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Case No: QB-2021-003297

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 March 2022

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

Eurasian Natural Resources Corporation Limited

Claimant

- and -

(1) Tom Burgis
(2) HarperCollins Publishers Limited

Defendants

- -

Adrienne Page QC and **Tom Blackburn SC** (instructed by **Taylor Wessing LLP**) for the **Claimant**
Andrew Caldecott QC and **David Hirst** (instructed by **Wiggin LLP**) for the **Defendants**

- -

Approved Judgment

(Computer-aided transcript of the Stenograph Notes of
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MR. JUSTICE NICKLIN:

1. This is a libel claim arising from the publication of a book "*Kleptopia*" written by the First Defendant and published in hardback by the Second Defendant in September 2020 ("the Book"). Paperback and e-book editions of the Book were published from 8 July 2021. The pagination of both the hardback and paperback editions are the same. The claim was commenced on 27 August 2021. The Particulars of Claim identified two sections of the Book which the Claimant contends defames it. Those are to be found at pages 283 to 287 and pages 308 to 309 and the text is set out in the Appendix to this judgment. I have removed some of the names of third parties from the quoted text because it is not right to embed them in a public judgment in circumstances where they could have no recourse.

2. When the paperback edition of the Book was published, it contained an Afterword in pages 341 to 345 (also set out in the Appendix). This was not complained of by the Claimant in the Particulars of Claim, but it is common ground that, in relation to the meaning that an ordinary reasonable reader would understand the paperback edition of the Book to bear, the Afterword must be read as part of the Book.

3. The natural and ordinary meaning that the Claimant says that the passages of the Book that it complains of bear is:

> "(a) the Claimant had Andre Bekker, James Bethel and Gerrit Strydom murdered to protect its business interests; alternatively
>
> (b) there are strong grounds to suspect that the Claimant had Andre Bekker, James Bethel and Gerrit Strydom murdered to protect its business interests; and
>
> (c) there were reasonable grounds to suspect that the Claimant had Jon Mack poisoned."

4. It is an essential part of any claim for defamation that the words complained of should refer to the claimant. Sometimes a claimant relies on the existence of extrinsic facts – facts that are not referred to in the publication complained of – to establish that readers would understand the words complained of to refer to him/her. The Claimant in this claim has not done so. It has relied simply on the references to it contained in the Book. Those are set out in paragraph 21 of the Particulars of Claim, as follows:

> "The statements complained of in their context of the Book as a whole referred to and were understood to refer to the Claimant:
>
> (a) The Claimant is identified in the Book not by indirect reference, or in a manner that would require a reader to infer that the Claimant was the company that was being referred to. The Claimant is named and identified directly as:
>
> (i) the company which operated and owned the business described in the Book as Eurasian Natural Resources Corporation, and in that capacity is referred to correctly and repeatedly as 'ENRC' and 'ENRC plc' (pages 13, 73, 94, 121, 122, 128, 129, 130, 133, 134,

135, 158, 172, 173, 174, 184, 209-213, 275-287, 295, 299-304, 307-309, and 334 of the Book); and

(ii) the company which in 2007 was the vehicle for the public offering and listing on the London Stock Exchange and KASE. In that capacity it is also referred to correctly and repeatedly as 'ENRC plc' and 'ENRC' (pages 13, 14, 15, 24, 64, 130, 131, 157 and 335 of the Book).

(b) The Book refers to the privatisation of the assets of the Claimant in 2014 and its consequent delisting from the Stock Exchange. Thereafter the Book refers throughout to 'ENRC' as the operating and decision-making entity in the narrative and, in particular, in chapter 36. The Book does not name Eurasian Resources Group or 'ERG' nor does that entity appear in the index of the Book, save for a reference to '*the Offer for ENRC by Eurasian Resources Group BV*' in the footnote on page 387 of the Book.

(c) Without limiting the generality of a) and b) above:

(i) (Page 283) Andre Bekker is said to have investigated the value of '*the manganese prospect in the Northern Cape - the one ENRC bought for $295 million*'.

(ii) (Page 283) [G] '*had been talking about a plan to hive off ENRC's Africa division*'.

(iii) (Page 284) Both Strydom and Bethel had decided in 2015 '*to leave ENRC*'.

(iv) (Page 284) [M] was dealing with Springfield Police as '*a representative of ENRC*'.

(v) (Page 285) … A private coroner, was paid by ENRC."

5. No Defence has yet been served. Instead, by order of 14 October 2021, I directed the trial of the following preliminary issues:

(1) whether the statements complained of at paragraph 20 of the Claimant's Particulars of Claim refer to the Claimant and, if so;

(2) the natural and ordinary meaning of the statement complained of;

(3) whether the statement complained of in any meaning found is defamatory of the Claimant at common law; and

(4) whether the statement complained of is or includes a statement of fact or opinion.

6. Consequent upon directions given for the preliminary issues trial, the Defendants filed a written notice, dated 29 October 202,1 setting out their case on the preliminary issues. In summary, the Defendants contended as follows:

(a) As to reference, the Defendants denied that the words in the two sections of the Book complained of would be understood by reasonable readers to refer to the

Claimant. The Defendants contended the Book makes the following matters clear:

(1) The Book explains that, by 2008, three businessmen from former Soviet republics had amassed a lucrative Kazakhstan-based natural resources business and incorporated it in London as Eurasian Natural Resources Corporation and floated "*a chunk*" of it on the London Stock Exchange via an IPO (page 12 of the Book). The businessmen are introduced in the *dramatis personae* and are thereafter referred to in the Book as "the Trio" (page 17).

(2) Readers are told that ENRC refers to "*one of the most valuable*" UK public companies with a "*London headquarters*", a board of directors who were "*city grandees*" and compliance officers together with several well-known professional advisers (pages 13 and 94). ENRC is also stated to have a network of international offices and numerous employees (pages 128-130, 133 and 173). Readers are also told that ENRC owned "*extensive operations abroad*", including in Kazakhstan, the Congo, Zimbabwe, Zambia and South Africa (pages 10, 121, 276-278). The ENRC referred to throughout the Book is stated to be responsible for operations, corporate governance and all executive decision-making for the global business (page 121).

