Case No: A2/2003/2250/QBENF

Neutral Citation No: [2003] EWCA Civ 1694
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(Mr Justice Eady)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Wednesday 26th November 2003

Before:

LORD JUSTICE SIMON BROWN
LORD JUSTICE MUMMERY
and
LORD JUSTICE MANCE

- -

Between:

(1) MOHAMMED ABDUL LATIF JAMEEL **Respondents**
(2) ABDUL LATIF JAMEEL COMPANY LIMITED
- and -
THE WALL STREET JOURNAL EUROPE SprL **Appellant**

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Geoffrey Robertson Esq, QC & **Ms Catrin Evans**
(instructed by **Messrs Finers Stephens Innocent**) for the Appellant
James Price Esq, QC & **Justin Rushbrooke Esq**
(instructed by **Messrs Peter Carter-Ruck**) for the Respondents

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Judgment

Lord Justice Simon Brown:

1. This is the defendant publisher's interlocutory appeal against two rulings made by Eady J on 7 October 2003 at a pre-trial review in a libel action, respectively as to the meaning of the words complained of and as to the admissibility and relevance of certain hearsay evidence. The trial, I may say, is fixed for a three week hearing starting on 1 December 2003. I myself gave permission to appeal on the documents on 24 October, albeit "with some considerable hesitation" and recognising the logistical inconvenience of such an appeal. I was, however, "persuaded that a genuine issue of principle arises in respect of each of the two rulings". We heard the appeal on 19 November. For obvious reasons it has been necessary to produce our judgments with some speed. In these circumstances I have taken the unusual course of incorporating within my own judgment the entirety of the (comparatively short) judgment below.

2. First, however, it is necessary to set out the most directly relevant parts of the article of which the respondents complain in this action (with paragraph numbers added for convenience), an article published by the appellant on 6 February 2002 in *The Wall Street Journal Europe*, under the headline "Saudi Officials Monitor Certain Bank Accounts" and the sub-headline "Focus is on those with Potential Terrorist Ties". Paragraphs 1 to 3 and the first part of paragraph 4 of the article appear under those headlines on the front page; the rest of the article appears on page 4 under the further headline "Certain Saudi Bank Accounts Are Being Closely Monitored". The body of the article reads:

> "1. RIYADH, Saudi Arabia - The Saudi Arabian Monetary Authority, the kingdom's central bank, is monitoring at the request of US law enforcement agencies the bank accounts associated with some of the country's most prominent business-men in a bid to prevent them from being used wittingly or unwittingly for the funnelling of funds to terrorist organisations, according to US officials and Saudis familiar with the issue.
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> 2. The accounts - belonging to Al Rajhi Banking & Investment Corp, headed by Saleh Abdulaziz al Rajhi; Al Rajhi Commercial Foreign Exchange, which isn't connected to Al Rajhi Banking; Islamic banking conglomerate Dallah Al Baraka Group, with $7 billion (€8.05 billion) in assets and whose chairman is Sheik Saleh Kamel; the Bin Mahfouz family, separate members of which own National Commercial Bank, Saudi Arabia's largest bank and the Saudi Economic Development Co; and the Abdullatif Jamil Group of companies - are among 150 accounts being monitored by SAMA, said the Saudis and the US officials based in Riyadh.
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> 3. The US officials said the US presented the names of the accounts to Saudi Arabia since the Sept 11 terrorist attacks in America. They said four Saudi charities and eight businesses were also among 140 world-wide names given to Saudi Arabia last month.
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> 4. The US officials said the US had agreed not to publish the names of Saudi institutions and individuals provided that

Saudi authorities took appropriate action. Many of the Saudi accounts on the US list belong to legitimate entities and businessmen who may in the past have had an association with institutions suspected of links to terrorism, the officials said. The officials said similar agreements had been reached with authorities in Kuwait and the United Arab Emirates. 'This arrangement sends out a warning to people', a US official said.

5. SAMA couldn't be reached for comment. In a recent report to the United Nations about combating terrorism, however, the Saudi government said: 'The Kingdom took many urgent executive steps, amongst which SAMA sent a circular to all Saudi banks to uncover whether those listed in suspect lists have any real connection with terrorism'.

6. Saudi Arabia has frozen the accounts of several businessmen suspected by the US of having funded terrorist organisations, including those of Jidda-based Yassin al Qadi. Among the bin Mahfouz family, Abdulrahman bin Mahfouz was a member of Muwafaq, a defunct Jersey-registered charity in the UK headed by Mr Qadi. Mr Qadi is publicly listed by the US as being associated with terrorism.

…

11. The US officials said that the accounts of Al Rajhi Banking and Al Rajhi Commercial Foreign Exchange were being monitored because of suspected associations of the companies in the past. A spokesman for Al Rajhi Banking, Ahmed Suleiman Ahmed, said, 'We maintain that our names have not come up nor have names of members of the [Al Rajhi] family.'

12. Mohammed al Rajhi, a spokesman for Al Rajhi Commercial Foreign Exchange, said he wasn't aware of any monitoring of the company's accounts by SAMA.

