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Case No: A2/2021/0231/QBENI

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
Mrs Justice Collins Rice
[2020] EWHC 79 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

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Date: 14 May 2021

Before :

DAME VICTORIA SHARP, PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE HENDERSON
and
LORD JUSTICE WARBY

- -

Between :

MICHAEL SIVIER	**Appellant/ Defendant**
- and -	
RACHEL RILEY	**Respondent /Claimant**

- -
- -

David Mitchell (instructed by **George Green LLP**) for the **Appellant**
John Stables (instructed by **Patron Law**) for the **Respondent**

Hearing date: 27 April 2021

- -

Approved Judgment

LORD JUSTICE WARBY:

1. Rachel Riley is a well-known television presenter. On 26 January 2019 the defendant, a political journalist, published an article about her under the heading "*Serial abuser Rachel Riley to receive 'extra protection' – on grounds that she is receiving abuse*" ("the Article"). Ms Riley sued for libel. At a trial of preliminary issues Nicklin J determined the meaning of the Article; he held that it was partly factual and partly an expression of opinion; and he ruled that the meaning as a whole was defamatory at common law. Mr Sivier then filed a Defence relying on the defences of truth, honest opinion, and publication on matter of public interest which are provided for by ss 2, 3 and 4 of the Defamation Act 2013 ("the 2013 Act") respectively. Ms Riley's application to strike out all those defences was granted by Collins Rice J, DBE, CB. This appeal against the striking out of the public interest defence is brought with the permission of Arnold LJ. He refused permission to appeal against the dismissal of the defences of truth and honest opinion. Ms Riley has filed a Respondent's Notice seeking to uphold the Judge's decision on additional or alternative grounds.

2. For the reasons that follow, I would allow the appeal. I would set aside the order striking out the defence of publication on matter of public interest, and substitute an order dismissing that aspect of Ms Riley's application. In my view, the appropriate course is for the public interest defence to be assessed at a trial.

The procedural background

3. The words complained of are set out in the Appendix to this judgment. It will be seen that the Article began by referring to some statements Ms Riley had reportedly made in or via the national media about online abuse of which she had been the victim. It then made a number of allegations about Ms Riley's own online behaviour, commencing with a suggestion that she herself was a "serial abuser". The allegations included assertions about Ms Riley's conduct towards a teenage girl who was said to have received death threats. Mr Sivier told readers that evidence in support of what he was telling them was to be found in two external articles, to which hyperlinks were provided.

4. Nicklin J's conclusions on the preliminary issues he tried were embodied in a formal order in these terms:-

> "1. The statement complained of means that,
>
> (1) the Claimant has engaged upon, supported and encouraged a campaign of online abuse and harassment of a 16-year-old girl, conduct which has also incited her followers to make death threats towards her.
>
> (2) By so doing, the Claimant is a serial abuser and has acted
>
> a. hypocritically: by complaining about being the victim of online abuse and death threats herself whilst at the same time committing serial abuse of someone who has in consequence herself now been subjected to death threats (but someone

> who, unlike the Claimant, cannot afford additional security protection);
>
> b. recklessly and irresponsibly: by provoking her followers to subject the 16-year-old to further abuse and harassment, including death threats; and
>
> c. obscenely.
>
> 2. The meaning at paragraph 1(1) above is a statement of fact.
>
> 3. The meaning at paragraph 1(2) above is an expression of opinion.
>
> 4. The meaning as a whole is defamatory at common law."

5. Mr Sivier sought to defend the meaning at 1(1) as true, the meaning at 1(2) as honest opinion, and the statement as a whole as a publication on matter of public interest.

