IN THE HIGH COURT OF JUSTICE Claim Nos. QB-2020-000799/

QUEEN'S BENCH DIVISION QB-2020-000801

MEDIA AND COMMUNICATIONS LIST

[2022] EWHC 543 (QB)

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday, 10 February 2022

Before:

MR JUSTICE NICKLIN

BETWEEN:

ZOË HARCOMBE PhD Claimant

- and -

(1) ASSOCIATED NEWSPAPERS LIMITED

(2) BARNEY CALMAN Defendants

AND BETWEEN:

DR MALCOLM KENDRICK Claimant

- and -

(1) ASSOCIATED NEWSPAPERS LIMITED

(2) BARNEY CALMAN Defendants

GODWIN BUSUTTIL (instructed by Carter-Ruck) appeared on behalf of the Claimants.

CATRIN EVANS QC and SARAH PALIN (instructed by RPC) appeared on behalf of the Defendants.

J U D G M E N T

MR JUSTICE NICKLIN:

1
This is a libel action that is brought by two individual Claimants. They have separate claims, but for a considerable period now they have been case managed together. The Claimants are Zoe Harcombe PhD and Dr Malcolm Kendrick. They were the subject of articles that were published in the Mail on Sunday and Mail Online in March 2019. In the print edition, there was a main news article and an inside piece. The main news article appeared on p.2 in the Mail on Sunday, on 3 March 2019. The headline was, "Statin deniers are putting patients at risk says Minister." There was then a separate article that appeared in the Health, Wealth and Holidays section of the newspaper at pp.47 to 50. The supplement article, as I will call it, was trailed in the main article, with a sub-headline, "'Experts' behind scare stories and why they are wrong pp.47 to 50". At p.47 there was a full page spread to begin the supplement article, headed

"The deadly propaganda of the statin deniers. The science is unequivocal. Statins do protect you from heart attacks but, as this devastating investigation reveals, thousands refuse them because of the deadly propaganda of the statin deniers. Special report by Barney Calman"

The article itself then ran to three inside pages. The headline of the second, double-page spread was, "It's worse than the MMR scare."

2
For the purposes of today's rulings, I do not need to set out the text of the articles. What I can do, instead, is to set out the meaning that the Claimants attribute to the articles in the Particulars of Claim. There are subtle differences between the meanings that are attributed to individual articles, but there is a degree of commonality. It suffices for me to set out just one of the pleaded meanings to give an overview of the complaints made by the Claimants:

"In their natural and ordinary meaning the words [of the print articles] meant and were understood to mean:

6.1 in respect of the First Claimant (Dr Harcombe):

(i) that she is a pernicious liar, who, for a venal as opposed to any proper, sincere motive, knowingly and deliberately disseminates to the public false information about statins in blatant contradiction of indisputable scientific facts; and

(ii) that by that conduct, she is needlessly:

(a) putting many thousands, if not millions, of people in Britain (like Colin Worthing) at a greater risk of a deadly or debilitating heart attack or stroke by misleading them into the false belief that statins do not work and/or have intolerable side effects, and thereby leading them to refuse or to abandon the treatment that has been definitively proven by medical science to benefit health in critical ways including by saving lives while causing insignificant side effects in the process; and

(b) contributing to a public health catastrophe with potential consequences in terms of preventable death and serious disability far graver than is resulting from the infamous MMR vaccine scandal involving disgraced paediatrician Andrew Wakefield – to whom Dr Harcombe is to be likened – who fabricated evidence to support his idea that the vaccine triggered autism in infants, leading to a decline in vaccination uptake and the resurgence of measles."

3

Substantially the same meaning is pleaded in para.6.2 in relation to Dr Kendrick with necessary changes to references to the individual Claimant. As I say, substantively the same meanings are complained of for the online publications as well.

4
Early in the proceedings, the parties tried to find a way of advancing the case in stages, as is now common in defamation claims. Obvious candidates for early resolution in most claims are the issues of meaning and whether the publication complained of was or contained an allegation of fact or expression of opinion. Resolution of these issues in most defamation claims, even prior to service of a Defence, can offer substantial benefits in terms of case management, see **Bokova -v- Associated Newspapers Ltd[2019] QB 861** [10] and **Morgan -v- Associated Newspapers Ltd [2018] EWHC 1850** [10].

5
In this case, there were difficulties in resolving these issues arising from the Defendants' reliance upon qualified privilege (on several bases) to protect publication of certain paragraphs of the articles. The articles contain a statement by the Secretary of State for Health as well as reference to some scientific studies. The Defendants rely upon defences of qualified under s.15 and Schedule 1 Part 2, para.9(1)(b) Defamation Act 1996 and s.6 Defamation Act 2013.

6
The complicating factor is the Court of Appeal's decision in **Curistan -v- Times Newspapers Ltd[2009] QB 231**. That decision, which predated the Defamation Act 2013, is authority for the position that the court must resolve the extent to which the publication complained of is protected by privilege before the court can determine meaning. In other words, when performing the test of deciding what is the meaning, the natural ordinary meaning of an article, the court must first remove from its consideration such parts of that article as the court finds is protected by qualified privilege.

7
There has been some criticism of that decision. The authors of Gatley suggest, at para.30.8:

"The full consequences of this iconoclastic approach to the determination of meaning remain to be seen."