13. The Abdullatif Jamil Group of companies couldn't be reached for comment.

14. The US officials said Dallah Al Baraka had been targeted because of investments it had in the Al Aqsa Bank, in the Palestinian territory of the West Bank, Baraka Exchange LLC in Somalia and Al Taqwa, a finance company in Switzerland - three organisations publicly listed by the US as being as having [sic] terrorist links."

3. The respondents contend that those words mean that they were reasonably suspected of having terrorist ties and of funnelling funds to terrorist organisations. The appellant disputes that the words are defamatory of the respondents at all, alternatively it contends for

a lesser defamatory meaning. In any event it contends that the words were published on an occasion of qualified privilege. There is no plea of justification.

4. Eady J's judgment below reads:

> "1. Following the pre-trial review in this libel action which is due to be tried in December, I am now required to rule on two outstanding matters, namely, (1) an issue of meaning and (2) questions on the admissibility and relevance of eleven witness statements served on the Claimants' behalf, and accompanied by Civil Evidence Act notices in May of this year.
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> 2. The claim is founded upon an article appearing in the Wall St. Journal (Europe) for 6 February, 2002 entitled 'Saudi Officials Monitor Certain Bank Accounts. Focus Is On Those With Potential Terrorist Ties'. I am told that there is a readership of the order approximately of 90,000 in this jurisdiction. The author is Mr. James Dorsey. As it happens, it is the same article which forms the subject matter of the claim by the Al Rajhi Banking & Investment Corporation and has received detailed consideration in two earlier judgments in those proceedings (see [2003] EWHC 1358 (QB) and [2003] EWHC 1776 (QB), handed down respectively on 12 June and 21 July, 2003).
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> 3. This claim is brought by Mohammed Abdul Latif Jameel, the First Claimant, and Abdul Latif Jameel Co. Ltd., the Second Claimant, who allege that they are referred to in, or identifiable from, the article, which is a matter of dispute, and that the words bear the following defamatory imputation: 'In their natural and ordinary meaning, and in the context in which they appeared, including the headlines on the front page and page 4, the said words meant, and were understood to mean, that the Claimants were reasonably suspected of having terrorist ties and of funnelling funds to terrorist organisations, and had therefore been included on a list of bank accounts which were required by the US law enforcement agencies to be closely monitored by the Saudi Arabian Monetary Authority'.
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> 4. In the Al Rajhi case, much attention was focused on the pleaded meanings, and especially upon various formulations of *Lucas-Box* meanings which the Defendants wished to justify. In this case, Mr. James Price QC for the present Claimants has referred to my earlier judgment of 21 July, and submitted that the position is analogous. Nevertheless, I must not forget that this is a different claim between different parties.
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> 5. The present application is somewhat unusual in that both parties are inviting me to "delimit" the possible meanings in advance of the trial, to borrow a phrase from the judgment of

Hirst, LJ in *Mapp -v- News Group Newspapers Ltd.* [1998] Q.B. 520. What is unusual is that the invitation comes in advance of trial and when there is (a) no suggestion that the article was incapable of bearing the Claimants' meaning, set out above, and (b) no plea of justification on the record, and thus no *Lucas-Box* meanings to be considered.

6. Mr. Robertson Q.C., appearing for the Defendants, as he did in Al Rajhi, submits that the words are capable of a lesser defamatory meaning than that contended for by the Claimants (assuming, of course, that the Claimants are able to establish that the words did indeed refer to them).

7. Mr. Price argues that, as I held in Al Rajhi, the words are only capable of conveying that there are "reasonable grounds to suspect" the Claimants of having terrorist ties and of funnelling funds to terrorist organisations. Mr. Robertson argues that there is room here for the lowest of the three tiers of gravity identified by the Court of Appeal in *Bennett -v- News Group Newspapers* [2002] EMLR 39 and *Chase -v- News Group Newspapers* [2003] EMLR 218 - namely, that there are grounds merely for investigation. This corresponds to the issue on which I ruled in Al Rajhi on 21 July (at paragraphs 8 to 12). There I held, in the context of various proposed *Lucas-Box* meanings, that the article was only capable of conveying the more serious of the two imputations, i.e. that there were in the case of that Claimant 'reasonable grounds to suspect'.

8. The tests to be applied on any such application are clear from a number of Court of Appeal authorities, including, for example, *Gillick -v- BBC* [1996] EMLR 267 and *Mapp* (cited above). Mr. Robertson relies primarily upon the distinction that there is no allegation corresponding to paragraph 11 of the article which refers specifically to the Al Rajhi group in the following terms: 'The US officials said the accounts of Al Rajhi Banking and Al Rajhi Commercial Foreign Exchange were being monitored because of suspected associations of the companies in the past. A spokesman for Al Rajhi Banking, Ahmed Suleiman Ahmed, said, "We maintain that our names have not come up; nor have the names of members of the Al Rajhi family"'.