6. In support of the defence of truth, extensive particulars were set out at paragraphs 10 to 34 of the Defence. These relied principally on a large number of tweets posted between 16 December 2018 and 15 January 2019, by Ms Riley, the young woman, named Rose, associates of Rose, followers of Ms Riley, and a friend of hers, Tracey-Ann Oberman. Those tweets were said to show that Ms Riley had behaved in the ways alleged in meaning 1(1). In support of his defence of honest opinion, Mr Sivier relied on the same tweets as "facts which existed at the time the statement complained of were published … from which an honest person could have held the opinion", as required by s 3(4) of the 2013 Act. Other matters relied on for the same purpose included three media publications, identified in paragraph 38 of the Defence, as follows:

> "c) In an interview with the journalist, Krishnan Guru-Murthy, broadcast by Channel 4 News on 9 January 2019, the Claimant complained that she was a victim of online abuse.
>
> d) The Claimant further complained that she was a victim of online abuse including physical threats with the result that "We are getting more security for *Countdown*" in an article published on 26 January 2019 by *The Times* newspaper (*"Rachel Riley of Countdown finds her Jewish roots to take on the Corbynistas"*)
>
> e) In its article, *"Rachel Riley to get extra security after receiving online threats"*, also published on 26 January 2019, *The Guardian* newspaper reported the Claimant's statements in *The Times* newspaper that she was to receive extra security at work following physical threats to which she had been subjected online."

7. In support of the alternative defence of publication on matter of public interest Mr Sivier relied on those same three publications, some of the tweets set out in support of the plea of truth, and the two external articles Mr Sivier identified in the Article as containing evidence in support of what he was saying.

8. To place Mr Sivier's pleaded case in context it is necessary to start with the requirements of the public interest defence. These are exhaustively set out in s 4 of the 2013 Act, in these terms:-

> **"4 Publication on matter of public interest**
>
> (1) It is a defence to an action for defamation for the defendant to show that—
>
> (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
>
> (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
>
> (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
>
> (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.
>
> (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.
>
> (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.
>
> (6) The common law defence known as the Reynolds defence is abolished."

9. As will be apparent, a defendant who relies on this defence must establish three things: (1) that the statement was on, or was part of a statement on, some matter of public interest; (2) that the defendant believed that publishing the statement complained of was in the public interest; and (3) that the defendant's belief was reasonable: *Economou v de Freitas* [2018] EWCA Civ 2591, [2019] EMLR 7 [87]. The first and third elements are objective, the second is subjective: ibid., [95]; *Doyle v Smith* [2018] EWHC 2935 (QB), [2019] EMLR 15 [64], [87].

10. Paragraph 39 of the Defence set out Mr Sivier's case on the first element, namely the requirement at s 4(1)(a):

> "The Defendant's Article addressed the following matters of public interest:

(1) Online bullying and harassment including death threats.

(2) The power of an adult celebrity compared to the relative powerlessness of a vulnerable child suffering anxiety.

(3) Mental health.

(4) Anti-Semitism."

11. Paragraphs 40 and 41 of the Defence dealt with the second and third elements: those set out in s 4(1)(b) of the 2013 Act. The Defence averred that "the Defendant reasonably believed that publishing the statement complained of was in the public interest" and provided the following particulars:

"40 ….

(1) The Channel 4 News broadcast (watched by 7.4m people per month in 2018), *The Times* article (daily online readership of 683,000), *The Guardian* article (daily online readership of 4,874,000) as well as the Claimant's own tweets (published to her approximately 610,000 Twitter followers) reported that she was the victim of online harassment and physical threats. Furthermore, in her tweets the Claimant denied being a bully.

(2) The Defendant's Article provided a wider context to the story by way of a counter-narrative suggesting that the Claimant was a hypocrite given her own harassment (leading to death threats from her followers) of a child victim who was vulnerable both as a minor and anxiety sufferer.

(3) Given the Claimant's purported campaigning against anti-Semitism the Article further questioned her record on the issue.

41. The basis for the Defendant's belief was reasonable:

a) The Defendant's Article was based on the tweets sent by and on behalf of the Claimant compared to those sent by and on behalf of Rose.

b) The Defendant further based his Article on Mr Lawson's two articles, "Enough is Enough: Rachel Riley, GnasherJew, and the Political Weaponisation of Antisemitism" published online on 12 January 2019 and "Beneath Contempt: How Tracy Ann Oberman and Rachel Riley harassed, dogpiled and slandered a 16-year-old child and her father" published online on 18 January 2019 (hyperlinks to both of which were included in his Article).