8
One of the consequences of the **Curistan**principle in relation to this claim is that it stands as a fairly significant impediment to the court determining the natural and ordinary meaning of the article. To do so, the court would have to resolve the question of qualified privilege. The determination of whether the pleas of qualified privilege protect parts of the publications complained of, in turn, would require the court to determine also the plea of malice that the Claimants have advanced. There are other implications of **Curistan** which have emerged only since the Defamation Act 2013. As the objective meaning of a publication is likely to be an integral part of the assessment of serious harm under s.1 Defamation Act 2013, that means that any dispute as to serious harm to reputation could also only be carried out after the issues regarding qualified privilege have been resolved.

9
There is no doubt that the impediment that **Curistan** represents has significant implications for this case and its case management. The court now has the benefit of full statements of case filed by the parties. It is no exaggeration to say that the parameters of this litigation are very substantial. Indeed, this is the most significant piece of defamation litigation that I have seen in a very long time.

10
It would take too long for me to set out the various defences relied upon by the Defendants. It suffices if I quote from the summary provided in the Defence:

“The Defendants admit that the First Defendant published, and the Second Defendant caused to be published, the articles complained of by the Claimants in The Mail on Sunday on 3 March 2019 and online on Mail Online and on a continuing basis... The Defendants deny that the articles bear the defamatory natural and ordinary meanings, or in the case of Online Publication 2, the innuendo meaning, ascribed to them by the Claimants... The Defendants admit that the articles are defamatory at common law… save in respect of the News Article (Print Publication) and Online Publication (2) when read alone... No admissions are made as to whether the articles have caused or are likely to cause serious harm to the Claimants’ reputations...

The Defendants’ Defences are:

A. Honest opinion pursuant to s3 of the Defamation Act 2013... The Defendants contend that an honest person could have held the opinions pleaded on the basis of (i) facts which existed at the time the statements complained of were published pursuant to s3(4)(a) …; and (ii) matters asserted to be facts in privileged statements published before the statements complained of were published pursuant to s3(4)(b)... The imputations the Defendants seek to defend as honest opinion are set out [below].

B. Truth pursuant to s2 of the Defamation Act 2013 (§25-26). The imputations the Defendants contend are substantially true are set out [below];

C. Statutory qualified privilege pursuant to s15 of the Defamation Act 1996…;

D. Statutory qualified privilege pursuant to s6 of the Defamation 2013…; and

E. Publication on a matter of public interest pursuant to s4 of the Defamation Act 2013...”

11
In the Reply, a similar summary has been given of the Claimants’ case:

“The Claimants aver that the publications complained of consist of defamatory statements of fact concerning them and deny that they are ‘statements of opinion’ within the meaning of s.3(2) of the Defamation Act 2013... The Claimants deny that the publications bear the meanings ascribed to them by the Defendants... The Defendants by their Defence downplay and seek to sanitise the true defamatory effect of what they published, which, in truth, so far as concerns the Claimants, consists of an unwarranted hatchet-job or, to use the Second Defendant’s own word, ‘takedown’... In particular, the Defendants seem to wish to shirk responsibility for accusing the Claimants entirely unjustifiably of dishonest and venally motivated conduct, and further accusing them of causing very many people, by that conduct, to be a greater risk of a heart attack or a stroke.

The Claimants deny that the ordinary reasonable reader would read what the Defendants refer to as the ‘News Article’, which forms part of the Print Publication, in isolation, that is without reading the rest of what the Claimants call the Print Publication... Similarly, the Claimants deny that the ordinary reasonable reader would read Online Publication (2) in isolation, that is without reading the material clearly hyperlinked from Online Publication (2), namely Online Publication (1), which consists of everything complained of that was published on the Defendants’ website...

So far as the Defendants’ defences are concerned:

A. The Claimants deny that any of the publications complained of is honest opinion under s.3 of the Defamation Act 2013. It is denied that any of the conditions in s.3(2)-(4) is met in relation to any of the publications complained of. Further, if contrary to the foregoing, any of the publications complained of is found to be a statement of opinion, the Claimants will show (a) that the Second Defendant, for whose conduct in publishing the articles complained of the First Defendant is vicariously liable, did not hold any defamatory opinion about the Claimants that the publications may be found to bear; or, alternatively, (b) that the First Defendant knew or ought to have known that the Second Defendant did not hold any such opinion about the Claimants...

B. The Claimants deny that any of the publications complained of is substantially true under s.2 of the Defamation Act 2013...

C. In particular, the Claimants respond to the Defendants' defences of honest opinion and truth by contending that an evaluation of the relevant scientific evidence relating to cholesterol, CVD and statins, primarily in the form of published scientific studies, demonstrates that the science on these issues is not in fact cut and dried as appears from both the articles complained of in the Defence (and could not reasonably be considered to be cut and dried), and that all the published statements that the Claimants have made on these topics – which are not the same as the ones that the Defendants have imputed to them in the publications – they have made honestly and reasonably on an evidence-based basis...

D. The Claimants deny that statutory reporting qualified privilege under s.15 of the Defamation Act 1996 attaches to any of the passages in the publications complained of to which the Defendants contend it attaches, including by virtue of the fact that the publication of each such passage was and continues to be made by the Defendants with malice...

E. The Claimants deny that peer-reviewed scientific statement privilege under s.6(5) of the Defamation Act 2013 attaches to any of the passages in the publications complained of to which the Defendants contend it attaches, including by reference to the fact that the publication of each such passage was and continues to be made by the Defendants with malice...

F. The Claimants deny that the publications complained of (or any of them) is a publication on a matter of public interest under s.4 of the Defamation Act 2013. It is denied that the Defendants believed or believed reasonably that publication of any of those publications was in the public interest...

