Neutral Citation Number: [2020] EWHC 3325 (QB)

Case No: QB-2019-004127

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 December 2020

Before :

MR RICHARD SPEARMAN QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

DYLAN SADLER	**Claimant**
- and -	
(1) ANTONY JOYNER	**Defendant**
(2) JOYNERS PLANTS LTD	

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Mr A. Eardley (instructed by **Penningtons Manches LLP**) for the **Claimant**
Mr N. Leviseur (instructed by **Samuels Solicitors LLP**) for the **Defendantts**

Hearing dates: 2 December 2020

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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.

……..

MR RICHARD SPEARMAN QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to Bailii and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:00am on 2nd December 2020.

Mr Richard Spearman QC :

1. This is a claim for libel and harassment. The libel claim is brought in respect of statements included in a press release issued by the Second Defendant and posted online at www.growndirect.co.uk, the website for Plants Galore Garden Centre ("the Press Release").

2. The parties are described as follows in paragraphs 1-3 of the Particulars of Claim:

> "1. The Claimant is an experienced solicitor who, since 2015, has been employed by the Environment Agency as a senior lawyer based at the Agency's offices in Exeter. His role is to prosecute serious environmental crimes. He has had a distinguished career as a public service lawyer, having previously been employed by the Army Legal Service, where he rose to the rank of Major, and by Plymouth City Council.
>
> 2. The First Defendant is the Company Secretary and a Director of the Second Defendant. At all material times, together with the two other Directors of the Second Defendant, Alfred and Mark Joyner, and another member of their family, the First Defendant was the owner of land known as Cockwells Nursery near Totnes, Devon ('the Site').
>
> 3. The Second Defendant is a private limited company which operates 3 garden centres in Devon under the brand name "Plants Galore". At all material times the Second Defendant has promoted its business through a website at the address www.growndirect.co.uk ('the Website'). According to the First Defendant himself, as at November 2018, the Website was receiving over 300,000 visits per year from the general public."

3. The Defendants accept that the background to the claim and the Press Release is succinctly set out in paragraphs 4-7 of the Particulars of Claim as follows:

> "4. From about March 2015 the Site was leased to a David Weeks who, together with his business partner Steven Loveridge, wished to operate a waste recycling business there. The First Defendant terminated or purported to terminate the lease in about January 2016 upon learning that Mr Loveridge had been convicted for an unrelated drugs offence, but the waste that had been brought on to the Site remained there. On 16 May 2016 a major fire broke out at the site and burned for some 5 days.
>
> 5. In 2018, the Environment Agency prosecuted the First Defendant, Mr Weeks and Mr Loveridge for environmental offences committed at the Site. Mr Weeks and Mr Loveridge both pleaded guilty and were sentenced at Plymouth Magistrates Court on 15 May 2018. The First Defendant was charged with two offences: (1) together with Mr Weeks and Mr Loveridge, knowingly causing or knowingly permitting the carrying on of a waste operation at the Site between 19 February 2015

> and 16 May 2016 without an environmental permit being in force, contrary to regulations 38(1)(b) and 12(l)(b) of the Environmental Permitting (England and Wales) Regulations 2010 ('Count 1'); and (2) keeping controlled waste at the site between 11 January 2016 and 19 May 2016 in a manner likely to cause pollution of the environment or harm to human health, contrary to sections 33(6) and 33(1)(c) of the Environmental Protection Act 1990 [('Count 2')].
>
> 6. The First Defendant initially pleaded not guilty and the case was sent to the Crown Court. On 19 November 2018, the First Defendant pleaded guilty to Count 2, for which he was fined £3,600, ordered to pay £4,250 to Devon and Somerset Fire and Rescue Service, and ordered to pay £5,000 prosecution costs. Count 1 was left to lie on the Court file.
>
> 7. The Claimant was the lawyer responsible for bringing the prosecution on behalf of the Environment Agency."

4. Under the heading "Libel", paragraph 8 of the Particulars of Claim pleads as follows:

> "From about 22 November 2018 until a date unknown but believed to be in late October or early November 2019, the Defendants published or caused to be published on the Website, to a large but presently unquantifiable number of readers, a press release ('the Press 2 12 Release') containing the following statements which referred to and were defamatory of the Claimant:
>
> "[15] … the EA strangely chose to prosecute one of the tour landlords - Tony Joyner - on a charge that he was involved in bringing wood on to the site.
>
> [16] After a nine month legal battle this criminal charge was then dropped by the EA just before trial when the evidence showed the landlords were clearly not involved in bringing wood on to site. The EA should never have brought this charge and it was thrown out by their own legal expert!! This resulted in a waste of £6000 of legal costs being incurred for no reason by the EA in trying to bring a false charge.
>
> [17] Sadly, during the process of bringing this charge against the landowners, the main culprit the tenant Steve Loveridge, was given a more lenient sentence as an inducement to aid the EA in the prosecution of the landowners. This decision by the EA to reward a criminal with a lesser sentence has to be questioned in the light of events. The landowners are concerned that "evidence" was then

> invented by Steve Loveridge to aid the prosecution as a result of this EA inducement of a convicted criminal.
>
> [18] As this charge was dropped anyway then this "evidence" was never relied on - but it has to be a questionable way for the EA to proceed in order to gain a conviction - to promise a known criminal - serving a prison sentence - a lesser sentence for another crime if he can "produce testimony" good enough to prosecute the innocent landowner. What a way to carry on! Is this the way we expect the solicitor for the EA to behave?
>
> [27(a)]… Questions should be asked of Dylan Sadler solicitor for the EA about his handling of this case and the tactics used so far against the landlords and his encouragement to convicted criminal Steve Loveridge to "produce evidence" against the landlord in return for a lesser sentence - this appears a vindictive prosecution of a landlord from a solicitor who is willing to go to any length to gain a conviction whether fair or not. Many thousands of pounds of government money has been wasted by Dylan Sadler when the major charge brought against Tony Joyner was dropped after the EA barrister advised there was no chance of successful prosecution. Why was this charge brought in the first place? Is he suitable for this position at the EA?""

