Neutral Citation Number: [2011] EWCA Civ 1534
Case No: A2/2010/1004 + (A), (B), (E) & (Z)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(THE HONOURABLE MR JUSTICE EADY)
HQ07X01481

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 December 2011

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE LAWS
and
LADY JUSTICE RAFFERTY

- -

Between :

	Vladimir Terluk	**Appellant**
	- and -	
	Boris Berezovsky	**Respondent**

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- -

Mr Simon Davenport QC and Mr Aidan Casey (instructed by **McGrigors Solicitors LLP**) for the **Appellant**
Mr Desmond Browne QC and Mr Matthew Nicklin (instructed by **Carter Ruck Solicitors**) for the **Respondent**

Hearing dates : 1-3 November 2011

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Judgment

LAWS LJ:

INTRODUCTION

1.This is a defendant's appeal in a libel action in which on 10 March 2010, after a trial without a jury, Eady J gave judgment for the claimant Mr Boris Berezovsky (respondent in the appeal) in the sum of £150,000 ([2010] EWHC 476 (QB)). The appellant, Mr Vladimir Terluk, was the second defendant. The first defendant was the State-owned Russian Television and Radio Broadcasting Company ("RTR"). RTR did not appear at the trial and took no part in the appeal. For clarity I shall refer to the appellant and the respondent as the defendant and the claimant respectively.

2.The case concerns the broadcast in the United Kingdom on 1 April 2007 of a Russian-language television programme called *Vesti Nedeli* (which may be translated "Newsweek"). It was broadcast by RTR on a satellite channel, RTR Planeta, which is available without subscription throughout the United Kingdom. The judge found (judgment, paragraph 2) that the British audience was likely numbered in thousands. The programme's theme was the murder of Mr Alexander Litvinenko, which took place in London in November 2006. A significant part of the programme consisted in an interview with a man going by the name of Pyotr, who spoke the words complained of as defamatory. The interview was said to have taken place in London on 28 March 2007. In it, Pyotr's identity was disguised. It was the claimant's case, and the judge found (judgment paragraph 59, to which I will return), that Pyotr was the defendant, despite the latter's persistent denials.

3.The appeal's procedural history is convoluted, and there are a number of discrete issues before the court which I will explain in due course. I will deal with two of them before the others: each is within a relatively narrow compass, and success on either for the defendant would lead to the appeal being allowed with no question of a retrial. They are (1) whether the words complained of are capable of bearing any meaning defamatory of the claimant, and (2) whether in law the defendant bears any responsibility for the publication sued on. As I shall show these are raised as Grounds of Appeal B and E respectively. Another issue which has figured large in the appeal is whether the defendant should be permitted to rely on fresh evidence in this court (Ground G). In particular he seeks to adduce two witness statements from Mr Andrei Lugovoy, who is wanted in this country for the murder of Mr Litvinenko. This evidence is not relevant to either of the issues I have mentioned, but is said to be critical to the defence of justification, which the defendant says was wrongly rejected by the judge.

4.It will make for clarity if I first give a short account of the case's factual background, and introduce the alleged libel.

BACKGROUND

The Claimant

5.The claimant has lived in this country since 2001. He was described by one of the witnesses

before Eady J, Mr Alex Goldfarb, as a leader of the Russian émigré community and the principal opponent of Mr Vladimir Putin abroad. In March 2003 the Russian prosecutor applied for his extradition on charges of stealing a large number of motor cars. The claimant has always contended that the charges were trumped up and politically motivated. He was granted asylum by the Secretary of State on 10 September 2003 on the footing that he had a well-founded fear of political persecution in Russia. The extradition proceedings brought against him here were discharged. Further details of the claimant's earlier career as scientist, businessman and politician, and of his difficulties with the Russian authorities, are given by the judge at paragraphs 16 – 26 of the judgment.

The Defendant

6. The defendant hales originally from Kazakhstan. He arrived in this country on 15 February 1999 and has lived here ever since. His English is very poor, a fact which was relevant to the judge's assessment of the credibility of some aspects of his case. In a note ("the Rose Note") of two discussions in September and November 2003 between Detective Sergeant Simon Rose (as he then was) of the Special Branch and the defendant, the latter is recorded as having described himself as a former Russian Intelligence Officer. While he has been resident here he has made repeated, unsuccessful, applications for political asylum. As will become apparent the Rose Note is a piece of evidence of no little importance in connection with the defendant's justification defence.

Mr Alexander Litvinenko

7. Mr Litvinenko had been an officer in the KGB. Later he worked for its successor, known from 1995 as the Federal Security Service ("FSB"). He was one of the officers required to investigate an attempt on the claimant's life on 7 June 1994, when the latter's car was blown up and his driver decapitated. That was how they met. Thereafter, on the claimant's account, he and Mr Litvinenko offered each other material support through a series of dangerous, not to say potentially lethal, political exigencies. Mr Litvinenko arrived in London with his wife and son on 1 November 2000. He was granted political asylum in May 2001. The claimant's description of the relationship between Mr Litvinenko and himself is described by the judge at paragraphs 27 – 37 (see also paragraphs 38 – 43, under the heading *The "apartment bombings" and the "Ryazan incident"*).

8. At paragraph 48 the judge said this:

> "[O]n 7 October 2006, the Russian journalist Anna Politkovskaya was murdered. She had been the Chechen correspondent of the *Novaya Gazeta* and was known as a critic of the Chechen war and of Mr Putin's presidency. Reports appeared shortly afterwards to the effect that President Putin had made comments about the murder during a trip to Germany on 10 October. He apparently

> suggested that it might have been ordered by those living abroad and hiding from Russian justice – the motive being to create anti-Russian feelings around the world. Some took this to be a reference to Mr Berezovsky. Without mincing his words, Mr Litvinenko shortly thereafter accused Mr Putin of ordering her murder. This took place at a Politkovskaya commemoration at the Frontline Club in London. Whatever else may be said about him, that no doubt took considerable courage. He first fell ill on 1 November and died a horrible death on 23 November. Afterwards, it was established that he had ingested polonium-210, which is a rare radioactive isotope. It destroyed his bone marrow, other organs and his immune system. Mr Berezovsky had visited him several times in hospital before his death. The funeral took place on 7 December 2006 at Highgate Cemetery."

9. As is well known, Mr Andrei Lugovoy is wanted by the Crown Prosecution Service in this country for the murder of Mr Litvinenko, but the Russian authorities have declined to co-operate, on grounds that his extradition would be repugnant to the Russian Constitution; and indeed Article 61(1) of the Constitution prohibits the extradition to another State of any citizen of the Russian Federation. Shortly after Mr Litvinenko's death, reports began to emerge from Russia to the effect that the claimant was to blame for the murder and that his motive was to embarrass Mr Putin. The claimant agreed to be questioned by the Russian authorities in the presence of British police officers. The interview was held on 30 March 2007. That was two days before the broadcast complained of in these proceedings and two days after the defendant had been interviewed by Mr Medvedev.

