



**FINANCIAL  
TIMES**



## **ADJUDICATION**

by

**GREG CALLUS**

**EDITORIAL COMPLAINTS COMMISSIONER**

**Financial Times Limited**

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## ADJUDICATION

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### Factual Background

1. This is my Adjudication of a complaint by Valbury Capital, a UK-based brokerage. Valbury was mentioned in three articles in the *Financial Times* in June 2018:
  - a. “*Day Trader sues broker over ‘demo’ trading platform mix-up*”<sup>1</sup> (21 June 2018, by Martin Arnold) (“the First Article”);
  - b. “*Futures tense*” (21 June 2018, by Jonathan Guthrie) (“the Second Article”) which was beneath a Lombard Opinion piece headlined “*Chemring does not need Britain to be a ‘tier one’ military power*”<sup>2</sup>;
  - c. A short insert in the Due Diligence blog of 22 June 2018<sup>3</sup>, about which no complaint has been made.
2. All the articles concerned a lawsuit brought by a Mr Harouna Traoré (“the Plaintiff”) in the Pontoise district court in France, seeking €10 million for breach of contract and negligence. The claim is denied by Valbury, which also denies that the French court has jurisdiction (on the basis that the Plaintiff was not in fact a ‘consumer’ trader).
3. The facts (to the extent they are not in dispute) are startling. The Plaintiff opened a €20,000 account with Valbury, and used a dummy version of its trading platform to practice trading equities. At some point (possibly without realising) he had switched to the live platform, and had run up real losses of over €1 million. He says that this was the point that he realised he was trading for real, and then proceeded to build up a massive position in American equities (apparently around US\$5 billion) and turned his €1 million loss into a €10 million profit. Valbury has declined to pay-out the €10m.

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<sup>1</sup> <https://www.ft.com/content/46eff974-7470-11e8-b6ad-3823e4384287>  
<sup>2</sup> <https://www.ft.com/content/5a404778-753c-11e8-b6ad-3823e4384287>  
<sup>3</sup> <https://www.ft.com/content/931770c0-75ab-11e8-a8c4-408cfba4327c>

4. As with all of my Adjudications, I am not resolving or giving any view whatsoever about the contested facts of the underlying case, especially in circumstances where they will be determined by a Court of law. I am solely concerned with alleged breaches by the *Financial Times* of the FT Editorial Code of Practice.
5. Martin Arnold had been in touch with Reed Smith, lawyers for Valbury, prior to publication. It refuted the allegations, described the claim as being ‘wholly without merit’, but – beyond saying that it had kept the appropriate regulator (the FCA) informed from the outset– declined to comment further as the matter was *sub judice*.
6. Following that email of 19 June 2018 from Mr Robert Falkner of Reed Smith, Martin Arnold followed up the same day to better understand Valbury’s case on the Plaintiff’s experience (which is relevant to the issue of jurisdiction). There was clearly a telephone conversation that day as well, because on 20 June 2018, Mr Falkner set out the case on the Plaintiff’s experience by email, which referenced such a call.
7. However, importantly for this Adjudication, that email from Mr Falkner (“the First Falkner Email”) concluded with a paragraph that said:

*“When we spoke yesterday you referenced the revenues of Valbury in 2016 in juxtaposition with the amount of Mr Traore’s claim. For the avoidance of doubt Valbury has adequate capital to meet any award Mr Traore may obtain in the most unlikely event he were to achieve success in whole or in part. Accordingly we would be concerned if any article were to suggest or contain any false innuendo either that Valbury may face financial difficulties or that it may not be in a financial position to meet its regulatory capital requirements if in either case Mr Traore’s claim was upheld”.*
8. The First Article was then published on 21 June 2018.
9. Following it up for the Lombard opinion column, Jonathan Guthrie (Head of Lex) also got in touch with Reed Smith at 15:39 on 21 June 2018. That email (“the Guthrie Email”) said:

*“I am writing a short comment on the news story by my colleague Martin Arnold about Harouna Traore.*

*I’m planning to say that if Vallbury [sic] had hedged Mr Traore’s position it would have made the money it might otherwise have passed on to him. And that if it had not hedged, questions should be asked about the exposures it takes on.*

*I also wondered how common it was for clients to lose money and whether that was important to Vallbury's business model.*

*Please call or email if you'd like to discuss. If not, no worries. I expect to put this through to production around 5pm."*

10. Mr Falkner of Reed Smith replied 25 minutes later, at 16:04 on 21 June 2018, saying ("the Second Falkner Email"):

*"We confirm that in the normal course of business Valbury hedges client transactions with it. In this case we further confirm Valbury own account hedges generated a profit of approximately Euro 10 M, however, the related customer "transactions" with Valbury are clearly void as the orders placed were in substantial breach of set account trading limits".*

11. The Second Article was published later in the afternoon of 21 June 2018.

### **Complaints at First Instance**

12. There was then a spate of inter-partes correspondence:

- a. Mr Stockman of Reed Smith sent a very substantial complaint email about the First Article at 19:11 on 21 June 2018, with follow-up emails at 09:58 and 11:14 on 22 June 2018;
- b. Mr Stockman of Reed Smith also sent a substantial complaint email about the Second Article at 19:34 on 23 June 2018;
- c. Nigel Hanson, Senior Legal Counsel at the FT, responded to the complaint about the First Article at 17:16 on 22 June 2018, rebutting the complaint;
- d. Mr Stockman responded in at 18:21 on 25 June 2018, primarily about the First Article, but making some reference to the Second Article;
- e. Mr Hanson responded at 14:26 on 28 June 2018, declining to remove the articles or make changes, but alerting Reed Smith to their right to appeal the handling of the complaint to me.

13. The matter was appealed by letter from Reed Smith on 10 July 2018, in respect of both articles.

14. The nub of the complaints is that the First and Second Articles are inaccurate: the First Article for insinuating that Valbury is in financial difficulty (or will be if the case is lost) and inaccuracy as to its CEO's experience; the Second Article for suggesting that Valbury's business model is not wholly aligned with the interests of its customers.

