Neutral Citation Number: [2005] EWHC 1688 (QB)

Case No: HQ04X02761

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2005

Before :

THE HON. MR JUSTICE EADY

- -

Between :

1. Abdel Mahmoud Al-Koronky	**Claimants**
2. Hanan Ibrahim Mohammed	
- and -	
1. Time Life Entertainment Group Ltd	**Defendants**
2. Damien Lewis	

- -
- -

Geoffrey Shaw QC and Harvey Starte (instructed by **Carter-Ruck**) for the Claimants
Adrienne Page QC and Matthew Nicklin (instructed by **Reynolds Porter Chamberlain**) for the Defendants

Hearing dates: 7th, 12th, 13th and 26th July 2005

- -

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.

.....

THE HON. MR JUSTICE EADY

Mr Justice Eady :

Introduction

1. This is a troubling case. I am immediately concerned with an application by the Defendants in this libel action for security for costs but, in the course of the argument and evidence, serious allegations of dishonesty have been made on both sides. It is thus all the more important that I should draw back from determining the merits of the case, and in particular the merits of the defence of justification, on the basis of an incomplete picture. It is always tempting to try and find a short cut in what is bound, otherwise, to be very lengthy and expensive litigation, but it is very much the sort of case which can only be properly determined in the light of the impression made by witnesses and their evidence as tested in cross-examination. Also, expert evidence may have a significant role to play.

2. The Claimants are Abdel Mahmoud Al-Koronky, a former Sudanese ambassador and press attaché, and his wife Hanan Ibrahim Mohammed. They currently live in Sudan. Their claim is based upon the contents of a book published by the first Defendant, Time-Life Entertainment Group Ltd. It was co-authored by the second Defendant, Damien Lewis, and a Sudanese woman (not a party) who has been granted asylum here. Her name is Zainab Nazer, although she is generally known as "Mende". The work, which is entitled "Slave", purports to be an account of her life. The accuracy of its contents is hotly disputed.

3. The first part of the book sets out what is alleged to be Mende's life story, including an account of her abduction into slavery from her native village of Karko in the Nuba mountain region of Sudan. It is her case, adopted by the Defendants as being accurate, that in 1994 (when she is said to have been about 12 years old) she was captured by raiders and kept in slavery in Sudan until June 2000, when she arrived in London and worked for the Claimants in their London home – still in the capacity of a slave. It is part of her account that she escaped in September 2000 and has thereafter been at liberty, eventually being granted asylum in December 2002.

4. It is common ground that Mende left No. 6 Deerhurst Road, Willesden Green, London NW2, where the Claimants were then living, and applied immediately for asylum. On 17th September of that year *The Sunday Telegraph* newspaper reported her departure as being the escape of a slave. This allegation led to the first Claimant, Mr Al-Koronky, suing *The Sunday Telegraph*, the claim form being issued on 1st December 2000. The newspaper pleaded justification in February 2001, but the action was eventually settled on 26th June 2002. The Defendants paid £100,000 damages and joined in the making of a statement in open court, withdrawing the offending allegations and apologising.

5. Meanwhile, between July and September 2001, Mende was working in Wiltshire with the second Defendant, Mr Lewis, preparing the book. It was published first in Germany in October 2002. It attracted a degree of publicity and the book itself describes how pressure then mounted on the British government to grant her asylum. Baroness Cox offered her "unstinting support".

6. In the first instance, on 17th October 2002, Mende was refused asylum. Nevertheless, Baroness Cox led a lobbying campaign to persuade the government to reverse the decision. After reconsideration, asylum was duly granted on 23rd December 2002. It was only a year later that the book was published in the United States, and publication within the United Kingdom followed in January 2004. In the meantime, the Claimants had left this country to return to Sudan, where they have been residing since July 2002. On their instructions a claim form was issued, and particulars of claim served, on 31st August 2004.

The Claimants' defamatory meanings

7. It is unnecessary to rehearse lengthy passages from the book itself, but the words complained of are said to bear the following natural and ordinary meanings:

   i) that the Claimants kept a slave, Mende Nazer, in their London home; and

   ii) that the first Claimant made statements in open court which he knew to be false, to the effect that Mende Nazer was the Claimant's *au pair* and not their slave and that Mende Nazer's story of abduction and slavery in Sudan and then in London was a tissue of lies.

   The reference to the "statements in open court" relates to the settlement of the *Sunday Telegraph* action in June 2002, to which I have referred.

The plea of justification

8. The defence in this action is dated 31st January 2005 and, although no admissions are made as to the meaning of the words complained of, a plea of justification was entered to the Claimants' meanings. This is not a case where it is sought to plead justification to a lesser defamatory meaning. These Defendants are willing, if necessary, to justify the serious meanings cited above from the particulars of claim.

9. One complaint made by Miss Page QC on the Defendants' behalf is that the width of the Claimants' second defamatory meaning will inevitably extend the proceedings and make them significantly more expensive than is truly necessary. That is to say, the Claimants could have achieved their legitimate objectives of vindication and compensation without having included the final words ("… and that Mende Nazer's story of abduction and slavery in Sudan … was a tissue of lies"). Miss Page submits that this broad form of pleading for which the Claimants have opted makes it necessary for her clients to plead justification relating to Mende's life in Sudan between her supposed capture in 1994 and her departure for England in June 2000. The issues would have been considerably narrowed, she says, if the Claimants had chosen to confine the enquiry to what took place in London and the subsequent (allegedly false) statements made in open court about Mende's status over the short period between June and September 2000.

