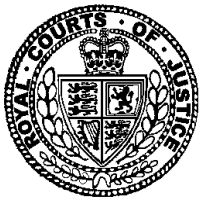

Neutral Citation Number: [2022] EWHC 3542 (KB)

Case No: QB-2021-001248

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

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 1 November 2022

Before:

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between:

(1) SIMON BLAKE
(2) COLIN SEYMOUR
(3) NICOLA THORP

Claimants

- and -

LAWRENCE FOX

Defendant

- -
- -

Heather Rogers KC and **Beth Grossman** (instructed by **Patron Law Ltd.**) for the **Claimants**
Greg Callus (instructed by **Gateley Tweed**) for the **Defendant**

- -

APPROVED JUDGMENT

- -

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MR JUSTICE NICKLIN:

1. The three Claimants in this claim have brought a claim for libel against the Defendant. By a counterclaim, the Defendant has brought a claim for libel against the three Claimants.

2. The claim and the counterclaims all relate to postings on Twitter. The relevant Tweets, and the circumstances in which they came to be published, are set out in the judgment I gave refusing the Defendant's application for trial by jury ("the Mode of Trial Judgment"): **[2022] 4 WLR 77** [5]-[10].

A: The claim and the counterclaim

(1) The claim

3. The Claim Form was issued on 1 April 2021. The Claimants allege that the Defendant's Tweets on 4 October 2020 libelled them, and they claimed remedies including damages and an injunction. Particulars of Claim, dated 6 April 2021, set out the detail of the Claimants' claims. The Claimants contended that each of the Defendant's Tweets bore the natural and ordinary meaning that each Claimant:

> "… was a paedophile who had a sexual interest in children and had (or was likely to have) engaged in sexual acts with or involving children, such acts amounting to serious criminal offences".

(2) The Defence and Counterclaim

4. On 21 May 2021, the Defendant filed a Defence and Counterclaim. In his Defence, the Defendant did not dispute the fact of publication of his Tweets on 4 October 2020 or that the words of each Tweet had referred to the relevant Claimant. He did dispute the natural and ordinary meaning of the Tweets and, in particular, whether they were defamatory of the Claimants.

5. He contended that an ordinary reasonable reader would have understood that the Defendant's words were "*tit-for-tat vulgar abuse*" which did not bear a literal meaning that the Claimants were paedophiles and the Defendant: "*was giving the Claimants a taste of their own medicine*". As such he contended that his Tweets were not defamatory of any of the Claimants.

6. As to the natural and ordinary meaning, he contended:

> "The reader's understanding of [his Tweets] (and each of them, if not all were published to a particular publishee) will have been affected by [matters set out by way of context]. Different publishees, depending how and when they read the relevant Responsive Tweet(s) would have been aware of these matters at different levels of detail. However, all publishees would have been aware of the following minimum irreducible features of the words complained of:
>
> (1) Each [of the Defendant's Tweets] was made by the Defendant in direct response to an allegation of racism against him by the particular Claimant.

(2) There was no apparent cause or reason for the relevant Claimant to allege that the Defendant was a racist.

(3) The Defendant retaliated by calling the relevant Claimant a 'paedophile'."

7. The Defendant contended that the publication of each Tweet had not caused, nor was each likely to cause, serious harm to the reputation of the Claimants or any of them, relying principally on the clarification he had published within an hour of the publication of the original Tweets and the deletion of his Tweets the following morning.

8. In paragraph 35 of his Defence, the Defendant advanced his case on meaning of the Tweets:

> "In these circumstances an ordinary reasonable reader would have understood that the Claimants' words for tit-for-tat vulgar abuse and did not bear the literal meaning that the relevant Claimant was a paedophile. Ordinary and reasonable readers of the words complained of will have understood the rhetorical point the Defendant was making, namely that it was wrong to throw around seriously defamatory allegations on Twitter without any factual foundation and that the Defendant was giving the Claimants a taste of their own medicine (accusing a serious but outlandish term which if a true allegation would not be made in these terms)".

9. The Defendant relied upon a substantive defence of reply-to-attack qualified privilege on the grounds that each Claimant had posted a Tweet calling him a racist; and made clear that he was not alleging against any of the Claimants that s/he was a paedophile.

10. By his counterclaim, the Defendant brought a claim for libel against each Claimant arising from each Claimant's Tweet published on 4 October 2020. He alleged that each of the Claimant's Tweets was defamatory of him and that the meaning(s) of the relevant Tweets were as pleaded as follows:

> "The [First Claimant's] Tweet and the [Second Claimant's] Tweet each meant and was understood to mean that the Defendant was a racist.
>
> The [Third Claimant's] Tweet meant that the Defendant was unequivocally and undeniably a racist".