(3) Prior to 2013, the company in overall control was the Claimant. Nevertheless, the Trio were the Book's prime targets in terms of allegations of corruption, but they were not directors (page 14). From 2013, the Claimant became a mere intermediate holding company (a corporate entity without any employees and a board) and is not identifiable from the depiction of ENRC in the Book in relation to any operational activity thereafter.

(4) The Defendants contend that the Book makes clear that the Claimant had been stripped of all operational and executive functions well before the relevant events, the subject of the two passages complained of occurred. Those events took place in 2015 and 2016. The Book explains that the deaths of James Bethel and Gerrit Strydom took place in May 2015 and that of Andre Bekker in 2016. The Book states that "*by the end of 2013*" the Trio had already "*relocated their multibillion-dollar corporation abroad and that the new home of the Trio's corporate personage was Luxembourg*" (pages 210, 304 and 343). The author makes clear that the operational and governance issues together with the reconstituted ownership passed to the "*new non-public company*" when the Claimant was taken private (page 211). The Book's explanation for transferring operational control from the Claimant was to avoid any scrutiny of the Trio's affairs by the Serious Fraud Office which was carrying out an investigation into the public limited company. The Book refers to the "*city grandees*" falling away at this time (page 174).

(5) The focus of the Book in relation to ENRC from 2013 is to "*the Trio's corporation*". The Defendants contend that the Book has a large number of references to the Trio's corporation used alternatively with ENRC

(pages 73, 94, 212, 283, 285, 301-304), referred to as ENRC's "*successor company*". Readers would understand references to ENRC after 2013, including the two sections complained of by the Claimant, to refer to ERG, which is a successor company, notwithstanding that the text is not slavishly switched to naming the corporation as ERG.

(6) Ordinary reasonable readers would not identify the Claimant as having been connected with the deaths of the three men and the poisoning of the fourth referred to in the Claimant's meanings. The Book expressly states that Bethel and Strydom, both "*held senior positions*" at the "*ENRC subsidiary*" in Africa run by another individual which was one of the subjects of the SFO's investigation (pages 284 to 285). The Book identifies several individuals, companies and state entities as having been involved in alleged corruption to which Bethel and Strydom would or might have been able to give evidence and about or whose financial interests might suffer from exposure of such corruption (pages 174, 210-212, 275-285, 300, 304 and 307-308). The Defendants contend that the suggestion that an intermediate group holding company in London would be understood by an ordinary reasonable reader to be a suspect or merit investigation is wholly fanciful.

(b) As to meaning, the Defendants' case is that if the words complained of did refer to ENRC:

(1) they do not bear the meanings of guilt as advanced in the first of the Claimant's meanings;

(2) they contain no meaning defamatory of the Claimant concerning Jon Mack's suspicions that he had been poisoned. Readers are told there was no medical evidence to support his suspicion;

(3) in the context of the Book as a whole, the sections of the Book complained of by the Claimant mean ("the Defendants' Meaning"):

> "the deaths of Andre Bekker, Gerrit Strydom and James Bethel are suspicious and the cause of death in each instance remains open to question which merits further investigation"; and

(4) finally, this meaning is a statement of the author's opinion.

In support of these submissions, the Defendants contend that the Book does not adopt a position on how any of these men died or attribute responsibility. The deduction or opinion that it remains an open question is communicated to the reader in clear terms by the following statements: "*… which left* the question, *what had [killed Bethel and Strydom]*?" (page 287); "*… whatever befell the deceased bearers of ENRC's secrets* ..." (page 309); and "*… in fact, as you will see if you re-read chapters 36 and 39, we don't yet know what befell these men in their last hours or at whose hand.*" (Afterword, page 344).

(c) Finally, the Defendants contend that if the words complained of do refer to the Claimant, they are not actionable at common law as defamatory statements because the Claimant's meanings cannot be committed by corporations, in other words the act of murder, still less holding companies but only by natural persons.

The approach to determining preliminary issues in defamation claims

7. As is now the well-established practice, I read the Book without having read the Particulars of Claim, the Defendants' written case or the skeleton arguments: see ***Tinkler -v- Ferguson*** **[2019] EWCA (Civ) 819** [9] and [37]; and ***Millett -v- Corbyn*** **[2021] EMLR 19** [8]. That is in order, so far as possible, to place me in the position of an ordinary reasonable reader and to enable me to capture my immediate impression of the meaning of the Book. I knew, of course, the identity of the Claimant.

8. It is perhaps important to state, clearly, that the hearing today has been limited to the preliminary issues that are identified above ([5]). If the action continues, then the Defendants will have an opportunity to raise any substantive defences and other challenges to the Claimant's claim. At this stage, therefore, the Court is not considering any question of whether the allegations made in the Book against the Claimant (or anyone else) are true. The Court is also not, at this stage, considering whether the Claimant can satisfy the requirements of s.1 Defamation Act 2013 (serious harm to reputation) and particularly how that section affects companies. That issue, together with any defences raised by the Defendants, would fall to be considered later in the proceedings if the claim continues.

9. The Book contains many serious allegations against the Claimant, its owners, shareholders and/or officers and indeed other people in events unconnected with the Claimant. Ms Page QC quite correctly recorded in her submissions that, so far as concerns the Claimant and those connected with it, the allegations made in the Book are disputed. The function of the Court, at this stage, is limited to determining the preliminary issues that I have identified.

The relevant legal principles

10. There is no dispute as to the general approach the court must adopt in determining the natural and ordinary meaning of a publication and whether the statement complained of is (or contains) an allegation of fact or an expression of opinion. The long-established principles are gathered in ***Koutsogiannis -v- Random House Group Limited*** **[2020] 4 WLR 25** [12]-[17], as approved by the Court of Appeal in ***Millett -v- Corbyn***.

11. To those well-established principles Ms Page has also reminded me of several other statements of the law which are uncontroversial:

(a) A wider degree of latitude is given to the words to convey particular meanings where the words published are imprecise, ambiguous, loose fanciful or unusual: ***Lewis -v- Daily Telegraph*** **[1963] 1 QB 340, 374**.

