Neutral Citation Number: [2004] EWHC 2928 (QB)

Case No: HQ04X01798

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2004

Before :

THE HON. MR JUSTICE EADY

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Between :

Lance Armstrong	**Claimant**
- and -	
1. Times Newspapers Ltd **2. David Walsh** **3. Alan English**	**Defendants**

- -
- -

Richard Spearman QC and Matthew Nicklin (instructed by **Schillings**) for the Claimant
Heather Rogers (instructed by **Gillian Phillips**) for the Defendants

Hearing dates: 30th November and 6th and 7th 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. If ever there was a case for isolating the "real issues" between the parties in a libel action and excising superfluous material, this surely is it. Some of the particulars pleaded in the defence go back for decades and others even to ancient Greece and Rome.

2. The article complained of was published in *The Sunday Times* on 13th June 2004. It refers to, and apparently repeats, allegations or "questions" raised in a book of which the second Defendant, Mr David Walsh, is a co-author. It has been published in France under the title "LA Confidentiel". I ruled on 30th November 2004, in so far as the article may reflect upon the Claimant, Mr Lance Armstrong, in associating him with illicit performance-enhancing drugs, that it is capable only of imputing either "guilt" (in the sense of having taken such drugs) or, at the least, that there are reasonable grounds to suspect him of having taken such drugs. On that occasion, I indicated that I would give my reasons in writing, and that is one of the matters addressed in the course of this judgment.

3. The consequence of that ruling is that, for the purposes of the trial and the preparations leading up to it, there is no room for advancing a plea of justification in any lesser sense, such as was contemplated by Brooke LJ in *Chase v News Group Newspapers* [2003] EMLR 11 at [45]. He recognised that the sting of a libel may sometimes "… mean that there are grounds for investigating whether [the claimant] has been responsible for such an act". Depending on the circumstances, the exclusion of "grounds for investigating" may significantly reduce the scope for a plea of justification.

4. It is important to remember, however, that a judge should not exclude such a meaning, at the pleading stage, purely on grounds of case management. Such a step should only be taken if the judge is satisfied that the words complained of, taken as a whole and read in their context, are simply not capable of bearing a meaning at the lowest level of gravity. That is to say, I should only exclude such a meaning if it can be characterised as so far-fetched that a jury, properly directed, would be perverse to uphold it. The principle was concisely stated by Simon Brown LJ in *Jameel v The Wall Street Journal Europe* [2003] EWCA Civ 1694 at [14]:

> "It is a high threshold of exclusion. Ever since Fox's Act 1792 the meaning of words in civil as well as criminal libel proceedings has been constitutionally a matter for the jury. The judge's function is no more and no less than to pre-empt perversity".

5. There was some argument in the course of the hearing before me as to the precise nature of the third tier of gravity to which Brooke LJ was referring in *Chase*. He went on in [46] to attribute this tripartite gradation to the speech of Lord Devlin in *Lewis v Daily Telegraph Ltd* [1964] AC 234, 282 where he said:

> "I do not mean that ingenuity should be expended in devising and setting out different shades of meaning. Distinct meanings

> are what should be pleaded; and a reasonable test of distinctness would be whether the justification would be substantially different. In the present case, for example, there could have been three different categories of justification – proof of the fact of an inquiry, proof of reasonable grounds for it, and proof of guilt".

6. It will be noted that Lord Devlin referred to "the fact of an inquiry"; that is to say, he appeared to contemplate the subsistence of a pending inquiry at the time of publication. The reason why such a third tier of meaning would be defamatory was clearly explained in *Lewis v Daily Telegraph* by Lord Reid (at pp. 259-260) who, in the light of the facts before him, suggested that some readers of the newspaper, on learning that a police inquiry into the plaintiffs' affairs was on foot, might say:

> "We really must not jump to conclusions. The police are fair and know their job and we shall know soon enough if there is anything in it. Wait till we see if they charge him. I wouldn't trust him until this is cleared up, but it is another thing to condemn him unheard".

7. More recently this same three tier gradation was referred to by Robert Walker LJ in *Bennett v News Group Newspapers* [2002] EMLR 860 at [36]:

> "A statement that a police officer is under investigation is no doubt defamatory, but the sting of the libel is not as sharp as a statement that he has by his conduct brought suspicion on himself. That point is reflected in a passage in the speech of Lord Devlin in *Lewis* already cited which refers to 'three categories of justification – proof of the fact of the inquiry, proof of reasonable grounds for it and proof of guilt'".

8. A little later at [37] the Lord Justice added:

> "The fact of an official investigation into accusations against the police… must be recognised as a news story in its own right, just as the Fraud Squad's investigation of Mr Lewis's company was".

9. As is recognised by Mr Spearman QC, on behalf of the Claimant in the present case, the lowest tier of gravity may not be confined to circumstances where there is *already* an inquiry of some kind into the relevant claimant's conduct. In the present case, it is not suggested that any inquiry has been set up into the question whether Mr Armstrong has taken drugs. What Ms Rogers, on the Defendants' behalf, wished to advance was a plea of justification on the basis that an inquiry *should* be conducted, because there are grounds which would merit such an investigation. It is thus clear that the case does not fall neatly within Lord Devlin's lowest level of gravity, as he defined it. Yet it is necessary to bear in mind that he was focussing upon the particular facts of the case before him – where it so happened that an inquiry *had* been under way at the time of publication.

10. Mr Spearman thus concedes, at least in theory, that a defendant could be permitted to justify a third tier meaning even where no inquiry was on foot. This might be on some such basis as setting out the grounds which would merit an investigation. It is always necessary to remember, of course, that in order to serve a valid function in libel proceedings any defence of justification has to be directed towards proving the truth of words which are actually defamatory of the claimant. There must, therefore, be grounds which would lead reasonable onlookers to say of the claimant, in Lord Reid's words, "I would not trust him until this is cleared up".

11. Even though a judge on an application of this kind is concerned only to pre-empt perversity, Simon Brown LJ himself recognised in *Jameel*, cited above, at [16] that where a defence of justification is raised with regard to a third tier *Lucas-Box* meaning (unlike in the *Jameel* case itself) it may be important to rule in advance whether the words are capable of bearing the relevant lesser defamatory meaning "so as to control the evidence properly adducible at trial". That is exactly what I am invited to do in this case by Mr Spearman.

The article in The Sunday Times

12. I now turn to the article complained of in *The Sunday Times.* The heading appeared alongside a large photograph of the Claimant:

> "LA CONFIDENTIAL
>
> A book co-written by David Walsh of The Sunday Times will raise new questions about Lance Armstrong, five-time champion of the Tour de France and an icon of the sporting world. Alan English reports."

There is a caption underneath the photograph of Mr Armstrong:

> "Heart of the matter: Lance Armstrong after victory in the Tour de France, a race he will attempt to win for a sixth time next month. The new book investigates the aftermath of a drug test on Armstrong during the 1999 Tour".

