Neutral Citation Number: [2004] EWHC 2959 (QB)

Case No: HQ03X03184

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2004

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

1. Ibrahim Hewitt	**Claimants**
2. Shahan Izzat Husain	
3. Essam Mustafa	
4. Ismail Ginwaller	
5. Ghassan Faour	
6. Rafiq Vindhani	
7. Mahfuzh Safiee	
and	
1. Henry Grunwald	**Defendants**
2. Jerry Lewis	
3. Eleanor Lind	

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Richard Rampton QC and Anthony Julius (Solicitor Advocate) (instructed by **Mishcons**) for the Defendants
Desmond Browne QC and Justin Rushbrooke (instructed by **Carter-Ruck**) for the Claimants
Hearing dates: 25th to 26th October and 3rd December 2004

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE EADY

Mr Justice Eady:

Introduction

1. The serious issues raised in this litigation are important to the parties, and indeed more widely. They are also extremely sensitive in political and religious terms. The Claimants, who are trustees of a charity named 'Interpal', claim damages and an injunction arising out of the publication of two items on the website of the Board of Deputies of British Jews, of which the Defendants are honorary officers. These postings occurred respectively on 1st and 5th September 2003.

2. The particulars of claim were served on 23rd January 2004 and the defence on 2nd April. The Claimants contend that they were defamed because, effectively, Interpal was described as a terrorist organisation. The Defendants disputed the meaning which the Claimants attached to the words complained of. They also relied upon defences of qualified privilege and justification.

3. The meanings which the Defendants proposed to justify were at that stage expressed as being that:

    i) Interpal is a terrorist organisation in the sense that it is an entity which, while not itself engaging in direct acts of terror, assists others to engage in acts of terror, either by funding them or otherwise;

    ii) Funds raised by and remitted to Interpal are used to fund terrorism in the Middle East;

    iii) Funds remitted by Interpal undermine the Middle East peace process by assisting entities hostile to it to pursue their aim of aborting it;

    iv) The Claimants, as the trustees and managers of Interpal, are responsible for the activities attributed to Interpal above.

4. As to qualified privilege, the case is founded essentially upon the relationship between the Board and the Jewish community in this jurisdiction and upon the common interest in the subject matter of terrorism generally, and in ways of reducing the risk of atrocities in the Middle East (in particular, those perpetrated upon Jews). It is the Claimants' case that the *raison d'ętre* of Interpal is the raising and distribution of funds from around the world for the relief of suffering and for medical, educational, and other humanitarian projects, primarily within 'the occupied territories of Palestine as well as in refugee camps in Lebanon and Jordan'.

The applications

5. By notice dated 22nd June 2004, the Claimants applied for a ruling on the Defendants' pleaded meanings as they then stood (see CPR Part 53 P 4.1); to strike out the qualified privilege and justification parts of the defence (see CPR Part 3.4(2)); alternatively, for summary judgment in respect of those defences (see CPR Part 24). There was also before the Court an appeal from the Master's order giving disclosure to the Defendants under CPR Part 31.14 and 31.12. When the case first came before me on 25th October 2004, it was agreed that the first matter to be dealt with would be the application under Part 3.4(2), for which purpose evidence would not be admissible. The Part 24 application had been adjourned by consent, so as to give the

Defendants an opportunity, if necessary, to put evidence before the Court in answer to that relied upon by the Claimants. It was thus recognised that, strictly, the evidence placed before me could not be relied upon for the limited purpose of the first application.

Ruling on the Lucas-Box meanings

6. As is well known, an application to a judge for a ruling on meaning is for the purpose of determining whether, and to what extent, the pleaded meanings are ones which the words complained of are capable of bearing. The ultimate object, in this case, is to persuade the Court that the words are not capable of bearing the Defendants' pleaded meanings and, in the light of that, to strike out the defences of justification and qualified privilege. On a more limited basis, the jurisdiction would enable the Court to delimit the range of possible defamatory meanings for the purpose of a trial: see e.g. *Mapp v News Group Newspapers Ltd* [1998] QB 520.

7. The first of the two website postings contained the following words in its first paragraph, namely '… terrorist organisations such as Hamas and Interpal …' The third paragraph included these words:

> "Funds raised by organisations such as Hamas and Interpal are used to undermine the peace process… The Government must do everything in its power ensure that no money can be raised in this country for the funding of such terrorist organisations".

8. The only difference in the later posting of 5th September 2003 is that in the first paragraph the reference to 'Interpal' is no longer present. The name still appears, however, in exactly the same context in paragraph 3 of the posting. The Claimants plead that the publications conveyed the imputation that Interpal is a terrorist organisation, and they take the stance that this necessarily entails direct involvement in acts of violence or terror. It is the Defendants' contention that an ordinary fair-minded reader of the postings could well understand the term to be wide enough to embrace those who facilitate or fund the acts of terror, and who are thus responsible indirectly. The Defendants accordingly submit that a reasonable jury could come to the conclusion that the postings meant, in context, that Interpal was a terrorist organisation in that indirect sense, not least because the focus of the postings' message was the Board's concern about the use of money raised in this country for funding terrorist acts abroad. In the course of submissions, Mr Rampton QC appearing for the Defendants referred to those directly participating in violence as 'type 1' organisations and those who merely facilitate such activities indirectly as 'type 2' organisations. It was implicit in the Defendants' submissions that a jury might conclude that, morally, there is no substantive distinction between the two hypothetical categories of organisation.