10. Mr Shaw QC, on the Claimants' behalf, does not accept this argument because he claims it is an essential step in establishing where the truth lies to investigate Mende's status over the intervening years. It is not Mende's account in the book, and it is not the Defendants' case in this litigation, that her role as a slave commenced only upon her arrival in England. They suggest that one of the main reasons why the Claimants

went to such lengths to secure Mende's entry into this country (including, on the Defendants' case, a deliberate deception of the British government on her visa application form) is that they wanted not merely paid domestic help but an unpaid slave.

11. Be that as it may, there was no application for me to narrow the issues by, for example, striking out part of the Claimants' meaning paragraph. Indeed, Miss Page did not recognise that she would be permitted in law to make such an application. On the face of it, the Claimants are entitled to plead any defamatory meaning which the words are capable of bearing. Whether that is a correct analysis, in general terms, may not matter for present purposes, since no such application was notified to the Claimants or argued before me. Therefore I should proceed for the purposes of resolving the present issues on the basis that the extent of the enquiry will be as broad as that indicated in the plea of justification.

The Claimants' two submissions on security for costs

12. Mr Shaw makes the bold submission on the Claimants' behalf that no order for security should be made in the Defendants' favour at all, despite the Claimants' residence in Sudan, for two reasons. First, it is contended that the Defendants brought the litigation upon themselves by choosing to publish the book in the full knowledge of the earlier litigation against *The Sunday Telegraph* and the terms upon which it was settled. Secondly, I am invited to conclude on the evidence before the court that the defence of justification, for all its breadth, is bound or at least highly likely to fail. The submission is a surprising one in the light of the fact, to which I drew attention at the outset of this judgment, that much would apparently turn upon the impression ultimately made by the witnesses upon the fact-finding tribunal and how their totally conflicting stories stand up to the adversarial process of litigation.

13. The Claimants place much reliance upon certain documents which they submit demonstrate conclusively that Mende's claims to have been kept as a slave in Sudan, and later in England, are fundamentally dishonest. Why should she make it up? The Claimants' answer to that question is that she was motivated, and encouraged by a particular identified individual, to bolster her claim for asylum in this country. They say that Baroness Cox, and ultimately the authorities, were taken in by a tissue of lies.

Can the case be cut short by expert reports?

14. Alternatively, Mr Shaw threw down the gauntlet by challenging the Defendants to agree to certain tests, by way of a short cut, which would supposedly demonstrate Mende's dishonesty authoritatively. Until such tests are carried out, Mr Shaw argued, and determined in favour of the Defendants' case, it would be premature for the court to entertain an application for security for costs.

15. I was naturally attracted by the possibility of cutting through the dispute with the assistance of expert evidence, since it would be likely not only to resolve the present application but also the litigation as a whole. What Mr Shaw had in mind was that Mende should submit herself to a medical examination in order to determine, if possible with a modest margin of error, her true age. According to her account in the book, she would have been born in about 1982 and taken into slavery 12 years later. According to the evidence adduced by the Claimants, however, it would appear that

she is significantly older. As with most of the evidence in the case, there are inconsistencies and contradictions, but it is variously suggested that she was born in 1966, 1970 or 1972 (the date which appears on the visa application form which was purportedly signed by Mende herself in 2000). Miss Page argues, on the other hand, that there is no reliable test for determining a person's age at least while still living, without either submitting her to risky radiology or to other tests (such as an examination of her teeth) which would leave an unacceptably wide margin of error. She was not in a position to demonstrate this by evidence since Mr Shaw's suggestion was rather sprung on her at the first hearing.

16. Another suggestion by Mr Shaw was that three documents, which purport to be letters from Mende to various people in Sudan written while she was in England in July 2000, should be submitted to handwriting analysis. The reason for this was that they appear to show her living a free and perfectly contented life during the period she worked for the Claimants. They are said by the Defendants to be forgeries. This potentially attractive solution, however, runs into difficulty because there is no agreed sample available of Mende's handwriting. That which appears on her visa application, and upon what purports to be a tea-seller's licence for the market in Khartoum, dated March 2000, is not accepted by the Defendants as her genuine handwriting.

17. Another possibility presented itself in the course of argument, because reliance was placed upon a copy of a photograph said to have been taken on 10th June 1999 in Khartoum, which apparently shows Mende in the company of an older sister (Samia, also known as Sharan) and a number of children. This would be inconsistent with her own account in the book, since she claims not to have seen her family since 1994. The genuineness of that document is challenged also. I understand the Defendants' case to be that a genuine image of Mende has been super-imposed on a separate photograph. There were hopes that the original and/or negatives might be obtained so that they could be examined and subjected to expert testing. The Defendants' solicitors requested access to the original six months ago, but without response. On the morning of 13th July, Mr Shaw told me on instructions that the original photograph had gone missing from the owner's album and that the photographer had gone out of business, with the result that his records and negatives were no longer available. It was implied that Mende was in some way, indirectly, responsible for the disappearance of the original. That route was also therefore closed off. When the photograph went missing and when the negatives were disposed of were matters on which at that point no information was given.

18. I was at one stage during the hearing tempted by the possibility of not making any order for security become effective until a suitable time had elapsed to enable one or more of these tests to be carried out. Yet, because of the formidable hurdles I have rehearsed, this option did not appear to be feasible.