> c) Having compared a) and b) above to establish the evidential basis for his Article it was the Defendant's editorial judgement that publication was in the public interest.
>
> d) At the outset of his Article the Defendant set out the Claimant's statements and position, as reported by *The Guardian* newspaper.
>
> e) Further, it was the Defendant's editorial judgement that the Claimant should not be approached for comment. Her position had been consistently stated, not least in the publications referred to at paragraph 40(1) above. In particular, in her 14 tweet barrage at 4.45pm on 15 January 2019, the Claimant had vehemently denied bullying Rose whilst further attacking her. It was the Defendant's judgment that firstly, the Claimant was highly unlikely to comment, and secondly, in the event that she did she would only take the opportunity to double down in her attacks on Rose.
>
> f) Given the currency of the story and the fast pace of the online news agenda it was the Defendant's editorial judgement that the public importance in the Article required that it be published as soon as practicable after the articles that day in *The Times* and *The Guardian*. Otherwise, its impact and relevance could be lost.
>
> g) In all of the circumstances the publication of the Article amounted to a lawful exercise of the Defendant's Article 10 Convention right to free expression."

12. Ms Riley's application to strike out was made under CPR 3.4(2)(a) and/or (b) and/or (c) and the inherent jurisdiction of the Court. The application notice sought an order that the Defence be struck out in its entirety, alternatively that part of paragraph 1 and the whole of paragraphs 8-35 and 48-50 be struck out, on the following grounds:

> "2.1 The defence of truth and its particulars are impermissibly and/or irrelevantly pleaded and disclose no proper defence.
>
> 2.2 The particulars of truth specified in the application notice do not allege primary facts in relation to the Claimant's conduct that are properly arguable, or are impermissible as not alleging primary facts at all, or are irrelevant, or seek to reverse the burden of proof, and ought not to have been pleaded.
>
> 2.3 The impermissible inclusion in the Defence at §1 and §§48 and 49 of allegations not complained of. These ought not to have been pleaded.

> 2.4 The impermissible inclusion in the Defence at §1 and §50 of matters pleaded being neither related to the claim nor admissible as Burstein particulars. These ought not to have been pleaded."

13. The primary attack was, therefore, on the defence of truth. In the application notice, there was no mention of the other two defences pleaded by Mr Sivier. Ms Riley's position was explained in the Skeleton Argument submitted on her behalf to Collins Rice J. This began by stating that the application to strike out was made "principally in respect of the purported particulars of truth". Over the next 66 paragraphs, those particulars were subjected to detailed criticism. The first mention of the other defences came at paragraphs 70-71. There, it was asserted that once the truth defence was struck out the defence of honest opinion must also fail by reason of Nicklin J's formulation of the opinion as being contingent on the factual imputation, "By so doing …". As to the s 4 defence, this was said:-

> "Similarly the defence brought under s.4 DA 2013 cannot have been reasonably believed if the facts relied on in the truth defence are incapable of supporting a plea of truth." (sic).

The argument was, therefore, that everything turned on the defence of truth. We are told that this short written submission was not developed in oral argument.

The judgment of Collins Rice J

14. The Judge's reasoning on the s 4 defence is contained in two short sentences in paragraph [68] of the judgment. These must however be seen in their context, which can be found in the following passages:

> **Conclusions on the Defence of Substantial Truth**
>
> 63 … I have not been able to discern in Mr Sivier's pleadings a case, arguable with a realistic prospect of success, that it is substantially true that Ms Riley engaged upon, supported and encouraged a campaign of online abuse and harassment of Rose. That itself precludes the possibility of arguing that any such conduct incited others to make death threats to Rose. If such threats were made there is no basis for saying they were incited by Ms Riley's conduct as alleged, since there is no arguable basis for establishing the objective fact of that course of conduct.
>
> 64 …the only online speech of Ms Riley cited in this case falls far short of anything that could fairly and arguably be said to constitute a campaign of harassment and abuse of Rose. There is no sustainable basis pleaded for imputing to her responsibility for supporting and encouraging, by her speech or by her silence, any such conduct by third parties. No other conduct of Ms Riley