The Claimants' case, in short, is that they have both been grossly and indefensibly libelled. They are each entitled to a very substantial award of damages to vindicate their unfairly traduced reputations and to set the public record straight. They are also entitled to an injunction to restrain the further publication of these libels, which continues to this day on the Defendants' website."

Those two summaries give an indication of the extensive issues that arise in the context of this litigation.

12
The parties had tried themselves to fashion a way of enabling the court to resolve the issue of meaning. A consent order was put before Jay J and an order was made directing the trial of the following preliminary issues:

"(A) Whether the Print Article, Online Article 1 and/or Online Article 2 attract qualified privilege under section 15(1) and (3) of the Defamation Act 1996 and Schedule 1, Part I, paragraph 7 thereto if

and insofar as any of those articles consists of a copy of or extract from matter published by or on the authority of the UK government, that matter being, according to the Defendants, the statement published by or on behalf of Matt Hancock MP as set out on pages 4-5 of RPC's letter to Carter-Ruck dated 1 November 2019.

(B) Whether the Print Article, Online Article 1 and/or Online Article 2 attract qualified privilege under section 15(1), (2) and (3) of the Defamation Act 1996 and Schedule 1, Part II, paragraph 9 thereto if and insofar as any of those articles consists of a copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of the UK government, that notice or other matter being, according to the Defendants, the statement issued by or on behalf of Matt Hancock MP as set out on pages 4-5 of RPC's letter to Carter-Ruck dated 1 November 2019.

(C) Whether the Print Article, Online Article 1 and/or Online Article 2 attract qualified privilege under section 15(1) and (3) of the Defamation Act 1996 and Schedule 1, Part I, paragraph 7 thereto if and insofar as any of those articles consists of a copy of or extract from matter published by or on behalf of the UK government, that matter being, according to the Defendants, the statement published by or on behalf of Dr Matt Kearney as set out on page 5 of RPC's letter to Carter-Ruck dated 1 November 2019.

(D) Whether the Print Article, Online Article 1 and/or Online Article 2 attract qualified privilege under section 15(1), (2) and (3) of the Defamation Act 1996 and Schedule 1, Part II, paragraph 9 thereto if and insofar as any of those articles consists of a copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of the UK government, that notice or other matter being, according to the Defendants, the statement issued by or on behalf of Dr Matt Kearney as set out on page 5 of RPC's letter to Carter-Ruck dated 1 November 2019.

(E) Whether the Print Article, Online Article 1 and/or Online Article 2 attract privilege under section 6(5) and (6) of the Defamation Act 2013 if and insofar as any of the articles in question consists of a summary of a statement whose publication is privileged by virtue of section 6 of the Defamation Act 2013 (pursuant to sections 6(1) to (3) thereof), the statement in question being, according to the Defendants, the London School of Hygiene and Tropical Medicine paper published in the BMJ in 2016 (Matthews et al, Impact of statin related media coverage on use of statins: interrupted time series analysis with UK primary care data. BMJ2016; 353: i3283).

(F) The meaning of each of the articles complained of in respect of each of the Claimants.

(G) Whether Online Article 2 bears by innuendo the meaning set out in paragraph 11 of the Amended Opening Statement of Case of the Claimants for the trial of preliminary issues.

(H) With respect to each of the articles complained of, whether the article is statement of fact or opinion (it being agreed by the Defendants that each of the articles complained of is in its natural and ordinary meaning defamatory of the Claimants and each of them at common law)."

13
Directions were given for exchange of evidence and the trial was listed for 1½ days on 23 March 2021. Shortly before the preliminary issues were due to be tried, the case was referred to me. I was concerned, initially, about the time estimate which appeared to be a substantial underestimate. More generally, but particularly given the likely scale of the trial, I was concerned that there should be some reconsideration of whether resolution of the preliminary issues remained sensible. In an Order

dated 11 March 2021, I vacated the trial and converted hearing on 23 March 2021 to a directions hearing. My concerns were explained in the Order:

"(A) Whilst much else is capable of dispute, one thing is clear: there is insufficient time to complete the trial of the Preliminary Issues in the 1½ days allocated on 23-24 March 2021. A more realistic time estimate is up to 3 days. If the trial of the Preliminary Issues is going to go ahead, then it will have to be refixed with a revised time estimate.

(B) When the Preliminary Issues were originally ordered – by consent – the true extent of the issues that would require determination was not apparent. The Order of 30 June 2020 provided for filing and service of statements of case for the preliminary issues. These documents have proved to be very substantial. In the "Defence" (17 pages, dated 20 November 2020), the Defendant advances pleas of statutory qualified privilege on several bases. In the "Reply" (63 pages, dated 18 December 2020), the Claimants dispute the claim for qualified privilege and advances a plea of malice. Recently, the Defendant has indicated an intention to apply to "amend" the "Defence" to withdraw an admission relevant to publication.

(C) Ostensibly, resolution of the Preliminary Issues was justified as an attempt to determine the issue of the natural and ordinary meaning of the publications complained of and the issue of the extent to which the publications made allegations of fact or were expressions of opinion. Early resolution of those issues in defamation claims – even prior to service of a Defence – is now recognised to offer substantial benefits: **Bokova -v- Associated Newspapers Ltd [2019] QB 861** [10] and **Morgan -v- Associated Newspapers Ltd [2018] EWHC 1850** [10]

(D) However, resolution of the issue of natural and ordinary meaning and fact/opinion is complicated in this case by the authority of **Curistan -v- Times Newspapers Ltd [2009] QB 231**. The decision(which pre-dated the Defamation Act 2013) suggests that the Court must resolve the extent to which the publication is protected by privilege before the Court can determine meaning. … The present case requires careful consideration of the practical implications of **Curistan** on, at least, the Court's determination of meaning as a preliminary issue. Resolution of the extent to which the publications sued upon are protected by privilege will also require the resolution of whether any privilege defence can be defeated by proof of malice. As objective meaning of a publication is regarded as an integral part of any assessment of serious harm under s.1 Defamation Act 2013, the implications of **Curistan** perhaps go further still.

