Neutral Citation Number: [2019] EWHC 650 (QB)

Case No: HQ18M01315

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 March 2019

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

Barbara Hewson	**Claimant**
- and –	
(1) Times Newspapers Limited **(2) Associated Newspapers Limited**	**Defendants**

- -
- -

William Bennett QC (instructed by **Gillen de Alwis Solicitors**) for the **Claimant**
David Price QC (instructed by **David Price Solicitors & Advocates**) for the **First Defendant**
David Glen (instructed by **ACK Media Law LLP**) for the **Second Defendant**

- -

Approved Judgment

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

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THE HONOURABLE MR JUSTICE NICKLIN

The Honourable Mr Justice Nicklin :

1. These libel proceedings are brought by the Claimant against the publishers of *The Times* and *MailOnline* for articles published on 12 April 2017. The text of the articles complained of is set out in the Appendix to this judgment with paragraph numbers added in square brackets. The words selected for complaint by the Claimant are shown underlined in each article.

2. The Claim Form was issued on 10 April 2018. The Particulars of Claim are dated 12 June 2018. Following amendment, for which permission was granted on 8 March 2019, the meaning that the Claimant contends that both articles bear is:

> "… the Claimant committed, or it almost certain that she committed, or it is highly likely or reasonably suspected that the Claimant committed the following criminal acts:
>
> (a) threatened to murder a law student several times by personally telephoning him to make death threats;
>
> (b) impliedly threatened to cause physical harm to the law student's ex-partner and his daughter by sending the law student a picture of his address, his ex-partner's details and a picture of his daughter's head and, as part of her campaign to intimidate and frighten him, further harassed him by pestering him so incessantly with nuisance phone calls that he has been left feeling frightened, alarmed distressed and anxious to the point that his exams might be jeopardised".

3. Neither Defendant has filed a Defence. Instead, following an Application, by Order of 20 December 2018, the Court directed that meaning be tried as a preliminary issue. The time for the filing a Defence has been extended until the preliminary issue has been determined.

4. The First Defendant contends that *The Times* article bears the meaning:

> "… that there were grounds to investigate whether [the Claimant] has committed the acts which are attributed to her in the article by Mr Desai and Ms Phillimore"

5. The Second Defendant contends that the *MailOnline* article bears the meaning:

> "(1) The Claimant had been the subject of an investigation by the Metropolitan Police over allegations that she engaged in harassment of Sarah Phillimore and had been issued with a harassment warning from the Metropolitan Police in light of those allegations.
>
> (2) There were sufficient grounds to investigate the Claimant of having engaged in the harassment of Sarah Phillimore, and Ms Phillimore's supporters such as Mehul Desai, by making repeated abusive and threatening communications towards and about them (including in Mr Desai's case, death threats).
>
> (3) There had been at least 3 complaints to the Bar Standards Board concerning the Claimant's behaviour in this regard."

6. The Claimant has also complained that the First Defendant published a link to *The Times* article on its Twitter account. The text of the Tweet was "*A barrister has been handed a harassment warning over alleged 'death threats' to student*". The Claimant contends that readers who read the Tweet "*in conjunction*" with *The Times* article would have understood the "relevant words" to bear the same meaning as *The Times* article.

7. The Claimant contends that the relevant readers would also have read *The Times* article. As no case on reference is pleaded in relation to the Tweet, the Claimant's case *depends* upon the Twitter publishees following the link to the article. As such, the meaning will be the same as *The Times* article. Practically, all the Tweet does is increase the number of publishees of the article.

Determining meaning: the Law

8. In determining the meaning, I apply the well-established principles set out in ***Koutsogiannis -v- The Random House Group Ltd*** **[2019] EWHC 48 (QB)** [11]-[15].

9. In this case, the following principles assume particular importance:

   i) although the Claimant has selected only parts of each article for complaint, the Court must ascertain the meaning of these sections in the context of each article as a whole: ***Koutsogiannis*** [12(viii)]; and

   ii) the repetition rule: ***Koutsogiannis*** [15]; and ***Brown -v- Bower*** **[2017] 4 WLR 197** [19]-[32].

10. Mr Bennett QC has emphasised in this case the capacity of headlines to affect the overall meaning of a publication. Although each article has to be read as a whole, as Lord Nicholls observed in ***Charleston -v- News Group Newspapers Ltd*** **[1995] 2 AC 65, 72** and **74**:

> "Whether the text of a newspaper article will, in any particular case, be sufficient to neutralise the defamatory implication of a prominent headline will sometimes be a nicely balanced question for the jury to decide and will depend not only on the nature of the libel which the headline conveys and the language of the text which is relied on to neutralise it but also on the manner in which the whole of the relevant material is set out and presented…
>
> … Those who print defamatory headlines are playing with fire. The ordinary reader might not be expected to notice curative words tucked away further down in the article."

11. Mr Bennett QC has also objected to the form of both Defendants' meanings.

   i) He contends that the First Defendant's meaning fails to identify (other than by reference to those "*attributed to her in the article*") the acts of the Claimant which would make the meaning a defamatory one. It has the effect, critically, of leaving for some later adjudication *what* the article alleges that the Claimant has done.

ii) He submits that the Second Defendant's meaning fails to identify the acts of the Claimant and instead relies upon the fact of investigations by, or complaints to, other bodies. He relies upon ***Alsaifi -v- Trinity Mirror plc*** **[2017] EWHC 2873 (QB)** [28]. The point is also made in ***Koutsogiannis*** [32(ii)], but is perhaps most clearly and succinctly articulated by Warby J in ***Miah -v- BBC*** **[2018] EWHC 1054 (QB)** [35]:

> "Originally, the Defence sought to prove the truth of a meaning that the claimant 'was the subject of an investigation' at the time of publication. In the circumstances, one can understand the relevance of particulars setting out a narrative of the investigation. That plea was however always vulnerable to being struck out. Conventionally, in the modern law, an allegation that someone is under investigation is only considered defamatory because of what it implies, namely that there are grounds for an investigation or for suspicion of guilt. A defendant is not entitled to defend a libel action by proving the mere fact of an investigation, because proof of that does not establish anything of relevance." (emphasis added)