## Framework

15. The FT Editorial Code of Practice<sup>4</sup> incorporates the IPSO Editors' Code. This complaint falls to be adjudicated under Clause 1 (Accuracy), which provides that:

### **“1. Accuracy**

- 1.1 *The Press must take care not to publish inaccurate, misleading or distorted information or images, including headlines not supported by the text.*
- 1.2 *A significant inaccuracy, misleading statement or distortion must be corrected, promptly and with due prominence, and – where appropriate – an apology published. In cases involving IPSO, due prominence should be as required by the regulator.*
- 1.3 *A fair opportunity to reply to significant inaccuracies should be given, when reasonably called for.*
- 1.4 *The Press, while free to editorialise and campaign, must distinguish clearly between comment, conjecture and fact.*
- 1.5 *A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.”*

16. In the *Berkley Adjudication*<sup>5</sup>, I explained the distinction between Clauses 1.1 and 1.2:

- “8. *However, it is important to understand what exactly constitutes a breach of Clause 1 (Accuracy):*

*[...] Clause 1.1 will only be breached if the Press has not taken care to avoid publishing inaccurate information. It is a rule against slapdash journalism that is negligent about setting out the facts. It is not a rule which is breached by the mere presence of any inaccuracy however minor. It is breached only by such inaccuracies that a careful newsroom could and should have avoided publishing.*

*[...] Clause 1.2 will only be breached if the Press has refused to properly correct, clarify or apologise for a ‘significant inaccuracy, misleading statement or distortion’. Clause 1.2 is therefore different to Clause 1.1 in two material respects: first, the inaccuracy must be ‘significant’; and second, the breach is not one of negligent omission, but intentional refusal to amend”*

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<sup>4</sup> [https://ft1105aboutft-live-14d4b9c72ce6450cb685-1b1cc38.aldryn-media.io/filer\\_public/92/e9/92e922e4-579d-406a-9db2-0e76c232a632/editorial\\_code.pdf](https://ft1105aboutft-live-14d4b9c72ce6450cb685-1b1cc38.aldryn-media.io/filer_public/92/e9/92e922e4-579d-406a-9db2-0e76c232a632/editorial_code.pdf)

<sup>5</sup> [https://ft1105aboutft-live-14d4b9c72ce6450cb685-1b1cc38.aldryn-media.io/filer\\_public/aa/27/aa27c09e-86e3-45f6-b063-ed809df43f00/2015-01-28\\_matt-berkley-adjudication.pdf](https://ft1105aboutft-live-14d4b9c72ce6450cb685-1b1cc38.aldryn-media.io/filer_public/aa/27/aa27c09e-86e3-45f6-b063-ed809df43f00/2015-01-28_matt-berkley-adjudication.pdf)

17. Then, in the *Portes Adjudication*<sup>6</sup>, I explained the three different forms of error covered by Clause 1 of the IPSO Code:

*“24. Whether a statement is ‘inaccurate’ (in the narrow sense of factually wrong, and requiring a correction) can be judged by comparing the published information to a provably true version of the information. If they differ, and the difference is ‘significant’, a correction will be directed.*

*25. A statement will be ‘misleading’ where the objective reasonable reader of the FT would take away an erroneous belief about the subject of that statement, even though the statement was true. The words “John Doe has been caught in bed with woman who isn’t his wife” may be perfectly true because John Doe has never married, but if a reasonable reader would take away that John Doe is both married and having an extra-marital affair, the statement is misleading. Significant misleading statements will require clarification, not correction, given that the information is not intrinsically inaccurate.*

*26. What then of ‘distorted’? It clearly is intended to mean something distinct from ‘misleading’. My provisional view is that whereas a misleading statement misinforms the reasonable reader about the factual content of that statement, a ‘distortion’ is an assembly of statements that are neither inaccurate, nor misleading, but collectively give an impression that a reasonable and fair-minded person in possession of all the facts would not have. To say of Adolf Hitler that he was a vegetarian, liked dogs, painted watercolours, and never cheated on his wife might not be inaccurate or misleading in any of the specifics, but would give the most grossly distorted view of his character.”*

18. I have had a number of complaints under Clause 1 (Accuracy) where the question of whether or not the article was inaccurate was wholly or largely contingent on the ‘single meaning’ of the article: see in particular the *Wessendorff Adjudication*<sup>7</sup> at [7]-[22] and more-recently the *Chandler Adjudication*<sup>8</sup> at [14] where I relied on the judgment of Warby J in *NT1 & NT2 v Google LLC* [2018] EWHC 799 (QB) at [79]-[87]<sup>9</sup>.

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<sup>6</sup> [https://ft1105aboutft-live-14d4b9c72ce6450cb685-1b1cc38.aldryn-media.io/filer\\_public/60/9f/609fb246-1319-4841-8d2f-a7a9b2c5ee2f/2015-05-11\\_ferguson-adjudication-with-ps.pdf](https://ft1105aboutft-live-14d4b9c72ce6450cb685-1b1cc38.aldryn-media.io/filer_public/60/9f/609fb246-1319-4841-8d2f-a7a9b2c5ee2f/2015-05-11_ferguson-adjudication-with-ps.pdf)

<sup>7</sup> [https://ft1105aboutft-live-14d4b9c72ce6450cb685-1b1cc38.aldryn-media.io/filer\\_public/c9/71/c971ea46-1c8d-47f4-940c-8132b412c7fe/wessendorff\\_adjudication.pdf](https://ft1105aboutft-live-14d4b9c72ce6450cb685-1b1cc38.aldryn-media.io/filer_public/c9/71/c971ea46-1c8d-47f4-940c-8132b412c7fe/wessendorff_adjudication.pdf)

<sup>8</sup> [https://ft1105aboutft-live-14d4b9c72ce6450cb685-1b1cc38.aldryn-media.io/filer\\_public/49/08/49081cab-f770-4ca1-a76c-94998b2d00a7/chandler\\_adjudication.pdf](https://ft1105aboutft-live-14d4b9c72ce6450cb685-1b1cc38.aldryn-media.io/filer_public/49/08/49081cab-f770-4ca1-a76c-94998b2d00a7/chandler_adjudication.pdf)

<sup>9</sup> <https://www.judiciary.uk/wp-content/uploads/2018/04/nt1-Nnt2-v-google-2018-Eewhc-799-QB.pdf>