(E) The more complicated/costly it is to resolve the preliminary issue, the more cautious and careful the Court must be before directing it. The sort of cost/benefit analysis the Court performs, and the factors considered, are set out in **Steele -v- Steele [2001] CP Rep 106** (see also **Wentworth Sons Sub-Debt SARL -v- Lomas [2017] EWHC 3158 (Ch)**[33]-[34]). Lord Neuberger MR later cautioned heed of the "siren song" of agreeing or ordering preliminary issues which "should normally be resisted": **Rossetti Marketing Ltd -v- Diamond Sofa Co Ltd[2013] Bus LR 543** [1]. As Lord Scarman famously observed in **Tilling -v- Whiteman [1980] AC 1, 25**, "preliminary points of law are too often treacherous short cuts." That was a warning about points of law. A fortiori preliminary issues that involve substantial disputes of fact.

(F) Reflecting these principles, and for good and sensible reasons, the current edition of the Queen's Bench Guide suggests (§17.29): "Trials of preliminary issues in the MAC List are usually limited to issues that can be resolved without the need for disputed witness evidence." This reflects the decisions of the former Judge in Charge of the Media & Communications List in **Hope Not Hate -v-**

Farage [2017] EWHC 3275 (QB)[37] and **Brown -v- Bower [2017] 1 WLR 4703**. Outside the specialist area, in **McLoughlin -v- Junes [2002] QB 1312**[66] the Court of Appeal stated:

"… the right approach to preliminary issues should be as follows.

(a) Only issues which are decisive or potentially decisive should be identified.

(b) The questions should usually be questions of law.

(c) They should be decided on the basis of a schedule of agreed or assumed facts.

(d) They should be triable without significant delay, making full allowance for the implications of a possible appeal.

(e) Any order should be made by the court following a case management conference."

(G) I accept the Defendant's submission that the Court retains an overall discretion – in furtherance of the overriding objective – to direct trials of preliminary issues that do not meet these criteria (or all of them). For example, before Easter, there will be a trial of a preliminary issue in a MAC List case on the issue of whether the defendant broadcast the programme upon which the claimant has sued (**Junejo -v- New Vision TV Limited**). This preliminary issue has been directed because it is a self-contained and limited factual inquiry, which can be tried in 2 days and will resolve – once and for all – the issue of publication which, if the claimant fails, will bring the proceedings to an end (subject only to any appeal).

(H) For the reasons that have been communicated already to the parties in summary form, I have very serious reservations about whether it remains practical, proportionate and desirable to proceed to determine the Preliminary Issues and whether doing so would further the overriding objective. These reservations are founded principally on the following:

(i) The nature and extent of the factual issues (including the cross-examination of witnesses) that will require to be determined to resolve the Preliminary Issues.

(ii) The likely costs of doing so.

(iii) The agreed position of the parties that, whatever the Court's decision, the resolution of the Preliminary Issues will not dispose of the claim.

(iv) The risk of an appeal on one or more of the determined Preliminary Issues which will delay the resolution of the remaining issues.

(v) The absence of any pleaded case by the Defendant which sets out the other issues that will arise in the case after the Preliminary Issues have been determined, which makes it very difficult (if not practically impossible) for the Court to perform the fundamental cost-benefit analysis that lies at the heart of the decision whether to order trial of preliminary issues. As Warby J noted in **Brown -v- Bower** [55]"it may be hard for a defendant to persuade the court to order a preliminary issue without providing some kind of answer to the obvious question: "preliminary to what?"

(vi) Specifically, the lack of a statement of case setting out the full issues likely to require determination in the proceedings means that (save at anything other than a high level of generality) the extent to which resolution of the Preliminary Issues will (or may) overlap with issues that will subsequently require determination (e.g. the likely commonality of issues under reporting privilege, malice and a defence under s.4 Defamation Act 2013). It would appear to be undesirable – to say the

least – for witnesses to have to be called to give evidence and be cross-examined about pre-publication conduct/decisions on the issue of malice only for there to be a very real prospect that a substantially similar exercise will have to be performed again when the s.4 defence is considered.

(I) Nevertheless, I will not make a final decision on the question whether the Court should go on to try the Preliminary Issues until I have the benefit of full argument, if that is required. I recognise the force in the Defendant's submission that aborting the trial of the Preliminary Issues will prevent meaning being determined. That risks litigation of a truth defence (if one is advanced) which may seek to prove true a meaning that the words are ultimately not found to bear. Unfortunately, **Curistan** appears to stand as a fairly formidable obstacle to resolution of meaning without at the same time resolving the plea of qualified privilege and malice.

(J) Ultimately, the parties agreed by consent that the court would vacate and not try the preliminary issues as they had been ordered, and instead directions were given by the order of 17 March 2021 for the filing of particulars of claim, defence and a reply. The issue about whether, and if so what, preliminary issues the court ought to consider instead remained a live one and originally the Claimants sought to revive the proposal to resolve the issue of meaning, but recognising that the **Curistan** issue meant that that could not be a final determination, so that it would be on, I suppose, assumed facts, but they really were hypothetical. The court will be addressing hypothetical questions.