5. The words complained of form only part of a much longer text. The Press Release does not contain any paragraph numbers. I have added them for ease of reference. The full Press Release contains 30 paragraphs, and there are four sub-paragraphs in total within [27].

6. As I was addressed on much of that additional text during the course of the argument before me, it is convenient to set it out as well. It reads as follows (bold text as in the original):

> "***PRESS RELEASE by Joyners Plants Ltd***
>
> ***(Plants Galore Garden Centres)***
>
> ***Environment Agency facing "an inconvenient truth" about waste transfer station at Cockwells Nursery, Totnes***
>
> *[1] (We have sent this press release to local media outlets, local south hams Councillors, Devon County Councillors and our member of parliament to ensure that both sides to this story are heard and a balanced, fair view is formed of events at Cockwells Nursery following recent publicity in the press and Radio. We are available for interview*

as we think this story needs to be in the public domain and searching questions need to be asked of the Environmental Agency).

[2] This week Tony Joyner of Plants Galore Garden Centres was fined at Exeter Court for being an owner in charge of waste left on a nursery site he co-owned with three other family members, after a tenant renting the land was suddenly sent to prison.

[3] The Environmental Agency role in building up the waste on site and their lack of action to clear the site has not been made public until now.

[4] The owners of Joyners Plants need to make it clear that the Environmental Agency knew all along about the build up of waste wood on site at Cockwells Nursery by the tenants but chose to do nothing. The EA failed to force the tenants to clear this waste wood from the nursery - as is their legal responsibility and duty when the tenants were on site.

[5]On October 2nd 2015 at a key "on site" meeting at Cockwells Nursery, the EA along with Devon County Council Enforcement Agency and South Hams Enforcement all agreed to "turn a blind eye" to 10,000 tonnes of waste wood on site at Cockwells Nursery when the tenants promised to make a planning application for a waste transfer station. This waste transfer station would in effect solve the problem and make the thousands of tonnes of illegal waste on site "legal".

[6] The meeting was so secret that not even the landlords – Joyners Plants Ltd - were informed of the meeting, or the secret agreement reached by all parties to allow the waste wood to remain on site – which was clearly illegal and well over the waste levels permitted on the site.

[7] Importantly no "waste removal order" was issued to the tenants by the EA on October 2nd 2015, to force the tenants to clear the excess waste wood from the site – which would be the normal action taken by the EA in these circumstances. The EA have never explained to the landlords why it didn't take action at the time. The landlords were kept in the dark and never informed of the problems on site by the EA until five months later.

[8] It appears that all three government agencies chose to ignore the activities of the two tenants – Steve Loveridge and David Weeks – and

instead chose to "warn them" not to continue bringing any more waste on to the site until their major planning application gained permission from the local authorities. All three government agencies then agreed to support the major planning application when it was finally made by the tenants in November 2015.

[9] The government rewards county councils for improving recycling rates - the opening of waste transfer stations helps bring in extra revenue to the council from central government. It appears this was the motivation of the government agencies in choosing to ignore the waste built up on site – in the hope that a waste recycling station would be a benefit to the county. This was definitely a Devon County Council issue – dealt with directly by Andy Bowman from DCC – he visited the site several times. Samantha Oman of the EA visited the site multiple times when the tenants were on site.

[10] The situation then became worse on January 10th 2016 after the main tenant renting the land - Steve Loveridge - was sentenced to six years in prison for other offences relating to growing and supplying drugs.

[11] On hearing this news and completely unaware that there was any problem on the site, the landlords decided to close the premises and evict the remaining tenant and his company with immediate effect on January 11th only to be told by the EA a few weeks later that the amount of waste wood on the site was now well over the permit level allowed. At no time did the landlord know that the tenants had acted illegally at any time - until after the tenants were evicted from the site and the EA finally informed the landlord in February 2016. This was the first contact between the landowners and the EA – one year after the site began to operate.

[11] The EA also failed at this point to tell the landlords that that they had actually allowed and permitted the build up of waste wood on site during 2015 but instead kept this information secret – presumably as the EA and Devon County Council felt very vulnerable to criticism regarding their complete lack of action in clearing the waste wood on October 2nd 2015 when they had the opportunity.

[12] In May 2016 after warnings that the wood was heating up and could ignite, a fire did break out at Cockwells and the vast majority of wood burnt in a major fire.

[13] The landlords were then told by the EA to leave the site exactly as it was while a two year investigation took place in to events at Cockwells Nursery. The landlords were always hoping and planning to work with the EA to arrange the clear up of the nursery area affected and jointly work with the EA to force the criminal tenants to pay the costs of the clean up.

…

[19] The EA then brought another charge against Tony Joyner – of being in charge of waste (on a site he co-owned with three other family members) between January 2016 and May 2016 at Cockwells Nursery. It is not very well known but there is strict liability for landlords regarding waste being on their land when brought on to the site. It does not matter how the waste came to be on site or who is responsible – the landlord is guilty in any eventuality – no explanation is permitted or considered by the court. You are simply guilty and if you decide to plead not guilty then the judge will order the jury to convict.

[20] The landlord in this case would need to appeal to the High Court in order to challenge the law or even beyond that to overturn the legislation. In the circumstances Tony Joyner took a pragmatic approach and pleaded guilty to this minor charge rather than try to take on the entire legal system and EA at the cost of hundreds of thousands of pounds.

[21] Was this prosecution fair and just and in the public interest – the landlords had not brought the waste on to site, the tenant had signed a lease just as in any landlord / tenant arrangement and it was agreed in court that the landowners had not played any part or had any guilt in the fire starting. The EA have lost track of who the real culprits are – the criminal tenants – who brought the waste wood on to the site and walked away with £175,000 in return for dumping the waste on site.

[22] There definitely are two sides to every story and we have not been able to give our side due to the criminal changes faced by our family in connection with these matters.

[23] We estimate from records seen from the court bundle that the EA and other enforcement authorities visited the site on numerous occasions (between 6 and 10 occasions) during 2015 when the tenants had control of the property and never once acted to stop the build up of waste on site – then when a fire takes place it suddenly becomes the responsibility of the landlord for the waste being on site and they are prosecuted. This does not appear to be fair or reasonable.

