[2021 Gib LR 14]

BARRASS, TAYLOR and FINANCIAL SERVICES COMMISSION v. CRUZ

COURT OF APPEAL (Kay, P., Elias and Rimer, JJ.A.): March 12th, 2021

2021/GCA/01

Civil Procedure—pleading—striking out—defamation claim—particulars of malice and bad faith not struck out

The respondent brought a claim in defamation.

Enterprise Insurance Company plc ("Enterprise") was an insurance company established in Gibraltar. The respondent was a non-executive member of Enterprise's board of directors and its non-executive chairman. The appellants were the Chief Executive Officer of the Gibraltar Financial Services Commission, the Commission's Director of Legal Enforcement and Policy, and the Commission itself.

In 2016, Enterprise was placed into liquidation. The appellants issued a press release concerning the collapse of Enterprise, which was published on the Commission's website and allegedly to a large number of publishees including local and international media outlets. The respondent asserted that the press release made serious and damaging allegations against him, including that there was reason to believe that he had misled the Commission about Enterprise's true financial position and that he had failed to run it in a sound and proper manner. Further, the respondent alleged that the reference in the note accompanying the press release to offences under the Financial Services (Insurance Companies) Act 1987 implied that there were reasonable grounds to suspect that he was guilty of a criminal offence.

The respondent claimed damages (including general, special and/or aggravated damages), interest on the special damages and an injunction restraining the appellants from further publishing the allegations and requiring them to remove the press release from the Commission's website.

The appellants issued an application seeking the following relief: (a) that the respondent's pleadings of malice and bad faith be struck out; (b) that summary judgment be entered for the appellants on the grounds of statutory immunity under s.19(1) of the Financial Services Commission Act 2007; (c) that summary judgment be entered for the appellants on the grounds of qualified privilege; (d) that the claim be struck out as an abuse of process;

and (e) that the claim be stayed. The appellants alleged that even if the press release did damage the respondent's reputation, they were protected in law by two distinct defences: the statutory defence in s.19(1) of the Financial Services Commission Act 2007 and the common law defence of qualified privilege. Those defences were not absolute. The statutory defence would be lost if a defendant acted in bad faith and the defence of qualified privilege would be lost if a defendant acted out of malice. The respondent had not alleged bad faith or malice in the particulars of claim, but there were particulars in paras. 14(w) and 14(x) of the pleadings, concerning the claim for aggravated damages, which were treated as identifying particulars of malice and bad faith.

The Supreme Court (Yeats, J.) dismissed the appellants' application save for ordering that three of the particulars of malice and bad faith be struck out (that decision is reported at 2020 Gib LR 36).

The appellants appealed, submitting that the judge erred in numerous ways in his approach to the strike out application and that, had he properly directed himself, he would inevitably have had to conclude, even at this early stage, that the particulars of malice and bad faith could not succeed and should be struck out. They submitted *inter alia* that (a) if there was a reading of the press release, whether or not the single or pleaded meaning, which would be consistent with the defendants having acted honestly, the court should not permit the case to proceed; and (b) the judge made three errors which invalidated his analysis of certain particulars: (i) he did not properly apply the *Telnikoff* test (that a piece of evidence must be more consistent with malice than the absence of malice in order to provide evidence on which the jury could find malice); (ii) he did not apply the *Turner* principle, *i.e.* the need to consider each piece of evidence independently; and (iii) he did not properly deal with post-publication matters.

Held, allowing the appeal in part:

(1) There would be malice where the privilege of publication was abused, *i.e.* used for an illegitimate purpose. That would be the case if a claimant could show that a defendant was dishonest, reckless or had a dominant motive which was improper. Very exceptionally, the privilege of publication might be abused by the extravagance of the language used or because the publication included defamatory material which went beyond what the performance of the duty or interest required. That was sometimes termed intrinsic malice. A defendant was given wide latitude with respect to the terms in which privileged material was expressed. The concept of bad faith was not quite as clearly defined as malice, although it was very closely aligned to that concept. It was not possible to give an exhaustive definition because it could arise in a number of ways. Bad faith was a serious allegation and must be clearly alleged and proved. It covered recklessness as well as dishonesty, but mere negligence was not enough. Bad faith did not necessarily include improper motive; it depended on the statutory context. In the context of the present appeal, the court rejected the suggestion

that an improper or malicious motive for making the press statement would not constitute bad faith within the meaning of s.19 of the Financial Services Commission Act 2007. If the Commission knowingly used powers given to it for legitimate and public purposes in order to achieve an improper purpose, at least where that was the predominant purpose, and if it caused reputational damage as a result, there was no reason why it should not be liable for the resulting damage. The court would not interpret the concept of bad faith so as to exclude liability in such circumstances absent at least clear language to the contrary, which was not present in s.19. In the context of the present appeal and like the judge below, the court saw no material difference in the way the court ought to approach the issues of malice and bad faith (paras. 28–40).

(2) The court summarized the principles for pleading malice and bad faith. (1) Any allegations of fraud or dishonesty, which included an allegation of malice or bad faith, must be clearly and unambiguously pleaded and must state the facts and matters which were said to justify the inference of malice or bad faith. (2) The particulars must identify precisely which facts and matters allegedly capable of establishing malice or bad faith were said to be known by which defendant. Where the liability of a company was in issue, the pleading must identify the person or persons whose actions were said to make the company liable, whether personally or vicariously, and the pleading must identify what it was alleged was actually known by each individual defendant. (3) Any piece of evidence relied upon to establish malice must be more consistent with malice than with its absence. If it was neutral or more consistent with the absence of malice, it could not be left to the jury as evidence in support of an inference of malice or bad faith. (4) When considering whether principle (3) was satisfied, each distinct piece of evidence must be separately considered. (5) Evidence of conduct which occurred after the date of publication was only material if it could properly be relied upon to establish the state of mind of the defendant at the time of publication itself. In certain circumstances, however, post-publication events might show that a refusal or failure to withdraw a publication rendered the continued publication defamatory from that time (para. 41).

(3) On appeal against the judge's refusal to strike out, the appellate court needed to be satisfied that there was an error in approach or that the judge's decision was perverse in the sense that it was a conclusion not properly open to a reasonable judge. This was sometimes described as plainly wrong. In the context of case management decisions, the adoption of a limited review jurisdiction was generally appropriate, as in the United Kingdom. The first instance judge's determination should be upheld unless it involved some misdirection in law or was plainly wrong. Where there was a misdirection of law, however, the court would have to assess the matter for itself in accordance with the proper legal principles (paras. 55–57).

(4) At the strike out stage, the relevant meaning of a publication was the meaning advanced by the claimant in the particulars of claim. Where malice was in issue, the court was not considering an objective concept but rather whether the defendant was subjectively dishonest or subjectively reckless. It could not be the case that if there was a possible construction of the words which would not involve dishonesty, the defamation claim must be struck out without a trial. The judge was correct to say that at the strike out stage the court had to accept the pleaded meaning (at least unless it was quite unrealistic). In any event, in the present case the core of the alleged libel was the statement, made in express terms, that those running Enterprise, who included the respondent, had seriously and consistently misled the appellants. On the assumption that this was untrue to the knowledge of the appellants (because, it was said, they well knew the state of affairs in the company—an assumption that must be made for strike out purposes) it was impossible to see how the appellants could have intended a meaning of the words which could possibly have been consistent with their honestly believing that they had been seriously misled (paras. 62–64).

(5) The judge's approach on the strike out application to the application of the *Telnikoff* test was not erroneous and his ruling on the particulars could not be set aside for that reason. At the interlocutory stage the judge was required to adopt a cautious approach; a claimant should not be denied the right to have an issue determined at trial unless the judge was satisfied that it could not succeed. If the judge was not persuaded of that, the particular should remain in the pleading. The judge did not at this stage have to be satisfied that any specific particular was more consistent with malice than its absence, merely that a trial judge could consider that it was capable of being seen in that way. Whether it did or not was ultimately a decision for the trial judge who might take a different view to the interlocutory judge. The trial judge would in no way be bound by the ruling of the strike out judge. Therefore, the court rejected the suggestion that the strike out judge had to assess each allegation and decide definitively whether or not it was more consistent with malice than with a lack of malice. It would be undesirable for a judge to have to make a definitive and necessarily impressionistic ruling at the interlocutory stage. This did not mean that the judge could adopt a perfunctory or casual approach when assessing the strike out application. The judge must bear in mind that the onus was on a claimant to prove malice, that a serious allegation of dishonesty should not be made lightly and that fairness demanded that a defendant should know the nature and substance of the case he had to meet. The judge must be prepared to analyse the pleaded facts with care and strike out all those which he was confident did not satisfy the *Telnikoff* criteria. However at the strike out stage, any real doubt about which side of the line a particular piece of evidence lay should be resolved in the claimant's favour. Unless the strike out judge was sure that an allegation if proved could not help show malice, he could not properly say that it was evidence which the law did not permit the jury to consider (paras. 71–76).

(6) Each piece of evidence had to be considered separately and had to be more consistent with malice than its absence. It did not follow that each particular must be treated entirely separately from each other. That could lead to an artificial assessment of the evidence depending on how the evidence was presented in the particulars. The court must take a realistic view as to what constituted a single piece of evidence and that might involve reading different paragraphs of the pleading together. Therefore whilst it was correct to say that each particular had to be separately considered, at least where they were discrete from one another, that did not automatically mean that each paragraph in the pleading must be so treated. What the court was not entitled to do was to consider together paragraphs which plead what were in substance quite distinct events or matters. The judge held that each particular must be looked at in the context of the "substratum of dishonesty" which where relevant was an "underlying theme" which must be taken into account when separate particulars were under consideration. That was a flaw in the judge's approach. If a particular incident was only capable of demonstrating malice when read with the substratum of dishonesty, it stood or fell with the primary fact and added nothing to the assessment of malice. It might be that once malice was established on the basis of properly pleaded facts and matters, that might well lend support to the notion that other, apparently neutral, facts were also influenced by or resulted from the underlying malice shown towards the claimant. However such facts did not themselves assist in demonstrating that malice existed in the first place and the jury, if there were one, could not be allowed to consider them in that context unless they satisfied the *Telnikoff* test in their own right, independently of the impermissible linking. In instances where a particular had been held admissible evidence of malice when read with the substratum of dishonesty, the court had to consider whether, shorn of the illegitimate link, the particulars still satisfied the *Telnikoff* test (paras. 77–81).

(7) The court considered the grounds of appeal in respect of each particular of malice and bad faith which the judge refused to strike out. The court upheld the appeal to the extent that it struck out some of the particulars of malice in para. 14(w) (*i.e.* paras. 14(w)(v), (vi), (vii) and (xi)) and all of the particulars of bad faith in para. 14(x) except for the particulars which had been incorporated from para. 14(w) by para. 14(x)(iv). Given that there were a few outstanding particulars of malice and bad faith which the court would allow to go to trial, it was not necessary at this stage to consider the summary judgment applications (paras. 123–125).

Cases cited:

(1) *Adam* v. *Ward*, [1917] A.C. 309; [1917] All E.R. 151; (1917), 86 L.J.K.B. 849, considered.

(2) *Bonnick* v. *Morris*, [2002] UKPC 31; [2003] 1 A.C. 300; [2002] 3 W.L.R. 820; [2002] EMLR 37, distinguished.

(3) *David* v. *Hosany*, [2016] EWHC 3797 (QB), referred to.