12. In response, Mr Glen has relied on Lord Devlin's speech in ***Lewis -v- Daily Telegraph*** **[1964] AC 234, 282** and upon Brooke LJ's judgment in ***King -v- Telegraph*** **[2005] 1 WLR 2282** [29]-[34] to support the proposition that the Second Defendant is "entitled" to prove the fact of an investigation. I do not accept this submission.

i) In ***Lewis***, Lord Devlin's *obiter* suggestion of three categories of defamatory imputation was: "*proof of the fact of an inquiry, proof of reasonable grounds for it and proof of guilt*". These three levels were expressly considered in ***Chase -v- News Group Newspapers*** **[2003] EMLR 11** and "*proof of fact of an inquiry*" became expressed as "*grounds to investigate*" [45]-[46]. The underlined passage from Warby J's judgment in ***Miah*** explains why this is so.

ii) In ***King***, the appeal was against the striking out of certain particulars of justification ([1], [17]). Consistently with the principles I have already identified, Eady J required a *Lucas-Box* meaning that sought to defend a meaning that "*the police suspected the claimant…*" to be repleaded with the conventional (and permissible) "*grounds to suspect the claimant…*" ([15]-[16]). The appeal against Eady J's order was dismissed, albeit that the Court observed that he should be ready to permit appropriate amendments to the defendant's case on justification reflecting some of the arguments the Court heard on the appeal [109]. The case does not stand as authority for Mr Glen's proposition. If anything, it tends to undermine it.

13. As it is for the Court to determine the single meaning of the article, argument as to the form in which a party articulates the meaning for which s/he contends is unlikely to have much bearing.

14. Finally, there is a dispute between the parties as to whether the Claimant can isolate a distinct sting or whether the articles bear a general meaning. The Claimant has limited her complaint to the words of the articles which concern Mr Desai and she has pleaded a meaning that relates only to him. The Defendants contend that the articles

bear a more general meaning. Although there is a dispute as to its application in this case, there does not appear to be any challenge to the basic legal principle, summarised in ***Bokova -v- Associated Newspapers Limited*** **[2018] 2 WLR 232** [5]:

> "… Where a publication contained two or more 'separate and distinct' defamatory imputations, a claimant was entitled to select one for complaint, and the defendant was not entitled to assert the truth of the others by way of justification. Whether a defamatory imputation was separate and distinct from other defamatory statements contained in the publication was a question of fact and degree in each case. If the several defamatory imputations, in their context, had a common sting, the defendant was entitled to justify this general sting as a meaning the words were capable of bearing: ***Polly Peck (Holdings) plc -v- Trelford*** **[1986] QB 1000, 1032** *per* O'Connor LJ; ***Warren -v- The Random House Group Ltd*** **[2009] QB 600** [102] *per* Sir Anthony Clarke MR."

15. Beyond the familiar yardstick of whether there is a "*common sting*", Mr Glen submits that the authorities identify the following as indicators of whether the ordinary reasonable reader would understand a wider or more general meaning:

    i) whether the allegations complained of and those made elsewhere in the article "*overlap at any point*": ***Warren -v- Random House*** **[2007] EWHC 3062** [29] *per* Eady J; and

    ii) whether the allegation is properly to be understood as an example of a more general charge about the claimant's conduct: ***Rothschild -v- Associated Newspapers Limited*** **[2013] EMLR 18** [22]-[23] *per* Laws LJ.

Preliminary Issue determined without a hearing

16. The trial of preliminary issues ordinarily take place at an oral hearing. If there is an evidential dispute (particularly with oral evidence of witnesses), the only way of resolving the issue is by way of a conventional trial in Court.

17. In a libel action, where the natural and ordinary meaning of a publication is determined as a preliminary issue, no evidence beyond the words themselves is admissible to determine the meaning: ***Koutsogiannis*** [12(x)]. Further, prolonged oral submissions on the meaning of the publication are not consistent with the principle that the Court should not be engage in an over-elaborate analysis: ***Koutsogiannis*** [12(iv)]. Occasionally, evidence proving the existence of contextual material can be admitted, but in most cases that will not be contentious: see ***Greenstein -v- Campaign Against Anti-Semitism*** **[2019] EWHC 281 (QB)** [16].

18. These principles mean that, at least in theory, there is no practical reason why the natural and ordinary meaning of a publication cannot be determined by the Court, without a hearing, based on the parties' written submissions.

19. Such a course would certainly further the overriding objective by saving expense and ensuring that a case is dealt with expeditiously and fairly. Where appropriate, the Court should adopt new methods of dealing with cases that will reduce costs. The Court already has extensive powers of case management and has a duty actively to manage cases under CPR Part 1.4(1). Active case management includes, under CPR 1.4(2):

> "… (b) identifying issues at an early stage; …
>
> (d) deciding the order in which issues are to be resolved; … and
>
> (j) dealing with the case without the parties needing to attend at court."