9. The Claimants suggest that the Defendants' definition is thus too wide to be sustainable. To put it another way, they suggest that no reasonable jury could conclude, without being perverse, that the postings imputed to the Claimants merely indirect responsibility for the facilitation or funding of terrorism.

10. It is important to make it clear that the Defendants' case is not based merely upon innocent involvement or association with those directly committing acts of terror; they intended fairly and squarely to allege that the assistance which Interpal gives to

'type 1' terrorist organisations is given knowingly or consciously. They do not suggest that Interpal's involvement was, or might have been, 'innocent'.

11. There are perhaps echoes here of issues which arose in *Al Rajhi Banking and Investment Corporation v The Wall Street Journal Europe SPRL* [2003] EWHC 1776 (QB). I there quoted at [17] a general principle from my earlier judgment in the same case on 12th June 2003, which I relied upon as a guide in picking my way through that pleaded case. It is a principle which is also relevant here:

> "I believe it is in accordance with principle not to permit justification by *mere* association. In other words, in order to pass muster, the pleaded association must itself be 'guilty'. If an association involves knowledge on the claimants' part, by way of (say) co-operating with or aiding or abetting terrorists, then such an association may certainly be pleaded".

12. In the *Al Rajhi* case a 'guilty' association was *not* alleged. Here, by contrast, the Defendants maintain that Interpal is a 'type 2' terrorist organisation and thus not in any sense 'innocent'.

13. The Defendants sought by reference to statute to support their somewhat broader definition of 'terrorist organisation' (i.e. as including one which facilitates direct acts of terrorism) as one which accords with current usage. Attention was drawn to a difference between the terminology of section 3(5) of the Terrorism Act 2000 and that adopted in the Prevention of Terrorism Act 1976.The more recent definition of 'terrorism' would encompass the activities of a 'type 2' organisation. No one suggests that this is common currency, but it tends to underline that the concept of terrorism is not capable of inflexible definition. It is a matter for the jury to decide the meaning of the words. I cannot conclude that twelve reasonable readers would be perverse to understand the concept of terrorism in its broader sense.

14. There seems to have been something of a mismatch between the respective parties' understanding of the way the plea of justification is meant to be understood. That is unfortunate, since if ever there was an allegation which needed to be spelled out with clarity it is surely that of knowing involvement in the funding of terrorism. The Defendants sought to clarify any such misunderstanding in their written submissions for this application and, later, by proposed amendments formulated in the course of the first hearing in October. Mr Browne QC, appearing for the Claimants, insisted that the very least he was entitled to was a written draft upon which the Defendants were prepared to take their stand. Eventually, it became necessary for that purpose to have an adjournment. The parties reassembled on 3rd December to make further submissions in the light of Mr Rampton's redraft, which expressly adopted the meaning that Interpal's support was knowing or reckless, although he emphasised that in his view this had been a superfluous exercise, since his earlier pleading had left the position in no doubt.

15. The Defendants asserted from the outset the following propositions:

    i) The pleaded meanings, when read in the context of the particulars of justification, make it plain that 'knowingly or recklessly' is implicit and that they do not assert *mere* association.

ii) It is not possible to make donations to Hamas, in whatever form or guise, without making oneself a 'type 2' terrorist organisation since Hamas itself is said to be notorious. (This was how it was put in written submissions, but the pleading was not originally formulated in this way.)

iii) The remarks of the first Claimant from two interviews in *The Guardian* newspaper and quoted at paragraph 5.10 of the defence would tend to show that he and, to the extent that his knowledge reflects that of Interpal itself, it too is at least indifferent as to whether the entities to which it remits funds engage in acts of terror:

> "5.10.1 (on 7 August 1997): Mr Hewitt (the first Claimant) said it was possible that some of Interpal's beneficiaries in the Palestinian territories had been established by Hamas, but argued that Hamas runs a social welfare and religious network separate from its military wing, Izz al Tin al Qassam. 'It's like the difference between Sinn Fein and the IRA', Mr Hewitt said.
>
> 5.10.2 (on 28th August 2003): The first Claimant said 'Hamas is an ideology as much as an organisation. We deal with people whether they are Hamas or whether they are Fatah'".

16. In order to understand the Defendants' case in the respect, it is appropriate to bear in mind what else is said about Fatah (in paragraph 5.16); namely, that "… in the past three and a half years the lines have become blurred; Hamas and the Fatah organisations now work closely together and co-ordinate terror attacks". It is suggested that prior to that, until the current Intifada, Fatah and the various Palestinian security services had been viewed generally, both in Israel and in Palestine, as relatively 'moderate forces'.

17. It is fair to record that Mr Browne in the course of his submissions stated on behalf of his clients, without qualification, that they have never given a penny piece to Hamas. The validity or otherwise of the inference that Interpal was 'indifferent' was also hotly disputed by Mr Browne, who (at paragraph 62 of his skeleton argument) submitted that the reference by Mr Hewitt to the 'possibility' that some of Interpal's beneficiaries had been established by Hamas could not begin to justify describing Interpal as a terrorist organisation. He continued:

> "In the first place, the Defendants fail to identify any beneficiaries of Interpal's funding, so that it can be investigated whether they were (or even whether it is possible that they were) established by Hamas.
>
> There is no allegation that Interpal knew that any such beneficiary was established by Hamas; nor that any such beneficiary was involved in or facilitated terrorist attacks.
>
> It is accepted that Hamas is not like Islamic Jihad whose aim is 'singular and clear' … Hamas plainly plays an important part in the provision of kindergartens, schools and medical clinics in Palestine. There is no suggestion that Interpal funded Hamas' 'social welfare support organisations' knowing that they were merely a cover for terrorist activities and intending that their

> contributions should be used for that purpose rather than philanthropy and the relief of genuine suffering ".