(4) *Edmonson* v. *Birch & Co. Ltd.*, [1907] 1 K.B. 371; (1907), 76 L.J.K.B. 346; 96 L.T. 415; 23 T.L.R. 234, considered.
(5) *Horrocks* v. *Lowe*, [1975] A.C. 135; [1974] 1 All E.R. 662, followed.
(6) *Huda* v. *Wells*, [2017] EWHC 2553 (QB); [2018] EMLR 7, referred to.
(7) *Hughes* v. *Richards*, [2004] EWCA Civ 266; [2004] PNLR 35, considered.
(8) *Interdab* v. *Balassarian*, April 4th, 1989, unreported, considered.
(9) *JSC Bank Moscow* v. *Kekhman*, [2015] EWHC (Comm) 3073, followed.
(10) *Khader* v. *Aziz*, [2010] EWCA Civ 716; [2010] 1 W.L.R. 2673; [2011] EMLR 2, considered.
(11) *Laughton* v. *Sodor & Man (Bishop)* (1871–73), L.R. 4 P.C. 495; 1522–1920 MLR 412; (1872), 9 Moo. PC NS 318, referred to.
(12) *Lillie & Reed* v. *Newcastle City Council*, [2002] EWHC 1600 (QB), considered.
(13) *Loveless* v. *Earl*, [1999] EMLR 530, considered.
(14) *Marrache* v. *Lavarello*, 2019 Gib LR 57, referred to.
(15) *Marrache* v. *Marrache (Trustee)*, 2010–12 Gib LR 221, referred to.
(16) *Milne* v. *Express Newspapers*, [2004] EWCA Civ 664; [2005] 1 W.L.R. 772; [2004] EMLR 2, referred to.
(17) *Monks* v. *Warwick District Council*, [2009] EWHC 959 (QB), considered.
(18) *Morgan* v. *Odhams Press Ltd.*, [1971] 1 W.L.R. 1239; [1971] 2 All E.R. 1156, considered.
(19) *Mullarkey* v. *Broad*, [2007] EWHC 3400 (Ch), referred to.
(20) *Palladian Partners LP* v. *Republic of Argentina*, [2020] EWHC 1946 (Comm), referred to.
(21) *Police Commr.* v. *Abdulle*, [2015] EWCA Civ 1260; [2016] 1 W.L.R. 898, considered.
(22) *Qadir* v. *Associated Newspapers Ltd.*, [2012] EWHC 2606 (QB); [2013] EMLR 15, referred to.
(23) *SBBS* v. *Minister for Immigration & Multicultural & Indigenous Affairs*, [2002] FCAFC 261; (2002), 194 ALR 749, referred to.
(24) *Saad* v. *Southampton University Hospitals NHS Trust*, [2018] IRLR 1007; [2018] UKEAT 0276-17-2208; [2019] ICR 311, considered.
(25) *Seray-Wurie* v. *Charity Commn.*, [2008] EWHC 870 (QB), referred to.
(26) *Somerville* v. *Hawkins* (1851), 10 CB 583; [1851] EngR 73; 138 E.R. 231, considered.
(27) *Street* v. *Derbyshire Unemployed Workers' Centre*, [2004] EWCA Civ 964; [2004] 4 All E.R. 839; [2004] IRLR 687; [2005] ICR 97, considered.
(28) *Telnikoff* v. *Matusevitch*, [1991] Q.B. 102, applied.
(29) *Three Rivers D.C.* v. *Bank of England (No. 3)*, [2001] UKHL 16; [2003] 2 A.C. 1; [2001] 2 All E.R. 513; [2000] 2 W.L.R. 1220; [2000] 3 All E.R. 1; [2000] 3 C.M.L.R. 205, considered.

(30) *Turner* v. *M.G.M. Pictures Ltd*., [1950] W.N. 83; [1950] 1 All E.R. 449; (1950), 66 T.L.R. 342, applied.
(31) *Webster* v. *Lord Chancellor*, [2015] EWCA Civ 742; [2016] Q.B. 676; [2015] 3 W.L.R. 1909, considered.
(32) *Yeo* v. *Times Newspapers Ltd.*, [2015] EWHC 209 (QB); [2015] 1 W.L.R. 3031; [2015] 2 Costs LO 243; [2015] EMLR 18, considered.

Legislation construed:
Civil Procedure Rules (S.I. 1998/3132), r.3.4(2)(a): The relevant terms of this provision are set out at para. 26.

Financial Services Commission Act 2007, s.19(1): The relevant terms of this subsection are set out at para. 7.

D. Browne, *Q.C.*, *J. Montado* and *G. Callus* (instructed by Isolas LLP) for the defendants/appellants;
J. Santos and *D. Martinez* (instructed by Hassans) for the claimant/respondent.

1 **ELIAS, J.A.:** This is an appeal against the decision of Yeats, J. (judgment and order both dated January 31st, 2020, reported at 2020 Gib LR 36) in which, save to a very limited extent, he refused to strike out particulars of malice and bad faith relied upon by the claimant in a defamation action brought against three defendants. He also refused to grant summary judgment applications which were interlinked with the strike out application.

Background

2 Enterprise Insurance Co. plc ("Enterprise") is an insurance company registered in Gibraltar and now in compulsory liquidation. Its business was to write policies primarily in the UK but also in five other EU countries. On July 22nd, 2016, Enterprise's directors notified the Financial Services Commission in Gibraltar ("the Commission") that it was insolvent. The Commission is the financial regulatory body in Gibraltar and is responsible, *inter alia*, for overseeing the operation of insurance companies. It applied to the Supreme Court for a provisional liquidator to be appointed and the relevant order was made on July 25th, 2016. Mr. Frederick White was appointed provisional liquidator. He produced a report dated October 21st, 2016 in which he said that the company was insolvent with a potential deficiency of some £94m. (although that figure is disputed by the claimant). On the basis of his report, the Supreme Court made a compulsory winding up order on October 26th, 2016. On the same day, the Commission issued a press statement ("the press release") about the collapse of the company and published it on its website together with additional information provided as an addendum and headed "Notes for Editors." This was picked

up by other media outlets. It is that press release, read with the addendum, which is said to be defamatory of the claimant, Mr. Nicholas Cruz.

3 Mr. Cruz is a lawyer at the Gibraltar Bar and was the founder and, for many years, the senior partner in the law firm now called Cruzlaw LLP. He had been a non-executive director of Enterprise since November 2003 until September 21st, 2016 and its non-executive chairman from October 1st, 2014 until September 21st, 2016. He was also directly involved with a clutch of entities which were closely related to Enterprise. He was a non-executive director of Enterprise's holding company, Enterprise Holdings Ltd. This was in turn beneficially owned by two trusts, the Andrew Flowers Family Settlement Trust and the Jonathan Evans Sub-Trust. The corporate trustee of both these trusts was Acquarius Trust Co. Ltd. ("ATC") and Mr. Cruz was its sole director and shareholder. In addition to holding these positions, Mr. Cruz has at various times held non-executive posts in other Gibraltar companies. He has a highly visible commercial and public profile in Gibraltar.

4 Mr. Cruz believed that the press release had damaged his reputation and had caused him serious economic harm. Some two years after the press release had been published, he sued three parties connected with its publication: the Commission itself as third defendant; its then Chief Executive Officer, Ms. Samantha Barrass, as first defendant; and its then Director of Legal Enforcement and Policy, Mr. Peter Taylor, as the second defendant. Ms. Barrass had been in post since February 2014 but Mr. Taylor had only been appointed to his position in May 2016, shortly before it became clear that Enterprise was insolvent. Each of these defendants is said to be personally responsible for publishing or authorizing publication, and the Commission is also alleged to be vicariously liable for the acts of the two individual officers. The particulars of claim allege both that the original publication was defamatory and that retaining it on the website after being specifically told of its defamatory content was also defamatory.

5 Mr. Cruz filed his claim form on November 30th, 2018 appending the particulars of claim. This set out the basis of his claim and sought both damages, including aggravated damages and special damages for economic loss, and an injunction to have the press release withdrawn. The Commission had not been willing to take that step voluntarily. On the day when the defence was due to be served, but without serving any defence, the defendants issued an application in the action in which it sought the following relief:

(a) that the claimant's pleadings of malice and bad faith be struck out;

(b) that summary judgment be entered for the defendants on the grounds of an alleged statutory immunity;

(c) that summary judgment be entered for the defendants on the grounds of qualified privilege;

(d) that the claim be struck out as an abuse of process on three separate grounds; and

(e) that the claim be stayed.

6 It is necessary to say a little more about the somewhat unusual circumstances in which the strike out application was made and its relationship to the two summary judgment applications. The defendants allege that even if the press release did damage the reputation of the claimant, they were protected in law by two distinct defences: a specific statutory defence which gave them express immunity from any claim in damages; and the common law defence of qualified privilege arising from the circumstances in which the press release was made which provided them with a complete defence to any relief.

7 The statutory immunity is conferred by s.19(1) of the Financial Services Commission Act 2007 and is cast in the following terms:

> "Neither the Commission nor any member of the Commission, nor any officers or servants of the Commission . . . shall be liable in damages for anything done or omitted in the discharge of any powers or functions conferred on the Commission by this or any other act or regulation unless the act or omission is shown to have been in bad faith."

8 The defence of qualified privilege arises at common law in a context where the publication is made in pursuance of a duty or interest, legal, social or moral, and the person to whom it is made has a common interest in receiving it. The defendants contend that as the Commission is the regulatory body responsible for overseeing the operation of Enterprise, the defence manifestly applies here.

9 However, neither of these defences is absolute. The statutory defence is lost if the defendant acts in bad faith, as is clear from the terms of s.19 itself, and the defence of qualified privilege is lost if the defendant acts out of malice. I will discuss the scope of these defences, and their inter-relationship, below.

10 An unusual feature of this case is that the claimant had not in the particulars of claim alleged in terms that the press release itself was either made in bad faith or was activated by malice. However, there were particulars provided in para. 14(w) and (x) of the pleadings which relate to the claim for aggravated damages. Paragraph 14(w) stated in terms that, in publishing defamatory allegations, the defendants "were acting maliciously and/or with reckless indifference as to their truth or falsity." There then follow eleven detailed sets of particulars. Paragraph 14(x) identifies

conduct which is termed "high-handed and aggressive and evinced clear ill-will towards the Claimant" and this expressly incorporates all the matters referred to in para. 14(w) as well as identifying other discrete matters. Although the phrase "bad faith" was not used, the particulars set out in para. 14(x) were treated by all parties below to be particulars of bad faith although not, it seems, of malice. I confess that it is not entirely clear to me why at least some of the particulars identified in para. 14(x) could not, if they demonstrated bad faith, also be relied upon as evidence of malice, and Mr. Julian Santos, counsel for the claimant, indicated during the hearing that he might seek to amend to make it clear that they do. However, for the purposes of this appeal, I shall act, as did the judge below, on the basis that para. 14(w) identifies particulars of malice and para. 14(x) particulars of bad faith.

11 Mr. Santos argued before the judge that it was premature to consider the strike out application given that the particulars of malice and bad faith had not been specifically directed either to the statutory immunity or the defence of qualified privilege. Indeed, he disputed—and still does—that either defence is applicable in the circumstances of this case. He contended that he was only obliged to plead bad faith or malice in his reply, once it became clear in the defence that these defences were indeed being relied upon by the defendants. This had not happened and he had not therefore prepared his response; the particulars directed to damages should not be treated as particulars of an as yet unpleaded reply to an as yet unpleaded defence.

12 The judge did not dispute that there was no obligation on the claimant to plead these matters in the particulars of claim, particularly since the claimant was contending that the defences were not available to the defendants. However, the judge was satisfied, after exploring the matter with Mr. Santos at the hearing, that in substance the matters pleaded in para. 14(w) and (x), albeit directed to damages, in fact contained all the facts and matters on malice and bad faith which the claimant would plead in any formal reply. Accordingly, he determined to hear the application. He did note, however, that even if he were to strike out any of the particulars as sought in the strike out application, that would leave open the possibility that the claimant could seek to amend or plead new particulars of malice and/or bad faith in different form in any reply; if that were done, they would have to be "the subject of further analysis." Mr. Santos has reserved the right to take this course if necessary.

13 I can see the pragmatic reasons for the judge resolving to hear the strike out application rather than to postpone it given that it would almost certainly have come back before the court, and probably in much the same form, once a defence and reply had been served. However, it might have been wiser if the parties had sought first to have determined the logically

prior questions whether the statutory immunity and qualified privilege defences are applicable at all. If neither can be relied upon, as the claimant alleges, the issues of malice and bad faith simply do not arise. But whatever the merits of dealing with the strike out application in the way the judge did, there is no cross-appeal resuscitating the argument that it was premature for him to do so. We therefore have dealt with this appeal on the same basis as the judge, namely as though the pleadings of malice and bad faith are to be treated as directed towards rebutting the as yet unpleaded defences of statutory immunity and qualified privilege.

14 By the time the case came before Yeats, J., it had been made clear that the two summary judgment applications were contingent on the particulars of malice and bad faith being struck out in their entirety. The contention was that if there were no particulars capable of sustaining allegations of malice or bad faith, the two defences would inevitably apply and therefore the claim for defamation was bound to fail. Summary judgment would then be the obvious and appropriate method of having the case dismissed. This, however, was disputed by the claimant who contended that neither defence is applicable here. Accordingly, even if Yeats, J. had struck out all the relevant particulars, he would have had to consider whether the defences applied.

15 In the event, when the applications came before Yeats, J., he dismissed all the claims in the application save for making an order that three of the particulars of malice and bad faith should be struck out. On the logic of the defendants' own case, therefore, the judge could not then give summary judgment on the grounds that the case was bound to fail. Even if the defences were in principle applicable, they might fail because of malice or bad faith. It was therefore unnecessary for the judge to engage with the question whether the defences were in principle applicable in the context of the case, and he did not do so.