THE ALLEGED LIBEL

10. The programme broadcast on 1 April 2007 did not consist only in the defendant's interview. There was some commentary by a presenter, Mr Kondrashov, and also observations by Mr Medvedev, who interviewed the defendant. Any liability of the defendant was (as the judge observed at paragraph 173) limited to what he himself had said. At paragraph 52, however, the judge set out the whole text of the broadcast save for passages dealing with other matters altogether. The quotations which follow are limited to the defendant's broadcast words, together with some linking passages from Mr Kondrashov or Mr Medvedev. (I will refer compendiously to their observations by the word "Comment".)

11. After references to the claimant's interview of 30 March 2007, Mr Kondrashov explains that Pyotr described a meeting with Mr Litvinenko (referred to as "Sasha") and a Mr Chekulin, a friend of the claimant, in 2003 during the course of the then extant extradition proceedings against the claimant. Here is what follows.

> "[**Pyotr**] And this Sasha said to me, straight off, 'We recognise you. You're a KGB colonel. And I recognise you for sure: you were following me two days ago

at Heathrow.' And Boris Berezovsky told me – Litvinenko that is – that he'd seen me at the Prosecutor General's Office in Russia and you'd been assigned to make an attempt on Berezovsky's life.

[**Comment**] Pyotr says he tried to explain that no way was he an agent and he was trying to get political asylum himself. Litvinenko replied that it didn't matter. 'Confess that you have to poison Berezovsky with a toxin hidden in a fountain pen and we'll pay you two million pounds.'

You had to confess to murder?

[**Pyotr**] Yes, yes, to Berezovsky's murder, and they presented it as if I'd decided not to do this and met up with them and told them all about it.

[**Comment**] Litvinenko immediately explained that this would be a strong argument for the British court. If they're even trying to kill Berezovsky here, that means he's going to be persecuted for his political convictions and there's no way he should be sent back to Russia.

[**Pyotr**] They needed my confession to help Boris Berezovsky when his case came to court; to help his lawyers make a sensational announcement, you know, and put Boris Berezovsky in a stronger position so they would not extradite him – that's what they were basically trying to achieve.

[**Comment**] But Pyotr refused. Litvinenko proposed another meeting and increased the payment to 5 million. In all, there were more like ten meetings and the pay eventually went up to 40 million. Pyotr recalled one of the final meetings, in particular. They were sitting in a sushi bar, by coincidence, drinking coffee.

[**Pyotr**] Litvinenko went to get coffee and we were sitting with Dubov. That evening they made up their minds to take action and obviously slipped something into my coffee.

[**Comment**] 'My head started to spin', Pyotr says, 'I couldn't concentrate.' Litvinenko invited him to meet his lawyer, supposedly for a consultation. The lawyer asked him to explain in detail what Litvinenko was basically proposing. Evidently, they then recorded Pyotr's story on tape.

[**Comment**] And at the end of August 2003, articles appeared in the British press with the headline, 'Attempt on Berezovsky's life'. The extradition trial was brought to a halt and the oligarch was given political asylum in early September. Soon after, Litvinenko phoned Pyotr and said, 'you've got problems, come to my office.'

[**Pyotr**] At our meeting in the office, Berezovsky's lawyer told me, 'young man, 70% of Boris Berezovsky's success in obtaining political asylum is down to the information you gave to Alexander Litvinenko.' Then I realised that by somehow putting together all sorts of tapes they could send something somewhere and get someone wanting to look into it.

[**Comment**] During that meeting, they again proposed to him: tell people you're an FSB agent and you're planning to kill Litvinenko and Dubov. Pyotr refused and said basically, I don't want to have any more meetings with you.

[**Pyotr**] Then Alexander Litvinenko went crazy. He grabbed the edge of the oak table and in front of everyone literally banged his head on the table several times, shouting: 'Don't you understand that if we don't get this confession, they'll extradite Dubov to Russia and all of us will follow? Alexander Litvinenko

rang Berezovsky and started to discuss the situation that had developed and I heard Berezovsky tell him, 'Agree to all his conditions'.

[**Comment**] But he didn't offer any conditions, he just went home. Then they started making threatening phone calls and watching his flat."

DEFAMATORY MEANING – THE JUDGE'S VIEW

12. The claimant pleaded three possible defamatory meanings. Eady J set them out at paragraph 53:

> "i) the Claimant was a knowing party to a criminal conspiracy to avoid his extradition and obtain political asylum in Britain by procuring a false confession from the so-called Pyotr (first by offering him massive bribes and then, when he refused to comply, by drugging him) that there was an FSB plot to poison the Claimant and hence he would be in mortal danger if returned to Russia; and
>
> ii) the Claimant had been a party to the murder by poisoning of Alexander Litvinenko because the latter had been a witness to the said conspiracy and the procurement of the false confession from Pyotr; alternatively by his conduct the Claimant had given strong cause to suspect that he had been guilty of doing so; and
>
> iii) the Claimant had been a party to threats which made Pyotr fear for his life."

13. The judge held that the first of these defamatory meanings was made out, but not the second or third. This is what he said:

> "61. Mr Terluk seems to me to be accusing Mr Berezovsky, albeit indirectly through others, of having offered him massive payments to tell a false story to help him gain refugee status. He also makes the allegation of drugging. But he does not himself make the suggestion that Mr Berezovsky was behind the murder...
>
> 62. In those circumstances, Mr Terluk can be fixed with responsibility for the first of the defamatory meanings listed above – but not the second.
>
> 63. It is also Medvedev, rather than Mr Terluk, who says that '… they started making threatening phone calls and watching his flat'. It is quite possible that the story originates from Mr Terluk, but it is equally possible that it did not. This means that I have to exempt

him from liability for the third of the pleaded meanings also. Only the First Defendant can be shown to be responsible for that."

14. The defendant had sought to justify the meaning attributed by the judge to what had been said by Pyotr. This defence was rejected at paragraph 166 of his judgment after a detailed and painstaking analysis of the facts. (He also stated at paragraph 138: "I can say unequivocally that there is no evidence before me that Mr Berezovsky had any part in the murder of Mr Litvinenko".) He awarded (paragraph 177) damages in the sum of £150,000 to the claimant as against both defendants. (In the course of argument on the defendant's appeal as to damages, which I will address later, there was some discussion of this single figure as an apt outcome of the distinct claims against each defendant.)

