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Case No: A2/2004/0221 & A2/2004/0221/Z

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL APPEALS DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

**The Hon Mr Justice Eady**

**[2003] EWHC 2945 (QB) and [2004] EWHC 37 (QB)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 3 February 2005

**Before :**

**LORD PHILLIPS OF WORTH MATRAVERS, MR**

**LORD JUSTICE SEDLEY**

and

**LORD JUSTICE JONATHAN PARKER**

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**Between :**

**JAMEEL & ANR**

**Claimant**  
**Respondents**

- and -

**WALL STREET JOURNAL EUROPE SPRL (No.2)**

**Defendant /**  
**Appellant**

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**Geoffrey Robertson QC & Rupert Elliott (instructed by Messrs Finers Stephens Innocent)**  
for the Appellant

**James Price QC & Justin Rushbrooke (instructed by Carter-Ruck) for the Respondent**

Hearing dates : 18-20 October 2004 & 29-30 November 2004

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**Approved Judgment**

## **Lord Phillips, MR :**

This is the judgment of the court

### **Introduction**

1. This appeal is brought in a libel action in respect of an article ('the article') published by the appellant ('the publishers') in the Wall Street Journal Europe on 6 February 2002. The action was tried before a jury between 1 and 19 December 2003. The publishers had raised issues as to whether the article would have been understood to refer to the first respondent ('Mr Jameel') and to the second respondent ('the Jameel Company'). The jury decided that in each case it would have been so understood. The publishers had raised issues as to whether the article was defamatory of Mr Jameel and of the Jameel Company. The jury decided, in the case of each, that it was. The jury decided that the appropriate sums to be awarded by way of damages were £30,000 to Mr Jameel and £10,000 to the Jameel Company.
2. The publishers had advanced a defence of qualified privilege of the type identified by the House of Lords in *Reynolds v Times Newspapers* [2001] 2 AC 127 ('*Reynolds* privilege'). The jury answered a number of questions relevant to that defence. The judge, Eady J, gave a ruling rejecting the defence on 19 December 2003. He gave his reasons for that ruling on 20 January 2004. On 11 March 2004 Sedley LJ gave the publishers permission to appeal against that ruling.
3. It is an established principle of the law of libel in this country that a claimant, whether individual or corporate, does not have to allege or prove special damage in order to establish a cause of action. Once the defamation is proved damage is presumed. The publishers challenged this principle on the ground that it infringed Article 10 of the European Convention on Human Rights ('the Convention'). Eady J rejected that challenge in a ruling delivered on 5 December 2003 [2003] EWHC 2945. Sedley LJ gave the publishers permission to appeal against that ruling.
4. It is also an established principle that a claimant does not have to prove that a defamatory statement is untrue. Once the defamation is proved there is a presumption that it is false. If a defendant wishes to challenge that presumption he must plead and prove justification. The publishers sought permission to appeal on the ground that this presumption of falsity infringed Article 10 of the Convention. This was not a point that the publishers took before the judge. Sedley LJ refused an application for permission to appeal on this ground. The publishers have renewed that application before us.
5. The publishers made a second, and distinct, application for permission to appeal in relation to the presumption of falsity. This was on the ground that the judge had misdirected the jury as to the circumstances in which it should be applied. Sedley LJ refused this application. The publishers have renewed it before us.
6. Directions were given that we would deal with this appeal in two separate sittings. We would first sit to hear the appeal in relation to qualified privilege. After an interval we would sit to hear the appeal in relation to the presumption of damage and the two applications in relation to the presumption of falsity. The object of this unusual course

was to hear the presumption of damage appeal at the same time as an appeal raising a similar issue in *Yousef Abdul Latif Jameel v Dow Jones and Co Inc*. In the event we heard most of the argument in relation to the application for permission to appeal on the ground of misdirection in the course of the first hearing, for it proved convenient to consider this in the context of the issue of qualified privilege.

7. In this judgment we propose to deal first with the appeal in relation to qualified privilege, dealing at the same time with the two applications for permission to appeal in relation to the presumption of falsity. We shall then deal with the appeal in relation to the presumption of damage.

### **THE APPEAL IN RELATION TO QUALIFIED PRIVILEGE**

8. In our introduction we explained that the publishers have sought to challenge the established law in relation to burden of proof of both falsity and damage on the ground that this law is in conflict with Article 10 of the Convention. This appeal also raises questions as to what has to be proved, and by whom, where *Reynolds* privilege is in issue. These issues were not explicitly addressed when pleadings were exchanged. This was unfortunate. Where a defendant intends to rely on *Reynolds* privilege, careful consideration should be given to what the defendant needs to plead and prove in support of that defence. We shall revert to this question in due course.

