Neutral Citation Number: [2004] EWHC 2675 (QB)

Case No: HQ03X02085

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2004

Before :

THE HONOURABLE MR JUSTICE EADY

Sitting with:

COSTS JUDGE ROGERS
MR J ROWLEY

- -

Between :

David Gazley	**Appellant**
- and -	
1. Rebekah Wade	**Respondents**
2. News Group Newspapers Limited	

- -
- -

Ronald Thwaites QC and William McCormick (instructed by **Peter Carter-Ruck and Partners**) for the **Appellant**
Matthew Nicklin (instructed by **Farrer & Co**) for the Respondents

Hearing date: 2nd November 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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Mr Justice Eady :

1. On 2nd November 2004 I heard, together with Assessors, an appeal from a decision of Costs Judge Simons of 9th March 2004, whereby he ruled *inter alia* that the Claimant had not acted reasonably in instructing solicitors in London, on the basis that they were libel specialists, and that he should therefore recover costs on the basis of rates which would have been applicable to fee earners in the Norwich area. I granted permission following a renewed oral application on 26th May, having initially refused on paper.

2. I bear in mind that in accordance with the modern practice in relation to appeals, and having regard particularly CPR 52.11, the appeal must be limited to a review of the decision of the lower court rather than a re-hearing. A factor which is also relevant to the present appeal is the stipulation in CPR 52.11(2) that the appeal court will not generally receive evidence which was not before the lower court. It is possible to order otherwise, but that step should only be taken if there is good reason to do so according to the long established criteria set out in *Ladd v Marshall* [1954] 3 All ER 745.

3. On an appeal by way of review, the Court will only allow an appeal where the decision of the lower court was either 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings'.

4. I remind myself of the helpful formulation which has been adopted on numerous occasions and which originated in the speech of Lord Fraser of Tullybelton in *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, 652:

> "…the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution, which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible".

5. Where the original judicial exercise was one of discretion or evaluation, one must always consider on a review whether the relevant judge has applied the correct principles, taken into account all relevant considerations and, correspondingly, has not taken into account any irrelevant factors: see e.g. *Solutia UK Limited v Griffiths* [2001] EWCA Civ 736 at [11].

6. One area of dispute between the parties, which may in the end prove to be more semantic than of substance, related to the question whether and, if so, how far it was legitimate to ask whether or not in relation to any individual factor or factors the judge at first instance had attached either excessive or inadequate weight. If one is drawn into that debate, as Mr Nicklin for the Respondents points out, there is a danger that the court will be re-visiting the judge's decision-making process and substituting its own evaluation – rather than applying the proper review test. On the other hand, Mr Thwaites QC, appearing for the Appellant, drew my attention to the recent judgments of the Court of Appeal in the *Solutia* case where, for example, Mance LJ at [33] referred to the costs judge having "focussed excessively" on the possibility that Manchester solicitors could have been instructed; also Latham LJ appeared at [9]–[11] to endorse the decision of the deputy judge below which was,

in turn, based upon the costs judge's failure to "attach sufficient weight to two of the relevant factors" (i.e. the extra complexities of a group action and the advantages of using a particular firm of solicitors in the light of their experience in such actions).

7. All I need say in the context of those submissions is that they underline the importance of ensuring that the appellate court does not trespass into the impermissible territory of a re-hearing. I must essentially ask myself the question whether the costs judge was 'wrong' in holding, on the particular facts of this case, that it was *not* reasonable to instruct Peter Carter-Ruck and Partners ('Carter-Ruck') as London libel specialists. Was that a possible view for a costs judge to take in the light of the modern approach to litigation, and the overriding objective in particular? Would it fall within the 'generous ambit within which a reasonable disagreement is possible' or was it, when one stands back and looks at the circumstances as a whole, just 'plainly wrong'?