16 The defendants now appeal the first three of the judge's rulings. They do not appeal the other two rulings relating to abuse of process and a stay. I say no more about them save to note that we were provided with voluminous evidence which had been before the court below, in part to deal with these matters and in part because initially (although not by the time the case came before Yeats, J.) the summary judgment applications were being pursued independently of the strike out applications. Evidence was admissible to deal with all these matters. For reasons I consider below, however, it is not appropriate for us to have regard to evidence in the strike out applications, although from time to time both counsel—and particularly Mr. Desmond Browne, Q.C., counsel for the defendants—sought to draw evidential issues to our attention under the guise of it being relevant context. We have resisted the temptation to be drawn into these matters.

17 In essence, the defendants submit that Yeats, J. erred in numerous ways in his approach to the strike out application and that, had he properly directed himself with respect to the sustainability of the particulars of malice and bad faith, he would inevitably have had to conclude, even at this early stage, that they could not succeed and should be struck out. On the premise that we upheld the appeal with respect to all the extant particulars, the defendants wanted this court to go on to decide whether, as they allege, the two defences of statutory immunity and qualified privilege were applicable, notwithstanding that there had been no determination of these points below. This would be necessary if we were to be in a position to make an order for summary judgment. The claimant did not agree with that course and submitted that even if the strike out application were to succeed in full, it would not be appropriate for us to rule on those two questions at this stage. In part this was because the applications required a consideration of evidence, and in part because they raised complex issues which required fuller consideration than counsel had been able to give them. I return briefly to consider this point at the end of this judgment.

The press release: objective and subjective meanings

18 I would summarize the principal points made in the press release as follows. It starts by announcing a major investigation into Enterprise and its board of directors (although it does not specifically identify them) and then adds: "The GFSC [the Commission] has reason to believe that it may have been significantly and consistently misled about Enterprise's true financial position."

19 It says that the financial collapse is unprecedented. Enterprise should have been run prudently and in the interests of policyholders but "the nature and extent of the insolvency demonstrates that this has not happened." The extent of the insolvency "raises major questions about the competency and integrity of the Board." It noted that the Commission had invited the directors holding regulated positions in other companies voluntarily to stand down from positions while under investigation.

20 The statement then referred to a quote from the second defendant, Mr. Taylor, which repeated that the Commission had reason to think it may have been seriously misled and had major questions for the Enterprise Board. He is reported as saying that the Commission was "shocked" by the extent of the collapse. It was critical to the reputation of Gibraltar "to determine the extent to which any of the directors need to be held to account for what had occurred." He then stressed, however, that whilst the Commission had "deep and serious concerns," it had as yet made no findings and had reached no conclusions.

21 In an annexed section headed "Note for Editors," the following matters were drawn to the attention of the reader. First, it briefly summarized the

objects of the Commission as being to provide financial services regulation in an effective and efficient manner; to protect the public from financial loss; and to enhance Gibraltar's reputation as a quality financial centre. Second, it outlined the principal activities of Enterprise and the areas in which it operated. Third, it identified the relevant dates when certain events, such as the orders for provisional liquidation and compulsory winding up, took place. Fourth, it referred to the Commission's Policy Statement on the Assessment of Fitness and Propriety which states that where a person is the subject of matters involving insolvency in Gibraltar, that raises a presumption that they are not fit and proper. Finally, it made the observation that subject to particular identified defences, the Financial Services (Insurance Companies) Act 1987 provided that where an insurance company was in breach of the Act or any regulations made pursuant to it, certain officers of the company were also guilty of the same offence and were liable to the same penalty, which could include imprisonment for up to two years.

22 In para. 13 of the particulars of claim, the claimant pleads the natural and ordinary meaning of the words used in the press release (read with the Notes for Editors). These include that there were serious grounds to suspect that the claimant had "seriously, significantly and consistently" misled the Commission about the true state of Enterprise's finances; that there were reasonable grounds to suspect that he had committed a criminal offence punishable by two years' imprisonment; that he had failed to run Enterprise in a "sound and prudent manner," thereby causing loss to policyholders and creditors; that he had breached his duty to the company and policyholders; that he had failed properly to govern the company and to report its true position to the Commission; and that there were major concerns about his competence and integrity such that he was no longer a fit and proper person to hold regulated positions.

23 At trial there will have to be a determination of what, objectively, the press release means. This is how a hypothetical, reasonable reader would understand it. The court will at that stage have to determine what is termed the "single meaning" and various issues, in particular whether the statement was defamatory or whether it was true, will then have to be determined by reference to that meaning. However, the single meaning is not the relevant meaning when the question of malice or bad faith is in issue. This is because, as I discuss below, the question, or at least the principal question, is whether a defendant making the statement has been untruthful or recklessly indifferent to the truth. So if at trial it is accepted that a defendant genuinely understood the words to have a particular meaning, and that meaning is consistent with the statement having been made honestly, there can be no malice. That is so even though the statement could not have been honestly made if it were to be read as having the meaning identified as the

single meaning. The point was succinctly made by Hirst, L.J. in *Loveless* v. *Earl* (13) ([1999] EMLR at 538–539):

> "Here, it is very important to contrast the test for meaning on the one hand and the test for malice on the other. Meaning is an objective test, entirely independent of the defendant's state of mind or intention. Malice is a subjective test, entirely dependent on the defendant's state of mind and intention. Thus, in a case where words are ultimately held objectively to bear meaning A, if the defendant subjectively intended not meaning A but meaning B, and honestly believed meaning B to be true, then the plaintiff's case on malice would be likely to fail."

24 A question put in issue in this appeal is how a judge should approach the issue of meaning in a strike out application relating to the particulars of malice and bad faith. I discuss this question later in this judgment (see paras. 58–64).

Strike out

25 At the heart of the appeal is the question whether the particulars of malice or bad faith should be struck out because, as framed, they cannot stand as particulars which are capable of rebutting either the statutory immunity or the defence of qualified privilege. Where the trial is by judge and jury, the issue whether the publication was made with malice or in bad faith is for the jury to decide, provided the judge is satisfied that there is evidence on which a reasonable jury, properly directed, could make that decision. As has been said on numerous occasions, the test is akin to the well-known *Galbraith* test adopted in criminal cases when the question arises whether there is evidence justifying the question of guilt being left to a jury. It is not clear at this stage whether the trial will be by a judge alone or a judge with a jury. Jury trials have in practice been almost entirely abolished in Great Britain in defamation cases as a result of the Defamation Act 2013, but that legislation has not been adopted in Gibraltar. Although there is apparently some uncertainty about the current legal position in Gibraltar, both parties accept that there is a realistic possibility that, if this case goes to trial, it could be before a jury. If the trial is by judge alone, the judge will not of course formally have to go through that two-stage process of deciding whether the evidence is capable of sustaining malice and bad faith and then determining whether it actually does so (although it may be a useful discipline to adopt that approach). In the course of this judgment, I will assume that the case will be heard by a judge and jury, although the legal analysis is the same whether it is or not.

26 The strike out application is made under CPR r.3.4(2)(a) which empowers a court to strike out all or part of a statement of case:

> ". . . if it appears to the court—

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim."

Where an application is made under this rule, there are two important and firmly established principles which come into play and which are not disputed. First, the court must assume that the claimant's assertions are true and act on the premise that he will be able to establish the facts and matters asserted in the pleading; in other words, the case is taken at its highest from the claimant's point of view. Second—and this is a corollary of the first point—the application is determined on the basis of the particulars of claim alone without recourse to extrinsic evidence.

27 There are detailed rules, which I set out below, which are designed to ensure that the plea of malice or bad faith is properly particularized so as to enable the defendant to know the nature of the case against him or her, and for the court to be satisfied that the facts and matters relied upon are in principle capable of sustaining a finding of malice or bad faith. Whether they are so capable depends in part upon the proper meaning of those concepts. For the most part this is not controversial, although there is some disagreement over the precise scope of bad faith in the context of this case.

Malice and bad faith

28 The leading guidance on the concept of malice is the speech of Lord Diplock in *Horrocks* v. *Lowe* (5) ([1975] A.C. at 149–151). There will be malice where the privilege has been abused, *i.e.*, used for an illegitimate purpose. That will be the case if the claimant can show that the defendant was dishonest, reckless, or had a dominant motive which was improper.

29 Lord Diplock explained why dishonesty should defeat the privilege (*ibid.*, at 149H–150A):

"If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another . . ."

30 He then turned to what recklessness requires (*ibid.*, at 150B–150C):

"If he [the defendant] publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed by all sorts and conditions of men. In affording to them immunity from suit if they have acted in

> good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them."

31 So far as improper motive is concerned, Lord Diplock pointed out that, although it will commonly be personal spite or ill-will, that is not necessarily the case: any improper motive will suffice, even where there is no dishonesty or recklessness, provided it is the dominant motive (*ibid.*, at 150G–H):

> "There may be instances of improper motives which destroy the privilege apart from personal spite. A defendant's dominant motive may have been to obtain some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege If so, he loses the benefit of the privilege despite his positive belief that what he said or wrote was true."

32 In practice, it is very rare for an improper motive alone, absent dishonesty or recklessness, to found a successful claim of malice. Eady, J. observed in *Lillie & Reed* v. *Newcastle City Council* (12) that "dominant motive" is really only something which comes into play where a defendant had been held to be honest. In the same case he described it as an "endangered species" ([2002] EWHC 1600 (QB), at para. 1039). It has hardly ever been established perhaps because, as Lord Diplock observed in the *Horrocks* case (5), a judge or jury should be slow to find that an otherwise honest defendant has a dominant improper motive.

33 Very exceptionally, the privilege of publication may be abused by the extravagance of the language used or because the publication includes defamatory material which goes beyond what the performance of the duty or interest requires. This is sometimes termed "intrinsic malice." In *Edmonson* v. *Birch & Co.* (4), Lord Collins, M.R. said this ([1907] 1 K.B. at 381):

> "I agree that the language used may in some cases be so defamatory, and so far in excess of the occasion, as to be evidence of actual malice, and to shew that the publication of the defamatory matter was not a use, but an abuse of the privileged occasion. But the mere fact that language used is somewhat strong, or not altogether temperate, would not, in the absence of any indication that it was not used bona fide, be evidence of malice."

34 Other cases show that a defendant is given wide latitude with respect to the terms in which privileged material is expressed. In *Adam* v. *Ward* (1), Lord Atkinson observed, with respect to privileged communication, that a defendant is not limited to the use of only such language as is reasonably necessary to protect the interest or discharge the duty and that a defendant ([1917] A.C. at 339):

> ". . . will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote was true and necessary for the purpose of his vindication, though in fact it was not so."

Lord Dunedin, adopting what was said by the Privy Council in *Laughton* v. *Sodor & Man (Bishop)* (11), observed in the same case that (L.R. 4 P.C. at 508):

> ". . . to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications."

35 The justification for allowing a defendant leeway for including what is strictly unnecessary material was succinctly explained by Lord Diplock in *Horrocks* v. *Lowe* (5) ([1975] A.C. at 151):

> "Logically it might be said that such irrelevant matter falls outside the privilege altogether. But if this were so it would involve the application by the court of an objective test of relevance to every part of the defamatory matter published on the privileged occasion; whereas, as everyone knows, ordinary human beings vary in their ability to distinguish that which is logically relevant from that which is not and few, apart from lawyers, have had any training which qualifies them to do so. So the protection afforded by the privilege would be illusory if it were lost in respect of any defamatory matter which upon logical analysis could be shown to be irrelevant to the fulfilment of the duty or the protection of the right upon which the privilege was founded. As Lord Dunedin pointed out in *Adam v Ward* [1917] A.C. 309, 326–327 the proper rule as respects irrelevant defamatory matter incorporated in a statement made on a privileged occasion is to treat it as one of the factors to be taken into consideration in deciding whether, in all the circumstances, an inference that the defendant was actuated by express malice can properly be drawn. As regards irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true or, though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. Here, too, judges and juries should be slow to draw this inference."

36 The defendants also relied upon the decision of the English Court of Appeal in *Khader* v. *Aziz* (10), where a claimant sought to infer malice

merely from the words used in two conversations which were themselves in response to what were alleged to be derogatory newspaper articles. The President of the QBD cited ([2011] EMLR 2, at para. 19) without dissent a submission by counsel, itself based on earlier authorities, that if the response was "in a broad and reasonable sense, germane to the subject matter of the attack" then it would be protected by qualified privilege. There was considerable latitude, but the defendant must not include "entirely irrelevant and extraneous material" (*ibid.*).