The nature of the protection the Defendants now seek

19. I must therefore turn to consider the application for security in the light of the evidence put before me. The Defendants are seeking an order that the Claimants give security within 14 days, to cover the period up to the stage of disclosure of documents, in the sum of £433,028. A large proportion of this according to the evidence of Mr Mathieson, the Defendants' solicitor, has already been incurred in the gathering of evidence to support the plea of justification. A significant part of that

expenditure was attributable to a visit he made last December to Sudan for the purpose of interviewing witnesses. Until such security is provided, the Defendants submit that a stay of the proceedings should be ordered and, in default, the claim should be struck out.

20. The order sought is plainly of the highest importance for both parties. If I do not grant a substantial order for security, the Defendants will clearly be placed in a thoroughly unenviable position since if they are successful they may not be able to recover any of their costs. If they are unsuccessful, they will have to pay an uplift as well as costs on the conventional basis, since the Claimants have the benefit of a conditional fee agreement. Although the evidence is far from satisfactory on this aspect of the case, the Claimants' contention is that if I make an order in the terms sought, or anywhere near it, their claim will be effectively stifled.

The applicable principles of law

21. Against this unhappy background, I must now turn to consider the principles of law applicable to security for costs in the aftermath of the Human Rights Act 1998 and the adoption of the CPR in April 1999. As to the law, there was little, if any, dispute between the parties.

22. Since the Claimants are ordinarily resident out of the jurisdiction, as I have described, and they have no assets here apart from £18,770 held to their credit in their solicitors' client account, one of the relevant conditions identified in CPR 25.13(2) is fulfilled. The question I have to consider, therefore, is whether it is just to make an order for security having regard to all the circumstances. This involves a value judgment and a large measure of discretion.

23. One of the leading cases on the approach now to be adopted on such applications is *Nasser v United bank of Kuwait* [2001] 1 WLR 1868, CA. From this decision it emerges clearly that the discretion must not be exercised in a manner that is discriminatory against claimants who reside outside a relevant contracting state. Accordingly, it should not be assumed that an order for security automatically follows from establishing residence in a non-convention country. There is no presumption of that sort. It is necessary for the court to be satisfied, usually on the basis of evidence, that any costs order made in favour of the defendants would not be enforceable or, at least, that enforcement would be substantially more difficult in that jurisdiction and consequently more expensive for the defendants.

24. It was observed by Mance LJ in the *Nasser* case, at [64], that there are some parts of the world where there can be a natural assumption that there would be not merely substantial obstacles but "complete impossibility of enforcement". It has not been suggested that Sudan is such a case, and therefore I need to address the question of enforceability in the light of the evidence.

25. Further assistance is provided by the judgment of Gross J in *Texuna International Limited v Cairn Energy plc* [2004] EWHC 1102 (Com). His Lordship there commented that, where the court concludes that it may be effectively impossible to enforce an order for payment of costs, then this situation would provide "an objective justification for the court exercising its discretion to make an order for payment of the

full amount of the costs likely to be ordered against a claimant if unsuccessful in the litigation".

26. I pause at this stage to note that these authorities indicate a shift of emphasis in a number of respects from the former long-standing practice with regard to such applications. Not only is it inappropriate to proceed on the basis that an order should, or should ordinarily, be made against a resident outside a contracting state, but it is no longer acceptable practice to work on the basis of a rule of thumb to the effect that the court should make an order of a specific proportion (such as two thirds) of the costs likely to be incurred up to the relevant stage of the litigation. In the Masters' corridor, this used to be the regular practice. The consequence of putting the reasoning of Gross J into practice is that once the necessary threshold criteria are fulfilled, in any given case, the court may well make orders at a higher level than was customary in the past.

27. If on the basis of the evidence before the court it emerges that there *is* a realistic prospect of enforcement against the claimant in any particular jurisdiction, the court will be likely to limit the order for security to a sum corresponding to the additional costs which will be incurred in the process of enforcement: see e.g. the *Nasser* case at [67]. Where a claimant is impecunious, that is likely to be a relevant factor to the exercise of the court's discretion. It is important to note, however, that it is not in itself a threshold requirement. That is to say, impecuniosity is not, without more, a ground for awarding security. Being realistic, however, one has to recognise that it is a factor which will inevitably render enforcement more difficult and/or lead to the claimant's taking steps to resist the process of enforcement: see e.g. the *Nasser* case at [62].

28. I need also to bear in mind the words of Peter Gibson LJ in *Keary Developments Limited v Tarmac Construction Ltd* [1995] 3 All ER 534, where he said:

> "The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression such as by stifling a genuine claim by an indigent company against a more prosperous company. But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company".

That encapsulates some of the more important policy considerations that are likely to come into conflict when security for costs is sought. The relevance of the passage is not, or so it seems to me, in any way diminished by the fact that the Claimants in the present case are individuals rather than corporate entities. Nor, since they are of universal application, can those considerations be said to have become outdated by reason of any subsequent legislative developments. The passage in no way enables one to see how, on the facts of any particular case, the conflicting considerations can be resolved, but they are important nonetheless. Nowadays, it is necessary to have regard to the parties' respective rights under Article 6 of the European Convention on Human Rights. Since in this instance both sets of parties' rights are engaged, the exercise becomes one of focussing upon the balancing of those rights and interests and having regard to the familiar tests of necessity and proportionality.

