contentious issue.
Factual issue: See above.

67. When the Defendants themselves gave evidence, the Judge adopted an entirely different approach. At no point did he criticise either the Defendant's conduct, even when it was apparent that they had published defamatory allegations in the article for which they had no basis. He suggested answers to the witnesses, *e.g.* when the Claimant asked the First Defendant which of his (the Claimant's) family members in Poland had thought the Claimant was still married, the Judge interrupted to say to the witness, **"*You would not want to [name the person] anyway because the source is confidential*"** [Day 3 p119], even when the First Defendant had not claimed any such confidentiality.

The Judge also repeatedly let the Claimant know that the Claimant was not cross-examining to his satisfaction, telling him that his questions were **"*wasting [his] time*"** [Day 3 p117] (and again); or not relevant [Day 4 p80]; or not ***"proper"*** [Day 4 p8]; Day 4 p9] ("***That was not a brilliant question was it?***"); Day 4 p14 ("***So this is a hopeless line of questioning. The more you try and distance yourself from this, the worse it gets from your perspective***").

Comment: As a general observation, greater control on relevance is likely to be necessary where a litigant in person is cross-examining. C was prone to making lengthy submissions and speeches or asking irrelevant questions. The Judge was correct to observe that cross-examination had to be directed to Ds' research prior to publication and belief at the time of publication. In addition, C was repeatedly evasive when giving evidence and the Ds were not. In relation to Day 3 p.119 – The First Defendant did, in effect, claim confidentiality prior to the Judge raising it: "*the person is not listed in our case so, therefore I am not naming her*" and the circumstances in which he received the information were obviously suggestive of a confidential source. The other examples relate to questioning that was irrelevant to any issues properly falling for determination.

The overriding point is that the Judge did not deprive C from putting his case in relation to any matters centrally in issue.

68. The Judge tried to stop the Claimant cross-examining one of the Defendant's witnesses, a woman to whom the Claimant owed money. When the Claimant asked the witness why she had not sued him if she believed she was owed money, the Judge interrupted the cross-examination to support the witness and admonish the Claimant for his prior relationship behaviour [Day 4 p78-9]:

*J: **Yes. What is the point of her suing you if you are bankrupt? …. Complete waste of time suing you. You have not made any proposals, by the way, to repay this money, have you?***
C: Serafin: No.
*J: **You seem pretty craven about that. I think you need to get on with this because you are just making it worse, okay?***
C: Serafin: Yes.
*J: **Just speed up and come to a conclusion. It is not the best part of your case.***
C: I know.
*J: **You know? Well then why aggravate it even more?***
C: I know that this is my worst bundle. [sic]
*J: [inaudible] **you have acted completely in the wrong and you were with at least one other woman at the time, when the money was lent to you?***
C: Yes, I accept it.
*J: **It was deplorable behaviour and I am going to say so in my judgment.***
C: Yes, I know.
*J: **Well, are you going to stop asking questions or not?***

Comment: The short point is this was indeed "*a woman to whom the Claimant owed money*", which he had inveigled while in a relationship with her. The fact she had not sued him was irrelevant and he was a bankrupt. The Judge was entitled, if not obliged, to protect this witness from obviously irrelevant questions. The Judge was short, but not rude. C had accepted in cross-examination that he had behaved badly towards

her and the Judge was entitled to take this and any improper questioning of her into account in his judgement (see [69] of the Case re litigation conduct).

69. The Judge appeared to regard hearing from the Claimant in any capacity as a waste of time. Halfway through the trial, during Day 4, counsel for Ds suggested to the Judge that he might ask the Claimant which parts of the article he still maintained were false [Day 4, p20]. The Judge's response was curt: "***I would not even bother, Mr Metzer. I think we have got to assume every point is lies***". It was to Claimant's credit that he managed to continue to present his case in the face of this show of contempt for him by the bench.

Comment: This misinterprets the Judge's meaning. The context was Ds' counsel informing the Judge that he will be asking C which parts of the article the C still maintains are false (p.20C-D). The Judge replies: "*I think we have got to assume every point is lies*" (p.20D) In other words, Ds' counsel must proceed on the basis that C will say that the article is completely untrue. The Judge was plainly not saying that it had to be assumed that C was telling lies.