9. On the other hand, Mr. Price invites particular attention to paragraph 4 of the article: 'The US officials said the US had agreed not to publish the names of Saudi institutions and individuals provided that Saudi authorities took appropriate action. Many of the Saudi accounts on the US list belong to legitimate entities and businessmen, who may, in the past, have had an association with the institutions suspected of links to terrorism, the officials said. The officials said similar agreements had been reached with authorities in Kuwait and

the United Arab Emirates. “This arrangement sends out a warning to people”, the US official said’. That is general, and not confined to Al Rajhi. It would therefore, he submits, reflect upon any identifiable person, including these Claimants. Moreover, it is not appropriate to expect readers to draw sophisticated distinctions between some of the named bodies and others. After all, the headlines will undoubtedly be taken as of general application. Also, the citation in paragraph 5 of the article, attributable to the Saudi government, states, ‘In a recent report to the United Nations about combating terrorism, however, the Saudi government said, “The Kingdom took many urgent executive steps, amongst which SAMA sent a circular to all Saudi banks to uncover whether those listed in the suspect lists have any real connection with terrorism”’.

10. Accordingly, the remarks I made in paragraph 11 of my earlier judgment would appear to be apposite here: ‘Since the focus is already declared to have been on those with potential terrorist ties, it is difficult to comprehend how a fair-minded reader is supposed to construe “ties”, “links”, or “associations” variously referred to throughout the article as being other than the subject of at least reasonable suspicion - that is to say, as giving rise to suspicion of knowing or negligent involvement - or because the possibility has also to be admitted of the use of the Claimants’ accounts or facilities being unwitting - of negligently permitting circumstances to arise where they were so used’.

11. As the parties invite me to rule at this stage, my conclusion is that the words complained of in these proceedings are not capable of bearing a lesser defamatory meaning than that of ‘reasonable grounds to suspect’, reflected in the second tier of gravity identified by Lord Justice Brooke, in *Chase* at paragraph 45.

12. The other issue to be resolved is that of the eleven witness statements which were served with Civil Evidence Act notices some months ago, and in respect of which no counter-notices have been served. They consist of a statement from the Saudi Arabian Monetary Authority (SAMA) which was said in the article to be the body ‘monitoring’, and of ten others deriving from other Saudi banks. I am told that the Claimants have, as yet, not quite covered all the Saudi banks, but these statements certainly embrace the great majority. The object of that exercise is to demonstrate to the jury that the central allegation of the article is quite simply wrong, since no such monitoring was taking place, whether of the Claimants or at all. Whether the statements achieve that objective is another question. Mr. Robertson has submitted that upon close analysis they do no such thing. Nevertheless, for the moment, I am concerned with the question of principle as to whether the Claimants

should even be permitted to try to demonstrate falsity - in a case where there is no plea of justification. There is a presumption that defamatory words are false, unless and until the relevant defendant proves them to be true.

13. Here, because there is no plea of justification, the presumption will prevail. Why, therefore, it may be asked, should the Claimants be allowed to adduce evidence which appears to be directed to the unnecessary exercise of disproving the truth of the libel? Could it conceivably be relevant to the issue of qualified privilege? Intuitively, one would answer in the negative. Moreover, some consideration was given to the question by the Court of Appeal in *GKR Karate -v- Yorkshire Post (No. 1)* [2000] EMLR 396 at 406. It is possible to derive authority from that decision for at least these two propositions: (1) it is not relevant to qualified privilege whether the publication was true or not; (2) it is not relevant to speculate what further information the publisher might have discovered if he had made more extensive inquiries.

14. Mr. Price, however, seeks to distinguish *GKR Karate* on the facts, and to argue that there are features in the present case not addressed by the Court of Appeal at that time. In particular, he does not seek to adduce the relevant witness statements to achieve either of the impermissible objectives to which the Court of Appeal referred. He has identified a number of other purposes to which he argues no objection can be taken. For one thing, he wishes to refute assertions in the evidence of Mr. Dorsey, who describes a meeting with an unidentified diplomatic source. He claims that the source told him things about the monitoring of certain bank accounts, but Mr. Price submits that he should be allowed to introduce these statements to show that the conversation simply cannot have gone as Mr. Dorsey suggests. He says also that there is nothing in *GKR* inconsistent with his taking that course.

15. In order to understand the Claimants' case in this context, it is necessary to refer briefly to passages in two of the Defendant's witness statements. First, I go to a passage in that of Mr. Dorsey: 'The US diplomat told me that the US had two weeks earlier distributed a new list of 140 names world-wide, including to Saudi Arabia, that included four Saudi charities and eight businesses … Asked whether accounts of Abdul Latif Jameel were being monitored, the diplomat briefly consulted his file again and said, "Yes"'.

16. Next, I go to paragraph 20 in the statement of Mr. Glenn Simpson: 'Fifteen months have passed since the publication of the article. I am today convinced that it was accurate.'

17. Against that background, Mr. Price summarised his case in his skeleton argument at paragraph 38 as follows: '(1) This is

not a *GKR Karate -v- Yorkshire Post* [2000] EMLR 396 case. These statements are not introduced for the purpose of showing what further checks would have shown, or to undermine the objective reliability of the Defendant's sources. It is introduced to rebut Mr. Dorsey's account of what occurred. The Claimants' case is that Mr. Dorsey either misunderstood the position or his memory is at fault for the reason that what he says took place cannot have occurred. In very short summary, the evidence that the US diplomat was privy to the relevant discussions between the US authorities and SAMA, and that his file relating to the matter contained documents showing that the bank accounts of, among others, the ALJ Group were being monitored, cannot be right because it is affirmatively established that the accounts were not being monitored. If permitted, we would also wish to put these statements to some of the Defendant's witnesses in the proper manner in cross-examination to challenge the witnesses' evidence that the matter - in particular, the naming of names - was really of pressing public interest.