18. Whatever criticisms may be levelled at the third of the Defendants' propositions in paragraph 15 above, it is at least fair to say that the first two have the merit of removing any ambiguity as to the Defendants' case in this respect. They allege *knowing* involvement.

19. Mr Rampton went on to submit that his clients would be entitled at trial to say that the demonstrable link between Interpal and Hamas, in its cumulative weight, is incapable of any innocent explanation. Mr Browne challenged this proposition on that the basis that the formulation would offend against the principle that a defendant should not plead particulars of justification in such a way as to transfer the burden of proof to the claimant.

20. It is important to recognise that a defendant may plead facts with a view to inviting an inference to be drawn by the jury at trial. Provided he does so clearly, and provided the inference is one that a jury could draw without being perverse, that is a legitimate pleading exercise. It would then be for the defendant to explain (by means of evidence or submissions) that the inference in question should *not* be drawn. But that is by no means because the defendant has reversed the burden of proof. It all depends whether the defendant has identified facts from which a properly directed jury *could* draw the inference.

The challenge to the particulars of justification

21. It is now necessary for me to focus on the particulars of justification in order to see whether they are capable of supporting the *Lucas-Box* meanings, and whether they are so framed as to let the Claimants know the case they have to meet. It is this factor which, in the circumstances of this case, seems to me to be critical.

22. As I have said, Mr Browne prayed in aid the *Al Rajhi* precedent and sought to lay at the door of the Defendants here similar criticisms to those he had earlier levelled at the *Wall Street Journal* pleadings. That is not, in my judgment, a helpful analogy. Those pleadings were far more difficult to fathom and the Claimants could reasonably be forgiven for not knowing the case they had to meet. Here the allegations, serious and offensive though they are, are more focussed. I do not think the defence can be characterised as "a loose, ineffective pleading" (to adopt a phrase of Lord Denning from *Associated Leisure Ltd v Associated Newspapers Ltd* [1970] 2 QB 450,455 G).

The propriety of the Defendants' pleading

23. Before I turn to some of the specific allegations, I should briefly address the more general criticism of the propriety of the pleading. It is said that the Defendants' advisers cannot have sufficient material before them to justify pleading anything so serious. That is of course a grave allegation in itself. I cannot make the assumption that the plea has been put forward in breach of professional obligations without something solid to support it – still less so when the pleader has the wide and long experience of Mr Rampton. I need to bear in mind also what was said by Neill LJ in *McDonalds v Steel* [1995] EMLR 527, 535-536. It was there made clear that a plea of justification must be 'properly particularised' but, subject to that, the pre-conditions which a pleader had to satisfy for the purposes of a defence of justification were identified as follows:

i) The defendant should believe the words complained of to be true;

ii) The defendant should intend to support the defence of justification at the trial;

iii) The defendant should have reasonable evidence to support the plea or reasonable grounds for supposing that sufficient evidence to prove the allegations will be available at the trial.

24. A little later Neill LJ continued:

> "It is to be remembered, however, that the evidence which a defendant may be entitled to rely upon at trial may take a number of different forms. It may include:
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> a) his own evidence and the evidence of witnesses called on his behalf;
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> b) evidence contained in Civil Evidence Act statements;
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> c) evidence contained in his own documents or in documents produced by third parties on subpoena;
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> d) evidence elicited from the plaintiff or the plaintiff's witnesses in the course of cross-examination;
>
> e) answers to interrogatories;
>
> f) evidence contained in documents disclosed by the plaintiff on discovery".

25. Of course, some of the terminology and concepts there referred to are now out of date (e.g. with regard to interrogatories). Mr Rampton submits, on the other hand, that the principles as to the professional requirements upon a conscientious pleader have not changed. Mr Browne suggested, however, that this authority may need to be reviewed in the light of the analysis of Lord Bingham in the recent case *Medcalf v Mardell* [2003] 1 AC 120 and the subsequently re-drafted Bar code of conduct at paragraph 704. I am not persuaded that there has been any change of substance. The formulation in paragraph 704 of the code is different. It is true that a pleader must not advance any contention "which he does not consider to be properly arguable" and that any allegation of fraud should not be advanced "unless he has clear instructions to make such allegation and has before him reasonably credible material which as it stands establishes a *prima facie* case of fraud". Needless to say, the reference to 'fraud' is not directly applicable here but the allegations are at least as grave and the pleading should be subject to similar disciplines. It is clear that "reasonably credible material" need not be in the form of admissible evidence; thus I see no inconsistency with Neill LJ's formulation of "reasonable grounds for supposing that sufficient evidence to prove the allegations will be available at the trial".

26. There comes a point in any such discussion when the Court has to accept the *bona fides* of the pleader. It is not for me, or for Mr Browne, to press Mr Rampton as to the nature of the information he has in his possession on the basis of which he has set out the pleading in its current form. Some examples were given in the *Medcalf* case of the sort of material which might suffice, although I have no doubt that they were not intended to be exhaustive. They would certainly embrace public reports following an

inquiry, and Mr Rampton has argued that he would, for example, be entitled to place reliance on officially promulgated material from the United States government if it could be characterised as 'reasonably credible'. In the circumstances of this case, I certainly cannot be satisfied that Mr Browne's hints or suggestions of professional impropriety are well founded.