13. The article is long and takes up most of the page. It is striking that in the middle there appears a quotation from Brooke LJ in *Musa King v Telegraph Group Ltd* [2004] EMLR 23 at [55]. What appeared in the newspaper was his observation that the media are the general public's "eyes and ears" and a summary of the following passage from his judgment:

> "This is of especial importance in the 'war against terrorism' where in a free society fearless reporting has often exposed information which it has been in the public interest to expose".

It is thus apparent that the author of the article had legal expertise to hand when it was written. That also emerges from the formula, adopted throughout the article, of referring to "questions" which need answering. There are about ten examples of this

formula, which rather suggests to the casual observer that the article was tailored with legal advice, with a view to fitting neatly within Brooke LJ's third tier level of gravity as described in *Chase*. The question, therefore, essentially is whether this device has succeeded, or whether it would be perverse of a juror, or indeed of any reasonable and fair-minded reader, to conclude that the article conveys anything less than that there are "reasonable grounds to suspect" Mr Armstrong of taking drugs. That is a notch higher and corresponds to the second tier of gravity.

Delimiting the range of natural and ordinary meanings

14. The tests to be applied by a judge on such an exercise, quite apart from remembering only to pre-empt perversity, are well known from a number of relatively recent Court of Appeal authorities, but it is nonetheless appropriate to remind myself of them.

15. My role when adjudicating a question of this kind is to evaluate the words complained of and to delimit the range of meanings of which the words are reasonably capable, exercising my own judgment in the light of the principles laid down in the authorities and without any of the former RSC Ord.18 r.19 overtones. If I decide that any pleaded meaning falls outside the permissible range, then it will be my duty to rule accordingly. In deciding whether words are capable of conveying a defamatory meaning, I should reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation. The object is to fix in advance the ground rules and permissible meanings, which are of cardinal importance in defamation actions, not only for the purposes of assessing the degree of injury to the claimant's reputation but also for the purposes of evaluating any defences raised, and in particular justification or fair comment.

16. I should give the article the natural and ordinary meaning, or meanings, which it would have conveyed to the ordinary reasonable reader, reading the article once. Hypothetical reasonable readers should not be treated as either naive or unduly suspicious. They should be treated as being capable of reading between the lines and engaging in some loose thinking, but not as being avid for scandal. The court should avoid an over-elaborate analysis of the article because an ordinary reader would not analyse the article as a lawyer or accountant would analyse documents or accounts. I should have regard to the impression the article has made upon me, in considering what impact it would have made upon such hypothetical reasonable readers. I should not take too literal an approach to my task.

17. I do not intend to set the whole article out in this judgment, but there are some general observations to be made. It is not a general piece about taking drugs in sport generally or even in cycling in particular. It is, as the photograph and very large "LA" at the top of the page indicate, all about Lance Armstrong. So too is the book to which the article refers.

18. In the first column it is said that the contents of the book have been a closely guarded secret. "What is certain, however, is that it raises serious new questions about drug-taking in professional cycling and investigates the possibility that Armstrong might have taken performance-enhancing substances in order to compete in a sport riven with drugs, of which the most prominent has been the blood-boosting product erythropoietin (EPO)". It is said that for much of the 1990s cyclists could take EPO safe in the knowledge that it was undetectable. Even though a blood test was

introduced in 2001, it stills remains difficult to detect because EPO is a natural body substance. "For a clean cyclist to beat a rider taking EPO is extremely difficult. The book will quote experts who believe that in a race as gruelling as the Tour de France, to do so is probably impossible". That is an especially important sentence in judging the overall impact of the article.

19. So too is the passage a little further on:

> "Armstrong is no ordinary cyclist, but there are those who fear that a man who has won five Tours de France in a row must have succumbed to the pressure of taking drugs".

The formula "those who fear that…" is not an effective device to avoid a claim for libel.

20. Apart from anything else, there is the so-called "repetition rule". If a defendant publishes allegations to the effect (a) that experts have expressed a belief that it is probably impossible to win the Tour de France without taking drugs, or (b) that a man who has won the race five times must have succumbed to the pressure of taking drugs, and if reference to a particular individual can be established, the defamatory imputation against that individual cannot be justified by proving merely that those statements have been made. It is well established that it is necessary to prove, on a balance of probabilities, the truth of the underlying defamatory imputations.

21. Those two passages are, in my judgment, sufficiently powerful to colour the whole article. In the face of these, it seems to me that it would indeed be perverse to conclude that the article meant no more than that there were some questions needing to be investigated. The defamatory sting about Mr Armstrong obviously goes well beyond that.

22. As Lord Devlin observed in *Lewis v Daily Telegraph*, at p.285, "… loose talk about suspicion can very easily convey the impression that it is a suspicion that is well-founded". Likewise, repetitive and loose talk about "questions" can convey the impression that there are reasonable grounds to suspect.

23. Moreover, the transparent device of peppering the article with the "questions" formula is not sufficient to defuse the powerful impact of such assertions as "… to do so is probably impossible" and "… a man who has won five Tours de France in a row must have succumbed to the pressure of taking drugs".

24. Here, of course, there is no question but that the article refers quite explicitly to Mr Armstrong. It is not a call for an inquiry to be set up by a sports body to investigate whether there is drug taking generally in the cycling world. That the sport is "riven with drugs" is taken for granted. Mr Walsh is quoted as saying in *The Sunday Times* four years ago that "doping is destroying cycling and many other sports. It is pervasive and it is sanctioned by sports bodies and event organisers". The question is whether such a successful exponent as Mr Armstrong could conceivably be so successful without having succumbed also to "the pressure of taking drugs" or "the pressure on the team to deliver results". The reader is left in little doubt. Not only has he achieved five (now six) victories in the Tour de France, but he has made a

triumphant return to the saddle after recovery from cancer. "If it is true, said LeMond, it is the greatest comeback in the history of sport. If it is not, it is the greatest fraud".

25. The overall effect of the quotations and the events described in the article is to leave readers with the impression that Mr Armstrong's denials of drug-taking beggar belief and are to be taken with a pinch of salt. It is not for me to rule on meaning, at least at this stage, but only on whether the words are capable of bearing the pleaded meanings. I am quite satisfied that the words are not capable of conveying merely that "a third party has alleged enough to warrant an investigation of the claimant's activities": see *per* Sedley LJ in *Jameel v Times Newspapers Ltd* [2004] EWCA Civ 983 at [29].

26. In any event, as Mr Spearman has argued, the very fact that the sport is supposed to be riven with drugs would provide grounds to investigate whether *any* successful participant in the sport might have taken performance-enhancing substances. There would be nothing in the article to differentiate Mr Armstrong in this respect from any other such participant. In so far as there is material focussed upon Mr Armstrong, it invites the reader to come to a conclusion as to where the "probability" lies or, at least, as to reasonable suspicion.