### **The parties**

9. The Jameel Company is a substantial Saudi Arabian trading company, of which Mr Mohammed Jameel is the General Manager and President. It has interests in car distribution and is part of an international group of companies, which includes the English car dealer Hartwell plc. The publishers publish the Wall Street Journal Europe and are based in Belgium.

### **The Article**

10. The article of which complaint is made was published by the publishers on 6 February 2002. It was headed:

“SAUDI OFFICIALS MONITOR CERTAIN BANK  
ACCOUNTS

Focus Is On Those With Potential Terrorist Ties”

The article began:

“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 businessmen in a bid to prevent them from being used wittingly or unwittingly for the funnelling of funds to terrorist organizations, according to US officials and Saudis familiar with the issue.

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 euros) 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.

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.

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.

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.""

The article went on to record the comments made by a number of those listed in the article to the suggestion that they were on the list of those being monitored. It stated, "the Abdullatif Jamil Group of companies could not be reached for comment". The author of the article was stated to be James M. Dorsey, but "staff writer Glenn Simpson in Washington" was said to have contributed to it.

### **The pleadings**

11. Paragraph 6 of the Particulars of Claim alleged:

"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 authorities”*

12. The first part of this plea sets out a meaning that constitutes what is alleged to be the sting of the libel. The second part of the plea summarises statements of primary facts in the article from which that meaning is to be inferred. It was, as we shall show, important to distinguish between the two. Confusion occurred because the distinction was not always made.
13. In the defence, after particulars as to why the publication was in the public interest, the pleading turned to the circumstances of the publication:

“(d) The primary author of the article, James Dorsey, is a distinguished investigative journalist who has covered important financial stories arising from the Middle east for the WSJE since 1993, and for the previous two decades for the United Press International (as Bureau Chief and senior Middle East correspondent) and for The Financial Times, and New York Times. He is a graduate in economics and the author of a book and an encyclopaedia section on the Middle East. He has had connections with Saudi Arabia for the past 25 years and is fluent in Arabic. The article was the kind of news story that he accurately reported throughout his professional career.

(e) Mr Dorsey had spent 5 months continuously in Saudi Arabia (living in Riyadh) before publication of the article, investigating stories about Saudi connections with 11 September and al-Qaida. His cultivated sources included Princes of the House of Saud, their officials, bankers (both local and foreign), and diplomats.

(f) Mr Dorsey was informed by his sources in the banking community in early December 2001 of the existence of an “off the record” list of bank accounts being monitored at US request by the Saudi Arabian Monetary Authority in consequence of 11 September 2001. This list included at least one account associated with the Abdul Latif Group of companies of which the Second Claimant alleges it is a part. This was confirmed by a highly placed Saudi banking source at the beginning of February 2002. The said account was subsequently confirmed as being on the list by a US diplomat who consulted an official file in the author’s presence before providing this confirmation. The author, notwithstanding the authoritative status of this diplomatic source, made a further check prior to publications with a senior Saudi official, who independently confirmed that said account was on the list.

(g) The author and his editors had no reason to believe that any of these sources were other than reliable, and the fact that they corroborated each other made the statement that the said account was on the list extremely reliable. They had no reason

to suspect that any of these sources was malicious or self-serving, and none was paid money in return for information.

(h) Further investigation of the draft article was undertaken in the US, and no reason emerged to suspect its untruth.

(i) The article fairly and accurately reported and presented the news of the bank account monitoring by SAMA and fairly and accurately reported the US government's reasons for requesting that monitoring. It made clear that its purpose was to send a warning message to banks and businesses, and that many of the Saudi accounts on the list belonged to legitimate entities. The tone of the article was moderate, non-accusatory and unsensational, and entirely appropriate to a straight-forward and significant news story.

(j) The reporter was scrupulous in attempting to obtain, prior to publication, a comment from the First Claimant or a spokesperson for the Second Claimant. At about 9am on the day prior to publication a recorded message was left for the First Claimant advising him of the nature of the story and inviting him to call the reporter if he wished to comment. The reporter called again later in the afternoon and spoke to an employee who stated that the First Claimant was overseas and uncontactable, but who refused to provide his mobile number when pressed. This employee refused to comment on the story. He was clearly told of its gist and that it was to be published the following day, and that if the First Claimant or a representative of the second Claimant called the reporter back with any comment then it would be incorporated into the article. He further agreed that in the event that reporter did not receive a call back, the article should simply state that the First and Second Claimants had not commented. No such call was received.

(k) Prior to publication of the article, the existence of such a list had been widely and wildly discussed in business circles in Saudi Arabia: speculation that it covered any thousands of accounts was rife. In this context, and given its importance as news its publication on 6 February was justified.”

14. The pleading then made this ambiguous averment:

“The facts reported in the article were true and/or were honestly believed to be true by the WSJE reporter and editors.”