14
Thereafter, a Case Management Conference was fixed for 14 December 2021 (although this had to be adjourned due to the impact of the pandemic). In the meantime, the Claimants gave further consideration as to whether it would be possible to devise alternative preliminary issues that could be resolved that did not have the problems that I had identified. On 11 October 2021, the Claimants issued a further Application Notice seeking orders directing the trial of the following preliminary issues:

"(i) the natural and ordinary meaning of the Publications complained of in respect of each Claimant on the following alternative bases:

(a) that the passages identified in §27 of the Defence (the Hancock Statements) are all privileged but none others;

(b) that the passages identified in §30 of the Defence (the LSHTM Statements) are all privileged but none others;

(c) that the Hancock and the LSHTM Statements are all privileged; and

(d) that neither the Hancock nor the LSHTM Statements are privileged;

(ii) whether in respect of Online Publication (2) (as to which, see Particulars of Claim, §10) readers of that Publication in the category described in §12 of the Particulars of Claim would have understood the Publication to convey by true innuendo the meaning pleaded in §14 of the Particulars of Claim by reason of their reading of Online Publication (1) (assuming for this purpose that there was as a matter of fact at least one reader in the category described in §12 of the Particulars of Claim); and

(iii) with respect to each of the Publications complained of, whether the statement is a statement of fact or opinion ('the Preliminary Issues Application')…"

The Claimants also sought to postpone the time for service of their fully pleaded Reply pending the Court's determination of the preliminary issues. Instead, the Claimants proposed that they provide a summary of their position in lieu of a Reply.

15
Having considered those applications, on 27 October 2021, I refused to delay the service of the Reply, granting only a limited extension of time for that to be filed. I directed that the Claimants' Application for the revised preliminary issues should be listed to be heard at the CMC in December 2021. The reasons I gave for that order were as follows:

"(A) I have not heard full submissions, but presently I am sceptical about the whether the Court should direct the trial of the Preliminary Issues sought by the Claimants. Fundamentally, and quite apart from the issue of whether directing trial of the Preliminary Issues would further the overriding objective (see discussion in **Bindel -v- Pink News Media Group plc[2021] EMLR 23**), I would need persuading that it is appropriate to ask the Court to determine issues on a hypothetical basis. What would the Court's order be after such determination? What would the determination actually resolve? What route of appeal would be available against such a determination? It is impossible for me fairly to assess or resolve the arguments raised in the Claimants' letter of 26 October 2021 as to the wisdom/ virtue of resolution of the proposed Preliminary Issues on the papers. This will have to be resolved at the CMC.

(B) I am clear, however, that meaningful case management in these claims cannot be carried out at the CMC unless the extent of the issues to be resolved between the parties is clear. That can only be achieved if Replies are served. I am not persuaded by the suggestion of some form of 'Reply Lite', which (a) risks not fulfilling the function of the Reply; and (b) raises potential complications as to the status of that document later in the proceedings. Postponement of service of the Replies until after the CMC threatens to impair the effectiveness of the CMC. The Defendants, in their letter of 22 October 2021, have put forward alternative proposals for case management and split trials. The Claimants do not agree with these proposals. Again, I cannot fairly adjudicate upon the rival contentions on paper without a hearing. But, in order to consider those (or any alternative) proposals the Court must have the full picture. That can only be effectively achieved by service of the Replies. Whether postponing the service of the Replies would lead to the saving of any (substantial) costs is uncertain. Whether it did, would appear to depend on a series of assumptions which, at this stage, are highly speculative. The benefits that flow from service of the Replies are compelling and overwhelming.

(C) By the time of the CMC, it will be almost 9 months since the Court made directions to get the case to a stage where effective case (and costs) management would be possible. The claims need to be progressed.

(D) The Defendants have offered an extension of time for the Reply to 19 November 2021. The Claimants seek until 7 December 2021. The latter date is too close to the CMC. I note what is said in Paragraph 9 of the Application Noticed dated 19 October 2021, but the Defences were served on 2 July 2021. The Claimants should have been working on their Replies since then. I will extend time to midday on 29 November 2021. Any further extension of time will require a very good explanation/ justification, as any further delay is likely to threaten the date for the CMC."

16
As I have already noted, the CMC could not take place in December and had to be refixed for today's date. During that period, the Claimants changed tack and decided not to pursue their application for

the preliminary issues. Instead, the preliminary issue baton was then picked up by the Defendants who contended that the Court should direct the resolution of a different list of preliminary issues.

17
With that lengthy introduction, I can now turn to the matter that requires resolution today: whether I should direct now the trial of the preliminary issues in the terms sought by the Defendants. The draft order provided by the Defendants identifies the preliminary issues that the Defendants say the court should direct:

(i) whether the qualified privilege defence under s.15 Defamation Act 1996 is made out;

(ii) whether the qualified privilege under s.6 Defamation Act 2013 is made out;

(iii) whether the Claimants' plea of malice defeats any qualified privilege defence that is established; and

(iv) whether the articles complained of are protected by the public interest defence under s.4 Defamation Act 2013.

18
Resolution of issues (i) to (iii) would remove the **Curistan**obstacle. If issue (iv) was not resolved in the Defendants' favour, the way would be clear for the Court to go on and resolve, as the final preliminary issues, the issues of natural and ordinary meaning and whether the articles were (or contained) allegations of fact or an expression of opinion. There are subsidiary issues that have been identified and which would have to be resolved by the Court determining the issue of meaning. One of those is whether the news article and the supplement article of the print publication are sufficiently closely connected to be regarded as a single publication. That is important because if they are to be regarded a single publication, they will have a single natural and ordinary meaning. The Defendants contend that they would have been read separately and so the news article and the supplement article would have separate meanings. I understand the argument to be that readers who only read the news article would not understand it to refer to the Claimants. To cater for that, the Claimants rely also on an innuendo based on the class of reader who would have read both articles. That is not a matter that the Defendants contend should be resolved as a preliminary issue in their proposals.