PROCEDURAL HISTORY

15. I will limit this account of the procedural history of the case to what is necessary to explain how the various points sought to be taken in this court arise. I will therefore omit any description of the comings and goings of the first defendant RTR. It is enough to say that on 4 December 2008 judgment had been entered against both defendants in default for damages to be assessed. The judgment was set aside by Eady J in July 2009, but only in respect of the second defendant, now the appellant. Accordingly at the trial (which took place over eight working days in February 2010), as against RTR the judge was concerned with damages only.

16. The defendant has raised seven grounds of appeal altogether, tabulated A – G. Ground A concerned the judge's refusal to adjourn the trial and the circumstances in which the case came to be heard without a jury. On 25 November 2010 Mummery and Sedley LJJ granted permission to appeal against the refusal to adjourn but dismissed that appeal, and refused permission to appeal against the decision to sit without a jury. Accordingly I need say no more about Ground A. The balance of the permission application then went before Sedley LJ on the papers. On 13 December 2010 he refused permission to appeal on Grounds B, C and D. These were as follows: B – the judge's finding that the words complained of were defamatory: the defendant's case is that nothing said by him in the broadcast interview was capable of defaming the claimant; C – the judge's conclusion as to what the defendant had to prove in order to establish his justification defence; and D – the judge's failure (as it is claimed to be) to consider whether the interview was conducted on a privileged occasion, and to find that it was. On the same day Sedley LJ also considered Grounds E, F and G. Ground E was the second of the two grounds which at paragraph 3 I indicated I would deal with first: that the judge was wrong to hold that in law the defendant bears any responsibility for the publication sued on. The basis of this ground is that while there is now no contest but that Pyotr was the defendant, he nevertheless did not apprehend (to the extent the law requires to fix him with liability) that the interview would or might be broadcast in the United Kingdom. The judge did not address this issue. Ground F was as to the quantum of damages awarded. Ground G was that there existed fresh evidence which ought to be received in this court. Sedley LJ adjourned Ground E

for the claimant to show cause in writing why permission should not be granted. He granted permission on Ground F. He indicated that he would give further directions on Ground G when it was finally formulated. On 4 March 2011 the defendant issued an application to amend Ground G so as to introduce the witness statement of Mr Lugovoy of the same date.

17. On 23 March 2011 the case went before Mummery LJ in court, though the claimant was not represented. He granted permission on Ground E, and adjourned the application for further evidence (Ground G) together with renewed Grounds B, C and D to be heard on notice with appeal to follow if permission granted. All those issues were accordingly argued before us, together with Grounds E and F for which the defendant has permission.

18. I turn to the two issues which at paragraph 3 I indicated I would address first.

GROUND B – DEFAMATORY MEANING

19. At paragraph 61 of his judgment, which I have set out, the judge found that words spoken by the defendant in the interview bore the first of the defamatory meanings which he had listed at paragraph 53. As I have indicated the judge recognised at paragraph 173 that any liability of the defendant was limited to what he himself had said in the interview (see also paragraphs 54 and 60). Mr Davenport QC for the defendant submits that the words spoken by the defendant imputed nothing to the claimant; only Mr Litvinenko and Mr Dubov were implicated in the bogus plot. Mr Browne QC for the claimant relies of course on the last words the defendant spoke in the broadcast, "I heard Berezovsky tell [Litvinenko – on the telephone], 'Agree to all his conditions'". Mr Davenport's riposte was that this reference ties in with nothing and lacks sufficient detail to constitute a libel. He also submits that the judge failed to give proper reasons for his finding of defamatory meaning, and that is itself enough to found a good appeal.

20. In my judgment, with respect to Mr Davenport's argument, the judge's conclusion at paragraph 61 was obviously right and any elaboration of detailed reasons would have been entirely otiose. Earlier in the interview "Pyotr" had told the plainest tale of a bogus conspiracy to murder the claimant in which Mr Litvinenko (together with Mr Dubov) had attempted to inveigle him. The natural and ordinary meaning of the closing words, in their context, was that the claimant was involved – or was involving himself – as well: he was urging the others to see that the defendant was on board: "Agree to all his conditions".

21. I would refuse permission to appeal on Ground B.

GROUND E – REPUBLICATION

22. The words complained of were, first published when the defendant, as Pyotr, uttered them to

Mr Medvedev during the interview on 28 March 2007. The broadcast on 1 April was thus a republication, and one in which the defendant so far as is known played no further part. By Ground E Mr Davenport contends that the evidence did not prove, and the judge did not find, such facts as in those circumstances were required to fix the defendant with liability for the republication.

23. This issue has prompted much exchange of learning between counsel. There has been a lively debate upon the question what test the law imposes to establish the liability of an original publisher for another's republication of what he has said or written. I may however deal with the point shortly, for the good reason that in my judgment the test is met in this case whether Mr Browne or Mr Davenport has the better of the argument.

24. The defendant's case on the facts on this issue is not made any easier (to say the least) by his perjured evidence at trial that he was not Pyotr. He was in no position to dispute the evidence led by the claimant as to the circumstances of the interview. Moreover, as the judge said (paragraph 55), there were many examples of incidents described by Pyotr which mirrored events which had happened to the defendant. Thus the defendant accepted (paragraph 57) that on or about 28 March 2007 – the day when "Pyotr" was interviewed – he indeed attended at the Russian Embassy in London. There is nothing to contradict the description I gave in paragraph 2 of the programme *Vesti Nedeli* – broadcast by RTR on a satellite channel available without subscription throughout the United Kingdom with a British audience in the thousands; nor the fact that Mr Medvedev is well known as an interviewer. There was evidence before the judge that the defendant's interview was pre-arranged by Mr Medvedev and his crew.

25. At paragraph 57 the judge said this:

> "[The defendant] claims, however, that he thought he was being interviewed by someone from the Russian prosecuting authorities rather than by a television interviewer. He denies also having spotted any television camera or recording equipment. That is implausible, not least because of the special lighting arrangements that were made. I received expert evidence from Mr Anderson to the effect that a camera and operator would have been located about six feet behind him and that an obvious microphone would have been placed to his left. There would also have been a powerful light to his left pointing at Mr Medvedev (in fact reflected off his shaven head) and on to the net curtains behind him. This left the back of Pyotr's head in relative shadow."

Little wonder that the judge concluded at paragraph 59 that he had "no doubt that 'Pyotr' was indeed Mr Terluk and that he must have known that he was being filmed and recorded".

26.Given that inevitable conclusion, and the surrounding facts, it is to my mind inescapable that the defendant appreciated that his interview was to be broadcast in the United Kingdom.