(b) Where the publisher invites the reader to adopt a suspicious approach, a reader may be guided to the real explanation of what has taken place; an explanation which the publisher did not care or did not dare to express in direct terms: ***Jones***

-v- Skelton **[1963] 1 WLR 1362**, **1372** and ***Lloyd -v- David Syme and Co Ltd*** **[1986] 1 AC 350**, **363-364**.

(c) In such cases it may be reasonable for the reader to indulge in a degree of conjecture or guesswork which might otherwise not be permitted: ***Amalgamated Television Services Pty Ltd -v- Marsden*** **[1988] 43 NSWLR 158**, **169F**.

(d) The statement complained of must be recognisable as opinion rather than a statement of fact: ***Morgan -v- Associated Newspapers Ltd*** **[2018] EWHC 1850 (QB)**.

(e) Opinion is something that is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark, or observation: ***Butt -v- Secretary of State for the Home Department*** **[2019] EMLR 23** [24].

(f) The ultimate determinant is how the statement would strike the ordinary reasonable reader, that is whether the statement is discernibly opinion: ***Butt*** [39].

12. As to the requirement that the words complained of must refer to the claimant in a defamation claim, I can take the statement of legal principles from ***Monir -v- Wood*** **[2018] EWHC 3525 (QB)**.

> [95] To be actionable, words in a publication that are alleged to be defamatory must refer to the claimant. If s/he is not named, reference to the claimant can be intrinsic – i.e. from the words themselves (e.g. X's father is a thief) – and/or established by the proof of extrinsic facts, knowledge of which would cause a reasonable reader to understand the words to refer to the claimant: ***Economou -v- De Freitas*** **[2017] EMLR 4** [9].
>
> [96] Understanding the law relating to reference must start with the appreciation of the fundamental principle that the test is objective. The question is whether the hypothetical ordinary reasonable reader (if necessary, attributing knowledge of particular extrinsic facts) would understand the words to refer to the claimant: ***Morgan -v- Odhams Press Ltd*** **[1971] 1 WLR 1239, 1243B, 1245B**, *per* Lord Reid; **1261E-F** *per* Lord Guest; and **1264A** *per* Lord Donovan. In assessing this, the Court adopts the same approach as to the determination of meaning: **1245G** *per* Lord Reid.

13. No extrinsic facts are relied upon either by the Claimant, to establish reference, or by the Defendants in an attempt to rebut the Claimant's case on reference. As such, my task would be limited to the objective assessment of whether an ordinary reasonable reader would understand the word complained of to refer to the Claimant in the defamatory sense contended for by the Claimant.

14. A point that had emerged prior to the hearing, but more clearly during the hearing, was a dispute between the parties as to the parameters of the exercise in determining the first preliminary issue; that is the issue of reference. Unlike the other issues that fall for decision, reference is an issue to which evidence is potentially admissible. Deliberately, no directions were made for the service of evidence. The parties did not seek such a direction. As such, on the specific question of reference, the exercise the Court could

carry out today would be limited to the impression created on the ordinary reasonable reader from reading the Book, and including particularly the passages that were identified by the parties. If this case were to go further, there might arise a question of whether any allegation defamatory of an ENRC corporation refers to this Claimant. I will return to this issue below.

15. ***Millett -v- Corbyn*** also establishes, at [9], that at common law a meaning is defamatory and therefore actionable if it satisfies two requirements. The first, known as "*the consensus requirement*", is that the meaning must be one that "*tends to lower the claimant in the estimation of right-thinking people generally*". The Judge must determine "*whether the behaviour or views that the offending statement attributes to a claimant are contrary to common, shared values of our society*": ***Monroe -v- Hopkins*** **[2017] 4 WLR 68** [51]. The second requirement is known as the "*threshold of seriousness*". To be defamatory, the imputation must be one that would tend to have a "*substantially adverse effect*" on the way that the people would treat the claimant: ***Thornton -v- Telegraph Media Group Ltd*** **[2011] 1 WLR 1995** [98].

16. As regards defamation claims by companies, a corporation which trades for profit may bring an action for defamation in respect of the publication of defamatory matter which affects its business or trading reputation. A corporation cannot be injured in its feelings and at common law. A company can only sue in respect of imputation that caused damage to its trading or business reputation and liable to cause it financial loss. Additionally, companies must now meet the requirements of s.1(2) Defamation Act 2013.

17. Mr Caldecott QC identified a line of authority in which it has been held that a corporation cannot sue in respect of allegations of *"murder or incest or adultery*" because a company, not being a real person, cannot commit those acts: ***South Hetton Coal Co -v- N.E. News*** **[1894] 1 QB 133, 141**, approving a similar statement of the law by Pollock CB in ***Metropolitan Saloon Omnibus Co -v- Hawkins*** **(1859) 4 H&N 87**, **90**. Similarly, in ***D&L Caterers v D'Anjou*** **[1945] KB 364, 366**, Lord Goddard CJ stated:

> "If one said of a company 'it is a murderer' or 'it is a forger', I have no doubt that the company could not bring an action, because a company cannot forge and a company cannot murder, so that in the ordinary way it would not be actionable to write something of a company which might be actionable in the case of individuals, unless what is written reflects on the company in the way of its business."

18. Ms Page QC argues that Mr Caldecott's argument, based on these authorities, is too wide. She has referred me to, and relied upon, a decision of the High Court of Australia in ***Barnes -v- Sharpe*** **(1910) 11 CLR 462**, in which Griffith CJ held: "*The injury done to the reputation of a trading company by imputing to them criminal practices is in no way affected by the question whether they could be successfully prosecuted for them in a criminal court.*" She also contends that the line of authority, relied upon by Mr Caldecott, has been criticised in several subsequent cases: see ***National Union of General and Municipal Workers -v- Gillian*** **[1946] KB 81**; ***Bognor Regis UDC -v- Campion*** **[1972] 2 QB 169**, **176-178**; ***Willis -v- Brooks*** **[1947] 1 All ER 191**; and ***Multigroup Bulgaria AD -v- Oxford Analytica Ltd*** **[2001] EMLR 28**.

