



Neutral Citation Number: [2004] EWCA (Civ) 613

Case No: A2/2003/1393 & A2/2003/1393B

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
Eady J

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18th May 2004

Before :

LORD JUSTICE BROOKE
Vice-President of the Court of Appeal (Civil Division)
LORD JUSTICE JONATHAN PARKER
and
LORD JUSTICE MAURICE KAY

Between :

ADAM MUSA KING

- and -
TELEGRAPH GROUP LIMITED

Claimant/
Respondent

Defendants/
Appellants

Andrew Caldecott QC & Godwin Busuttil (instructed by Farrer & Co) for the Appellants
Richard Rampton QC & Harvey Starte (instructed by Peter Carter-Ruck and Partners) for
the Respondents

Hearing dates: 22nd & 23rd March 2004

Approved Judgment

Lord Justice Brooke :

1. This is an appeal by the defendants, the Telegraph Group Ltd, from certain parts of an order made by Mr Justice Eady in this libel action on 9th June 2003. The appeal falls into two distinct parts. The defendants complain that the judge should not have struck out certain parts of their defence of justification, and they also contend that he ought to have made some kind of special order for their protection because the claimant had brought this action under a conditional fee agreement (“CFA”) without taking out an “after the event” (“ATE”) insurance policy.
2. The parties’ very full statements of case set out clearly what is in issue in this action. The claimant is a website designer. He has created on his own website, which bears the name of Mathaba.net (“the Mathaba site”), what he describes as an internet news service, political forum and reference tool. He is also the founder of Green Charter International, which he describes as an organ devoted to promoting the Green Charter of Human Rights (“GCHR”). In 1990 he changed his name by deed poll from Louis Szondy to Adam Musa King, although he is still widely known by his original name. He is a convert to Islam, although he says that since 1996 he should be regarded as a non-practising Muslim, and he no longer observes the central pillars of that faith.
3. The defendants maintain that the Mathaba site contains or provides direct access to websites which contain Islamic extremist propaganda. They also contend that the GCHR does not accord with internationally accepted standards of human rights, and that it has only been accepted by the state of Libya. While not denying any of these propositions, the claimant requires the defendants to prove them.
4. The claimant accepts that he has enjoyed a long-standing connection with a man named Francis Etim, who has also adopted a Muslim name. He denies that the connection was a close one, and he puts the defendants to proof as to its precise nature. In the autumn of 2001, when the two articles which are at the centre of this action were published, Mr Etim was in custody awaiting trial on charges under the terrorism legislation, on which he was eventually acquitted in August 2002.
5. In early 2000 the claimant helped Mr Etim by constructing a website for his business known as Sakina Security Services (“the Sakina site”). He accepts that he registered the domain name for this site, and that his own name was registered as the point of contact on technical matters for so long as the domain registration lasted. He also accepts that Mr Etim asked him to do whatever was necessary to set up his business as a limited company, and that he asked his accountant to carry out this work for Mr Etim. He does not know if the accountant ever met Mr Etim, or if he was ever paid by Mr Etim for his services. For about one month his own site carried material destined for the Sakina site.
6. The claimant maintains that his role was confined to making whatever simple formatting and design improvements were needed before he loaded the Sakina material onto the Sakina site. He was not involved in writing it or editing it or deciding on its content: Mr Etim supplied this to him.

7. One of the web pages on the Sakina site contained an advertisement for what was described as “The Ultimate Jihad Challenge”. This advertisement related to a two-week firearms training course at a shooting range in the United States, and described the various weaponry skills that would be taught there. The defendants also maintain that during 2001 Mr Etim received training in the use of weapons at a camp in South Wales.
8. They also say that the Sakina site offered an encryption key, for use by those who wished to conceal the fact that they were accessing the site. The claimant for his part maintains that the only encryption facility on the site was a common facility which enabled e-mails to be encrypted.
9. The parties’ statements of case also disclose issues relating to the nature and extent of the claimant’s admiration of Colonel Gadaffi, the president of Libya, and the fact that he once posted on his own Mathaba site classified documents which Mr David Shayler had stolen from MI5. These issues, however, are only tangentially connected with the matters we have to decide on this appeal.
10. It appears that the defendants’ interest in the claimant was aroused when the police visited their offices on Friday 19th October 2001 (shortly after the destruction by terrorists of the World Trade Centre in New York) and accidentally left there a list of the names of 24 people into whom the Anti-Terrorist Branch was conducting an official investigation. Most of the names on the list were obviously Islamic, but the list contained the name of “Adam Moussa” and at least one other person with an English sounding name.
11. On the following Sunday, 21st October, the defendants published in the Sunday Telegraph the first of the two articles of which complaint is made in this action. It was headed “Two white suspects in Bin Laden probe” and it read as follows:

“Detectives are investigating two white people in Britain who they suspect of aiding Osama bin Laden’s terror network.

Secret Scotland Yard documents, obtained by The Sunday Telegraph, name two men – one of whom is understood to be a computer expert – as assisting al-Qaeda’s network in this country. It is the first time since September 11 that white non-Muslims have been accused of involvement in Islamic extremism.

The documents reveal that a special unit has been established at the Yard to carry out ‘Operation Full Circle’, to monitor the two white men and 22 other suspects. All are being investigated to establish whether they have committed terrorist offences.

The Sunday Telegraph cannot name the two for legal and operational reasons.

One of the two white men on the list, the computer expert, is believed to have assisted bin Laden operatives with website activities. He is named in the document as also being linked to Francis Etim, who has been charged under the Prevention of Terrorism Act. Etim, who lived in Greenwich, south-east London, was born in Britain and converted to Islam at marriage and changed his name to Sulayman Zain-Ul-Abidin.

Also on the list is a white man with a French name. Little is known of him, except that he has adopted several aliases. He is believed to be wanted in connection with Algerian plots to attack France.”

12. One of the issues to be decided at the trial is whether this article would have been understood by its readers to refer to the claimant. At all events he contends that the natural and ordinary meaning of these words is that

“there were strong grounds to suspect the claimant of being a supporter and accomplice of Osama bin Laden’s al-Qaeda network of terrorists who had assisted in that network’s terrorist operations by helping with website activities”.

13. There is no dispute that the second article, which was published in The Sunday Telegraph on 9th December 2001, does refer to the claimant. It is headed “British Muslim targeted by FBI for terror link”, and the other words complained of read as follows:

“The FBI wants to question a white British Muslim computer expert, who lobbies for the Libyan government, about his alleged links to Osama bin Laden’s terror network.

Louis Szondy, who also calls himself Adam Moussa, is on the list of 24 people sent to the British police by the FBI. He is the second white Briton to appear on the list.

This newspaper has already revealed that American intelligence officers want to talk to Mark Yates, a weapons expert from Liverpool who allegedly trained Muslims who might later have become members of Osama bin Laden's al-Qa’eda terror network.

Mr Szondy, who is married and has an address in Harlesden, North London, runs a computer firm called Unitel which has offices in Burton-on-Trent and the Sudan. He also supports Colonel Gaddafi and the Libyan regime. Two years ago he changed his name by deed poll to Adam Moussa, apparently calling himself after a senior figure within the Libyan intelligence service.

The Special Branch has established that Mr Szondy developed a website for Sakina Security, the London-based organisation which is suspected of providing military training for young Muslims. The website includes enhanced security features which allow Sakina to keep some of its activities secret.

Francis Etim, the man behind Sakina, is now being held in Belmarsh prison awaiting trial on terrorism charges, which he denies. Mr Szondy has close links with Sakina Security and allegedly still holds the registration of the internet domain name Sakinasecurity.com.

Through the website, Sakina offered what it described as 'the Ultimate Jihad challenge' – a two-week course in shooting and 'bone breaking'.

Unitel has also allowed Sakina to use its facilities and provided access to the services of a business registration firm. London-based British Monomarks, a kind of private post office, allows companies to use its premises as their headquarters. An official said: 'Mr Szondy has been allowing Sakina to use his facilities here. That has been going on for some time. It is only recently that we have been told Adam Moussa and he are one and the same'.

Patricia Szondy, Mr Szondy's mother, confirmed last night that her son had changed his name by deed poll and set up the Sakina website.

She added that police had now seized his computers. She insisted, however, that he was innocent of any links with al-Qa'eda.