8. I have referred to "the particular facts of this case" and it is necessary to emphasise that they are very unusual. That is important because Mr Nicklin rather chastised the Appellant's advisers for what he characterised as their "apocalyptic statements" as to the possible floodgate consequences if the appeal were dismissed. It was suggested, for example, that if the Costs Judge's ruling were to be upheld this would lead to "catastrophic consequences for victims of irresponsible journalism". Mr Nicklin drew attention to the irony that this stern warning was to be found in the statement of a trainee solicitor.

9. Having said that, however, it is only fair to record that Mr Nicklin himself proved not averse to a little 'doom mongering'. He went so far as to suggest that if I allowed the appeal it would be tantamount to a green light in *any* libel action for a party to avail himself or herself of the services of this particular firm of libel specialists – a vista which apparently media lawyers (and no doubt finance directors and shareholders) would be unable to face with equanimity.

10. I should, therefore, make it clear that I would not accept Mr Thwaites' submission that "the outcome of this appeal has the potential to shape the course of defamation litigation for many years to come". The Costs Judge focussed, quite correctly, upon the facts of this case and I must assess his judgment accordingly. Neither he nor I would suggest that this is an appropriate case for laying down general guidelines, one way or the other, as to the appropriateness of instructing specialist or expensive London solicitors in libel actions.

11. I turn therefore to the facts, so as to demonstrate how special they were. What happened was that *The Sun* newspaper on 28th March 2003 published a prominent article under the headings

> "Perv Chris Harris is so dangerous he's barred from talking to kids and going into schools for life…" and "SO WHY THE HELL ISN'T HE IN JAIL?"

12. There was a discussion by John Troup, the author of the article, of how a judge was supposed to have been "blasted by parents and police" because Mr Harris, described as "A PAEDOPHILE", had not been given a custodial sentence. The following day, on Saturday 29th March 2003, a small inset 'follow up' item was published with a

photograph and the caption "Face of Kid Ban Pervert". Underneath was written "THIS is the first snap of Christopher Harris banned from going near kids for life. Harris, 38, groped girls in Great Yarmouth".

13. Unfortunately, the photograph published above that caption was not one of Mr Harris but one of Mr Gazley, the Claimant in these proceedings, who also lived at the time in Great Yarmouth. This was a most unfortunate mistake, but there can be no doubt that the Claimant was seriously defamed despite the fact that his name was not mentioned. Anyone who recognised his face, and especially people who would recognise him without knowing his name, such as people living in the same locality, would reasonably think that he was a 'paedophile' and 'pervert'. It is fair to say that the Defendants and their lawyers recognised the gravity of the situation, published an apology and set about negotiating a settlement.

14. It is well known that allegations of child abuse published in newspapers, and particularly perhaps in tabloid newspapers, tend to generate anger and resentment on the part of some readers. It is notorious that in August 2000, following a campaign in a Sunday tabloid newspaper to "name and shame" those who were, or were perceived to be, paedophiles, a number of people were attacked by vigilantes. Other examples could be given, including the virulent media attacks from 1998 to 1999 upon the Claimants in the case of *Lillie & Reed v Newcastle City Council* [2002] EWHC 1600 (QB). These were matters of which, I have no doubt, the Defendants' lawyers were only too well aware. Whatever steps were taken by way of mitigation, a substantial sum of compensation would almost certainly have to be paid to Mr Gazley.

15. Not surprisingly, Mr Gazley was extremely anxious following the publication and feared for his physical safety. He therefore consulted the police. One of the officers with whom he came into contact recommended that he consult a local firm of solicitors called Belmores. He consulted them in the first instance, as I understand it, by telephone and someone from that firm set about protecting his interests in discussions with representatives of *The Sun*. As Mr Nicklin has pointed out, Belmores took a reasonably creative approach to their task in that, very quickly, arrangements were made for the Claimant to give interviews to the local media with a view to correcting as effectively as possible the false impression which had been given. Although an apology was in fact published in *The Sun* as promptly as in the very next issue, on 31st March 2003, it was bound to be to a large extent ineffective. It was headed "David Gazley: An apology", but the relevant photograph which did the damage was not published alongside it. In the circumstances, it was more likely that an effective vindication could be achieved through local media coverage which did identify Mr Gazley by means of a photograph.