11. In a separate paragraph the Defendant added by way of clarification:

> "Although 'Racist' is an ordinary English word requiring no definition, for the avoidance of any doubt it means someone who is hostile to people of different ethnicities, races or skin colours and/or who believes that some racial or ethnic groups or people with certain skin colours are inferior to others and/or who believes that people should be segregated based on their racial or ethnic origins or the colour of their skin".

B: The direction of trial of preliminary issues

12. After the Defendant's application for trial by jury was dismissed, I made directions for the trial of various preliminary issues on 26 May 2022. The order provided:

> "There shall be a trial of the following preliminary issues ('the preliminary issues')

Issues in the claim

(a) What natural and ordinary meaning or meanings does each publication complained of (in Paragraphs 11-13 of the Particulars of Claim) bear in relation to the relevant Claimant?

(b) Is the meaning (or are the meanings) found at (a) in relation to each publication defamatory at common law of the relevant Claimant?

(c) Is the publication complained of in the meaning (or meanings) found at (a) in relation to each Claimant a statement of fact or a statement of opinion?"

Issues in the counterclaim

(d) What natural and ordinary meaning (or meanings) does each publication complained of (Particulars of Claim Paragraph 10, Defence and Counterclaim Paragraphs 20-24 and 76) bear in relation to the Defendant?

(e) Is the meaning or are the meanings found in (d) above defamatory of the Defendant at common law?

(f) Is the publication complained of in the meaning or meanings found in (e) above a statement of fact or a statement of opinion?

(g) In so far as any of the publications complained of is a statement of opinion, does that publication indicate whether in general or specific terms the basis of that opinion?"

13. There was a short argument, at the hearing on 26 May 2022, as to whether the Court should give directions regarding disclosure and possible expert evidence to resolve the preliminary issues. The Defendant wished to admit evidence as to the way in which the relevant Tweets would have appeared to various categories of readers and contended that this evidence was admissible as "*context*" to the relevant publication. I gave a short judgment on that occasion: [2022] EWHC 2726 (QB). I declined to give directions for disclosure and evidence. I said:

> [15] The evidential enquiry which the Defendant proposed to conduct, and which the proposed directions were designed to support, was purportedly to establish the "context" in which the relevant Tweets would have appeared to readers. It is well-established that the natural and ordinary meaning of a publication must be ascertained having proper regard to the context in which it appeared: ***Stocker***. However, there are limits to what is admissible as context. It does not extend to context that would vary reader by reader. Such a publishee-specific inquiry may be relevant to damages/serious harm, but it is neither relevant to, nor admissible in, the determination of the natural and ordinary meaning.
>
> [16] In the objective assessment of the natural and ordinary meaning, the context relevant to this exercise must be the context in which the publication appeared to the notional ordinary, reasonable reader. The principles are set out fully in ***Riley -v- Murray*** **[2020] EWHC 977 (QB)** [12]-[18].

Riley -v- Murray was a Twitter case, and it led me to observe in that case [28(v)]:

> "The Tweet was self-contained and stood alone. It would have appeared - and been read - on its own in the timelines of the Defendant's followers. What appeared in the immediate context in the timelines of the Defendant's followers would have depended entirely on who else each of them followed. In that respect, Twitter is perhaps one of the most inhospitable terrains for any argument based on the context in which any particular Tweet appeared in a reader's timeline."

14. There remained a small dispute between the parties as to the extent to which hyperlinks to the original Sainsbury's announcement that were contained in some of the Tweets are admissible as context. On analysis, neither side contended that the Sainsbury's announcement had any material impact on the issues I have to decide save, potentially, in relation to the issues of the decision as to fact and opinion.

C: The Claimant's case on the preliminary issues raised in the Counterclaim

15. As the Defendant has filed a Defence to the Claimants' claim, his position on the preliminary issues is set out above. The Claimants have not yet filed a Defence to the Defendant's Counterclaim. As a result, as part of the directions given in the order of 26 May 2022, the Claimants were required to set out their case on the preliminary issues.

16. On 30 June 2022, in compliance with that order, the Claimants filed their statement of case on the preliminary issues. The Claimants' position on the preliminary issues is as follows:

    i) As to the natural and ordinary meaning of each of the Claimants' Tweets:

        a) The First Claimant contends that the meaning of his Tweet is that: "*the Defendant's latest Tweet about Sainsbury's was a 'mess' and showed that he was a 'Racist twat'*".

        b) The Second Claimant contends that the meaning of his Tweet is that: "*the Defendant's response to the action taken by Sainsbury's was cringeworthy and showed him to be a racist*".

        c) The Third Claimant contends that the meaning of her Tweet is that: "*the Defendant's public statements, including his response to Sainsbury's, showed him to be unequivocally, publicly and undeniably a racist*".