Is the Claimants' second meaning pitched too broadly?

29. I should be vigilant for any element of unfair pressure being brought to bear on these Defendants, despite their wealth, by the Claimants. One aspect of the situation upon which Miss Page places reliance, as I have already indicated, is the choice of the Claimants to pitch their second meaning so widely – thus introducing inevitably an enquiry as to Mende's movements and activities over the period between 1994 and 2000. On the other hand, if Mr Shaw is correct in his submission that the nature of the allegations which directly implicate the Claimants is such that it would be impossible to avoid going into the background, then this is a factor which should not be held against the Claimants as "putting unfair pressure" on the more prosperous litigants. It would simply be a legitimate part of the process of pursuing a fair trial of the issues between the parties. I will proceed on the basis that Mr Shaw's analysis is correct in this respect. Even if proportionate, however, the strategy inevitably puts the Defendants to great expense.

The relevance of the conditional fee agreement

30. It has already been recognised that when considering "unfair pressure" it is relevant for the court to take into account the fact that a claimant is pursuing his or her case with the benefit of a conditional fee agreement with a substantial uplift – especially if there is no "after the event" insurance ("ATE"): see e.g. the observations of Mance LJ in *Nasser* at [60]. Here it has, after a considerable lapse of time, finally been acknowledged on the Claimants' behalf by their solicitor that there is no ATE insurance that is likely to be of any value whatsoever to the Defendants should they succeed. What is more, as I understand it, there is no challenge to the Defendants' assumption that in this particular case there is likely to be a 100% uplift.

The need to consider whether the claim will be stifled

31. An important consideration, especially having regard to the need for equality of arms under the CPR and the Claimants' rights of access to justice under Article 6 of the European Convention, is whether the order sought or indeed any order for security for costs will have the effect of stifling their claim. That is a major factor in the present case. I need to remember, however, that it is necessary for the Claimants to demonstrate the probability that their claim would be stifled. It is not something that can be assumed in their favour. It must turn upon the evidence. I approach the matter on the footing that there needs to be full, frank, clear and unequivocal evidence before I should draw any conclusion that a particular order will have the effect of stifling. The test is whether it is more likely than not.

32. There are interesting recent observations in this context in the case of *Brimko Holdings Limited v Eastman Kodak Company* [2004] EWHC 1343 (Ch), to which Miss Page drew my attention. Park J, having referred to the burden of proof, continued:

> "Secondly, the court should not restrict its evaluation of the ability of a claimant to provide security to the means of the claimant itself. If the claimant cannot provide the security from its own resources, the court will be likely to consider whether it can reasonably be expected to provide it from third parties such

> as, in the case of a corporate claimant, shareholders or associated companies or, in the case of an individual claimant, friends and relatives. If the case moves to the stage of considering whether the security should be regarded as being available from third parties, the burden still rests on the claimant. He or it has to show that, realistically, there do not exist third parties who can reasonably be expected to put up security for the defendant's costs".

That is a factor which is potentially of some significance in this case and I shall return to it in due course.

The court should not attempt to determine the merits

33. A vitally important principle for me to have in mind in the instant case (and the importance of which I do not believe has been diminished by the advent of the Human Rights Act 1998) is that the court should not, upon such an application, enter into the merits of the case in any detail, save in the exceptional case where one party or the other can demonstrate a high degree of probability of success: see *Keary Developments* at p. 540d. I take it from the way the case was argued by Mr Shaw that the Claimants consider themselves to qualify in this respect. Again, therefore, I shall need to return to the subject at a later stage in order to see whether they can meet that demanding test.

Is there "something that may not be bona fide" about the claim?

34. I was somewhat concerned about another test which I was invited to apply by Miss Page, deriving from some remarks of Buckley J in *Mealey Horgan plc v Horgan* [1999] STC 711, as approved by Simon Brown LJ in *Olatawura v Abiloye* [2003] 1 WLR 275 at [25]. I do not feel it is precise enough for me to apply with confidence in this case. What was said was to the effect that the court can approach an application for security on the footing that there is "something that may not be *bona fide*" about the conduct of the claim, in which case the court may come to the conclusion that "the other side should have some financial security or protection". Here Miss Page relies not only upon the evidence going to the plea of justification, but also on the conduct of the Claimants in the course of the litigation and, in particular, the way in which they have gone about obtaining evidence from potentially vulnerable witnesses in Sudan, and indeed in seeking to persuade such people to change their stories. Although there is no doubt that the evidence raises suspicions as to the Claimants' good faith in these respects, it is also true that there is a good deal of evidence giving rise to suspicions about the good faith of Mende. To an extent, therefore, these considerations cancel one another out. One must avoid deciding such crucial questions on the basis of partial evidence and mere impression. I prefer to consider this evidence as part of the overall picture when I come to determine whether or not the Claimants have succeeded in discharging the very heavy burden of demonstrating that the defence of justification is bound to fail or, at least, that there is a high probability that it will fail.

The possibility of enforcing a judgment in the Sudan

35. I turn now to consider the prospects of enforcement in Sudan of any order made by the English court. There is evidence from Mr Mathieson based upon legal advice he has obtained from Sudan. I shall not set it out but it is to be found in paragraph 36 of his second witness statement. That advice is to the effect that, for one reason or another, enforcement in Sudan of any order for costs against the Claimants would fail. There is no evidence relied upon on the Claimants' behalf by way of rebuttal. Ordinarily, therefore, I would expect to proceed on the basis of that unchallenged evidence and to work on the assumption that it would be impossible to enforce any order in the Defendants' favour.