'My son is not a terrorist' she said. 'He's totally opposed to any terrorist activity. I believe he is wanted as a witness, not as a suspect. I don't think he knew if Sakina was up to anything. The police have taken things from his home including a computer. They haven't given us a full list of things taken.'

Mr Szondy also (*sic*) the owner of Mathaba, an internet site for Islamic extremists. According to documents on Mr Szondy's own website, he is a self-proclaimed 'white Muslim' and a supporter of Colonel Gaddafi.

He distributes copies of the Libyan leader's 'Green Book', which advocates the overthrow of Western democracy. Special branch officers are probing his work for a fanatically pro-Libyan organisation called Green Charter International. The London-based organisation, which has

its own internet site, campaigns for the establishment of Libyan-style regimes throughout the world.

The organisation says: ‘Human rights cannot be guaranteed in a world where there exist governors and governed, masters and slaves, rich and poor.’

M15 and the Metropolitan Police's Special Branch were looking into Mr Szondy even before September 11, because he had posted classified documents on his website.

They were copies of M15 files obtained by David Shayler, the former agent.

A spokesman for the Jewish Community Security Trust, said: ‘We have believed for sometime (*sic*) that Adam Moussa and Louis Szondy are one and the same person’.

No one at Unitel was available for comment.”

These words were illustrated with a photograph of the claimant with the caption “Pro-Gaddafi: Louis Szondy renamed himself Adam Moussa, after a Libyan intelligence official”.

14. The claimant contends that the natural and ordinary meanings of the words in the second article were as follows:
 - a) There were strong grounds to suspect the claimant of being a supporter and accomplice of Osama bin Laden’s al-Qaeda network of extremist Islamic terrorists.
 - b) The claimant advocates and supports violent Islamic extremism, running a website for Islamic extremists, distributing copies of a book which advocates the overturning by force of Western democratic government and working for an organisation fanatically devoted to supporting and replicating throughout the world the Libyan regime of Colonel Gaddafi.
 - c) The claimant has for some time been recognised as a threat to the safety and security of the Jewish community.

On this appeal we are not really concerned with the second and third of these meanings.

15. In addition to a plea of qualified privilege, with which we are also not concerned on this appeal, the defence contained a plea of justification, part of which was in these terms:

“In so far as the words complained of in paragraphs 4 and 6 of the particulars of claim bore or were understood to bear the meaning that the police suspected the claimant of involvement in terror-related activities on reasonable and/or strong grounds, they are true in substance and in fact.”

16. The judge's order had the effect that this part of the plea of justification had to be rewritten in these terms:

“In so far as the words complained of in paragraphs 4 and 6 of the particulars of claim bore or were understood to bear the meaning that there were reasonable and/or strong grounds for suspecting the claimant of involvement in terror-related activities, they are true in substance and in fact.”

17. He also gave directions in relation to paragraphs (6) and (7) of the particulars of justification. These followed five paragraphs of particulars which set out various assertions of fact, many of which have been summarised in the early parts of this judgment. They were originally in these terms:

"(6) In the light of the above, the Anti-Terrorist Branch at New Scotland Yard suspected that the claimant was an accomplice of Francis Etim and placed his name on a list of persons suspected by the police of being Islamic extremists in the United Kingdom involved in terrorist offences.

(7) The police raided the claimant's home on 18 October 2001 and removed a computer, documents and other belongings".

18. The judge directed that paragraph (7) of the particulars should be deleted completely, and that paragraph (6) must be rewritten in these terms:

“In the light of the above, there were strong and/or reasonable grounds for suspecting that the claimant was an accomplice of Francis Etim.”

19. The only other matter to which objection was successfully taken was an allegation, as part of Response 2 to a request for further information, to the effect that it was clear that the police suspected Francis Etim of being a terrorist and/or being involved in terror-related activities from the fact that he had been arrested under the Terrorism Act 2000 and was, at the time of publication, in custody awaiting trial on charges under that Act relating to the provision of weapons training for terrorist purposes.

20. This information was related to the plea in paragraph (2) of the particulars of justification, which was to the effect that the claimant “has long-standing and close connections with Francis Etim who, at the time of publication, was remanded in custody awaiting trial on charges under the Prevention of Terrorism Act.” The judge struck out the part of Response 2 described in paragraph 19 above.

21. The judge reminded himself that a plea of justification may be pitched at one of three levels of gravity in relation to a defamatory sting, or to put it another way, a *Lucas-Box* meaning might fall into one of the three categories which I identified

in my judgment in *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772 at [45]; [2003] EMLR 218:

“The sting of a libel may be capable of meaning that a claimant has in fact committed some serious act, such as murder. Alternatively it may be suggested that the words mean that there are reasonable grounds to suspect that he/she has committed such an act. A third possibility is that they may mean that there are grounds for investigating whether he/she has been responsible for such an act.”

22. The judge said that this was one of those cases where the defence of justification depended upon establishing at least “reasonable grounds to suspect” the claimant (of involvement in terrorist activity). After referring to *Lewis v Daily Telegraph* [1964] AC 235, *Evans v Granada Television* [1996] EMLR 429, *Stern v Piper* [1997] QB 123, *Shah v Standard Chartered Bank* [1999] QB 241, *Bennett v News Group Newspapers* [2002] EMLR 39 and *Chase v News Group Newspapers* [2003] EMLR 218, the judge accepted counsel’s formulation of the following principles:

(1) There is a rule of general application in defamation (dubbed the “repetition rule” by Hirst LJ in *Shah*) whereby a defendant who has repeated an allegation of a defamatory nature about the claimant can only succeed in justifying it by proving the truth of the underlying allegation – not merely the fact that the allegation has been made;

(2) More specifically, where the nature of the plea is one of “reasonable grounds to suspect”, it is necessary to plead (and ultimately prove) the primary facts and matters giving rise to reasonable grounds of suspicion *objectively judged*;

(3) It is impermissible to plead as a primary fact the proposition that some person or persons (eg law enforcement authorities) announced, suspected or believed the claimant to be guilty;

(4) A defendant may (for example, in reliance upon the Civil Evidence Act 1995) adduce hearsay evidence to establish a primary fact – but this in no way undermines the rule that the statements (still less beliefs) of any individual cannot themselves serve as primary facts;

(5) Generally, it is necessary to plead allegations of fact tending to show that it was some conduct on the claimant’s part that gave rise to the grounds of suspicion (the so-called “conduct rule”).

(6) It was held by this court in *Chase* at [50] – [51] that this is not an absolute rule, and that for example “strong circumstantial evidence” can itself contribute to reasonable grounds for suspicion.

(7) It is not permitted to rely upon post-publication events in order to establish the existence of reasonable grounds, since (by way of analogy with fair comment) the issue has to be judged as at the time of publication.

(8) A defendant may not confine the issue of reasonable grounds to particular facts of his own choosing, since the issue has to be determined against the overall factual position as it stood at the material time (including any true explanation the claimant may have given for the apparently suspicious circumstances pleaded by the defendant).

(9) Unlike the rule applying in fair comment cases, the defendant may rely upon facts subsisting at the time of publication even if he was unaware of them at that time.

(10) A defendant may not plead particulars in such a way as to have the effect of transferring the burden to the claimant of having to disprove them.

23. The judge decided to make the orders of which complaint is now made because he accepted arguments advanced by Mr Rampton QC, who appeared for the claimant both in this court and in the court below, which ran along the following lines. The defendants could, in general terms, mount a case to the effect that there were at the relevant publication date facts that gave rise, objectively judged, to reasonable grounds to suspect the claimant of terrorist activity, provided that their pleaded case did not infringe any of the ten principles of law I have listed above. It would be legitimate to plead as part of such a case primary facts which happened to coincide with those that gave rise to suspicion on the part of one or more police officers. But those facts had to be judged objectively, like any other facts. The allegation that any particular police officer believed them to be true (or considered that they gave rise to suspicion) was irrelevant. The fact that a police officer believed certain allegations, or thought certain facts suspicious, did not render suspicions “reasonable” that a jury might otherwise dismiss as *not* passing the objective test.
24. Mr Rampton accepted that in some cases evidence could be adduced, as part of the background narrative, to the effect that police officers had suspected or arrested the claimant or raided his premises, if such was the fact. But in such cases everyone involved (and especially the jury) should be clear as to the role of such evidence. There should be no doubt on anyone's part that the suspicions of police officers did not support a plea of justification, and, in particular, they did not in themselves establish reasonable grounds to suspect.
25. The judge said that depending on the circumstances, a pleading in the form challenged by Mr Rampton might offend against the repetition rule or the conduct rule. More fundamentally, it might offend the basic principle that the only point of such a plea is to justify a defamatory meaning. That X suspected Y of a crime was only defamatory in so far as it conveyed the imputation that there were reasonable grounds for such a suspicion. It might well be that the ultimate objection was that such a pleading placed a burden of proof on the claimant to prove his innocence. He said that all the rules he had identified might be regarded as buttressing the presumption of innocence on which a claimant is entitled to rely (see *Chase* at para 65).
26. In these circumstances he ruled that that part of paragraph 7 of the defence which alleged police suspicions was impermissible as a pleading, although it was no doubt capable of amendment. What was more, if it came into evidence at trial for

some reason, the jury would have to be told in the clearest terms that the mere fact of police suspicions was not capable of supporting the plea of justification. The graver the allegations, the more important it was to hold fast to these principles and not to dilute their purity.