20. Court hearings are frequently costly. Delay can be caused whilst the matter awaits the fixing of a hearing. There is much to be said for the Court dealing with matters, in suitable cases, without a hearing. However, when the Court determines matters on paper and without a hearing, there is a potential impact on the principle of open justice. In ***Church -v- MGN Ltd*** **[2012] 1 WLR 284**, Tugendhat J observed:

> [41] The principle of open justice as recognised by the common law is wider than the principle enshrined in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It applies to all the business of the High Court, not just to those hearings in which there is to be a determination of the civil rights and obligations of a party, or a criminal charge against a party. It is enshrined in section 67 of the Senior Courts Act 1981 which provides:
>
> > "Business in the High Court shall be heard and disposed of in court except in so far as it may, under this or any other Act, under rules of court or in accordance with the practice of the court, be dealt with in chambers."
>
> [42] The rules of court include CPR r 39.2(1) which provides: "*The general rule is that a hearing is to be in public*".
>
> [43] Since ***Hodgson -v- Imperial Tobacco Ltd*** **[1998] 1 WLR 1056** it has been recognised that applications heard in chambers in the Queen's Bench Division are public proceedings in accordance with the principle of open justice. Reference is most commonly made to ***Scott -v- Scott*** **[1913] AC 417**.
>
> [44] CPR r 23.8(c) is another rule of court within the meaning of section 67 of the Senior Courts Act 1981. A decision by a court to deal with an application without a hearing is in substance a decision to depart from the principle of open justice.
>
> [45] Circumstances in which the court may derogate from the principles of open justice are set out in CPR r 39.2(3). There are seven listed, and all but one of them relate to the purpose of the proceedings, and invite consideration of whether it is necessary and proportionate to hold a hearing in private. One example is because publicity would defeat the object of the hearing: sub-rule (a). The only one of the instances listed where the test of necessity and proportionality could not be applied is: "*(f) it involves uncontentious matters arising in the administration of trusts or in the administration of deceased person's estate*".
>
> [46] That does not apply to an application for a ruling on meaning. And none of the other instances listed in CPR r 29.2(3) is likely to apply.

> [47] The fact that a court deals with an application without an oral hearing does not preclude the giving of a public judgment. In a case to which CPR r 23.8 applies, including any case to which sub-rule (c) applies, a court will normally be bound to deliver a public judgment, in accordance with the guidance in ***Hodgson -v- Imperial Tobacco Ltd*** **[1998] 1 WLR 1056**. It will normally be appropriate to have an open judgment in which the judge will rehearse in some detail the rival submissions, so that interested onlookers could follow. In principle the issue of meaning is to be largely "*a matter of impression*", leaving little room for detailed argument. But everything depends on the particular facts. If there has been little argument and few submissions, the judgment can say so. And sometimes, there may be hopeless applications, where the court might apply sub-rule (c) of its own motion, and where no one would be interested in the arguments or the outcome. But the principle of an open judgment should hold.
>
> [48] The requirement of open justice seems to me to support the submission… that applications for a ruling on meaning should be made at a hearing in open court.

21. ***Church*** was an example of a determination of whether the words complained of in a defamation claim were *capable* of bearing a pleaded meaning under CPR Part 53 PD §4.1. Such applications were commonplace when defamation claims were tried by juries; the ultimate issue of what the words *actually* meant being a matter of fact reserved to the jury (see discussion in ***Bokova*** [3]-[10]).

22. Tugendhat J considered that the potential range of meanings that the Court could find the words were *capable* of bearing was a factor that militated against determining such applications on paper [36].

23. As the Judge recognised [41], he had not received detailed submissions of the parties in the case as to the impact of the open justice principle. In particular, he did not receive submissions as to what other measures might be adopted properly to respect the important principle of open justice that the Judge had identified.

24. In my judgment, if a Judge considers that the determination of meaning as a preliminary issue is appropriate in a case, then I believe the practical difficulties that Tugendhat J identified of determining the issue without a hearing can be overcome. First, the parties can still make submissions before the Court makes the determination; but those submissions are conveyed in writing rather than orally. Second, the issues to be determined are of narrow compass and the written submissions need not be lengthy. Third, the Court's task is to determine the single meaning (not to adjudicate potentially on a range of meanings). Fourth, that is done by considering the words of the publication alone and no evidence beyond that is admissible. Fifth, as an over-elaborate analysis is to be avoided, determining meaning based on written submissions is more likely to conform to this principle.

25. In this case, the parties consented to the Court determining the meaning, without a hearing, based on written submissions. Of course, their consent does not resolve the important issues of open justice that Tugendhat J identified. This is the first time that the Court has dealt with a preliminary issue in this way, but I consider that these concerns can also be overcome by the Court adopting the following procedure:

i) the Court will consider the written submissions of the parties and prepare a judgment to be handed down;

ii) the draft judgment will be circulated to the parties in the normal way;

iii) the case will be listed, in open court, for judgment to be handed down; and

iv) at the hand-down, together with copies of the judgment, the Court will make available of all written submissions that were considered by the Court before making the determination.

That is the process that I shall adopt in this case.

26. In that way, the Court's decision, and the parties' submissions that led to it, are transparent and open to full public scrutiny. Indeed, it is arguable that written judgments (because of their wider availability through services like BAILII) are more effective at promoting open justice than the Judge giving an *ex tempore* judgment, perhaps in a court room where there are present no members of the public or media.

27. As I have said, in this case, the procedure has been adopted by consent. It leaves open for consideration on another occasion whether, if the parties do not consent, the Court could nevertheless direct, in an appropriate case, that a preliminary issue on meaning should be determined, without a hearing, on the basis of written submissions. It may well be a procedure that is not suitable for all cases, for example, where one or more of the parties is not legally represented.

Parties' Submissions

28. I will summarise the parties' submissions briefly.

29. In relation to *The Times* article, Mr Bennett QC for the Claimant submits:

i) The articles clearly allege that the Claimant is guilty. The evidence that is presented to the reader is overwhelming coming from several incidents; it is all bane and no antidote.

ii) The use of inverted commas around "*made death threats*" in the headline of both articles and the statements that what was being reported was what Mr Desai had "*claimed*" or "*alleged*", does not lower the meaning from guilt. The repetition rule prevents the Court discounting meaning solely on the basis that what is reported are the allegations of Mr Desai.

iii) The Claimant is presented in the articles as being generally disreputable and the subject of several complaints.

iv) The complainant is presented as credible and the reader is given no cause to doubt his account; there is no suggestion that he could be mistaken or that he is inventing the claims. On the contrary, the articles suggest a motive for why the Claimant would be making threats to Mr Desai; his refusal to assist in her campaign against Ms Phillimore.

v) The Claimant's behaviour as described by Mr Desai is serious enough not only to be reported to her professional regulator, but also to the police.

vi) As to distinct, as opposed to general, sting:

a) the articles do not convey a common sting. The harassment described against Ms Phillimore is of a different, and less serious, character. He submits that the question could be put in this way: "*Does the Phillimore circle in the Venn diagram overlap sufficiently with the Desai circle to entitle the Defendants to add an additional less serious/different allegation to the meaning?*"; and

b) the Claimant is not complaining about the allegations concerning Ms Phillimore. She is not seeking damages for those allegations and she is not seeking an injunction to prevent their publication. The Court should not permit a trial to be taken up with consideration of the truth of statements not complained about.