"(2) They support the Claimants' aggravated damages claim. It is particularly hurtful for the First Claimant that the Defendant has refused, and continues to refuse, to apologise for, or retract, these very serious allegations when, as the Claimants wish to prove, the falsity of the central allegation in the article has been conclusively shown to the Defendants from the horses' mouths. In this context it is important to bear in mind that the evidence from the Governor of SAMA, Hamad Al Sayari, authoritatively refuting the allegations is part of a nexus of denials stretching back to the evening of the date of publication of the article complained of when the First Claimant was so concerned that he spoke to Al Sayari on the telephone, and which includes the press release issued by SAMA shortly afterwards.

The Claimants wish to invite the jury to contrast all of this evidence with the offensive response to the Claimants' solicitors' complaint sent by the Defendant's in-house lawyer on 21 February 2002 in which he effectively suggested that no-one should believe anything any Saudi official might say (see in this regard the second witness statement of Mohammed Jameel at paragraphs 6 and 9 to 10).

(3) They rebut the Defendant's contention in paragraph 20 of the witness statement of Glenn Simpson, if that paragraph is permitted to remain, that the article was accurate - a matter on which Simpson professes himself to be convinced.'

18. I need to remember that where journalists are entitled, as a matter of law, to protect their sources there can often arise real practical difficulties for claimants seeking to challenge, test, or rebut a defence of qualified privilege based on the criteria

set out by Lord Nicholls in *Reynolds -v- Times Newspapers Ltd.* [2001] 2 A.C. 127. It is obvious that where the source, or sources, cannot be identified, the tests for establishing social or moral duty on the one hand, and public interest on the other, become, to say the least, elusive. It is thus important to recognise that claimants must be permitted to probe and test the defendant's case, including the evidence of any relevant journalist in cross-examination, with such thoroughness and vigour as is compatible with not revealing the source.

19. There is always a risk that anonymous sources will acquire, in the eyes of a jury, an aura of saintliness, wisdom, or infallibility when they are not permitted to take on human form, especially having regard to the natural tendency of journalists to buff up the quality of their character or experience - for example, by using the standard description for anonymous sources, which is 'impeccable'. In such circumstances there is room, potentially, for injustice if the claimant is not permitted to introduce evidence capable of casting doubt on the accuracy of the journalist's evidence, or the reliability of his source of information. Here, in particular, it would be unfair to force the Claimants to rest upon the law's presumption that the words are false when Mr. Simpson, far from admitting inaccuracy, is reasserting the truth of his story with such vehemence. The impression could easily be given to the jury that the Claimants are being allowed to claim vindication under the protection of a legal technicality.

20. I am accordingly persuaded by Mr. Price that his submissions do not fail to honour the principles identified by the Court of Appeal in *GKR Karate*. The statements he wishes to introduce would be directly relevant to rebutting evidence to be given by Mr. Dorsey, and by Mr. Simpson, and to supporting the case on aggravated damages. How much weight is to be attached to them, and especially if the witnesses do not attend in person, is a matter for submissions to the jury. But, as a matter of principle, it seems to me that such statements are relevant and admissible."

For convenience I shall refer to paragraphs in Eady J's judgment as paragraph E1, E2 and so forth.

5. Pursuant to that judgment Eady J's order of 7 October 2003 so far as material reads:

"It is ruled, ordered and directed as follows:

1. Pursuant to paragraph 4.1 of the Practice Direction to CPR Part 53, the words complained of are not capable of bearing a lesser defamatory meaning than that of 'reasonable grounds to suspect' the conduct alleged in the article complained of.

2. The defendants' application to exclude the hearsay evidence served on behalf of the Claimants under the Notice of Desire to Adduce Hearsay Evidence dated 12 May 2003 be dismissed."

6. I turn to the first of the two issues, the question of meaning, and begin by reminding myself of the approach which this court should properly take to appeals against a ruling by the first instance judge upon what meanings words are capable of bearing. This approach emerges plainly from the following two citations. First, Sedley LJ's judgment in *Berezovsky -v- Forbes Inc* [2001] EMLR 1030, 1040:

> "16. The real question in the present case is how the courts ought to go about ascertaining the range of legitimate meanings. Eady J regarded it as a matter of impression. That is all right, it seems to us, provided that the impression is not of what the words mean but of what a jury could sensibly think they meant. Such an exercise is an exercise in generosity, not in parsimony. It is why, once fairly performed, it will not be second-guessed on appeal by this court: the longstop is the jury. But it is also why, if on an application for permission to appeal it appears that the judge had erred on the side of unnecessary restriction of meaning, this court - though it will always be mindful of what Brooke LJ said in *Cruise -v- Express Newspapers* [1999] QB 931 about self-denial in libel cases - may be readier to take another look. In those cases where it does so, its decision is akin to (and strictly speaking probably is) a holding of law. It will have careful regard to the judge's view, but the view it comes to on the legitimate ambit of meaning will be its own. That is the approach we propose to take here."