## The First Article

19. The First Article (with paragraph numbers added for ease of reference) said:

- [1] *“A trainee day trader in France is suing a British brokerage for an amount comparable to almost its entire annual revenue after it seized the €10m profit he made using what he initially thought was a demonstration version of its platform.*
- [2] *Harouna Traoré opened a €20,000 account at Valbury Capital, a UK-based brokerage, last summer after using a dummy version of its platform to learn how to trade equity futures as a retail investor on a trading course in Paris.*
- [3] *A couple of weeks later, he was practising trading at home on what he believed to be the demo version – placing €1bn of orders for European and US equity futures – before realising that it was the live platform and he had run up a loss of more than €1m.*
- [4] *He continued trading, eventually building up a \$5bn position in US equity futures and turning the loss into a profit of more than €10m. “I could only think of my family,” said Mr Traoré, who is married with two children. “I was stressed.” After he called Valbury a few days later to explain what had happened, the brokerage told him he had breached his contract and his positions were “void and cancelled”.*
- [5] *In January, he filed a writ of summons in the Pontoise district court, north of Paris, claiming breach of contract and negligence by the British brokerage and calling for it to pay him the €10m he says it owes him.*
- [6] *Valbury, which is owned by the eponymous Indonesian financial services group, denies any wrongdoing and is preparing to file its initial submission next week. It is expected to argue that Mr Traoré is not a consumer, but a financial services professional, so the case should not be heard in France, where he would benefit from greater consumer protection.*
- [7] *Robert Falkner, partner at Reed Smith, the law firm representing Valbury, said: “We are familiar with the spurious allegations made by the French arcade trader Mr Traoré (a seasoned market risk analyst formerly employed by Reuters) which are strongly denied as wholly without merit and will be vigorously contested.”*
- [8] *“This matter is now before the courts so that we consider it inappropriate to comment further,” said Mr Falkner, adding that Valbury had kept its regulators at the UK Financial Conduct Authority “fully informed”.*
- [9] *Valbury is expected to point out that Mr Traoré said in his application to open an account that he had traded futures and options frequently. Mr Traoré admitted that he had “tried to embellish my trading experience and professional qualifications at the time, as I thought my application might otherwise not go through as easily”.*
- [10] *According to the court filing by Mr Traoré, which has been seen by the Financial Times, Valbury told him that it had treated the trades he carried out*

as a “manifest error” because he had thought he was using its demo platform and had not intended to place real orders. The brokerage also told him that he had breached his trading limits.

- [11] *Mr Traoré’s lawyers at Linklaters said in the filing that the 41-year-old had no prior experience of financial markets and previously worked at Thomson Reuters, selling performance analysis software to investors, before being made redundant last year.*
- [12] *Therefore, they said, he should be considered a consumer and the case should be heard in France. His lawyers also said Mr Traoré should have been prevented from trading such large amounts by preset trading limits that could have been imposed by Valbury.*
- [13] *They disputed Valbury’s suggestion that his orders were a “manifest error” – the definition usually given to fat-finger trading mistakes – because most of the profits were only made once he realised he was trading on the live platform.*
- [14] *The stakes are high for Valbury, which made £9.88m of revenue in the year to December 2016 down from £11.7m the previous year. It reported its third consecutive annual loss of £455,405 in 2016 – its last set of publicly filed accounts.*
- [15] *Mark Hanney, chief executive of Valbury, has previously worked at several other trading firms and spent five years as financial director of Refco Trading Services Ltd, the UK arm of the collapsed US brokerage. Mr Hanney declined to comment.*
- [16] *The FCA declined to comment.”*

20. Having regard to the three forms of error covered by Clause 1, with one exception I shall now address, this is not a case of ‘inaccuracy’ in the stricter sense of an individual fact or facts included within the article being provably wrong. The bulk of the complaint concerns a ‘misleading’ implication against Valbury itself of illiquidity. The only suggestion of outright ‘inaccuracy’ in the technical sense comes from Mr Stockton’s first complaint email of 19:11 on 21 June 2018, where he says:

*“Of particular concern also, is the false suggestion in you (again, confusing) article that Mr Hanney was an officer of the US Brokerage firm Refco Trading and was involved or responsible in part for its collapse. Mr Hanney was not a director of the US entity that collapsed. He was a director of the UK Refco’s regulated UK business, which remained operational and solvent during his tenure. Mr Hanney was also the co-founder Marex-Spectron which included a management buyout of the Refco UK business and which was a successful UK broker. Given this, your article is clearly misleading and would be read by the ordinary reader as suggesting, falsely, that Mr Hanney has a track record of managing brokers that go insolvent or was in some way responsible for the collapse of the US brokerage firm Refco Trading.”*

21. In the appeal letter of 10 July 2018, this was expanded upon somewhat, where it is said “A simple check of the FCA website would have established that Mr Hanney was not at Refco for five years”.
22. While the FCA (Financial Conduct Authority) website<sup>10</sup> bears out that Mr Hanney (Reference Number MXH01454) was only the regulated person for a Refco entity from 20 February 2003 until 11 September 2006, I found the Companies House website<sup>11</sup> lists him as the Director of Refco Trading Services Limited (referenced in paragraph [15]) and Refco Trading Services (UK) Limited from 4 April 2003 to 20 June 2008.
23. When I put this to Reed Smith in correspondence, I was told that Mr Hanney was a director of the abovementioned companies (per Companies House), but that they were both acquired by Marex Financial Limited (of which Mr Hanney was a founding director) in 2006. After that time, although solvent throughout, they were placed into solvent voluntary liquidation. While Mr Hanney remained a ‘director’ of these companies until June 2008, he did not have classic directorial control of them from the period of 22 August 2006 (the date of the first winding-up commencement process) to 20 June 2008. He was, it is said, a nominal director only for 2 of the 5 years.
24. Therefore, the complaint about paragraph [15] has shifted ground to one of ‘misleading’ implications, rather than ‘inaccuracy’ in the strict sense because:
- “(1) It implies that the UK Refco entities collapsed along with the US Refco entity. In fact, the UK Refco entities of which Mr Hanney was a director did not “collapse”, they remained solvent and were part of a successful management buyout.*
- (2) It is not apparent from the article that Mr Hanney had no operational control over Refco Trading Services Ltd from 27 January 2007 onwards and was a director in name only as a result of the voluntary liquidation process (which position could have been readily identified from the information filed at Companies House.*
- (3) From 2006, Refco Trading Services Ltd was no longer the “UK” arm of the US brokerage. Therefore Mr Hanney did not spend five years as a director of the UK arm of the collapsed US brokerage even if he did spend five years as a director (albeit from 27 January 2007 in name only) of Refco Trading Services Ltd.”*