37 The concept of bad faith is not quite so clearly defined as malice, although it is very closely aligned to that concept. Indeed, as the citation from Lord Diplock's speech in *Horrocks* (5) (para. 30 above) shows, he used the concept of acting in good faith when he was describing the state of mind of someone acting without malice. The two concepts may not cover precisely the same ground but any differences are narrow. In *Webster* v. *Lord Chancellor* (31), the English Court of Appeal was considering a claim for damages against a judge. The claimant had been convicted of rape but his conviction had been overturned on appeal because of defects in the summing up. Section 9(3) of the Human Rights Act 1998 excluded such a claim if the judicial act was done in good faith and the court had to consider what might constitute a lack of good faith. Sir Brian Leveson, P. referred to a decision of the Federal Court of Australia in *SBBS* v. *Minister for Immigration & Multicultural & Indigenous Affairs* (23) which had considered the concept of bad faith in some detail and identified nine characteristics. For the purposes of this appeal it is sufficient to mention the following: that it was not possible to give an exhaustive definition because it could arise in a number of ways; that it is a serious allegation and must be clearly alleged and proved; and that it covers recklessness as well as dishonesty, but mere negligence is not enough. Sir Brian Leveson held that "errors of approach" in the summing up ([2016] Q.B. 676, at para. 34) did not demonstrate lack of good faith in the absence of any evidence of ulterior motive, indicating that improper motive could suffice even without dishonesty or recklessness. So bad faith may include dishonesty and improper motive, just as with malice.

38 However, bad faith does not necessarily include improper motive; it depends on the statutory context. An example is given by *Saad* v. *Southampton University Hospital NHS Trust* (24), which concerned the scope of the protection from victimization discrimination under s.27(3) of the Equality Act 2010. The claimant had made a complaint about an alleged racist remark by a surgeon and complained that his subsequent dismissal was connected to that disclosure and amounted to unlawful victimization. In order for the protection to apply, the disclosure had to be in good faith. The employment tribunal found that the employee had honestly, albeit unreasonably, believed that the remark had been made but that the complaint had not been made for a proper purpose but in order to delay an

assessment of the claimant's abilities which he knew would go badly. The Employment Appeal Tribunal held that in the particular statutory context, the claimant was acting in good faith if he honestly believed that the disclosure was true even though it was not, and that his improper motive did not amount to relevant bad faith within the meaning of the statute. The court distinguished its meaning here from that given to the concept of good faith in the closely related field of victimization for whistleblowing where the Court of Appeal had held that if the predominant motive in making a disclosure was an improper one, the statutory protection would not apply: *Street* v. *Derbyshire Unemployed Workers' Centre* (27).

39 In the context of this appeal, I would reject any suggestion that an improper or malicious motive for making the press statement would not constitute bad faith within the meaning of s.19 of the Financial Services Commission Act 2007. If the Commission knowingly uses powers given to it for legitimate and important public purposes in order to achieve an improper purpose, at least where that is the predominant purpose, and if it causes reputational damage as a result, I can see no reason why it should not be liable for the resulting damage. I would not interpret the concept of bad faith so as to exclude liability in such circumstances absent at least clear language to the contrary, which in my view is not present in s.19.

40 It may be that the concept of bad faith is less stringent than malice. In the *Street* case, Auld, L.J. also made the following *obiter* remark ([2005] ICR 97, at para. 57): "[M]alice is a sharper concept than bad faith and, on the whole, sets a higher threshold of proof than might be required for other or lesser forms of bad faith." The defendants submit that in so far as these comments might suggest (as the claimant did below) that malice would be harder to establish than bad faith, that would be an erroneous approach. I agree with that submission. At least in circumstances where the two concepts cover essentially the same ground, as in my view they do here, I do not see how a court could find on the balance of probabilities that a publication was, say, dishonest enough to constitute bad faith but not malice, or vice versa. In the context of this appeal, therefore, and like the judge below, I see no material difference in the way the court ought to approach the issues of malice and bad faith.

The principles of pleading malice and bad faith

41 The strike out application is directed at the pleaded case in the particulars of claim. It is alleged that the pleadings fail in various ways to satisfy certain principles which the common law requires when dishonesty, which includes malice or bad faith, is alleged. The principles themselves are now well established although there is some dispute both as to their scope and as to whether they were properly applied by the judge below. I

will summarize them first and then deal briefly with the authorities from which they are derived.

(1) Any allegation of fraud or dishonesty, which includes an allegation of malice or bad faith, must be clearly and unambiguously pleaded and must state the facts and matters which are said to justify the inference of malice or bad faith.

(2) The particulars must identify precisely which facts and matters allegedly capable of establishing malice or bad faith were said to be known by which defendant. Where the liability of a company is in issue, the pleading must identify the person or persons whose actions are said to make the company liable, whether personally or vicariously, and the pleading must identify what it is alleged was actually known by each individual defendant.

(3) Any piece of evidence relied upon to establish malice must be more consistent with malice than with its absence. If it is neutral or more consistent with the absence of malice, it cannot be left to the jury as evidence in support of an inference of malice or bad faith.

(4) When considering whether principle (3) is satisfied, each distinct piece of evidence must be separately considered.

(5) Evidence of conduct which occurs after the date of publication is only material if it can properly be relied upon to establish the state of mind of the defendant at the time of publication itself. In certain circumstances, however, post-publication events might show that a refusal or failure to withdraw a publication renders the continued publication defamatory from that time.

42 The first two principles focus on the need to ensure that defendants know the nature of the case against them. They can be seen as aspects of fairness. The other three principles go to the substance of the case. Underpinning them is the notion that even where the pleading properly satisfies principles (1) and (2) so that the claimant's case is adequately explained, a defendant ought not to be put to the trouble of defending a case, particularly where it is one of dishonesty, where there is no pleaded *prima facie* case which is capable of sustaining such an allegation even when the claimant's case is taken at its highest. Even if some only of the particulars can be properly struck out, this has the merit of narrowing the focus of the trial with a consequential saving of time and expense.

43 There is a plethora of authority in support of these principles. In *Three Rivers D.C.* v. *Bank of England (No. 3)* (29), Lord Millett described the requirements for pleadings of fraud or dishonesty as follows ([2003] 2 A.C. 1, at para. 186):

> "The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved." [Emphasis in original.]

44 Warby, J. reiterated the importance of clear pleadings and the reason for this in *Yeo* v. *Times Newspapers Ltd.* (32) ([2015] 1 W.L.R. 3031, at paras. 30–31):

> "30. Clarity and precision are always required in statements of case, but never more so than when an allegation of dishonesty is being made. This is axiomatic. One reason is the obvious one that the ordinary requirements of fairness dictate that a person accused of acting dishonestly must be given a clear statement of the case against him, so that he can prepare to meet it.
>
> 31. Clarity and precision are also required in order that the party accused and the court can police the making of allegations of dishonesty, and weed out those which do not deserve to go to trial because the case cannot attain the high standard required."

45 It is implicit in these fundamental requirements that mere unparticularized assertions will not do and a claimant cannot plead malice in the hope that some evidence potentially supporting it will turn up following discovery or as a result of cross-examination: *Seray-Wurie* v. *Charity Commn.* (25) ([2008] EWHC 870 (QB), at paras. 34–35, *per* Eady, J.). Similarly, equivocal or ambiguous words or language which merely hint at malice or bad faith will not suffice: see the authorities cifted by Lewison, J. (as he was) in *Mullarkey* v. *Broad* (19) ([2007] EWHC 3400 (Ch), at paras. 40–43).

46 Furthermore, in order that a defendant knows the case he or she has to meet, the pleadings must identify precisely how the facts and matters set out in the particulars are said to be linked to that particular defendant. They must identify facts and matters from which an inference of malice or bad

faith against that defendant could properly be inferred, and that defendant must have participated in the publication. Malice cannot be established by showing what a defendant ought to have known, or could have discovered (save where this involves recklessly turning a blind eye). Such constructive knowledge falls short of the required evidence: see *Milne* v. *Express Newspapers* (16) ([2004] 1 W.L.R. 772, at para. 50, *per* May, L.J.).

47 There is an additional issue with respect to the liability of the third defendant, the Commission, which is a statutory body corporate. A corporate body can in principle be liable both vicariously for the acts of its officers and employees, and personally, where the wrongdoing is committed by persons who are capable in law of fixing it with personal liability. Both forms of liability are pleaded here. However, in each case it is necessary for the pleading to identify the knowledge and state of mind of the individuals whose acts are alleged to make the corporate body liable, as well as the facts relied upon to justify any inference of malice. In *Monks* v. *Warwick District Council* (17), Sharpe, J. (as she then was), a highly experienced defamation judge, approved the following principle advanced by counsel ([2009] EWHC 959 (QB), at para. 23(ii)):

> "ii) Where (as here) malice is alleged against a corporate defendant 'it is necessary to find an individual who is responsible for the words complained of and who had the state of mind required to constitute malice in law' (Webster v British Gas Services Ltd [2003] EWHC 1188 at [30]; see also Bray v Deutsche Bank [2008] EWHC 1263 at [16]). In such a case the claimant should give particulars of the person or persons through whom it is intended to fix the corporation with the necessary malicious intent, as well as pleading the facts from which malice is to be inferred: Gatley 11th ed 30.5. See also Bray v Deutsche Bank [2008] EWHC 1263 at [16]."

It follows, as Warby, J. noted in *Yeo* v. *Times Newspapers* (32) ([2015] 1 W.L.R. 3031, at para. 34):

> "It is not good enough to allege generally that the company was malicious, still less to aggregate pieces of knowledge or conduct of several individuals."

48 The need for there to be evidence of facts which, to use Lord Millett's metaphor, may "tilt the balance" in favour of inferring malice has been the subject of more specific consideration by the courts in the context of defamation. These authorities are the source of principles (3) and (4). They are well-established principles which were clarified in a trilogy of cases starting with the judgment of Maule, J. in *Somerville* v. *Hawkins* (26) (10 CB at 590):

> "On considering the evidence in this case, we cannot see that the jury would have been justified in finding that the defendant acted

maliciously. It is true that the facts proved are consistent with the presence of malice, as well as with its absence. But this is not sufficient to entitle the plaintiff to have the question of malice left to the jury; for, the existence of malice is consistent with the evidence in all cases except those in which something inconsistent with malice is shewn in evidence: so that, to say, that, in all cases where the evidence was consistent with malice, it ought to be left to the jury, would be in effect to say that the jury might find malice in any case in which it was not disproved,—which would be inconsistent with the admitted rule, that, in cases of privileged communication, malice must be proved, and therefore its absence must be presumed until such proof is given.

It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence."

49 This judgment was cited with approval by Lord Porter in his speech in the House of Lords in *Turner* v. *M.G.M. Pictures Ltd.* (30). In the course of his speech he said this ([1950] 1 All E.R. at 455):

"No doubt, the evidence must be more consistent with malice than with an honest mind, but this does not mean that all the evidence adduced of malice towards the plaintiff on the part of the defendant must be set against such evidence of a favourable attitude towards him as has been given and the question left to, or withdrawn from, the jury by ascertaining which way the scale is tipped when they are weighed in the balance one against the other. On the contrary, each piece of evidence must be regarded separately, and, even if there are a number of instances where a favourable attitude is shown, one case tending to establish malice would be sufficient evidence on which a jury could find for the plaintiff. Nevertheless, each particular instance of alleged malice must be carefully analysed, and, if the result is to leave the mind in doubt, then that piece of evidence is valueless as an instance of malice whether it stands alone or is combined with a number of similar instances."

50 This line of authority culminated in the judgment of Lloyd, L.J. in *Telnikoff* v. *Matusevitch* (28). The question was whether the trial judge had misdirected himself and had usurped the role of the jury in the test he had adopted for determining whether evidence of malice should be left to the jury. The Court of Appeal held that he had not. Lloyd, L.J., in his judgment, noted that the trial judge was following the principles established in

Somerville and in *Turner.* He summarized the legal position as follows ([1991] Q.B. at 120):

> "The point is quite simple. If a piece of evidence is equally consistent with malice and the absence of malice, it cannot as a matter of law provide evidence on which the jury could find malice. The judge would be bound so to direct the jury. If there are no pieces of evidence which are more consistent with malice than the absence of malice, there is no evidence of malice to go to the jury."

51 A point in issue with respect to principle (4) is precisely what it means to say that each piece of evidence must be considered separately; and whether at the strike out stage it is legitimate to treat one alleged piece of evidence as being capable of supporting another. I return to this when addressing in detail the grounds of appeal.

52 Principle (5) is simply the logical consequence of the fact that a publication can only be malicious or made in bad faith if that reflected the state of mind of the defendant at the time of publication. In *Turner* (30), Lord Porter said that post-publication examples of malice would need to be "so connected with the state of mind of the defendant as to lead to the conclusion that he was malicious at the date when the libel was published" ([1950] 1 All E.R. at 455). This is not to say that subsequent conduct evidencing malice is always irrelevant if it is not connected with the contemporaneous state of mind of the original article. It may, depending upon the circumstances, establish malice from the time when the post-publication conduct arose. Typically this arises where a claimant provides a defendant with clear evidence that a defamatory allegation, originally believed in good faith, was untrue. It may well be defamatory to allow the publication to remain in place, or to repeat it once the defendant knows it is false, and to fail to publish a correction: see, *e.g.*, *Qadir* v. *Associated Newspapers Ltd.* (22) where a journalist was found to be recklessly indifferent about correcting a defamatory newspaper article, also published online, after appreciating that information in it was false. The online version of the article was held to be defamatory from the date when it was known to be false but not earlier.