[24] Our family have emailed you so you are fully informed about events at Cockwells Nursery Totnes and so that you may meet with us or the EA to discuss any concerns you might have regarding this unsatisfactory situation. At the very least you now have a more complete picture of what happened and why, and can make your own judgments.

[25] Please note – we are able to support this press release with detailed evidence from the court bundle to support our position and concerns regarding the actions of the EA and the DCC official Andy Bowman.

[26] We are happy to give interviews to media or meet with local councillors to discuss the situation. Now the criminal trial has ended we are able to speak freely.

[27] This is not a story about a poor landlord but is instead a concerning story about the Environmental Agency tactics and incompetence in dealing with events at Cockwells Nursery. If the EA had done their job properly in October 2015 and ordered the removal of waste wood from the premises - then there would never have been a build up of waste on site or subsequent fire at Cockwells. The EA are the police force for the environment but they appear to have conveniently "looked the other way" in October 2015 when action should have been taken.

[27(b)]Questions should be asked of Adrian Evans EA investigator about his investigation, outcome and recommendations bearing in mind his total absence of reporting the EA's close involvement with managing and advising the tenants on site from the outset of their lease 2015 and advising on a major planning application. Also no mention in his report of Devon County Council's wholehearted support for the planning application made by the tenants. No mention that the site

could have been cleared of waste in October 2015 when all the agencies met on site to discuss the problem.

[27(c)]Adrian Evans has deliberately white washed and ignored EA and DCC involvement in visiting and supporting the tenants during the 9 months they were on the site. It could be described as a deliberate cover up by the EA but I will let you form your own opinion.

[28] It has always been the opinion of the landlords that the EA and the landowners should have worked together to ensure the site was cleared of waste by the two criminal tenants who brought the waste on to the site. Sadly the EA never took this approach and a costly unnecessary legal battle has ensued – while the criminal tenants walk away with £175,000 and no confiscation order.

[29] This press release has been issued by the landowners of Cockwells Nursery, Totnes because the EA version of events released to the public is slanted, not true or definitely not the complete picture.

[30] ***Joyners Plants Ltd is a local family business located in Totnes for the past 60 years. We generate and contribute over £1 million in tax to central and local government by operating three large Garden Centres in Devon and employ 80 staff with Head Offices at our Newton Abbot Garden Centre. We are one of the region's largest growers and retailers of garden plants and plan to expand our business significantly over the next 10 years as a new generation of our family take the business forward. We treat all our customers with respect and try our best to offer great value for money and service but we do expect government bodies to treat us fairly and not abuse their trusted position. We remain good people trying hard to run a successful local business with thousands of loyal happy customers who live in your towns and villages. We ask you to form a balanced view of events at Cockwells Nursery with all the facts to hand.***"

7. The Claimant alleges that the words complained of bore the following natural and ordinary meanings (which are set out in paragraph 10 of the Particulars of Claim):

   (1) The Claimant knowingly induced Mr Loveridge, a convicted criminal, to concoct false evidence against the First Defendant by offering Mr Loveridge a lesser sentence.

(2) The Claimant pursued a prosecution against the First Defendant for being involved in bringing wood onto the Cockwells Nursery site near Totnes when the evidence showed there was no realistic prospect of such a prosecution succeeding, with the result that it was ultimately abandoned and thousands of pounds of government money were wasted.

(3) These facts demonstrate that the Claimant is a solicitor who is willing to go to any length to gain a conviction, whether fair or not, and who brought this prosecution vindictively.

(4) By reason of these facts, it is questionable whether the Claimant is suitable for his position at the Environment Agency.

8. The Claimant's case is that: (a) the first three meanings comprise statements of fact; (b) the fourth meaning comprises a statement of opinion; (c) the basis of that opinion is sufficiently indicated in the Press Release (that is to say in the factual assertions which constitute the first three meanings); and (d) all of these meanings are defamatory at common law.

9. The Defendants' case on meaning is set out in a letter from their solicitors dated 7 April 2020 as follows:

> "The words complained of are incapable of being defamatory of the Claimant and do not convey the imputations alleged in the letter of claim dated 21 October 2019. An ordinary reasonable reader, having read the words complained of, would not have found the meanings to be as you have pleaded.
>
> In fact, the words complained of were imputations of opinion and had the following meanings:
> a) That the Claimant's involvement in the decision to prosecute the First Defendant was flawed because the evidence to support it was non-existent and did not justify a prosecution;
> b) That the Claimant's decision to seek to rely upon evidence from a convicted criminal, and to urge the Court to give a lesser sentence in return for testifying against the First Defendant called into question the reliability of that evidence;
> c) The Claimant's involvement in the decision to prosecute, and then drop the charge against the First Defendant, in circumstances where there was no or no sufficient evidence, appears consistent with a vindictive approach designed to gain a conviction;
> d) It would be legitimate to inquire into the decisions made by the Claimant, and his suitability to take those decisions in the future, in light of the decision to drop the prosecution of the First Defendant in relation to the charge of knowingly causing or knowingly permitting the carrying on of a waste operation between 19 February 2015 and 16 May 2016 without an environmental permit being in force, contrary to regulations 38(l)(b) and 12(l)(b) of the Environmental Permitting (England and Wales) Regulations 2010 , and the resulting costs that were incurred by the taxpayer.
>
> An ordinary reasonable reader, having read the words complained of, would have taken them to have the meanings as stated above. Especially when the

> publication indicated the basis of these opinions by setting out the following facts:
> a. The Environment Agency chose to prosecute the First Defendant in relation to his alleged actions in bringing wood onto a site;
> b. After nine months, charges in relation to these alleged actions were dropped;
> c. The Environment Agency's barrister chose not to pursue this charge as the evidence did not support a prosecution;
> d. £6,000 of public money was spent in the pursuance of the charge that was dropped;
> e. Evidence was sought from a convict, Mr Loveridge, who was serving a prison sentence; and
> f. The Claimant made submissions to Plymouth Magistrates' Court, inviting the Court to reduce the sentence it would otherwise have passed on Mr Loveridge, in recognition of his decision to testify against the First Defendant.
>
> The Claimant will fundamentally struggle to prove his pleaded meanings. It is further denied that the words complained of are defamatory at common law as the Claimant's reputation cannot have been harmed when the words complained of were imputations of opinion that had been justified by the facts."