> is pleaded to the requisite standards of sufficiency and particularity.
>
> 65 In these circumstances it is neither fair nor in the interests of justice for a proposed defence of substantial truth to proceed to trial. Mr Sivier's pleading discloses no reasonable grounds for defending the substantial truth of his factual allegations, and to that extent falls to be struck out.
>
> **The Honest Opinion and Public Interest Defences**
>
> 66 Defamatory expressions of opinion may be defended if an honest person could have held them on the basis of any fact which existed at the time of publication. The supporting facts pleaded in this case are the defamatory allegations, and Ms Riley's own complaints of others' speech and threats against herself. The opinion expressed – that Ms Riley is a serial abuser and has acted hypocritically, recklessly, irresponsibly and obscenely – has in any event been ruled to be an opinion attached to the assertion that this was by virtue of her having done in fact what he had alleged.
>
> 67 If it is not even arguably true that Ms Riley engaged in or encouraged and supported a campaign of online abuse and harassment of Rose, I do not see that opinions based on the fact of her having done so can themselves survive to be defended. … If Ms Riley did not engage in, encourage or support a campaign of online abuse and harassment of Rose, there is no survivable basis in these pleadings to defend an opinion that *by so doing* she is a serial abuser meriting the pejorative epithets applied to her conduct.
>
> 68 The same must go for the public interest defence. There can be no *reasonable* belief in the public interest in publishing untrue allegations and unsustainable opinions without some clear explanation and justification. None appears here."

Issues raised in the appeal

15. The ground of appeal is that the Judge "failed to apply" s 4 of the 2013 Act. Developing that short proposition on behalf of Mr Sivier, Mr Mitchell argues that the Judge wrongly treated the failure of the s 2 defence as dispositive of the defence under s 4. The public interest defence is not conditional on proof of the truth of any factual meaning. The test is not whether the defendant believed it was in the public interest to publish the imputation which the court assigns to the words complained of; what is required is a belief that publication of "the statement" is in the public interest. This allows room for

a defendant who intends a meaning different from that which, objectively, the statement conveys. In any event, the objectively determined truth or falsity of what was said is irrelevant to the question of whether Mr Sivier believed that publication was in the public interest, or whether such belief was reasonable. Thus, says Mr Mitchell, the short submission made on behalf of Ms Riley was wrong (and he says this was admitted by her Counsel at the hearing), yet the Judge proceeded on the basis of that submission. Mr Mitchell adds that it was wrong to determine the merits of the s 4 defence without a trial, when the court is mandated by s 4(2) to "have regard to all the circumstances of the case", and this is a developing area of the law. The Defence asserted all the necessary elements of the statutory defence. The Judge should have asked herself whether it set out a "reasonable basis" for those assertions, and should have held that it did.

16. On behalf of Ms Riley, Mr Stables accepts that the Judge's reasoning was sparse, and expressed with economy, but he defends her decision. He points out that at [12] the Judge recorded his submission that "if facts are incapable of being shown to be true there is no arguable basis in law for sustaining an opinion based on them, or a reasonable belief in publishing them in the public interest". He submits that the reasons given by the Judge capture "the essential point that the pleaded defence is wholly deficient in substance and particularity". By a respondent's notice, Mr Stables further contends that the Judge's decision can and should be upheld on the additional or alternative grounds that: (1) the statement complained of was not on a matter of public interest; (2) the pleaded defence discloses no grounds capable of giving rise to a reasonable belief that the publication was in the public interest; and/or (3) the particulars of the defence are so deficient that it should be struck out as likely to obstruct the fair disposal of proceedings. In his skeleton argument for the appeal, Mr Stables has gone further and invited us to conclude that Mr Sivier did not in fact hold the alleged belief. His argument is that no honest person could have done so, on the basis of the true facts.

17. Mr Mitchell submits that none of these lines of argument were advanced before the Judge. He objects that this is a new case, raised for the first time on this appeal, and thus procedurally illegitimate. He also takes issue with all these new points on their merits.