27. It has been suggested that the repetition rule might have no application to meanings at the lowest level of gravity. As Sedley LJ observed, however, in *Jameel v Times Newspapers Ltd*, at [30]:

> "But the consequences of so holding are disquieting. It means that, so long as a slur on an individual's reputation is cast in level (iii) terms, it can be justified by reliance on the bare fact of assertions made by others, without any need to make them good. The court which decided *Bennett* was not asked to address this problem. Faced with it in the course of preparing to hear this appeal, it seemed to me, first of all, that there was no prior reason why the repetition rule should apply to this third and novel class of libel; secondly, that there were defensible theoretical reasons why it should not; but thirdly that there were strong practical reasons why it should – among them that disapplying the rule will place a premium upon formulating slurs as levels (iii) allegations and defending them unembarrassed by the otherwise general restraint on repeating the allegations of others".

28. That is an interesting observation in the context of the present case. The scattering throughout the article of the "questions" formula suggests that this might have been the very strategy anticipated by Sedley LJ. Be that as it may, wherever a defendant seeks to rely upon "neutral reportage", whether for purposes of setting up a case of *Reynolds* privilege or to justify by reference to a "level (iii) libel", it is important to determine whether the public policy considerations which have led to the need for reportage to be protected are truly engaged, or whether it is simply a situation where the journalist is seeking to by-pass the constraints of the repetition rule and the well established principles in English defamation law relating to the burden of proof. Those rules are equally defensible in terms of public policy considerations which should be given their proper weight.

29. I indicated to the parties on 30th November that I would strike out those parts of the *Lucas-Box* meanings which went only to level (iii). It was pleaded in paragraph 4 of the defence as follows:

> "If and in so far as the words complained of bore the following meanings, they are true in substance and in fact:
>
> (i) That there are serious questions about drug taking in professional cycling including the question whether it was possible that the Claimant might have taken performance-enhancing substances in order to compete in a sport riven with drugs;
>
> (ii) That there are reasonable and/or proper grounds to question, suspect that and/or investigate whether the Claimant might have taken performance enhancing substances in order to compete in professional cycling, a sport riven with drugs".

30. All I was prepared to leave was a meaning in these terms:

> "… that there are reasonable grounds to suspect that the Claimant has taken performance enhancing substances in order to compete in professional cycling".

Shortening the particulars of justification

31. Following my ruling, the parties were given an opportunity to consider where this left the particulars of justification. The scale of the problem is illustrated by the fact that there are no less than 102 paragraphs of particulars (including within them a number sub-paragraphs). Having considered their positions, counsel returned to argue that matter on 6th and 7th December. Ms Rogers by this time conceded that (assuming that my ruling was correct) a number of particulars should be struck out as being incapable of supporting a defamatory meaning at level (ii). There was then a good deal of debate as to the intermediate territory, and I was greatly assisted by schedules setting out in summary form the rival contentions. I intend to confine myself in what follows to those sub-paragraphs of paragraph 4 which remained in dispute.

32. *Paragraph 4.4:* Here are set out in summary form the international standard rules on misuse of drugs promulgated by the International Olympic Committee and the World Anti-Doping Agency. As Mr Spearman succinctly put it, the existence (or otherwise) of a regulatory regime on doping cannot in itself provide objectively reasonable grounds to suspect the Claimant of doping. I agree.

33. *Paragraph 4.9:* I am prepared to allow a truncated form of pleading explaining the concept of "VO2max". What I have in mind is as follows:

> "In endurance sports, maximal oxygen intake, VO2max, is a major determinant of performance. An athlete's VO2max depends on a number of variables, including:

> (i) ventilation: the respiratory function of the lungs;
>
> (ii) transport of inhaled oxygen through the pulmonary membranes to the blood – the diffusion capacity of the lungs, diffusion-distance;
>
> (iii) oxygen transport capacity of the blood, determined by haemoglobin concentration and cardiac output;
>
> (iv) capacity of the working tissue to absorb and metabolise the delivered oxygen – enzymatic systems of the muscles, mitochondrion.
>
> Maximal cardiac output is a key determinate of VO2max".

34. *Paragraph 4.10:* I would allow only the following:

> "Some of the variables above can be influenced by endurance training; others cannot".

35. *Paragraph 4.11:* I will allow the revised wording suggested by the Defendants:

> "Haemoglobin is the protein contained in red blood cells that transports oxygen from lungs to tissue. Manoeuvres that increase total body haemoglobin increase VO2max; and manoeuvres that decrease total body haemoglobin reduce VO2max. The changes appear to be independent of total blood volume. Increased VO2max and total body haemoglobin increase performance".

36. *Paragraph 4.12:* This is disallowed as being unnecessary and disproportionate to the very narrow issue of whether there were any reasonable grounds to suspect the Claimant of "blood doping".

37. *Paragraph 4.13:* I agree with Mr Spearman that for the Defendants' purposes it is only necessary to identify the characteristics of EPOs. Accordingly I will allow the following:

> "Erythropoietin is one of a number of hormones that stimulate red cell production. Recombinant EPO ("EPO") was developed for clinical purposes and became available commercially in about 1987".

38. *Paragraph 4.14:* I will allow this in the form pleaded as it shortly explains the background context in which EPO is alleged to be abused by some sports men and women.

39. *Paragraphs 4.15 and 4.16:* I will disallow 4.15 as unnecessary but will allow 4.16, which describes shortly the tests approved by the IOC in 2000.

40. *Paragraphs 4.17 and 4.18:* There is a description of the "direct test" and its limitations on the basis that it is relevant to understanding how the Claimant could

have managed to obtain repeated negative results in drug testing throughout his career. Mr Spearman, on the other hand, submits that the reasoning is perverse. Because the Claimant has *not* failed a drug test, this is relied upon by the Defendants to provide reasonable grounds upon which to suspect him. "So, in summary, on the Defendants' 'Alice in Wonderland' case, all those who fail a drugs test are to be suspected of having taken drugs, and likewise all those who pass such a test". Logically, that is right. The material must relate to the Claimant's conduct or qualify as "strong circumstantial evidence": See e.g. *Chase v News Group Newspapers*, cited above, *per* Brooke LJ at [50]-[51].

41. *Paragraphs 4.20 and 4.21:* A similar dispute arose because here the Defendants wished to set out a short explanation of the nature and limitations of the "indirect test" for EPO. Again, submits Mr Spearman, a jury would not be assisted by having to grapple with expert evidence on the ways in which the authorities test for EPO. The supposed inference is impermissible; that is to say, because testing for EPO has its limitations it is reasonable to suspect cyclists of doping with EPO. More specifically, these paragraphs do not go to support reasonable grounds to suspect this Claimant. They too will therefore be disallowed. (Mr Spearman also submits that it is necessary to concentrate on what is the core of the Defendants' defence; in other words, the allegation contained in paragraph 4.94 about the Claimant's haemocrit. For "reasonable grounds to suspect" it would be legitimate to give examples of Mr Armstrong's levels at a particular time – as part and parcel of arguing that this gave rise to suspicion of doping, because (if the evidence bears out the argument) there was no other logical explanation for the findings.)