19. In the last of those cases, Eady J said ([41]):

> "It is probably correct to say that earlier judicial statements, to the effect that allegations of corruption cannot be taken as reflecting upon a corporate entity's business reputation, were too widely expressed. Normally of course they would be taken as reflecting upon one or more human beings rather than upon corporations; but there could be circumstances in which Lord Keith's test in Derbyshire could be satisfied if such allegations had a tendency to damage a corporation's business reputation. Yet the court does need to examine such contentions very carefully in those where it might be thought that the allegation reflects primarily upon human beings."

20. For my part, like Eady J, I doubt that the rather firm statements of principle from the older authorities cited by Mr Caldecott now represent the law. The ability of corporations to commit criminal offences has expanded significantly since the late 19th century. Companies can now face prosecutions for a range of criminal offences ranging from alleged breaches of health and safety and environmental protection legislation all the way to corporate manslaughter.

21. However, like most matters concerned with the meaning of words, the real question is what allegation the hypothetical ordinary reasonable reader would understand was being made by the publication concerned. "*One always gets back to the fundamental question what is the meaning that the word convey to the ordinary man. You cannot make a rule about that*": ***Lewis -v- Daily Telegraph*** **[1964] AC 234, 285** *per* Lord Devlin. A statement in an article that an asbestos company has "*murdered its employees*" may well not bear a literal meaning that the company is guilty of the criminal offence of murder, but it may, in context, bear a meaning that it had contributed or caused the deaths of its employees by failing to provide adequate protective equipment and a safe working environment. There is little doubt that such a meaning would be defamatory of the company, and, in context, the use of "*murder*" would be likely to be found to be hyperbolic and a strong indication of an expression of an opinion. By contrast, an allegation that a company had paid a contract killer to murder a director of a rival company might well be found to contain a factual allegation of procuring the murder of the relevant individual. Providing that the allegation did actually refer to the company, rather than an individual, it could hardly be doubted that it would be defamatory of the company at common law. These examples serve to demonstrate that what allegation is being made, and whether it refers to and reflects adversely upon a company, all depends on the precise nature of the allegation and the context in which it appears. The relevant principles, and the need to draw a careful distinction between defamatory allegations made against the corporate entity and allegations made against officers or employees of the company, were recently set out by Tipples J in ***Public Joint Stock Company Rosneft Oil Company -v- HarperCollins Publishers Ltd*** **[2021] EWHC 3141 (QB)**:

> [13] It is clearly established that a company is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business. Examples are those that go to credit such as might deter banks from lending to it, or to the conditions experienced by its employees, which might impede the recruitment of the best qualified workers, or make people reluctant to deal with it: see ***Derbyshire County Council -v- Times***

Newspapers Ltd **[1993] AC 534**, HL ("***Derbyshire***") at **547B-C**, *per* Lord Keith of Kinkel. The editors of *Duncan and Neill on Defamation* (5th Edition; 2020) ("*Duncan & Neill*") explain that 'an allegation which impugns the honesty or fairness of the business methods employed by the corporation or company may be actionable, as may allegations which reflect adversely on the financial position or the efficiency of the company' (see para. 10.02).

[14] An imputation is now only actionable by a company if it has a tendency to cause a substantial adverse effect on people's attitudes towards the company: ***Triplark*** [11]-[13]. The threshold has been set higher by statute which requires a company to prove that the harm to its reputation has caused or is likely to cause it 'serious financial loss': s.1(2) Defamation Act 2013.

[15] Further, it is also well established that a company cannot bring an action in respect of allegations which reflect solely on its individual officers, and not on the corporation: see ***Bognor Regis UDC -v- Campion*** **[1972] 2 QB 169**, Browne J at **175** (cited with approval in ***Derbyshire*** at **545E-547A**). In cases where the words might be thought to 'reflect primarily upon human beings' the court will examine carefully a contention that they are damaging to the company's business reputation: ***Multigroup Bulgaria Holding AD -v- Oxford Analytica Ltd*** **[2001] EMLR 28** [41], Eady J ("***Multigroup***").

[16] The editors of *Duncan & Neill* explain the following in relation to allegations reflecting on the officers or employees of a company at para. 10.05:

> 'But allegations about officers of a corporation or company, or even about an individual employee if they relate to their work in their employment, will often reflect on the corporation or company itself, either because the act of the individual or individuals will be identified in the mind of the publishee with the employer, or because the allegations involve some imputation against the methods of selection of staff or their supervision. Similarly, allegations against a corporation or company will often involve by necessary inference imputations against those who are responsible for its direction and control. Such inferences may arise more easily in the case of directors of a small family company than in the case of directors (especially non-executive directors) of a large organisation'.

[17] In ***Undre -v- Harrow LBC*** **[2017] EMLR 3** ("***Undre***"), Warby J explained at [21]:

> 'Cases where individuals and companies are co-claimants can give rise to difficulties when it comes to reference and meaning. A single set of words can defame both a company director or officer and the company itself, particularly if the individual is so closely associated with

> the company that those who know them will treat one as an alter ego of the other.'

[18] The words underlined in ***Undre*** were relied on by Mr Browne, for the claimant, as one of his examples where a reader identifies the act of an individual with the company. He submitted that, in relation to the association between Mr Igor Sechin and the claimant in the present case, this example is particularly apt.

[19] However, as was explained in ***Jameel -v- Times Newspapers Ltd*** **[2004] EMLR 665**, CA at [35] by Sedley LJ:

> 'It has to be kept well in mind that a limited liability company is a distinct legal person, not an extension of its proprietor (if I may adopt an imprecise but useful term). To defame the proprietor, even in an article which identifies the business as his, is not to defame the company unless the article also suggests that the company is itself implicated in the wrongdoing or suspicion of wrongdoing attributed to the individual, or it merits investigation for the same reasons as its proprietor. This article suggests none of those things.' (Underlining added)

[20] Examples of words which reflect solely upon a company's individual officers, and not upon the company itself, were identified by Warby J in ***Triplark*** [55]:

> 'This could be the case where the allegation is of personal misconduct, such as sexual promiscuity, by an officer of the company ... Equally, however, a publication might (at least in principle) impute misconduct by a director, for instance bribery, in the course of business activities on behalf of the company but, on a proper analysis, it might nevertheless defame only the individual and not the company for which he or she worked.'