36. Mr Shaw, however, urges me not to do this for reasons of comity. He suggests that it would be inappropriate, on grounds of public policy, for an English court to assume that duly appointed judges in that jurisdiction will act improperly, unlawfully or in bad faith. So it may be. It is not necessary, on the other hand, to come to any such conclusion in arriving merely at the decision that an order would be difficult or impossible to enforce. An example I cited in the course of argument was that of the attitude of the courts in the United States towards the enforcement of damages awards in favour of claimants in English libel proceedings. There are differences of policy as between the English courts and those of the United States in that context. To conclude that an English award would not be enforceable in the United States is not to criticise the judiciary or to act inconsistently with the demands of comity.

37. I prefer to take the more conventional course of proceeding on the evidence before me. Since Mr Pepper has chosen not to counter the Defendants' evidence on the subject with any legal opinion from Sudan, I regard myself as required to proceed on the basis of the only evidence I have on that topic.

The factors relevant to discretion

38. In the light of my conclusion that enforcement would be impractical, I must now address the factors argued before me as relevant to the exercise of my discretion. There are certain very serious criticisms made of the Claimants' conduct both in relation to this litigation and other extraneous matters. In certain important respects, those allegations have not been answered in the evidence and, what is more, there was a deafening silence in the submissions of counsel. I make no criticism of Mr Shaw. On the contrary, I entirely accept that he was representing his clients' interests with vigour and determination. That is why it seems to me that I must inevitably draw the conclusion that the criticisms directed at his clients, or at least some of them, were not answered because there was no effective answer that could be given.

39. The first of these criticisms relates to alleged deception of the United Kingdom authorities in relation to the circumstances in which Mende was permitted to enter this country in 2000. In the visa application form and in a copy of the undertaking sent to the Foreign and Commonwealth Office on 3rd March 2000 (recently disclosed by the Home Office) it is quite clear that the basis upon which permission was being sought for her entry was that she would work for Ali Bashir Gadalla at his residence (16 Tiverton Road, London NW10 3HL) and that he would be fully responsible for Mende while she was in the United Kingdom. In their reply (at paragraph 4.8) in these proceedings, the Claimants seek to finesse that indisputable fact by asserting that Mr

Gadalla offered merely "to take formal responsibility for [Mende] on her visit to the UK while she would be living and working for the Claimants in their home". That was how the matter was put by the first Claimant in a witness statement prepared for use in *The Sunday Telegraph* action (at paragraphs 27–28) and in the further information of the reply in these proceedings, served on 21st April 2005.

40. The true intention was that Mende would come for the purpose of working for and living with the Claimants at the address to which I have referred above. Thus, not surprisingly, it is contended on the Defendants' behalf for the purposes of the present application that the Claimants deceived the Foreign and Commonwealth Office in that respect. There was no need for a false account to be given unless it was appreciated that the first Claimant would not be permitted himself to bring another Sudanese domestic servant into the country. It is asserted therefore by the Defendants, fairly and squarely, that the first Claimant has abused diplomatic privilege "by means of a deliberate deception of the UK authorities for personal advantage for himself and his family". What matters for present purposes is that, despite this very grave allegation, not a whisper of an answer was offered on the Claimants' behalf. That is a very telling consideration when it comes to the exercise of the court's discretion.

41. As I have noted above, Mr Mathieson has also taken the point that the lengths to which the first Claimant was prepared to go, in order to obtain Mende's services in his house, tend to suggest in themselves that she was no ordinary paid servant. In the present context, however, that is irrelevant. That is an argument for later. Yet, for the purpose of exercising my discretion on the present application, the very serious deception which *appears* to have been practised upon the authorities in this country cannot be ignored. There has been no denial of the basic facts, no explanation and certainly no apology.

42. I am invited also to bear in mind the fact that an order was made against the first Claimant for payment of costs incurred on behalf of Mende with reference to the *Sunday Telegraph* case. Payment was avoided for some considerable time until he was facing the possibility of an application for security in the present action. I am invited to conclude, in the absence of any other convincing explanation, that this was no coincidence. The reluctance to comply with the court order is plainly a relevant factor in deciding whether or not the discretion should be exercised in this litigation in favour of granting security.

43. The next category of conduct criticised by the Defendants related directly to this litigation. The essence of the complaint is that the means used to gather the evidence from relatives of Mende, who are said to be socially and educationally vulnerable, was unacceptable because:

> "… the rounding up of and dealings with Mende's relatives was allowed to be conducted by those that Mende was accusing of having enslaved her and their family members. This was a fundamental error of judgment on the part of those conducting the action for the Claimants which, the Defendants believe, has led to Mende's relatives being procured to provide, or put their marks or signatures to, evidence that is false and which has probably compromised these witnesses irretrievably and

> rendered the task of the Court in determining the truth impossible".

44. The Defendants are particularly troubled about the lack of direct involvement (no doubt for reasons of cost) on the part of English solicitors in proofing potential witnesses and, conversely, as to the involvement of the second Claimant and a relative called Salma who is herself accused of keeping Mende as a slave in the Sudan. The evidence relied upon by the Defendants for this purpose is undoubtedly troubling and gives rise to concerns, but it would be inappropriate for me to conclude that there has been improper pressure in the gathering of evidence purely on paper, and without the benefit of hearing the other side of the story.

