

WHITE PAPER CONFERENCE 2024

“HOW HAS THE BLAKE & ORS V FOX LITIGATION CHANGED EXISTING THINKING ON WHICH PRELIMINARY ISSUES TO APPLY FOR IN MEDIA CASES, SUCH AS "NATURAL AND ORDINARY MEANING", AND WITH WHAT PROSPECTS OF SUCCESS?”

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1. What is the thinking behind TPIs?
2. What did the *Blake v Fox* TPI determine?
3. How did the TPI impact on the Trial?
4. The future / a possible appeal by Fox.
5. Lessons from the *Blake v Fox* Litigation.

WHAT IS THE THINKING BEHIND A TPI?

Kings Bench Guide, para 17.30:

“At any stage of the claim, the court can determine the issue of what defamatory meaning or meanings were conveyed by a statement complained of. The determination of meaning is often suitable to be heard as a preliminary issue.”

PD53B, para 6.1 sets out that a court may determine:

- (i) the meaning of a statement complained of,
- (ii) whether the statement is defamatory of the claimant at common law, and
- (iii) whether statement is a statement of fact or opinion.

WHAT IS THE THINKING BEHIND A TPI?

Benefits

- Removes uncertainty.
- Defines parameters of truth defence.
- Relates to 'reasonable belief' in s.4 DA 2013.
- Informs parties of gravity of statement re damages.

Overriding Objective

CPR 1.1(2):

(b) saving expense;

(d) ensuring that the case is dealt with expeditiously and fairly;

(e) allocation of appropriate share of the court's resources to the case.

See too CPR 1.4(1)(2) & *Yeo v Times Newspapers* [2015] 1 WLR 971

BLAKE V FOX TPI : THE TWEETS

Ms Thorp tweeted:

"Any company giving future employment to Laurence Fox, or providing him with a platform, does so with the complete knowledge that he is unequivocally, publicly and undeniably a racist. And they should probably re-read their own statements of 'solidarity' with the black community."

Mr Blake quote-tweeted Mr Fox's Sainsbury's tweet and said:

"What a mess. What a racist twat."

Mr Seymour quote-tweeted Mr Fox's Sainsbury's tweet and said:

"Imagine being this proud of being a racist! So cringe. Total snowflake behaviour."

LAURENCE FOX'S MEANINGS

Mr Blake's and Mr Seymour's tweets: "each meant and was understood to mean that the defendant was a racist" (§77 DAC)

Ms Thorp's tweet "meant that the defendant was unequivocally and undeniably a racist" (§78 DAC)

"Although 'racist' is an ordinary English word requiring no definition, for the avoidance of any doubt it means someone who is hostile to people of different ethnicities, races or skin colours; and/or who believes that some racial or ethnic groups, or people with certain skin colours, are inferior to others; and/or who believes that people should be segregated based on their racial or ethnic origins or the colour of their skin ..." (§79 DAC) (emphasis added)

BLAKE, SEYMOUR & THORP MEANINGS

"... if and insofar as any of their tweets bore the meaning that the defendant was 'a racist' the natural and ordinary meaning would be in that form, using the word ('racist') without any further definition".

"'racist' is an ordinary English word that requires no further definition."

Disagreed with §79 DAC and set out alternative.

TPI: NICKLIN J DECISION & APPEAL

Nicklin J:

- Single, natural and ordinary meaning of each of the claimants' tweets about Mr Fox was "that the defendant was a racist".
- "obviously" an expression of opinion.

Appeal by Laurence Fox seeking definition failed.

Warby LJ: "On each side these are fall-back arguments that need consideration only if the court rejects the pleader's primary case. The judge accepted the primary case of both parties that no definition was required."

SHOULD THE CT HAVE GIVEN A DEFINITION?

Swan v Associated Newspapers [2020] EWHC 1312, Warby J

Meaning: C had “made a number of racist comments” (comment)

“The term "racist" is capable of a range of meanings. It does not have any defined meaning as a matter of law ... There is a range of views about the proper application of the term. Some, for instance, deplore the use of stereotypes about nationalities, or "cultural appropriation" as racist. Others would regard that as a misapplication of the word.” [57]

Butt v SoS for the Home Department [2019] EWCA Civ 933

Meaning: C was “hate speaker and extremist” (comment)

Greenstein v Campaign Against Antisemitism [2019] EWHC 281

Meaning: C was an “antisemite” (comment)

HOW DID THE TPI DECISION IMPACT TRIAL?

- Laurence Fox's claim failed to get over s1 hurdle.
- Judge refused to consider the defences of honest opinion & truth. Two reasons given:
 - (1) S1 of DA 2013 reflected a policy intention by Parliament to focus minds and deter potential defamation litigants from seeking to occupy scarce and precious court time and public resource unless the threshold is crossed (§161),
 - (2) D is entitled not to be asked to explain themselves unless s1 threshold is passed. Even if D waives that right, the resources argument still applies (§162).
- Remedies hearing on 22 March 2022: Fox appeal?

COURT'S APPROACH TO TRUTH DEFENCE WHEN MEANING IS OPINION

Sharma v Singh & Anor [2007] EWHC 2988

“Comment may include inferences or statements of fact, and it may be defended in either of two ways. Comment may be defended as honest opinion, or it may be defended as the truth. The fact that words complained of are comment does not preclude their being defended as true.” [24]

Lingens v Austria (1986) 8 EHRR 407:

“In the Court’s view, a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof. As regards value-judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10...” [46]

COURT'S APPROACH TO TRUTH DEFENCE WHEN MEANING IS OPINION

Irving v Lipstadt and Penguin Books [2000] EWHC QB 115

Meaning included: C was “*an apologist for and partisan of Hitler*”; that he was “*one of the most dangerous spokespersons for Holocaust denial*”; and he had “*allied himself with...extremist and anti-semitic groups*”. Held to be justified.

Shakeel Begg v BBC [2016] EWHC 2668

Meaning included: C was ‘*extremist Islamic speaker who espouses extremist Islamist positions*’. Held to be justified

TRUTH IN THE BLAKE V FOX LITIGATION?

Definition of racism raised in context of s.1 DA 2013:

“It suggests an outlook, and a practice, which is at odds with the values and norms – and at least potentially the laws – on which an egalitarian democracy like ours is based. It is a particularly grave allegation to be made against an aspirant for political service within such a democracy” (§114)

“Depending on context, the impact of an expression of opinion can be contingent on, and say as much about, the maker as it does in relation to the object, and perhaps never more so than when the opinion is one which takes a position within a spectrum of recognisably contested opinions. That may substantially restrict its impact” (§115)

TRUTH IN THE BLAKE V FOX LITIGATION?

Meaning: “Laurence Fox was a Racist”

Truth of comment to be determined by:

- Laurence Fox’s motivations?
- The view of each of the makers of the statement?
- An “objective” view of both / all circumstances / context?

Article 8 / Article 10 considerations (c.f. serious harm)

BLAKE V FOX LITIGATION: LESSONS

- (1) Importance of indicating basis of comment in statement itself.
- (2) If the definition of a term is important, incorporate it into the meaning.
- (3) Uncertainties of a TPI on meaning
 - Judges “own experience of the use of English”
 - V difficult to appeal
 - Bind the trial judge
- (4) Consider TPI on serious harm if evidence is not substantial.

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