[21] Therefore, in Warby J's second example of bribery by a director, the proper analysis referred to is to identify whether the company itself is implicated. If it is not, then it will only be the individual that is defamed, not the company for which he or she worked.

[22] In any event, whether a company can maintain a claim for defamation turns on two fundamental requirements: the words must refer to the corporate claimant, and they must convey a defamatory meaning about the corporate claimant (see ***Undre*** [23]; and ***Triplark*** [55] in which Warby J identified this as the 'first principle' derived from the following cases: ***Multigroup***, ***Elite Model Management Corporation -v- BBC*** (25 May 2001, unrep.), Eady J ("***Elite***"); ***Al Rajhi Banking & Investment Corporation -v- The Wall Street Journal Europe SPRL*** **[2003] EWHC 1358 (QB)**, Eady J ("***Al Rajhi***")).

Submissions

22. Ms Page QC submitted that the section of the Book complained of by the Claimant would be understood by readers to refer to the corporate entity ENRC. Ms Page took me through several passages in the Book which, she submitted, showed that the Claimant was being referred to as effectively the alter ego of the Trio. It was the entity through which the acts of wrongdoing identified in the Book were carried out. Chapter 36, particularly, which contains the words complained of, Ms Page suggests tells the reader that ENRC's Africa operations had involved bribes and corruption. These were the secrets that needed to be kept, if necessary, by silencing people. She argues that this provides the motive for what would be understood to be the murder of Bekker, Bethel and Strydom. In context, she argues, readers would understand that the ENRC had had them murdered. When the topic of the men's death is returned to, in chapter 39, the chapter ends with the observation: "*Whatever befell the deceased bearers of the ENRC secrets, their deaths struck fear into those charged with establishing the truth.*" This, she said, neatly encapsulates the allegation of murder for which the ordinary reader would understand ENRC was responsible. The motive being the need to protect its incriminating business secrets. The people who actually carried out the murder did so to protect ENRC, Ms Page submits.

23. Mr Caldecott submitted that there were two issues. First, whether the suspicious deaths would be linked to individuals as opposed to the company. If it is only to individuals, then he submits the claim must fail because it lacks any connection with any corporate entity.

24. Second, if the text suggests that a company did order or procure the murder of the three men, then the issue is *which* company. He submits that, if the text refers to a company at all in connection with the men's deaths, then the reader would understand it was to the Luxembourg company.

25. On the first issue, Mr. Caldecott suggests that the nature of the allegation is important. Murder is, as all readers would understand, only capable of being carried out by an individual or individuals. The Claimant's meaning is not that it was morally or legally responsible for the murders or poisoning; it is that the company had actually had the three men murdered. The Book makes clear that none of the Trio ever served on the board of the company. The motive for harming the four men is explained in the book. ENRC, he submits, as a corporate entity is, in many instances, portrayed as the victim of the fraud, in particular that carried out in the African operations. Further ENRC is identified as having brought in Neil Gerrard to investigate corruption and other wrongdoing. Yet it was one of the Trio who is said in the Book to be responsible for removing him. There are, Mr Caldecott submits, a host of people who would have had a motive for killing people who threatened their criminal activities, many of whom and identified in the Book and whose connections to the underworld and illegality are also made plain. In relation to ENRC's activities in Africa, Mr Caldecott highlights that ENRC was, through Mr Gerrard, said to be attempting to investigate what was going on. Identified individuals within ENRC are said to have obstructed that investigation and ultimately Mr Gerrard was removed by one of the Trio. He is said to have received death threats and others involved with the investigation also said to have been threatened.

26. On his second point, Mr. Caldecott submits that the reader will understand from the book that there are potentially several corporate companies in the ENRC structure.

If, contrary to his primary submission, the passages in the book do defame a corporate entity in the ENRC corporate structure, it is not the Claimant in this claim.

Decision

27. In each defamation action where the court determines preliminary issues, some issues assume more importance than others. In this case it has become quite clear that the central point of dispute, and the one that logically must be determined first, is whether the statements complained of by the Claimant, and said to have conveyed a defamatory imputation against it, refer to any ENRC corporation at all. If they do not, then that is an end of the Claimant's claim. If they do, then the balance of the preliminary issues identified above would require determination (see [5(2) to (4)] above). This potentially might leave over a question of how the Court is to resolve the issue, that has now become clearer, as to whether, if the words complained of refer to an ENRC corporation, whether it actually refers to this Claimant.

28. I shall therefore start with the central issue of whether the Book in the passages complained of makes a defamatory allegation against any ENRC company at all. This is a question of assessing the natural and ordinary meaning, and whether the ordinary reasonable reader would understand the allegation to be made against a company. As I have said, if the Claimant fails on this issue, the other preliminary issues will fall away.

29. I read the whole book in preparation for this hearing. Certain passages made an impact on me and shaped my overall impression of the message of the Book as a whole. The Book's title is "*Kleptopia - How dirty money is conquering the world*". As concerns ENRC specifically, a message that comes across clearly from the Book was that ENRC was simply the corporate front for the illegal activities of the Trio; for example:

> "… it was as though ENRC was a dual corporation… There was ENRC plc a corporation with shares traded on the London market, bound by laws and regulations, producing accounts, making presentations to investors about its prospects and enjoying the protection of the law. Then here was its doppelganger. Its purpose was not to dig for ore from the earth but to siphon money away into the black aquifer" (pages 279 to 280).

30. Even during the period when ENRC was a public company, the Book suggested that its corporate governance was an inadequate "*counterweight*" to the Trio's influence (page 121). Again, by way of example: "*When ENRC's executives wanted to know what to do, they turned not to the board with its independent city grandees but to the oligarchs*" (page 129). Later when ENRC was taken back into private ownership, the ordinary reasonable reader could not fail to appreciate the significance of this step, which was clearly explained in chapter 27 (pages 210 to 212).