    ii) Each Claimant denies that his/her Tweet bore a meaning that was defamatory of the Defendant at common law and each contends that his or her Tweet constituted: "*tit-for-tat vulgar abuse of the Defendant*".

    iii) As to fact/opinion, each Claimant contends that his or her Tweet was, and would have appeared to readers to be, an expression of opinion.

    iv) Finally, as to whether relevant Tweets indicated in general or specific terms the basis of the opinion, the First and Second Claimants rely upon the fact that they had quote-Tweeted the Defendant's Sainsbury's Tweet (see [6] Mode of Trial Judgment). As such, the basis of the expressed opinion would have been plain to all readers. The Third Claimant, who did not quote-Tweet or otherwise include the Defendant's Sainsbury's Tweet, nevertheless contends that her Tweet was a

response to what the Defendant had said publicly, including his Sainsbury's Tweet. She contends: "*The natural and ordinary reader would have understood from the third Claimant's Tweet that the Defendant had made public statements included (sic) his [Sainsbury's] Tweet and other statements*". The other statements relied upon are identified in the Particulars of Claim.

17. Given the substantive defence that has been advanced by the Defendant, it is perhaps necessary to explain why the Court has directed the resolution of some of the preliminary issues arising from the Claimants' claim.

18. The natural and ordinary meaning of a publication, if found to be defamatory at common law, is important not only for the parameters of any defence of truth but also in the assessment of damages on the assumption that the Claimant is able to establish serious harm to reputation under s.1 Defamation Act 2013. Here, the Defendant does not intend to advance a defence of truth in respect of his Tweets about the Claimants. Expressly, he has made clear that he does not allege that the Claimants are, in fact, paedophiles. He also does not advance the defence of honest opinion. So why should the Court resolve the question of whether the Defendant's Tweets make an allegation of fact or an expression of an opinion? The answer to that is that the decision has a potential bearing, as I have said, on the issues of serious harm to reputation under s.1 Defamation Act 2013 and, if that point is reached, also as to damages. If the hypothetical ordinary reasonable reader considered that the Defendant's Tweets simply expressed his opinion that the Claimants were paedophiles, then the objective finding could be relevant to those issues. That explains why the Court has directed the resolution of issue (g) in respect of the counterclaim, even though the Defendant is not intending to rely upon defences of either truth or honest opinion.

19. The Claimants contend that their Tweets about the Defendant were an expression of opinion. One of the elements that must be established for that defence under s.3 Defamation Act 2013 is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion: s.3(3). The question whether the relevant Tweet indicated whether in general or specific terms the basis of the opinion is an objective one and an issue on which no evidence beyond the publication itself is admissible. It can therefore conveniently be resolved as a preliminary issue along with the other preliminary issues that are commonly now resolved in defamation claims. Ultimately, if one or more Claimants fails on this issue then the relevant Claimant would not be able to rely upon a defence of honest opinion as s/he would have failed to have established the necessary element of the defence under s.3(3) Defamation Act 2013.

D: Legal principles

20. The core principles are not in dispute between the parties. Inevitably, some of the principles have more application in this case and some of them deserve closer analysis and consideration of other authorities.

(1) Natural and ordinary meaning

21. The approach to assessing the single natural and ordinary meaning is set out in ***Koutsogiannis -v- The Random House Group Limited*** **[2020] 4 WLR 25** [11]-[16] as approved by the Court of Appeal in ***Corbyn -v- Millett*** **[2021] EMLR 19** [8] and ***Riley -v- Murray*** **[2023] EMLR 3** [11].

22. Ordinarily, on the determination of the objective single meaning, no evidence is admissible beyond the publication itself: ***Koutsogiannis*** [12(ii)] and [12(x)] and ***Riley -v- Murray*** [12].

23. The context in which the words appeared to the hypothetical ordinary reasonable reader or viewer is very important to the determination of the natural and ordinary meaning, as is the medium in which the words appeared. ***Stocker -v- Stocker*** **[2020] AC 393** [39]-[46]. The nature of the medium of publication is relevant to the ***Koutsogiannis*** principles [12] (i), (iv), (v), (vi) and (ix). Commenting particularly upon social media platforms, Lord Reed noted, in ***Stocker*** [43]:

> "…it is wrong to engage in elaborate analysis of a Tweet. It is likewise unwise to parse a Facebook posting for its theoretically or logically-deducible meaning. The imperative is to ascertain how a typical (i.e. an ordinary reasonable) reader would interpret the message. That search should reflect the circumstance that this is a casual medium. It is in the nature of conversation rather than carefully-chosen expression and that it is pre-eminently one in which the reader reads and passes on".