19
Originally, the Defendants had additionally proposed the inclusion in the first preliminary issue trial, "Trial 1" as it has been referred to in argument, the resolution of the honest opinion defence. An honest opinion defence under s.3 Defamation Act 2013 has several elements and they are familiar and straightforward. The section sets them out very clearly.

"(1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.

(2) The first condition is that the statement complained of was a statement of opinion.

(3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.

(4) The third condition is that an honest person could have held the opinion on the basis of—

(a) any fact which existed at the time the statement complained of was published;

(b) anything asserted to be a fact in a privileged statement published before the statement complained of.

(5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.

(6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person ('the author'); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion…"

20
It is important to note here because it assumes some importance later that subsection (5) is the statutory formulation of the form of malice that was capable of defeating an honest opinion defence at common law: see **Tse Wai Chun Paul -v- Cheng[2001] EMLR 31** For today's purposes, the important point is that is the only part of the honest opinion defence (excluding subsection (6)) which focuses on the actual state of mind of the relevant defendant. The remaining elements of the defence under the Act are all objective questions.

21
The Defendants originally included the honest opinion defence in their proposed list of issues to be determined at the preliminary issue trial. They reflected on that and withdrew that issue from their proposal because, I think, they recognised that the factual issues that arise under s.3(4) would have to be tried together with the defence of truth. In other words, the honest opinion defence would have to be resolved in Trial 2 if the result of Trial 1 did not dispose of the entire claim.

22
The Claimants' position advanced before me today by Mr Busuttil is that the court not to accede to the application for preliminary issues. They argued that nothing had changed substantially from my decision, set out on 11 March, as to the pitfalls of ordering preliminary issues. In summary, preliminary issues often turn out to be treacherous shortcuts which rather than producing case management benefits, instead achieve only delay and increased costs. By reference to **McLoughlin v Junes**(quoted above), none of the factors (a) to (d) apply. Nevertheless, and as Mr Busuttil accepts, the court does retain an overall discretion to consider whether a case is suitable for the trial of a preliminary issue. No two cases are the same and that ultimately the court has to make an assessment of the ultimate cost/benefit analysis as it appears to the court at the point where it considers making the direction for the preliminary issues.

23
Apart from those general points in opposition, there are specific grounds on which the Claimants contended that the court should not direct the preliminary issues as sought by the Defendants. First, the risk of overlapping issues between those matters tried in Trial 1 and those left over to Trial 2. Helpfully, Mr Busuttil provided in his skeleton argument a table which sought to capture the extent of that overlap. Three areas were identified. Firstly, responsibility for publication. This point arises because although Mr Calman was the author of the supplement article, he did not actually write the news article. Nevertheless, the Defendants have accepted that he has caused the publication of that news article. There may be some scope for some interesting questions as to where that dispute will take us ultimately in the proceedings, but I doubt it will have an impact on the overall result of the proceedings. It certainly is not a significant issue, and it is one that on its own would not have deterred me from directing a preliminary issue trial.

24
The second is more substantial, and it has led to some interesting discussion in submissions this morning. The issue is the overlap between ‘malice’ issues. Malice is pleaded in answer to the qualified privilege defences that have been advanced, but it also arises in the context of the statutory malice under s.3(5) in respect of the honest opinion defence. Those issues will be resolved by determining the state of mind of the Defendants, principally Mr Calman as the author of the supplement article. His state of mind is going to be a matter that is of central importance in Trial 1, if it were ordered, because it is a critical aspect of the public interest defence under s.4. But it also arises in Trial 1, in relation to the malice plea in answer to the qualified privilege defence. Finally, Mr Calman’s state of mind is relevant to the plea of the statutory malice, under s.3(5), in answer to the honest opinion defence.

25
Mr Busuttil had, in my mind rightly, argued that it would not be satisfactory for Mr Calman to have to give evidence in Trial 1 in relation to the issues relating to his state of mind and then, potentially, face having to come and give evidence in Trial 2 in relation to the issue of honest opinion. I do not understand Ms Evans to have argued that this would be a sensible or desirable outcome. Indeed, she accepted that it would be important that Mr Calman did not give evidence twice, and she also accepted that the Claimants should be permitted to advance their full case against Mr Calman on one occasion.

26
That opened the way potentially to a solution which Ms Evans had identified in her skeleton argument. She proposed that the honest opinion defence should be tried in Trial 2, but that the issues under s.3(5), relating to Mr Calman’s state of mind, should be tried in Trial 1. Although it is a novel approach, it is not one to which I see any principled objection. It meets the objection that Mr Calman should not be required to give evidence twice potentially, and it meets the objection that the Claimants should not be prevented from deploying their full case on the issues that relate to Mr Calman’s state of mind in Trial 1.

27
Mr Busuttil considered the position over the luncheon adjournment. It is one that, in fairness, he needed time to consider and reflect upon with his clients. I was perfectly content for that because it is an issue of some significance. After lunch, he confirmed that the Claimants saw no objection in principle with this course.