> "[S] still graced London with his presence for occasions such as this. He kept a place around the corner from ENRC's headquarters in St James's. Except they were no longer ENRC's headquarters. When it came to business – as opposed to pleasure – the Trio had tired of the UK, a nation that wanted their money then professed to balk at how they made it. The Serious Fraud Office's top brass had responded to [S]'s decision to fire Neil Gerrard just as he was preparing to hand the results of his investigation over to them by opening a formal criminal case. Relocating their multibillion-dollar corporation abroad

> was the least the Trio could do to register their dissatisfaction – not to mention making it harder for the SFO's bureaucrats to come meddling in their affairs.
>
> As a new home for their corporate personage, the Trio had selected Luxembourg, a friendly destination for those keen to avoid tax, scrutiny and other encumbrances. To move ENRC from London would be tricky, however. After all, they had sold almost a fifth of the company's shares, which were traded on the exchange…
>
> … Of the new, non-public company, the Trio would own 60 per cent, the Kazakh state 40. When you added the new loan to old debts, this company would owe … more than $7 billion, equivalent to three years' profits. There was a danger in that: the banks could squeeze and squeeze, and ultimately start seizing the Kazakh mines that pumped out all that cash. But that was where having a state on the team was so helpful. It was in Kazakhstan's power simply to confiscate those mines, invoking some law or other, should anyone other than those anointed with [N's] patronage try to lay hands on them…
>
> ... By the end of 2013, the Trio's corporation was private once more, safely shifted to the duchy. They had not even had to bother handing over so much as a business plan…, they retained sole right to appoint the management, and even the Kazakh regime's own bankers knew Kazakhstan was ultimately on the hook for the Russian billions that had bailed the Trio out…"

31. A more general theme of the Book is that corporate structures, and the opacity of ownership of companies and property, enable criminal activities, particularly the laundering of the proceeds of crime and the plundering of resources to flourish. A second aspect is the suggestion by the author that such corporate structures are used not only as a front by wrongdoers but also a shield and occasionally as a weapon. An illustration is the comment, at page 173, "*the corporation itself – an idea, incorporeal, a thing that could not be impoverished or incarcerated – would carry any punishment.*"

32. This is the context in which the reader arrives at the section complained of by the Claimant. I am quite satisfied that the section of the words complained of from pages 283 to 287 suggest that the deaths of Bekker, Bethel and Strydom were suspicious. The text suggests that there could be grounds to suspect that there they might have been killed to stop them from revealing information about "*the ENRC unit at the heart of the suspected corruption*". This is reinforced when the narrative returns to the deaths in question at pages 308 to 309. There, readers are told, by way of update, that in 2020 investigation into the deaths of Bethel and Strydom was taken over by the FBI. But a reader who concluded that had the men had been murdered, in order to silence them, would be avid for scandal. Similarly, no reasonable reader could conclude, from the single paragraph relating to Jon Mack that he had been poisoned or even that there were grounds to suspect him of being so. That is an unreasonable and forced meaning. The importance of the section is more that Jon Mack believed that he had been poisoned, by whom is not specified, and that this had led him to terminate his involvement with the SFO investigation into ENRC.

33. The concluding sentences of that section echo one of the broad themes I have already noted: that, even if the SFO investigation reached a conclusion too adverse to ENRC,

any punishment was likely to be felt only by the corporation and not "*the Trio or their lieutenants*".

34. Does this text refer to or in any way reflect adversely upon a corporation? In my judgment, it does not. The Book portrays ENRC as little more than a front for the operations of the Trio. It would be unreal for the reasonable reader, at this stage of the Book, to attribute or link the suspicious circumstances of the deaths of Bekker, Bethel and Strydom and Mack's belief he had been poisoned to a corporate entity. If a reader paused to consider the role played by ENRC in these events, the impression is the one that is consistent throughout the Book, that it was being used as the vehicle for criminal activities, or, as Mr Caldecott QC submitted, occasionally sometimes as the target. It was not the organiser of them. The Book does not make that allegation either in terms or by implication. In the sections of the text complained of by the Claimant, this message is reinforced by repeated references to "*the Trio's corporation*", "*the Trio's African mining interests*" and "*the Trio's people*". There is an unreality at the heart of the Claimant's pleaded meanings. They attribute, to a corporate entity, actions, and a motive, that it simply cannot have. Only individuals can carry out acts of murdering or poisoning. Only individuals can be motivated to do so to protect some business interests. A company cannot. I reach that conclusion not by application of 19th century legal precedent but by a straightforward application of the principles that guide the determination of natural and ordinary meaning to the text of this book.

35. As I have indicated, the Book does not allege that Bekker, Bethel and Strydom were murdered or that Mack was poisoned. In so far as it suggests that these events were suspicious, the ordinary reasonable reader would conclude that the finger of suspicion point pointed at individuals – some of whom a reader might conclude fell under suspicion are named in the chapter and in other places in the book - not at a corporate entity of ENRC. There is no suggestion, for example, that there was any corporate sanction for these actions. Those with a motive for acting against the four men would plainly be understood to be the individuals that stood to lose out, either if the information they had was revealed or their investigations went further. That was not a corporation. The reference is clearly to those who were using ENRC for their own gain by unlawful means. Nor does the Book implicate any corporate entity in suspicion of wrongdoing. It does not even suggest that the company's role in these events merited investigation. In respect of that last point, it is perhaps best demonstrated neatly by asking who, on the evidence presented in the Book, would be the target(s) of any police investigation into the men's death. Of the many names that might appear on this list of suspects, no ordinary reasonable reader would conclude that ENRC would be amongst them.

36. I accept that it is possible to make an allegation that implicates a company in murder, for example, as I gave earlier, by stating that it procured it or to suggest that a company is legally or morally responsible for a murder. But this Book does not make any such allegation against ENRC. In short, the Book does not bear the defamatory meaning contended for by the Claimant because, read in their proper context, the allegations complained of by the Claimant do not refer to any ENRC corporation.