10. During the course of the hearing, Mr Leviseur, who appeared for the Defendants, accepted that the contention that "the words complained of are incapable of being defamatory of the Claimant" was not seriously arguable. He also indicated an acceptance that the Defendants' fourth meaning was either intended to mean, or would make more sense if it was re-cast to read: "It would be legitimate to inquire into the decisions made by the Claimant, and his suitability to take those decisions in the future, in light of the matters which led to the decision to drop the prosecution …" On that footing, there is less difference between the parties concerning the fourth meaning. In all other respects, Mr Leviseur sought to support the Defendants' meanings as set out in the letter from the Defendants' solicitors dated 7 April 2020, which he described as "carefully crafted, perfectly capable meanings".

11. The hearing before me today arises pursuant to paragraph 1 of the Order of Master Thornett dated 28 May 2020, which provides that the following issues should be determined by way of a trial of preliminary issues:

> "(a) The natural and ordinary meaning of the statements complained of;
>
> (b) Whether, in those meanings, the statements complained of are defamatory of the Claimant at common law;
>
> (c) Whether the statements complained of are statements of fact or opinion; and
>
> (d) If opinion, whether the statements indicate, in general or specific terms, the basis of the opinion.""

12. Turning to the first point, that is to say the resolution of the issue of meaning, there was no difference between the parties as to the applicable legal principles, which are well settled.

13. Mr Eardley, who appeared for the claimant, referred me to the summary provided by Nicklin J in *Koutsogiannis v The Random House Group Ltd* [2020] 4 WLR 25 at [10] to [15]. Those passages are too well known to require repetition. Mr Eardley expanded on the principles enunciated by Nicklin J at [12] by submitting, among other things, as follows:

    (1) Principle (viii) (publication must be read as a whole) is derived from *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65. The meaning is that which the ordinary reasonable reader would derive from reading the whole article once: see e.g. *Gillick v Brook Advisory Centre* [2001] EWCA Civ 1263 at [7] (approving Eady J's self-direction).

    (2) The importance of "context and mode of publication" (principle ix) when determining meaning was stressed by the Supreme Court in *Stocker v Stocker* [2020] AC 593. The overriding principle is that the Court should undertake a "realistic exploration" of how the hypothetical reasonable reader would have understood the statement complained of, having regard to all the circumstances: *Stocker* [48]-[51].

    (3) Applying principles (viii) and (ix) can give rise to difficulties, but they do not arise where, as here, the Court is concerned with a single article on a single web page without internal hyperlinks.

    (4) The Court must differentiate between implications conveyed by the article (i.e. what the reasonable reader would understand they were being told by the article, including "between the lines") and further inferences which individual readers might draw for themselves, having first understood the article in its true sense: *Allen v Times Newspapers Ltd* [2019] EWHC 1235 at [50] (Warby J).

    (5) Often, the Court's task will include determining the level at which an allegation is pitched (guilt, grounds to suspect etc). While it is conventional to speak of "Chase" levels of meaning (see *Chase v News Group Newspapers Ltd* [2003] EMLR 11), the Court is not required to fit every statement into one of these categories – there is infinite capacity for subtle differences in meaning, which the Court may need to reflect: *Allen* at [17]-[18].

    (6) Similarly, the fact that the ordinary and reasonable meaning is not always the highest or always the lowest meaning that the words are capable of bearing does not mean that it is always somewhere in between those two extremes. Nor is the Court constrained by the parties' pleaded meanings; instead, it is open to it to find a meaning outside those meanings.

14. With regard to the issue of fact versus opinion, Mr Eardley submitted that: (a) the first condition for the defence of honest opinion is that "the statement complained of was a statement of opinion" (Defamation Act 2013, s3(2)); (b) pursuant to s3(1), the burden to establish this is on the Defendant; (c) the question is determined by reference to the

same principles that applied under the common law; and (d) these principles were helpfully summarised by Nicklin J in *Koutsogiannis* at [16]:

"(i) The statement must be recognisable as comment, as distinct from an imputation of fact.
(ii) Opinion is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc.
(iii) The ultimate question is how the word would strike the ordinary reasonable reader. The subject matter and context of the words may be an important indicator of whether they are fact or opinion.
(iv) Some statements which are, by their nature and appearance opinion, are nevertheless treated as statements of fact where, for instance, the opinion implies that a claimant has done something but does not indicate what that something is, ie the statement is a bare comment.
(v) Whether an allegation that someone has acted "dishonestly" or "criminally" is an allegation of fact or expression of opinion will very much depend upon context. There is no fixed rule that a statement that someone has been dishonest must be treated as an allegation of fact."

15. Mr Eardley further submitted:

(1) At [17] Nicklin J urged a cautious approach where a meaning that arises by implication rather than express statement is sought to be classified as opinion.
(2) The summary of principles in *Koutsogiannis* is consistent with the later Court of Appeal decision in *Butt v SSHD* [2019] EMLR 23 (at [25]-[39]).
(3) In respect of principles (i) and (ii), it is trite that a defendant cannot invoke the protection of the honest opinion defence by inserting words like "in my opinion" where the reasonable reader would nevertheless understand that they were being told a matter of fact: see *Gatley on Libel and Slander*, 12th edn, §12.11.
(4) Further, where the article fails to distinguish clearly between factual matters and the writer's subjective opinions or inferences, it runs the risk of being classified as entirely factual: *ibid* §12.13.

16. Mr Eardley next submitted that: (a) the second condition for the defence of honest opinion is that "the statement complained of indicated, whether in general or specific terms, the basis of the opinion" (s3(3)); (b) again, the Defendant bears the burden of proving this; (c) this puts on a statutory footing the former common law test as stated definitively by the Supreme Court in *Joseph v Spiller* [2011] AC 852 (see the Explanatory Notes to the Act [22]); and (d) Lord Phillips PSC stated the test as follows: "the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based" (at [105]).