28
The final issue that was identified as an overlapping one in relation to the issues that would be involved in Trial 1 and Trial 2 was the issue of the s.4 public interest defence. Mr Busuttil put it this way. The Claimants have raised the issues of whether Mr Calman (a) correctly identified and represented accurately in the articles the claims that the Claimants had in fact made about cholesterol, CBD, and/or statins, and (b) accurately characterised such claim as the Claimants had made as “fake news”. He submits that the same issues will arise in the context of honest opinion under s.3(4)(a) and truth in Trial 2, if it takes place.

29
In my judgment, however, it is important to be clear about the parameters of, and Court’s approach to, a s.4 defence: see discussion in **Hijazi -v- Yaxley-Lennon [2021] EWHC 2008(QB)**. With a s.4 defence, the issues include identification of the materials that were available to the defendant, the

enquiries or investigations that s/he did make, the enquiries he or she could have made, and, critically, the way in which the material that s/he obtained was represented in the publication. Those are all matters which potentially have a bearing ultimately on the question the court has to decide, which is whether or not a belief that the publication was in the public interest was reasonable in all the circumstances.

30
That is quintessentially an assessment of what was available at the time, or could have been available, and the assessment that is or was made of it by the journalist. Issues of objective truth of that material do not arise under the s.4 defence, so they can and should be kept quite separate from any defence of truth. Equally, the objective matters relied upon in support of an honest opinion defence are quite separate from the subjective matters that arise under s.3(5). I am not persuaded that there is any real overlap of issues. The Court's task in respect of these defences is very different. I accept that it is likely that in Trial 1, the court will ascertain that which was available to Mr Calman when he was drafting his article, and the court will make decisions as to what he made of that and ultimately will decide whether the s.4 defence is made out.

31
To the extent the court has therefore captured the material and made findings of what was available to the journalist, that does not trespass impermissibly on the cope of any enquiry that would have to be carried out either for the honest opinion or truth defence. The issues in the ultimate assessment of those are quite different in their respective contexts.

32
My conclusion is that, with the exception of the s.3(5) issues, which seem to me can be fairly accommodated in and should be resolved at Trial 1, there is no real risk of overlapping issues or unfairness being caused to either party. In my judgment, what I have called the 'state of mind' issues can be properly and fairly be tried at Trial 1.

33
One then comes to consider the benefits and downsides of directing the trial of the preliminary issues on this basis as sought by the Defendants. There is no doubt that a trial of the preliminary issues proposed by the Defendants would be a substantial enterprise. It will involve the resolution of substantial issues of fact. In consequence, it will require disclosure, witness evidence and a trial at which witnesses are cross-examined. There is likely to be substantial cross-examination of the Defendants' witnesses, particularly in respect of the s.4 defence, but experience tends to show that many s.4 defences are tried in a couple of days. There are likely to be relatively few witnesses. The issues to be resolved would mean that it is very unlikely that the Claimants would have to give evidence. Save in unusual circumstances, in most cases a claimant is unlikely to have any relevant evidence to give in relation to a s.4 defence.

34
The parties have put in evidence estimates as to the likely costs of the two trials. The Claimants have estimated that the first trial would take eight and a half days and would cost in the region of £565,000. Trial 2 would last for twenty-three and a half days and could cost as much as £1.4 million. The defendants say their first trial would be likely to be resolved in seven days, costing around £360,000 whereas Trial 2 they believe could be conducted or completed within fifteen days at a cost of £875,000. On any view, and it will not come as a surprise given the nature of the issues that arise in these proceedings, this is substantial litigation.

35
Mr Busuttil makes the point, which I accept, that experience tends to show that splitting trials can lead to an overall increase in costs. It is very difficult to try and make an assessment at this stage as to the likely twists and turns of the litigation. As I expressed in argument, I have a suspicion that if the court directed one single trial of all these issues, that it would be likely to be very resource intensive. That is simply a reflection of the large number of issues that arise and the way in which they interlock. The legal issues raised are complicated. It seems to me to be likely-- I say no more than that-- that the court would have to be actively involved at several stages of the litigation. Each of those issues could produce the risk of an appeal at an interim stage in the proceedings. As I say, it is very difficult to make a reliable assessment of that and how the action would unfold if it were directed to be tried all in one go, but one thing is very clear: it would be a very substantial piece of litigation with many complicated factual and legal matters to be resolved.

36
The principal benefit that Ms Evans for the Defendants has identified is that, firstly, if the preliminary issues that she seeks are directed, it does potentially offer the possibility that the litigation will be brought to an end. That would be so if the Defendants succeed with their s.4 defence. It is not possible (nor appropriate) at this stage to attempt to assess how likely it is that the s.4 defence will succeed, but I think Ms Evans is entitled to submit that there is a realistic prospect that the preliminary issue Trial 1 would bring an end to the proceedings.

37
Ms Evans' second point is that even if it does not itself bring an end to the proceedings, the trial of the preliminary issues she has identified would deliver several identifiable benefits for Trial 2. The first is that the Court will have resolved the issues of meaning and fact or opinion. Experience shows that those are decisions in libel claims the resolution of which are very significant. This is because they are often the issues upon which the parties are divided and unable to resolve themselves by any form of negotiation or alternative dispute resolution. Since it has been possible to resolve meaning and associated issues of fact and opinion early in proceedings, there are many fewer libel actions that go on to a full trial. The experience of the Media and Communications List is that most actions now resolve once the court has determined meaning and fact/opinion. That is not always the case, and there are some examples where the cases do nevertheless go to trial, but those that do are now in a small minority. Those that do proceed, do so with the benefit of key issues having been resolved.