30. In relation to the *MailOnline* article, given the substantial similarity in the text, he repeats the points made in respect of *The Times* article but additionally he makes two further submissions:

i) The *MailOnline* article is more explicit in explaining that the harassment against Ms Phillimore occurred "*via a social media network (Twitter)*" and is to be contrasted with the personal death threats made to Mr Desai by telephone.

ii) The harassment warning regarding Ms Phillimore is presented as a finding of guilt. Following an investigation by the police, the Claimant was issued with a harassment warning and the "*victim was informed of the outcome*".

31. Mr Price QC for the First Defendant submits:

i) The key issue for determination is the *Chase* level of the meaning. *The Times* article did not adopt or endorse the allegations to give rise to a level 1 meaning. He relies upon the analysis of the repetition rule in ***Brown -v- Bower*** [19]-[32], and places particular reliance upon what I said in [30]:

> "… to produce a *Chase* level 1 meaning, the *effect* of the publication (taken as a whole) has to be the adoption or endorsing of the allegation. That adoption or endorsement may come from "bald" repetition (as May LJ observed in ***Shah***) or it may come from other context which signals to the reader that the allegation is being adopted when it is repeated. The converse is also true. The context may signal to the reader that the allegation is not being adopted or endorsed."

ii) Relying upon the underlined passage, Mr Price QC contends that, as *The Times* Article did not adopt or endorse the allegations that were reported, the Court cannot find a *Chase* level 1 meaning. He contends that 'adoption' and 'endorsement' cannot have a different meaning from the meaning those words have in the context of *Reynolds* privilege (now the public interest defence under s.4 Defamation Act 2013).

iii) *Chase* level 3 is that there are grounds to investigate whether the claimant has committed the relevant act. The classic situation in which this level of meaning should apply is a report of a complaint to a body with responsibility for investigating the claimant. Unless there is something in the report to suggest that the complaint is without foundation - which it is accepted is not the case here - it will generally be reasonable for the reader to infer that there are sufficient grounds to investigate whether the claimant is guilty of the act(s) which are the subject of the complaint.

iv) There is nothing in *The Times* article to take the meaning beyond level 3. The complaints have been "*lodged*" but there is no suggestion that they have been the subject of any evaluation by the BSB. In contrast, had the BSB referred the conduct to a tribunal, a level 2 meaning would be appropriate.

v) The report of the police harassment warning in relation to Ms Phillimore, not complained of, is downgraded by the following words: "*Such warnings have no legal standing and do not establish wrongdoing, but are used by police as a response to allegations of low-level harassment. There has been no finding against her.*"

vi) The article does not contain any comment - express or implied - on the veracity of the allegations.

vii) The reasonable reader would understand that the fact that such allegations have been made against the Claimant to the BSB to be newsworthy in its own right. It is a classic case of a publisher referring to allegations to establish the fact that they have been made. The death threat allegation appearing in the headline supports this point.

viii) If a level 3 meaning does not arise in a case such as this, it is difficult to see any circumstances in which it could apply.

ix) The fact that the article identifies 3 complaints, that the Claimant has controversial views and that she chose not to respond, does not elevate the case beyond a *Chase* level 3. Even if these matters are possibly relevant to the reasonable reader's assessment of the reported allegations, they are adequately catered for within the concept of "*grounds to investigate*".

x) Finally, there is no justification for a "*highly likely*" formulation. The *Chase* levels are a product of the single meaning rule, which prioritises certainty. He recognises that the levels are not a straitjacket, but submits that too many shades of probability would render them otiose and give rise to conceptual difficulties in determining substantial truth. A "*highly likely*" standard of probability is unclear, and it is difficult to see how, in practice, such an imputation could be defended as substantially true other than by proving, on the balance of probabilities, that it was true.

xi) In relation to the general/distinct sting issue:

a) A determination of meaning is intended to rule on which of the meanings contended for by the parties is conveyed, in whole or part, by

the publication complained of. This process will necessarily resolve any inconsistencies in the respective meanings by operation of the single meaning rule. It is a straightforward exercise that does not involve any assessment other than how the words would have been reasonably understood.

b) The First Defendant does not accept that the preliminary determination in the present case encompasses a ruling on the application of the ***Polly-Peck*** principles and/or the parameters of any defence of truth under s.2(3) Defamation Act 2013, which raise different considerations. Such issues are, in general, best judged when, and if, the court is presented with a properly pleaded truth defence.