17. Moving on to the test of what is defamatory at common law, Mr Eardley submitted that: (a) a statement satisfied this test if it substantially affects in an adverse manner the attitude of other people towards the claimant, or has a tendency to do so: see *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985 at [96]; (b) "other people" here are "right-thinking members of society"; (c) since the test is satisfied if, objectively, the statement has a tendency to have a substantial adverse effect, it is unnecessary in practice to explore the actual effects of publication; and (d) they fall to

be considered at the next stage (i.e. that of "serious harm" for the purposes of the Defamation Act 2013, s1).

18. Further, Mr Eardley reminded me of the approach adopted by Nicklin J and approved by the Court of Appeal at [9] in *Tinkler v Ferguson & Ors* [2019] EWCA Civ 819 as "the correct approach for a judge at first instance", namely to "read the words complained of without reference to the parties' contentions or submissions so as to capture [the judge's] initial reaction as a reader".

19. With regard to the words complained of in the present case, Mr Eardley submitted:

(1) The Claimant is expressly named in [27(a)] as the "solicitor for the EA" who handled the case and it is not disputed that the earlier passages complained of also referred to him personally.

(2) The passages specifically complained of need to be read in the context of the Press Release as a whole. The whole Press Release is a diatribe against the Environment Agency ("EA"). The EA is accused of having acted unlawfully: failing in its duty to prevent the Defendants' tenants from bringing thousands of tons of waste wood onto the Cockwells Nursery site illegally and instead acquiescing in their criminal conduct. Then, when the situation became embarrassing for the EA, because one of the tenants was convicted of serious drug offences and then the illegally stored wood caught fire, the EA looked for a scapegoat and prosecuted the First Defendant in order to distract attention from its own failings. It was all part of a "*deliberate cover up*": see, in particular, [3]-[13], [15], [23], [27], [27(b)] and [27(c)].

(3) This context of a deliberate scapegoating exercise will naturally inform the reasonable reader's understanding of whether what is being alleged against the Claimant is merely naïve incompetence or, rather, highly culpable knowing and deliberate wrongdoing.

(4) The Claimant's first meaning is derived from [17]-[18], and [27(a)]. It is expressly stated in [27(a)] that the Claimant gave "encouragement to convicted criminal Steve Loveridge to "produce evidence" against the landlord in return for a lesser sentence" (emphasis added, quotation marks in original). The quotes around "produce evidence" (also used to similar effect in [17] and [18]) tell the reader that this was not the bringing forward of evidence in any ordinary sense but consisted in the fabrication of false evidence. It is this that the Claimant is said to have "encouraged".

(5) [27(a)] puts to bed any possible ambiguity that might be said to have arisen in [17] about the Claimant's knowledge and intention. This is not about an unforeseen consequence of a plea bargain, or a naïve or reckless decision. Plainly, the reader is being told, the Claimant knew that offering the lower sentence would result in Mr Loveridge making up false evidence and wanted him to do so, so that the Claimant could convict an innocent man. Indeed, the Claimant's guilty intention is clear from how the bargain is described in [18]: the offer is not simply a lower sentence in return for whatever evidence Mr Loveridge may be able to give – the terms of the deal are that Mr Loveridge must ""produce testimony" good enough to prosecute the innocent landowner" (emphasis added).

(6) The Claimant's second meaning is derived from [16] and [27(a)]. It is important that the decision to drop "the major charge" is not presented as having been made in response to new evidence. The case never had any prospects. [16] states that this was a "false charge" that the EA "should never have brought". [27(a)] states that the EA's barrister advised that "there was no chance of successful prosecution" (emphasis added). Again, readers will be influenced by the context (the EA's desire to find a scapegoat and distract attention). The Claimant is here being accused of pursuing a prosecution in the face of overwhelming evidence of innocence.

(7) The Claimant's third meaning is derived from [27(a)]. "Vindictive prosecution", and "a solicitor who is willing to go to any length to gain a conviction whether fair or not" are the words actually used in the Press Release. Those words draw together the threads of what has already been alleged against the Claimant. An important matter of context is that the Claimant is alleged to have brought the two charges sequentially: first the "false charge" that should never have been brought, and in support of which the Claimant induced a criminal to fabricate false evidence ([15]-[18]), and "then", when that course of action was stopped by the EA's barrister, another charge, this time - and unjustly - a strict liability offence (the implication being that a conviction could be obtained more easily, without the troublesome evidential burden that had foiled the Claimant's first attempt): [19]-[21].

(8) Reasonable readers will not have been fooled by the frequent resort to formulae such as "questions should be asked…" and so forth. The Press Release clearly instructs readers what the correct answers to the "questions" are. These are Chase Level 1 allegations. Any reasonable reader will have understood what they were being told: the Claimant did encourage Mr Loveridge to give false evidence, knowing that it would be false, in order to secure the conviction of an innocent man; the Claimant did pursue a prosecution which never had any chance of success; and the Claimant did do this this vindictively and is willing to go to any lengths to secure a conviction whether fair or not.

(9) The Claimant's fourth meaning is derived from the end of [27(a)] ("Is he suitable for this position at the EA?") and needs no gloss.

(10) To the extent that any parts of the words complained of are held to be statements of opinion, the Claimant does not dispute that the Press Release identifies the basis for such opinions (without prejudice as to whether the identified factual basis is actually true).