27.Mr Davenport submits that a party is only liable in defamation for a republication of words uttered by him if he intended or authorised the republication. Mr Browne submits it is enough if the party ought reasonably to have foreseen the republication. The debate between them was informed by a distinction between two situations in which the legal consequences of a republication may fall to be considered. The first is where, as here, the claimant sues on the republication: that is to say, his cause of action consists in it. The second is where he sues on the original publication only, and relies on the republication as swelling the damages. It is well established that in the latter case the defendant (who *ex hypothesi* is liable for the original publication) will be responsible for additional damage occasioned by the republication if he should reasonably have foreseen that it would take place: see for example *McManus v Beckham* [2002] 1 WLR 2982. Mr Browne relies in particular on *Broxton v McLelland* [1995] EMLR 485, *Richardson v Schwarzenegger* [2004] EWHC QB 2422 (another decision of Eady J) and *Mahfouz v Brisard* [2005] EWHC QB 2304 to show that in the former case the test is the same: reasonable foreseeability is enough to found liability. Mr Davenport says that the learning betrays some uncertainty on the question, and that so much is demonstrated by the leading textbooks; he refers to the current editions of *Duncan and Neill on Defamation* at paragraphs 8.15 – 8.17 and of *Gatley on Libel and Slander* paragraph 6.36. He submits that "principle and consistency favour [the] higher test... where the claimant seeks to make the original publisher liable as a joint tortfeasor for the separate tort generated by the republication" (supplemental skeleton argument paragraph 106).

28.As I have indicated, the defendant is in my judgment liable on the facts for the republication (subject to any available defences) whatever the test. By giving the interview in the sure apprehension that it was to be broadcast in the United Kingdom he intended or authorised that event. If my Lord and my Lady agree with that conclusion, it becomes unnecessary to resolve the legal issue as to which test is correct. Nor do I think it appropriate to do so, since it seems to me with respect that these may be deeper waters than counsel have acknowledged. If Mr Browne is right, the tort of defamation would be located (at least in the republication case) closer to the territory of claims in negligence, where reasonable foreseeability of harm is a prime constituent of the duty of care. That might be apt for the protection of reputation seen as akin to a right of property. But I incline to think that the modern law in this area should more visibly occupy the legal territory of privacy and free expression, and the tensions between them; and to that end the tort of defamation should excoriate not carelessness, but knowing or deliberate action.

29.That being so, this debate, if it had to be conducted, might be quite extensive. But as I have said, on my view of the case the defendant meets whichever test is right. I would dismiss the appeal on Ground E.

GROUND G – FRESH EVIDENCE

30. The question whether the defendant should be allowed to rely on the statements of Mr Lugovoy as fresh evidence occupied a substantial part of the hearing, and I will consider Ground G next.

The Law

31. It is convenient first to consider the law relating to the deployment of fresh evidence in civil appeals. The *locus classicus* is *Ladd v Marshall* [1954] 1 WLR 1489, 1491 where three criteria were articulated by Denning LJ as he then was: (1) the evidence could not with reasonable diligence have been obtained for use at the trial; (2) the evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive); and (3) the evidence is apparently credible though it need not be incontrovertible.

32. The admission of fresh evidence in this court is now addressed in the Civil Procedure Rules. CPR 52.11(2) provides in part:

> "Unless it orders otherwise, the appeal court will not receive... (b) evidence which was not before the lower court."

The impact of the CPR on the established approach set out in *Ladd v Marshall* has been considered in a number of cases. It is clear that the discretion expressed in CPR 52.11(2)(b) has to be exercised in light of the overriding objective of doing justice (see for example *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318 *per* Hale LJ as she then was at paragraph 35, *Sharab v Al-Sud* [2009] EWCA Civ 353 *per* Richards LJ at paragraph 52). The *Ladd v Marshall* criteria remain important ("powerful persuasive authority") but do not place the court in a straitjacket (*Hamilton v Al-Fayed (No 4)* [2001] EMLR 15 *per* Lord Phillips MR as he then was at paragraph 11). The learning shows, in my judgment, that the *Ladd v Marshall* criteria are no longer primary rules, effectively constitutive of the court's power to admit fresh evidence; the primary rule is given by the discretion expressed in CPR 52.11(2)(b) coupled with the duty to exercise it in accordance with the overriding objective. However the old criteria effectively occupy the whole field of relevant considerations to which the court must have regard in deciding whether in any given case the discretion should be exercised to admit the proffered evidence. It seems to me with respect that so much was indicated by my Lord the Chancellor (then Vice-Chancellor) in *Banks v Cox* (17 July 2000, paragraphs 40 – 41):

> "In my view, the principles reflected in the rules in *Ladd v Marshall* remain relevant to any application for permission to rely on further evidence, not as rules, but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an appellant to rely on evidence not before the

Court below."

33. Adopting that approach I turn to the merits of Ground G.

Mr Andrei Lugovoy

34. The principal item of fresh evidence sought to be adduced is Mr Lugovoy's witness statement of 4 March 2011. He has also made a second statement dated 26 October 2011; in it he seeks to answer many of the points made about his prospective evidence in the first statement of Claire Gill of the claimant's solicitors made on 5 October 2011. There are some further items of fresh evidence to which I will turn below, but they are much less substantial.

35. As I have indicated Mr Davenport seeks to rely on Mr Lugovoy's prospective evidence only in relation to the defence of justification which the judge rejected. His first statement runs to no fewer than 166 paragraphs, but its essence (so far as it asserts facts said to assist the justification defence) may be summarised quite shortly. Mr Lugovoy states that Mr Patarkatsishvili (a Georgian associate of the claimant: he is now dead) more than once told him that the claimant's asylum claim was a fraud invented by Mr Litvinenko and Mr Goldfarb, and that "they [had] found an idiot who had nothing to do in London and that they paid him money to say that he had been recruited by FBS [*sic*: FSB is meant – successors to the KGB] to kill Mr Berezovsky" (paragraph 68). Also (paragraph 150) "Mr Litvinenko told me that he came up with the 2003 assassination plot relied on by Mr Berezovsky to obtain asylum in the UK". Moreover, from conversations Mr Lugovoy had with Mr Patarkatsishvili and/or Mr Litvinenko (the attribution is not entirely clear) it would in Mr Lugovoy's opinion (paragraph 145) "inevitably leak back to Mr Berezovsky that Mr Litvinenko was actively looking to blackmail him" over the bogus assassination plot, which "went to the very foundation of Mr Berezovsky's asylum claim" (paragraph 146). Mr Litvinenko would have to be bought off, or "another way" found to eliminate the difficulty (*ibid.*). Mr Litvinenko's death "definitely appears to have been a murder... I am not responsible... nor do I know who did commit the murder" (paragraph 151).

36. Mr Lugovoy's statement plainly implicates the claimant in the killing, on the footing that Mr Litvinenko was threatening or would threaten to expose the sham conspiracy on the strength of which the claimant's grant of asylum had been falsely procured. But this was the very basis of the defendant's justification case; hence Mr Davenport's pressing reliance on what Mr Lugovoy has to say.