42. *Paragraph 4.22:* I will allow a limited form as follows: "There was no effective risk of detection of EPO abuse between 1987 and 1997; very limited risk of detection between 1997 and 2000; and some (but still very limited) risk of detection after 2000". Although Mr Spearman argues that the lack of an effective test for doping cannot objectively provide reasonable grounds to suspect this Claimant (any more than any other athlete), it seems to me that it is a legitimate factor to plead in combination with others.

43. *Paragraph 4.23:* This relates to "other performance-enhancing drugs" and deals with so-called "HBOCs". These are haemoglobin based oxygen carriers which are said to have the potential to be abused as performance-enhancing drugs. There is, however, nowhere else in the pleading a suggestion that the Claimant has been guilty of using these particular drugs and in my judgment it should come out as irrelevant and/or prejudicial.

44. *Paragraph 4.24:* The same point arises here in relation to another type of drug (perfluorocarbons or "PFCs"). I disallow it too.

45. *Paragraph 4.34:* This begins somewhat unpromisingly with the words "cycling has always been dogged by rumours of doping". It is too vague and general and must come out.

46. *Paragraphs 4.41and 4.42:* Once again reference is made to abuse in general terms, during the 1980s, and to "widespread concern" during that period. Again, in my judgment there is nothing sufficiently connected to this Claimant. They must be excluded.

47. *Paragraphs 4.45 and 4.46:* These relate to two other cyclists called Stephen Swart, from New Zealand, and Paul Kimmage from Ireland. They are said to have experienced cycling's "doping culture" at first hand or to have experienced pressures to engage in abuse themselves. The allegations are liable to waste time and money since there is no sufficient nexus to the Claimant. Therefore they must come out.

48. *Paragraphs 4.47 and 4.48:* Reference is made to "unexplained deaths" in cycling between 15 and 18 years ago. There is also reference to "considerable concern" that EPO was being used by professional cyclists. Again there is no sufficient nexus.

49. *Paragraph 4.49:* I am just persuaded that the fact that the head of UCI, Hein Verbruggen, set up an anti-doping commission is relevant to show the scale of the problem. There is no direct nexus with the Claimant but it seems to me to be (just) legitimate background.

50. *Paragraph 4.51:* I will permit a limited version, again by way of background, to the following effect:

> "In 1994, the UCI introduced Anti-Doping Examination Regulation ("AER"), which included the introduction of some out of competition random blood tests".

51. *Paragraph 4.52:* This is about a seminar in December 1994, which seems to me to have nothing to do with the Claimant.

52. *Paragraph 4.53:* This paragraph deals with various concerns of the UCI in the mid-1990s and, in particular, the regulation of attendants and doctors specialising in cycling. Again there is no sufficient nexus.

53. *Paragraph 4.54:* This mentions Michel Ferrari in the context of his having expressed views during an interview in 1994 about EPO. It appears that he is on record as having said that, if used properly, it was no more dangerous than orange juice. There is a dispute between the parties as to whether this is a fair or accurate summary of what he said, but Ms Rogers wishes to have this in her pleading in order to support the argument that the Claimant's consultation of Mr Ferrari, later, provides a ground for suspicion. To that limited extent, it seems that parts of paragraph 4.54 are legitimate. Much of it, however, would appear impermissible. I would allow a pared down version along these lines:

> "In 1994, riders from the Gewiss Team were placed first, second and third in the Fleche Wallonne. At that time, Michel Ferrari was working for the Gewiss Team. Shortly after the victory, he was interviewed about EPO and said words to the effect that, if used properly, it was no more dangerous than orange juice. His comments about a performance-enhancing drug led people to believe that Mr Ferrari felt there was nothing wrong in principle with the use of EPO as part of a medical programme".

I am persuaded that this apparent public position, on the part of Mr Ferrari, has a role to play in the material relied upon as reasonable grounds to suspect.

54. *Paragraph 4.55:* This relates to a "practical guide" sent in August 1996 by the UCI providing information about anti-doping examinations. Mr Spearman asked rhetorically "What evidence does it provide that the Claimant, objectively judged, was suspected of doping?" I would agree with him that the answer is "none".

55. *Paragraphs 4.57 and 4.58:* These paragraphs are concerned with the arrest in 1998 of a soigneur with the Festina cycling team, Willy Voet, when he crossed the border into Belgium and was found to be carrying a cargo of banned performance-enhancing drugs including EPO. It is said that this case confirmed that doping was deeply rooted in cycling. I do not consider that this is sufficiently linked to the Claimant. It would not comply with the "conduct rule"; nor yet would it qualify as "strong circumstantial evidence", as contemplated by Brooke LJ in *Chase v News Group Newspapers*, cited above, at [50]-[51].

56. *Paragraph 4.60:* This seems to be reciting "considerable concern" in 1999 about the possible abuse of EPO in cycling. It is not, however, sufficiently tied into the Claimant to survive.

57. *Paragraph 4.66:* This paragraph is headed "The UCI Rules Against Doping" and it contains a summary. It is then concluded that they did not eliminate the doping culture in cycling. I agree with Mr Spearman that this is irrelevant to the very narrow purpose of the current pleading.

58. *Paragraph 4.67:* This asserts that the average speed of the Tour de France increased by 10% from 1980 to 2000. It continues "The reason for such an increase in speed may in part be attributable to technical innovations, smarter training methods, shorter stages, improved road surfaces and better food. However, doping may also be a factor". That, again, falls woefully short of establishing any conduct on the part of the Claimant which brings suspicion upon himself, and also short of "strong circumstantial evidence".

59. *Paragraph 4.71:* This is characterised by Mr Spearman as an example of "guilt by association", because it concerns members of the USA national junior team in 1989 and 1990 making claims that they had been doped without their knowledge. What Ms Rogers submits is that, because the Claimant was a member of the USA national junior squad the year before, there are grounds to suspect that he too would have been subjected to performance-enhancing drugs. Not only would this be in breach of the "repetition rule", but it is highly speculative and, in any event, the relevant *Lucas-Box* meaning is nothing to do with having been drugged unwittingly by others. It is about reasonable grounds to suspect the claimant of knowingly taking drugs.

60. *Paragraphs 4.72 and 4.73:* These are concerned with the Claimant's membership of the Motorola Cycling Team from 1992 onwards. There is no objection, as such, to recording the fact that the Claimant was a member of the team, but it does not advance the case of "reasonable grounds to suspect". It is asserted that the team doctor encouraged the team to focus on training and discouraged them from taking pharmacological remedies. It is not suggested the advice was ignored. Nor is there anything to connect the Claimant with the taking of drugs. I agree with Mr Spearman that paragraph 4.73 should be excluded – the consequence of which would be, presumably, that paragraph 4.72 would lose its relevance also.