27. I have no reason to suppose that Mr Rampton, at the time of the pleading, had no grounds for concluding that sufficient evidence to prove his allegations would be available at trial. Moreover, I bear in mind that this is a case where there might well be expert evidence to be called on both sides on events in the Middle East. This could have a significant bearing upon the validity of any inference which the Defendants seek to draw, and disclosure too could well be an important factor in determining the central issue.

The particulars of justification as they stood on 26th October 2004

28. That brings me to the next question, which is that of the ability of the Claimants' advisers to understand and respond to the plea of justification. Here it is within the Claimants' knowledge, or at any rate it is information that is accessible to them, whether they have donated money and, if so, how much within any given accounting period to any organisation which could truly be characterised as Hamas or a Hamas vehicle. As I have said, Mr Browne's instructions were, as at 26th October 2004, that *nothing* has been knowingly donated to Hamas by any of his clients or by Interpal (including any sums that might be supposed to be 'ring-fenced' for humanitarian projects).

29. The Defendants' pleading makes the following allegations, whether or not sufficiently particularised, with stark clarity and lack of any of the circumlocution which characterised the pleaded case in *Al Rajhi.* (The application was adjourned on 26th October, mainly for the purpose of enabling Mr Rampton to reconsider the formulation of his pleading and to supplement it if he thought fit. The following allegations are taken from the pleading as it stood at that point.)

30. Lest there be any confusion as to the Defendants' understanding of Hamas, they alleged:

> "5.5.2 Article 7 of the Hamas Charter states "Judgment day will not come until Muslims fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Muslims, O Abdulla, there is a Jew behind me, come and kill him. Only the Gharkad tree would not do that because it is one of the trees of the Jews;
>
> 5.5.3 In 1998 Hamas threatened to attack Jews around the world, stating in a leaflet that attacks by Israel 'will push us, with no other choice, to transfer our battle outside the homelands to get the Zionist interests all over the world'".

31. Reference was also made (at para. 5.5.5) to a bulletin published by the 'military wing of Hamas' on 23rd November 2002 on the Hamas official website advocating the murder of Jews. It contained a quotation from Imad Akkal (who had apparently died

nine years earlier) to the effect that " We will knock on the doors of Heaven with the skulls of Jews". There is also said to be a depiction of an axe shattering the word 'Yahud' and splintering the skulls of Jews. I pause to note that in the course of his submissions Mr Browne sought to draw a clear distinction between anti-Semitism or anti-Zionism, on the one hand, and terrorist violence on the other. Citations of this sort, however, if they were genuine statements of policy by Hamas, would tend to suggest that no such clear-cut distinction can really be drawn.

32. It was further pleaded (at paras. 5.7 and 5.8) that, although Hamas has a 'dual aim: to eradicate Israel, and provide local services to Palestinians (such as kindergartens, schools, and medical clinics)', its social welfare support organisations play a direct role in facilitating terrorist attacks, including suicide bombings. Such activities, it was said, are supported with funds from abroad. In paragraph 5.9 it was alleged:

> "Hamas and other terrorist organisations in the West Bank and Gaza cannot operate without extensive funding from charities abroad. The funding they receive is ostensibly for the 'non-military' wings. However, these two wings are inextricably linked."

33. This allegation was apparently confirmed (see para. 5.11) by the late Sheikh Yassin, who is described as the founder and leader of Hamas. There was attributed to him, in an interview of 12th August 2002, the claim that there was no difference between the military and political wings of Hamas: "When we make decisions on the political level and convey them to the military wing it abides by it normally". Earlier, on 27th March 1998, it is claimed (at para. 5.12) that Sheikh Yassin specifically stated:

> "We cannot separate the wing from the body. If we do so, the body will not be able to fly. Hamas is one body."

34. The conclusion drawn in the Defendants' pleading, which probably represents the nub of their case, is that, "In truth there is no distinction between the two wings of Hamas. Both are terrorist".

35. It will be remembered that the words complained of made reference to jeopardising the Middle East peace process. In that context, attention is drawn in the pleading (at para. 5.15) to Article 13 of the Hamas charter:

> "There is no solution of the Palestinian question except through Jihad. Initiatives, proposals and international conferences are all waste of time and vain endeavours. The Palestinian people know better than to consent to having their future, rights, and fate toyed with."

36. It would, therefore, appear that one of the central issue of the case will be whether the Defendants have got hold of the wrong end of the stick. If they have not, in the sense that they can prove Interpal funds to have been donated to one or other wings or manifestations of Hamas, then a secondary issue will arise; namely, whether any of the Claimants, or any relevant person within Interpal, was unaware of either the recipient body's link to Hamas or of Hamas' terrorist connections or activities.

37. It is submitted by Mr Browne that references to Al Qa'eda should be struck out from the pleading as being irrelevant or peripheral, since they do not appear to be connected to the Hamas allegations or directly linked to anything the Claimants have done or said. Similarly, there are passing references to a relative of Osama Bin Laden. It is suggested that both these references are dragged in purely for the purpose of creating prejudice. I doubt very much whether the relevant paragraphs serve to illumine the case, rather than to confuse it, but after careful consideration I decided that I would not have ordered, at that stage, that they be struck out (in fact, Mr Rampton thought better of it and by 3rd December they had been withdrawn).