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<sup>10</sup> [https://register.fca.org.uk/ShPo\\_IndividualDetailsPage?id=003b000000LUkMyAAL](https://register.fca.org.uk/ShPo_IndividualDetailsPage?id=003b000000LUkMyAAL)

<sup>11</sup> <https://beta.companieshouse.gov.uk/officers/arLXXT9Agd5iRQ2u8NnZUbej2zM/appointments>

25. Putting aside for a moment whether there is a misleading implication, I reject outright any inaccuracy complaint insofar as it complains that paragraph [15] is factually ‘inaccurate’: the facts are all correct.
26. Nor do I consider paragraph [15] is ‘misleading’.
- a. It could not be clearer from a plain reading of that paragraph that Mr Hanney was the director of a UK company, and that it was the US arm (of which it is not said he was a director) that collapsed.
  - b. I agree that it is not clear that Mr Hanney was a ‘nominal director’ without ‘operational control’ for part of the 5 years, but nor does it need to be. The overwhelming majority of articles, let alone sentences, in a newspaper do not convey the fullness of a situation. If the article had expressly suggested that he had full operational control for 5 years, there might (I put it no higher) be a basis for an inaccuracy complaint, but it does not. It simply says that he was a director for a period of time: there is no further necessary implication to assess.
  - c. The third complaint fares no better. If a man (A) is married to his wife (B), but has a relationship with another woman (C) which lasts for 5 years, divorcing B after 3 years, it would still be accurate to say that “C had a relationship with B’s husband, A, lasting five years”. The reference to “B’s husband” is an identifier of A, not a warranty that A and B married for the duration of the affair. It would be perverse, indeed inaccurate, to say “C had a relationship with B’s husband for 3 years” on account of A no longer being B’s husband in years 4 and 5.
27. None of the above complaints about paragraph [15] are ‘misleading’. They are based on facts which did not come to light until after publication, and so I would not have found a breach of Clause 1.1 in any event: the duty to take care does not extend to exhaustive investigation of non-contentious facts in every sentence of an article. Even if I had found any of the above complaints were ‘misleading’, I would not have found them ‘significant’ enough to justify correction or clarification, and so would have declined to find a breach of Clause 1.2 on that basis as well.
28. The weightier task for this part of the Adjudication is to assess whether the First Article as a whole bears the meaning that Valbury Capital’s financial position is ‘tenuous’ or ‘precarious’ i.e. that if it lost the case to the Plaintiff, that it may be insolvent or unable to meet its capital requirements. It is not suggested by the FT that such a meaning is true, and Valbury is adamant that it is utterly untrue.

29. The meaning for which Valbury contends arises out of:
- a. Paragraph [1] comparing the size of the amount sued-for, namely €10m, with Valbury's annual revenue;
  - b. Paragraph [14], which draws the same comparison, and begins with the words "*The stakes are high for Valbury*"; and
  - c. Paragraph [15], which makes reference to the collapse of the US brokerage of Refco in the context of saying that Valbury's CEO was a director of its UK arm.
30. The FT, for its part, denies that an ordinary reasonable reader of the FT would understand that the claim poses any existential threat to Valbury, because:
- a. It is said to be plain from the article that the €10m is a 'windfall' for Valbury, in that the trade has generated a profit which it is refusing to pass onto the Plaintiff, so win-or-lose, it will either break even on the trade, or enjoy a profit;
  - b. Paragraph [6] makes clear that it is backed by the large Indonesian financial services group of the same name, so it has a parent with deep pockets; and
  - c. That the scalar comparison with its earnings is a legitimate fact to include.
31. Valbury 's complaint was buttressed by complaint about:
- a. Online comments by FT readers on the First Article which appeared to be based on its meaning, and which were deleted by the FT before it chose to close the First Article to further comments (I note that these comments were the focus of the emails from Mr Stockman on the morning of 22 June 2018); and
  - b. Other articles published by other publishers, based on the reporting in the First Article, which Valbury says overtly suggest an insolvency risk, including:
    - i. *Finance Magnates* 'Tradebuddy', which used the words "*If Traore is successful in his efforts to retrieve the money he believes is rightfully his, it could be the end of Valbury. The firm had total revenues of £9.88 million (\$12.95 million) last year and losses of £455,405 (\$597,070)*";

- ii. The *CNBC* website (and a *Yahoo! Finance* article in the same terms) who used the words “*This could well be a make or break case for Valbury, as the firm brought in about \$10 million of revenue in 2016, according to the most recently filed public documents*”;
- iii. *Analyst of Finance* website said “*Valbury could go belly up because the amount of the lawsuit is equal to the firm’s annual revenues*”;
- iv. *Zero Hedge* wrote “*Of course, none of this matters when the amount at stake could potentially put the brokerage out of business*” then quoting paragraph [14] of the First Article from the FT;
- v. *The Guardian* published a news report that “*Traore is suing Valbury, owned by an Indonesian company, for the €10m profit he made after filing a writ against them in a French court as a consumer. According to the FT, the sum involved is roughly equivalent to the £9.9m revenue the company made in the last financial year*”.

32. Valbury contends both that

- (1) these other articles, re-reporting the FT First Article, are evidence as to the meaning of the First Article; and also
- (2) that, relying on the decision of the Court of Appeal in *McManus v Beckham* [2002] EWCA Civ 939: [2002] 1 WLR 2982, the FT is liable for the repetition by other publishers of any ‘defamatory’ imputation in the First Article that Valbury is at risk of insolvency if it loses this case.

33. For my purposes in adjudicating, the second point is somewhat circular. The obvious answer to *McManus v Beckham* is the decision of Eady J in *Baturina v Times Newspapers Limited* [2010] EWHC 696 (QB) (appealed, but not on this point), where although republications by third party media of the *original* defamatory sting were (subject to questions of foreseeability) recoverable as loss from the original publisher, the embellishments of third parties *adding further* defamatory stings would constitute a *novus actus interveniens* for which the original publisher would not be liable: see the discussion in *Gatley on Libel & Slander* (12<sup>th</sup> edition) at §6.56. On that basis – without deciding the point, or commenting on the foreseeability of onwards media publication – the FT’s liability for third-party media publications which allege a risk of insolvency seems to me to be entirely contingent on *that* being the meaning of the First Article.