7. Secondly, Keene LJ's judgment in *Patterson -v- ICN Phototonics* [2003] EWCA Civ 343:

> "17. For my part, I fully accept the principles as to this court's approach to a judge's ruling on meaning as summarised by Mr Nicklin. The matter was succinctly put by Lord Phillips, MR, in *Gillick –v- Brook Advisory Centre* [2001] EWCA Civ 1263 at paragraph 5 and 6:
>
> > '5. The Court of Appeal will always be very reluctant to reverse an interlocutory finding of a judge at first instance that the words alleged to be libellous are capable of bearing the defamatory meaning alleged (see *Hinduja v Asia TV Limited* [1998] EMLR 516, 523 per Hirst LJ and *Cruise v Express Newspapers* [1999] QB 931, 936 per Brooke LJ).
> >
> > 6. Where the judge has held that words are not capable of bearing a defamatory meaning, with the result that the issue will never go to a jury, the reluctance to

> intervene will be less marked (see Hirst LJ in *Geenty v Channel Four Television* [1998] EMLR 524 at 532).'
>
> As Lord Phillips indicates at paragraph 6, the reason for being readier to intervene where the judge below has ruled the words incapable of bearing a defamatory meaning is that, if the ruling stands, a jury will never have the opportunity of reaching a view as to the natural and ordinary meaning of the words. Those principles do not, however, prevent this court from intervening in an appropriate case, where it is satisfied that the judge has clearly gone wrong as a matter of approach or has reached a conclusion which is patently unsustainable."

8. As to the approach to be adopted by the first instance judge himself, this, it may be noted, was dealt with by Eady J below in a single sentence at the start of E8:

> "The tests to be applied on any such application are clear from a number of Court of Appeal authorities, including, for example, *Gillick -v- BBC* [1996] EMLR 267 and *Mapp* [1998] QB520."

9. Whilst I too think it unnecessary to rehearse at length all the many citations we were shown on this question, it is, I think, worth highlighting what I conceive to be the real function which the judge is discharging when ruling on meaning. He is in my judgment ruling as a matter of law that the words in question are simply not capable of bearing any meanings more and/or less defamatory (as the case may be) than that (or those) which he is determining fall(s) within the permissible range. In other words he is holding that if the jury were to conclude that the words bore a meaning outside the range he is specifying, not merely could that not properly be found to be the one single meaning (the "artificial" meaning classically spoken of by Diplock LJ in *Slim -v- Daily Telegraph* [1968] 2 QB 157, 172), defamatory or otherwise, which the words bear, but it could not even be a meaning reasonably open to the jury. In short, the ruling involves this: that no reader could reasonably understand the words to bear any meaning outside the range delimited (to use the word used by Hirst LJ in *Mapp*) by the judge; and that it would be "perverse" for any jury to do so - the language of perversity I take from Diplock LJ's judgment in *Slim* at p174 and from the judgments of Lord Woolf CJ (paragraph 60) and May LJ (paragraph 38) in *Alexander -v- Arts Council of Wales* [2001] 1 WLR 1840.

10. In delimiting for the jury the permissible range of meanings the words in question may bear, the judge would I think do well to have in mind the following passage from Lord Nicholls' judgment in the Privy Council in *Bonnick -v- Morris* [2002] EMLR 827:

> "20. This divergence of view [as to whether the article contained the defamatory implication there in question] is neither surprising nor unusual. Language is inherently imprecise. Words and phrases and sentences take their colour from their context. The context often permits a range of meanings, varying from the obvious to the implausible. Different readers may well form different views on the meaning to be given to the language under consideration."

11. The Privy Council was there concerned with whether, given that the defendant had not intended her published words to bear the defamatory meaning which the judge ascribed to them, she was entitled to ask the court to take their possible non-defamatory meaning into account when deciding whether the defence of *Reynolds* qualified privilege was available to her. It was held that she was:

> "24. … a journalist should not be penalised for making a wrong decision on a question of meaning on which different people might reasonably take different views. … If the words are ambiguous to such an extent that they may readily convey a different meaning to an ordinary reasonable reader, a court may properly take this other meaning into account when considering whether *Reynolds* privilege is available as a defence."

12. It is, I should note, principally in connection with their pleaded defence of qualified privilege that the defendant in the present case too is anxious to invite the jury to take into account the non-defamatory, or at any rate the lesser defamatory meaning, which it says it intended its published words to bear. *Bonnick*, of course, begs rather than answers the question whether any reasonable reader (or, indeed, writer - see *Slim* at p171) of the words could reasonably have understood them in that sense. *Bonnick*, however, underlines the fact that there is often room for different views on the meaning of an article, particularly where, as there (see paragraph 19) and as also here, the defamatory imputation is a matter rather of *implication* than by express statement.

13. The judge's function in delimiting the possible meanings of the published words may have to be discharged in connection with a wide variety of issues. In *Bonnick*, as in the present case, the range of possible meanings may be relevant with regard to evaluating the defence of qualified privilege. More usually, however, the ruling is relevant to the defence of justification in connection with a pleaded *Lucas-Box* (lesser) meaning, or to assess the degree of injury to the claimant's reputation, or to determine whether the words complained of are capable of having any defamatory meaning at all, or - as *Alexander* has now for the first time clearly established - whether the words are capable of having a *non*-defamatory meaning (either of which latter conclusions can of course result in summary judgment).