32. Mr Glen, for the Second Defendant, contends:

i) the Claimant's meaning is too narrow and artificially concentrates on the account of Mr Desai:

a) The Article has a broader focus than the matters canvassed by Mr Desai's allegations; it included other complaints of alleged harassing behaviour on the Claimant's part by different (albeit related) individuals. The alleged harassment of Mr Desai and Ms Phillimore is connected because of Mr Desai's alleged refusal to help the Claimant "*dig up dirt*" on Ms Phillimore.

b) The Court cannot accept the submission that the Claimant's alleged behaviour towards Mr Desai is of a sufficiently different order or type to that alleged to have been suffered by Ms Phillimore, such that it can be regarded as 'distinct' on the grounds of severity.

c) The common sting of repeated harassing behaviour, and the more general imputation which would consequently be conveyed to the reader, should be reflected in any single meaning ultimately found by the Court.

ii) the Claimant's meaning is pitched too high:

a) The *Chase*-level meanings do not constrain the Court when it determines a publication's actual meaning; they are as a useful framework with recognised evidential parameters for subsequent stages in the litigation. The Claimant's formulation of "*highly likely*" is akin to a 'Chase 1½ level' meaning of strong grounds to suspect.

b) The Claimant's meaning substantially overstates the gravity which a reasonable reader would attach to the untested and ostensibly partial third-party allegations about the Claimant's conduct which are reported in the Article.

c) The Article makes clear that Mr Desai's allegations were advanced in the context of a "*22-page complaint*" [4] submitted to the BSB. A reasonable reader is well-able to distinguish between a report about

uncorroborated allegations which seek to initiate an investigation and an article which makes or refers to categorical findings of fact regarding an individual's conduct.

d) There is nothing in the Article to elevate its gravity beyond *Chase* level 3 in this instance. There is no suggestion that either the BSB or the Police have made any independent assessment or finding about the complaints which they received. The Claimant is said to have recently left her chambers for *'personal reasons'* - a non-condemnatory form of words. Perhaps most significantly, while Ms Phillimore's allegations were reported to the Police at the beginning of 2017: [12] & [26], the upshot of that investigation is inconclusive according to its own stated terms. While the Claimant was given a 'warning', the police regarded her as no more than "*alleged suspect*": [29].

e) The reader would immediately recognise that the allegations against the Claimant all originate from individuals on one side of a contentious and long-running 'social media debate' about a controversial subject which has clearly elicited strong (and inevitably partial) views on both sides.

f) Finally, the uniformly positive references to the Claimant's professional career set out in the Article suggest that criminal conduct would be wholly out of keeping for an individual who has previously been praised as "*highly diplomatic*" and who is clearly a "*well-respected*" barrister who has achieved considerable professional success: [25].

iii) the Court should find that the *MailOnline* article bears the Second Defendant's meaning (see [5] above):

a) Imputations (1) and (3) record the fact of an investigation in light of complaints to the police and BSB about the Claimant's conduct. These imputations reflect defamatory meanings which are clearly identifiable in the Article and which ANL is entitled to defend as true in their own right.

b) Imputation (2) acknowledges that the fact of a regulatory or police investigation will often also give rise to the related imputation that are "*sufficient grounds*" to investigate the Claimant for the conduct of which complaint is made. The charge is framed in more general terms than the artificially narrow focus contended for by the Claimant.

c) Consistent with the informed approach of the police, which is expressly signalled in the Article, the "*criminal acts*" in respect of which exist grounds to investigate the Claimant are defined as forms of harassment. They include, as one element, a reference to the "*death threats*" which Mr Desai alleged he received and which plainly forms a related, albeit serious, example of the conduct which the scope of that offence properly encompasses.

Decision

33. Although there is substantial similarity between them, I have treated each article separately and assessed the meaning individually. I read each article through once, and noted the impression each had on me, before turning to consider the submissions of the parties. I was in no doubt that both articles alleged guilt, the more nuanced question was "*of what?*".

34. I reached the decision about the level of the meaning without analysing it in terms of the legal principles that govern the assessment of meaning, but a consideration of those principles reinforces the conclusion I reached. This is not a bane and antidote case; it is practically all bane and no antidote. It is also a paradigm example of the proper application of the repetition rule.

35. The starting point is that these articles contain and report the allegations of others. The repetition rule applies to them. The rule represents a principle that is "*deeply embedded*" in the law of defamation; ***Shah -v- Standard Chartered Bank*** **[1999] QB 241, 261G** *per* Hirst LJ.

36. The rule has been stated in numerous authorities, but two passages from the decisions of the Court of Appeal in ***Stern -v- Piper*** **[1997] QB 123** and ***Shah*** succinctly describe the rule and its effect:

    i) *per* Simon Brown LJ in ***Stern -v- Piper***, at p.135H-136A

> "The repetition rule… is a rule of law specifically designed to prevent a jury from deciding that… a publication which conveys rumour, hearsay, allegation, repetition, call it what one will - … bears a lesser defamatory meaning than would attach to the original allegation itself";

    ii) *per* May LJ in ***Shah***, at p.266D-F:

> "The repetition rule in its simplest application is that, if you publish a statement that Y said that X is guilty, it is not a defence to an action for defamation to establish the literal truth of the publication, i.e. that it is indeed true that Y said that X is guilty. You are repeating and endorsing Y's publication and your justification must address the substance of what Y said, not the fact that he said it. <u>The obvious underlying reason for the rule is that statements of this kind in substance restate the original publication. It is … a rule which encapsulates the fact that publications of the bald kind under consideration do in substance amount to a republication of the reported publication and that that is their meaning.</u>"

37. I reject Mr Price QC's submissions as to the effect of paragraph [30] in ***Brown -v- Bower***. As is clear from the full discussion in [19]-[32], I was certainly not casting doubt upon the very clearly established principles of the repetition rule. The underlined passage from May LJ above establishes that publications which baldly restate the allegations of others are likely to amount to a republication of those allegations. For the purposes of meaning, therefore, the practical effect is that the allegations are "*adopted*" by the republisher. This form of adoption – whatever the meaning of that word in relation to *Reynolds* privilege (and see discussion of the repetition rule in the context of *Reynolds* in ***Mark -v- Associated Newspapers Limited*** **[2002] EMLR 38** [33]-[35]) – does not require a publisher actively or expressly to adopt the allegations. The point was made clearly in the passage from Macoll JA in

John Fairfax Publications Pty Ltd -v- Obeid **[2005] NSWCA 60**; **64 NSWLR 485** [119]:

> "(a) Republication of defamatory hearsay constitutes adoption of the defamatory statement —using 'adoption' in the primary sense;
>
> (b) As a general rule the republisher is liable in defamation as if the author of the defamatory hearsay;
>
> (c) To determine what, if any, defamatory imputations are conveyed by the publication in which the defamatory hearsay appears, the matter complained of must be viewed as a whole."