20. With regard to the broader context, Mr Eardley submitted, in sum, that this was a factual piece from start to finish. It starts by promising a formal statement to "ensure that both sides of the story are heard", and such a statement would typically concern factual matters. At [10], [13], and [14] a picture is built up of matters which are embarrassing to the EA, and of the EA not doing the right things. By the time one reaches [15], the reader has been told that the real culprits, the "criminal tenants" referred to in [14], have not been pursued, and it will come as no surprise to learn that the EA is looking for a scapegoat and for any means to deflect blame away from it. That colours what the reader thinks of the Claimant by the time that he is introduced into the narrative. At [16] the reader is told that there was exculpatory evidence, but

the prosecution of the First Defendant was only stopped when it was pulled up by the EA's own legal expert. In [17], the quotation marks show that "evidence" is not used in its usual sense, but instead denotes material which has been made up. Although it could be argued that [18] bears a Chase Level 2 meaning, the key allegation is of a "promise" to a known criminal to "produce testimony", and that bears a Chase Level 1 meaning. The question "Is this the way we expect [the Claimant] to behave?" admits of only one answer. At [24] and [25] the reader is told that the factual allegations can be substantiated by other sources. In [27] all the matters relating to the Claimant come to a head. The words used here leave no room for doubt or debate, and there is no suggestion of any error of judgment on the Claimant's part. The contents of [28] reflect a pattern which runs through the Press Release: the formula "I will let you form your own opinion" does not achieve a departure from an allegation of guilt, because the earlier part of [28] leaves no room for different answers. In [29] the message that the Press Release is concerned with factual matters is reinforced. Similarly, [30] is clearly saying that the reader now has "all the facts to hand".

21. Mr Leviseur submitted as follows:

(1) [15] cannot properly be read nor meaning given to it without the opening words of it which are: "Instead after this two year investigation".

(2) [27(a)] cannot properly be read nor meaning given to it without the whole of the Press Release which comes before and after it.

(3) The Press Release as a whole sets out in considerable detail the history of the prosecution of the First Defendant and of the circumstances which led to his conviction on his own plea on 19 November 2018. It is clearly not a law report nor an academic article but it is a detailed account of the matter and provides considerable factual material in support of the points it makes.

(4) The First Defendant was prosecuted for two offences. The first can properly be described as a serious and wilful breach of environmental law for gain requiring mens rea; the second as one of strict liability attaching to the owner of land. The first offence was said to have been carried on knowingly with the tenants Messrs Weeks and Loveridge between February 2015 and May 2016. Shortly before trial at the Crown Court the EA abandoned its intention to prosecute the more serious charge.

(5) The Press Release as a whole fairly sets out the prolonged investigation by the EA, the respective roles of the Claimant and Mr Loveridge and the position of the First Defendant. It makes clear that the First Defendant was one of the owners of the land but the only one to be prosecuted and that the prosecution was reliant on the evidence of one of the co-accused. The Press Release sets out in proper detail the submission as to co-operation which the Claimant made to the sentencing court in respect of Mr Loveridge.

(6) When read as a whole a reader would conclude that the words of which complaint are made were imputations of opinion and had the meanings which are attributed to them in the letter from the Defendants' solicitors dated 7 April 2020. The questions raised are entirely proper given the prosecutorial role of the EA and its funding as an emanation of the state.

(7) Those meanings are not capable, when read in conjunction with the whole of the Press Release, of being defamatory of the Claimant and are not so.

(8) The same letter sets out a number of bases on which those opinions were founded. The Press Release as a whole is clearly an adequate foundation for the basis of these opinions.

22. Mr Leviseur expanded on those submissions orally, as follows:

(1) First, he reiterated the importance of three of the principles stated in *Koutsogiannis*: principle (iii) means that one should not take the worst or the least bad meaning which is reasonably available, but at the same time it does not mean that one must find a meaning in the middle of the available meanings; with regard to principle (ix), he accepted that the present case concerned a single item on a simple website; with regard to principle (xii), he submitted that when having regard to the impression the Press Release made upon me there was a particular need for caution, because the allegations related to someone from a legal profession and it was necessary to a heed the warning to guard against being over-jealous to protect persons with that particular professional standing.

(2) Second, in addressing what the Press Release is about, Mr Leviseur pointed out that it did not simply focus on the Claimant, but instead covered a range of other serious matters, such as the role of the EA, the role of the local Council, issues about a waste recycling station, and various implications of environmental law. That said, I believe that Mr Leviseur was inclined to accept – and I would hold in any event – that these are all matters of fact. Accordingly, while they indeed provide the context within which the words complained of are set, it is not clear to me how they assist the Defendants' arguments that those words comprise statements of opinion rather than fact.

(3) Third, having accepted that [1]-[14] concern matters of fact, and that these are the matters which are picked up by the opening words of [15] ("Instead after this two year investigation") about which no complaint is made, Mr Leviseur submitted that the word "strangely" in [15] and the reference to "[t]he EA should never have brought this charge" in [16] and the references to "[s]adly" and "[t]his decision … has to be questioned" and "the landowners are concerned" in [17] all denote expressions of opinion. Accepting without deciding that there is force in those submissions, it seems to me that nevertheless they do not take the Defendants' case very far. It is clear that there are still a number of factual allegations in [15]-[17].These include, for example, the allegation in the first sentence of [17] that "during the process of bringing this charge against the landowners, the main culprit … was given a more lenient sentence as an inducement to aid the EA in the prosecution of the landowners".

(4) Fourth, moving on to [18], Mr Leviseur submitted that the question "Is this the way that we expect the solicitor for the EA to behave?" (a) did not only refer to the preceding text in [18] and (b) was not only expecting the answer "No". Valiantly though these points were argued, I did not find them persuasive.

(5) Fifth, Mr Leviseur submitted that [19] and [20] are concerned with explaining the criminal process and that [21] is concerned with who the real culprits are. I accept those submissions. However, I do not consider that they really help the Defendants.

(6) Sixth, Mr Leviseur said that [24] and [25] supported the Defendants' case that the Press Release is an opinion piece, on the basis that the essential message conveyed here is to the effect: "We have told you our opinion, but if you want to find out the facts, here are some other sources you can go to". In my view, however, referring the reader to further sources is, in principle, equally consistent with bolstering a publication which is stating facts. In addition, I consider that this is the better view of what [24] and [25] are saying. For example, the words "you now have a more complete picture of what happened" seem to me to be saying that the Press Release has provided factual information.