61. *Paragraph 4.74:* The allegation is that, in 1995, during a training ride in Como, a discussion took place about doping between the Claimant and two other members of the Motorola team (Stephen Swart and Frankie Andreu). The allegations include at 4.74 (iii):

> "The initial stance in the discussion between the Claimant, Mr Swart and Mr Andreu was that if they were going to ride the Tour de France that year, they would have to be on a doping programme; their view was that, in order to get results, they would have to do so".

It is said that they then planned that each team member would organise his own programme for himself. It is not alleged that Mr Armstrong thereafter used EPO or indeed any other drug, although it is asserted that Mr Swart obtained EPO from a pharmacy in Switzerland. Ms Rogers submits that this discussion (whatever the Claimant chose to do after it) is relevant and constitutes grounds for suspicion (particularly in the context of the Claimant's denial that there were any discussions of doping at Motorola). Mr Spearman submits that there is a fallacy in her argument highlighted by the words "whatever the Claimant chose to do after it". I disagree, since an apparent *willingness* to participate could provide grounds for suspicion that he did take drugs. Accordingly, I will permit the introductory rubric to the paragraph together with sub-paragraphs (iii) to (vi). For reasons similar to those already advanced in respect of other paragraphs, I consider that sub-paragraphs (i) and (ii) are impermissible.

62. *Paragraph 4.75:* This is concerned with the use of cortisone by the Motorola team, which is said by Ms Rogers to be "relevant context". It is pleaded that during Mr Swart's membership of the Motorola team "cortisone was kept in the team truck and was standard issue for many races". The complication is that it could be used legitimately *after* the race to help recovery. The significant point is that, so it is alleged, it was also used *prior* to races. That would be impermissible. I am inclined to allow this, provided it is fairly and squarely pleaded either that it was taken prior to a race on a "standard basis" by members of the team or that it was so used by the Claimant. I will only permit reference to this if Ms Rogers' instructions, and the material before her, would justify the pleading going that far. Otherwise it should be removed.

63. *Paragraphs 4.76 to 4.77:* These are concerned directly with the Claimant and, in particular, with the fact that in October 1996 he was diagnosed with cancer which required surgery and chemotherapy. It is asserted obliquely that, because of "some medical opinion", the Claimant's testicular cancer could have been caused by the use of anabolic steroids (which stimulate cell divisions). His medical condition in October 1996 would have led quite naturally to higher levels of chorionic gonadotropin hormone (known as "hCG"). Because this symptom had not apparently been picked up earlier by routine drug testing, it is suggested that his earlier tests must have been inadequate. There is thus something of a jumble, and it needs to be clarified. As Mr Spearman submits, even if it could be demonstrated, proof of an inadequate testing regime does not establish reasonable grounds to suspect any individual of doping. Unless the Defendants wish to advance the proposition that Mr Armstrong had taken anabolic steroids, or at least that there were reasonable grounds to suspect him of

having done so, this paragraph must go. At the moment it falls foul of the description "willing to wound, but afraid to strike".

64. *Paragraph 4.81:* The Claimant joined the US Postal team after he left Motorola. This paragraph contains allegations, not about the Claimant, but about one Prentice Steffen who had provided medical advice and assistance to the Claimant's new team (which had previously been known as the Subaru Montgomery team). The suggestion is that Dr Steffen may have been (or at least he believes that he was) removed in 1996 because he refused to engage in doping. The short point here, as Mr Spearman puts it, is that the paragraph constitutes a "breach of the conduct rule not justified by *Chase*". I agree.

65. *Paragraph 4.82:* This relies upon the level of the Claimant's performance in 1998 (following his return to racing after his cancer treatment). It is said that this in itself constitutes grounds for suspicion. Mr Armstrong is described in 4.82 (ii) as "an improved and a changed rider". I have come to the conclusion that the mere allegation of "remarkably good" performances by him, or by his team, is not sufficient to constitute reasonable grounds to suspect drug taking.

66. *Paragraph 4.83:* This too is characterised by Mr Spearman as "guilt by association". It is alleged on the basis of information from Emma O'Reilly, a soigneur in the US Postal team, that its medical programme included the administration of drugs for performance enhancement. She is said to have been aware that some soigneurs (other than herself) were involved in providing drugs for their riders. Crucially, however, it has now been clarified by Ms Rogers that it is *not* alleged by the Defendants that Mr Armstrong was one of the riders mentioned in the paragraph as having taken drugs. Mr Spearman has argued that the allegations are only permissible in the pleading if it is alleged that the Claimant *was* himself taking drugs, and that it cannot suffice to allege that some other members of his team were doing so. Mr Spearman also takes the point that there is reference to "drugs" and "medicines" in the paragraph without making clear to what extent they are said to be illicit. He went on to submit that:

> "It is absolutely essential that there is clarity on what is being alleged so as to be able to ascertain whether the particulars are capable of providing reasonable grounds to suspect the Claimant of doping. As things stand, the confirmation that the Claimant is not being referred to by the compendious use of the word 'riders' demonstrates that none of this paragraph is capable of providing such reasonable grounds".

I agree. The allegation that other riders were, or may have been, taking drugs does not comply with the conduct rule; nor, in my view, does it constitute "strong circumstantial evidence".

67. *Paragraph 4.87:* This is coming close to the high water mark of the Defendants' case. Details are given of how, in May 1999, the Claimant is supposed to have asked Ms O'Reilly to collect something from the team doctor in Piles. These facts alleged are capable of constituting reasonable grounds to suspect the acquisition by the Claimant of illicit drugs. I am prepared to allow this paragraph, therefore, to stand – with the exception of sub-paragraph (v). Ms O'Reilly's beliefs are irrelevant.

68. *Paragraph 4.88:* Here one sentence only is challenged. It relates again to Ms O'Reilly's beliefs. It must come out, since the test is an objective one.

69. *Paragraph 4.90:* This was re-worked by Ms Rogers in the light of earlier comments by Mr Spearman and, in the light of the changes, Mr Spearman has withdrawn his objection.

70. *Paragraph 4.93:* This too is said to be "guilt by association". It concerns Michel Ferrari who, it will be remembered, has earlier in the pleading been described as having taken a public stance in relation to EPO which might suggest that he sees no objection to its being taken by athletes. On this occasion, I am persuaded that it is just permissible for that reason.

71. *Paragraph 4.94:* No objection is taken to the pleading of the Claimant's haematocrit levels on 2nd December 1997 and on 14th February and 17th June 1998. Objection is taken, on the other hand, to the source of this information having been pleaded. It is said to have come from documents produced in the course of proceedings taken against Mr Ferrari. That is said to be prejudicial and irrelevant to the legitimate purpose of including the haematocrit levels. I agree. I am inclined to agree, however, with Ms Rogers when she argues that it is significant, as a potential ground of suspicion, that Michel Ferrari had recorded the Claimant's haematocrit level *in his own records*. If she pleads it like that, I would have no objection.