The role of the appellate court in strike out cases

53 Before considering the detailed grounds of appeal in this case, it is necessary to clarify the approach which this court should take when assessing the merits of the appeal. The claimant makes a strong submission to the effect that since the appeal relates to case management decisions, the appeal court should be reluctant to interfere with the exercise of the judge's discretion. There is well established jurisprudence which limits the role of the appellate court when hearing such appeals. It should not substitute its decision for that of the judge merely because it would not have reached the

same conclusion; it has to be satisfied that the judge has either erred in law or reached a conclusion which was not open to a reasonable judge. We were referred to a number of cases in support of this proposition. It suffices to refer to a passage in the judgment of Lewison, L.J. in *Police Commr*. v. *Abdulle* (21) ([2016] 1 W.L.R. 898, at paras. 26–29):

"26. In *Mitchell v News Group Newspapers Ltd (Practice Note)* [2014] 1 WLR 795, para 52, this court said:

> 'We start by reiterating a point that has been made before, namely that this court will not lightly interfere with a case management decision. In *Mannion v Ginty* [2012] EWCA Civ 1667 at [18] Lewison LJ said: "it has been said more than once in this court, it is vital for the Court of Appeal to uphold robust fair case management decisions made by first instance judges."'

27. The first instance judge's decision in that case was to refuse relief against sanctions and her refusal was upheld by this court. But the same approach applies equally to decisions by first instance judges to grant relief against sanctions. In *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506, [2014] 3 Costs LR 588, para 63, Davis LJ said:

> '. . . the enjoinder that the Court of Appeal will not lightly interfere with a case management decision and will support robust and fair case management decisions should not be taken as applying, when CPR 3.9 is in point, only to decisions where relief from sanction has been refused. It does not. It likewise applies to robust and fair case management decisions where relief from sanction has been granted.'

28. In my judgment the same approach applies to decisions by first instance judges to strike out, or to decline to strike out, claims under CPR 3.4(2)(c). In a case in which, as the judge himself said, the balance was a 'fine' one, an appeal court should respect the balance struck by the first instance judge. As I have said I would have found that the balance tipped the other way; but that is precisely because in cases where the balance is a fine one reasonable people can disagree. It is impossible to characterise the judge's decision as perverse.

29. In the *Chartwell* case Davis LJ also said that if parties understand the approach that this court will take to discretionary interlocutory decisions of first instance judges then satellite appeals should be avoided. I echo that hope. It is a depressing fact that this satellite appeal has added a further year to the overall delay in bringing this claim to trial."

54 Mr. Desmond Browne denied that the *Abdulle* case lays down the appropriate test in the context of this appeal, essentially for two reasons. First, he noted that *Abdulle* was not a case on CPR 3.4(2)(a) but rather on sub-para. (c) which allows for a strike out where a claimant has failed to comply with a rule, practice direction, or court order. He submitted that the latter involves a wide exercise of discretion whereas a case under sub-para. (a), at least in the context of this case, raises a point of law, namely whether the proceedings are capable of sustaining pleas in malice and bad faith. Second, he points out that under the CPR it is expressly provided that the appeal is by way of a review whereas in Gibraltar it is still by way of a rehearing. This, he contended, requires the court to make up its own mind on an issue, or at least gives it the opportunity to do so if that is appropriate, and he submits that it is here.

55 I accept that there is a distinction between the nature of the exercise in sub-para. (a) on the one hand, and sub-para. (c) on the other. I would not myself describe the exercise carried out by the judge in a strike out of this nature as an exercise of discretion. It involves an application of a legal principle to primary facts and is more aptly described, in my view, as an exercise in judgment or evaluation. But it is plain from the authorities, as the cited passage from *Abdulle* indicates, that in English law the same approach applies generally to case management decisions irrespective of their particular character, not least because of the strong policy objective of discouraging satellite litigation. The appellate court needs to be satisfied that there is an error in approach or that the decision is perverse in the sense that it is a conclusion not properly open to a reasonable judge. This is sometimes described as "plainly wrong."

56 As to Mr. Browne's second point, the difference in nomenclature between a review and a rehearing does not, in my view, materially affect the way in which the appellate court approaches case management questions. There is recent authority in Gibraltar to the effect that there must be a significant degree of leeway given to judges hearing case management issues just as there is in England: see the judgment of Sir Colin Rimer, J.A. in *Marrache* v. *Lavarello* (14) and the earlier judgment of Sir Jonathan Parker, J.A. in *Marrache* v. *Marrache (Trustee)* (15). In the latter case, Sir Jonathan Parker specifically rejected a submission that a rehearing meant that the court was free to exercise its judgment afresh with an obligation merely to have regard to the decision appealed against. He described that submission (2010–12 Gib LR 221, at para. 38) as being "plainly contrary to authority."

57 It is obviously the case that appeals in Gibraltar do not habitually take the form of a complete rehearing. When there is an appeal against a trial decision, this court does not start from scratch and receive the evidence and hear the witnesses afresh and nobody would expect the court to do this. I

would accept, as Sir Maurice Kay, P. observed in argument, that the concept of a rehearing is broad enough in principle to allow for the court to adopt a variety of approaches appropriate to the issue in question, some more interventionist than others. In my judgment, in the context of case management decisions, the adoption of a limited review jurisdiction is generally appropriate, as in the UK. It chimes with, and reinforces, the policy of discouraging satellite litigation arising out of interlocutory matters. The first instance judge's determination should be upheld unless it involves some misdirection in law or is plainly wrong. Where there is a misdirection of law, however, this court will have to assess the matter for itself in accordance with the proper legal principles.

Attributing meaning at the strike out stage: a potential defence?

58 Before considering the detailed grounds of appeal, I will consider an argument advanced at the oral hearing which was not, however, identified in the grounds of appeal at all and was not considered by the judge below. Mr. Santos understandably objected to the point being raised now, at least not without an amendment of the grounds, which Mr. Browne did not seek to do. I have doubts whether the point should even be considered but if it were correct, it seems to me that it could be a complete defence to a defamation claim, even at the strike out stage. For that reason, I have thought it right to consider the argument.

59 As I have already noted above, the single meaning is not the relevant meaning when the question of malice is under consideration. The issue (leaving aside improper motive) is whether the defendant was honest or reckless, and that is entirely a subjective matter. It will often be the case that there will be no evidence at all at the strike out stage about the defendant's own understanding of what the publication meant, particularly where, as here, the application has been lodged before any defence has been served and given that extrinsic evidence is inadmissible. In this case, the judge took the relevant meaning for the purposes of the strike out to be the meaning which the claimant advanced in the particulars of claim. That is consistent with the general principle that the court must take the facts as pleaded by the claimant.

60 However, Mr. Browne submitted that this was the wrong approach. He argued that if there is a reading of the press release, whether or not the single meaning or the pleaded meaning, which would be consistent with the defendants having acted honestly, the court should not permit the case to go further. He relied in particular upon the decision of the Judicial Committee of the Privy Council in *Bonnick* v. *Morris* (2) in support of that proposition. *Bonnick* was a case in which the defendant, a journalist, sought to rely upon *Reynolds* privilege, a form of qualified privilege designed to enable journalists who act responsibly to report on matters in the public

interest. The concept of a responsible journalist is an objective one. Lord Nicholls of Birkenhead, who gave the lead judgment, said that in looking at the objective concept of a reasonable journalist, a court should have regard to the fact that there may be a number of possible meanings which reasonable people might adopt and that the question whether the journalist had been reasonable should not be assessed solely by reference to the single meaning.

61 Mr. Browne says that this principle should apply in a similar way when considering malice. The court should recognize potentially different meanings, provided that they are realistic interpretations of the publication, and should not find a defendant liable in defamation if there is a possible meaning which is consistent with the defendant having acted honestly.

62 I do not accept that *Bonnick* supports that proposition. First, it was not concerned with a strike out claim; and second, it was focusing on an objective test, namely the concept of a reasonable journalist. Where malice is in issue, the court is not considering an objective concept but rather whether the defendant was subjectively dishonest or subjectively reckless. It cannot be the case that if there is a possible construction of the words which would not involve dishonesty, then the defamation claim must be struck out without a trial. That would mean that even if the defendants were in fact activated by malice and did not honestly believe that the words were true, they would not be liable for potentially serious damage to reputation simply because the words could bear a possible meaning which is consistent with the statement being true. The defendants would escape liability not because they honestly believed that the words had an innocent meaning but because someone else might plausibly think that they did. We were shown no authority to support such an unjust result. Nor do I see how the court is expected to identify potential readings consistent with honesty. In my view, the judge was right to say that at the strike out stage the court has to accept the pleaded meaning (at least unless it is quite unrealistic).

63 I would accept that if the court were satisfied that the pleaded meaning is no more consistent with malice than with its absence, that would justify the claim being struck out. The evidence would not satisfy the *Telnikoff* test. But that is not the position here, and Mr. Browne did not suggest that it was.

64 I would add that I am not sure how this submission, even if correct in principle, could have assisted the defendants in the circumstances of this case. The core of the alleged libel is the statement, made in express terms, that those running Enterprise, who included the claimant, had seriously and consistently misled the defendants. On the assumption that this was untrue to the knowledge of the defendants (because, it is said, they well knew the state of affairs in the company—an assumption that must be made for strike out purposes) I find it impossible to see how the defendants could have intended a meaning of the words which could possibly have been consistent

with their honestly believing that they had been seriously misled. So even if the principle advanced by Mr. Browne were correct, which in my view it is not, I do not see how it would assist him at the strike out stage.

The grounds of appeal

65 The grounds of appeal are directed to each particular of malice and bad faith which the judge refused to strike out. The judge is alleged to have acted in breach of each of the five principles I have identified above, although different errors are said to have been made with respect to different particulars. I will not set out the judge's analysis of each of these particulars independently of the grounds of appeal, but will discuss his analysis in the context of assessing whether the grounds of appeal are sustained or not.

66 Because there is much repetition in the grounds of appeal, I will deal first with three grounds which are repeated in relation to a number of these particulars. The defendants contend that the judge made three particular errors which invalidated his analysis of certain particulars irrespective of the detailed facts and matters relied upon. First, it is said that he did not properly apply the *Telnikoff* test in its strict form but wrongly diluted it in the strike out context so as to allow particulars to remain in the pleading which ought to have been removed. Second, Mr. Browne alleges that in a number of cases the judge did not apply what I will call the *Turner* principle, by which I mean the need to consider each piece of evidence independently and without reference to other distinct pieces of evidence. Third, he says that the judge did not properly deal with post-publication matters; they were not, he submits, capable of sustaining the claimant's case. Having dealt with those three grounds, I will then look at the other submissions, which are more fact sensitive, in relation to each of the facts and matters relied upon in each particular.

***Telnikoff* and strike out**

67 The judge cited the *Telnikoff* test and accepted that it was the relevant test to apply. However, he said that it had to be applied "through the prism of the test for strike out contained in CPR 3.4(2)(a)." He added that (2020 Gib LR 36, at para. 26): "The test is commonly formulated as being one where the court should be certain that the claim is bound to fail before granting an application to strike out a pleading."

68 There is clear authority for that formulation. It reproduces word for word some observations of Sir Peter Gibson in *Hughes* v. *Richards* (7), where he said, admittedly in very different circumstances than arise here, that in order to strike out a claim ([2004] EWCA Civ 266, at para. 22):

> "the court must be *certain* that the claim is bound to fail. Unless it is certain, the case is inappropriate for striking out (see *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at p. 557 per Lord Browne-Wilkinson.)"

The underlying principle is that a claimant is entitled to his or her day in court unless it is clear that the pleaded case cannot succeed.

69 The effect of adopting this approach is that in analysing a number of the particulars, the judge used language which suggested that he was not finally determining whether or not the particular in question would satisfy the *Telnikoff* test but merely whether it could or might do so. His judgment is peppered with the conclusion that a particular was "arguably" capable of supporting malice, or that it "could" do so, or "could arguably amount" to conduct supporting malice.

70 The appellant submits that, in adopting this approach, the judge was not applying the *Telnikoff* test as required. The duty of the judge was a simple one, namely to apply the *Telnikoff* test to each piece of evidence (as the allegation must be assumed to be) and to decide in each case whether that evidence was more consistent with malice or bad faith than the converse. Mr. Browne submitted that this was a binary question; the answer was either yes or no. The judge was able to determine that question because of the assumption in the claimant's favour that he would be able to make good the factual allegations in the pleadings. On this approach, the judge was not entitled to fudge the issue and fail to reach a definitive conclusion one way or another. He did not have to be satisfied that a particular allegation, if proved, would establish malice, but he did need to be satisfied that it was more consistent with malice than its absence. If the judge was left in doubt, he should not have allowed the particular to go to trial, as Lord Porter indicated in the *Turner* case (30). The question the judge had to decide was whether any specific particular did or did not satisfy the *Telnikoff* test, not whether it could or arguably might do so.