34. Both Valbury and the FT have focussed their arguments on the ‘meaning’ of the First Article, by which both mean the ‘single meaning’ which English law of libel attributes to words according to a set of principles recently re-articulated by the Court of Appeal in *Bukovsky v Crown Prosecution Service* [2017] EWCA Civ 1529 at [11]-[17].
35. It is an objective meaning (so the intent of the publisher is irrelevant) that would be taken by an objective reasonable FT reader who read the article once all the way through, and so the meaning looks at the totality of the article, with ‘bane & antidote’ taken together. There may be several meanings which an article is *capable* of bearing, and several meanings which might actually have been taken by some readers, but liability in the torts of libel or slander is premised on the ‘single meaning’ which a Court actually finds.
36. In any determination of the single meaning, I do not consider that it is correct that I should look at how particular FT readers (in the comments section) or indeed other journalists may or may not have understood the article. The law of defamation of England & Wales has long prohibited reliance on such extrinsic evidence on ‘single meaning’ (although the best authority for this narrow proposition appears to be *Hough v London Express Newspaper Ltd* [1940] 2 KB 507, 515, and the precise ambit of the rule will soon be considered by the UK Supreme Court in *Stocker v Stocker*<sup>12</sup>).
37. Similarly, it is not relevant to my determination of meaning that the FT did not *intend* to convey any impression that Valbury might have solvency issues if it lost the case. Martin Arnold told me that his use of “[t]he stakes are high” was a straightforward phrase comparing the size of the litigation with its income. A person of modest but stable income who comes into a large lump sum (whether by inheritance or luck) and gambles with it (the origin of the term ‘stakes’) is playing for ‘high stakes’ comparable to his income, even if the loss of the lump sum would not result in his ruin. But whether or not that imputation is present does not and should not depend on intent: ‘meaning’ is discerned by way of an objective test.
38. If I were to apply the ‘single meaning rule’ from the law of defamation, as I did in the *Wessendorff Adjudication* and the *Chandler Adjudication*, then applying the principles codified in *Bukovsky v CPS* I would prefer the FT’s submissions on the single meaning: the article does not imply that Valbury is liable to become insolvent if it loses the case. An ordinary and reasonable FT reader, considering the article as a whole once, would appreciate that the profit had been made, and the only question was

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<http://www.dpsa.uk/supreme-court-grants-permission-to-appeal-in-stocker-v-stocker/>

whether it should be paid to the Plaintiff, or kept by Valbury. I do not think they would read in the implication – necessarily or otherwise – that Valbury was at risk of insolvency if the Plaintiff were to win.

39. However, this is not an Adjudication where the single meaning is determinative of the complaint. Whilst I am not convinced that Valbury’s meaning is the single ‘natural and ordinary meaning’ of the article, there is a clear *subsidiary meaning* which the First Article would have been *capable* of meaning, notwithstanding that it is not the ‘single meaning’. Contrary to the First Falkner Email, it is not an ‘innuendo’ meaning in the legal sense of the term (which is to say a separate meaning available to readers with prior knowledge of extrinsic facts): it is a secondary ‘natural & ordinary’ meaning.
40. Valbury relies on the comments and other articles for this subsidiary meaning, but I have not relied on them to find the First Article *capable* of bearing it. I have found the subsidiary meaning on the basis of the same objective test of ‘natural & ordinary meaning’. It may not be the ‘single meaning’, but it is still *there*, and I consider that some minority of FT readers would have understood the article that way.
41. Although I have applied the single meaning rule by analogy in previous adjudications, it is a much-criticised fiction that belongs to the law of defamation. It does not apply directly to Clause 1 of the IPSO Code, any more than it applies in the tort of malicious falsehood (see *Ajinomoto Sweeteners Europe SAS v ASDA Stores Ltd* [2010] EWCA Civ 609; [2011] QB 497) and I have wondered whether to apply it to the present case would cause injustice to the complainant.
42. The question of principle with which I must grapple is how Clause 1 of the IPSO Code should deal with subsidiary meanings that are objectively foreseeable, even subjectively foreseen, and yet not the single meaning that would be attributed by the law of defamation.
43. My concern is not only that the FT has refused to correct or clarify the First Article upon receipt of the complaint (which is the basis of the complaint under Clause 1.2) but specific risk of publishing the subsidiary meaning was conveyed to the FT prior to publication in the last paragraph of the First Falkner email (which gives rise to the complaint under Clause 1.1).

44. There is some discussion of similar problems in two leading authorities:
- a. In *Bonnick v Morris* [2002] UKPC 31; [2003] 1 AC 3000, the Judicial Committee of the Privy Council (“JCPC”) sitting as the highest appellate court from Jamaica, considered the *Reynolds* privilege defence (a form of common law qualified privilege for responsible journalism, since codified & abolished in England & Wales by s.4(4) of the Defamation Act 2013). The JCPC had to consider whether the journalist’s *Reynolds* defence should succeed where the single meaning arose by way of an implication (not express wording) which the journalist neither meant to convey, nor accepted was the ‘single meaning’. The judgment is short but instructive, especially the passage from paragraphs [17] to [25], in holding that the ‘Single Meaning’ rule is appropriate for determination of meaning, but that a greater degree of flexibility was necessary in questions as to the proper *conduct* of journalism.
  - b. In *Cruddas v Calvert (No 2)* [2015] EWCA Civ 171; [2015] EMLR 16, the Court of Appeal considered ‘malice’ (both in the tort of malicious falsehood, where the ‘single meaning’ rule does not apply, and in relation a parallel claim in libel, where the rule does apply). The relevant passage is in paragraphs [95]-[116] of a much longer judgment, but the key principle is that where the ‘single meaning’ is true, but there is a subsidiary meaning that is untrue, and a number of ‘cynical’ readers would understand the article to bear the subsidiary meaning (see judgment [99]-[102]), the question of ‘malice’ as to journalistic knowledge is *subjective* (see [103]) based on not only whether the defendant *foresaw* the subsidiary meaning that ‘cynical’ readers would take (see [104-105]), but whether or not they *intended* that subsidiary meaning to be taken ([111]-[114]).
45. It is clear then that whether in libel (under the *Reynolds* defence) or in malicious falsehood (where the ‘single meaning’ rule does not operate) there is room for *consideration* of subsidiary meanings in respect of assessing journalistic *conduct*, including under Clause 1 of the IPSO Code (which is ultimately all about conduct, under both Clause 1.1 and 1.2) if those subsidiary meanings were known to the journalists at time of publication (Clause 1.1) or at time of complaint (Clause 1.2).
46. Clause 1.1 requires me to consider a failure to take due care in publishing the First Article. There is quite some force in Valbury’s complaint that – in circumstances where the subsidiary meanings was specifically warned-of in the First Falkner email sent (prior to publication) on 20 June 2018 – to allow that subsidiary meaning to arise constituted a failure to take care.