72. *Paragraph 4.97:* This is pleaded under the heading "The Claimant's interview with the second Defendant in April 2001". There is no doubt that statements or admissions made by the Claimant in the course of an interview could constitute part of a case on reasonable grounds to suspect. Mr Walsh's opinions, on the other hand, could not. What is said is that the Claimant's answers on certain matters relating to doping were unsatisfactory, and examples are given. Sub-paragraph (i) deals with allegations attributed to Greg Strock against his coaches and others. It is pleaded that the Claimant claimed not to have discussed the matter with Mr Carmichael (against whom it had apparently been alleged that he had injected Mr Strock), despite the fact that he was the Claimant's own coach. The pleading asserts "The suggestion that they had not even discussed it, when the matter had been publicly reported, when the Claimant knew that Strock had followed the same programme the year after him, was questionable". This is not satisfactory. As Mr Spearman argues, Ms Rogers needs to go so far as to allege that the Claimant's answer was false ("questionable" will not do).

73. Sub-paragraph (ii) goes back to the subject of the hCG levels not having shown up in the tests prior to the Claimant's diagnosis of cancer in October 1996. He said in the interview that he had not checked with the cycling authorities for any explanation as to why those levels had not shown up in the course of earlier testing. This is of no significance unless it is to be stated that the answer was false, and the same point arises in relation to sub-paragraph (iii). Reliance is placed on the fact that the Claimant denied ever talking to Mr Livingston about his having been "named in connection with the Ferrari investigation". The denial is described as "very surprising", but unless it is asserted to be false it is nothing to the point.

74. Sub-paragraph (iv) is said to be "far fetched". I am inclined to allow this to remain because Ms Rogers wishes to argue that the Claimant's responses about visiting Mr

Ferrari tended to understate the nature and extent of this relationship, when he had in fact made a series of visits to Ferrari's practice in northern Italy on several occasions between March 1999 and May 2001. In view of what I have already permitted about Mr Ferrari, it seems to me that this too can survive. Those visits, however, should be pleaded directly rather than being obliquely described as information received after the interview by David Walsh.

75. As to sub-paragraph (v) it seems to be insinuated that the Claimant had given a false explanation to Mr Walsh about the dumping of medical products by the US Postal team (apparently filmed by French television). If the allegation is made directly, to the effect that he gave a false answer, that could remain, since it would be capable of providing reasonable grounds to suspect. The present formulation is, however, unacceptable. Sub-paragraph (vi) is simply not capable of giving rise to reasonable grounds to suspect.

76. *Paragraph 4.98:* The Claimant's denials cannot provide reasonable grounds to suspect, and I cannot quite understand what this paragraph is doing in the particulars.

77. *Paragraphs 4.99 to 4.100:* Paragraph 4.99 relates to the fact that in June 2001 Michel Ferrari was charged with various doping offences. Importantly, however, none of them relate to this Claimant. What is more, it is pleaded that the proceedings have not been brought to a conclusion. If it were to be directly alleged that Mr Ferrari was indeed guilty of supplying EPO to cyclists, then in view of the Claimant's association with him it is arguable that this could form part of a package of "reasonable grounds to suspect". At the moment, however, that is not how it is put. It must come out, therefore, as it stands.

78. Paragraph 4.100 consists of a summary of comments made by Mr Greg LeMond. He is described as having won the Tour de France three times and as never having used performance-enhancing drugs (which would, apparently, tend to refute the suggestion in column one of the article to the effect that this feat would be virtually impossible). The repetition rule comes into play here, since what Mr LeMond said or thought is impermissible. If the Defendants wish to allege that the Claimant is guilty of fraud, by reason of taking drugs, then that allegation should be made directly. It does not gain respectability by being dressed up as a hint from Mr LeMond. The paragraph must come out.

79. *Paragraph 4.102:* This is headed "the Claimant's performance". Mr Spearman submits that this simply cannot stay as it is. It effectively says no more than that the Claimant's performance was strong, and especially so having regard to the fact that he had had cancer treatment. These two propositions in themselves cannot be grounds for suspecting that he had been using illicit performance-enhancing drugs. It is also said that Mr LeMond, who had a higher VO2max than the Claimant, had not been able to achieve anything like the wattage he achieved. Nor could he understand how this was possible without performance-enhancing drugs. Yet Mr LeMond's speculations cannot form the subject of reasonable grounds to suspect. It might be possible to formulate a case by reference to expert evidence and analysis of Mr Armstrong's speed and power in a number of events. For all I know, it may be possible to show that his VO2max would be inconsistent with such results *unless* the Claimant had taken drugs. That is not the pleaded case at the moment. It should accordingly come out, at least in its present form.

Section 5 of the Defamation Act 1952

80. While on the subject of justification, I should mention that I have also been invited by Mr Spearman to strike out the reliance in Ms Rogers' pleading upon s.5 of the Defamation Act 1952. This is a very short point. The statutory provision can only have application where there are two or more distinct charges against a claimant. That has no application here. In the light of my rulings, there are only two meaning s which remain in contention (i.e. "guilt" or "reasonable grounds to suspect"). These cannot be categorised as distinct, especially in light of the decision of the Court of Appeal in *Berezovsky v Forbes Inc* [2001] EMLR 1030. It may be thought that there is little point in striking out what appears to be a merely formulaic reference to s.5. On the other hand, since I consider it serves no useful purpose, logic requires that it should come out.

Qualified privilege: applying the Reynolds criteria

81. My next task is to address Mr Spearman's submissions on qualified privilege since he submits that this defence has no realistic prospect of success and therefore should be struck out. For this purpose, I need to assume that all factual allegations relied upon in support of the defence can be established by the Defendants at trial. I can only strike out the defence if, on those assumptions, I am prepared to hold that the Defendants simply cannot bring themselves within the principles identified in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. I would not accept Ms Rogers' submission that it is necessary to wait for a jury to determine all the facts before the ruling can be made. In so far as they are controversial, all the facts must be assumed in the Defendants' favour.

82. Specifically I need to test the plea against the ten non-exhaustive criteria identified by Lord Nicholls in *Reynolds* at p.205.

83. First, the allegation of cheating by the taking of illicit drugs is plainly serious. Secondly, the subject matter is, I am prepared to assume, one of public concern: see e.g. *Grobbelaar v News Group Newspapers* [2001] 2 All ER 437.

84. Thirdly, I need to consider the source or sources for the article. It would appear that the only true source for the information was the second Defendant himself. It may be, however, that this cannot be determined on a definitive basis at this stage. I need to bear in mind Lord Nicholls' observations in this context: "Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories". Mr Spearman addressed the possibility that Emma O'Reilly should be classified as a "source" for this purpose, and pointed out that it is accepted in the defence that she "never saw the Claimant take any performance-enhancing drugs".

85. It is an unusual situation where the primary source for the relevant article is one of the defendants. This particular criterion in Lord Nicholls' catalogue may, therefore, loom less large than in other cases.