24. Quoting from my judgment in ***Monir -v- Wood*** **[2018] EWHC 3525 (QB)**, Lord Reed added:

> [44] … People scroll through [social media] quickly. They do not pause and reflect, they do not ponder on what meaning the statement might possibly bear. Their reaction to the post is impressionistic, is fleeting. Some observations made by Nicklin J are telling. Again at paragraph 90 [in ***Monir***] he said:
>
> > 'It is very important when assessing the meaning of a Tweet not to be over-analytical…largely the meaning that an ordinary reasonable reader will receive from a Tweet is likely to be more impressionistic than, say, from a newspaper article which, simply in terms of the amount of time that it takes to read, allows for at least some element of reflection and consideration. The essential message that is being conveyed by a Tweet is likely to be absorbed quickly by the reader'".
>
> [45] And Nicklin J made an equally important point at paragraph 92 where he said (about arguments made by the Defendant as to meaning) "*…these points only emerge as a result of close analysis or someone pointing them out. An ordinary reasonable reader will not have someone by his or her side making points like this*".

25. Lord Reed's reference to "*context*" in ***Stocker*** is capable of being misunderstood. In ***Riley -v- Murray*** **[2020] EWHC 977 (QB)** [10] I noted the "*creeping tendency, under the guise of 'context', to attempt to adduce evidence extrinsic to the words complained of on the issue of the natural and ordinary meaning*". After analysis of the authorities, I concluded that three categories of material can be considered when determining the natural and ordinary meaning of a publication [16]:

i) **Matters of common knowledge**: facts so well-known that for practical purposes everybody knows them.

ii) **Matters that are to be treated as part of a publication**: although not set out in the publication itself, material that the ordinary reasonable reader would have read (for example, a second article in a newspaper to which express reference is made in the first, or hyperlinks).

iii) **Matters of directly available context to a publication**: this has a particular application where the statement complained of appears as part of a series of publications - e.g. postings on social media which may appear alongside other postings, principally in the context of discussions.

26. A proper understanding of the limits of context requires as a starting point acknowledgement that the exercise of determining the natural and ordinary meaning of a publication is objective. It is the meaning that the notional hypothetical ordinary reasonable readers or viewers would understand the words to bear. As I noted in the Mode of Trial Judgment [21]:

> "The *actual* meaning that individual readers understood a particular publication in the specific context in which it was presented to them is, of course, a highly relevant material factor when the court is considering serious harm to reputation and ultimately, if it arises, the question of damages. It does not arise in - and is not relevant to - the determination of the single natural and ordinary meaning".

(2) Defamatory: Common law

27. There is no dispute as to the applicable principles, they are set out in Warby LJ's judgment in ***Corbyn -v- Millett*** [9].

(3) Fact/opinion

28. The principles are set out in ***Koutsogiannis*** [16]-[17], approved by the Court of Appeal in ***Corbyn -v- Millett*** [12]. As the Court of Appeal noted in ***Corbyn*** [13]:

> "Although it may seem logical to consider first whether a statement is defamatory and only then to consider when a defence of honest opinion is available, this may not always be the best approach. That is because a statement of opinion may be less reputationally damaging than an allegation of fact, so 'the answer to the first question may stifle the answer to the second': ***British Chiropractic Association -v- Singh*** **[2011] 1 WLR 133** [32]. It has been common for the two issues to be considered in the reverse order, as Saini J did in this case".

29. In ***Triplark Limited -v- Northwood Hall (Freehold) Limited*** **[2019] EWHC 3494 (QB)** [17], Warby J explained that the overall impression created by the publication is likely to be the best guide whether a 'bare comment' would be understood to be an allegation of fact or an expression of opinion:

> "There is also something of an overlap between the question of whether a statement is one of opinion, and the second requirement of the statutory defence under s.3 of the Act, namely 'that the statement complained of indicated, whether in general or specific terms, the basis of the opinion' (s.3(3)). Although an inference may amount to a statement of opinion, the bare statement of an inference, without reference to the facts on which it is based, may well appear as a statement of fact: see ***Kemsley -v- Foot*** **[1952] AC 345**. As Sharp LJ, DBE, pointed out

> in ***Butt*** at [37], not every inference counts as an opinion; context is all. Put simply, the more clearly a statement indicates that it is based on some extraneous material, the more likely it is to strike the reader as an expression of opinion".

30. The ultimate "*question*" or "*determinant*" will always be "*how the statement would strike the ordinary reasonable reader*": ***Butt -v- The Secretary of State for the Home Department*** **[2019] EMLR 23** [39]. The process is highly fact-sensitive and reference to earlier decisions are only ever likely to provide general assistance as to the broad principles to be applied: ***Corbyn*** [19]. The Court should not adopt "*prescriptive rules*" as to the decision as to whether the statement makes or contains allegations of fact or expressions of opinion. In ***Zarb-Cousin -v- Association of British Bookmakers*** **[2018] EWHC 2240 (QB)** [26], I said this:

> "In most cases it will be the context in which the words appear or are spoken that will provide the answer to whether the words are or would be understood to be opinion or whether the statement is 'bare comment' and therefore potentially liable to be treated as an allegation of fact. Asking a question whether the statement is 'verifiable' is perhaps a dangerous gloss on this approach".