16. In any event, on the day the apology was published, Mr Gazley went to Belmores to see a solicitor together with a friend called Mr Russell Triggs, who had taken the day off work in order to give him moral support. It seems they were not impressed. Mr Gazley stated in his first witness statement:

> "I was very disappointed after the meeting at Belmores because I did not feel the solicitor came across as knowing what she was doing; I wondered if she was going to help me at all. This made me feel that my situation was completely hopeless to the extent that I almost decided not to do the interview with the

> BBC scheduled for after the Belmores meeting. Russell persuaded me to do it because it was important for as many people as possible to see the news stories and understand that I am not Christopher Harris or a paedophile, so we met a reporter called Jack Izzard of BBC Look East in a park in Norwich. I was still very down after the Belmores meeting though, and I broke down on camera during the interview"

17. Mr Triggs also covered the interview in his first statement:

> "I took the day off work on Monday 31st March 2003 because David had an appointment with his solicitor in Norwich and a television interview with BBC Look East and I though he needed my support. After meeting the solicitor from Belmores, David and I felt she was clearly out of her depth in dealing with a libel complaint. This gave David no hope that his problem could be properly sorted out and, as a result, David became really despondent after the meeting ended".

18. He also recorded how, a little later in the day, "… I got the feeling that the situation with *The Sun* had just become too much for him and he was at the end of his tether".

19. Mr Gazley explained how, on the following day, he was still depressed and telephoned the Samaritans and Victim Support for help. It was on the next day, 2nd April, that he instructed Carter-Ruck. How that came about was explained in a second witness statement of Mr Gazley, which was dated May 2004 and thus was not before the Costs Judge below:

> "I thought: 'If [Belmores] are the best around here then God help me'. I didn't know of any solicitors in the area who would know how to handle a case against a national newspaper.
>
> Luckily for me Russell took over and told me not to despair … He told a contact at work about my situation and was put onto Max Clifford, who then recommended PCR. I can't remember if Russell asked me if I would like him to phone PCR or whether he just did. Anyway, it was a massive relief when he told me that he had found a libel firm who could handle the case and I felt very lifted".

20. Another factor which was mentioned in the second witness statement was that the solicitor at Belmores informed him that *The Sun* had made an offer of £10,000 which she advised him to accept. He added: "Although I was in a state I knew that this was rubbish advice as I felt as though *The Sun* had ruined my life and I knew there was no way £10,000 would be enough to get my life back and start a new life somewhere else".

21. There is no doubt that an offer of £10,000 would be hopelessly inadequate to compensate for a nationwide publication in a tabloid newspaper to the effect that the Claimant was a paedophile. It is important to note, however, that this information (that Belmores had recommended accepted acceptance of the offer of £10,000) was not before the Costs Judge and objection is taken to any of the new information being introduced for the purposes of this appeal.

22. At this point, it becomes necessary to distinguish between two separate considerations. It does not seem to have been in dispute on this appeal that it was reasonable for Mr Gazley to move from Belmores and seek alternative legal advice. At all events, that was how the matter was put to me by Mr Thwaites in the course of his opening. I pressed Mr Nicklin a little later in order to see whether this was in fact so, because some of the arguments he was raising appeared to suggest that Mr Gazley should have stayed with Belmores despite his lack of confidence. Although the position was not entirely clear, I believe the main thrust of his submissions was that, even if it was reasonable to leave Belmores, the Costs Judge was entirely right to conclude that it was not reasonable to go to Carter-Ruck. Whereas the subsequent evidence about the advice to accept £10,000 might have been relevant to a determination of the former question, it does not seem to bear upon the question of going to Carter-Ruck. If I were to apply the *Ladd v Marshall* tests, I should be disinclined to admit the later evidence on the first relevant ground; namely, that there was no reason why the information could not have been placed before the Costs Judge in March 2004. Since I am concerned with the different question, however, of how appropriate it was, or was not, to go to a specialist London firm, the significance of that debate rather falls away.