14. But every time a meaning is shut out (including any holding that the words complained of either are, or are not, capable of bearing a defamatory meaning) it must be remembered that the judge is taking it upon himself to rule in effect that any jury would be perverse to take a different view on the question. 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. That being clearly the position with regard to whether or not words are capable of being understood as defamatory or, as the case may be, non-defamatory, I see no basis on which it could sensibly be otherwise with regard to differing levels of defamatory meaning. Often the question whether words are defamatory at all and, if so, what level of defamatory meaning they bear will overlap. Take this very case. It is difficult to understand how, if the judge is right to have ruled that this article is not capable of bearing a lesser defamatory meaning than that of reasonable suspicion, the appellant can continue to dispute that they are defamatory at all.

15. May LJ in *Alexander*, echoing what Bingham LJ had said in *Kingshott -v- Associated Kent Newspapers Limited* [1991] 1 QB 88, 101, sounded a note of caution about withdrawing questions (there the issue of malice) from the jury:

> "The word of caution is simply to draw attention to the possibility in cases such as this of leaving questions to the jury, notwithstanding a judge's view on matters of law, to obviate or mitigate the risk of an expensive new trial."

16. By the same token that the judge's ascertainment of the range of permissible meanings is "an exercise in generosity, not in parsimony" and, moreover, an exercise in which this court will be readier to intervene if the judge has withdrawn from the jury (rather than left to them) any particular meaning, so too in my opinion the judge should be warier even than usual of withdrawing meanings unless there is sound reason for doing so. I can quite see that where the defence of justification is raised with regard to a *Lucas-Box* meaning then it may be important to rule in advance on whether the words are capable of bearing their lesser defamatory meaning so as to control the evidence properly adducible at trial. In a case like the present, however, there seems altogether less reason for a pre-emptive ruling - although I recognise, of course, (see paragraphs E5 and E11) that the judge was expressly invited to make it.

17. With these perhaps over-lengthy reflections in mind, let me now return to the facts of the present case. The first matter to which I wish to draw attention is this. The judge's ruling is that "the words complained of are not capable of bearing a lesser defamatory meaning than that of 'reasonable grounds to suspect' the conduct alleged in the article complained of". What, however, *is* the conduct alleged in the article? The meaning of the words pleaded by the respondent (see E3) is that they "were reasonably suspected of having terrorist ties and funnelling funds to terrorist organisations, and had therefore been included on a list of bank accounts which were required by the US law enforcement agencies to be closely monitored by the Saudi Arabian Monetary Authority". The conduct alleged against them therefore seems to be that they had terrorist ties and funnelled funds to terrorist organisations, conduct to my mind necessarily implying a high degree of bad faith. At E10, however, the judge imports into this case the conclusion at which he had arrived in the parallel but different case of *Al Rajhi* in which he held that the conduct of which the article said that those claimants were reasonably suspected was that "of knowing or negligent involvement - or because the possibility has also to be admitted of the use of the claimants' accounts or facilities being unwitting - of negligently permitting circumstances to arise where they were so used".

18. As I understand that conclusion, it is that Al Rajhi, a banking and investment group, is said by the article to be reasonably suspected at least of unwittingly, albeit negligently, permitting their accounts or facilities to be used for the benefit of terrorists.

19. Put aside the difficulty of deciding what in this context is meant by "negligently permitting" the use of, say, a bank account for a no doubt anonymous terrorist. Put aside too the difference between a banking group like Al Rajhi and a trading group like these respondents. Once it is recognised that the article may be asserting no more than that in one way or another the respondents may unwittingly have assisted terrorists in the past and may by introducing more controls be able to prevent that in future, the borderline between what

for convenience we have been calling level 2 meaning (reasonable grounds to suspect) and level 3 meaning (grounds merely for investigation) becomes somewhat blurred.

20. The difference and inter-relationship between level 2 and level 3 meanings have been discussed in a number of cases, mostly notably in *Lewis -v- Daily Telegraph* [1964] AC 234 (where this distinction was first drawn), *Bennett -v- News Group Newspapers Limited* [2002] EMLR 860, and *Chase -v- News Group Newspapers Limited* [2003] EMLR 218. It is not perhaps an entirely satisfactory distinction. As Eady J himself said at paragraph 9 of his *Al Rajhi* judgment, "it may be … that it [the third and lowest tier of gravity: grounds for investigating whether the claimant has been responsible for the act in question] differs in quality from the second tier, 'reasonable grounds to suspect', only as a matter of degree". As, however, Gray J observed yet more recently in another action brought by a member of the Jameel family against Times Newspapers Limited [2003] EWHC 2609 (QB) in respect of a not wholly dissimilar kind of article:

> "23. It might at first blush appear that the distinction between what I have called level 2 and level 3 meanings is artificial and over-refined. But, quite apart from the fact that the distinction is one which is clearly made in the authorities to which I have referred, it appears to me that there are real distinguishing features.
>
> 24. In the first place, an imputation that there exist reasonable grounds for suspicion of misconduct generally (but not invariably - see *Chase* at 231 per Brooke LJ) arises because the person suspected has acted in such a way as to bring suspicion on himself. …
>
> 25. The second distinguishing feature is that sufficient grounds may exist for an enquiry or investigation in circumstances where the information available is incomplete and where it may comprise or consist in hearsay statements. To take a mundane example, a police officer to whom a complaint is made may justifiably conclude that further investigation into that complaint is required even if it is based exclusively on hearsay evidence."