38. The references to Al Qa'eda, in particular, might have had a legitimate part to play as background to the plea of qualified privilege, and by way of reinforcing the common and corresponding interest at the material time in the subject of reducing the risk of terrorism generally. The material might also perhaps have played a role at the outer edge of justification, having some potential relevance to the likely state of knowledge of those sending funds to the Middle East. It is part of the background climate which could be relevant, at least, to assessing the validity of any suggestion of ignorance, at the material time, of the risk to Jews from Arab terrorist organisations. At all events, that is now water under the bridge.

39. Specifically with regard to Interpal, the Defendants' pleading made the following assertions. It is said to be a constituent member of the Union for Good and openly to provide a facility for those who wish to donate funds to that body. It is also alleged that its President is Sheikh Al-Qaradawi who has issued Fatwas permitting suicide bombings and to have described all Israelis as "legitimate targets" (in July 2003 while in Sweden). I should have thought that was clear enough. Will the Defendants be able to prove those allegations? If so, were the Claimants or the staff of Interpal genuinely in ignorance of the true picture. These seem to be the essential issues.

40. It was also said that the Union for Good launched the '101 Days Campaign' on 15th May 2001, one of its objectives being the provision of financial support to the families of suicide bombers. Once again, so it was claimed, Interpal is available as a conduit for funds for that campaign.

41. Similar allegations were made (at 5.19.3) in relation to the World Assembly of Muslim Youth (WAMY). A specific and clear allegation was made to the effect that Interpal's trustees' report for the year 2000 contained a statement to the effect that it had signed a co-operation agreement with the Saudi Branch of WAMY. A number of allegations are made about WAMY itself, including references to some of its propaganda about "taking revenge on the Jews and the oppressors" and calling upon children to "make Jihad for the sake of Allah". It is said also to provide a conduit route for the Saudi Arabian financing of the terrorist group Hamas. No doubt further particularity would be desirable, but I cannot believe that this allegation left the Claimants in any doubt as to the case they have to meet.

42. Another organisation called Sanabil comes into the picture at this stage (at para. 5.19.4), which is said to be a charity based in Lebanon. The relevance of this is that on 15th August 2001 Interpal's website contained a claim that the organisation worked closely with Sanabil. It is baldly asserted, admittedly without particularity, that Sanabil has carried out, participated in or facilitated terrorist activity. I did not think it appropriate to strike these allegations out, but it does behove the Defendants to give the best particulars they can; especially, of course, as to how Interpal is

supposed to know of such activities. That is one of the factors to which I drew Mr Rampton's attention when the Court adjourned on 26th October. Whether specific knowledge is attributed to any individual, or it is said to be a matter of inference, I thought that the Claimants were entitled to have the nature of their connection spelt out more clearly.

43. There were other allegations (at para. 5.2.0) relating to some of the individual Claimants. Whatever their merits, those individual litigants should have no difficulty in understanding and dealing with what is attributed to them. In any event, I would not have struck any of that material out as it seemed to me to be clearly relevant to the sting of the libel.

The amendments put before the Court on 3rd December 2004

44. On 3rd December a new version of the defence was produced for consideration. Mr Rampton stated that it had been clear from the earlier pleading that the Defendants were alleging "knowing or reckless" funding of Hamas by Interpal, but to put the matter beyond doubt it was expressly included at para. 5.1.4 as a new *Lucas-Box* meaning. He said it was the Defendants' case that Interpal was used a "sausage machine" or "laundry" for the provision of money to Hamas. In providing for material needs, Interpal was thus facilitating the recruitment to the Hamas cause for the purposes of terrorism and/or suicide bombings. He referred in this context to Article 30 of the Hamas charter, which includes the words "Whosoever supports the relatives of a fighter, he himself is a fighter".

45. In new paragraphs 5.5.1 to 5.5.13 a further selection of extracts from the Hamas charter were included in order to underline its terrorist character. There can be no doubt that the extracts, for pleading purposes, are capable of supporting the Defendants' characterisation of Hamas. The former paragraph 5.5.3 now becomes 5.5.14 and includes a new citation from Sheikh Yassin to the effect that "Muslims have to threaten and strike western interests, and hit them everywhere".

46. The section formerly headed "The character of terrorist organisations" is now headed "The character of Hamas". It is now alleged that its welfare support organisations (including Zakat Committees) and other non-military institutions play a direct role in facilitating terror.

47. Mr Browne submitted that this inclusion of the Zakat Committees raises a critical issue. The giving of Zakat is one of the five pillars of Islam and every mosque has its Zakat Committee. He submits that the Defendants' case is thus reduced to an absurdity, since it would entail that any Muslim adhering to one of the central tenets of the faith, and giving Zakat to any Committee in the West Bank or Gaza, is thereby to be regarded as a terrorist. Such persons, just as much as the Claimants, could therefore on the Defendants' reasoning be said to be "knowingly or recklessly" funding a terrorist body. This allegation in the defence seems to be based upon the content of an interview (cited at paragraph 5.8.4 in the new version of the defence) in the London "Filastin Al-Muslimah" in January 1998 with a "Hamas aide". He was apparently asked how the Hamas movement was able to utilise the Zakat Committees and the Islamic associations and institutions in the Gaza Strip to build an infrastructure of support. To this, he responded:

> "The … social roles that the Hamas movement has carried out and adopted have a way of attracting and winning support and blessing from our Palestinian people on the street for the Hamas movement".

48. Mr Browne complains that the cutting has not been supplied and it is not therefore possible to make a fair assessment of the context of the words spoken. He does not know whether, even on its own terms, the remarks would support the proposition now pleaded, to the effect that *all* Zakat committees are liable to be used for funding terrorism. He also takes the point that, without identifying the speaker and context of the words relied upon, the Defendants would not be able to rely upon the statement as hearsay evidence. (That is, I suppose, a less important point in the context of an application to challenge the pleading under CPR 3. Mr Rampton emphasised that at this stage it is appropriate for the Court to assess the pleading *qua* pleading and without reference to evidence. The CPR Part 24 application has been adjourned.)