86. Fourthly, there is the question what steps, if any, were taken to verify the information published. There does not appear to be a claim on the part of the Defendants to have taken any such steps – save in so far as the second Defendant made some inquiries. The defence does not allege that those were made for the purposes of obtaining the

Claimant's observations or the contents of the proposed article (as opposed to Mr Walsh's book). The question therefore arises as to whether or not, applying the standards of "responsible journalism", Mr Walsh's efforts were adequate for the purpose.

87. Fifthly, there is the question of what Lord Nicholls called the "status of the information". He noted that the allegations may already have been the subject of an investigation which commands respect. That in itself has no application here. Mr Spearman described the status of the allegations as being "… that the second Defendant had formed the belief that the Claimant was guilty of taking performance-enhancing drugs and the first and third Defendants were prepared to present material that they had obtained from him as 'the relevant evidence'". It is perhaps fair to say that the status of much of the information is that of rumour or speculation. It certainly cannot be said that it comes from any kind of official report or "public document", such as was recently considered by the European Court of Human Rights in *Selistö v Finland*, handed down on 16th November 2004.

88. The sixth matter to be considered is that of "urgency". Mr Spearman submits that there was no urgency here at all, save in the sense that the book was about to be published in France. It was no doubt, to some extent at least, linked with the desire to promote that book. There might also be said to have been a certain topicality by reason of the imminence of the 2004 Tour de France. Where the allegations are very serious, as they plainly are here, one should not necessarily conflate topicality or commercial expediency with urgency, which requires to be judged from the public's point of view.

89. Seventh, it is necessary to consider whether comment was sought from Mr Armstrong. Lord Nicholls recognised that an approach to the claimant will not always be necessary, but it seems to me that where the allegations are as serious for the claimant as they are here, it is likely to be very rare that an approach will not be regarded as necessary.

90. Closely linked, of course, is the eighth question of whether or not the article contained the gist of the Claimant's "side of the story". It is Mr Spearman's submission that the attempts to obtain comment from the Claimant, and to present his side of the story, were both completely inadequate in view of the nature of the allegations. I shall return to this important question shortly, when I address the criticisms made of paragraph 5.8 of the defence (see paragraphs 101-104 below).

91. Ninth, there is the "tone" of the article. It was in my view quite sensational and likely to "stir things up" for the purposes of the book and in the context of the Tour de France in July. Although it claimed merely to "raise questions", it could hardly be described as measured, impartial or neutral reportage. That does not necessarily matter, however, since journalists are in the business of stirring up controversy and are fully entitled to express themselves vigorously. Yet sometimes, if they do so too enthusiastically, they must be prepared to establish the defence of justification.

92. Tenth, there is Lord Nicholls' "sweep up" provision about "other circumstances". When one is considering cases of this kind, there is often not much left to be addressed at this stage. But here the Claimant relies on the suggestion that the article

was driven by commercial expediency and a desire to promote the book. I have already mentioned these points in other more specific contexts.

93. Mr Spearman's submission is that this is a case where qualified privilege is "clearly not available" and the Defendants should be held to account for such defamatory statements as they have made – unless they are able to prove that they were substantially true.

94. He has a secondary submission on qualified privilege; that is to say, that the pleading should not be permitted to stand in its present form and should be re-pleaded. He took particular issue with the first paragraph of the particulars, which merely purports to include all the preceding particulars which have gone to support the particulars of justification (many of which, of course, have now gone). If I may say so, it is a somewhat sloppy approach to use this cross-over technique as though particulars of justification were simply interchangeable with a case on *Reynolds* privilege. Nevertheless, I need to consider Mr Spearman's submissions in relation to the other sub-paragraphs of paragraph 5, which are specific to privilege.

95. Paragraph 5.2 is challenged on the basis that it appears to be putting forward a claim for privilege in respect of an article different from that published. It describes the article as reporting "upon matters of legitimate public interest, raising questions about the Claimant's performance in his career as a cyclist, against a background of the significant problem of doping in the sport of professional cycling".

96. The use of the word "background" appears to be intended as a peg on which to hang the 102 particulars of justification which I have already addressed. That is unsatisfactory because it is necessary to confine the particulars, whether for the purposes of justification or for qualified privilege, to those matters which are necessary for a fair disposal of the real issues between the parties. What is more, as I have already held, the article went beyond merely "raising questions". It follows that the paragraph is unsustainable.

97. Paragraphs 5.3 to 5.5 are there to introduce *The Sunday Times* and the second and third Defendants. As such, they would be unobjectionable background, but strictly speaking they contain a good deal of material which is irrelevant to the central question in a plea of *Reynolds* privilege; that is to say, whether the Defendants are able to demonstrate that the classical duty/interest test has been satisfied. If this were the only problem with the pleading, however, I should probably allow the material to remain purely by way of background.

98. In relation to paragraph 5.6 (headed "The publication of the article"), Mr Spearman raises the problem of the equivocal case on the respective roles of the three Defendants. It lists, yet again, all the matters pleaded in the particulars of justification as having been within the knowledge of "the Defendants" at the material time. It is unsatisfactory for the Defendants to be treated compendiously in this way, since the second Defendant's role as a co-author of the book sets him apart. As Mr Spearman observed, "… it would be remarkable if all three defendants shared every item of knowledge". However, parts of the pleading tend to suggest that it was the second Defendant alone who had knowledge of all the pleaded matters.

99. Another unsatisfactory formula in paragraph 5.6 is to be found in the sentence "The article drew upon the knowledge and expertise of the second Defendant gained over many years". That is vague; especially so in the context where the second Defendant is not admitted to be an author of the article (as opposed to having caused its publication). It is unclear, for example, to what extent the first and third Defendants "drew upon" the knowledge of the second Defendant other than by borrowing chunks of his book.

100. Mr Spearman submits that one can fairly deduce from the form of the pleading (a) that the second Defendant had a number of sources whom he consulted for the purpose of writing his book, as opposed to the article, (b) that the other Defendants had no involvement in the writing of the book, and (c) that the second Defendant also played the role of being a source for the article itself. Moreover, there is no pleaded allegation to the effect that the items of knowledge contained in paragraph 5.6 (i)-(viii), deriving apparently from various discussions and interviews conducted by the second Defendant, were known to the first or third Defendant before publication.

101. Paragraph 5.8 pleads that the second Defendant attempted to contact the Claimant prior to the publication of the article, so as to obtain his answers to questions and any further comments he might wish to make. It would seem, however, although it is not spelt out, that the purpose of the second Defendant's contacts from mid-May to early June this year were for the purpose of his book rather than for the article. The article was written by the third Defendant, it seems, and no attempt was made by him or anyone else from *The Sunday Times* to contact Mr Armstrong about the allegations *they* were going to make.