27. The judge went on to say that sub-paragraphs (6) and (7) of the particulars of justification clearly offended against a number of the principles he had listed. He accepted that the defendants would be able to set out the grounds of suspicion on which the raid was based, if they had access to them, but they could not rely on the mere fact of the raid. He therefore struck out the passages to which I have referred.
28. Mr James Price QC, who appeared for the defendants in the court below, was prevented by another professional engagement from appearing before us, but Mr Rampton assured us that the way in which Mr Caldecott QC argued the appeal before us raised issues which Eady J had not been invited to consider. Unhappily, this contention was disputed, a matter to which I will return in paragraph 32 below.
29. Mr Caldecott submitted that paragraph 7 of the defence had rolled up two *Lucas-Box* meanings in one:
 - (a) that the police suspected the claimant of involvements in terror-related activities;
 - (b) that the claimant was suspected of such activities on grounds that were reasonable and/or strong.
30. He said that each of these meanings carried a defamatory sting. They could be equated with the second and third meanings which I set out in paragraph 45 of my judgment in *Chase* (see para 21 above), which in turn can be traced back to the speech of Lord Devlin in *Lewis v Daily Telegraph* [1964] AC 234, 282:

“In the present case, for example, there could have been three categories of justification – proof of the fact of an inquiry, proof of reasonable grounds for it and proof of guilt.”
31. Mr Caldecott submitted that his clients were entitled to rely on the matters pleaded in sub-paragraphs (6) and (7) of the particulars of justification in defence of the first, less serious, sting identified in para 29(a) above, although he entirely accepted that the judge would have to direct the jury that the mere fact of a police suspicion or a police raid could not justify the second, much more serious, sting in para 29(b) above.
32. In the end, Mr Rampton accepted that the two meanings could be split in this way. He said, however, that although there was a sign of this line of argument in Mr Price’s skeleton argument in support of the appeal, it was not the way on which argument had been advanced in the court below. In this context he showed us a paragraph of Mr Price’s skeleton argument in that court, which he accepted was directed towards obtaining a Part 24 judgment and not towards averting a strike-

out. This document certainly disclosed no sign of Mr Caldecott's arguments in this court. On the other hand, the defendants maintain that Mr Price did advance an oral argument in response to the claimant's application to the effect that the language used in the statement of case had effectively rolled up two meanings in one. This is not a dispute we are able to resolve.

33. In all the circumstances I would accept that the defendants are entitled to reinstate sub-paragraphs (6) and (7) of their particulars of justification provided that paragraph 7 of the defence is amended to make a clear distinction between the two different *Lucas-Box* meanings relied on, and the necessary amendments clearly show which of the particulars of justification are relied on in support of which *Lucas-Box* meaning.
34. Similar objection had been taken to Response 2. Although in this instance the plea was at one remove from the claimant, the judge considered that the form of pleading was objectionable for the same reasons, and he ruled against it. I do not consider that it is necessary to say very much about this matter. Once again, it is likely that if the wording had been reframed the language of the response might have been acceptable, but the distinction between there being grounds for inquiry and reasonable grounds for suspicion was not effectively made in the original response, and the judge was entitled to take the approach he did.
35. Incidents like this show the wisdom of the long-abandoned practice whereby a pleader, as a matter of etiquette, would warn his opposite number if he intended to strike out any part of his pleadings, so that an opportunity might be taken to examine whether any amendment might be made to cure the alleged defect. I cannot help thinking that, given reasonable notice of the complaint and a less antagonistic approach to the litigation by the claimant's lawyers, a lot of the expense and heat engendered by this ancillary dispute might have been avoided.
36. I now turn to the second matter in issue on this appeal. On 14th February 2003 the defendants' solicitors made four applications to the court. One of these was accommodated by an amendment to the claimant's statement of case, and the judge dismissed the other three. We are not concerned with three of them (striking out pursuant to CPR 3.4; summary judgment for the defendants pursuant to CPR 24.2; and a ruling on meaning pursuant to para 4.1 of the Practice Direction to CPR 53). All that remains is the defendants' application for a conditional order for security for costs pursuant to CPR 24.6, which was expressed as an alternative to the order for summary judgment that was being sought. The grounds for seeking this order were that:

“...it is improbable that the claim will succeed and any order against the defendant is likely to be difficult to enforce.”

This wording was, no doubt, based on the wording of paragraph 4 of the Practice Direction to CPR 24 which provides that:

“Where it appears to the court possible that a claim ... may succeed, but improbable that it will do so, the court may make a conditional order as described below.”

37. The defendants' application was supported by a witness statement from their solicitor, Mr Beabey. He referred to the claimant's notice of funding, and said that based on his firm's assessment of the claimant's prospects of success it was likely that the success fee provided for in the CFA was 100% (the maximum permitted). The claimant appeared to be of limited means, and in the absence of ATE cover the defendants were unlikely to recover any of their costs if they won the action, whereas they would be likely to have to pay the claimant's costs if they lost. Mr Beabey went on to say that:

“The costs of defending this action are likely to be extremely high. The defendant has entered a substantive defence pleading justification and qualified privilege. The best estimate at this early stage of the costs that will be incurred to defend the claim to judgment after a jury trial is approximately £300,000. For the reasons given above, this amount is likely to be irrecoverable if the defendant wins. If the claimant were to win at trial his bill of costs is likely to be at least as high as the defendant's and subject to uplift by way of a success fee which I have mentioned. This could result in total costs in excess of £1 million plus any award of damages which the court may make.

Any reasonable award of damages is likely to be so low in comparison to the costs of a trial that those costs will be entirely disproportionate to the issues at stake for the parties. In those circumstances the defendant is faced with a situation in which it does not make economic sense to defend the proceedings. The economics of the situation clearly dictate in favour of the defendant making attempts to settle the action by offering compensation for a publication in respect of which it has been advised it has a sound defence. It is reluctant to do so because of issues of journalistic integrity and the fact that such action would inevitably encourage claimants and their solicitors to make similar claims in the future. This in turn would be likely to lead to a self-imposed restraint on publication for fear of being sued by impecunious claimants, no matter how satisfied the potential defendant was that his story is true and/or covered by qualified privilege. Such a chilling effect on a newspaper exercising its right to freedom of expression would not be in the public interest which the *Reynolds* defence, for example, is designed to protect.”

38. Much of the rest of this witness statement was concerned with argument, but in paragraph 8 Mr Beabey set out the alternative approaches he was inviting the court to consider:

“The defendant believes not only that this claim has less than a 50-50 chance of success but that the claimant in fact has no real prospects of success. Accordingly it is making this application for summary judgment. Even if the court

were to consider that the claimant has some albeit improbable prospect of success the defendant respectfully submits that the court should be very cautious before it permits cases with less than a 50-50 chance of success to proceed on a CFA without an ATE, without clearly signalling the likely problems should the CFA require to be enforced. In the alternative to the defendant's substantive application, the defendant submits that the proper way for the court to do this is to make a conditional order. My firm has written to the claimant's solicitors notifying them of this application and alerting them to the need to provide the court with evidence of the claimant's means for this purpose."