49. It is clearly a controversial allegation to suggest that Zakat committees in general play a role in facilitating terrorist attacks. Nevertheless, I cannot assume that the allegation is bound to fail. It all depends on the evidence. It is, I suppose, conceivable that expert or other evidence could establish, on the balance of probabilities, that donations to Zakat committees in the relevant part of the Middle East are from time to time channelled towards terrorist activity. If that is so, and the fact is known to a donor, it would not be a giant leap to conclude that the donor is prepared to take the risk that some or all of his money will be used for that purpose. It may be that the evidence at trial will fail to demonstrate the underlying proposition. It may be that the Claimants knew nothing about it. But I cannot see that the plea, as such, is impermissible.

50. As to Hamas' notoriety, Mr Rampton relies upon the new paragraph 5.18, which sets out in very general terms that Hamas is known to be a terrorist organisation with military and political wings that are indivisible; and that it exercises power in the occupied territories through Zakat committees that are known as Hamas entities. He relies simply in general terms upon the many statements made by Hamas and its leaders, and upon reports of its activities appearing in the mainstream media over many years. I regard that, again, as a legitimate pleading and, without there being any impermissible reversal of the burden of proof, the Claimants are fully entitled to give evidence at trial to the effect that they were unaware of this reputation acquired through media coverage (if that is their case). The jury will have to decide whether they believe it. Perhaps it is necessary to emphasise that the media reports are not, and could not be, relied upon for supporting the truth of the Defendants' allegations but for the purpose of establishing notoriety.

51. In what is the new paragraph 5.12 it is pleaded that Hamas pursued attacks against civilians as a policy, bombing civilian targets without discrimination. It is also said that it has threatened to kill Jews around the world and that, in a leaflet published in about April 1998, it declared that it would have no choice but to transfer outside the homeland "to get the Zionist interests all over the world". That seems unobjectionable as a pleading.

52. Objection is taken by Mr Browne to a substantial addition in what is now paragraph 5.17. This lists no less than 44 suicide bombings and other attacks, identified as occurring between April 1994 and September 2003 for which, it is said, Hamas was responsible. Mr Browne objects because he says that the pleading is neither

proportionate nor necessary. Some of the incidents post-date September 2003 and thus post-date the publication. That in itself would not matter, since subsequent material can be relied upon, in appropriate cases, to support an allegation of a trait of character of habitual conduct. Mr Browne also suggests that, since the payments made by Interpal (relied upon at what is now paragraph 5.22.2) were made in 2002, the Defendants should only be permitted to plead facts demonstrating the notoriety of Hamas at that time. As I understand it, however, the part of the pleading that is supposed to demonstrate Hamas' notoriety is contained later (in paragraph 5.18, to which I have already referred). The purpose of paragraph 5.17 is to illustrate the scale and nature of Hamas' terrorist activity. To that extent, the pleading seems to me to be legitimate.

53. In the new paragraph 5.20 the general assertion is made that any person or entity having dealings either with Hamas or a Hamas entity is to be taken to be doing so knowingly or recklessly. This would apply to Interpal. That seems unobjectionable as a pleading and it leaves the Claimants in no difficulty. Whether or not the defence succeeds will depend upon the evidence at trial. Mr Browne takes the point that " Hamas entity" has not been defined anywhere in the pleading. It seems to me, on the other hand, quite clear what the Defendants' case is. They say that Hamas operates through various entities, some of which are outwardly respectable, and that would be a matter for evidence (I suspect expert evidence). The Claimants can either refute the proposition or, no doubt much more easily, assert that they had no knowledge that Hamas operated in this way, either generally or through any specific entity in particular.

54. Objection is also taken to the pleading in the new paragraph 5.21 regarding the Netherlands branch of the Al-Aqsa Foundation. It is said to be a critical part of Hamas' terrorist support infrastructure which, through various offices in different parts of the world, including the Netherlands, funnels money collected for charity to Hamas terrorists. Mr Browne submits that this does not get off the ground, because there is no allegation to the effect that Al-Aqsa's activities in this regard are known to the Claimants, or to Interpal, or that they are generally notorious. In any event, the allegation here is not that Interpal gives money to Al-Aqsa but rather that it receives money *from* Al-Aqsa for onward transmission. I am inclined to think that this part of the pleading should either be deleted or clarified. The Claimants are entitled to know exactly how the case on knowledge is put. The significance of this is highlighted by the fact that reliance is placed (at paragraph 5.21.2) on the fact that in about April 2000 Interpal received money from the Holy Land Foundation for Relief and Development ("HLFRD"), but in this instance it is specifically alleged that HLFRD's support for, and relations with, Hamas were well known by that date. Mr Browne points to the contrast with the case pleaded with regard to the Al-Aqsa foundation.

55. He nonetheless objects to the plea even as it relates to HLFRD. The criticism is made that the Defendants would need to plead that the money was provided by HLFRD to Interpal with the purpose ultimately of supporting terrorism *and* that this was known by Interpal. I do not agree. I consider that if the Defendants are able to allege that HLFRD's funding of terrorism is notorious, and that it sent money to Interpal, that is capable of supporting the proposition that Interpal must have known that its onward transmission of such funds to the Middle East was intended to facilitate terrorism. It is alleged that 66,000 dollars was sent in April 2000 from HLFRD which "relates to an entirely legitimate payment for qurbanis, the traditional sacrifice of sheep". If that is

the explanation, no doubt it can be proved at trial. It is not for me to decide the facts now.