71 In my view this is putting the test too high at the strike out stage. At the interlocutory stage the judge is required to adopt a cautious approach; a claimant should not be denied the right to have an issue determined at trial unless the judge is satisfied that it could not succeed. If the judge is not persuaded of that, the particular should remain in the pleading. The judge does not at this stage have to be satisfied that any specific particular is more consistent with malice than its absence, merely that a trial judge could consider that it is capable of being seen in that way. Whether it does or not is ultimately a decision for the trial judge who might take a different view to the interlocutory judge.

72 It is important to emphasize that the trial judge is in no way bound by the ruling of the strike out judge. However, since the interlocutory judge

must take the claimant's case at its highest, it may be argued, as Mr. Browne did, that even if a claimant proves all the matters asserted in his pleading, the trial judge will be in no better position than the interlocutory judge to apply the *Telnikoff* test; each judge is making the same assessment on the same factual basis and therefore there is no reason why the interlocutory judge should not make a clear determination one way or another. I do not accept the premise that they are in exactly the same situation. The interlocutory judge will not have the same feel for the case as the trial judge who will have heard the evidence and will inevitably have a fuller grasp of the true significance of any particular piece of evidence, and whether or not it is more consistent with malice than otherwise. The approach of the strike out judge is necessarily going to be more impressionistic in nature than that of the trial judge and this in part explains why it is only appropriate in a plain case to strike out the pleadings. Observations to this effect were made by Lord Reid in *Morgan* v. *Odhams Press* (18) ([1971] 1 W.L.R. at 1341–1342), a case specifically concerned with a strike out application in a defamation action (then RSC O.18, r.19, the predecessor of the current rule, Part 3.4(2)(a)). Lord Reid's judgment also shows that a decision at an interlocutory stage—even by an appeal court—will not in any way bind a trial judge:

> "I understand that your Lordships are agreed that this procedure is only intended to apply to cases where it is plain and obvious that the plaintiff has no case. Whether that is plain and obvious or only arguable can depend on little more than first impression . . .
>
> The article complained of has been set out by my noble and learned friends and I shall not set it out again. The question in this case is not whether the words are defamatory: plainly the words are. The two questions which arose here were whether they were capable of referring to the appellant and whether they did so refer. The first was for the trial judge when the respondents took the point at the conclusion of the appellant's evidence at the trial. Owing to the somewhat elaborate judgments in the Court of Appeal the trial judge seems to have thought that this question had been decided there: he did not realise, and I can hardly blame him, that the Court of Appeal had no power to decide that question, and that he must decide it himself. So he left the case to the jury."

73 Accordingly, I reject the notion that the judge has to assess each allegation and decide definitively whether it is or is not more consistent with malice than with a lack of malice. As May, L.J. pointed out in *Interdab* v. *Balassarian* (8) (April 4th, 1989, unreported), "it is often difficult to draw the line between what is an adequate pleading and what is not" and it would be undesirable for a judge to have to make a definitive and necessarily impressionistic ruling at the interlocutory stage. If the judge is

sure that the piece of evidence encapsulated in an allegation is not more consistent with malice, he must reject it and strike it from the plea; but if he is left unsure, he must leave it in. Flaux, J. (as he was) in *JSC Bank Moscow* v. *Kekhman* (9), a case involving fraud, succinctly put the different roles of the interlocutory and trial judge in the following terms ([2015] EWHC (Comm) 3073, at para. 20), which I would respectfully endorse:

> "At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge."

74 This does not mean that the judge can adopt a perfunctory or casual approach when assessing the strike out application. The judge must bear in mind that the onus is on a claimant to prove malice, that a serious allegation of dishonesty should not be made lightly, and that fairness demands that a defendant should know the nature and substance of the case he or she has to meet. The judge must be prepared to analyse the pleaded facts with care and strike out all those facts which he is confident do not satisfy the *Telnikoff* criteria. But at the strike out stage, any real doubt about which side of the line a particular piece of evidence lies should be resolved in the claimant's favour. Unless the strike out judge is sure that an allegation if proved could not help show malice, he cannot properly say that it is evidence which the law does not permit the jury to consider.

75 I recognize that in *Turner* (30), Lord Porter held that a trial judge deciding whether to allow certain particulars to be considered by a jury should not allow them to be put before the jury if he was genuinely uncertain whether they could be said to be more consistent with malice than the converse, although he thought that in practice this would be very rare. But he was not concerned with a strike out application but rather the later stage during the trial itself when the question arises whether evidence of malice ought to be left to the jury. For reasons I have given, I do not accept that the same principle should apply at the strike out stage and the observations of Lord Reid cited above support that view.

76 It follows that in my opinion the approach of the judge to the application of the *Telnikoff* test was not erroneous and his ruling on the particulars cannot be set aside for that reason.

The application of the *Turner* principle

77 The line of cases through *Somerville* (26), *Turner* (30) to *Telnikoff* (28) confirms that each piece of evidence must be considered separately

and must be more consistent with malice than its absence. In my view it does not follow, however, that each particular must be treated entirely separately from each other. I accept the submission of Mr. Santos that this could lead to an artificial assessment of the evidence depending upon how the evidence was presented in the particulars.

78 The court must take a realistic view as to what constitutes a single piece of evidence, and this may involve reading different paragraphs of the pleading together. There is no magic in the way in which the claimant presents the facts and matters on which he intends to rely, and it is wrong to assume that each separate paragraph, or each allegation, will necessarily disclose a discrete piece of evidence. Accordingly, whilst it is right to say, as Nicklin, J. did in *Huda* v. *Wells* (6) ([2017] EWHC 2553 (QB), at para. 73), that each particular has to be separately considered, at least where they are discrete one from another, that does not automatically mean that each paragraph in the pleading must be so treated. However, what the court is in my view plainly not entitled to do is to consider together paragraphs which plead what are in substance quite distinct events or matters.

79 We were referred by Mr. Santos to passages in judgments which suggest that a cumulative approach to the evidence may be justified and that scrutiny of each aspect of the evidence is unnecessary: *e.g. David* v. *Hosany* (3) and, more recently, *Palladian Partners LP* v. *Republic of Argentina* (20). He suggested that we could adopt that approach here. I do not think that this would be consistent with the authorities, including binding House of Lords authority in *Turner* (30), and it is to be noted that they were not referred to in either *David* or *Palladian Partner*s.

80 The judge also rejected this argument and agreed that instances of malice must be treated separately. But he added (2020 Gib LR 36, at para. 33) that "what this means in practice may not be so simple." He held that each particular must be looked at in context, and the context was that the claimant was advancing "the underlying allegation . . . that the defendants were fully aware of Enterprise's financial position at all times and had been very involved in its management." He referred to this as the "substratum of dishonesty" and said that where relevant it was an "underlying theme" which must be taken into account when separate particulars were under consideration.

81 The defendants allege that this was a fundamental flaw in the judge's approach and was impermissible. Its effect was to go behind the *Turner* approach. I agree with that submission. That approach seems to me to fly in the face of Lord Porter's speech in *Turner* to the effect that each piece of evidence must be considered separately and is "valueless" unless it is more consistent with malice than its absence. If the particular incident is only capable of demonstrating malice when read with the substratum of dishonesty, it stands or falls with the primary fact and adds nothing to the

assessment of malice. It may be that once malice is established on the basis of properly pleaded facts and matters, that might well lend support to the notion that other, apparently neutral, facts were also influenced by, or resulted from, the underlying malice shown towards the claimant. But such facts do not themselves assist in demonstrating that malice exists in the first place and the jury, assuming there is one, cannot be allowed to consider them in that context unless, of course, they satisfy the *Telnikoff* test in their own right, independently of the impermissible linking. In cases where a particular has been held admissible evidence of malice when read with the substratum of dishonesty, the court has to consider whether, shorn of the illegitimate link, the particulars still satisfy the *Telnikoff* test. I will consider that question when looking at the individual particulars.

Post-publication events

82 A number of the particulars raised post-publication events where it is said that the defendants treated the claimant unfavourably and in a manner which demonstrated malice. The defendants say that these matters were not connected with the original publication and did not, therefore, cast any light on whether it was malicious. The judge did not find otherwise. What he did say with respect to a number of these particulars was that they were capable of sustaining a finding of malice with respect to the continuing publication of the press release by not removing it from the website. Although it is not entirely clear, the judge's assumption appears to be that a particular act of malice could of itself remove the protection of qualified privilege from the date of the malicious act. I consider in the context of discussing the particular paragraphs in the pleading whether that was a legitimate conclusion and whether these particulars could be sustained on that basis.

Reviewing the individual particulars

83 I now turn to consider each of the particulars which the judge did not strike out, to see if they are consistent with the pleading principles set out above. The relevant particulars are extensive and cover some ten pages of the pleadings. They are in para. 14(w) and (x) of the particulars of claim, with each of two paragraphs having several sub-paragraphs. In a separate document setting out the relevant particulars that counsel helpfully produced for the hearing, the relevant paragraphs are more clearly identified by the use of brackets. I shall refer to the paragraphs in the form used in that document.

Paragaphs 14(w)(i) and (ii)

84 As I have said, the core of the claimant's case so far as it relates to dishonesty, is set down in para. 14(w)(i) and para. 14(w)(ii). The essence of these two paragraphs is that, given the detailed involvement of the

Commission in the activities of Enterprise, it was manifestly false for the press release to allege that Enterprise had "seriously, significantly and consistently" misled the Commission as to its financial situation (para. 14(w)(i)) or that the "serious contraventions" disclosed in Mr. White's provisional liquidator's report of October 26th, 2016 could form the basis of any allegation that the Commission had been misled by the claimant, given that the defendants knew the facts underpinning the alleged regulatory breaches. The basis for this knowledge is spelt out in some detail. The allegation is that officers of the Commission were involved in the running of Enterprise to the point where they were virtually micro-managing it. Some further details which provide evidence of the involvement are pleaded, such as the matters identified in the Ritchie report, the making available of various accounts and audits, the fact that certain steps taken by Enterprise had been sanctioned by officers of the Commission, the involvement of management in regular meetings, and the fact that officers of the company were making weekly reports to the Commission. (The Ritchie report was an internal Commission document produced by one of its officers which evidenced the involvement of the Commission staff in Enterprise and was written at the end of June 2016.) So far as the particular in para. 14(w)(ii) is concerned, it is specifically alleged that the Commission at all times knew the facts underpinning the regulatory breaches and, more specifically, knew about the relationship between Enterprise and its associated companies and had indeed approved them.

85 So far as the particular in para. 14(w)(i) was concerned, the judge concluded that if the defendants knew as much about the affairs of Enterprise as was claimed, it was at least "arguable" that the statement that the company had "seriously, significantly and consistently misled the Commission" could not be true and that would "arguably" satisfy the *Telnikoff* test. He also held that the two individual defendants were sufficiently clearly identified; he noted that the first defendant was specifically mentioned as someone conducting the supervision of Enterprise and the second defendant was shown to have knowledge of the Richie report. For similar reasons the judge was satisfied that if the alleged facts were established, the statement referred to in para. 14(w)(ii) "could be more consistent with malice than its absence." With regard to this paragraph, he also rejected a submission that the pleaded particular was mere assertion.

86 The first ground of appeal with respect to each of these particulars is that the judge failed to give a clear ruling whether the particulars were or were not more consistent with malice than its absence and merely asked whether they could be consistent with malice. For reasons I have given above (at paras. 67–76), I do not accept that this reveals any error of law. The two other grounds of appeal with respect to each of these particulars is that they do not satisfy the *Telnikoff* test nor do they identify with sufficient

precision the knowledge and belief of the two defendants. It is not legitimate merely to assume that each of the individual defendants had knowledge of these things, and constructive knowledge is not good enough. It is what they knew, not what they ought to have known, which is material, and that must be properly identified.

87 I reject each of these grounds with respect to each of these particulars. Given that in my view the judge did not misdirect himself as to how he should approach these two matters, the question is whether the decision he reached was open to him. In my judgment it plainly was. If the defendants knew what it is alleged they knew about the state of affairs in Enterprise, then it is difficult to see how they could honestly make the allegations referred to in those paragraphs about having been misled in the way suggested. The judge was entitled to hold that this could be more consistent with malice than its absence.