21. Generally where this distinction is raised it is necessary to decide between the two levels of meaning in order to determine whether the plea of justification is permissible given the differing character of justification evidence required for the respective levels. Here, however, as already made plain, that is not so.

22. This to my mind is not a case in which the imputations made by the article are so plain as to justify the judge withdrawing from the jury the possibility of finding at least that the author could reasonably have been intending to convey some lesser defamatory meaning than reasonable grounds for suspicion even if they were ultimately to regard that level 2 meaning as the (artificial) single meaning of the words.

23. I recognise, of course, the force of the respondents' arguments as to the meaning which the ordinary reader would put upon the words used - arguments summarised in E9 and E10 above. It may, indeed be the likeliest meaning which the jury will place upon the article. I remain unpersuaded, however, that it is the only possible meaning which can be put upon it, particularly bearing in mind the uncertainty as to just what in the way of misconduct is really being suggested by the article to underlie the investigations. In short, I think the judge wrong to have rejected the meanings contended for by the appellant as necessarily involving "some strained or forced or utterly unreasonable interpretation" (language used in Eady J's own formulation of the correct approach, approved by this court in *Gillick -v- Brook Advisory Centres* [2001] EWCA Civ 1263).

24. Before leaving this part of the appeal I should just briefly note an argument advanced by Mr Price QC based upon the judge's unappealed ruling in *Al Rajhi*. In paragraph 21 of his skeleton in support of this appeal, Mr Robertson QC said:

> "The decision in *Al Rajhi* should not have been relied upon because:
>
> (a) the specific allegation against the Al Rajhi Bank (article, paragraph 11) is not made against [the respondents];
>
> (b) the decision in *Al Rajhi* was not in relation to a defence pleading *Reynolds* and was in the special context of a *Lucas-Box* meaning underpinning a justification defence;
>
> (c) in any event that decision was wrong."

25. Paragraph 21(c) prompted a vigorous intervention in the present appeal by those acting for Al Rajhi and, indeed, we received a seven-page skeleton argument from Mr Mark Warby QC. In the event, however, Al Rajhi agreed not to proceed with their proposed intervention upon the appellant's confirmation that they would "not pursue the fall back submission in paragraph 21(c)", a confirmation which they gave by letter dated 18 November 2003, albeit subject to a number of points which included the following:

> "7. It was not our intention to secure a decision of the Court of Appeal over-ruling the Al Rajhi decision. Our intention was to secure a decision of the Court of Appeal over-ruling the Jameel decision.
>
> …
>
> 9. … Here we are only concerned to criticise the meaning decision in *Al Rajhi* insofar as Eady J expressly adopted and incorporated [it] in the decision under appeal."

26. Having regard to that agreement between the claimants in the other action and the appellant (who is, of course, the defendant in both actions) it is Mr Price's submission that it would be an abuse of process for Mr Robertson to invite this court to determine the present appeal on any basis other than that the judge was right to have ruled as he did in the Al Rajhi action. In other words, Mr Price submits that unless Mr Robertson can distinguish the two cases on their facts, his appeal must necessarily fail. I cannot accept that submission. Clearly it

would be an abuse of process for the appellant, assuming it succeed in the present appeal, then to seek to appeal out of time to overthrow the decision in *Al Rajhi*. That, however, is not its intent. Its intent, as paragraph 9 of its letter to Al Rajhi's solicitors made plain, is rather to argue this appeal on its own merits without it being handicapped by what may or may not have been a correct ruling in what the judge himself rightly recognised to be "a different claim between different parties" (E4).

27. I have to say that for my part I regard the distinction between the two cases as slender in the extreme. True, paragraph 11 of the article introduced in relation only to Al Rajhi the additional assertion that their accounts were being monitored "because of suspected associations of the companies in the past". But paragraph 2 of the article names both groups within a total of four groups being monitored; paragraph 4 refers to all those on the list as having perhaps had in the past "an association with institutions suspected of links to terrorism"; paragraph 5 speaks in relation to all those being monitored as "listed in suspect lists"; and the sub-headline refers to all as having "Potential Terrorist Ties".

28. I think it unnecessary, however, to reach a firm conclusion on the correctness or otherwise of the Al Rajhi ruling. Rather I prefer to decide simply that with regard to these respondents it should be open to the appellant to invite the jury to conclude that the article asserted no reasonable grounds to suspect any actual misconduct whatever on their part and that they were simply being investigated and monitored, first as "a warning to people" (paragraph 4 of the article), and secondly to ensure that they would not in future inadvertently conduct their operations so as to enable terrorists to benefit.

29. I now come to the second of the judge's rulings, that with regard to evidence. The appeal against this ruling can be disposed of altogether more briefly. As a reading of paragraphs E12 - E20 readily makes apparent, the judge below decided to allow in evidence going to the truth or falsity of the article's central assertion - that the respondents' accounts are now being monitored by the Saudis - for two particular reasons: first and foremost to enable the respondents to undermine, if they can, the defence of *Reynolds* privilege; secondly, to support the respondents' claim for aggravated damages.