56. Paragraph 5.22 turns to the subject of money remitted by Interpal to certain specific entities. Paragraph 5.22.1 is concerned with the Al-Salah Islamic Association ("Al-Salah"), and 5.22.2 with payments to "Hamas and or Hamas entities". Mr Browne takes objection to both.

57. As to Al-Salah, it is not pleaded that this organisation has ever been designated a terrorist organisation either by Israel or the United States. The original allegations were contained in Paragraph 5.18.1 (now renumbered as 5.22.1). The new material is that Hamas has acknowledged Al-Salah as being one of its institutions and that a "one-time chairman of Al-Salah" is a Hamas member. I think Mr Browne is entitled, however, to particulars of where, and in what terms, Hamas is supposed to have acknowledged Al-Salah. Subject to that, however, the pleading is adequate as far as it goes.

58. More to the point is the allegation at 5.22.1 (d). It is alleged that in 2000 Al-Salah issued a press release thanking Interpal for its generous support "in aid of the families of the martyrs of the Al-Aqsa Intifada". In my judgment, that leaves the Claimants with no difficulty in meeting the allegation. Their case is, presumably, simply that they knew nothing about this press release or Hamas' acknowledgment of Al-Salah. I agree with Mr Browne that he is entitled to have particulars of "at least one independent research institute", a phrase pleaded in sub-paragraph (e). Which institute? What did it say? Is it alleged that the Claimants or Interpal knew anything about this?

59. In paragraph 5.22.2 there has been a huge augmentation since the October hearing. It is alleged that in 2002 Interpal transferred £2,431,035.57 (59% of its whole distribution for the year) to Hamas entities. A schedule then follows of the entities supposed to fit that description, including a large number of Zakat committees. Precise sums are given in each case. Mr Browne accuses the Defendants of sleight of hand here, because they seem to be taking the information from the Interpal accounts and simply asserting that they are Hamas entities. Mr Browne argues that the 66 bodies selected have come from a total of some 117 beneficiaries in the relevant accounts, but the basis upon which the Defendants have sorted the sheep from the goats is unclear. It may be a bold plea, and it may come unstuck at trial, but applying the appropriate test for an application under CPR Part 3, I do not believe it would be right for me to assume that the claim is bound to fail. Again, it all depends on what evidence is available at trial.

60. Mr Browne has argued that "the gravity of the issue cannot be over-stated, given the wider implications for all those involved in charitable and relief work in that part of the world". I have to recognise, however, that it is the Defendants' case that terrorist activity, specifically on the part of Hamas, derives its money in large measure from funds ostensibly donated for charitable purposes. It is inevitable that a plea of justification will point the finger at charitable entities. It is not for me at this stage, by conducting a mini-trial, to determine whether the allegations are true or false.

61. Another somewhat *in terrorem* point made by the Claimant's solicitor, Mr Doley, is that the scale of disclosure in relation to the 66 separate entities would give rise to "several van loads" of documents. The difficulty is that the Claimants' case on this

pleading tends to hover between two stools. On the one hand, it is said that there is not enough particularity and they do not know the case they have to meet. On the other hand, it is claimed in relation to the number of Hamas terrorist incidents, and the number of bodies described as "Hamas entities", that the Defendants' pleading is disproportionate. No one can doubt the gravity of this case or its importance for the Claimants, or indeed its possible ramifications for other charities working in the Middle East, but I cannot shut out this material on purely pleading grounds. There may come a time when evidence demonstrates convincingly that some part of the defence is false or, for case management reasons, it will be possible to narrow the issues because of either admissions or unnecessary repetition. At the moment, however, any such step would be premature.

62. There may be force in Mr Browne's point in relation to the plea at paragraph 5.22.2(f), which appears to express an intention to expand the list of "Hamas entities" in the light of the Claimants' disclosure. That is said to infringe the principle in *Yorkshire Provident v Gilbert & Rivington* [1895] 2 QB 148. For my part, however, I intend to cross that bridge when we come to it.

63. The former paragraph 5.19 is now renumbered as paragraph 5.23. It is concerned with alleged co-operation on Interpal's part with terrorist organisations "knowing them to be terrorists". With reference to the "101 Days Campaign" the only new addition is at 5.23.2 (e), which is to the effect that:

> "By virtue of its membership of Union for Good and its participation in the 101 Days Campaign, Interpal would have known of Sheikh Al-Qaradawi's incitements of terrorist activities against Israelis and other Jews".

That leaves the Claimants in no difficulty as to the case they have to meet. It will no doubt be denied and the jury will have to make its mind up in the light of all the evidence, including cross-examination.

64. At the new paragraph 5.23.3 more is added about WAMY. I have already referred to the recording in the 2000 report of a co-operation agreement with the Saudi Arabian branch of WAMY. This is expanded by a passage asserting that the purpose of the co-operation was for Interpal to manage and administer their sponsorship of Palestinian orphans. The Defendants' case is then put somewhat starkly:

> "It is to be inferred that potential suicide bombers are encouraged to volunteer by the knowledge that entities exist to provide for their children".

The significance of this has to be seen, no doubt, against the background of Article 30 of the Hamas charter, cited above.