88 One particular argument advanced by Mr. Browne is that even if it be the fact that there had been close communication over the years between the Commission's officers and Enterprise—a point which he strongly disputes—that would not demonstrate that the Commission had not been misled; they may have been misled throughout their dealings with Enterprise. The real question, he submits, is whether the true position was different from that which had been asserted by Enterprise. In my view this involves a highly artificial and unrealistic reading of the particulars of claim. It is implicit in the pleadings as a whole, and made explicit in para. 14(n) of the particulars of claim, that the claimant is alleging that he has at all times acted appropriately, ethically, and in the best interests of the company, its shareholders and policyholders. It is equally obvious that when he is contending that the defendants knew the state of affairs in the company, he means the true state of affairs. That is obviously what is implicit in the claim that the defendants could not say that they were misled. Whether or not these allegations can be made good at trial is another matter, but that is the clear gist of the pleaded case.

89 Mr. Browne also submitted, with respect to the allegation that the Commission knew all about the Enterprise's affairs, that the provisional liquidator's report demonstrated that there were many important matters which were not known by the Commission and were not referred to in the Ritchie report which had been produced some four months earlier. There were six matters in particular which he relied upon. They were identified by the judge below and described as "causes for concern." Mr. Browne said that the evidence confirmed that the defendants were unaware of these important matters. But this was disputed by the claimant and at this stage we must take the pleadings as they are without recourse to extrinsic evidence. We are not, therefore, in a position to know whether these matters were or

were not known to the Commission before being highlighted in the provisional liquidator's report.

90 Mr. Browne also relied upon what he asserts is the remarkable consequence of this pleading. He said that if the defendants knew all about the state of Enterprise's finances as alleged, and given that the claimant claims to have been acting properly throughout, the logic of the claimant's position is that the defendants must have known that it was unjustified and unnecessary to set up the investigation to see if the Commission had been misled, and must also have known that it was false to raise the possibility in the press release that the claimant may have been committing a criminal offence. Mr. Browne submits that this would be bizarre conduct without any apparent purpose. However, in my view it could in principle be evidence of an improper purpose and, in any event, the fact that the defendants' conduct is, on the claimant's case, apparently inexplicable cannot be an answer to the allegations of malice and bad faith at the strike out stage.

91 I accept that the question whether particular knowledge has been attributed to each of the defendants is more problematic. There is no express pleading in terms to the effect that the first and second defendants knew or even must have known what other officers in the Commission were said to know about the state of affairs in Enterprise, and constructive knowledge is not enough. It is, however, stated in terms that the first defendant, Ms. Barrass, as the Chief Executive Officer, had been supervising Enterprise. There is no direct reference to the second defendant, Mr. Taylor, and much was made of the fact that he had only joined the Commission some weeks before Enterprise went into provisional liquidation, but it is pleaded that he must have known of matters identified in the Ritchie report because he appended it to a witness statement in other proceedings. Quite apart from that, it is a natural inference that in a major collapse of this nature, with such serious potential consequences both for the Commission and the standing of Gibraltar as a sound financial centre, both the CEO and the Director of Legal Enforcement and Policy would have been gathering information from officers who had been dealing on the ground with Enterprise in order to plan what response the Commission ought to make. The second defendant, Mr. Taylor, may only have been in office for a few weeks before publication of the press release, but there can be little doubt that he would have had to become aware of the information which had been available within the Commission about Enterprise. If necessary, I would have been willing to allow an amendment to the effect that these two very senior officers had actual knowledge of the true state of affairs of Enterprise prior to the winding up as a consequence of their position in the Commission. I would not, therefore, uphold this ground of appeal with respect to either sub-paragraph.

92 There is a further ground made only with respect to the allegation in para. 14(w)(ii), namely that it is mere assertion. The judge was very dismissive of this ground, in my view rightly so. The essential reason for making the allegation that the defendants already knew of the matters underlying the provisional liquidator's report is spelt out. Furthermore, in my view this paragraph must be read with the more general discussion in para. 14(w)(i) concerning the extent of the defendants' knowledge about the affairs of the Enterprise. It is in substance part of the same allegation, albeit with a different emphasis and placed in a different sub-paragraph. It is highly artificial to treat these two particulars as reflecting essentially different incidents or events.

93 The allegation in para. 14(w)(ix) is in substance interrelated with the two principal particulars, as the judge recognized. It says that the defendants could not honestly have claimed that they had been misled by the claimant, or implied that he might potentially have committed regulatory offences, given his close co-operation with Commission officers over many years, and with particular intensity in the last few months prior to its insolvency. The judge was satisfied that these pleadings, if true, would satisfy the *Telnikoff* test essentially for the reasons he had given with respect to the first two particulars. I agree with that conclusion. I doubt whether this way of formulating the particular adds anything of significance to the earlier two particulars but in my view the judge was entitled to allow it to go to trial.

Particulars linked to the substratum of dishonesty

94 I now turn to three other particulars set out in para. 14(w)(vi), (vii) and (xi) respectively. They have in common the fact that in each case the judge concluded that they satisfied the *Telnikoff* test but in each case the judge said that they were capable of being malicious when the substratum of dishonesty pleaded in para. 14(w)(i) and (ii) was taken into account. In my judgment, and for reasons I have already given, it is not legitimate to link these particulars in this way. This is not a case where these particulars are simply different aspects of what is essentially the same piece of evidence, as is the position with para. 14(w)(i) and (ii). Given that the judge erred in his approach, the question is whether these particulars could stand absent the link: are they, considered on their own, more consistent with malice than with its absence?

95 The three paragraphs of particulars rely upon the following matters: para. 14(w)(vi) refers to the fact that the press release, with its damaging defamatory allegations, was published before any investigation and therefore before the claimant had been given the chance to explain himself; para. 14(w)(vii) says that the press release was released allegedly in breach of the normal enforcement and publication policies; and para. 14(w)(xi)

that the true motive of the defendants was to avoid inescapable criticism of themselves and that, in order to do, they were making scapegoats of the claimant and the other directors of Enterprise. In support of this final alleged act of malice, the claimant relied upon three specific matters which he claimed demonstrated the relevant motive, two of which were post-publication events. For the purposes of strike out, I will assume that it may be established that this was the motive for making the publication and that the later events could properly be taken into account when determining the defendants' motives at the time of publication.

96 With respect to the second and third of these particulars, it is clear that the judge only found them to be capable of establishing malice when considered in the context of the substratum of underlying dishonesty. As to para. 14(w)(vii) the judge recognized that *Webster* v. *Lord Chancellor* (31) showed that departure from procedures is not in itself malicious, but here it could be because of the underlying theme of dishonesty. As to the improper motive allegation in para. 14(w)(xi), the judge said that it was capable of falling into the category because whilst avoiding criticism would not be malicious, it might be where it was "relying on a basis known to be false." In my view that is illegitimately assuming the very conclusion which the particulars were seeking to prove and is also inconsistent with the *Turner* principle. Even on the judge's own analysis, therefore, they could not stand alone once the link with the primary complaint had been broken.

97 It is not entirely clear whether the judge would have found that the particulars in para. 14(w)(vi) satisfied the *Telnikoff* test if considered independently of the substratum of dishonesty. He said that making serious and defamatory statements before an investigation could constitute evidence which was more consistent with malice than with its absence "particularly if the claimant's assertion that the defendants were being dishonest about having been misled is factored in." Publishing the press release before any investigation and allegedly in breach of procedures could not of themselves satisfy the *Telnikoff* test. The publication is readily explicable for wholly innocent and non-malicious reasons, namely the importance of making an urgent press statement given the widespread concern both about the collapse of such a large and important insurance company, and the efficacy of the regulatory process itself. These are obvious reasons for making an immediate statement even if the Commission is adopting an unusual procedure. The critical assertion is that the statement is malicious but that cannot be established by the fact that the statement was issued; it can only be shown by extrinsic evidence such as pleaded in para. 14(w)(i) and (ii) or intrinsic evidence about the terms of the statement. I do not accept that this particular, taken on its own, can be more consistent with malice than with its absence. Nor can the mere making of the statement, as opposed to its tone and content, give rise to intrinsic malice.

If the making of a statement is not itself evidence of malice, it cannot become so by the mere assertion that it contains defamatory material.

Intrinsic malice

98 There are two particulars which are said to show intrinsic malice, that is, malice which can be inferred from the words used. In para. 14(w)(v) it is alleged that the reference to the potential criminal offences in the Note for Editors demonstrated malice because it was unnecessary, acutely damaging and would suggest, even prior to any investigation whatsoever, that there were grounds to suspect that the claimant was guilty of a criminal offence. The judge recognized that leeway must be given to the defendants with regard to intrinsic malice but he held nevertheless that this gratuitous reference was potentially capable of amounting to malice. It was a possible reading of the press release that there were grounds to suspect that the claimant was guilty of a criminal offence. In that context he had regard to the fact that the individual defendants were "professionals in positions of authority in the financial services regulator."

99 The defendants submit that including the reference to criminal offences is simply incapable of amounting to intrinsic malice and, further, that in assessing that question, it is quite irrelevant that the defendants are professionals. The reference to potential criminal offences alone could not properly be said to be more consistent with malice than its absence.

100 I would not, in principle, be willing to treat the identity of the defendants as necessarily wholly irrelevant to the question whether the language was so exaggerated as to be capable of being malicious. It may be part of all the circumstances which a judge must consider when assessing whether a defendant could honestly have thought it appropriate to include this information and thus whether the privilege has been abused or not. Even so, I do not believe that it was open to the judge to find that the reference to criminal offences alone would be capable of amounting to such unnecessary exaggeration as to provide evidence that the defendants were behaving dishonestly or recklessly or that they had some improper motive. This is not, to use the language referred to by the President of the QBD in *Khader* (10) ([2010] 1 W.L.R. 2673, at para. 19), "entirely irrelevant and extraneous material." In itself the information is entirely neutral, and the Commission could quite reasonably consider it material for the reader to appreciate that Gibraltar takes its regulatory obligations seriously as demonstrated by the fact that those found to be in breach of relevant regulatory standards will be committing a criminal offence. I do not accept that drawing attention to potential criminal offences is, or is capable of being considered to be, so obviously gratuitously hostile to provide potential evidence of malice. It is drawing attention to a relevant part of the regulatory laws which puts the Commission's concerns in the appropriate

context and indicates the importance which is given in Gibraltar to ensuring that the financial centre is properly regulated.

101 The other particular identifying intrinsic malice is para. 14(w)(viii). This is cast in very general terms and states that even if some form of press release was justified, for example stating that an investigation into the company was being undertaken in the light of its liquidation, the press release adopted went "far beyond a neutral and dispassionate announcement of the investigation." The particular is somewhat lacking in detail, but it is a fair reading to assume that it includes all matters potentially prejudicial to the claimant which go beyond the mere statement that an investigation would be undertaken. It would in fact include the reference to the criminal offence which I have held could not, on its own, amount to irrelevant and defamatory material, but also much else besides. The judge accepted that it was arguable that it satisfied the *Telnikoff* test but without giving any further explanation. I doubt whether I would have reached the same conclusion, not least because of the generous leeway given to defendants but I accept that it could be said that the purpose of the privilege did not justify all the potentially damaging information in the press release. The judge was obviously alive to the leeway given to the defendants and nonetheless concluded that this evidence was not so weak that it should be rejected at the interlocutory stage. Despite my reservations, I have come to the view that this was a decision open to him and could not be described as plainly wrong.

Subsequent solicitors' correspondence

102 The final particular in issue, para. 14(w)(x), alleges malice arising from the fact that the defendants made no apology and kept the press release in place on its website even after having received copious correspondence from the claimant's solicitors, Peter Caruana and Co., which allegedly explained why aspects of the press release were allegedly false and potentially very damaging. The particulars themselves do not say when the correspondence was entered into nor precisely what the letters said, but there is a further reference to the correspondence in para. 14(y) where there is reference to a letter sent by Peter Caruana and Co. on November 25th, 2016. It is alleged that the defendants had already been aware of this information for two years by the time the claim form was issued and the press release had been on the website all of that time.

103 The judge held that the failure to remove the press release in the light of the correspondence could not demonstrate malice as at the time the press release was published because it did not cast light on what the defendants knew or thought on that date, but that it was capable of doing so insofar as the publication was kept in place on the website after considering the solicitors' observations. Retaining the press release on the website was therefore capable of showing malice from that point in time.

104 On the assumption that the correspondence clearly demonstrated that aspects of the press release were false—a highly contested matter but one which must at this stage be treated as true—then in my view the judge was entitled to conclude that this satisfied the *Telnikoff* test. This argument is only relevant if the original publication itself is not found to be malicious on the grounds that the defendants were not aware of all material matters when the press release was issued and did not become so aware until the information received in the solicitors' letter. In essence, it is akin to paras. 14(w)(i) and (ii) and is potentially evidence of malice for the same reason. It in effect asserts that if the substratum of dishonesty was not apparent when the press release was made, it became manifestly clear later.