38
The principal benefits of having resolved meaning and fact/opinion at Trial 1 will be clarity of the issues that remain to be resolved and the case management opportunities thereafter. The interval between Trial 1 and Trial 2 will provide an opportunity for the parties to take stock. It may be possible for them to resolve the remaining issues in dispute. But even if that is not possible, the fact that the court has now set the parameters of meaning and fact or opinion means that the case management of Trial 2 becomes a whole lot easier. Resolution of fact/opinion will clearly set out the extent to which (if at all) the Defendants can rely on defences of honest opinion and truth. At the moment, there is a sharp division between the parties – which is by no means uncommon – as to the natural and ordinary meaning of the articles and whether they make allegations of fact or express opinion. The Defendants do not seek to prove true the meaning complained of by the Claimants. If the Court rules that the articles do bear the Claimants' meaning and that it is an allegation of fact, two consequences follow. No defence of honest opinion will be available, and the defence of truth – at least in its present form – may not be viable. As the defence of truth is one that is likely to require expert evidence, achieving

certainty as to the parameters and viability of any truth defence is particularly important. On the other hand, if, for example, the court decides that the articles contain only defamatory opinion then the truth defence is likely to disappear and with it any need for expert evidence.

39
For as long as meaning, and the issues of fact and opinion remain live and unresolved, as they would do if the court directed a single trial of all issues, then the proceedings must work on the basis of various hypothetical outcomes. In that eventuality, this case would be like libel trials used to be when we had juries as the ultimate arbiters of fact. That is unsatisfactory because it risks litigation of issues that, in the final analysis, is not relevant. Substantial costs – and Court time – is wasted progressing through the phases of disclosure, witness statements and a trial of a truth defence only for it to be held, following trial, the publication complained of only expressed an opinion. For the reasons expressed in the authorities I have referred to above, there is likely to be a significant benefit in terms of case management and avoiding wasted costs, if the court is able to resolve the issues of meaning and fact or opinion as soon as possible.

40
One significant downside of having the two trials that I have identified is that there is a very real risk of an appeal that will arise following the determination of the issues at Trial 1. I say that because there has got to be at least a prospect that the **Curistan** decision, when applied to these proceedings, will mean that here could be two rival meanings: one natural and meaning, arrived at by excluding what the **Curistan** privilege material, and one in which the **Curistan** material is taken into account. **Curistan**is a decision of the Court of Appeal which a first instance Judge would be bound to follow. I have already referred to the fact that **Curistan** as a decision has received some criticism. There are respectable arguments that the decision profoundly conflicts with a fundamental principle of defamation law; the single natural and ordinary meaning of a publication. That issue alone could lead potentially to an appeal, and there would be several other issues that the parties could well seek to appeal after Trial 1.

41
The reason why the risk of appeal is such a significant factor against directing substantial preliminary issues is that it may prove, ultimately, to have been a waste of time and costs, if the resolution of the preliminary issue turns out to have been irrelevant to the ultimate outcome. Ordinarily, that is on the basis that the Court has resolved a preliminary issue, that leads to an interim appeal, only for it to turn out, when the full issues in the case in the subsequent trial have been resolved, the claim was decided on another point. That raises the spectre of significant waste of the parties' costs and the court's resources, and substantial delay.

42
Against that, there will probably always be a risk of an appeal when the Court directs trial of any preliminary issue, but rightly, it is one of the factors that looms large when the court is considering whether to direct a preliminary issue trial.

43
In this case, I think it is fair to say that there is a greater than the average risk of an appeal because of the **Curistan** point. It is a serious factor that weighs against the granting of the application for the preliminary issues sought for the Defendants. The greatest benefit of trying all the issues together is the finality that that would bring, of course subject to any appeal, but it would mean that the issues would be determined in one go and the parties would know which of those issues had in the end been

material and either carried or lost the day. Separating out issues runs the risk that you spend a great deal of time litigating on an issue that if you had tried it with everything else, would not have mattered in the final analysis.

44
I had started the day today sceptical about the wisdom of ordering a preliminary issue trial principally on the significant risk and downside of an appeal following Trial 1. But I have, nevertheless, been persuaded, in the particular circumstances of this case, that I should direct the preliminary issues sought by the Defendant. This is because I am satisfied that there are significant benefits to be achieved by splitting the trials. There is a realistic prospect the resolution of the issues in Trial 1 could dispose of the whole claim. Even if it does not, resolving the issues in Trial 1 will deliver real benefits (and significant savings in costs and resources) for the management and future conduct of the litigation thereafter. In light of that, I have decided that there is a sufficient upside in ordering the trial of preliminary issues to outweigh what I recognise are significant potential downsides, of which the appeal risk is the greatest. In making this decision, I have considered that the splitting up of the trials may be frustrating for the Claimants. I regret that the complicated nature of this case means that there will inevitably be a period of delay before any Trial 2 can be progressed. For the Claimants, the objective is that the court resolves the issue of meaning and decide whether any defamatory statement made against them can be defended. They seek by these proceedings to vindicate themselves. Against that, I must also properly also consider fairness to the Defendants. They wish to vindicate their journalism and have important rights of freedom of expression. I understand very much those concerns, and it is unfortunate that the complexity of this action and particularly the unusual feature of the **Curistan** decision has meant that the case management options that would ordinarily be open to the court as a matter of course are not immediately available.

45
Narrowly, but in the end, I have been convinced, that the court should direct the preliminary issues that have been sought by the Defendants. Trial 1 will also include the resolution of the s.3(5) issues that arise under the honest opinion defence. That is the ruling that I make.