23. Both counsel agreed that it was important for the Costs Judge to give close consideration to the principles discussed by the Court of Appeal in *Wraith v Sheffield Forgemasters Limited* [1998] 1 WLR 132. I heard full and interesting arguments on the significance of this decision from both Mr Thwaites and Mr Nicklin. It may be helpful to list at this stage the seven considerations identified by Kennedy LJ at p141:

(i) The importance of the matter to the litigant.

(ii) The legal and factual complexities, in so far as the relevant litigant might be reasonably be expected to understand them.

(iii) The location of the litigant's home, place of work, and the location of the court in which the relevant proceedings (if any) had been commenced.

(iv) The litigant's "possibly well-founded dissatisfaction" with the solicitors he had originally instructed.

(v) The fact that the litigant had sought advice as to whom to consult and had been recommended to consult a new firm.

(vi) The location of that new firm, including their accessibility to the litigant and their readiness to attend at the relevant court.

(vii) What, if anything, the litigant might reasonably be expected to know of the fees likely to be charged by the new firm, as compared to the fees of other solicitors whom he might reasonably be expected to have considered.

24. Some of those considerations are, of course, more relevant to the present situation than others. At this stage I merely pause to note two particular points. First, it was not apparently contemplated that in demonstrating the reasonableness of selecting a new firm of solicitors it was necessary for the litigant in question to establish objectively good grounds for changing solicitors. It appears to have been enough that there was a "possibly well-founded dissatisfaction with the solicitors he had originally instructed". Secondly, it is clear in the case of some of the criteria

identified that the test is intended to be objective in nature. For example, what, if anything might he *reasonably* be expected to know of the fees likely to be charged? What were the legal and factual complexities, in so far as he might *reasonably* be expected to understand? This formulation would seem to contemplate that it would sometimes be appropriate for a costs judge to address those steps taken, or those which ought to be taken, by the litigant for the purpose of informing himself.

25. Another principle which, in the light of the authorities, seems to be undisputed is that a costs judge's assessment of reasonableness in this context must be made as at the time the relevant decision or decisions were taken – rather than with the benefit of hindsight. In the light of the judgment of Kennedy LJ in *Wraith* it would seem clear that, while the test must also involve an objective element when determining the reasonableness or otherwise of instructing particular legal advisers in question, yet the question must always be answered within the context of the particular circumstances of the particular litigants with whom the Court is concerned: *per* Latham LJ in *Solutia UK Limited v Griffiths,* cited above, at [16].

26. The point is perhaps also illustrated well in the judgment of His Honour Judge Hegarty QC (sitting as a judge of the High Court) in *Mattel Inc. v RSW Group PLC* [2004] EWHC 1610 (Ch) at [37]. The learned Judge in that case decided that the costs judge below had placed "disproportionate weight" on his assessment of that case as a "Manchester case". He pointed out that this took no account *inter alia* of the fact that "… *when they were first instructed in this case,* it was not known where RSW was based or where the goods were located" (emphasis added).

27. Accordingly, I should approach the 'reasonableness' of instructing Cart-Ruck in this case by reference to the circumstances confronting Mr Gazley on, or shortly before, 2nd April 2003. As a matter of fact, we now know that a conditional fee agreement was entered into with Mr Gazley (contemplating a 100% success fee); that proceedings were issued claiming damages for libel; that an offer of amends was made and accepted within the terms of sections 2 to 4 of the Defamation Act 1996; that the offer of £10,000 was increased to one of £25,000; that advice was taken from London counsel; that ultimately a Part 36 payment of £50,000 was made and accepted. Those are matters which, strictly speaking, ought to be excluded from consideration when assessing how reasonable it was to instruct specialist London solicitors in early April.