47. Clause 1.2 requires me to consider if, even though there was no failure to take care prior to publication, whether failure or refusal to correct or clarify is a code breach.
48. There has also been a suggestion in the complaint of malice and/or improper motive on behalf of editorial: Mr Stockman's email of 18:21 on 25 June 2018 says "*The editorial decision-making in publishing this article and the Lombard article on the same day, and the refusal to recognise the wrong done give [sic] rise to the suspicion as to what is motivating the Financial Times here*".
49. Martin Arnold told me that he did receive and read the First Falkner email warning of the risk of 'innuendo' about lack of solvency. No clarifying statement as to Valbury's solvency was made for two main reasons:
- (1) he did not consider (then or now) that the First Article bore the implied meaning that losing the case would put Valbury's financial viability at-risk, so there was no need to include a statement to that effect; and
  - (2) the statement wasn't given as a quote for publication (indeed, I note on 19 June 2018, Mr Falkner had expressly said that "*it would be inappropriate to comment further*") and for the FT to include an (apparently unnecessary) statement insisting that a company it covers is not going to fall into financial difficulties is liable to cause exactly the harm that Valbury seeks to avoid (the risk of such a statement being they '*doth protest too much*': per Queen Gertrude in Shakespeare's *Hamlet*: Act III, Scene ii, line 227).
50. Martin Arnold also told me that the inclusion of details about Refco in relation to Mr Hanney was nothing more than colour (a set of facts to say who he was and what he had done previously), and that there was no intention to support an implication that he remains clear the First Article does not bear.
51. I am entirely satisfied that the coverage of Valbury and/or Mr Hanney in the First Article was not motivated by any improper purpose on the part of Martin Arnold, nor do I find that he either does not believe what he wrote, nor was he reckless with the truth of what he wrote. The allegation of malice is not sustainable.

52. Had I found that the single meaning of the First Article was that for which Valbury contended, I would have held there had been a breach of Clause 1.1 (failure to take care), specifically because there was an express warning of that implication in the First Falkner email. However, given that I have held that the FT is correct as to the single meaning, I think that *Bonnick v Morris* and *Cruddas v Calvert* suggest that I would be wrong to find a breach on the basis of a subsidiary meaning unless that was an *intended* meaning (i.e. subjectively intended by Martin Arnold, rather than merely objectively foreseeable). I find that it was not subjectively intended and so – narrowly – have decided that the complaint under Clause 1.1 should be dismissed.
53. However, I take a different view in respect of Clause 1.2. By the time of the complaints to the FT, it was clear that some readers (even if a tiny minority in the comments) and some major media publishers had taken the subsidiary meaning. Again, I do not find that the FT would necessarily be liable in law for such publications (on the basis of *Baturina v Times Newspapers Ltd*, and again, because the subsidiary meaning – even after the complaint – was not an *intended* meaning, even if it was a known meaning) but Clause 1.2 can be breached even where there would not be legal liability.
54. In circumstances where a serious subsidiary meaning has manifested from an FT Article, it is perfectly possible for the FT to gratuitously clarify its own publication without in any way compromising its clear and consistent belief that the ‘single meaning’ is not that contended for by the complainant. It is not a legal obligation, but an ethical obligation, to ensure that articles are not misleading in either their ‘single meaning’ but also in more-serious subsidiary meanings which have specifically been brought to the attention of the FT post-publication.
55. If the FT declines to clarify articles where a strong subsidiary meaning arises, especially where there is evidence of widespread publication of that meaning by other media companies, it does so at risk of breaching Clause 1.2. On the facts of this case, I do find that the FT has breached Clause 1.2 of the IPSO Code.
56. I do not agree that the appropriate remedy, as sought by Valbury, is to take down the First Article, or even the parts about which they complain. The First Article is largely based on entirely true and accurate facts, and further more is a report of French court proceedings enjoying Qualified Privilege under s.15 and Schedule 1 of the Defamation Act 1996. It is in the public interest to report the case, and the First Article should remain up. This is also not a case for ‘correction’: the First Article is at risk of being ‘misleading’ rather than ‘inaccurate’, and so the appropriate remedy is a ‘clarification’.

57. I direct that the online version of the First Article should be updated to include a sentence in broadly the following terms between paragraphs [14] and [15] as numbered above:

*“For the avoidance of doubt Valbury has adequate capital to meet any award Mr Traore may obtain in the most unlikely event he were to achieve success in whole or in part. There is no suggestion it may not be in a financial position to meet its regulatory capital requirements in any event.”*

58. The fact that the First Article has been updated with a clarification will, of course, be referenced at the bottom of the online version. It shall say that it followed an appeal to the Editorial Complaints Commissioner, and shall include a link to this Adjudication. I consider that that is an appropriate remedy in respect of the breach of Clause 1.2 in the First Article.