37. The conclusions I have reached so far concern the hardback copy of the Book without the Afterword. If the Afterword, published in the paperback, is also taken into account in the assessment of meaning, then the Claimant's position is weaker still. The Claimant's claim that the Book had alleged that it had had Bekker, Bethel and Strydom murdered is reported, and expressly rejected, in the Afterword. The reader is

told, in terms, that if s/he rereads chapters 36 and 39, the Book states that it is not yet known what befell these men "*or at whose hand*". Against that very clear statement, a reader who nevertheless concluded that the Book was alleging that these men had been murdered would be perverse.

38. I can readily accept that the sections of the Book complained of by the Claimant do bear the Defendants' Meaning (see [6(b)(3)] above), but that meaning is not defamatory of the Claimant or any corporate entity. More generally, I would accept that the Book bears other meanings that are defamatory of the Claimant. Most strikingly, the impression I got from reading the Book was that ENRC was the corporate front – "*a charade*" – for the Trio, and it was used by them for criminal activities including corruption, money laundering, theft and embezzlement. Perhaps a striking example of this is the section of the Book from, page 281 (part of which I have already quoted above):

> "Down in South Africa, in 2011, ENRC paid $295 million for a manganese prospect. The money went to a company with unnamed owners. Two years later, ENRC's annual report noted in a single paragraph on p.82 that the manganese prospect was now considered worthless. It was as though ENRC was a dual corporation, a cousin to Ernst Fraenkel's dual state. There was ENRC plc, a corporation with shares traded on the London market, bound by laws and regulations, producing accounts, making presentations to investors about its exciting prospects, and enjoying the protection of the law. Then there was its doppelganger. Its purpose was not to dig ore from the earth, but to siphon money away into the black aquifer…
>
> … ENRC went ahead and bought Congolese mines and prospects. But not directly from the Congolese state, which owned them in the name of the Congolese people. No first they were sold to [name]. [He] would pay a modest sum for the asset, then ENRC would pay multiples of that sum to one of [the person's] front companies. [That person] and anyone he chose to cut in, would make instant profits running to hundreds of millions of dollars, at the expense of the state entrusted with the care of the world's poorest population. And ENRC's shareholders on the London Stock Exchange lost too, because the company was paying far more than if it had bought the assets from the state directly. Once again, its purpose seemed to be to shift money from the open books of a public corporation to the closed ledgers of the financial secrecy system.
>
> Neil Gerrard concluded of ENRC that 'the majority of its African business appeared to represent the proceeds of criminal conduct.' There was always a cover story, a paragraph or two of business jargon to justify the enormous expense. That was supposed to be all the City moneymen ever wanted; a tale they could agree to tell one another so that everyone could keep getting richer, so that more wealth could be extracted from the rest of society."

39. That passage neatly encapsulates one of the key themes of the Book. It is one of the passages that contributes to the corruption meaning I have identified. Such a meaning is one that an ordinary reasonable reader would understand to refer to the corporate Claimant and is defamatory of it. At the hearing I asked Ms Page whether the Claimant's decision not to complain of this or any similar meaning was deliberate. She confirmed that it was.

40. In light of the ruling that I have made, it is not necessary for me to determine the other preliminary issues that were directed for trial, which do not arise. Subject to any further submissions that I will hear shortly, it would appear to me that the consequence of this ruling is that the Claimant's claim must be dismissed and judgment on the claim should be entered for the Defendants.

APPENDIX

Kleptopia: How Dirty Money is Conquering the World

(pp. 283-287)

… Some of the money with which [G] operated his bribery ring was alleged to have come from Och-Ziff. Some of it, the prosecutors suggested, had come from 'Mining Company 1'. This company, it was plain to see, was the Trio's corporation, ENRC. Neil Gerrard had heard something similar during his investigation: some of the millions [H] authorised for deals with [G] were denominated as bearer notes. That meant they could be passed on like cash to any ultimate recipient without leaving a trail.

Too many mouths were opening. But some were closing. Katumba died in a plane crash in 2012. In 2016 the charred corpse of Andre Bekker was found on the back seat of a burned-out Audi in a Johannesburg suburb. Bekker, a chipper Afrikaner who liked a pint, had been a mining geologist. He had assessed the value of a manganese prospect in the Northern Cape – the one ENRC bought for $295 million. Bekker knew the prospect was hopeless, that the valuation must have been inflated to push up the price. And he had started telling people as much.

Jim Gorman had died in the same city four years earlier. A Scot with a long career in mining, he had been [H]'s number two. Lately he had been talking about a plan to hive off ENRC's Africa division. After a boozy night out with his colleagues, he took himself off to bed at the nearby hotel where they were staying. Normally, he would have been the first down to breakfast in the morning. When he didn't appear, his colleagues went up to his room. They found him there, lifeless. Gorman had had a bad heart. Maybe it had just given out of its own accord, those who knew him thought. Until they heard what had happened in Springfield, and started to wonder.

Gorman's replacement as [H]'s deputy was James Bethel. Bethel worked closely with his old university friend and fellow South African, Gerrit Strydom. Both were in their forties and decided, in 2015, to leave ENRC. Bethel, for one, remarked that he had grown tired of [H]'s imperious manner. Then again, he had spoken of some business venture he and Strydom were cooking up with [H], outside ENRC. The main part of his job had been to run the operations in Congo. That was the centre of the corruption that Neil Gerrard believed he had started to detect when he was fired, and which the Serious Fraud Office's investigators were now apparently pursuing. The investigators had sent word to Bethel: they wanted to meet him. Strydom, for his part, had headed the ENRC subsidiary through which, Gerrard's people believed, payments to [R] had been funnelled.

Bethel and Strydom were bikers. In May 2015 they set off on a classic trail: Route 66. They flew to Chicago, picked up Harleys, and by May 6 had reached the town of Springfield, Missouri. They checked into a hotel, La Quinta Inn, taking separate rooms. On the third morning, they did not emerge. At 1 p.m. hotel staff opened the doors to their rooms. Strydom was lying naked on his bed. Bethel was on the floor of the bathroom in his underwear. Both were dead.