37. It is plain on reading Mr Lugovoy's statements that what he says about the supposed plot was on its face based entirely on hearsay accounts, or alleged accounts, from Mr Litvinenko and Mr Patarkatsishvili. That is, perhaps, a less than promising overture for Mr Davenport's submission that the third *Ladd v Marshall* criterion (that the evidence is apparently credible) is satisfied. Though I will start with the perspective of the first

criterion – whether the evidence could with reasonable diligence have been obtained for use at the trial – it will quickly be apparent that that question, and the issue of Mr Lugovoy's credibility, run together.

38. Mr Lugovoy (see his statement of 4 March 2011, paragraphs 6 – 12) asserts that he was aware in March 2010 that the claimant had obtained judgment in libel proceedings in London, but learnt that the defendant had launched an appeal only in November 2010, because of an interview given by the claimant to *Voice of America* which had been quoted in a Russian newspaper article published on 25 November 2010. It was brought to his attention by his personal assistant. He realised that he had relevant evidence to give. He made himself known to the defendants' solicitors McGrigors. He first spoke to them in January 2011.

39. On this part of the case Mr Davenport sought to make something of the fact that his client was a litigant in person at first instance (see his supplemental skeleton argument paragraphs 35 – 39), though at the hearing he disavowed any suggestion that that circumstance justified an objectively distinct approach, and for my part I am clear that it does not. In any event the defendant enjoyed a substantial degree of assistance at the trial from a *McKenzie* friend, Ms Margiani, to whom the judge gave a good deal of latitude to act as advocate. Much more germane for the purposes of the first *Ladd v Marshall* criterion, however, is the part played in the proceedings by a number of Russian State prosecutors. This unusual, not to say bizarre, aspect of the case is important because of the evidence of the Russian prosecutors' links both with the defendant and with Mr Lugovoy. Mr Browne relies on this as showing that if Mr Lugovoy's witness statements are true his testimony would have been readily available, through the agency of the Russian prosecutors or (presumably) associates of theirs, to be given at the trial.

40. In the six months or so following Mr Litvinenko's death Mr Lugovoy, on his own account, actively co-operated with the Russian prosecutors. So much is clear from a number of items of evidence, including the following. At a press conference on 31 May 2007 called in the context of the Crown Prosecution Service's accusation that he murdered Mr Litvinenko, Mr Lugovoy stated that he "constrained himself within the limits... determined by cooperation with the Russian Federation Procurator [*sic*: Prosecutor is meant] General Office"; that he "cooperated willingly with our Procurator General Office, and answered all the questions"; and "I naturally gave the maximum information to the Russian law enforcement agencies". Also at the press conference Mr Lugovoy indicated that he had been in touch with English solicitors since January or February 2007. In an interview published in *Izvestia* on 4 June 2007 he said that he had "agreed our position with the law enforcement agencies" and "worked actively with the Russian Office of the Prosecutor General". There is material to like effect in a radio interview broadcast on 20 July 2007. Moreover he had had contact with Inspector Otvodov of the Russian Prosecutors' Office since at least December 2006, when he was interviewed by officers of the Metropolitan Police in the Inspector's presence. In December 2010, according to his statement, he contacted Inspector Otvodov to tell him that he had "information that may be of interest to

the Court in London".

41. Given this degree of contact with the Russian prosecutors, in the very context of Mt Litvinenko's killing, it is in my judgment inescapable that if the tale told in Mr Lugovoy's new statements were true, he would have revealed it to the prosecutors at an early stage, in 2006 or 2007 – and certainly once the defendant's interview was broadcast on 1 April 2007: the broadcast was available on the internet and the allegations repeated in the Russian press. But as I shall show in dealing with that account's credibility, Mr Lugovoy has in fact repeatedly told quite a different story.

42. No less inescapably, if the Russian prosecutors had been informed of what is now Mr Lugovoy's version of events, they would have armed the defendant with it for the trial. The degree of cooperation between the prosecutors and the defendant is one of the most extraordinary dimensions of the case. At paragraph 151 the judge said this:

> "Because their interests coincide, Mr Terluk has been assisted both before and during the trial by a team from the Russian prosecutor's office. Four to five people have accompanied him throughout the hearing. One or two of the team have been sitting in the silk's row and asked for the opportunity to cross-examine Mr Berezovsky. I thought that a step too far. But they were able to assist Mr Terluk by presenting him with lists of questions to ask the witnesses in cross-examination. They also prepared applications for him to be allowed to introduce new evidence in the middle of the trial."

With respect to the judge this measured account hardly does justice to the welter of activity pursued by the prosecutors. They were involved in the application in July 2009 to set aside the judgment obtained in default. They assisted in the preparation of the defendant's defence. They sent documents directly to the judge with a request that he keep them to himself. They applied to the judge to have the proceedings stayed pending the conclusion of the criminal proceedings in Russia. Documents disclosed by the defendant included many supplied by the prosecutors' office, which also supplied documents to the defendant. The extent of their participation in the trial itself is graphically demonstrated by substantial passages extracted from the transcript by Mr Browne's junior showing the responses of judge, counsel, and Ms Margiani to their repeated interventions.

43. Against all this, the defendant thought fit to state at paragraph 11 of his second witness statement that "[t]he assistance provided to me by the PGO [Prosecutor General's Office] in the High Court proceedings was very limited". I note also the light thrown on the defendant's relationship with the prosecutors by an aspect of his conduct described by the judge at paragraphs 153 – 154:

> "153. Unhappily, Mr Terluk decided to hand over documents disclosed by Mr Berezovsky in these proceedings to the Russian

> prosecutors in breach of his obligation of confidentiality. This despite being given clear information about this rule in letters dated 28 August and 9 October 2009. Mr Terluk made expressly clear his contempt for the English court when he said at the trial, 'If you don't want me to have them, do not send them to me but, if I have them, I will decide myself what to do with them'. The disclosed documents have been used to further the criminal proceedings in Russia and also to launch civil proceedings there at the suit of Mr Terluk (presumably funded by the Russian government).
>
> 154. The civil claim was launched against Mr Berezovsky, Mr Dubov and Mr Goldfarb..."

44. In summary, I have no doubt but that if Mr Lugovoy's present account were genuine, the Russian prosecutors would have been armed with it before the trial, and so would the defendant. It would have been thrust before the judge as important evidence for the defence.