30. Mr Robertson's challenge to the ruling is founded principally upon this court's decision in *GKR -v- Yorkshire Post (No 1)* [2000] EMLR 396. The propositions for which that decision is authority are set out in paragraph E13. I should, however, refer to May LJ's leading judgment in the case in which, having cited a passage from Lord Nicholls' speech in *Reynolds -v- Times Newspapers Limited* [2001] 2 AC 127, 205, including his non-exhaustive list of ten factors to be taken into account in deciding whether or not the defence of qualified privilege arises, he continued (at p406):

> "This passage, in my judgment, clearly supports [the] submission that the existence or otherwise of qualified privilege is to be judged in all the circumstances at the time of the publication. It is not necessary or relevant to determine whether the publication was true or not. None of Lord Nicholls' ten considerations require such a determination and some of them … positively suggest otherwise. Nor is it necessary or relevant to speculate … what further information the publisher might have received if he had made more extensive inquiries. The question is rather whether in all the circumstances the public was entitled to

> know the particular information without the publisher making further such inquiries. The reliability of the source of the information is a relevant consideration, but that, in my view, is to be judged by how objectively it should have appeared to the defendant at the time. It is to be considered in conjunction with the inquiries which the defendant made at the time relevant to the reliability of the source."

31. The appellant's evidence in the present case is that Mr Dorsey, the main author of the article, received his information from five different confidential sources all of which he believed to be credible, and that a further confidential check was made in Washington by Mr Glenn Simpson, a staff writer who contributed to the article. Is the evidence in question here designed to demonstrate that those sources were not as reliable as objectively it might have appeared to the appellant at the time, or is it designed rather to show that the sources are in fact unlikely to have told the appellant what it says it was told (or at least are unlikely to have conveyed the information as clearly as the appellant claim it was conveyed)? The former purpose would, as *GKR Karate* makes plain, be impermissible; the latter, however, seems to me entirely justifiable. If (and it may be a big "if") the respondents really are able to establish that there was simply no truth whatever in the suggestion that their accounts were being, or were to be, monitored, then it may be difficult to believe the journalists when they say that they were nevertheless clearly given this wholly incorrect information. That is the use to which the respondents wish to put this evidence - see, for example, Mr Price's submission recorded at E14 that: "… he should be allowed to introduce these statements to show that the conversation simply cannot have gone as Mr. Dorsey suggests".

32. To my mind the judge was plainly correct in deciding as a matter of principle that there is no inconsistency between admitting evidence for this particular purpose and the main proposition for which *GKR Karate* stands, namely that whether the publication was true or false is just not relevant to the defence of qualified privilege. If this case represents an exception to the *GKR Karate* principle, so be it. In *GKR Karate*, it is important to understand, the author of the defamatory article had a single source who was *not* anonymous; he was, indeed, the second defendant, the claimant's business rival. There was simply no dispute in that case as to what the source had told the author, the very point to which the respondents in the present case wish to adduce the evidence in question here. For my part I find the reasoning in E17(1) (counsel's submission, accepted by the judge at E20) entirely convincing. I agree too with what he says in E19 subject to two minor qualifications. The first of these is the judge's reference in this paragraph to "the reliability of his source of information". That in itself, *GKR Karate* clearly establishes, is not properly the subject of investigation at trial. I rather think, however, that the judge intended no more than to indicate that journalists for their part should be circumspect about referring to the quality of their anonymous sources lest they thereby seek an untoward advantage in the litigation. The second qualification is with regard to Mr Simpson's reassertion of the truth of the story, as to which see also E16. It now appears that since judgment was given below (at which time the appellant was indicating no more than that it was reconsidering Mr Simpson's witness statement), that paragraph in his statement has been omitted. True, a second witness statement has been filed by Mr Dorsey stating at paragraph 59: "I had no doubt at all that the story was true." But note that the second word in that sentence is "had", not "have". I doubt, therefore, that the judge would include this point amongst his reasoning if he were deciding the issue today. That, however, ultimately matters not. There are other sufficient reasons for admitting this evidence.

Furthermore I should perhaps notice that although, as Eady J observed, in the absence of a plea of justification the law presumes the defamatory words to be false, Mr Robertson was at pains to indicate his unease at that presumption, a presumption which I understood him to suggest may be incompatible with Article 10 of the European Convention on Human Rights.

33. Given that this evidence is properly adducible with regard to evaluating the plea of qualified privilege, it seems to me unnecessary to decide whether it could in any event be properly admitted solely to support the respondents' aggravated damages claim. Clearly once the evidence is in, it can then be used for all issues in respect of which it is relevant and probative.

34. As for Mr Robertson's remaining arguments on this part of the case, in particular as to whether this evidence really is effective to establish the falsity of the allegation to which it goes, these I regard entirely as matters for the judge below. All are pre-eminently case management considerations with which it would be quite inappropriate for this court to deal.

35. In the result I would allow the appeal with regard to the judge's first ruling, but dismiss it with regard to his second.

Lord Justice Mummery:

36. I agree.

Lord Justice Mance:

37. I also agree.