The Judge then noted that "*relevant indicia*" will include whether the defamatory hearsay is "*approved, reaffirmed and/or endorsed (adopted in the secondary sense), repudiated or discounted and the purpose of the republication.*"

38. Mr Price QC's submissions seek to impose a new hard and fast rule for the determination of meaning. In effect, without active "*adoption*", the publication *cannot* bear a level 1 meaning. A statement: "*X stated Y stole money from him*" could *only* produce a level 1 meaning if what was published was "*X stated correctly that Y stole money from him*" or "*X stated Y stole money from him; and this has been established*". Whilst express adoption like that is highly likely to produce a level 1 meaning, such adoption is not *necessary* for such a meaning to result. That is not the law and, properly understood, nothing I said in ***Brown -v- Bower*** is capable of supporting that submission. Indeed, that case does not overthrow or cast doubt upon the application and effect of the repetition rule. The decision simply restated that the rule is not to be "*applied mechanistically*" and that it "*takes its place alongside all the other matters to which the court must have regard when determining meaning*": [28]. For example, the interrelation between the repetition rule and the principle of bane and antidote was considered in ***Mark -v- Associated*** [36]-[44].

39. Mr Price QC's submissions resurrect the heresy that bald reports of the allegations of others *necessarily* bear a meaning lower than the original allegations *because* they can be seen to be reports. That argument received no support in ***Brown -v- Bower***, indeed it was expressly rejected [32]:

> "When the authorities speak of rejecting submissions that words repeating the allegations of others bear a lower meaning than the original publication that is a rejection of the premise that the statement is less defamatory (or not defamatory at all) *simply* because it is a report of what someone else has said. That kind of reasoning is what the repetition rule prohibits when applied to meaning. The meaning to be attached to the repetition of the allegation has still to be judged, applying the rules of interpretation I have set out above, looking at the publication as a whole."

40. There are myriad ways in which the allegations of others can be reported in a publication. It is impossible to lay down hard and fast rules. Over and over again the authorities make clear that it is the effect of the publication overall that matters. In determining meaning, the cardinal principle is that "*it is the overall effect of the article that counts*": ***Poulter -v- Times Newspapers Ltd*** **[2018] EWHC 3900 (QB)** [43]-[44]; and ***Poroshenko -v- BBC*** **[2019] EWHC 213 (QB)** [28].

41. The effect of the repetition rule is that the use of verbs like "*alleged*" or "*claimed*" (however often they are repeated in a publication) is unlikely, *in itself*, to insulate a publisher from the effect of the rule. If the impact of the repetition rule on the meaning of reports of allegations made by others is to be mitigated or avoided, the material that has that effect must be found elsewhere in the publication.

42. The classic example of such mitigation is an article that contains two sides of a dispute. A direct application of the repetition rule to part of an article that reported the allegations defamatory of the claimant would produce a level 1 meaning. But that would be to ignore the context and the fact that the Claimant's rebuttal of the charge has also been included. How far that goes to reduce (or even extinguish) the meaning that application of the repetition rule would otherwise produce depends upon the context of the publication as a whole. If an article reports that Y has said that X had stolen money from him/her, but goes on to state that Y has previously made the same allegation which was shown to be false; that Y has a personal grudge against X; and Y has told Z that he has made up allegations against X to get back at him for some earlier dispute, the result will almost certainly be that the article bears no defamatory meaning of X. If anything, the article is more likely to defame Y. Examples like that are rare, but they do exist. A more common example is where an article presents both sides in a way that the reader will see as roughly even-handed; or certainly not containing any steer as to which side should be believed. At that point, the ordinary reasonable reader can only suspend judgment on whether the claimant is guilty. Instead, and depending on context, s/he may well alight on either a *Chase* level 2 or 3 meaning. I am deliberately using straightforward examples and a level of generality to demonstrate the point, but it cannot be repeated too often: context is everything.

43. Here, there is no real mitigating effect in the context of either article; there is nothing of any substance for the reader to put into the balance against the clear statements from Mr Desai and Ms Phillimore of the Claimant's wrongdoing.

    i) In *The Times* article, paragraph [11] does report that the police warning received by the Claimant in relation to her harassment of Ms Phillimore had "*no legal standing*" and that there has been "*no finding against her*". That paragraph might cause the ordinary reasonable reader to pause for a moment, but not in my judgment lead him/her to doubt the conclusion that the Claimant was guilty, but rather to wonder why the police had characterised "*months of serious and frightening harassment*" as "*low-level"* and not taken further action. There is certainly no suggestion that the police had not proceeded further because Ms Phillimore's evidence was unreliable or that her complaint lacked substance. Any exculpatory effect the reader might have detected from this paragraph would have been further undermined by paragraphs [14] and [15]. If a police harassment warning "*had no legal effect*" and did not amount to any "*finding*" why might it provide grounds to "*automatically trigger disciplinary proceedings*"? Further paragraph [11] has no bearing on the reported allegations of Mr Desai.

    ii) The *MailOnline* article contains no equivalent to paragraph [11] in *The Times* article. The complementary descriptions of the Claimant reported in [25] do not take away the sting of guilt. They serve simply to contrast the Claimant's serious harassment against her previous professional standing. The use of the

word "*victim*" to describe Ms Phillimore in [27] and [29] is entirely premised on guilt having been established.

44. As to whether each article conveys a general as opposed to distinct sting, I accept the submissions of Mr Glen. The ordinary reasonable reader would understand the meaning to embrace a general allegation that the Claimant had been guilty of repeated harassing behaviour. Mr Glen is correct that the allegations overlap and concern the same type of conduct. Whatever distinction would be drawn between the relative seriousness of the incidents goes not to whether there is a general sting, but the additional specific elements of the meaning which arise from the separate allegations.