31. The boundary between allegations of fact and expressions of opinion is notoriously difficult to draw. It is perhaps uncontroversial to state that a publisher is "*not permitted to shelter behind the defence of fair comment when the defamatory sting is one of … fact*": ***Hamilton -v- Clifford*** **[2004] EWHC 154 (QB)** [60]. However, bright-line rules are likely to prove elusive, as it is well-recognised that deductions or inferences of fact may, depending on context and their overall presentation, nevertheless be found to be expressions of opinion: ***Butt*** [34]-[37].

32. Ms Rogers KC submitted that there are some words, and she gave examples of "*fascist*", "*antisemitic*" and "*racist*", that have, necessarily, an inherent evaluative quality which reflects the speaker's value judgment. Such words are likely to strike the ordinary reader as being in the nature of an opinion. She referred to Warby J's decision in ***Swan -v- Associated Newspapers Limited*** **[2020] EWHC 1312 (QB)** in which the Judge decided that an imputation that the Claimant had made "*racist*" comments was an expression of an opinion. He noted [57(1)]:

> "The term 'racist' is capable of a range of meanings. It does not have any defined meaning as a matter of law. Some forms of speech and behaviour are criminal because of their tendency to stir up racial hatred, or they are criminal – or more gravely criminal – because of racial motivation; but Mr Hirst has not identified any criminal offence that is cast in terms of 'making racist comments'. In any event, the 'charge' in the Article is not that the claimant has committed a public order offence, or any racially aggravated offence. In its context, it represents an evaluation in everyday language of the statements quoted in the Article and others, alluded to but not identified. In ordinary language the term 'racist' may refer to speech or conduct that is motivated by racial prejudice, or to statements or behaviour that are objectively discriminatory, whatever their motivation. Discrimination may be direct or indirect. There is a range of views about the proper application of the term. Some, for instance, deplore the use of stereotypes about nationalities, or 'cultural appropriation' as racist. Others would regard that as a misapplication of the word."

33. I accept Ms Rogers KC's submission on this point. It has some importance to the issues that I have to decide. By contrast, some allegations do tend to suggest to ordinary readers that they are factual in nature. Typically, allegations of the commission of a criminal offence, for example rape, may be thought to be ones that are quintessentially factual in nature: ***Hamilton -v- Clifford***.

34. Nevertheless, neither of these can be regarded as a strict rule. For example, if a person alleged that a government minister had "*murdered*" thousands of people because of his or her handling of the COVID pandemic, no-one could sensibly take that to be a literal accusation that the minister was guilty of the criminal offence of murder. By the same token, even the use of heavily value-laden judgment terms in a publication may not prevent a finding that the overall effect of a publication is to convey an allegation of fact: see ***Ware -v- Wimborne-Idrissi*** **[2021] EWHC 2296 (QB)** [77], where an allegation that the Claimant's "*journalistic record includes right-wing racist work*" was found to be an allegation of fact.

35. Finally, the issue of context - and its proper limits - potentially raises its head again on this issue. I can take the law from *Gatley on Libel and Slander* (13th edition, Sweet & Maxwell, 2022) §13.10, under the heading "*Context provided by the specific publication only*" (with footnotes omitted):

> "When distinguishing between fact and opinion, the judge is confined to the context of the specific publication in respect of which the action is brought. It is not legitimate to look outside the publication in which the statement complained of is made for 'Wider' context. In ***Telnikoff -v- Matusevitch*** **[1992] 2 AC 343**, the plaintiff wrote an article critical of the recruitment policy of the BBC Russian service and the defendant responded with a letter to the editor of the newspaper accusing him of racism. If the letter alone was looked at, the statement was capable of being read as an assertion of fact, but if looked at along with the article it was plainly comment. The majority of the House of Lords held the question had to be judged solely within the context of the letter without reference to the article, with the result the defence of fair comment should not have been withdrawn from the jury on the ground that it was bound to succeed. It was open to the jury properly to conclude that the words comprised a defamatory imputation of fact in which a defence of fair comment would not run at all.
>
> Courts have considered the application of this rule in the context of online publications that include hyperlinks to other material. In ***Greenstein -v- Campaign Against Antisemitism*** **[2019] EWHC 281 (QB)**, the claimant argued that in determining whether a defamatory statement was an expression of an opinion or an allegation of fact, no reference should be made to hyperlink material, but Nicklin J considered this was 'to state the principle too widely'. He considered that: 'The extent to which the hyperlink material and article would be read by the ordinary reasonable reader does not admit that hard and fast rule. It is a matter to be judged on the facts of each case'. Hyperlinked material should not be automatically excluded when - in a particular context - the ordinary reasonable reader might be expected to follow the hyperlink and access the contextual material. Conversely, neither should it be assumed that because hyperlinks to outside material are present in the publication, they will necessarily be clicked on or any hyperlinked material read".