45. As I have indicated, it is plain that in the exigencies of this case the first and third *Ladd v Marshall* criteria run together. The fact that Mr Lugovoy's present account was not forthcoming until March 2011 very strongly suggests in the circumstances that it is at best extremely suspect. Mr Davenport relies in particular on the third statement of the defendant's solicitor, Mr Botiuk, and the statement of Mr Yalovitsky of the PGO as tending to show that Mr Lugovoy's new account was not reasonably available at an earlier date. This material contains a description of events in December 2010 when Mr Botiuk's office was contacted by the PGO and introduced to Mr Lugovoy whom the solicitor met in Moscow in January 2011. (Mr Botiuk's fourth statement, which is principally advanced to support Mr Lugovoy's credibility and assault that of the claimant.) None of this, however, begins to refute the conclusion that if true Mr Lugovoy's present account would have been produced much earlier. Moreover there is, as regards Mr Lugovoy's credibility, a good deal more to say; and I turn now to the third *Ladd v Marshall* criterion distinctly.

46. Mr Lugovoy gave a witness statement at the British Embassy in Moscow on 23 November 2006 – the day of Mr Litvinenko's death. But he said nothing then about the murder having been committed in order to silence threats to expose a bogus assassination plot which had been deployed to procure the claimant's grant of asylum. Nor did he do so when he was interviewed in December 2006, as I have said, in the presence of Inspector Otvodov. On the contrary he has repeatedly asserted that the cause or most likely cause of Mr Litvinenko's death was the careless handling of polonium. He was party to such a suggestion in a NTV programme broadcast on 2 March 2007, in the *Izvestia* interview of 4 June 2007, and in a *Sunday Times* interview of 25 November 2007 (in which he suggested that polonium had been planted on him). On 8 September 2011 – thus *after* his statement of 4 March 2011 – in an interview with a BBC correspondent, Mr Lugovoy said that "[w]e can presume that [Mr Litvinenko] was handling polonium without enough care

and died as a result". And on 13 October 2011 at the inquest into Mr Litvinenko's death his counsel submitted, no doubt on instructions, that death by misadventure was a verdict which the inquest should consider.

47. Mr Lugovoy's evidence is, of course, sought to be deployed to support the defendant's account to the effect that in 2003 he had been pressed by Mr Litvinenko and Mr Dubov to give a false account of an FSB plot to murder the claimant. But in my judgment that account itself, and therefore Mr Lugovoy's statements supporting it, are (aside from anything else) very substantially undermined by the content of the Rose Note to which I briefly referred at paragraph 6. I will explain how the point arises.

48. In a witness statement of 31 July 2003, Mr Litvinenko gave an account of what he had been told by the defendant. It was to the effect that he, the defendant, had attended the Bow Street Magistrates Court in the course of the claimant's extradition proceedings at the behest of a "handler", a Russian intelligence officer named Smirnov. He was told (I summarise) to survey the lie of the land at the court; and in particular to take with him a packet of ballpoint pens and a sealed packet of cigarettes, to see whether they would be examined by the security people. The purpose, so the defendant said he was informed, was

> "to see whether it would be possible to take in unexamined pens and cigarettes and to see if there was some place within the premises where someone posing as a journalist would be able to get sufficiently close to Berezovsky to drip fluid from the pen onto his clothing or shoe and then light a cigarette, blowing smoke in the direction of the liquid" (Litvinenko statement, paragraph 28).

The defendant was telling Mr Litvinenko about an actual plot to murder the claimant.

49. The Rose Note is a document compiled by Detective Sergeant Rose, now Detective Chief Inspector Rose, from his contemporary notes (which were destroyed) of two conversations with the defendant, one shortly after 21 September 2003 and the other on 24 November 2003. According to the Note, the defendant described his contacts with Smirnov, who

> "asked lots of questions in minute detail about what went on at the hearing [sc. at the Magistrates Court]. He asked about the layout of the building, Berezovsky's security detail, the general security and how members of the public were shown in and out... [He] was asking about how people were searched when they entered, if they used metal detectors, if they checked inside folders and if they examined pens... [H]e had never been tasked or asked to carry out an assassination... [H]e realised that Smirnoff [*sic*] worked for the

Russian Security Services and that he was being used by him..."

It is the claimant's case on the facts that the defendant was instructed to carry out a reconnaissance for a possible assassination attempt, not an actual assassination (see judgment paragraph 65). That is what the defendant described to Mr Litvinenko, on the latter's statement; and it is what the defendant described to DS Rose. The coincidence is stark, as is the contrast between those materials on the one hand and the defendant's justification case together with Mr Lugovoy's new account on the other. DS Rose, who gave evidence before the judge, had not seen Mr Litvinenko's statement (or that of Mr Goldfarb) when he spoke to the defendant (judgment paragraph 68). The defendant asserted before Eady J that the Rose Note was bogus and "probably manufactured by the police" to help the claimant (judgment paragraph 70). The judge concluded (paragraph 158) that it would be "perverse" to hold that DS Rose was lying or had concocted a false record.

50. In support of his application to be permitted to rely on Mr Lugovoy's evidence Mr Davenport advanced a large number of detailed submissions (which also went generally to the merits of his client's defence of justification) on a whole series of specific points in the evidence. He rehearsed the acts of various participants, including Mr Goldfarb, Mr Levtov and the solicitor Mr Menzies, as well as more major players. He sought to drive wedges between one account and another, for example between the Rose Note and Mr Litvinenko's statement; he asserted that Mr Litvinenko and Mr Goldfarb gave lying accounts; he said different and contradictory versions had been given of the details about pens at the Magistrates Court; he denied that Mr Lugovoy was a PGO stooge; he urged the defendant's disadvantage as a litigant in person; he condemned this or that aspect of the claimant's case as illogical or improbable.

51. I entertain some doubt as to the degree of any real disadvantage endured by the defendant as a litigant in person. The judge allowed Ms Margiani considerable leeway; he seems to some extent even to have indulged the Russian prosecutors, who had no proper standing of any kind save as onlookers in a public court. As for Mr Davenport's many submissions on the merits, the fact is that the judge painstakingly and in great detail described and assessed the history of the matter from paragraph 64 to paragraph 166 where as I have said he rejected the justification defence. With respect to Mr Davenport I think it unnecessary and inappropriate to confront his points line by line. They are by and large apt, and only apt, for the factual contest at first instance. None of them begins to persuade me that there is anything in the judge's analysis which should excite the intervention of this court. I will cite two further paragraphs of the judgment:

> "160. The evidence of Mr Litvinenko, Mr Goldfarb, Mr Dubov, Mr Levtov and Mr Menzies [for the claimant] is in all essentials consistent and plausible. I am not only asked to disbelieve Mr Rose, a senior police officer, but also Messrs Levtov and Menzies, who are two experienced practising solicitors. They are officers of

> the court and appeared to me to be scrupulously careful as to their professional responsibilities. Nor can I see why they would have any motive to mislead the court and put their careers in jeopardy.
>
> ...
>
> 165. Mr Terluk did himself no favours in cross-examination. Although articulate and never lost for words, he was truculent and evasive throughout. As often as not, he simply failed to engage with the questions he was being asked and tried to quip his way out of difficulty. This tactic made it very difficult to take what evidence he did give at face value. He tended to dismiss anyone who gave evidence inconsistent with his story as a liar in Mr Berezovsky's pay. He also accused Mr Browne of being a disgrace to his profession and even of 'palming' one of the documents he was passed by Mr Terluk in court. He seemed to be directing his performance more to the team of Russian prosecutors than the court; this plainly was not calculated to boost his credibility."