## **The Second Article**

59. The Second Article raises completely different issues from the First Article. Insofar as is relevant, with paragraph numbers added for ease of reference, it said:

- [1] *“We’ve all been there, writes Jonathan Guthrie. You think you’re paintballing with mates but there’s been a mix-up and you’re on a real battlefield, armed with a rocket launcher. Next thing you know, you’ve turned the course of the war and won a gallantry medal.*
- [2] *Something similar happened to French day trader Harouna Traoré. He ran up a €1m loss on a trading platform he initially thought was only a demo. His position in US equity futures then swung to a profit of more than €10m.*
- [3] *Mr Traoré says he felt “stressed”. He probably still does. Valbury Capital, his UK-based brokerage, is declining to pay him that €10m. It says he breached trading limits. Valbury sounds like one of those outfits whose business model depends on clients losing money, not making it. There are probably good, albeit expensive, legal arguments on either side.*
- [4] *Valbury apparently hedged Mr Traore’s bets with corresponding positions in the futures market. As a result, it made a packet. At least it wasn’t carrying a \$5bn unhedged client position. But it still needs to explain how that hedged position was chalked up by a bloke who was, in all likelihood, wearing tracky bottoms and a Gaston Lagaffe T-shirt at the time.*
- [5] *Brokers are meant to go through a “know your customer” rigmarole. But perhaps there isn’t a box to tick for “thinks he’s playing a computer game”. It may all come out in court. Mr Traoré admits he embellished his trading qualifications. Thank heavens no trader at an investment bank has ever done such a thing.”*

60. The complaint arises almost entirely out of paragraphs [3] and [4], which trace the questions asked in the Guthrie Email, and answered in the Second Falkner Email, but essentially object to just a single sentence “*Valbury sounds like one of those outfits whose business model depends on clients losing money, not making it*”.

61. Mr Stockman’s complaint email sent at 19:34 on 23 June 2018 followed from the confirmation of the hedging position in the Second Falkner Email, then said:

*“Where a firm hedges client transactions its business model does not depend on clients losing money because if the client’s trade loses money so does the corresponding hedge transaction. A business model which hedges client transactions, such as Valbury’s, depends on the client making money on transactions so they continue to execute transactions on which the firm generates its commission revenue. Therefore, and contrary to your unfounded suggestion that Valbury’s business model seeks to benefit from the losses of its clients, it is a key feature of Valbury’s business model that its interests are aligned with those of its clients.*

*We appreciate that this is pretty elementary and trust it does not come across as patronising but the above stated quote is a clear misrepresentation of Valbury’s business model which has been made in circumstances where you were expressly notified of the position following your request to us to comment on this specific issue.*

*It is obviously damaging to the business of Valbury which uses a business model where its interests are aligned with the customer’s interests to state that its business model is the opposite and that in effect it trades against its customers. It beggars belief that the FT, a sophisticated financial industry publication, could get such an elementary point wrong even more so when it makes specific enquiry about the business profile and hedging and is expressly notified that Valbury hedges client transactions.”*

62. The FT’s response in respect of the Second Article is limited to say the least. Mr Hanson said in his email at 14:28 on 28 June 2018 only that “*The Lombard piece constitutes honest opinion. Your ‘suspicion’ about some improper motive on the part of the FT is misplaced*” (the latter sentence here responding to the quote at paragraph 48 of this Adjudication above, which questioned the journalistic motives in respect of both the First and Second Articles).

63. I met with Jonathan Guthrie to understand his reasons for making this comparison, and to better understand the hedging activity in question. I should make clear that prior to speaking to him, my understanding of the comment (based on having read the Second Article as part of the complaint) was broadly that whatever position the lay

client took, the factual implication was that Valbury was being said to hedge in the *opposite* direction (so if the client gained, the hedge lost; if the client lost, the hedge gained), and that on that basis, **if** that had been true, it could easily be remarked that “*Valbury sounds like one of those outfits whose business model depends on clients losing money, not making it*”. This appears to be the understanding shared by the Second Falkner Email, and is the basis upon which the complaint has been made.

64. In fact, what Valbury does (and what Jonathan Guthrie understands it to do) is to hedge in *the same direction* as its lay client. So if the lay client shorts a particular equity with Valbury, Valbury makes the same (or similar) bet in the futures market. That way, if the client wins (and can claim from Valbury), Valbury can pay their lay client with the equivalent profit from its hedge into the market (and makes the profit that it keeps from commission on the trade). Thus the outrage in the Second Falkner Email.
65. My fundamental question for Jonathan Guthrie was therefore how his comment (which both Reed Smith and I had assumed to be based on Valbury’s alleged hedging activity) could be justified in circumstances where it was (a) true, and (b) had been confirmed to him in writing that Valbury had hedged the Plaintiff’s trade *in the same direction*, thus generating its own windfall profit of €10m which it refused to pay him (which is specifically referenced in paragraph [4] of the Second Article).
66. The simple answer I was given is that the comment was not based on the fact of, or direction of, Valbury’s hedging activity at all. Although contained as separate questions in the same Guthrie Email, and although in consecutive paragraphs of the Second Article, the comment in paragraph [3] is not based on the hedging activity (or the direction of those hedges) described in paragraph [4].
67. Jonathan Guthrie is a comment journalist, who writes about a variety of areas in the world of financial services. He describes his writing for Lombard as ‘tongue-in-cheek’ and ‘knockabout’, including taking aim at firms whose business models he derides and who are quick to avail themselves of lawyers and PR firms to massage their reputations. He is a combative and adversarial character, not shy of picking a fight with his subjects, and so exactly as one would expect an opinion writer to be.
68. He explained to me that he views the world of companies offering non-institutional trading with a high-degree of scepticism, in particular the less-well-regulated end of the Contract For Difference (“CFD”) trading market that he compares to ‘bookmakers’.

These firms, he told me, attract a high volume (often with a correspondingly high turnover) of non-professional investors and day traders. (I note, in passing, FCA research - which led to greater regulation of CFD platforms at the end of 2016 - indicated that 76% of retail customers who invested in CFDs lost money<sup>13</sup>). Mr Guthrie says these firms, like bookmakers, are happy to take the punters' money while they are losing, making profit from the margins, but when the punter wins big, they suddenly look for technicalities to avoid paying out. In that sense, like bookmakers, such firms make money primarily from the many losers, and not the few winners.

69. By way of context, he sent me an article previously published in Lex<sup>14</sup>, setting out some strong views of the CFD brokerage market, and those who offer 'binary options' which are soon to be outlawed by the European Securities & Markets Authority ("ESMA")<sup>15</sup>.