36. The point about the hyperlinks in that section is that they are intrinsic to the publication. On the determination of meaning, the question is to decide whether the ordinary reasonable reader would have followed the links (or at least some of them) so that what is found in the link should be included in consideration of the overall meaning. The presence of hyperlinks may, depending upon the overall presentation of the publication, reinforce the impression that the person is expressing an opinion. The point being made in the passage from *Gatley* is that reliance cannot be placed on truly extrinsic material to establish that the publication was, or contained, an expression of opinion. That decision must be made based on the *intrinsic* material available in the publication including, potentially, hyperlinks included in the text.

(4) Does that publication indicate, whether in general or specific terms, the basis of the opinion?

37. Section 3 of the Defamation Act 2013 provides (so far as material):

> "(1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
>
> (2) The first condition is that the statement complained of was a statement of opinion.
>
> (3) The second condition is that the statement complained of indicated whether in general or specific terms the basis of the opinion.
>
> (4) The third condition is that an honest person could have held the opinion on the basis of:
>
> (a) any fact which existed at the time the statement complained of was published.
>
> (b) anything asserted to be a fact in a privileged statement published before the statement complained of.
>
> (5) The defence is defeated if the claimant shows the defendant did not hold the opinion…"

38. There is little authority on the interpretation of the second condition of the honest opinion defence under s.3. That element of the defence - now embodied in s.3(3) – was formerly part of the common law defence of honest opinion before the defence was put on a statutory footing in the Defamation Act 2013: see ***Joseph -v- Spiller*** **[2011] 1 AC 853** [3] and [105]. ***Joseph***, in this respect, represented a liberalising of the defence which had previously required that the comment or opinion must explicitly or implicitly indicate at least in general terms the facts on which the comment was being made and, critically, that the reader or hearer should be in a position to judge for him or herself how far the comment was well-founded. That last element was removed from the common law defence of honest opinion by the Supreme Court in ***Joseph*** and the terms in which s.3(3) were enacted reflect that more generous approach.

39. In ***Riley -v- Murray***, Warby LJ held [44]:

> "…the only question raised by s.3(3) of the 2013 Act is whether the statement complained of indicated the basis of the opinion which it contained. That is a question of analysis or assessment which turns exclusively on the intrinsic qualities of the statement complained of. If the statement did not indicate the basis of the opinion, the analysis stops there and any defence fails. If it did, the condition is met and the analysis moves on to the next stage…"

40. Ms Rogers KC submitted that when considering whether the basis of any opinion has been indicated in a statement in a Twitter case, the Court should not take too narrow an approach. She submits that the Court should have regard to the realities of that medium and the circumstances of the publication. She argues that the basis of the opinion may not be in the Tweet, but in the surrounding material, including matters of common knowledge. A Tweet, she submits, is unlikely to stand alone and is inherently likely to be referring, explicitly or otherwise, to other material available. Finally, she contends that it is important, given honest opinion's important role in protecting freedom of expression, that the defence should not be applied too narrowly.

41. For the Defendant, Mr Callus submits that the assessment required under s.3(3) is objective, as stated in the Explanatory Notes of the Defamation Act 2013, at paragraph 23.

42. In my judgment, Ms Rogers KC's submissions may be stretching the definition of the word "*indicated*" beyond what it can reasonably bear. There may be cases where an event that is being commented upon is of such massive significance that the Court can treat it as being a matter of common knowledge. In such cases the element of indication may be found to be supplied. It is a point that will assume importance in relation to the third Claimant's Tweet and I will consider the arguments in the context of that below.

E: Submissions

43. Faithful to the requirement not to engage in over-analysis, I do not intend to set out the full submissions I have received. Both sides have submitted comprehensive skeleton arguments and have amplified their submissions this morning. What I set out below is my attempt to capture the essence of their submissions.

44. The Claimants submit that the Defendant's allegation is expressly that each of them was a 'paedophile'. It is an allegation of fact, being an allegation of criminal conduct. There is nothing in the context of the publication that could lead to a different conclusion.