65. There is also a new sub-paragraph (h) asserting WAMY's notoriety for terrorist activities.

66. There was already in the pleading reference to Sanabil. The former paragraph 5.19.4 has become the new paragraph 5.23.4. It is now asserted (not merely by reference to "reasonable grounds for believing") that Sanabil facilitates terrorist activities, because it is one of the organisations which enables Hamas to recruit permanent members from the religious and the poor by extending charity to them. It is said that Sanibil

terrorist activities must be well known to Interpal by virtue of its own activities in the Occupied Territories. The Claimants can deny it and the jury may believe them or simply refuse to draw the inference. But I see no reason to disallow the pleading.

67. There have also been some deletions from the defence since the October hearing. These include some of the references to Al-Qa'eda. There is no need for me to list these in any detail, since I am primarily concerned with what the defence now seeks to assert rather than what it omits.

68. Although I have considerable foreboding as to the potential scale and expense of this litigation, I do not consider it right as a matter of principle to disallow the pleading (subject to the relatively minor points I have addressed already) and thereby deprive the Defendants of a chance to defend themselves in respect of what are, on both sides, very grave allegations indeed. It goes without saying that following disclosure of documents, or the exchange of witness statements, it may be appropriate for the Court to reconsider the allegations and to attempt to narrow the issues or to exclude evidence as disproportionate. But I cannot anticipate that process by striking any of the pleaded allegations as being in themselves untenable.

Qualified Privilege

69. I must next turn to the criticisms made of the pleading in relation to qualified privilege. It is not framed specifically as a '*Reynolds*' defence, as Mr Rampton made clear, but is based upon a more traditional form of common law qualified privilege, uncomplicated by the refinements of their Lordships in that case. In other words, the case is expressed in terms of a duty, owed to the Jewish community to inform them of developments, and/or upon a common and corresponding interest between the Jewish community and the Defendants in the subject matter of the website postings. Moreover, in order to take account of the observations of Simon Brown LJ (as he then was) in *Kearns v General Council of the Bar* [2003] 1 WLR 1357, Mr Rampton has also drawn attention to the "existing relationship" between the Board and the Jewish community in this country, as well as to the duties, responsibilities and functions conferred on the Board in the light of that relationship.

70. Even if it be the case that Hamas confines its activities to the Middle East, and to Israel in particular, it is to be borne in mind that many Jews from England visit Israel or have friends or relatives there. It seems to me faintly unreal to suggest, in the context of an application under Part 3.4, that there *could not* be a legitimate interest on the part of Jews in Great Britain in the subject of Hamas' terrorist activities (if such they be) and in steps taken to reduce its flow of funds.

71. The pleading also raised the subject of Hamas' designation by various governments as a terrorist organisation; this is a subject which could clearly be relevant to the qualified privilege defence. As I believe Mr Rampton acknowledges, however, in that context it is not legitimate to rely upon anything occurring after the material dates of publication. There is no dispute that the designation of Hamas by the United States government took place shortly before publication (i.e. in August 2003), but it has now emerged that some of the other designations came later. To that extent, those matters would have to be excluded. The designation by the Canadian government was left in the pleading because it occurred before 18th September 2003, up to which point the postings remained on the website.

72. Attention was focussed on the issue of whether communication of the offending material by way of the world wide web was reasonable and proportionate or, on the other had, whether it was so wide as to be capable of undermining the defence of qualified privilege to the extent that it could already be characterised as "bound to fail". Mr Browne, not surprisingly, reminded me of the observations made in the High Court of Australia in *Gutnick v Dow Jones* [2002] HCA 56 to the effect that anyone who puts material on the web must be taken to be aware of the potential scale of publication and as to the multiplicity of jurisdictions where material can be read or downloaded. Notwithstanding this, Mr Rampton submits that a court cannot simply rule out a defence of conventional privilege automatically because the publication in question appeared on the internet. He propounded the test as to whether or not the mode of publication selected was reasonable and proportionate having regard to the interest sought to be protected.

73. My attention was drawn to paragraphs 14.68 and 14.70 to 14.75 of Gatley on Libel and Slander (10th edn.) and to my decision in *Vassiliev v Frank Cass & Co Ltd* [2003] EMLR 761, 763 to 764 at [9]–[10]. I am quite satisfied that at this stage it is impossible for me to rule out the defence of qualified privilege on the basis that publication must necessarily have been excessive or disproportionate. I need to be especially cautious in this context having regard to the fact that the burden rests upon each of the Claimants to demonstrate that some person or persons (and, in particular, persons outside the scope of the common and corresponding interest) have read the words complained of *and* construed them as referring to the relevant Claimant. I did not find the analogy with *Williamson v Freer* (1884) LR 9 CP 393 especially helpful. It comes from a bygone age. The words of Brett LJ (at p. 395) sound a little quaint in the context of the internet and Article 10 of the European Convention on Human Rights:

> "It was never meant by the legislature that these facilities for postal and telegraphic communication should be used for the purpose of more easily disseminating libels".

74. If one tries to think of an alternative method of communicating information to British Jews about terrorism, and the sources of funds for that purpose, it is not easy to arrive at a solution. It could hardly be suggested that the Board should address their information by individual letters to each and every Jew in the country. At all events, for present purposes I need say no more than that the defence of privilege is arguable and will have to be determined, in the light of the evidence, in due course. I am not prepared to make the assumption, without evidence, that "a substantial but necessarily unidentifiable and unquantifiable number of readers of the words in question would have understood them to refer to the Claimants". That is merely formulaic.

75. The plea of privilege must therefore stand.