70. Therefore, I am told, when he said "*Valbury sounds like one of those outfits whose business model depends on clients losing money, not making it*", he was drawing a comparison between Valbury (in the context of the facts of this case) and the sorts of firms who (like bookmakers) advertise to, and attract, retail traders in the CFD markets and similar. Therefore, this comment about the brokerage and what it 'sound[ed] like' was based, not on a specific *opposite* hedging strategy, but on the nature of their client, the Plaintiff (his actual, as opposed to purported, experience) and the withholding of the windfall profits that he had generated, as set out in paragraphs [3]-[5].

71. In that sense, both Reed Smith and I have misunderstood the basis for the comment, assuming it to be based on an incorrect implicit factual statement about Valbury's hedging strategy (which is contradicted in paragraph [4] of the Second Article in any event). We were led to that error by the proximity of those statements in the (short) Second Article, but more importantly by them **both** being in the Guthrie Email. This is what the law would call a 'reverse innuendo' – a meaning that appeared obvious to us only because of extrinsic facts (the emails) not available to the regular reader.

72. Valbury is, as Jonathan Guthrie accepts, an FCA-regulated entity, rather than being a binary/CFD broker. It therefore seems to me to be more than a little unfair to think of it in the same field as the somewhat unruly world of CFD platforms targeted at

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<sup>13</sup> <https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-cfd-review-findings.pdf>

<sup>14</sup> <https://www.ft.com/content/fcaa0f42-e3ee-11e7-97e2-916d4fbacoda>

<sup>15</sup> <https://www.esma.europa.eu/press-news/esma-news/esma-agrees-prohibit-binary-options-and-restrict-cfds-protect-retail-investors>

unsophisticated amateurs. However, Jonathan Guthrie considers that Valbury’s pitch to prospective clients on its website is not that dissimilar, in that it pitches access to volatile derivatives on a margin for only a small cash deposit. He notes that the Plaintiff was somehow able to build up an enormous position in US equities off a deposit of just €20,000, without an exhaustive investigation of the Plaintiff’s trading background.

73. I have previously made reference – in both the *Portes Adjudication* (referred to above) and in the *Angel/Lamm Adjudication*<sup>16</sup> – that I take a very different approach to questions of inaccuracy in Opinion pieces than I do in News stories. In the *Portes Adjudication* at [18]-[20], I said:

[18] *“I may adjudicate breaches of the Code, but unlike a Readers’ Editor or a Public Editor, it is not my place to say whether things were done well, or could have been done better. The question of whether or not there has been a breach is always binary. My role is quasi-judicial not supervisory, and other than finding breaches, I will be as disinclined to involve myself in the merits of editorial judgment as a judge would be to consider questions of academic judgment or tenets of religious faith.*

[19] *This disinclination will be at its very highest when considering an Opinion Editorial (“OpEd”): a degree of latitude will always be given for comment pieces, vis news stories. Save for breaches of the Code, only if an editorial judgment is so egregious that no reasonable journalist or editor could justify it in good faith (i.e. an irrationality or Wednesbury unreasonableness test) will I be prepared to interfere.*

[20] *However, allowing for such lassitude, OpEds also often contain unambiguous statements of fact. Statistical citation is the most obvious species of factual statement, which (under Clause 1 of the Editorial Code of Practice) must be accurate. I am wary, as was Lionel Barber, of adjudicating on interpretation of facts in OpEds, but a bare statement of fact is just as capable of adjudication as if it appeared in a news story.”*

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<sup>16</sup> [https://ft1105aboutft-live-14d4b9c72ce6450cb685-1b1cc38.aldryn-media.io/filer\\_public/d1/df/d1dfd469-a622-40fd-87fc-bbf2123597c2/2016-02-26\\_gifted-deposit-adjudication.pdf](https://ft1105aboutft-live-14d4b9c72ce6450cb685-1b1cc38.aldryn-media.io/filer_public/d1/df/d1dfd469-a622-40fd-87fc-bbf2123597c2/2016-02-26_gifted-deposit-adjudication.pdf)

74. Clause 1.5 requires the FT to clearly distinguish between comment and fact, and there can be no question that the FT has complied with that obligation in respect of the Second Article. What is complained of is clearly a comment (“*sounds like*”) in an opinion piece, and there is no question of it being adjudicated as a ‘bare fact’ at all.
75. To find an ‘inaccurate’, ‘misleading’ or ‘distorted’ statement, I would have to identify the factual error (arising in one of those three ways). Absent the ‘opposite hedging’ implication which Reed Smith and I read-into the comment (because of the email exchange), is there a ‘fact’ here which I can adjudicate as being inaccurate at all? To say whether or not Valbury ‘sounds like’ the CFD platforms otherwise is a matter of opinion, not fact. There is no definitive or objective truth upon which I could get the parties to agree, or by which I could adjudicate.
76. Therefore, per the *Portes Adjudication* at [19], and also in the Postscript at [62]-[64], if there is no factual matter capable of adjudication at all under Clause 1, the question to which I must direct myself in relation to the Second Article is whether the “*editorial judgment* [in publishing the comment] *is so egregious that no reasonable journalist or editor could justify it in good faith*”.
77. Whatever I may personally think of the fairness of the comment (recognising that I know far, far less about this world than Jonathan Guthrie or Valbury), I have no doubt whatsoever that Jonathan Guthrie’s opinion of Valbury is honestly held, and that he stands by it absolutely. I have therefore come to the conclusion that – understood as being a comment on the case brought by the Plaintiff and Valbury in general, and not a specific comment on a factual implication about its hedging behaviour – it is an opinion that is within the bounds of what could reasonably be believed.
78. Accordingly, I decline to find any breach of Clause 1 in respect of the Second Article.

## **Conclusion**

79. The Complaint in respect of the First Article is:
- a. Dismissed in respect of Mr Hanney under Clause 1.1 and Clause 1.2;
  - b. Dismissed in respect of Valbury under Clause 1.1;
  - c. Upheld in respect of Valubury under Clause 1.2.

80. The remedies directed by paragraph 54 and 55 of this Adjudication shall be given effect by no later than noon on Tuesday 25 September 2018, unless by that time the Editor exercises his right of appeal on remedy to the Appointments & Oversight Committee in writing, copying the Editorial Complaints Commissioner. In such circumstance, the Editor's appeal shall be heard and directions communicated by the Committee.

81. The Complaint in respect of the Second Article is dismissed under Clause 1 entirely.

**GREG CALLUS**  
**Editorial Complaints Commissioner**  
*Financial Times*  
**19 September 2018**