39. On 9th May 2003 the claimant filed a witness statement in which he set out evidence of his means. Apart from the value he ascribed to his Mathaba website, which generated a small income, he showed that he did not have the means to satisfy a conditional order. This evidence is not in issue on the appeal. The claimant said he was still pursuing the possibility of obtaining ATE insurance, but we were told by Mr Rampton that such cover would not be available for the trial. The claimant said that it was only because of the availability of a CFA that he was able to continue this litigation with legal representation.
40. Mr Price contended in the court below that if a claimant embarked on a libel action on a CFA without ATE cover the court should treat this conduct as an abuse of its process if the prospects of success, viewed objectively, were less than evens. Such conduct was likely to have a chilling effect on journalism because the media would feel constrained to "buy out" such claims at an early stage rather than face the prospect of paying heavy legal costs win or lose. Accordingly, even if it could not be said that the prospects of success were fanciful (so that the claim would be vulnerable to the normal CPR Part 24 test for summary judgment), the court should make an appropriate conditional order if it judged on the evidence before it that it was more probable than not that the action would fail. If no ATE cover was in place and it was not practical to require it, a modest payment into court should be ordered as a "marker" to signify that the court had "rumbled" the abuse.
41. The judge, who has immense experience in this field of law, said that there was no doubt that Mr Price had highlighted a general cause for concern, and that the availability of CFAs in defamation cases (often including a success fee of up to 100%) certainly created the potential for a chilling effect on investigative journalism and for significant injustice. In a rather different context Gray J, who has equally vast experience of defamation practice, can be taken to be expressing a similar view in a passage at the end of his judgment in the later case of *Pedder v News Group Newspapers Ltd* [2002] EWHC 2442 (QB) at [41].
42. In the present case, however, the judge said he had to bear in mind the modern principles relating to security for costs, as explained by Simon Brown LJ in *Olatawura v Abiloye* [2003] 1 WLR 275 at [26]. Although those comments did not concern a libel action, there was no basis for thinking that they did not apply in such a context. The court should always be on its guard against "exorbitant

applications for summary judgment ... in a misguided attempt to obtain conditional orders for security for costs”. Even where the court was satisfied that the provision of security at a particular level would not preclude the claimant’s access to justice, the occasions when security was ordered solely because the case appeared weak might be expected to be few and far between. The court should be reluctant to be drawn into an assessment of the merits beyond what was necessary to establishing whether the Part 24 test had been fulfilled. Yet that was what he was being invited to do.

43. He said it might be asked what was the point of a payment into court of a token character, where anything more substantial would be likely to bring the proceedings to a rapid conclusion (thus hindering the claimant’s access to justice and working against one of the principal policy considerations underlying the CFA regime). Mr Price’s reasoning in this context was that if the court had pronounced, at whatever stage it was invited to do so, that the chances of success were less than 50%, then this could be reflected in the costs orders made at the end of the litigation – either with regard to the exercise of the trial judge’s discretion or on a detailed assessment by the costs judge.
44. The judge said that there were obvious practical difficulties about any such solution. In a situation in which the claimant had won his case, and was seeking in consequence to recover his costs (including those specifically associated with the CFA agreement), this hypothesis involved the conclusion either that the claimant had succeeded against all the odds, or that the balance had changed over the course of the litigation as to where the merits lay.
45. He felt that in this situation it was difficult to understand how a judge or master could have any significant impact upon the trial judge’s wide discretion on costs, or for that matter on the detailed assessment by the costs judge, by virtue of what could only have been a preliminary and provisional view as to the merits at an early stage. The trial judge was bound to form an assessment of the merits on the basis of a much fuller picture and to reflect this assessment in the discretionary exercise of awarding or withholding costs. If the claimant won hands down, perhaps on the verdict of a jury, the trial judge could hardly penalise him or his legal advisers because months or even years earlier it had appeared doubtful that he would achieve his vindication. Furthermore, the judge said that it was by no means unknown in libel litigation for there to be a wide range of views on the merits of the parties’ respective cases, whether at the outset or indeed at the commencement of the trial. What was more, the overall assessment of the merits of the litigation could often change significantly as the litigation progressed (for example on the disclosure of documents, the exchange of witness statements or the cross-examination of the claimant). There would be very few cases in which a judge was in a position to make an Olympian pronouncement as to the “true” merits of the litigation even at the close of pleadings, and here the application had been launched before the Reply was served.
46. The judge said that because of the wider implications of Mr Price’s submission as to what the court’s approach should be to CFA funded litigation, he was obliged to consider libel actions more generally rather than focusing too narrowly on the facts of this particular case. There might be situations where a claimant’s solicitor and counsel were prepared to go ahead in supporting the claim notwithstanding

that a cold and dispassionate assessment of the likely outcome would lead them to the conclusion that the case was unlikely to succeed. The judge could imagine circumstances in which the evidence ranged against the claimant appeared very strong indeed. In a case, however, which turned upon the credibility of witnesses, the lawyers in question might simply have faith in their client after having interviewed him or her in depth. It was difficult to see why such a case, perceived by those lawyers to be “meritorious”, should not be funded on a CFA basis. He instanced in this context the recent case of *Lillie & Reed v Newcastle City Council* [2002] EWHC 1600 (QB). Here there would be nothing obviously inconsistent with the intention of the legislature. Still less should the lawyers’ conduct, commercially imprudent though it arguably might be, be characterised as either “improper” or an “abuse”.

47. In these circumstances he declined to make the order sought.
48. By the time the case reached this court disclosure of documents had taken place and witness statements (including a 114-page statement from the claimant) had been exchanged. At a hearing in January 2004 the court refused to admit a witness statement from the claimant’s solicitor, Mr Pepper, describing his experiences in libel actions under the CFA regime. It also refused to permit interventions by other representatives of the news media describing their experiences. In a judgment with which Mance LJ and Park J agreed (see [2004] EWCA Civ 81) I said at paras 3-7:

“3. At the heart of this appeal is whether the court does have the power in circumstances like this to police the litigation by one or other of the types of order that Mr Price is suggesting that it can make, and it will be considering this matter against the facts of this case. In my judgment, it will be much more straightforward for the court, in a necessarily short two-day hearing, to go straight to the real issue which is whether the court has power to make the type of order Mr Price suggests against the background of the evidential material in this case without being distracted by considering other matters such as the matters set out in Mr Pepper's statement, or the experience which other newspapers and representatives of the news media might have.

4. It would cause great concern if we were going to go along that path as an appeal court. The proceedings will get quite out of control, there will be submissions and requests to cross-examine on factual evidence, there will be the kind of requests for evidential material and statistical material we have already seen in the correspondence, and if new parties were allowed to intervene one would emerge with a quite unpoliceable piece of appellate litigation.

5. I go back to the view of the very experienced judge when he said that Mr Price had highlighted a genuine cause for

concern and that there was the potential for a chilling effect on investigative journalism and for significant injustice.

6. Against that background, in my judgment, the course the court should adopt is to permit the claimant to put in such further evidential material from the witness statements which were not before the trial judge on the basis that they should be lodged in the Court of Appeal as soon as possible and in any event within four weeks, leaving it to the decision of the court which hears the case to determine whether formally to give permission to adduce this material once it has heard proper argument on the matter, if it is lodged. That court will be able to pre-read and see the nature of the material.

7. I would not be disposed to allow Mr Pepper's material to be put before the court. If it was to be put before the court there would have to be cross-examination, and there would have to be, no doubt, disclosure to be policed and statistical evidence. In my judgment it would take us not much further than where Mr Price persuaded the judge to end up in his judgment. When I say that we are concerned in this appeal with the facts of this particular case, it is the genius of the common law that one does decide these matters on a case-by-case basis. Then after this court has decided whether or not the court does have power to police these matters, it may be on some subsequent occasion before one of the very experienced judges who handle cases of this kind in the Queen's Bench Division that more evidence might be sought to be adduced depending on the view that this court takes on the central issue of law."