Discussion

18. The first and third of the grounds relied on in the Respondent's Notice are entirely new points. So too is the additional contention that we should reject Mr Sivier's pleaded case that he believed publication to be in the public interest. I would decline Mr Stables' invitation to uphold the Judge's decision on any of these additional or alternative grounds. These are not just points on which the Judge did not rely. None of them were argued before the Judge, in any form. We do not usually allow entirely new points to be taken on appeal. It is often procedurally unfair to do so, and normally wrong because appeals are by way of review not re-hearing. Ordinarily the place for arguments to be given their first run-out is the court of first instance. Any appeal would then be a first appeal. For those reasons I would be averse to upholding the Judge's decision on any of these additional or alternative bases. But I would also reject these points on their merits. The Defence pleads all three of the essential ingredients of the public interest defence. Although it is imperfect in some respects it is not so deficient as to justify its summary striking out on any of these grounds.

19. I would accept that paragraph 39 is open to some criticism. The statutory condition is that the statement complained of is "on" a matter of public interest, or part of such a statement. As I said in *Doyle v Smith* [64], "It should be possible to look at the statement and describe quite shortly something the words are about – one or more topics or subjects - which is or are of public interest". It is not entirely satisfactory for a defendant simply to list a number of topics that were "addressed" by the words complained of. But in my judgment, it is plainly arguable, at the very least, that the Article was about matters of public interest. Indeed, it seems to me to be barely arguable that it was not.

20. There is relatively little authority on the notion of public interest in this context, but it is common ground that it is necessarily a broad concept. In the common law of fair comment, it was well-established that matters of public interest included the public conduct of public figures and any statement which the claimant – whether or not she was a public figure - had put before the public for consideration. Here, according to the Defence,

> "At all relevant times the Claimant had some 610,000 followers on Twitter and used her profile and celebrity as a television presenter in order to pursue a vociferous campaign against perceived anti-Semitism in the Labour Party. She actively and robustly engaged online with people who did not share her views. In 2019 the Claimant accepted a 'Warrior for Truth' award issued by *The Algemeiner*, a news outlet concerned with matters of Jewish interest around the world, for being 'a prominent voice against antisemitism in the UK Labour party'".

A major theme of the Article was the charge of hypocrisy. Mr Sivier was contrasting what Ms Riley had said to millions via the news media (Channel 4 News, *The Times*, and *The Guardian*) with her own public behaviour in front of hundreds of thousands on Twitter. Mr Sivier was suggesting that her public statements deprecating online abuse were at odds with her own conduct, which was that of a serial abuser who had encouraged others to threaten the life of a teenage girl. He was, in the process, criticising Ms Riley's conduct on the public platform of Twitter, suggesting it was a cause of the death threats made to Rose. No doubt there is more than one way to put it, but one way it could be put is that the matters of public interest which the Article was "on", or about, were the public conduct of a prominent public figure and, in particular, statements she had made or caused to be made publicly (a) in a media interview and (b) on Twitter.

21. As for Mr Sivier's pleaded contention that he believed that publication was in the public interest, I am not persuaded that we should take the exceptional course of rejecting it on the papers. It is a rare case in which it is possible to find, on an interim application, that a party *cannot* have held a state of mind which they have asserted. The Court will be very cautious before rejecting such an assertion without hearing or even reading evidence on the point. Particular caution is required in this Court, when there is no first instance decision on the issue, and the reason for that is that the Court of first instance was not invited to make such a decision. Mr Stables' argument is that the issue turns on the entirety of the Twitter exchanges and since these, read as a whole, do not arguably support the imputations which Mr Sivier published it follows that he cannot have believed that publication was in the public interest. As I shall come on to explain, that is a false line of reasoning; Mr Sivier's actual state of mind, and its reasonableness, must be considered at this stage in the light of the tweets that he pleads and the content

of the two articles to which he gave hyperlinks. Mr Sivier's case about his state of mind is supported by a statement of truth. It is not inherently incredible. It is worthy of a trial.