28. As I have already made clear, by the time Carter-Ruck came to be instructed on 2nd April 2003, the publishers of *The Sun* had admitted liability, apologised and expressed a willingness to pay damages, although the offer at that stage still stood at only £10,000. One might, I suppose, be forgiven for thinking that, as the conditional fee agreement was based upon a 100% success fee, the new solicitors had assessed the chances of improving upon the financial offer (by which 'success' was to be defined) as being no better than evens. That surely cannot be right, however, since it would be obvious to anyone that it was an opening shot and was almost certainly going to be significantly improved upon. Moreover, in evidence Carter-Ruck specifically rejected the suggestion that the success fee meant that they had assessed the risks of beating £10,000 at no more than 50%. In due course, when the matter came before the Costs Judge, he was confronted with a bill for over £91,000. He reduced the success fee from 100% to 20% (against which there has been no attempt to appeal) and, ultimately, made a detailed assessment in the much reduced sum of £32,633.48 (including VAT).

29. This affords an example of what Brooke LJ had in mind as the second of the "three main weapons available to a party who is concerned about extravagant conduct by the other side, or the risk of such extravagance" in *Musa King v Telegraph Group Limited* [2004] EWCA Civ 613. He referred at [105] to "a retrospective assessment of costs conducted toughly in accordance with CPR principles" which, needless to say, would include that of proportionality. It is thus clear that 'toughness' should not be discouraged in that context. On the contrary.

30. Evidence as to the fees subsequently charged needs to be excluded from an assessment of reasonableness as at 2nd April 2003 (although, in accordance with the seventh consideration listed by Kennedy LJ, one does need to address what, if anything, Mr Gazley might reasonably be expected to have known of the fees likely to be charged by Carter-Ruck as compared to the fees of other solicitors in (say) East Anglia).

31. Bearing in mind the evidence as to Mr Gazley's nervous state between 29th and 31st March 2003, following the publication of the relevant article, and his need for support, it may be that he did not make, and was not in a position to make, a cool appraisal of the circumstances in which he found himself, or of where his immediate best interests might lie. Nevertheless, it does appear that I must apply the test of a reasonable man finding himself in those circumstances (particularly having regard to the remarks of Latham LJ to which I have referred).

32. There is no doubt that the Costs Judge did direct himself as to the guidance given by the Court of Appeal in *Wraith* and there is no reason to suppose that he failed to ask himself the right questions. One of the primary criticisms made of his ruling by Mr Thwaites is that he erred in categorising this case as "obviously a Norfolk case", rather as the costs judge was held in the *Mattel* case to have attached "disproportionate weight" to the proposition that he was dealing with "a Manchester case".

33. Mr Nicklin sought vigorously to support the assessment of Costs Judge Simons even in this respect. To this extent, in so far as it matters, I would hold that the Costs Judge did fall into error. It was true that "Mr Gazley was from Norfolk", but I cannot accept that this made it "a Norfolk case". Proceedings had not yet been started when Carter-Ruck were first instructed, although they followed shortly afterwards. In the real world, there is no way that the libel action would have been heard in Norwich; nor yet that any hearing under section 3 of the Defamation Act 1996, were it to become necessary, would have taken place in that part of the world. Certainly at that stage, while practitioners were still finding their feet in the new offer of amends regime, the likelihood is that the hearing would have been in London before one of the Jury List judges.

34. What is more, this was a grave libel published all over the country by Defendants who are based in London. Had proceedings been started in Norwich, there would almost certainly have been an application to transfer the case to London and it would have been granted.