49. At that stage of the appeal the defendants were arguing that the judge ought to have assessed the merits of the case, and that if he considered that it was a weak one, he should have ordered that it might continue only if the claimant obtained ATE insurance (if he wished to continue to rely on a CFA for funding his litigation), or he should have made an order designed to limit the costs which the claimant could claim to an amount strictly proportionate to the real merits and worth of the case.
50. In the original skeleton argument supporting the appeal, for instance, it was suggested that if the court considered the case to be a weak one it should scrutinise the position (and particularly the CFA) carefully for the purpose of deciding on the appropriate order to make in order to ensure that funding by way of a CFA ceased or that there should be no recovery of costs under the CFA at the end of the case. The court was reminded that the non-availability of legal representation in a libel action raised no ECHR Article 6 difficulties (see *McVicar v UK* [2002] 35 EHRR 22, paras 46-72).
51. When Mr Caldecott took over the conduct of the appeal shortly before the appeal was heard he abandoned the suggestion that we should try to assess the merits of

the claim on paper, thereby entirely jettisoning his predecessor's approach. Following a hearing on 22nd January Mr Price had suggested that the court should make an order

“pursuant to the court's general powers of case management under CPR 3.1, alternatively in the exercise of the court's inherent jurisdiction, that:

- (1) this claim be stayed pending the discontinuation of the funding of the claim on the basis of a CFA;
- (2) this claim be stayed pending the obtaining of ATE insurance to cover the defendants' costs of the claim in the event that the defendant successfully defends it; and
- (3) in the event that the claim continues to be funded on the basis of a CFA, the claimant's recoverable costs of this claim be capped in an amount that is proportionate in all the circumstances of the claim.

Further or alternatively, this matter be remitted to the High Court for a further hearing to determine the appropriate order consequent on the judgment of this court.”

Mr Caldecott, for his part, made it clear that he would be inviting the court to take a dynamic case management approach to cap the costs and ensure that they were proportionate, rather than leaving such matters to assessment after the event. He was not pursuing the matter suggested in (2) above.

52. We were told that the trial of the action was fixed to start in early June 2004, although there was an unresolved dispute as to its likely length and whether a longer trial could be accommodated at that time.
53. It therefore turned out that the court was not being invited to set aside Eady J's order on the grounds that he should have accepted the arguments Mr Price was advancing to him. Instead, Mr Caldecott was now submitting that in the light of the very serious and novel concerns which this case raised this court should on its own initiative make a different type of order from that which the defendants had sought from the judge. Alternatively, at the very least the court should explain what steps a court might take to control the situation and similar situations in the future.
54. It needs to be said at once that this court is an appellate court and not a court of original jurisdiction. Its power to interfere with a judge's order are derived from CPR 52.11(3), and in the absence of consent I do not consider that the court has any power to make a quite different type of order from the order the judge was asked to make if it is satisfied that the judge's approach cannot be faulted. For this reason I would dismiss this part of the defendants' appeal.
55. The court has, however, heard full argument from two of the most experienced practitioners at the defamation bar, and it would be quite wrong to leave this

appeal without saying a little about the powers the court possesses to keep the balance fairly between the interests of a claimant seeking to vindicate his/her reputation with the help of a CFA who cannot afford appropriate ATE cover and the interests of the media as the eyes and ears of the public. This is of especial importance in the “war against terrorism” where in a free society fearless reporting has often exposed information which it has been in the public interest to expose.

56. The present difficulties arise at the interface between the civil justice reforms and the reforms concerned with litigation funding. The case is also set against a background of disquiet about the level of legal costs and the size of jury awards in libel cases which recent changes in the law have not entirely dissipated. That something is still seriously wrong can be readily gleaned from the fact that it was common ground that the claimant’s award would be unlikely to exceed £150,000 even if he succeeded on every issue, including his claim for aggravated damages. In February 2004 the claimant’s solicitors estimated their past and prospective costs in the main action to be just under £360,000. This figure did not allow for any success fee uplift, or for the costs of these ancillary proceedings before Eady J and this court. In March 2004 the defendants’ solicitors said that their likely costs, past and future, would be just under £350,000, a sum which did include all the costs of this ancillary litigation other than a figure of about £35,000 for the likely costs after Mr Caldecott and his junior were instructed on this appeal.
57. Since parts of both sides’ calculations were based on a likely five-day trial, the likely figures for a ten-day trial would be higher still. Of course, as Mr Rampton observed, a claimant brings an action like this not only to recover damages but also to vindicate his reputation, but that consideration cannot go far to bridge the gulf between the value of this action to the claimant and its value to the lawyers instructed in the case. As I have said, something seems to have gone seriously wrong.
58. There were a number of striking features about the way in which the claimant’s solicitors conducted this litigation. There were no pre-action costs other than those associated with preparing the original letter before action, yet the claimant’s solicitors revealed that by the time the original statements of case had been exchanged they had already incurred costs in excess of £32,000 (a sum equivalent to a potential liability of £64,000 for the other side on the basis of a 100% success fee). Over 54 hours of a partner’s time had already been charged out at just over £20,000, and over 48 hours of a trainee solicitor’s time at over £7,000. Mr Caldecott observed that these charges represented 12 whole working days of solicitors’ time. The CFA had been made on 11th September 2002, so that the uplift would relate to all the work done after that date. On 27th January 2003 the claimant’s solicitors said that their overall costs of the action were likely to be £238,250, of which over half was attributable to the cost of preparing for trial and for the five-day trial itself.
59. It was not until 15th October 2002 that the letter before action, settled by junior counsel, was written. Its late arrival gave the defendants no chance to consider their position before the proceedings were started six days later, and its vituperative tone appeared calculated to raise the temperature and to inflate the parties’ legal costs in a manner that entirely conflicts with the philosophy

underlying the civil justice reforms. Because the claimant's solicitors knew of their client's lack of means and the absence of any ATE cover, they knew that the defendants would be placed in the awkward position that whatever they did to defend themselves they would be unlikely to recoup the legal costs they incurred, and if they attempted a settlement they would probably have to pay an uplift (which might be as much as 100%) on all the claimant's solicitors' legal costs. In other words, none of the usual constraints existed which tend to encourage a party's solicitors to advance their client's claim in a reasonable and proportionate manner.

60. This initial letter arrived out of the blue over ten months after the second article was published, and nearly a year after the first. The first page contains a charge that the newspaper was recklessly and maliciously peddling many falsehoods and misrepresentations to millions of its readers. The fourth page includes accusations of cant and reckless falsehoods, misrepresentations and inaccuracies. Page 5 charges the newspaper with making a reckless exaggeration for a malicious purpose. Page 8 alleges in the alternative an incriminating smear or a maliciously reckless desire to wound, and it goes on to refer to the second article's malicious agenda of incriminating misrepresentation. Page 9 contains allegations of an incriminating smear, a baseless smear, and an accusation of wicked malice. The final page refers to dreadful libels. If the letter was intended to reflect the requirements of the Pre-Action Protocol for Defamation (which sets standards of good practice in relation to letters of this type) it departed markedly from those requirements in a number of important respects.
61. In the face of a letter like that, the prospects of an early settlement of the claim must have appeared to any objective observer slim almost to vanishing point. Yet, as Mr Caldecott observed, because the claimant's lawyers were running their client's case in such an extravagant manner, his clients faced a likely bill for Mr Musa King's costs of over £60,000 (if the uplift was as much as 100%) even if they attempted to settle the claim at the first possible opportunity in January 2003 after the parties had exchanged their original statements of case.

The request for further information.

62. Mr Caldecott's next complaint about extravagant conduct related to the claimant's lawyers' behaviour after his clients had served a response to a request for further information relating to their defence. So far as this procedure is concerned, the Practice Direction to CPR Part 18 contains the following pieces of practical guidance:

“1.1 Before making an application to the court for an order under Part 18, the party seeking clarification or information (the first party) should first serve on the party from whom it is sought (the second party) a written request for that clarification or information (a Request) stating a date by which the response to the Request should be served. The date must allow the second party a reasonable time to respond.