45. There is no doubt that there have been significant changes of story on the part of potentially important witnesses in Sudan, according to who was asking the questions. Mr Mathieson went to Sudan last December in order to interview witnesses and, subsequently, the Claimants' advisers have suggested that certain of those witnesses have withdrawn or varied that evidence. I cannot determine these issues finally at this stage, and it would not be appropriate to attempt to do so. There are many questions which require to be fully investigated.

The evidence relied upon to undermine the defence of justification

46. I prefer to approach these conflicts of evidence rather in the context of determining whether or not the Claimants' primary submission on this application is correct; namely, that there is no merit in the plea of justification. It seems to me plain that I cannot be so satisfied. I should proceed on the basis that it is *possible* that the defence of justification will substantially succeed, however extraordinary the story might appear to a casual observer. The undoubted inconsistencies in the evidence and the fundamental conflicts on the factual background require to be resolved, as I have said, after full disclosure and when the witnesses' oral testimony has been probed in cross-examination. For all I know, that process may have to take place in front of a jury (although this observation is naturally without prejudice to any application that may be made in due course on mode of trial). Because it is not appropriate for me to enter into the merits of the case in any detail (see paragraph 33 above), I do not intend to address all the matters canvassed before me in argument on whether the plea of justification will succeed. It is not only unnecessary to do so but also undesirable.

47. There are a number of documents which are said to be either forgeries or not genuine, upon which the Claimants place reliance as demonstrating conclusively that Mende's story cannot be true. There are photographs purporting to be of her with members of her family, attending a wedding in Sudan, and sitting alongside a supposed fiancé.

48. There is also what purports to be a copy of her school certificate showing that she passed certain examinations in 1986. Mende denies having done so. Attached to it is a photograph, however, which appears to date from the year 2000. When this document was put forward as "convincing" by the Claimants' solicitors in the first place, it appears that they were unaware that the photograph was discrepant, in the sense that it was taken some 14 years after the examination was allegedly passed. Yet the content of the 1986 certificate appears to verify that the person who allegedly passed the examination was the person who is portrayed in the 2000 photograph. This is plainly

unsatisfactory. The official who certified the copy was in no position to make such an identification.

49. Another document relied upon by the Claimants is what purports to be a tea-seller's licence for the market in Khartoum. It is dated March 2000 (and after the application for a visa to enter the United Kingdom came into existence). This is despite the fact that, according to the Claimants' case, Mende had been a tea-seller for a period of years during the 1990s (although there are inconsistencies between witnesses as to when this occupation began). Were there earlier licences in existence? Did they have to be renewed periodically? No answer was forthcoming.

50. It seems to me that the less I say about the credibility of witnesses or documentary evidence at this stage the better. Suffice to say that there are many puzzling questions to be answered. If it is ever going to be possible to get to the bottom of what happened, it is likely to be a very time-consuming exercise.

51. No attempt has been made to strike out the defence of justification and, as I have already indicated, nothing has been produced so far which persuades me that I should treat it as other than viable. I have little doubt that if the Defendants succeed in their defence it can only be after spending vast sums of money in addition to the costs already incurred. There is, on the evidence, virtually no prospect of ever recovering any of that money against these Claimants. These considerations, together with the discretionary factors I have identified above, point very firmly in the direction of a substantial order for security to be made in the Defendants' favour. At this stage, therefore, I need to consider what possible injustice might be caused to the Claimants by such an order and, in particular, whether there is evidence that a viable claim would be stifled.

Have the Claimants established that the claim would be stifled?

52. Neither Claimant has stated clearly that he or she will be unable to pursue the claim if an order is made for security. Moreover, little information is given as to how the Claimants became significant property owners; nor is there any independent valuation of those properties. As to raising funds from other sources, including family or friends, the evidence is unsatisfactory. All the first Claimant has said is that he has "considered" trying to raise such funds. No approach has been made, it would appear, but despite this he suggests that he does not believe that an approach would yield substantial funds. Nor is there any evidence as to what steps have been taken to raise loans, whether secured by the properties identified in the evidence or otherwise. An offer has been made to produce some title deeds by way of security, but I am not satisfied that this would provide the Defendants with any real security. I should require compelling evidence to be so persuaded.

The monetary value of the claim

53. I was reminded by Miss Page of the remarks of Brooke LJ on the relative monetary value of libel claims nowadays, so far as claimants are concerned, as compared to the costs of litigating – especially in the context of CFA cases where there is likely to be a substantial uplift – in *Musa King v Telegraph Group Ltd* [2004] EMLR 429 at [56]–[57]:

> "A claimant brings an action like this not only to recover damages but also to vindicate his reputation, but that consideration cannot go too far to bridge the gulf between the value of this action to the Claimant and its value to the lawyers instructed in the case. As I have said, something seems to have gone seriously wrong".

That is surely a relevant factor to bear in mind in weighing up the respective advantages and disadvantages to the parties in libel litigation of an order for security for costs. The costs vastly outweigh in this case any potential gain to the Claimants measured in purely financial terms. Moreover, so far as possible vindication is concerned, I need to bear in mind that the court is concerned with the publication of the offending words in this jurisdiction and therefore with what is required to restore reputation in England and Wales. The protection of the Claimants' reputations in Sudan is not a factor which enters into this equation.