35. Even though I certainly differ from the assessment of the Costs Judge in this respect, that is not an end of the matter. What seem to me to be more important are his conclusions that "by the time Mr Gazley instructed PCR the only live issue was

damages" and that "the paying party has submitted uncontested evidence about there being local solicitors able to represent Mr Gazley".

36. It may be something of an exaggeration to say that damages was the *only* live issue, since other improvements could have been, and indeed were, obtained upon the package offered by the Defendants up to 2nd April 2003. For example, there was a better apology negotiated, including a photograph, and the taking of advertising space in other papers to publish the correction. Although these precise improvements might not have been in Mr Gazley's head at the time he changed solicitors, they were obvious possibilities to be considered. So too, in my judgment, was the possibility that the case would turn into a statutory 'offer of amends'. Although proceedings had not been started at the time of the change to Carter-Ruck, it would still have been possible for there to be an offer of amends, since the commencement of proceedings is not necessary as a precondition of parties availing themselves of the procedure under section 3. There would clearly be something to be said for instructing a specialist in that context.

37. Nevertheless, although the Costs Judge may in certain respects have exaggerated the simplicity of the outstanding issues, I am not concerned with whether he *could* have expressed himself more fully or accurately, but rather with whether he was "plainly wrong" or, alternatively, whether he "exceeded the generous ambit within which a reasonable disagreement is possible".

38. I accept that because of my own particular background, in dealing with libel litigation, I have a very different perspective from that of the Costs Judge. It is therefore important that I should not allow that rather unusual viewpoint to colour my judgment about the assessment of an experienced Costs Judge.

39. I recognise that there was room for specialist expertise to play a role in the resolution of the outstanding issues between Mr Gazley and the Defendants (as they would have appeared to a reasonable onlooker in April last year). Such expertise would be especially valuable in the context of conducting negotiations with either Mr Crone, the very experienced in-house lawyer of News Group Newspapers, or with Farrer & Co who were instructed on their behalf; of the assessment of the appropriate sum of damages to be paid; and of how to deal with any offer of amends. It should readily have been apparent to any competent lawyer at that time that, if informal negotiations over the amount of compensation were not proving successful, this was a classic case for the new regime to come into play.

40. It is important to recognise, however, that in order to have the necessary or the proportionate expertise available one does not always need to instruct London specialist solicitors. An important factor is that any competent litigation solicitor in the country can call upon specialist members of the Bar at very short notice. Indeed, as I have already said, Carter-Ruck themselves took advice from counsel.

41. Naturally, there will be cases where it is reasonable, or for that matter highly desirable, for specialist lawyers to be instructed in libel litigation. One can think of many examples where it would be necessary to grapple with more contentious issues. There are those cases where the evidence or the law is complex, or where there are problems of causation in relation to special damages, or where there are likely to be significant disputes over the relevance of documents in the context of disclosure. So too, this expertise is likely to be of great assistance where there is a

defence of justification based on 'reasonable grounds to suspect' or '*Reynolds*' privilege. All will depend on the particular circumstances.

42. On the other hand, as the evidence in this appeal discloses, there have been substantial cases tried both in London and elsewhere which have been handled throughout by competent non-specialist solicitors, albeit with the help of very experienced counsel from the libel Bar. The question which arises here, at the risk perhaps of over-simplification, is whether the Costs Judge was wrong to conclude that it was *not* reasonable to instruct specialist London solicitors given the limited nature of the issues still outstanding between Mr Gazley and the Defendants. There was evidence before the Court as to the availability of local non-specialist but experienced litigation solicitors, such as Mills & Reeve and Eversheds, who would have felt competent to handle any necessary negotiations or litigation on Mr Gazley's behalf. It goes without saying that they would have had access to members of the libel Bar if the need arose.