- 1.2 A Request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or to understand the case he has to meet.
 - 4.1(1) If the second party objects to complying with the Request or part of it or is unable to do so at all or within the time stated in the Request he must inform the first party promptly and in any event within that time.
 - 4.2(1) There is no need for a second party to apply to the court if he objects to a Request or is unable to comply with it at all or within the stated time. He need only comply with paragraph 4.1(1) above.
 - (2) Where a second party considers that a Request can only be complied with at disproportionate expense and objects to comply for that reason he should say so in his reply and explain briefly why he had taken that view.”
63. It will be observed that the emphasis, as always in the CPR, is on confining this part of any litigation (in which costs tended to get out of control in the pre-CPR regime) “strictly” to what is necessary and proportionate and to the avoidance of disproportionate expense. Lord Woolf MR spoke trenchantly about the governing principles in his judgment in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at pp 792-4.
64. In the present case the claimant’s solicitors served a substantial request for further information concerning the defence, to which the defendants responded in detail on 9th April 2003. By this time the defendants’ solicitors had issued their application for summary judgment which was listed for a two-day hearing on 15th-16th May, and the way was clear for the claimant’s solicitors to file and serve timeously any evidence in response to this application and to file timeously, if so advised, any cross-application.
65. Instead, they dispatched a ten-page letter on 28th April which was settled by junior counsel in as aggressive a style as their letter before action. They said that the responses they had received were “by turns evasive, equivocal, confused and confusing”. The remainder of the letter was written in the same timbre. Mr Caldecott observed that the preparation of this letter, to which the defendants’ solicitors were put to the expense of preparing a courteous and concise three-page letter in reply on 1st May, would be charged out at £750 per hour (assuming a 100% mark-up), not including counsel’s fees. He said that the court had little opportunity to discipline conduct of this type.
66. On 6th-8th May the defendants’ solicitors filed further evidence in support of their application, and on 9th May the claimant filed a witness statement attesting to his means. On Monday 12th May the claimant’s solicitors filed their cross-application, on which they succeeded in part, and on 14th May they filed a further

application (“the website application”) which the court did not have time to accommodate on 15th-16th May. On 13th May they also filed a 30-page Reply. One of the problems we have experienced in understanding what happened at the hearing on 15th-16th May was that the claimants’ cross-application was served so late that the defendant’s counsel was not able to respond to it in his skeleton argument served in advance of the hearing. This is illustrative of what always tended to happen in the pre-CPR regime when litigation solicitors took up unnecessary time and incurred disproportionate expense in litigating aggressively in correspondence instead of conducting themselves within the structured framework provided by the rules.

The claimant’s witness statement

67. Master Foster’s order of 7th February 2003 had included a direction for the exchange of witness statements by 5th May. This timetable necessarily had to be extended in the light of the defendants’ application for summary judgment, and in the event witness statements were exchanged on 29th August. By this time the parties had exchanged their statements of case, so that it would by now be evident what was common ground and what had to be proved by evidence.
68. In Chapter 25 of his *Interim Report on Access to Justice* (1995) Lord Woolf described vividly many of the contemporary anxieties about the spiralling cost of preparing witness statements. He firmly endorsed the practice of requiring that they should be exchanged, but he made some suggestions designed to make it possible for parties to litigation and their advisers to adopt a more sensible approach to their preparation (para 21). In particular, he said that the court should make it clear that it was not prepared to tolerate extravagance in their preparation (para 20).
69. He returned to the same topic in Chapter 12 of his *Final Report* (1996). The chief mischief he was addressing there was what he described as “an elaborate, costly branch of legal drafting” (para 54) and a concern by lawyers that they had “to draft absolutely comprehensive statements” (para 58) because of their fear that judges would not permit the witness to give any oral evidence at the trial which was not contained in the witness statement.
70. CPR 32.4 and 32.5 contain the substantive rules relating to witness statements under the new procedural regime. CPR 32.4 provides, so far as is material, that:
 - “32.4(1)A witness statement is a written statement signed by a person which contains the evidence, and only that evidence, which that person would be allowed to give orally.
 - (2)The court will order a party to serve on the other parties any witness statement of the oral evidence which the party serving the statement intends to rely on in relation to any issues of act to be decided at the trial.”

71. CPR 32.5 contains measures intended to alleviate the problem which concerned Lord Woolf so much, and CPR 32.8 contains a cross-reference to the Practice Direction to that Part. The following paragraphs of that Practice Direction contain relevant guidance:

“20.1 A witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence ...

25.1 Where –

...

(2) a witness statement

...

does not comply with Part 32 or this practice direction in regard to its form, the court may refuse to admit as evidence and may refuse to allow the costs arising from its preparation.”

72. Section 7.10 of the Queen’s Bench Guide (2003 White Book, Vol II, p 122) also contains helpful guidance about witness statements. In particular paragraph 7.10.4 contains the following advice:

“(3) a witness statement should be as concise as the circumstances allow, inadmissible or irrelevant material should not be included;

(4) the cost of preparation of an over-elaborate witness statement may not be allowed.”

73. As I have already said, the claimant’s witness statement contained 114 pages. I have already referred to the very great escalation in the claimant’s solicitors estimate of their costs in the action. A significant proportion of those costs were attributable to the preparation of this statement.

74. Mr Rampton told us that in preparing this statement the claimant had avoided making the mistakes to which reference is made in two of the cases mentioned in the notes to the White Book (*Alex Lawrie Factors Ltd v Morgan*, The Times, 18th August 1999 CA and *Aquarius Financial Enterprises v Certain Underwriters at Lloyd’s* (2001) 151 New LJ 694, Toulson J). Mr King had written the first draft of his witness statement himself, and his lawyers’ time had been taken up in translating it into a form in which they considered that it could properly be served. Mr Caldecott observed that large parts of this witness statement were unnecessary because they went to matters on which there was common ground or to peripheral or irrelevant issues or to matters on which excessive detail was wholly inappropriate in the new CPR context with its emphasis on what is necessary and proportionate. He also submitted that substantial sections of the statement were inadmissible: indeed, there were six paragraphs concerned with serious injury to the claimant’s mental health, which is not mentioned in his statement of case, and

three paragraphs relating to foreign publication, of which similarly no complaint is made.

75. His main complaint, however, that this was another area in which, in the context of litigation conducted by a claimant on a CFA without ATE cover, conduct of this kind was wholly out of place. His clients would be put to irrecoverable expense in instructing their lawyers to consider this enormously lengthy statement, and in the event of any settlement into which they might be forced, not by the merits of the case but by purely commercial considerations, the claimant's solicitors would probably be seeking twice their already high hourly costs for the work they did in connection with this statement.
76. He said that extravagant conduct of this kind could not be effectively policed by robust orders made by a trial judge (if the action ever went to trial) or by drastic surgery by a costs judge, because by then the defendants had already incurred the irrecoverable cost of having to respond to it. Experience, moreover, had shown that recourse to the wasted costs jurisdiction was an unsatisfactory, unpredictable and expensive means of bringing such conduct under control.
77. Although he did not suggest that a costs capping order was appropriate in the present action, because it was now so close to trial, he invited the court to suggest that such an order, if made at an appropriately early stage of the proceedings and effectively policed thereafter, would be the most effective way of exercising the necessary control.

Costs Estimates and Costs Capping Orders

78. In this context the Costs Practice Direction ("CPD") contains quite new arrangements for enabling the court and the parties to understand how costs may be spiralling as the litigation proceeds, another matter to which Lord Woolf attached considerable importance. Section 6 of the CPD provides, so far as is relevant:

"6.1 This section sets out certain steps which parties and their legal representatives must take in order to keep the parties informed about their potential liability in respect of costs and in order to assist the court to decide what, if any, order to make about costs and about case management.

6.2(1) In this section an 'estimate of costs' means –

- (a) an estimate of base costs (including disbursements) already incurred; and
- (b) an estimate of base costs (including disbursements) to be incurred,

which a party intends to seek to recover from any other party under an order for costs if he is

successful in the case. ('Base costs' are defined in paragraph 2.2 of this Practice Direction.)

- (2) A party who intends to recover an additional liability (defined in rule 43.2) need not reveal the amount of that liability in the estimate.

6.3 The court may at any stage in a case order any party to file an estimate of base costs and to serve copies of the estimate on all other parties. The court may direct that the estimate be prepared in such a way as to demonstrate the likely effects of giving or not giving a particular case management direction which the court is considering, for example a direction for a split trial or for the trial of a preliminary issue. ...

6.4(1) When a party to a claim which is outside the financial scope of the small claims track, files an allocation questionnaire, he must also file an estimate of base costs and serve a copy of it on every other party, unless the court otherwise directs. The legal representative must in addition serve an estimate upon the party he represents. ...

- (2) Where a party to a claim which is being dealt with on the multi track files a pre-trial check list (listing questionnaire), he must also file an estimate of base costs and serve a copy of it on every other party, unless the court otherwise directs. Where a party is represented, the legal representative must in addition serve an estimate on the party he represents. ...