52. Mr Davenport had a number of points on the Rose Note, but in particular the following. He submitted that the officer's interviews with the defendant, recorded in the Note, involved "wholesale breaches" of the Code for Crown Prosecutors promulgated under the provisions of the Police and Criminal Evidence Act 1984. Thus no caution was administered at the beginning of the interviews (or at all) and there was no lawyer present. This is a false point. The defendant was not being interviewed as a suspect. The police were gathering information or intelligence. The Code has nothing to do with the case.

53. In my judgment Mr Lugovoy's present account, given principally in his statement of 4 March 2011, is not sensibly capable of belief. The third *Ladd v Marshall* criterion is not met. Nothing in *Lattimer v Cumbria CC* [1994] PIQR 395, on which Mr Davenport placed particular reliance, begins to suggest otherwise. It is in the circumstances unnecessary to consider the second criterion. More broadly, it would be contrary to the overriding objective to admit the evidence, whether in written form, or as I understand is suggested, by video-link. The interests of justice do not require its admission; quite the contrary.

Other Fresh Evidence

54. The defendant also sought the admission of (a) a written House of Commons answer by Hazel Blears MP published in *Hansard* for 13 January 2004, (b) two convictions of the claimant in Russia, recorded in his absence respectively by the Krasnogorsk City Court on 25 June 2009 and the Savelovskiy District Court on 29 November 2007; (c) the book *Death of a Dissident* by Mr Goldfarb and Mr Litvinenko's widow, published in 2007; and (d) *Londongrad* by Mark Hollingsworth and Stewart Lansley, on general sale from July 2009. These items were not pressed at the hearing by Mr Davenport, though they were

not as I understand it formally abandoned. I will deal with them very shortly.

55. The *Hansard* extract is not new evidence. It was put to the claimant in cross-examination by Ms Margiani. The convictions in Russia are not new evidence either. In fact the judge observed during the course of the trial that they were not legally relevant to the quantum of damages; nonetheless the defendant proceeded to rely on them in his closing speech, which had been written by the Russian prosecutors. *Death of a Dissident* was published in 2007 and publicly available for sale in the United Kingdom. *Londongrad* likewise, as from July 2009. There is nothing in these applications.

GROUND C – PROOF OF JUSTIFICATION

56. It will be plain from all I have said about Mr Lugovoy's prospective evidence that in my view the judge was wholly entitled to reject the justification defence on the merits. That is, however, on the premise that at paragraph 64 of his judgment he correctly identified the question on which the defence turned. He said:

> "So far as Mr Terluk is concerned, therefore, the central issue remaining in the case is whether he can prove on the balance of probabilities that Mr Berezovsky, indirectly through his associates, in particular Mr Litvinenko and Mr Goldfarb, attempted to bully and browbeat him into making a false statement to assist in Mr Berezovsky's asylum claim in 2003."

57. By Ground C Mr Davenport submits that this was the wrong question. He says (supplemental skeleton argument paragraph 149) that the defendant had to do no more than "establish on the balance of probabilities that the conversations and meetings he had with Mr Litvinenko and Mr Dubov were as he described in his evidence".

58. This argument has no force. If my conclusion on Ground B (as to the defamatory meaning to be attributed to what the defendant said in the interview) is right, the judge was in effect bound to pose the question on which the justification issue turned as he posed it at paragraph 64. In any event, of course, the judge comprehensively rejected the defendant's account of what had passed between him and Mr Litvinenko and Mr Dubov, and as I have made clear was in my view perfectly entitled to do so.

59. I would refuse permission to appeal on Ground C.

GROUND D – PRIVILEGE

60. Mr Davenport submits that the judge should have held that the defendant's interview was conducted on an occasion of absolute privilege. He says that it was part of a criminal investigation, or an equivalent process. He cites *Evans v London Hospital Medical*

College [1981] 1 WLR 184, 192, and other authority for the proposition that a statement made in the course of investigating a suspected crime with a view to possible prosecution is clothed with absolute immunity from suit. He asserts that it was common ground that the interview took place at the instance of the PGO; and the defendant's evidence was that he answered questions because the prosecutors required him to do so in the course of their investigation of possible criminality on the part of the claimant.

61. Mr Davenport acknowledges (supplemental skeleton argument paragraph 163) that "the factual issues surrounding these points were not examined in any depth". It is a model of understatement. No case of privilege was pleaded or argued below. There was no suggestion that the interview was in fact given as part or parcel of an investigation (whatever the defendant said he thought was the position). That was no accident: the defendant was advancing a completely different case to the effect that the interviewee was someone else called Pyotr. But whatever the defendant's beliefs or apprehensions, what matters is the objective reality: see *Adam v Ward* [1917] AC 309 *per* Lord Atkinson at 324. This was not an investigation at all but an interview by Mr Medvedev of RTR for the purpose of a television broadcast. There was evidence that it had been pre-arranged by Mr Medvedev and his crew. There is no question of its having been conducted by the Russian prosecutors; indeed they sought a copy of the interview.

62. Ground D is in my judgment hopeless, and I would refuse permission to advance it.

GROUND F – DAMAGES

63. At one stage during the argument on the quantum issue the court was somewhat perplexed by the position relating to RTR. In accordance with what Mr Browne submitted was established practice, the judge awarded the single figure of £150,000 against each defendant. Such an approach would no doubt be apt in a case where the defendants are joint tortfeasors responsible for a single libel bearing a single meaning and with nothing else to choose between them. However the position in this case appears, with respect, somewhat opaque having regard to the judge's reasoning at paragraphs 173 – 175:

> "173. First, I have found on the evidence that Mr Terluk is only responsible for what he actually said on the programme... There is no truth in any of the allegations, but I am not persuaded that Mr Terluk (as opposed to RTR) is to be held responsible for publishing them all. He may have been a party to the entirety of the messages proclaimed in the programme: on the other hand, he may have been confined to a subsidiary role.
>
> 174. Secondly, the aggravation has been different in the case of each Defendant. In *Cassell v Broome* [1972] AC 1027, 1063F-H, 1090D-E, it would appear that Lord Hailsham and Lord Reid were of opinion that, in such circumstances, any joint tortfeasor will only be liable for the lowest common denominator (that is to say,