43. I have seen a witness statement of Rachel Higgs dated 20th October 2004. She is a partner in Mills & Reeve and is the head of its Dispute Resolution Team based at the Norwich office. In relation to specialist counsel she said this:

> "When advising on defamation cases, if, which is in any event fairly rare, I consider it prudent to obtain counsel's advice, I will always look to one of the two known specialist London sets, namely One Brick Court and 5 Raymond Buildings, for that advice. I do not use local counsel for such matters (or indeed any matters) always preferring to use specialist London counsel. The availability of a specialist Bar is particularly helpful for a regional firm such as ourselves, used to dealing with substantial pieces of litigation but sometimes requiring the guidance of a true specialist in the field. On the facts of this particular case, had I been asked to advise, I would probably have taken some early advice on quantum from a relatively senior junior counsel before embarking on some negotiation with the Defendants' solicitors. I would also have asked for advice on negotiation strategy; e.g. whether it would be better to explore mediation on the damages issue or seek to pressurise the Defendant by issuing proceedings. The lack of complexity in this case would have meant that not only would I have been very comfortable in advising the Claimant on his claim, but I would also have been comfortable with anyone in my team (or for that matter anyone in the Cambridge office Commercial Disputes Team) advising the Claimant".

44. Ms Higgs went on to say that she would certainly not issue a defamation claim in a District Registry, but would always do so in London because she knows that judges with experience of defamation are based in London and that most libel actions are tried there.

45. Of course this information was not before the Costs Judge in March, but that hardly matters since Ms Higgs was stating no more than is common knowledge. It is exactly what I would have expected her to say and it is hardly likely to be outside the knowledge or expertise of the Costs Judge. The availability and role of the

specialist members of the Bar must be something of which he has almost day-to-day experience. When he expressed the view that the work requiring to be done could be competently carried out by a local solicitor, he would naturally have taken into account the fact that such a person will take specialist advice where necessary.

46. There are a number of other criticisms, or minor cavils, which could be directed at the Costs Judge's reasons as summarised in the note before me.

47. For example, although he admitted that there was a lack of evidence to this effect, he seemed to place some reliance upon the proposition "that Mr Gazley instructed a public relations company". There was indeed no evidence of this, and I have indicated above how the name of Max Clifford came obliquely into the case in the context of instructing Carter-Ruck. He seems to have misunderstood the position. Also, he concluded that "there is no evidence that Belmores were not up to the job" and that "there is no evidence to suggest that Mr Gazley was not getting anywhere through Belmores". It is, however, perhaps fair to conclude on the evidence before the Costs Judge (as opposed to the more cogent material which surfaced later) that there was at least a lack of confidence on the part of Mr Gazley; moreover, for the present purposes it does not appear to be necessary for the dissatisfaction to be characterised as anything more than "possibly" well founded.

48. Another of the conclusions debated between counsel was to the effect that "I do not accept that it was necessary in order to achieve a level playing field for PCR to be instructed". It is fair to say no reference was expressly made in the *Wraith* case to either 'equality of arms' or 'a level playing field', but that case was heard shortly before the CPR came into effect. I should be surprised if it were held today that such a factor was irrelevant in judging 'reasonableness', and I could certainly imagine circumstances in which it would weigh very significantly in a decision to instruct specialist lawyers. In general terms, I have already given some examples of the sort of litigation in which specialists might well be required. Here, however, for reasons already explained, the Costs Judge was of the view that the limited outstanding issues did not require the introduction of specialists for Mr Gazley's best interests to be properly represented.

49. None of these miscellaneous factors would support the proposition that the Judge's conclusions were 'plainly wrong'. On the contrary, it seems to me his decision was a sensible and robust one in the light of his very considerable experience. The essence of his determination is to be found in the following summarised paragraphs:

> "I take into account the importance of the matter to the Client and I do not wish to trivialise the matter, but it is quite clear that an apology had been offered to Mr Gazley by *The Sun* before he had got in contact with any solicitors. There was never any doubt that *The Sun* did not propose to settle the libel action (*sic*). The only issues were damages and an appropriate apology.
>
> I believe it is reasonable to assume that the first apology and the offer of £10,000 in damages was unlikely to be the last word.