The criticism of the Defendants' motives

54. Sometimes it is possible, by a consideration of the overall circumstances in a case, to decide that the purpose of a defendant in seeking security for costs is not so much the legitimate protection of its own interests but rather the stifling of a meritorious claim. It is true that the first Defendant is immensely wealthy, but I cannot detect any improper motive in the application before me. As Miss Page has pointed out, those who are responsible for giving instructions in the conduct of this litigation have obligations to shareholders. There is no reason why they should hold back from obtaining such legitimate remedies as are open to them, in the protection of their own interests, purely because the Claimants appear to be of relatively modest means.

55. Miss Page concluded her overall assessment of her clients' position with these words:

> "In commercial terms, this is a no-win situation for the Defendants. This is an extreme example of litigation that would represent a massive disincentive to any commercial publisher to defend to trial. If the story is true, and the Defendants believe it to be, a commercial decision not to further defend, to withdraw the book and to allow the Claimants, their families and the government of the Sudan to trumpet victory over Mende Nazer would be a very serious blow to freedom of expression. If the price of fighting to prove the truth is too high, suppression of the truth will prevail".

I allow of course for an element of rhetoric in that passage, but it does nevertheless highlight serious concerns which are relevant factors for the court to take into account. The court needs to be wary of the possibility of libel claimants (and perhaps especially claimants who are beyond the reach of enforcement and who have the benefit of a CFA arrangement) using its procedures in such a way as to bring intolerable pressures to bear on defendants in order to achieve vindication which may be hollow or misleading in the absence of full enquiry and the rigorous testing of the case in open court. I cannot, of course, come to any definitive conclusions as to the Claimants' motivation, but the risk is one factor to be weighed in the scales very carefully.

The new material to undermine the defence of justification

56. After this judgment was ready in draft, and arrangements were about to be made for handing it down on 29th July, I received some further material from Mr Shaw intended to buttress the case for refusing security. The first batch arrived at 4.30 on 22nd July together with a "supplementary skeleton argument", but unaccompanied by any witness statement.

57. The skeleton therefore consisted partly of further submissions but primarily of assertions of fact (no doubt by way of substituting for evidence because of pressure of time). I was told that on 12th July (i.e. the second day of the hearing) the Claimants were asked to find further evidence to disprove the Defendants' account of the photograph purporting to be of Mende posing with her elder sister, her (Samia's) two sons and the two daughters of Gismah (see paragraph 17 above). By 14th July "the documents were found and then entrusted to the second Claimant by Gismah".

58. There is now said to be another photograph taken in June 1999 – this time an original rather than a copy – although nothing is said as to the negatives. This time the photograph purports to have been taken two days later (on 12th June 1999) but also at the Nabeel Studio. Yet the children are wearing the same clothes "even down to the two pens in the eldest boy's pocket". Mende does not appear in the photograph, but nevertheless it is said to show that the copy photograph which does include her must be genuine and that Samia must have been lying when she told Mr Mathieson in December 2004 that the youngest boy in the photograph had not been born in June 1999. Although Gismah is the person from whose album the original of the photograph showing Mende apparently disappeared, no explanation has been produced from her as to when or how this could have happened. Nevertheless, it was explained to me by Mr Starte, on instructions, that it was noticed to be missing in or about January 2005. It is thus even more surprising that the Claimants' solicitors did not so inform Reynolds Porter Chamberlain by way of response to their enquiry as to what happened to the original (on 19th January).

59. Another photograph relied upon is said to have been taken in April 2001. It has the same red background. The purpose of this is to show that the two boys have grown up since 1999 consistently with the intervening period, and so to give the lie to Gismah's assertion that the younger one had not been born in June1999. Thus, submits Mr Starte, "the forgeries mount up". With allegations of forgery being made, however, and with no witness statement produced from either Gismah or the second Claimant, it is very difficult to conclude that all has become clear. The argument depends on the genuineness of the attribution of dates both in June 1999 and April 2001 and upon the genuineness of the photograph showing Mende as being present on 10th June 1999.

60. Of course, the more documents which are said to be forgeries, the greater one's scepticism. On the other hand, if one document turns out to be forged it would not be very surprising to find others created for the same purpose. It was asked, rhetorically, "Where was this photograph of Samia and Abdel Kareem [the son] taken (if not Khartoum) and when (if not April 2001) and how do Gismah or the Claimants have it?". The answer is simply that without evidence from those directly involved I cannot begin to come to definitive conclusions. If Mende has in fact lied about these matters, and has thus obtained asylum fraudulently, she would be guilty of serious criminal

offences. I cannot come to such a potentially significant decision on incomplete material.

61. Even more determinative is said to be a photograph from 1985 supplied by Gismah of herself (as a teenager) and Mende sitting with others round a table in her Aunt Maryam's house. Unfortunately it is very blurred.

62. Nevertheless Mr Starte submits that: "Provided only that this photograph depicts [Mende], that is the end of the case". The reasoning is that if Mende was accurately portrayed as a teenager or adult in 1985 it would be plainly impossible for her to have been taken into slavery nine years later at the age of 12. All depends, therefore, on who is in the photograph and when it was taken. That is not something I can determine finally without evidence from the relevant persons. On the face of it, I agree, it seems compelling and can apparently be dated by the presence of the baby (said to be Maryam's son Waleed born in that year). Mr Nicklin, however, claimed that one can detect a date on the back of the original suggesting that the photograph was taken in September 1993. This tends to underline the speculative and generally unsatisfactory nature of the present exercise.