(7) Seventh, Mr Leviseur argued that the nub of [27(a)] is to ask questions: it begins with the words "Questions should be asked" and it ends by asking two questions at the end. The difficulty with this submission, to my mind, is that it overlooks or plays down what [27(a)] opens by saying that questions should be asked about. The subject of those questions is identified as, for example, "[the Claimant's encouragement to [a] convicted criminal … to "produce evidence" against the landlord for a lesser conviction". That matter, and the further matters about which "Questions should be asked" are all matters of fact. Moreover, in the light of those patently serious factual allegations, it is, to my mind, very difficult to see how the hypothetical reasonable reader could be expected to think that the answer to the question "Is [the Claimant] suitable for his position at the EA?" which appears at the end of [27(a)] could be anything other than "No". Having said that, the essence of the Claimant's third meaning is that [27(a)] goes further than the statements which form the subject of his first two meanings, and add to the allegations encapsulated in those meanings the further allegation that, as a matter of fact, the Claimant has behaved vindictively and will "stop at nothing" to get a conviction. I consider the Defendants are on stronger ground on this point, which I return to below.

(8) Mr Leviseur sought to draw support for his contentions concerning [27(a)] by pointing out that it is immediately followed by [27(b)], which also begins by saying that "Questions should be asked", this time about another individual who works for the EA. The problem with that, as I believe that Mr Leviseur was, realistically, willing to accept, is that [27(c)] then provides the answer, or at least an answer, to the "questions asked" about that other individual, and in what seem to me to be categoric and damning terms: "[he] has deliberately whitewashed and ignores EA and DCC involvement in visiting and supporting the tenants during the 9 months they were on sight" – a matter about which it is then said that "[i]t could be described as a deliberate cover up by the EA …" In the result, [27(b)] and [27(c)] together are not, overall, helpful to the Defendants.

23. Mr Leviseur did not say much in support of the meanings set out in the letter from the Defendants' solicitors dated 7 April 2020. He submitted that they were very clearly set out in that letter, and that there was unlikely to be much benefit to be gained from

going over that ground as I would already have had, and taken, the opportunity to consider the matter.

24. Mr Eardley responded that the Defendants' meanings fail to acknowledge the reality of what is being said about the Claimant in the Press Release. In particular:

(1) The Defendants' first meaning, while it shows some acknowledgment of the allegation that the Claimant pursued a prosecution without any proper evidential basis, omits the clear allegation that this resulted in the waste of thousands of pounds of public money;

(2) The Defendants' second meaning is not even directed at the Claimant, but at the reliability of Mr Loveridge's evidence. It is therefore irrelevant. In any event, only an unduly naïve reader could fail to spot the strong and clear allegation against the Claimant for having knowingly induced Mr Loveridge to fabricate evidence;

(3) The Defendants' third meaning does not even confront what the Press Release says on its face: [27(a)] says "*this appears a vindictive prosecution*", not "appears consistent with a vindictive approach". In any event, reasonable readers will have seen through the use of "appears" and will have understood the Press Release to be alleging squarely that the Claimant's conduct was in fact vindictive;

(4) The Defendants' fourth meaning ("it would be legitimate to inquire into the decisions made by the Claimant…") is again an unreal attempt to avoid what is plainly being said about the Claimant in terms, i.e. that he is "*a solicitor who is willing to go to any length to gain a conviction whether fair or not*". In any event, the factual basis for any opinion cannot, logically, be "the decision to drop the prosecution" (as opposed to the factual matters which form the subject of the Claimant's first three meanings) because that decision is more or less the only matter which has not been subjected to criticism.

25. I am very familiar with the principles to be derived from *Koutsogiannis* and *Tinkler*, and I have borne them firmly in mind in considering the issue of meaning. I set about that task in what I consider to be the appropriate fashion, which is to sit down and read the publication complained of once, trying to put myself in the position of the hypothetical reasonable fair-minded reader of that publication having (so far as this can be gauged) the characteristics of someone of the type to whom the publication was addressed.

26. In broad terms, and in outline, upon reading the Press Release for the first time it appeared to me that it was detailing a litany of extremely serious complaints about the conduct of the EA in general and the Claimant in particular, which included allegations that the Claimant went to extraordinary and manifestly improper lengths to prosecute the First Defendant, specifically by participating in the offer of an inducement to a convicted criminal to provide false evidence in support of a prosecution for a "false charge" which should never have brought and which was dropped at the last minute, resulting in a waste of public money.

27. I find that the words complained of in the Press Release bore the following meanings (the first three of which are statements of fact and the fourth of which is a statement of opinion):

(1) The Claimant knowingly induced Steve Loveridge, a convicted criminal, to invent false evidence against the First Defendant by offering Mr Loveridge a lesser sentence.

(2) The Claimant pursued a prosecution against the First Defendant for being involved in bringing wood onto the Cockwells Nursery site near Totnes when the evidence showed there was no chance of such a prosecution succeeding, with the result that it was ultimately abandoned and £6,000 of government money was wasted.

(3) Having regard to the Claimant's handling of the case and the tactics used against the First Defendant and his inducement of Steve Loveridge to invent false evidence against the First Defendant in return for a lesser sentence, there are strong grounds to suspect that the Claimant is a solicitor who is willing to go to any length to gain a conviction, whether fair or not, and who brought this prosecution vindictively.

(4) In the light of these same facts, it is questionable whether the Claimant is suitable to occupy his position as a solicitor at the Environment Agency.

28. By way of brief exposition of the above, in general terms I accept the submissions of Mr Eardley. I consider that the submissions of Mr Leviseur, while advanced with moderation, grace and courtesy: (a) fail to grapple properly with the content of the words complained of; (b) fail adequately to take account of, or to apply to the issues before me, the applicable legal principles; (c) place reliance on other parts of the Press Release which is in many ways misplaced, and does not assist the Defendants in answering the Claimant's case on meaning; and (d) overall, in my judgment, miss a number of relevant points. Ultimately, this was not, in my view, surprising. The longer the argument went on the more I was confirmed in my view that this not an opinion piece, and that Mr Leviseur had little material to work with.

29. For example, Mr Eardley did not dispute, and I naturally accept, that the Press Release must be read as a whole. However, I am unable to accept that anything which is contained further to or beyond the words complained of ameliorates the meaning which the words complained of bear, and still less is capable of converting those words into "imputations of opinion".