105 The defendants submit that with respect to this particular it is not pleaded that the individual defendants had knowledge of this correspondence. In my view it is quite unreal to believe that they would not have been seen it; it is the only sensible inference given their positions in the Commission. Again, I would have allowed the claimant to amend to clarify the point had it been necessary, rather than striking it out on the basis that knowledge had not been adequately specified.

106 For the reasons advanced above, therefore, I would uphold the appeal to the extent that I would strike out paras. 14(w)(v), (vi), (vii), and (xi). Since the judge had struck out paras. (iii) and (iv), that leaves the following particulars in play: para. 14(w)(i), (ii), (viii), (ix) and (x).

The pleading of bad faith

107 The particulars of bad faith are found in para. 14(x). As I have said, the language of bad faith itself is not used, but the particulars are said to demonstrate that the defendants' "conduct prior to and in the aftermath of the publication of the press release has been extremely high-handed and aggressive and evinced clear ill will towards the Claimant." The particulars expressly include, in para. 14(x)(iv), each of the particulars of malice pleaded in para. 14(w). So to the extent that those particulars have not been struck out, they can also be relied upon to establish bad faith. (I do not think that those particulars can in fact necessarily be said to demonstrate high handed and aggressive conduct, but they could nonetheless fall into the category of bad faith.)

108 Apart from one particular which the judge did strike out (para. 14(x)(i)), he allowed all the remaining particulars to stand in the pleading. In six of the particulars, however, which concerned conduct after and unrelated in any direct way to the press release, the judge held that they were not material to the state of mind at the time the press release was published but could show bad faith in relation to its continued publication. However, he did not explain how, given that these matters could not cast light on the state of mind of the defendants when the press release was first published,

they were nonetheless capable of casting light on the state of mind which allowed the publication to be continued. I return to this point below.

Interlinked particulars

109 In my opinion a number of the particulars in para. 14(x) fall foul of the *Turner* principle. The judge found them to be potential evidence of malice at least in part when considered in the light of the substratum of dishonesty.

110 In para. 14(x)(iii), reliance is placed on the fact that the defendants demanded the claimant's resignation from all his positions in eight regulated entities in a letter dated October 25th, 2016, the day before the publication of the press release. The justification for this was said to be the difference, according to the Commission, between Enterprise's financial position as reported to it in July 2016 and the position as set out in the provisional liquidator's report. The judge held that if the claimant could show that the defendants were aware of the true financial position then making these demands could be consistent with malice and satisfy the *Telnikoff* test. However, for reasons I have given, this is not treating the particular in isolation, as *Turner* (30) requires. If one considers this action quite independently, I do not believe that it can be said to be capable of establishing bad faith. It does not of itself demonstrate either dishonesty or improper motive. There are sound non-malicious reasons why the Commission might quite properly think it appropriate to remove someone under investigation from involvement in regulated bodies pending the outcome of that investigation. That action is not, considered independently, capable of being more consistent with malice than its absence.

111 Paragraph 14(x)(v) refers to the news conference where the press release was read out, and to a subsequent interview communicated on Gibraltar television and radio where the second defendant, Mr. Taylor, is alleged to have made further damaging remarks to the effect that he had been misled, either incompetently or deliberately, about the financial state of affairs in Enterprise. The judge held that these matters were capable of showing bad faith on the basis that if the press release was potentially dishonest, then these further publications must also show bad faith.

112 I would agree that this must be so and no doubt these further publications could in principle be malicious or made in bad faith in their own right. But that is not what is alleged. It is said that they are capable of showing that the press release itself was malicious. However, I do not see how these matters can assist in determining that question. They do not independently show any dishonesty at all; it is only if the substratum of dishonesty is taken into account that they might themselves show dishonesty, but no reliance can be placed on that when considering their own independent evidential value. The problem here is not in my view—and contrary to the submissions of Mr. Browne—the fact that the reading

out of the press release and the interview post-dated the publication, because in substance they are all of a piece with the press release. But taken on their own, they are not capable of showing that the original press release was malicious. If it was, these are further malicious statements; if it was not, they are not. Either way, they do not cast light on whether or not the defendants honestly believed the matters stated in the original statement.

113 The judge held that two other particulars were capable of demonstrating malice but only when read in the context of a substratum of dishonesty. In para. 14(x)(ii), it is alleged that the second defendant, Mr. Taylor, notified Lloyd's Bank in advance of the press release of what was going to be said and that this led to the claimant being forced to resign as a director of the bank. In para. 14(x)(vi), the claimant says that the subsequent investigation by the Commission into Enterprise and the individuals running it (which included the claimant) was dealt with unfairly and this unfairness was only remedied after the claimant's solicitors had made various appeals to third parties, including Her Majesty's Attorney-General for Gibraltar. The judge accepted that, taken on their own, neither of these matters constituted evidence of bad faith. It was not intrinsically improper to discuss the matter in advance with the bank, and with respect to the unfairness point, the judge specifically cited the authority of Sir Brian Leveson, P. in *Webster* v. *Lord Chancellor* (31) to the effect that procedural blunders will not without more be evidence of want of good faith. In my judgment, as the judge below accepted, if these two matters are considered on their own as independent pieces of evidence, there is no proper basis for concluding that they satisfy the *Telnikoff* principle.

114 Both para. 14(x)(vi), which I have just dealt with, and the final five particulars all relate to alleged improper and vindictive behaviour against the claimant, each incident of which took place after the initial publication. They covered the following matters. Paragraph 14(x)(vii) refers to what is described as "an unjustified, underhand and completely aggressive attempt" on May 5th, 2017 to make the claimant's lawyer, Sir Peter Caruana, withdraw as his representative. Paragraph 14(x)(viii) refers to a letter from the defendants' lawyers, dated May 16th, 2017, in which it suggested that by writing to the Attorney General and others raising complaints about what the claimant saw as procedural failings by the Commission, the claimant was making it clear that he did not wish the investigation to be kept public and the claimant was asked to confirm whether this was so. Paragraph 14(x)(ix) relies upon letters dated May 25th, 2017 which the Enterprise Special Committee, set up by the Commission, sent separately to the claimant and ATG seeking that he should withdraw from the Board of ATG and making various allegedly unfair criticisms of him.

115 Paragraph 14(x)(x) relates to a document termed an "Enforcement Paper" which was enclosed with the letter of May 25th and was drafted by the Enforcement Division of the Commission which was headed by Mr.

Taylor, the second defendant. This alleged that it was legitimate to seek to remove the claimant from his post given what was in effect said to be his *prima facie* responsibility for "the catastrophic failure of a highly regulated entity." Paragraph 14(x)(xi) alleges that the second and third defendants improperly interfered with the proper management of ATG by refusing to consent to the restructuring of its Board, a restructuring which the claimant says was only required because of the circumstances in which he found himself because of the Commission's unfair and aggressive behaviour.

116 The judge held that each of these matters satisfied the *Telnikoff* test and were capable of establishing malice but not at the time of the original publication. They could only do so with respect to what he described as the ongoing publication of the press release. The judge did not explore exactly what was meant by that. The problem with this analysis, in my view, is that if the judge is right and these matters do not assist in establishing a malicious state of mind when the press release was first published—and there is no cross-appeal against that conclusion—there is equally no basis for saying that they have any bearing on the state of mind of the defendants when they chose not to withdraw the publication and to allow it to remain on the website.

117 Mr. Browne asserts that these matters could not be material because there was no new knowledge after the initial publication on October 26th, 2016 to require the defendants to change their mind so as to make the continuing publication malicious or in bad faith. In other words, the obvious explanation for not changing their mind would not be the development of malicious hostility towards the claimant, even assuming that to be true, but the simple fact that there was nothing to suggest the original publication should be retracted. I accept the premise of his argument that if the original publication is not malicious, and these subsequent acts of malice cannot be relied upon to support any finding of a malicious state of mind with respect to the original publication, later distinct acts cannot make the continued publication malicious. A completed publication not tainted by malice cannot be converted into a malicious one as a result of a subsequent but unconnected act of malice.

118 This submission, however, ignores the claimant's allegation concerning the evidence provided by the claimant's solicitors to the Commission shortly after the original publication, which meant that the defendants had all relevant knowledge by November 2016 even if they did not before. It is the claimant's contention that even on the assumption that the original publication was not malicious, it became malicious (and in bad faith) to continue to keep it online once the true situation had been pointed out to the defendants. As I have said, it appears from para. 14(y) of the pleading that the claimant is relying in particular upon a letter from Peter Caruana & Sons on November 26th, 2016. Any decision not to take the press release off the website (and to apologize) must have been taken shortly after its

receipt, and well before these events which took place in May 2017. So these matters can no more cast light on the state of mind at the time of that decision than they could on the state of mind when the initial decision was taken). In my judgment, therefore, this evidence is post-publication evidence which, in the light of the judge's unchallenged conclusion (with which I would respectfully agree) that they do not cast light upon the state of mind when the original publication was made, they cannot either be relied upon to show that the refusal to retract the publication was malicious.

119 Quite apart from this reason for striking out these particulars, I am inclined to agree with Mr. Browne that, taken individually, these particulars are not capable of satisfying the *Telnikoff* test. It seems that in this context, as more specifically elsewhere, the judge was influenced by the substratum of dishonesty. He said in terms in his discussion of paras.14(x)(ix) and (x), which he considered together, that "the claimant's position that the defendants were acutely aware of how Enterprise had been managed runs through all these allegations." In other words, these matters are capable of being seen as malicious if the basic stance adopted by the claimant alleging the substratum of dishonesty is correct. But on that analysis, every act of unfavourable conduct towards the claimant may be seen as potentially malicious. Approaching the evidence in that way is not in my view consistent with the individualized approach which *Turner* (30) and *Telnikoff* (28) require. It follows that this court has to assess the matter afresh.

120 If one considers these matters independently of the substratum of dishonesty, I do not accept that the judge could properly have concluded that they are more consistent with malice than with its absence, save for the attempted removal of Sir Peter Caruana as the claimant's solicitor. Nor is it clear that without the link the judge would have thought it appropriate to treat these matters as being more consistent with evidence of malice than its absence. All these matters are consistent with a robust response from the Commission and its officers to the collapse of a major insurance company which was massively damaging not only to policy holders who were out of pocket and presumably left uninsured, but also more widely to the standing of Gibraltar as a financial centre and to the reputation of the Commission as an effective regulatory body.

121 As to the attempt to get Sir Peter to give up acting for the claimant, I have reservations as to whether it has been properly particularized. It is largely an assertion that the attempt was underhand and unjustified without any facts being identified to make good that allegation. However, this could be remedied by amendment and I would accept that it was otherwise open to the judge to find that this was capable of amounting to malice if the allegation could be supported at trial. But for reasons I have given, I do not see how this conduct in May 2017 could cast light on the defendants' state of mind either when the original press statement was released—as the judge found—or when the defendants refused to withdraw it.

122 It follows that for these various reasons, I would strike out all of these particulars in para. 14(x) except for the particulars which have been incorporated from para. 14(w) by para. 14(x)(iv).

The summary judgment applications

123 Given that there are a few outstanding particulars of malice and bad faith that I would allow to go to trial, it follows that it is not necessary at this stage to engage with the summary judgment applications. These raise the question whether the two defences are in principle applicable. I do not see how we could have dealt with the qualified privilege issue now even if the defendants had succeeded totally on the strike out application. This is partly because the application of the defence is fact sensitive but also because the claimant says that the press release interfered with his art. 8 rights and, if that is correct, the issue of proportionality arises. There would need to be a consideration of some evidence to determine that question and that has not been undertaken before us. Nor (for perfectly good reasons) do we have the benefit of a ruling by the judge below. The statutory immunity issue is, by contrast, a pure question of law. However, it is a matter of some complexity about the inter-relationship between s.19 of the Financial Services Commission Act 2007 and s.10 which, it is alleged by the claimant, precludes s.19 from being relied upon with respect to the publication of a press release. I would have had reservations about deciding it in summary judgment proceedings, at least unless both parties wished the court to decide it, and the claimant did not. These will be issues which the trial judge may need to address.

Conclusion

124 For reasons set out above, I would strike out some of the particulars of malice in para. 14(w) (see para. 106 above) and all the particulars of bad faith in para. 14(x) save for para. 14(x)(iv). This incorporates particulars of malice and ensures that, to the extent that the particulars in para. 14(w) remain alive, they will constitute particulars of both malice and bad faith.

125 The particulars which I have held can be relied upon to show both malice and bad faith are those in para. 14(w)(i), (ii), (viii), (ix) and (x). If my Lords agree, I would strike out the remaining particulars which were in issue in this appeal. To that extent, therefore, I would uphold this appeal.

126 **RIMER, J.A.:** I agree.

127 **KAY, P.:** I also agree.

Order accordingly.