6.6 On an assessment of the costs of a party the court may have regard to any estimate previously filed by that party, or by an other party in the same proceedings. Such an estimate may be taken into account as a factor among others, when assessing the reasonableness of any costs claimed."

"Base costs" means costs other than the amount of any additional liability (CPD, para 2.2).

79. In *Solutia UK Ltd v Griffiths* [2001] EWCA Civ 736; [2001] 2 Costs LR 247 this court was concerned with issues relating to the appropriateness of the claimants instructing London solicitors in a case in which those solicitors had submitted a bill of costs totalling £220,000 in connection with a claim in which their clients had recovered £90,000. Sir Christopher Staughton (at para 25) said that two members of the court had described the bill as ludicrous, although that would be a

matter for the costs judge to determine. The court, however, upheld the judge's ruling that it had been appropriate to instruct London solicitors.

80. The fact that the court was uneasy about the sheer size of this legal bill, judged retrospectively, led two of its members to draw attention to the desirability of a judge being able to control legal expenditure on a piece of litigation prospectively. Sir Christopher drew attention (in para 27) to the statutory power possessed by an arbitral tribunal under Section 65 of the Arbitration Act 1996 to limit the amount the parties to an arbitration could incur by way of costs. This is a power which must be exercised, if at all, at an early stage, so that a party does not find that it has spent more than the limit if a costs cap was directed later on.
81. Sir Christopher also referred (at para 28) to the duty that normally rests on a party filing an allocation questionnaire to file and serve an estimate of base costs: see CPD para 6.4(1). Para 6.3 of that practice direction gives the court power to direct any other party to do the same, and Sir Christopher suggested (at para 29) that the court's case management powers would allow a judge at the allocation stage to exercise the power of limiting costs, either indirectly or even directly, so that they were proportionate to the amount involved.
82. Sir Christopher thought that such a power might be derived from CPR 3.1(6), although he saw difficulty in this context in the wording of CPR 3.1(5). In my judgment Mr Rampton was correct when he suggested that the power (whose existence he did not attempt to challenge) could be derived from CPR 3.2(m) which confers a power to
- “take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.”
83. It is, after all, an important feature of the overriding objective that the court must be enabled to save expense and deal with a case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party (CPR 1.1), and the parties are required to help the court to further the overriding objective (CPR 1.3).
84. In *AB v Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034 (QB) Gage J held (at para 18) that the court's general powers of case management were sufficiently wide to encompass the making of a costs capping order both in group litigation (with which he was then concerned) and in other actions. This judgment was followed by Hallett J in *Various Ledward Claimants v Kent & Medway HA* [2003] EWHC 2551 (QB), in which the chief costs judge was sitting with her as an assessor. She said:

“10 ... I am very concerned that without my intervention the costs in this particular case will spiral out of control, if they have not done so already. I intend to do what I can in the time remaining to ensure that they remain proportionate ...

- 11 I am satisfied that this case is a classic example of litigation, driven by the lawyer acting for the claimants, in which there is a real risk that costs have been and will be incurred unnecessarily and unreasonably ...
- 12 ... In summary, I fear that [the claimants' solicitor] is, at the very least, over generous with her time and with the time of her staff in planning the preparation of these actions for trial.”
85. In my judgment, Gage J and Hallett J were correct to consider that the court possessed the power to make a costs capping order in an appropriate case. The language of section 51 of the Supreme Court Act 1981 is very wide, and CPR 3.2(m) confers the requisite power. Needless to say, in deciding what order to make the court should take the principles set out in CPR 44.3 (which govern the retrospective assessment of costs) as an important point of reference. In *Leigh v Michelin Tyre plc* [2003] EWCA Civ 1766 [2004] 2 All ER 175 Dyson LJ said (at para 34) without inquiring (as we have done) into the source of the power to make a costs capping order:
- “We recognise that the use of CPR 43 PD para 6.6 to control costs by taking estimates into account at the assessment stage is not the most effective way of controlling the cost of litigation. It seems to us that the prospective fixing of costs budgets is likely to achieve that objective far more effectively.”
86. I turn now to the suggestion, first ventilated by Mr Price in a letter he wrote to the judge after oral argument had been concluded in the court below, to the effect that a cost capping order might be appropriate in this litigation as a means of controlling the potential injustice of which he had made complaint.
87. This is the first occasion on which this court has had to consider matters relating to the use of CFAs in defamation litigation, or to cost capping orders in this context. Earlier decisions of the court in relation to CFAs have largely been concerned with their use in personal injuries litigation, where typically a solicitor who acts for a large number of injured claimants bears the risk of the failure of some of the cases he takes on a “no win no fee” basis because that risk is offset against his right to recover an appropriate uplift in his fees in the successful cases. His client has no wish to go bankrupt in the quest of personal injuries compensation, and will be protected from adverse costs orders (if he loses) by the ATE policy he has taken out. The liability insurers on the other side have the comfort of being able to recover their outlay in legal costs in the cases they win as some form of compensation for their having to pay the success fee and the claimant's ATE premium in the cases where they have to pay compensation to the claimant.
88. In *Callery v Gray (Nos 1 and 2)* [2002] UKHL 28; [2002] 1 WLR 2000 Lord Bingham identified (at para 2) three main aims behind the introduction of the new statutory arrangements for CFAs and ATE policies four years ago. The first of

these aims, which relates to the refocusing of legal aid expenditure on more worthy causes, has no relevance to defamation litigation, for which legal aid has never been available. The second and third aims deserve quoting in full:

“A second aim was to improve access to the courts for members of the public with meritorious claims. It was appreciated that the risk of incurring substantial liabilities in costs is a powerful disincentive to all but the very rich from becoming involved in litigation, and it was therefore hoped that the new arrangements would enable claimants to protect themselves against liability for paying costs either to those acting for them or (if they chose) to those on the other side. A third aim was to discourage weak claims and enable successful defendants to recover their costs in actions brought against them by indigent claimants.”

89. In their speeches in *Callery v Gray* different members of the House of Lords expressed concern about certain features of the new arrangements, in particular the lack of any financial incentive for claimants to challenge either the size of their lawyers’ fees or the amount of the uplift or the amount of the policy premiums (see Lord Bingham at para 10, Lord Nicholls at paras 14 and 16 and Lord Hope of Craighead at para 54). Lord Bingham, in particular, said (at para 10) that although the defendants’ appeal in *Callery v Gray* was being dismissed:

“... I would not wish to discount either the risk of abuse or the need to check any practices which may undermine the fairness of the new funding regime. This should operate so as to promote access to justice but not so as to confer disproportionate benefits on legal practitioners ... or impose unfair burdens on defendants ...”

90. Lord Hoffmann, for his part, was sceptical (at paras 18 and 31) about the extent to which courts could effectively police the matters that gave rise to such concern in that case. The present situation gives rise to even greater concern. It is not at all clear whether Parliament ever turned its mind to the consequences of defamation actions being conducted under a CFA without any ATE cover, or to the ECHR Article 10 considerations that were of such concern to Eady J and Gray J (see para 41 above).
91. Simple palliatives are not easy to identify. I have no doubt that Eady J was correct to reject the solution suggested to him by Mr Price for the reasons he gave (see paras 42-46 above) and that Mr Caldecott was right to exclude it from his submissions on the appeal. While experience has shown that courts can readily detect on paper those cases which have no real prospect of success – and also those where it is possible that a claim may succeed but improbable that it will do so (see para 36 above) - to go any further than this in the pre-trial assessment of the merits of an action, at whatever early stage of the proceedings the application is made, would be to lure the court into dangerous territory and to open the way to very undesirable satellite litigation.

92. I have equally no doubt, for the reasons given by Sir Christopher Staughton in *Solutia*, that it would be very much better for the court to exercise control over costs in advance, rather than to wait reactively until after the case is over and the costs are being assessed. In this context section 65 of the Arbitration Act 1996 (“the 1996 Act”), to which he referred in that judgment, is in these terms:

“65 (1) Unless otherwise agreed by the parties, the tribunal may direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount;

(2) Any direction may be made or varied at any stage, but this must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account.”