> I accept that Belmores had arranged local interviews and within their time constraints had done an awful lot to get things done.
>
> It is difficult to see why Mr Gazley was so dissatisfied with them when they appear to have achieved a lot.
>
> There is no evidence that Belmores had decided this was the final word and I have to assume that *The Sun* would spend money and time negotiating. There is no evidence as to what they did. There is no evidence about Mr Gazley's situation other than in his witness statement prepared for the Part 8 claim.
>
> The onus is on the Claimant to satisfy me that it was reasonable to instruct PCR and without any evidence of why he sacked Belmores I am in difficulties. Any doubt should be exercised in favour of the paying party".

50. It is certainly true that there was evidence about Mr Gazley's 'situation' other than that contained in his witness statement because Mr Triggs also explained how the solicitor appeared out of her depth and failed to instil confidence. Nevertheless, I believe I should be exceeding my function on a review of this kind if I were to classify that encapsulation of the Costs Judge's reasons as being outside the generous ambit within which reasonable disagreement is possible. Although I would myself perhaps be more susceptible than others to the advantages of specialists in the field of defamation because I am alive to the risks, uncertainties, and pitfalls attaching to that form of litigation, this is not a factor which would justify me in classifying the Costs Judge's approach as 'wrong'. In any event, on the special facts of this case, which are unlikely I would hope to be replicated, I too would have considerable doubt whether it was reasonable or proportionate to instruct a specialist London firm, in addition to specialist counsel, for the purpose of resolving the outstanding issues.

51. There is one final matter I should briefly address. Reliance was placed on the Appellant's behalf upon the submission that the decision below was "unjust due to a serious irregularity (arising out of the tendering of material which was misleading on an issue relied upon by the Costs Judge to the Claimant's detriment)". Coupled with this allegation is the suggestion that the Respondents' solicitors 'ambushed' those of the Claimant by producing evidence as to the availability of competent litigation lawyers in East Anglia later than was necessary, and in breach of the time limits for evidence laid down on 3rd November 2003. Despite the fact that the relevant information would have been in the hands of Farrer & Co by 23rd February 2004, they chose not to disclose it to Carter-Ruck until the evening of 5th March (i.e. three days after the due date). It does not seem to be disputed that the material was served late and no explanation has been forthcoming, but I have no evidence that would justify my concluding that anyone at Farrer & Co had an intention to 'ambush' or overreach.

52. It is submitted on the Claimant's behalf that it is now possible to see that a "central premise of the Costs Judge's decision" has been comprehensively undermined in certain respects:

(i) as to the number of defamation actions begun in London;

(ii) the absence of any evidence relating to defamation proceedings issued out of the Norwich, Ipswich, Colchester or Cambridge District Registries;

(iii) the true extent of the specialist expertise of Eversheds in the field of defamation;

(iv) the extent of Mills & Reeve's expertise in defamation.

53. I think there has been something of a misunderstanding between the parties. It was never the Defendants' suggestion that either of those firms purported to rival the expertise of Carter-Ruck in the field of defamation. Their case was rather that they could offer competent and experienced litigation solicitors who could be relied upon to deal with the outstanding issues in Mr Gazley's interests and, in particular, with the benefit of advice from the specialist Bar. Having reviewed the relevant evidence, both that which was before the Costs Judge in March and the new material before me in November, I am unable to conclude either that there was any intention to mislead the Costs Judge, or indeed that his reasoning has been significantly undermined by the fuller picture which has now emerged.

54. In the result, I have decided that Costs Judge Simons' conclusion on the reasonableness of instructing Carter-Ruck was based on the particular facts of this case, in the light of his very wide experience of litigation generally including the role of specialist practitioners, and that it cannot be classified as wrong (whether 'plainly' or otherwise). Accordingly, the appeal is dismissed.