When the news reached SFO headquarters in London, the investigators on the ENRC case were alarmed. They scrambled to contact the Springfield police and ask them to secure the evidence: the men's phones, effects and so on. But the police were dealing with a representative of ENRC, who was assisting them. His name was [M].

[M] had left BP shortly after his strange performance during the Kremlin's campaign against its Russian venture. He had returned to the region he'd covered for the US National Security Council,

Africa, this time for his new employer: ENRC. During Neil Gerrard's investigation, he had been curious about what exactly [M] did to earn his pay. Clearly he was one of [H]'s crew; [H] would send him to debrief his underlings after Gerrard's team interviewed them. His contract was for the provision of services in 'Africa generally and in Zimbabwe in particular'. When Gerrard interviewed [M] he was accompanied by a lawyer who, Gerrard would later learn, also represented the designated Mugabe 'crony' [R]. Neither the lawyer nor [M] had clarified [M]'s job description to Gerrard's satisfaction. And now here [M] was, representing the Trio's corporation in the wake of the sudden deaths of two men who had held senior positions in the ENRC unit at the heart of the suspected corruption. It was [M] who the local police detective hoped might provide the codes to unlock the men's phones. Some codes did arrive, but if the US authorities ever checked them for evidence relating to the corruption investigation, no one told the SFO's investigators. The phones spent so long stashed in police storage that in time they, like their owners, died.

The bodies were taken for autopsy by the local coroner. His facility was poorly equipped. He lacked the necessary microscope kit to determine the nature of specks he detected in the men's cells. His office had a contract with a substandard local lab; when he sent off samples for toxicology tests, only partial results came back, and the report was not added to the police file. Another coroner turned up, a private one paid for by the Trio's corporation, ENRC. His name was [B], America's only celebrity medical examiner. He had made a career working on contentious deaths, from John F. Kennedy in Dallas to Michael Brown, the young black man shot by the police in Ferguson in 2014. From time to time, he would appear on Fox News to opine on some case or other. Neither he nor the local coroner could establish the cause of death, so they sent samples to the Centers for Disease Control and Prevention, the federal agency in charge of handling threats to public health. In London, the SFO's investigators regarded the provenance of these samples with suspicion. Had a chain of custody, which would have ensured they were not tampered with, been maintained? No one seemed to know.

The CDC's tests identified malaria in the samples. Its scientists did not conclude that this was necessarily what had killed the men. Nonetheless, six weeks after the bodies were found, the Springfield Police Department announced the cause of death: cerebral malaria. For some who knew the pair, that made sense. They had been on a fishing trip together in a malarial stretch of Zambia a couple of weeks before departing for the US. That was about the usual length of time malaria took to develop, from the mosquito bite, through the gestation of the parasites, to their surge into the bloodstream and devastation of the organs. Then again, Bethel at least had not mentioned being bitten; they had both been feeling ill on the road but he had seemed perfectly compos mentis on the phone a few hours before he died. And there was another anomaly, one that only a trained eye could catch. A malaria expert could tell you that a multitude of factors affected the speed at which the disease developed over many days as well as its severity, from the size of the mosquito's injection to the state of the host's immune system. That meant that the chances of two people contracting malaria at the same time and then dying within hours of each other were effectively nil. Unless, however, they had been bitten by the very same mosquito. Bethel and Strydom had been fishing together: that could have happened. Except that it hadn't: when the CDC tested the samples, they found the parasites had different genotypes. They could only have come from different mosquitoes.

Malaria, it seemed, had not killed James Bethel and Gerrit Strydom. Which left the question: what had?

In London and Africa, colleagues of the dead men shuddered.

(pp. 308-309)

The Trio's African mining interests were secure. And yet, from time to time, the past would threaten to bubble up to the surface. The former employer of Andre Bekker, the geologist found dead in the

back of a torched car in Johannesburg after suspecting that hundreds of millions had gone astray in ENRC's acquisition of a South African manganese prospect, hired a private detective to look into his death. The detective, a dogged former South African police colonel called Clement Jackson, started to piece together what Bekker had known. When the Serious Fraud Office investigators on the ENRC case got in touch, he went to London and passed on the results of his enquiries. In Springfield, Missouri, the police initially announced that James Bethel and Gerrit Strydom had died of malaria. But they had not formally concluded that that was indeed the true explanation: they quietly kept the case open. By the middle of 2020, without any announcement, the FBI had taken over the investigation.

Whatever befell the deceased bearers of ENRC's secrets, their deaths struck fear into those charged with establishing the truth. After John Gibson left the Serious Fraud Office, Jon Mack took over as case controller on the ENRC investigation. On the morning of a court hearing into [A's] refusal to hand over documents, Mack collapsed. During the weeks he spent in hospital, Mack was convinced he had been poisoned. Though the doctors didn't confirm as much, he was so shaken that he dropped the ENRC case, leaving it to someone else to try to bring the seven-year investigation to a conclusion. The Trio's people grew confident that, were that ever to happen, it would take the form of a deal, with any punishment directed not at the Trio or their lieutenants but at the corporation itself, which could settle its debt to society by handing over a little of its money.

(pp. 341-343)

Afterword

On January 18, 2021, four months after this book was published, I was accused of corruption…

By the time the Trio's London arm had brought its suit against [G], some more of its lawyers (Taylor Wessing again) had sent a letter to the UK office of HarperCollins. The lawyers said I had written that their client had murdered James Bethel, Gerrit Strydom and Andre Bekker. (In fact, as you will see if you re-read chapters 36 and 39, we don't yet know what befell these men in their last hours or at whose hand, though those who knew them hope that one day we may.) They wanted damages. They didn't say how much: 'Our client's loss cannot yet be precisely calculated. It is continuing. A huge and costly exercise is now required of our client and is underway to counter the Allegations in every quarter and to attempt to mitigate the damage to its reputation. The harm will be ongoing and will increase every day until such time as our client is fully vindicated by you or by a determination of the court.' They wanted an apology and their legal costs paid. And they wanted this: 'A recall of all copies of the Book that have not been sold to consumers' – that's what you are, not readers – 'and destruction of all such copies (and confirmation of the same by way of a signed witness statement)' …