102. Be that as it may, Mr Spearman embarked upon a detailed comparison of the enquiries made by the second Defendant and the serious matters raised in the article. It is submitted on the basis of this analysis that those enquiries were inadequate for the purposes of *Reynolds* privilege and, correspondingly, that the Defendants were thus unable to state fairly the gist of the Claimant's side of the story. For example, it was not put to the Claimant that cycling is "a sport riven with drugs". More specifically, in the relevant email sent by David Walsh to Lance Armstrong, the only reference to EPO related to his years with the Motorola team (1992-1996). He was asked whether or not he stood by earlier statements to the effect that no discussions had taken place among team members, to his knowledge, about the use of EPO or the need for "something … to be done to allow the team to be more competitive". He was asked also whether he still claimed that the Motorola team was "as pure as the driven snow". He was not asked about the properties of EPO or whether he knew anything about them. Critically, it was not put to him that it would be extremely difficult for a clean cyclist to beat a rider taking EPO or that there were "experts" who took the view that it would probably be impossible to win the Tour de France for a clean rider competing against those on drugs.

103. Nor yet was it put to the Claimant that one of his team mates (Stephen Swart) had taken EPO or that there was pressure on that team to deliver results in 1994 and 1995 – such as to lead to doping. It is also notable that, despite the significance attached to it in the article, the Claimant was asked nothing about his relationship with Mr Ferrari or his "controversial reputation", or whether he knew of the 1994 statement attributed to him about EPO being "no more dangerous than orange juice".

104. Another important allegation was that about the former soigneur with "extraordinary stories to tell about the disposal of empty syringes and a furtive trip to Spain to collect a bottle of pills". Since that is one of the more cogent parts of the Defendants' case on reasonable grounds to suspect, it would clearly have been appropriate to give the Claimant a chance to respond. The same is true of the matters involving Greg LeMond.

105. There are a number of other parts of the article that the Claimant did not have a chance to deal with, and to which Mr Spearman has drawn my attention. They are less significant than the examples I have given.

106. So far as qualified privilege is concerned, on an application of this kind I must decide (making all relevant assumptions in favour of the defendants) whether in all the circumstances the "duty-interest test or the right to know test" has been satisfied: *per* Lord Phillips MR in *Loutchansky v Times Newspapers* [2002] QB 783 at [23]. It is an objective test, but I need to bear in mind that the long established common law principles are adaptable to a great variety of circumstances. What is more, it is clear from *Reynolds* itself and from *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277 (at pp.300-301) that the courts are encouraged to invoke those principles more generously than in the past. As Lord Nicholls observed in *Reynolds* at p. 205:

> "Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication".

107. Having made due allowance for the width of the common law principles as now recognised, and making all relevant factual assumptions in their favour, I cannot see that the Defendants could be said to be under a duty to publish allegations to the effect that Mr Armstrong had probably taken performance-enhancing drugs or that, given his prowess in the Tour de France, he "must" have done so. I would readily accept, of course, that the use of forbidden drugs in sport is a matter of public concern. It is a different question, however, from whether or not they were under a duty to publish *these* allegations, about *this* Claimant, without at least affording him an opportunity of giving a measured response to the charges.

108. In these circumstances, I will accede to Mr Spearman's application and disallow those parts of the pleading concerned with qualified privilege. On that basis, the case would proceed on the limited plea of justification which I have described above.

Security for Costs

109. The Defendants applied for an order for security on the basis that the Claimant is resident abroad. In the end, the issue between the parties was reduced to a relatively minor one; namely, whether provision should be made to take account of the additional costs to be incurred in enforcing an order in the United States in the event

that the Defendants were ultimately successful. These were put at approximately £10,000. There is no suggestion that Mr Armstrong is other than a very wealthy man and good for any award of costs the Defendants may obtain.

110. It seems to me reasonable that provision should be made, but I believe it will be enough for the Defendants to set off £10,000 against any costs they may be ordered to pay in respect of interlocutory hearings.

A costs-capping order

111. In the light of the considerations addressed by the Court of Appeal in *Musa King v Telegraph Group Ltd*, cited above, Ms Rogers also sought some novel form of protection of the kind there described as a prospective costs capping order. I understand that rules are to be drafted to provide for the implementation of this regime but nothing has so far emerged. Accordingly, Mr Spearman suggests that I should not make such an order until the criteria are clearly set out. There seems to be no doubt that such a power exists, as the decisions of Gage J (as he then was) and Hallett J in earlier instances of group litigation demonstrate. To make such an order in this case, purely on the basis of the Court's inherent jurisdiction, would on the other hand be unprecedented.

112. What is more, in *Musa King* the Court of Appeal was concerned with a rather different situation where media defendants would find no comfort in a retrospective costs assessment following trial, however toughly it might be conducted in accordance with CPR principles. That was because they faced an impecunious claimant who had the advantage of a conditional fee agreement but with no "after the event" insurance cover. One can readily see that any libel action conducted in those circumstances would have a significantly chilling effect on the relevant media defendants over and above the normal hazards of litigation. Here, by contrast, none of those considerations applies. Of course, any libel litigation is costly and to some extent unpredictable, but there is no evidence that these Defendants would have to whistle for their costs if awarded at the end of the trial as the Telegraph Group would have in the *Musa King* case if it had gone in their favour (which it did not).

113. There are also practical difficulties as to how a costs-capping order would work in practice in a case of this kind. These may be overcome in due course, when new rules and practice directions are drafted, and when experience has been accumulated. For the moment, however, they seem to be formidable.

114. I have some sympathy with the Defendants' position, since they were informed that £140,000 of costs had been built up on the Claimant's side at a very early stage. The Claimant's solicitors, Schillings, also declined to provide any breakdown. Ms Rogers' clients therefore apprehend that, once the litigation was under way and costs incurred on pleading, disclosure and gathering evidence, those on the Claimant's side would prove to have moved rapidly into the stratosphere.

115. If the Defendants' suspicion is correct, however, and money is being splashed about unnecessarily or too generously, then that should be reflected in the costs judge's retrospective assessment conducted in accordance with CPR principles. The Defendants should not, at least in theory, have to pay for this hypothetical extravagance. Ms Rogers pointed out, however, that even if the theory works out, and

the *ex hypothesi* unnecessary costs incurred on the Claimant's behalf will not be recoverable against her clients, that still leaves the possibility that *they* also will have incurred unnecessary costs in responding to the superfluous evidence or other documents in respect of which the Claimant's solicitors have incurred the excessive expenditure. If, as I am for the moment supposing, the Defendants were to lose, they might have to bear their own costs of so responding.

116. This argument was countered by Mr Spearman, in my view convincingly, when he emphasised the wide discretion of the trial judge to order costs in favour of the losing party if it has succeeded on some issues, or if it is thought in some respects to have been made to incur unnecessary expenditure.

117. In all the circumstances in this case, I see no reason to believe that the Defendants will be inadequately protected by a retrospective costs award and/or assessment. Correspondingly, I see no tangible advantage in a costs-capping order being made (on an unprecedented basis) in a case of this kind.