45. The Defendant submits that his Tweets would be understood to be "*rhetorical comment by [the Defendant] to the effect that the allegation of racism that had been levelled against him was as baseless and abusive as an allegation that the person was a paedophile*". Each of the Tweets was clearly responsive to the relevant Claimant's Tweet alleging that he was a racist. Mr Callus argued that the words in each of the Defendant's Tweets could only operate as a meaningful or relevant response to the racism allegation if his Tweet meant in effect the opposite of its literal meaning. He argues that the Defendant would have been understood as suggesting that: "*two can play at the game of making extremely serious allegations that have no factual basis*".

46. The Defendant accepts that, if the Court finds that the natural and ordinary meaning of his Tweet is as pleaded by the Claimants, then that is defamatory at common law and

an allegation of fact. If, however, the Court finds the Tweets are nothing more than rhetorical comment, then they are not defamatory, and the issue of fact and opinion does not arise.

47. As to the Claimants' Tweets alleging the Defendant was racist, the Defendant contends that this was an allegation of fact. A substantial dispute between the parties has been raging for some time as to what the term "racist" means in this context. If, as the Defendant urges, the Court finds that the allegation is a factual one – and not an expression of opinion – then he has advanced his case as to what he says the Court should say that word means, as set out in his counterclaim (see [11] above).

48. In support of the allegation that this was an allegation of fact rather than an expression of an opinion, the Defendant argues:

i) None of the Tweets was published as part of a longer piece or article. The words complained of comprised the totality of the publication.

ii) None of the Tweets used language to signal that the allegation of "*racism*" was an expression of opinion, for example, being marked as a comment piece, or using words like "*I believe*" or "*In my opinion*".

iii) None of the Tweets made any direct reference to the basis of the allegation.

iv) None of the Tweets explained the use of the word "*racist*" or used any words to suggest that it was being used in an idiosyncratic sense, such that might signal to readers that the allegation was an individual's personal view.

v) The First and Second Claimants' Tweets made bald allegations that the Defendant was racist. These would be understood to be factual allegations. As regards the Third Claimant's Tweet, the inclusion of the words: "*unequivocally, publicly and undeniably*" make clear that the allegation is one of fact.

49. On the final issue – whether the Tweets indicated in general or specific terms the basis of the opinion –the Defendant contends that none of the Claimants' Tweets indicated the basis for the allegation. The accusation of racism was bare assertion. The First and Second Claimants' Tweets did refer to the Defendant's prior Tweet calling for a boycott of Sainsbury's, but that Tweet expressly condemned racial segregation and discrimination. It could not, therefore, be a basis for any allegation of racism.

50. The Claimants argue that each of their Tweets was and would have been understood to be an expression of opinion. It was inevitably a value judgment. The basis for the opinion was sufficiently indicated. In the First and Second Claimants' Tweets, they included the Defendant's Tweet about boycotting Sainsbury's. As for the Third Claimant, although she did not include the Defendant's Sainsbury's Tweet, she contends that, where a Tweet refers to a person who engages in public debate, the reader will readily appreciate that the Tweet indicates that the basis of the opinion is to be found in what the person has said.

F: Decision

51. The meaning of the Defendant's Tweets is that each of the Claimants was a paedophile, someone who had a sexual interest in children and who had or was likely to have engaged in sexual acts with or involving children, such acts amounting to serious criminal offences. That, in my judgment, was an allegation of fact which the Defendant accepts is defamatory at common law.

52. I reject the Defendant's argument that the hypothetical ordinary reasonable reader would have understood his Tweet to be making only a rhetorical comment about the baselessness of the Claimants' allegations of racism against him. That is *one* meaning that *some* readers may have thought his Tweets meant. It is not the natural and ordinary meaning. It is an extrapolation from the primary and obvious meaning of the words. It can only be arrived at after some interpretation. In that respect I consider the principles to be clear. Such an interpretation would only emerge after some analysis. For many readers it is likely to be arrived at only if they had someone prompting them to consider whether the Tweet had a second theoretically or logically deducible meaning beyond its plain meaning. That is not the natural and ordinary meaning of the Tweet. The Defendant may have intended to convey this second meaning, but his intention is irrelevant to the objective single meaning of the Tweet.

53. I also reject the Defendant's arguments that an allegation that someone is a paedophile is mere abuse. Neither party cited authorities on mere abuse. I have looked today at the passage in *Gatley* on mere abuse (§3-037) in which the authors say:

> "Similar principles apply to vulgar abuse, the question being whether the circumstances in which the words were used would convey a defamatory imputation to reasonable listeners who heard them. Insults or abuse which convey no defamatory imputation are not actionable as defamation. Even if the words, taken literally and out of context, might be defamatory, the circumstances in which they are uttered may make it plain to the hearers that they cannot regard it as reflecting on the claimant's character so as to affect his reputation because they are spoken in the 'heat of passion, or accompanied by a number of non-actionable, but scurrilous epithets, e.g. a blackguard, rascal, scoundrel, villain, etc.' for the 'manner in which the words were pronounced may explain the meaning of the words.'".