22. The third issue is whether it was reasonable for Mr Sivier to hold such a belief. Mr Stables now attacks the particulars pleaded in support of that contention, but he did not do so at the hearing below, and I do not agree with him that the Judge took the view that the s 4 defence should be struck out on pleading grounds. In any event, in my opinion whilst the pleading of the defence is sub-optimal it is not fatally flawed. Critical points are the clear identification of the information the defendant possessed, and the inquiries carried out before publication: *Hijazi v Yaxley Lennon* [2020] EWHC 3058 (QB), [2021] EMLR 7 [23]. Here, the facts relied on are clearly identified, and in my judgment they are relevant. The Defence makes clear that the evidential basis for the Article is to be found in the two Lawson articles and the tweets referred to in paragraph 41(a).

23. I do think paragraph 41 is short on detail, and lacking in clarity as to the defendant's reasoning process. It tells the reader hardly anything about the content of the Lawson articles. It does not contain any, or any clear explanation of how Mr Sivier reasoned from those articles and the tweets to the conclusion that publication was in the public interest. It may be that this involves a breach of the relevant Practice Direction. PD53 para 4.3(2) requires a defendant pleading this defence to "give details of all matters relied on in support of any case that they reasonably believed that publishing the statement was in the public interest." But I do not believe such formal deficiencies would justify an immediate strike-out. They might be capable of cure by amendment. The right approach for Ms Riley would have been to seek further information about the defence before seeking to strike out on pleading grounds.

24. That brings me to the Judge's reasoning for striking out the s 4 defence.

25. The Judge conducted a meticulous analysis of the defence of truth. She accepted Mr Stables' argument, that Mr Sivier's pleaded case presented a selection of the relevant tweets stripped of their proper context, in a way that was misleading. She held that a defendant is not entitled to have his defence of truth assessed by reference to facts of his own choosing; the issue must be determined objectively against the overall factual position as it stood at the material time. She therefore took account not only of the tweets relied on by Mr Sivier but also of a large number of additional tweets which Ms Riley's solicitor had put in evidence. The Judge also held that Mr Sivier was not entitled to rely on hearsay statements in support of his truth defence. The truth or falsity of Mr Sivier's allegations was to be assessed by reference to Ms Riley's actual conduct, not what others had said about it. Having reviewed the overall picture in detail on this basis, the Judge reached the conclusions I have set out above. She agreed with Mr Stables that as the honest opinion defence could only succeed if the facts were true, it followed that this too must fail. Thus far, the Judge's approach was unimpeachable.

26. The Judge went on to hold that it also followed from her conclusions on the s 2 and s 3 defences that Mr Sivier could not establish the third element of the s 4 defence: that it was reasonable for him to believe that publication was in the public interest. She evidently proceeded on the basis that the reasonableness of any such belief was to be tested against (a) the meaning found by Nicklin J, and his other determinations; (b) the facts as analysed by her when dealing with the defence of truth; and (c) the legitimacy of the opinion, as she had assessed it. In the absence of any coherent explanation to the

contrary, she reasoned, it could not be reasonable to believe that it was in the public interest to publish false factual allegations and unsustainable opinions.

27. The Judge did not make the mistake that Mr Mitchell attributes to her: she did not decide that a defence of publication on matter of public interest can *never* succeed where the facts alleged are false and the opinion therefore untenable. Nor do I read the argument for Ms Riley as advancing that stark proposition, which would clearly be an error of law. An important function of the s 4 defence is to protect those who honestly and reasonably get their facts wrong when publishing on matters of public interest. But I have concluded that the Judge was led into a different error. She was wrongly persuaded that it followed from her conclusions on the s 2 and s 3 defences in this case that the Defence disclosed no reasonable basis for defending the claim under s 4 of the 2013 Act.

28. I have put it that way to emphasise that this was a strike-out application, not an application for summary judgment. Ms Riley was not applying for a decision on the merits, that the pleaded defence had no realistic prospect of success at trial. She raised a formal question, of whether the pleading set out a tenable case.