> only to the limit of their joint responsibility). In *Hayward v Thompson* [1982] 1 QB 47, 62E-G, on the other hand, Lord Denning MR thought this unsatisfactory. He seemed to think that in the case of a joint publication, such as a newspaper article, one should not draw fine distinctions as between one defendant and another. I do not read the judgments of his brethren (Sir George Baker and Sir Stanley Rees) as expressing a view on this point either way. Accordingly, the law in this respect cannot be definitively stated.
>
> 175. I have indicated that the words complained of bear each of the Claimant's pleaded meanings and that, in respect of each of those meanings, the allegations are false. Nevertheless, I plan to compensate in respect of only the first of those meanings – for the reason that Mr Terluk cannot be shown to have published all the allegations. I propose to ignore individual aggravating factors, as something of a distraction, because I think the lowest common denominator approach is likely to be preferred by a modern appellate court – not least because it is more compatible with Article 10 of the European Convention on Human Rights. There would seem to be an inhibiting or 'chilling' effect on freedom of expression in so far as the law may render each individual contributor to an investigative story liable for the words or conduct of other people. In a genuine case of 'joint enterprise', that may be appropriate, but I am not persuaded that this is such a case. Yet I do not believe that for the purposes of this case I need to resolve this dilemma."

64. No appeal by RTR against the damages award is before us. If we had to consider their case as well as the defendant's, we might have to embark upon issues of the nature and reach of the "lowest common denominator approach" to libel damages where there is more than one tortfeasor. As it is, however, it is appropriate in my judgment simply to consider the merits of the judge's award of £150,000 against the defendant. Nothing in this judgment reflects one way or the other on the aptness of that sum to compensate the claimant for the wrong done by RTR.

65. The judge concluded as follows:

> "176. What I propose to focus upon is the seriousness of the allegation and the fact that it has gone uncorrected for about three years. The figure selected needs to compensate for distress, as well as the fact that the allegation was calculated to put at risk Mr Berezovsky's refugee status and leave to remain in the United Kingdom. It needs also to serve the purpose of vindication. Obviously, many people have fixed views about Mr Berezovsky

> and most will not change them as a result of this judgment. He is nevertheless entitled to his remedy as reflecting the court's clear and unequivocal finding, on the evidence, that the relevant allegations are false.
>
> *Conclusion*
>
> 177... I have concluded that there should be judgment for the Claimant and that an appropriate award in respect of these joint tortfeasors is £150,000. It would have been higher if I were also compensating for the equally unfounded allegation that he was responsible for the death of Mr Litvinenko."

66. Mr Davenport submits that £150,000 is far too high. The right figure would have been in the region of £25,000. He says that the claimant's witness statement and outline written submissions at first instance reveal that his real or principal concern was the apparent allegation of involvement in murder, which of course the judge held not to be the meaning of the defendant's spoken words. However the letter before action complains of the meaning found by the judge.

67. More pointedly, Mr Davenport referred us to the well known decision in *John v MGN Ltd* [1997] QB 586, showing that damages for personal injuries may serve as a reference point for libel damages. He submitted that in the personal injury field an award of £150,000 for pain, suffering and loss of amenity would be apt only for a case of catastrophic injury. He proceeded to rely on a number of recent cases whose gravity was (he contended) broadly comparable to that of the present case but where much lower awards were made. Thus in *Field v Local Sunday Newspapers* (unreported, March 2002) a borough solicitor was awarded £27,000 in respect of two publications alleging that he used public funds to advance party political interests. In *Greenaway v Poole* [2003] EWHC 1735 a parish clerk and local councillor were each awarded £25,000 for false allegations of dishonesty, corruption an misappropriation leading to the resignation of one and a lost election for the other. In *Keith-Smith v Williams* [2006] EWHC 860 £10,000 (including £5,000 aggravated damages) was awarded to a UKIP parliamentary candidate for false accusations of sexual perversion and racism. In *Galloway v Jewish Communications* (unreported, July 2008) a well known politician received £15,000 for an allegation of anti-semitism. Mr Davenport says that a figure of the order of £150,000 would be appropriate for a case where the facts were nearer those of *Lillie v Newcastle City Council* [2002] EWHC 1600, in which qualified nursery workers were awarded £200,000 for false accusations by their employers of sexual, physical and emotional abuse of children in their care. The accusations were reported nationally and the claimants had to flee their homes, go into hiding and change their names.

68. For his part Mr Browne referred us to other recent cases in which six-figure sums had been awarded. *Ghannouchi v Al Arabiya* [2007] EWHC 2855 (£165,000) concerned a false broadcast to the effect that the claimant, a Tunisian exile, was an extremist with links

to Al-Qaeda. In *Veliu v Mazrekaj* [2007] 1 WLR 495 Eady J held that the starting point under the offer of amends procedure was £180,000 for a newspaper publication suggesting that the claimant was implicated in the London terrorist bombings of July 2005. The libel in *Al Amoudi v Kifle* [2011] EWHC 2037, published in this country on an Ethiopian website, alleged that the claimant had perpetrated the financing of terrorism and hunting down his own daughter to secure her execution by flogging or stoning in Saudi Arabia. He was awarded £175,000.

69. In *Kiam v MGN* [2002] EWCA Civ 43 Simon Brown LJ as he then was stated at paragraph 49 that "this court should not interfere with the jury's award unless it regards it as substantially exceeding the most that any jury could reasonably have thought appropriate", and (paragraph 53(3)) "[i]n short, the jury's award should not be condemned as 'unreasonable' unless it is out of all proportion to what could sensibly have been thought appropriate". See also *Gatley*, paragraph 38-32. These *dicta*, with respect, in my judgment indicate the approach this court should adopt in addressing the defendant's damages appeal. I would also accept Mr Browne's submission that the decision in *John v MGN* was not intended to prescribe a sharp or precise correlation with damages for personal injuries.

70. Mr Davenport also complains of a want of sufficient reasoning in the judge's assessment of the damages. But he clearly took account of the libel's inherent gravity, its having gone uncorrected for about three years, the attempt to show that it was true, the distress occasioned, and the need for vindication.

71. In all these circumstances I would hold that no sufficient basis is made out to justify this court's interference with the judge's award. The award was certainly a high one. But it did not, in my judgment, "substantially [exceed] the most that any jury could reasonably have thought appropriate".

CONCLUSION

72. I would dismiss the appeal in relation to the grounds on which the defendant has permission to appeal; and I would refuse permission in relation to the remainder.

Lady Justice Rafferty:

73. I agree.

The Chancellor:

74. I also agree.