30. The one instance of significance in which I part company with Mr Eardley's arguments is in relation to the Claimant's third meaning. I have no doubt at all that [27(a)] of the Press Release contains a statement of fact rather than a statement of opinion. In my view, however, Mr Eardley's contention that [27(a)] bears a Chase Level 1 meaning does not give adequate weight to the opening words ("Questions should be asked") nor the words "this appears" nor the fact that [27(a)] ends with questions being asked about why the charge was brought in the first place and about the Claimant's suitability for his position at the EA. I consider, although not by a very wide margin, that these words have the effect that the meaning of [27(a)] is that there are strong grounds to suspect that the Claimant pursued the prosecution vindictively and will go to any length to gain a conviction, whether fair or not. The fact that the final question, in my view, admits of only one answer is not telling in this regard,

because that would be so regardless of whether the allegation concerning vindictiveness and going to such lengths is or is not one that bears a Chase Level 1 meaning.

31. On the basis that I accept, as, in substance, I have, Mr Eardley's contentions about meaning, I readily accept his submission that the test of what is defamatory at common law is satisfied. I did not understand, with respect, the foundation for Mr Leviseur's written submission that the meanings of the words complained of "are not capable, when read in conjunction with the whole of the Press Release, of being defamatory of the Claimant and are not so". In any event, during the course of the hearing, I understood Mr Leviseur to retreat from that submission, and to accept that the test of what is defamatory at common law would be made out in the event that I was to find in Mr Eardley's favour on meaning.

32. In reaching that conclusion I have of course very clearly borne in mind the guidance to be derived from *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985; and also the other cases summarised in *Gatley on Libel and Slander, 12th edn*, at §2.4, as follows:

> "In *Thornton v Telegraph Media Group*, Tugendhat J. concluded that an imputation that the claimant author had engaged in copy approval, that is to say giving interviewees the right to read what the author has said about them and to change it, fell below the threshold required and was not therefore defamatory of the claimant. In *Ecclestone v Telegraph Media Group* [2009] EWHC 2779 (QB) Sharp J. held that an allegation that the claimant was dismissive of the views of several well-known vegetarians was not capable of being defamatory. Such an imputation was at worst a breach of conventional etiquette but did not reach the level of seriousness required to be actionable. Similarly in *Daniels v BBC* [2010] EWHC 3057 (QB) Sharp J. again concluded that minor criticisms of the claimant's performance at work would not be defamatory because the necessary threshold of seriousness was not met. By way of contrast, in *Church v MGN Ltd* [2012] EWHC 693 (QB); [2012] EMLR 28 the necessary threshold of seriousness was held to have been met in respect of an imputation that the claimant had made an embarrassingly drunken spectacle of herself as she proposed to her boyfriend while singing karaoke in a pub in the early hours of the morning. So too, in *Cammish v Hughes* [2012] EWCA Civ 1655; [2013] EMLR 13 the Court of Appeal concluded that a charge of serious incompetence against a businessman was sufficient to meet the necessary threshold. Such an imputation "was capable of affecting his livelihood. Reputation is important to a businessperson as he needs to persuade others to trust that he will competently perform commitments entered into in the course of business.""

33. Looking at that summary, it seems to me absolutely clear that, insofar as those cases provide guidance, the allegations in this case fall on the seriousness side of the line

rather than on the lack of seriousness side of the line. And looking at the very detailed analysis in *Thornton v Telegraph Group*, as I had an opportunity to do in advance of the hearing, it appears to me that much of the guidance in that case makes clear that allegations of the seriousness which I have found to be made in this case do cross the threshold of seriousness.

34. In light of Mr Eardley's concession that in the event that any part of the words complained of is held to be a statement of opinion, the Claimant will not dispute that the Press Release identifies the basis for that opinion, I readily accept Mr Leviseur's submission to that effect.

35. Accordingly, I determine the preliminary issues which I am asked to decide as follows:

(1) The natural and ordinary meaning of the statements complained of is as set out in paragraph 27 above.

(2) In those meanings, the statements complained of are defamatory of the Claimant at common law.

(3) The first three statements complained of are statements of fact; the fourth statement complained of is a statement of opinion.

(4) The fourth statement complained of does indicate the basis of the opinion.

36. At the conclusion of the hearing, I indicated what my determination of the preliminary issues would be, and said that I would provide my reasons in writing subsequently.

37. In those circumstances, Mr Eardley applied for the costs of and occasioned by the trial of those issues. Although the order made at the conclusion of such hearings is often "costs in the case", Mr Eardley submitted that the order that he sought would be appropriate in this case on the basis that: (1) as a starting point, costs ought to follow the result; (2) the Defendants had not adopted a realistic approach to the issues, and, in particular, the Claimant had been required to embark on substantial correspondence to get them to engage with the issues, which they had failed to do by complying with the applicable Pre-Action Protocol; (3) in these circumstances, and having regard to the general "pay as you go" policy of the CPR, an immediate order for costs should have a salutary effect on the Defendants; and (4) the Second Defendant's financial position was not certain.

38. Mr Leviseur resisted any such order, contending that: (1) there is an expectation that an order for "costs in the case" is the order which will be made on a trial of such preliminary issues; (2) there is a significant issue in this case as to whether the First Defendant is liable for the publication of the Press Release, and it would be wrong to make any immediate order for the payment of costs in light of that; (3) what is a "salutary effect" for one side looks to the other side more like an attempt to choke off the other side's case with large demands for costs; and (4) there was no reason to doubt the Second Defendant's ability to make payment. Point (2) seemed to me a cogent one until it emerged, upon inquiry, that the commercial reality is that the costs of the claim will be funded by the Second Defendant in any event.

39. I prefer the submissions of Mr Eardley on this matter.

40. Both parties filed statements of costs for the purposes of summary assessment: the Claimant in the sum of £40,198, and the Defendants in the sum of £12,993. Following the hearing, however, both parties submitted that, if I was minded to make an order for costs in favour of the Claimant, instead of assessing the costs summarily, I should order detailed assessment on the standard basis together with an interim payment on account. In those circumstances, that is the course which I propose to follow. I will order the Defendants to make a payment on account of the above costs in the sum of £20,000, which is to be paid within 14 days. I should be grateful if Counsel would agree an Order which reflects all of these rulings.