29. I am not persuaded by Mr Mitchell's criticism of the Judge's approach to meaning. As he rightly points out, the s 4 defence relates to the "statement complained of". So the fate of the defence will not always turn on the true meaning of that statement. The meaning the defendant intended his words to convey may be relevant to the question of whether it was reasonable to believe that publication was in the public interest: *Economou* (above) [95]. But as my Lady pointed out in that same paragraph, this cannot be pressed too far; there are limits to the latitude that can be allowed for ambiguity. And in my judgment the Judge was not wrong to proceed in this case on the basis of the imputations as identified by Nicklin J. A defendant who wishes to have his belief assessed on this alternative basis must make his position clear. He cannot keep his cards close to his chest, leaving the claimant and the court guessing until he gives his evidence. Here, the actual meaning of the statement complained of had been determined before the Defence was served, and it was that meaning which Mr Sivier sought to defend as true. On general pleading principles, if he wanted to make it part of his public interest defence that he had intended a different meaning he should have said so clearly in his Defence. That was not done.

30. There are, however, other problems with the Judge's approach. It is axiomatic that the truth or falsity of a defamatory allegation must be determined objectively, by reference to the full factual picture as presented to the court. It matters not whether the defendant knew all the facts at the time of publication. There will often be relevant facts which the defendant did not know, and sometimes there will be relevant facts he could not have discovered. But the legal approach is different when it comes to a s 4 defence: see *Economou* at [100-101], [105]. The relevant question for the Judge was: did the facts pleaded in paragraphs 39-41 of the Defence disclose a reasonable basis for the public interest defence?

31. In this context, the two legal principles which the Judge applied when assessing the defence of truth were inapplicable. It was not legitimate for Ms Riley to rely on her "selectivity" argument. It was an error to rely on, or to take account of, any tweets other than those put forward by Mr Sivier as facts he knew and relied on at the time of publication. It might be said – and in argument on this appeal it was said by Mr Stables

– that if some of the tweets were available for Mr Sivier to read so were the rest. But that is an evidential matter. The Judge was not in a position to make a finding that Mr Sivier had seen or read the entire body of tweets that she reviewed when deciding on the viability of the truth defence, or even that he could and should reasonably have reviewed the entirety of that material. So the tweets that were relevant at the s 4 stage were a sub-set of the totality. Those tweets were set out in terms on the face of the pleading, but there were additional matters to consider.

32. According to Mr Sivier's pleaded case, there were two pillars for his belief that publication was in the public interest. Besides the tweets, he relied on the two articles by Shaun Lawson. These were not relied on in support of the defence of truth, and rightly so. Whatever they said, it would have been irrelevant hearsay in that context. So the articles were rightly ignored by the Judge in assessing the defences of truth or honest opinion. But the position is different when it comes to the s 4 defence. It may, depending on the circumstances, be reasonable for a person considering whether a publication would be in the public interest to rely on hearsay statements from third parties. This point was not addressed below, either in argument or in the Judge's reasoning. In summary, therefore, the Judge was persuaded to take an approach to the s 4 defence which was wrong in principle, took account of some irrelevant matters and did not take account of some that were relevant.

33. Mr Stables submits that we can nonetheless conclude that the Judge's decision was right. He argues that we have the text of all the tweets on which Mr Sivier says he relied, and can readily assess whether these could support a reasonable belief that the publication of the imputations identified by Nicklin J was in the public interest. Mr Stables accepts that for this purpose the relevant tweets are but a sub-set of those considered by the Judge. But he submits that it is just as clear from the selection as it is from the totality of the relevant tweets, that no reasonable person could think it was justified or in the public interest to accuse Ms Riley of being a serial abuser, or to level at her the other allegations of which she complains. Mr Stables submits that we need not be concerned by the fact that Mr Sivier also pleads reliance on the Lawson articles, these are not set out in the Defence, and we do not know what they said. His response is that the articles could not assist Mr Sivier as they were no more than a series of vituperative allegations based on the self-same tweets.

34. This is a seductively simple argument. But I do not believe we should accept it. I would have been reluctant to let the public interest defence go to trial, if I thought the trial would be long and expensive and could confidently say – albeit for reasons other than those relied on by the Judge – that nobody could reasonably believe that it was in the public interest to publish these imputations. But striking out is a drastic remedy, reserved for plain and obvious cases. The burden lies on the applicant to demonstrate that it is appropriate, and to do so by reference to the statement of case. In my judgment, Mr Stables has failed to do that. I can see the force of the argument that, if the tweets read as a whole contained nothing capable of showing that Ms Riley was a serial abuser, a sub-set of the tweets cannot do so either. Tempting though it is, however, I am not convinced that we can simply dismiss the significance of the Lawson articles, as we are invited to do. I do not think it clear that the articles are an irrelevance.