45. I reject Mr Price QC's submission that the Court should postpone determining whether the article conveys a general sting until a truth defence has been pleaded (see [31(xi)(b)] above). That is wrong in principle:

i) the assessment of meaning, because it is an objective assessment of the single meaning that the article bears, cannot be affected by extrinsic matter like what defence is advanced;

ii) the Court cannot assume that a defence of truth will be advanced. Even if a truth defence were not advanced, the issue of meaning would still have to be resolved for the purposes of damages and/or injunction; and

iii) a party who contends that a publication bears a general sting must argue for that meaning at any trial of meaning as a preliminary issue: ***Bokova*** [8], [44].

46. Finally, I reject Mr Bennett QC's submissions that a finding of a general sting would impermissibly frustrate the Claimant's intention of complaining only of the alleged incidents concerning Mr Desai.

i) First, I do not find the Venn diagram analysis helpful. That cannot be a proper approach to meaning, but even if it were permissible, it would be far too analytical. Readers do not decide what an article means utilising Venn diagrams.

ii) Second, control of the parameters of any defence of truth (yet to be pleaded) is a matter to be considered *after* meaning has been determined, applying the relevant legal rules and proper case management. If a defence of truth is advanced, and if it relies upon matters concerning Ms Phillimore, then time will only be taken up at a trial determining these matters if the Claimant disputes them in her Reply. If they are admitted, there will be almost no impact on the length of the trial or the other stages of the litigation. The Court determines the objective single meaning of a publication applying the rules governing meaning. The parameters of a defence of truth engage different principles. The two are entirely separate.

47. For the reasons I have given, I find the meaning of *The Times* article to be:

"the Claimant was guilty of repeated acts of harassment and online bullying, including:

(1) making death threats to Mehul Desai and subjecting him to online abuse and persistent nuisance phone calls that caused him to be frightened, alarmed, distressed and anxious;

(2) sending Mr Desai pictures that he found distressing of his home address and his daughter's head and details of his ex-partner's address; and

(3) repeatedly directing abusive language at Sarah Phillimore online over a number of months, that was both serious and frightening."

48. I find the meaning of the *MailOnline* article to be:

"the Claimant was guilty of repeated acts of harassment and online bullying, including:

(1) making death threats to Mehul Desai and subjecting him to online abuse and persistent nuisance phone calls that caused him to be frightened, alarmed, distressed and anxious;

(2) sending Mr Desai pictures that he found distressing of his home address and his daughter's head and details of his ex-partner's address; and

(3) repeatedly directing abusive language at Sarah Phillimore over a period of some 4 months via the social media network Twitter."

49. Meanings (1) and (2) are common to both articles. Meaning (3) is slightly different between the two articles because of the differences in text. I do not regard the differences as being in any way material in terms of seriousness, but it is right that I reflect them.

Appendix: Articles complained of

(A) *The Times*, 12 April 2017

Barrister 'made death threats' to student

[1] Police have issued a harassment warning to a barrister amid allegations that she waged a campaign of online bullying, abuse and 'death threats' against a law student.

[2] Barbara Hewson, 55, who came to prominence after the Jimmy Savile scandal when she called for the age of sexual consent to be substantially lowered, is the subject of mounting complaints to the Bar's regulator.

[3] At least three complaints have been lodged with the Bar Standards Board, *The Times* has learnt.

[4] It has also emerged that Ms Hewson, a Court of Protection, and human rights specialist, has within the past few weeks left her chambers, 1 Gray's Inn Square, in London. The chambers, which is also home to the civil liberties lawyer Michael Mansfield, QC, declined to comment on her departure, apart from saying she had left for 'personal reasons'.

[5] In a 22-page complaint to the standards board, seen by *The Times*, Mehul Desai, a student at Nottingham University law school, claimed that he had 'received death threats and abuse over the phone' from Ms Hewson.

[6] He said that the barrister sent him 'a picture of my address, my ex-partner's details and a picture of my daughter's head'. The student has been left so distressed that his exams may be jeopardised. He alleged that the lawyer pestered him so incessantly with nuisance phone calls that he was left 'feeling frightened, alarmed, distressed and anxious'.

[7] The dispute allegedly grew out of Mr Desai's support for Sarah Phillimore, a family law barrister at St John's Chambers in Bristol. Ms Phillimore is a well-known campaigner on child protection issues who has frequently crossed swords with Ms Hewson on social media over their opinions on investigations into alleged historical child abuse.

[8] Mr Desai alleges that Ms Hewson contacted him in an attempt to obtain 'dirt' on Ms Phillimore. When the law student refused to help her, he claims that he was subjected to an onslaught of online and other abuse. In his complaint, Mr Desai pointed to an alleged series of comments made by Ms Hewson about Ms Phillimore.

[9] According to the file submitted to the regulator, Ms Hewson directed a barrage of abusive language at Ms Phillimore, including calling her a 'c***', 'Nazi', as well as referring to her and her Twitter sympathisers as 'f***wits' and 'sociopathic bunny boilers'.

[10] Ms Phillimore told *The Times* that, 'following months of serious and frightening harassment' by Ms Hewson, she registered a complaint with the police. The Metropolitan Police confirmed that on March 1 'a 55-year-old woman, was issued with a harassment warning".

[11] Such warnings have no legal standing and do not establish wrongdoing, but are used by police as a response to allegations of low-level harassment. There has been no finding against her.

[12] Mr Desai also told the Bar authorities that he had registered a complaint with Leicestershire police. His complaint was submitted to the standards board at the end of last month.

[13] At least one other complainant has contacted *The Times* alleging that Ms Hewson has engaged in online bullying. Ms Hewson did not respond to requests for comment.

[14] The standards board said it would not comment 'as to whether or not individual barristers are the subject of a complaint or a disciplinary investigation'. It would also not comment on whether a police harassment warning would automatically trigger disciplinary proceedings against a barrister.