63. The other category of new documents consists of two birth certificates. I raised this subject in argument during the original hearing because it seemed to me a possible way of determining the age of the child who was said not to have been born in June 1999 (and perhaps also of other relevant persons). But I was told that there would not be any such documents available from Sudan; yet now two seem to have been obtained without difficulty. These related to Gismah's two daughters but, as Miss Page submits, they "do not, of themselves, prove anything about whether or not Mende's account of her life is true or false". It is possible that there is a distinction between Karko and Khartoum. The girls came from Khartoum, where birth certificates are available. The boys come from the remote region of Karko, where they are apparently not.

64. I allowed the new material to be canvassed after further written submissions at a renewed hearing on 26th July, but the overall effect was simply to deepen the mystery.

65. In the meantime, yet further photographs were supplied at the very last minute, on the evening of 25th July, upon which the Defendants were able to obtain information from Mende at a meeting. The upshot was that she knew nothing about any of the people in the photographs produced on 22nd and 25th July with two exceptions. She accepted that there was a photograph of herself against a yellow background and that there was a photograph of her father. Specifically she denies that some of the photographs supposed to be of herself are what they purport to be. I indicated that her account of these matters should, as soon as practicable, be put into a witness statement. This should be filed and served upon the Claimants' solicitors by 15th August.

66. Another development was that the original of the 10th June 1999 photograph, which Mr Shaw told me on 13th July had gone missing, was mysteriously recovered on either Saturday 23rd or Thursday 21st July. It was then sent over, along with other material, by courier and arrived in the middle of the restored hearing on 26th July. It certainly does not look to the layman like a forgery, but it would require expert consideration. Unfortunately Miss Page's instructions are that without the negative no expert could pronounce on the matter definitively. When I asked Mr Starte how it was that the

missing original had been "recovered", he told me that Gismah was not prepared to say from where it had been recovered. Since on 13th July it was being implied that Mende was somehow responsible for the photograph being extracted from Gismah's album, this was particularly unfortunate.

67. The number of documents is mounting rapidly but since their relevance and, at least in some cases, their authenticity is disputed it becomes correspondingly more inappropriate for a judge to pre-empt the role of the ultimate fact-finding tribunal. It is a most unusual set of circumstances, but this seems to me to make it all the more important to approach the new material, unsupported as it is by any evidence, in a methodical and orthodox way.

Have the Defendants brought the claim upon themselves?

68. I should add that I was not impressed by the Claimants' other ground for resisting security. The Defendants have in one sense brought about their present predicament themselves. But that is surely true of any defendant in defamation proceedings who has voluntarily exercised his or her right of free speech (whether on a matter of public interest, as here, or otherwise). What is undoubtedly unusual about this case is that the Defendants were only too well aware of the earlier proceedings against the newspaper and the fact of settlement (without any determination on the merits). The Defendants have no doubt thought about it and come to the conclusion that they are in a better position to establish a substantive defence. As I have noted above, the second Defendant worked closely with Mende for some three months. This was well after the *Sunday Telegraph* publication. He therefore had an opportunity to assess and test her story. I should not assume that the collaboration with her on the book, and its subsequent publication, took place for cynical commercial reasons; in other words that the Defendants were aware at the time of publication that her story was false. Indeed, it seems on the face of it most unlikely.

69. They would naturally be aware that the *Sunday Telegraph* and its advisers had been persuaded to make a statement in open court, well before the book was published, but they were in a position to form their own independent judgment as to Mende's veracity. They were entitled to back it and take the consequences. They have been provided (or, as Miss Page suggests, "inundated") with witness statements and documentary evidence, on the Claimants' behalf, which was intended to demonstrate the error of their ways, but they were not impressed. Indeed, as time has gone by, they consider that this material raises rather more questions than it answers.

70. Not only did the Defendants have, prior to publication, the opportunity to assess the critical witness upon whom the entire book was based. There has also been, subsequently, the information which became available after Mr Mathieson's visit to Sudan in December 2004. Far from undermining their confidence, it seems to have strengthened their conviction in the essential validity of Mende's account. It is not for me, certainly at this stage, to decide whether they are right or not. It is the Defendants' right to make their own judgment in the matter. They should not be placed at any greater disadvantage in defending their beliefs, and the stance they have chosen to take in this litigation, merely because some other litigant has on the basis of different information come to a different decision (or perhaps concluded, for all they know, that discretion was the better part of valour). In particular, there is no reason

why this factor should detract from the opportunity to seek the protection of security which is open to any litigant.

My overall conclusion

71. In all the circumstances, I have come to the conclusion that this is overwhelmingly a case for an order for security. I bear in mind proportionality, but I also need to have very much in focus the evidence of the enormous expenditure which the Defendants have already had to incur in investigating the situation in Sudan because of the way the case has been framed against them. It seems to me to be right to make an order that security be provided in the sum of £375,000 down to completion of the disclosure process. Subject to any further submissions, it would appear to be reasonable to allow the Claimants until 1st October 2005 to produce the security. There will be liberty to all parties to apply and I would not wish to inhibit, in the meantime, any expert assessment of the disputed original photograph "recovered" last week (for whatever that may be worth). Subject to that, and to the preparation of Mende's witness statement, the action will be stayed forthwith until security is provided.