93. In my judgment, the court possesses pursuant to CPR 3.2(m) similar powers in relation to the conduct of litigation which it may exercise without the parties having any opportunity to agree otherwise. If defamation proceedings are initiated under a CFA without ATE cover, the master should at the allocation stage make an order analogous to an order under section 65(1) of the 1996 Act. In the ordinary course of things this order would cover the normal costs of the litigation. The master may consider it desirable to make the order subject to a condition along the following lines:

“...that if either party wishes to make any application to the court that may significantly increase the costs in this action, it must first apply to the court in writing for a direction varying this order and serve notice of its application on all the other relevant parties;

All relevant parties must file and serve up to date estimates of costs pursuant to Section 6 of the Costs Practice Direction within ... days of such notice being given;

The court will then decide whether and to what extent it will vary this direction before it permits the application to be issued.”

94. It would be helpful if the senior master were to assign a particular master to handle case management applications in this specialist field of law because they demand a degree of practical experience that will not become available if they are distributed generally among the masters. If the master considers that a budget or cap is required he should refer the issue of imposing a cap to a costs judge. The costs judge should determine what sum is reasonable and proportionate to fix as the recoverable costs of the action. Similar arrangements should be made, if and when necessary, in district registries of the High Court outside London.

95. The judgment of Lord Woolf CJ in *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 1 WLR 2450 should be particularly helpful in this context. While

counsel were correct to observe that in a defamation action the maximum financial value of a claim should not necessarily be decisive when determining the amount of costs it is reasonable to incur in pursuing it (because the claimant may prize the vindication of his/her reputation far above any monetary compensation), it is likely to provide a useful starting point in most cases.

96. A cost-capping regime is one thing. A cost-capping regime in a CFA context (with or without ATE cover) is another. As a general rule, Parliament has decided that it is appropriate to order a party opposed to one funded by a CFA to pay costs at a level that would not ordinarily be regarded as reasonable or proportionate. This principle is most clearly articulated in CPD paras 11.5 – 11.9. Defamation proceedings, however, represent a potential infringement of the right to freedom of expression guaranteed by ECHR Article 10(1), and a particularly sensitive approach is required to costs issues.
97. Article 10(2), which contains a qualification on the right to freedom of expression, provides, so far as is material, that:

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others...”
98. Nobody has the right to peddle falsehoods deliberately if they damage another person’s reputation, and in general our system of defamation law, which provides the opportunity for a person thus damaged to seek redress from the courts (whether financial or otherwise), constitutes a restriction or penalty which is prescribed by law and necessary in a democratic society. Under our traditional English system of justice the loser in a defamation action has to pay the winner his reasonable and proportionate costs of the action, and this arrangement is compatible with the criteria contained in Article 10(2). Under a different system of justice each party might have to bear their own costs, win or lose, and again there would seem to be nothing there that is not Convention compliant.
99. What is in issue in this case, however, is the appropriateness of arrangements whereby a defendant publisher will be required to pay up to twice the reasonable and proportionate costs of the claimant if he loses or concedes liability, and will almost certainly have to bear his own costs (estimated in this case to be about £400,000) if he wins. The obvious unfairness of such a system is bound to have the chilling effect on a newspaper exercising its right to freedom of expression of which Mr Beabey spoke in his witness statement, and to lead to the danger of self-imposed restraints on publication which he so much feared (see para 36 above).
100. It is not for this court to thwart the wish of Parliament that litigants should be able to bring actions to vindicate their reputations under a CFA, and that they should not be obliged to obtain ATE cover before they do so. Nor do we have any power to override the express provisions of CPD para 19.1(1) and require a litigant supported by a CFA to disclose the level of the success fee to the other side in advance of any costs assessment proceedings. On the other hand, we are obliged to read and give effect to relevant primary and secondary legislation so far as

possible in a way that is compatible with a publisher's Article 10 Convention rights (Human Rights Act 1998, s 3(1)).

101. In my judgment the only way to square the circle is to say that when making any costs capping order the court should prescribe a total amount of recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability. It cannot be just to submit defendants in these cases, where their right to freedom of expression is at stake, to a costs regime where the costs they will have to pay if they lose are neither reasonable nor proportionate and they have no reasonable prospect of recovering their reasonable and proportionate costs if they win.
102. If this means, now that the amount at stake in defamation cases has been so greatly reduced, that it will not be open to a CFA-assisted claimant to receive the benefit of an advocate instructed at anything more than a modest fee or to receive the help of a litigation partner in a very expensive firm who is not willing to curtail his fees, then his/her fate will be no different from that of a conventional legally aided litigant in modern times. It is rare these days for such a litigant to be able to secure the services of leading counsel unless the size of the likely award of compensation justifies such an outlay, and defamation litigation does not open the door to awards on that scale today. Similarly, if the introduction of this novel cost-capping regime means that a claimant's lawyers may be reluctant to accept instructions on a CFA basis unless they assess the chances of success as significantly greater than evens (so that the size of the success fee will be to that extent reduced), this in my judgment will be a small price to pay in contrast to the price that is potentially to be paid if the present state of affairs is allowed to continue.
103. In future, if a claimant's solicitors agree to act on a CFA without ATE cover in a defamation action, they will have to bear in mind from the time they were first instructed the words of Judge Caroline Alton which were approved by Lord Woolf CJ in the judgment of this court in *Lownds* (at para 23):

“In modern litigation, with the emphasis on proportionality, there is a requirement for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate to spend on the various stages in bringing the action to trial and the likely overall cost.”
104. In this judgment I am not concerned to give more than general guidance as to the procedure that should be followed in future cases to mitigate the evils of which Mr Caldecott and his clients were right to complain. The details of what may be appropriate to order in individual cases will have to be worked out on a case by case basis. Nor am I willing to accept Mr Caldecott's invitation that we should make a specific order disallowing costs in relation to any of the acts of extravagance of which he made complaint. This is not the subject matter of this appeal. It will be sufficient only to say that the claimants' lawyers appear to have advanced their client's claim from time to time in a manner that is wholly

incompatible with the philosophy of the Civil Procedure Rules, and that I would expect a costs judge to take an axe to certain elements of their charges if the matter ever proceeds to an assessment. If the action goes to trial, the trial judge should express his views on matters of this kind and direct that they be transcribed for the benefit of the costs judge, since the trial judge will be much better able than the costs judge to identify those parts of a case in which costs have been wastefully or extravagantly incurred.

105. There are three main weapons available to a party who is concerned about extravagant conduct by the other side, or the risk of such extravagance. The first is a prospective costs capping order of the type I have discussed in this judgment. The second is a retrospective assessment of costs conducted toughly in accordance with CPR principles. The third is a wasted costs order against the other party's lawyers, but this is not the time or place to discuss the occasions when that would be the appropriate weapon.
106. In my judgment recourse to the first of these weapons should be the court's first response when a concern is raised by defendants of the type to which this part of this judgment is addressed. The service of an over-heavy estimate of costs with the response to the allocation questionnaire may well trigger off the need for such a step to be taken in future. The claimant's solicitors' suggestion that the court should send the relevant correspondence files and ancillary documentation to a costs officer for a costs judge to review if it is concerned during the course of any proceedings about any evidence of extravagance is not provided for by any of the costs rules and would not, in my judgment, be a practical course to follow even if it was sanctioned by the rules.
107. I would also endorse the submissions Mr Caldecott made to us in relation to strict observance of the pre-action protocol, the desirability of giving the other side forewarning of points which may be very expensive to prove but which they may be willing to admit, the need to avoid putting the other side to proof of matters just for the sake of it, and the importance of holding a case management conference in any CFA case after statements of case have been exchanged and filed and before witness statements and disclosure, so that with the help of the parties the court may explore the scope for making admissions and other means of restricting disclosure and the length of witness statements.
108. I do not consider that it is appropriate to say very much about Mr Caldecott's arguments about a new claim (relating to a publication on the Internet) which the claimant's solicitors sought to include by amendment in their statement of case just before the hearing before the judge, and have never thereafter served. Since the trial of this action is now imminent, it seems far too late to resurrect this matter now, but this will be a matter for the judge if the issue ever surfaces again. It is sufficient to say that Mr Caldecott's arguments appeared to have a good deal of force, given the evidence his clients have filed which has never been effectively answered.
109. For these reasons I do not consider that this court should interfere with the judge's order, but the judge should be ready to permit appropriate amendments to the defendants' case on justification which bring out clearly the distinction which Mr Caldecott was making in argument.

Lord Justice Jonathan Parker:

110. I agree.

Lord Justice Maurice Kay:

111. I also agree.