[15] The board has the power to refer conduct that it deems has brought the profession into disrepute to an independent disciplinary tribunal, which has power to disbar people it finds guilty.

[16] Ms Hewson has regularly aroused controversy. In the *Daily Mail* last year, she said: 'Our criminal justice system has swung too far the other way. It now assumes that an accusation by a woman is tantamount to proof of guilt'.

The print version of *The Times* article included a photograph of the Claimant and a photograph of Mr Desai with the caption: "*Barbara Hewson has been accused by Mehul Desai of online and other abuse*".

At the top of the online version of *The Times* article, under the headline, was a photograph of the Claimant with the caption: "*Barbara Hewson has been accused of online and other abuse. She came to prominence after calling for the age of consent to be lowered in the wake of the Jimmy Savile scandal*". Between paragraphs [6] and [7] in the online version, was a photograph of Mr Desai with the caption: "*Mehul Desai, a student at Nottingham University law school, claimed he received death threats*".

(B) *MailOnline*, 12 April 2017

Lawyer who was dubbed the 'bolshiest barrister on Twitter' and called for the age of consent to be lowered to 13 'made death threats' to law student

*** Barbara Hewson, 55, has been issued a harassment warning from the Met Police**

*** Nottingham law student Mehul Desai said he suffered 'death threats and abuse'**

*** Lawyer Sarah Phillimore also claims to have been harassed on social media**

[1] Police have issued a harassment warning to a top barrister amid allegations she made 'death threats' to a law student.

[2] Barbara Hewson, 55, who was once dubbed 'the bolshiest barrister on Twitter' and sparked controversy after calling for the age of consent to be substantially lowered, is also accused of abuse by another lawyer.

[3] She has been the subject of at least three complaints with the Bar Standards Board, according to *The Times*.

[4] In a 22-page complaint Mehul Desai, a student at Nottingham University law school, claimed that he had 'received death threats and abuse over the phone' from Miss Hewson.

[5] He said the barrister had sent him 'a picture of my address, my ex-partner's details and a picture of my daughter's head'.

[6] The student has been left so distressed that his exams may be jeopardised, it is claimed.

[7] He alleged that the lawyer pestered him so incessantly with nuisance phone calls that he was left 'feeling frightened, alarmed, distressed and anxious'.

[8] It is reported that the dispute allegedly grew out of Mr Desai's support for Sarah Phillimore, a family law barrister at St John's Chambers in Bristol.

[9] Both Miss Phillimore and Miss Hewson have clashed on social media over their opinions on investigations into historical child abuse.

[10] Mr Desai alleges that Miss Hewson contacted him in an attempt to dig up 'dirt' on Miss Phillimore. When he refused to help her, he claims he was subject to an onslaught of online and other abuse.

[11] According to the file submitted to the regulator, Miss Hewson has directed a slew of abusive language at Miss Phillimore including calling her a 'Nazi' and referring to her sympathisers as 'sociopathic bunny boilers'.

[12] Miss Phillimore told *The Times* that after 'months' of harassment she reported the barrister to the police, who then issued Miss Hewson with a harassment warning.

[13] It has also emerged that Miss Hewson, who is a Court of Protection and human rights specialist, has left her chambers at 1 Gray's Inn Square, London within the past few weeks.

OUTSPOKEN VIEWS OF TOP FEMALE BARRISTER

[14] Barbara Hewson has never shied away from sharing her opinions on controversial matters.

[15] In the wake of the Jimmy Savile abuse allegations, Miss Hewson called for the legal age of sexual consent to be lowered to 13 and an end to the 'persecution of old men'.

[16] Miss Hewson said rape victims had a 'moral responsibility' and cases were rarely straight forward where one party was 'utterly guilty' or 'utterly innocent'.

[17] And she described Scotland Yard's investigations into historic sexual abuse of ageing celebrities accused of sexual abuse as a 'witch hunt'.

[18] In September 2016 Miss Hewson said it was time to 'put an end to the whole fiasco'. Writing for the Daily Mail, she called for the inquiry into historic abuse to be closed.

[19] The chambers, which is also home to the civil liberties lawyer Michael Mansfield, QC, declined to comment on her departure, apart from saying she had left 'for personal reasons'.

[20] The standards board said it would not comment 'as to whether or not individual barristers are the subject of a complaint or a disciplinary investigation'. It would also not comment on whether a police harassment warning would automatically trigger disciplinary proceedings against a barrister.

[21] It is not the first time Miss Hewson has aroused controversy.

[22] She caused outrage after the Jimmy Savile abuse allegations when she called for the age of consent to be lowered to 13 and for an end to the 'persecution of old men'.

[23] She has also questioned whether rape victims are 'utterly innocent' and suggested that they can have a 'moral responsibility for the crime'.

[24] Miss Hewson has previously won Barrister of the Year award from the Lawyer magazine after she fought for the rights of pregnant women against compulsory treatment.

[25] The Chambers UK guide has variously described her as 'bright, committed and passionate', 'well-respected', 'highly diplomatic' and 'a tough opponent'.

[26] A spokesman for the Metropolitan Police said: 'On 2 February an allegation of malicious communications was transferred to the Metropolitan Police from another force.

[27] 'The victim, a 46-year-old woman, alleged she had been harassed via a social media network (Twitter) between August 2016 and January 2017.

[28] 'The allegation was passed to officers in Islington to investigate.

[29] 'On 1 March the alleged suspect, a 55-year-old woman, was issued a harassment warning. The victim was informed of this outcome.'

At the top of the *MailOnline* article, above paragraph [1], was a photograph of the Claimant with the caption: "*Pictured: Leading barrister Barbara Hewson*". Between paragraphs [9] and [10], was a photograph of Mr Phillimore with the caption: "*Pictured: Sarah Phillimore told The Times that after 'months' of harassment she reported Miss Hewson to the police*".