35. The Article complained of suggests that the Lawson articles were heavily relied on by Mr Sivier as a basis for what he wrote. Mr Sivier's case under s 4 is imperfectly pleaded, as I have said. He has not made clear which aspects of the Lawson articles he regarded

as significant. His reasoning process is opaque so far. That may justify a probing request for further information. But I do not think it is a good enough reason to dismiss this part of Mr Sivier's case without a trial. We do not have the text of the articles. We cannot proceed on the basis of Mr Stables' oral submissions about them. We have no detail of the process of comparison or verification that Mr Sivier undertook. In short, without sight of the Lawson articles we cannot be confident that, taken in conjunction with the tweets relied on by Mr Sivier, they were incapable of grounding the necessary reasonable belief on his part. The appropriate time and place for an evaluation of these issues is at a trial. If Mr Stables is right, then the trial should be a relatively short and simple affair.

Lord Justice Henderson:-

36. I agree.

Dame Victoria Sharp, P:-

37. I also agree.

APPENDIX

Words complained of

"Serial abuser Rachel Riley to receive 'extra protection' – on grounds that she is receiving abuse

[*Photograph of the Claimant, captioned*:] Death threats: Rachel Riley says she needs extra security on Countdown – but her own behaviour has encouraged others to threaten a teenage girl's life.

. . .

It is absolutely right that abuse should not be tolerated, and anybody abusing or threatening another person – over any issue – needs to be tackled over it.

And that includes Ms Riley – because she is, herself a serial abuser.

. . .

- Cold-shouldering a 16-year-old girl with anxiety problems who had pointed out that Ms Riley has adopted questionable allies, in such a way that her (Ms Riley's) supporters subjected her to an appalling amount of abuse (known as dogpiling).
- Doubling-down on this behaviour by including a tweet from the same teenager as an example of anti-Semitism.
- Comparing this teenager's attempt to point out the inconsistencies in her own behaviour with "the spread of Antisemitism".

You can find evidence in support of all the above in this article. [*Hyperlink to first Shaun Lawson article*.]

Oh, and she also:

- Supported actress Tracy Ann Oberman's campaign of harassment against the same teenage girl.
- Tried to gaslight her followers into thinking that the article I mention immediately above was inaccurate by supporting false claims by one of her allies.
- Attacked that teenage girl yet again, along with her father.

You can find the evidence supporting this claims here. [*hyperlink to second Shaun Lawson article*]

Now, if you visit those evidence-packed articles by Shaun Lawson, you'll see some extremely harsh comments about Ms Riley. As mentioned twice above, I don't condone abuse of any kind and so I don't support those expressions of opinion although, reading through the evidence, I can certainly understand why he made them.

And you should too, from this summary of what has happened to the teenager who has suffered so much abuse from two television celebrities:

"The consequences of Riley and Oberman's obscene conduct have been as follows:

1. Rosie's Twitter account has been hacked several times, by people trying to delete screenshots. Now why might that be…?
2. People have tried to track down her family's address and her devastated mother's Facebook page.
3. Someone eavesdropped on Rosie in class and tried to sell the story to The Sun. Which in keeping with its reputation of being lower than vermin, printed something… before deleting it hours later.
4. She has people in college believing she's an anti-Semite.
5. She, a 16-year-old child, has received death threats.

I'm not saying Ms Riley intentionally tried to get her followers to threaten this girl with death. But nobody can deny that her irresponsibility has encouraged others to do so, and that she has been reckless as to the consequences of her behaviour.

So now we see that a person who has complained to the newspapers about "extra security" on the TV show she co-presents – because of death threats – has herself provoked death threats against a teenage girl.

And you can be sure this girl won't be getting "extra security" – or, indeed, any security at all."