54. In my judgment, an allegation that a person is a paedophile does not qualify in the sense of being mere abuse as indicated in that passage. There was nothing in the Defendant's Tweets to indicate the word was not to be given its clear meaning.

55. Turning to the Claimants' original Tweets about the Defendant, in my judgment, the single, natural and ordinary meaning of each of these Tweets was that the Defendant was a racist. That was an expression of opinion, and obviously so. Accepting Ms Rogers KC's submission on this point, there are some words that almost always signify that they represent the person's opinion. "*Racist*" is quintessentially one of those words. It almost invites the question from someone who hears the allegation: "*why do you say that?*" It is very different from the allegation that somebody is a paedophile.

56. Mr Callus' argument in respect of the Third Claimant's Tweet is that it is an allegation of fact. He says that this conclusion is reinforced with the words: "*unequivocally,*

publicly and undeniably a racist". I disagree. The ordinary reasonable reader would, I am satisfied, understand these simply to be the third Claimant's forceful expression of her opinion. These words are rhetoric. They do not convert the expression of an opinion that the Defendant is a racist into an allegation of fact. In respect of the First and Second Claimants' Tweets, this conclusion is fortified by the presence of the Defendant's Sainsbury's Tweet which would appear to the ordinary reasonable reader to be the basis of a comment that the Defendant was a racist. In their respects, therefore, s.3(3) is satisfied. The basis of their opinion was indicated.

57. I reject the Defendant's argument that his Sainsbury's Tweet could not be a basis for the allegation of racism. That is not the issue under s.3(3). As I indicated in ***Riley -v- Murray***, in a passage approved by the Court of Appeal in [44]: *"The issue (at this stage) is not whether the factual premise is right but whether it was sufficiently indicated*." An allegation of racism is defamatory at common law applying the principles set out in [27] above.

58. A point raised by Ms Rogers KC was whether the First Claimant's Tweet, because it used the words: "*what a racist twat*" was mere abuse because of the word "*twat*". Calling someone simply "*a twat*" may well qualify as vulgar or mere abuse. Here, however, the use of the word "*twat*" does not remove the allegation of racism. The use of "*twat*" is simply emphatic. It therefore does not change the nature of the allegation or its capacity to bear a defamatory sting.

59. The position of the Third Claimant is, however, different in this respect. Although I am satisfied that her allegation of racism would be understood to be an expression of opinion, her Tweet did not indicate whether in general or specific terms the basis of her opinion. As such, she has not established the second condition of the defence of honest opinion under s.3(3). Whatever the width of the term "*indicated*" in s.3(3), it cannot be interpreted to embrace the facts of the Third Claimant's case. The Defendant's protest against Sainsbury's certainly cannot be described as being of such importance, prominence, significance or notoriety as to amount to a matter of common knowledge, meaning that it was obvious to all readers of her Tweets that it was the basis of her opinion. The hypothetical ordinary reasonable Twitter user, reading the Third Claimant's Tweet, would simply not know (from the Tweet) the basis of the criticism. It is not obvious from the Tweet that she was referring to something that he had said or done. There is no indication, even on a general level, that she was referring to the Defendant's suggestion of a boycott of Sainsbury's. Mr Callus is right to submit that there was no indicated basis for the expressed opinion. As such and if the Counterclaim against the Third Claimant proceeds, she will not be able to advance a defence of honest opinion in answer to the Defendant's Counterclaim for libel.

60. Having stated my conclusions on the preliminary issues, it is perhaps important that I make clear that I am resolving only these preliminary issues. Apart from the availability of an honest opinion defence for the Third Claimant, the Court is not in a position to resolve any defences that may be raised to the claim or the counterclaim. Any such issues will have to be resolved later in the proceedings.

61. For example, the Court has not resolved the issue of whether the Claimants in their claim, or the Defendant in his counterclaim, can satisfy the requirement to establish serious harm to reputation as required under s.1 Defamation Act 2013. This may well be a significant issue at any trial. For example, if the Defendant can establish that in fact

a significant number of readers of his Tweets did understand them simply to be making a rhetorical comment about the baselessness of the Claimants' claims of racism against him, then the Claimants may struggle to demonstrate that they have been caused serious harm to their reputation.

62. For those who may wonder why the Court has not resolved this important issue as part of the trial of these preliminary issues, it is because, unless capable of being disposed of on an application for summary judgment, the issue of serious harm to reputation requires an assessment of evidence that, having regard to the other related issues that require determination, can only be carried out fairly at a final trial.

(This Judgment has been approved by Mr Justice Nicklin.)