15. The respondents (‘the Jameels’) sought clarification of this plea, asking which of the facts in the article were alleged to be true. The publishers responded as follows:

“The plea is of qualified privilege, not of justification. Pursuant to this plea, the Defendant makes no allegation that the Claimants are associated or linked with terrorism”

16. The Jameels persevered, asking among other questions whether it was the publishers' case that the Jameels' accounts were in fact being monitored by the Saudi Arabian Monetary Authority (SAMA) at the request of the United States authorities. The publishers replied that this was not their case, but that Mr Dorsey reasonably and honestly believed that the monitoring was taking place as described in the article. The basis of this belief was pleaded as follows:

“(i) In early December 2001, Mr Dorsey was informed by a prominent Saudi businessman that he reliably knew that accounts belonging to some of the country's most prominent businessmen were being monitored by SAMA. The businessman said that his banker had shown him a list of names, accounts linked to whom the bank had been requested to monitor by SAMA. He recalled several names including Abdul Latif Jameel.

(ii) Towards the end of January 2002, Mr Dorsey met with the highly placed Saudi banking source. Mr Dorsey asked the source whether he was aware of requests by SAMA to monitor the accounts of certain individuals or institutions. He said he was. Mr Dorsey asked him whether the name of Abdul Latif Jameel was among those accounts. He confirmed that it was. Mr Dorsey asked whether the accounts were personal accounts or accounts associated with businesses. The sources could not provide any more detail. Mr Dorsey asked whether these were the only accounts being looked at. The source said there were more but could not indicate how many. Mr Dorsey asked what monitoring meant, whether the accounts had been frozen or whether it impeded account holders' transactions. The sources said the accounts were being watched but that account holders were free to do what they wished with their assets.

(iii) At the beginning of February 2002, Mr Dorsey met with the senior US diplomat. In the course of their discussion, Mr Dorsey asked whether an account linked to Abdul Latif Jameel was being monitored. The diplomat consulted a file from a cabinet near his desk and said, “yes”.

(iv) Later on the same day, Mr Dorsey met the senior Saudi official. Mr Dorsey explained that he had received confirmation of some of the names of accounts being monitored and wanted to get further confirmation. He told the Saudi official the names that he had been given including Abdul Latif Jameel. The source said he believed the names to be accurate.”

17. The publishers served a witness statement of Mr Glenn Simpson. This related to enquiries that he had made of sources in Washington, which had left him persuaded that the article was accurate.

**What must a defendant plead and prove to establish *Reynolds* privilege?**

18. CPR PD 53 paragraph 2.7 provides:

“Where a defendant alleges that the words complained of were published on a privileged occasion he must specify the circumstances he relies on in support of that contention”

This requirement can be a weighty one where a defendant relies on *Reynolds* privilege, for there may be many different circumstances relied upon in support of the defence. Whether Eady J correctly defined the test to be applied when considering *Reynolds* privilege is in issue, and we shall deal with this in due course. For present purposes it suffices to record that it is common ground that the test involves consideration of whether the publication was in the public interest and whether, in the particular circumstances, it was a product of responsible journalism. It is also common ground that the non-exhaustive list of material circumstances drawn up by Lord Nicholls of Birkenhead in *Reynolds* at p.205 has to be considered. It is convenient to set these out.

- “1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff’s side of the story.



9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

10. The circumstances of the publication, including the timing.”

19. In *Reynolds* their Lordships adverted on a number of occasions to the proposition that qualified privilege will be defeated if the defendant does not believe the defamatory statement that he has published to be true. Absence of belief in the truth of what is published is one form of express malice that defeats the privilege; see the speech of Lord Diplock in *Horrocks v Lowe* [1975] AC 135 at 149. Yet Lord Diplock himself recognised at p.150 that there can be exceptional cases “where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person”. Lord Nicholls included in his list of material matters:

“9. The tone of the article. A newspaper can raise queries or call for an investigation. *It need not adopt allegations as statements of fact.*”

The words that we have emphasised suggest the possibility that *Reynolds* privilege may attach to the neutral reporting of allegations made by a third party, notwithstanding that the publisher does not believe that the allegations are true.

20. *Al Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634; [2002] EMLR 215 would seem to have been such a case. The defendant reported defamatory comments in a slanging match between two prominent members of a political Committee. One of them sued for libel, consisting of the defamatory comments reported to have been made about him by the other member. This court held that the defendant was protected by qualified privilege notwithstanding that it had not sought to verify whether the defamatory allegations that it had published were true. Giving the leading judgment, Simon Brown LJ said at paragraph 52:

“where ... both sides to a political dispute are being fully, fairly and disinterestedly reported in their respective allegations and responses ... it seems to me that the public is entitled to be informed of such a dispute without having to wait for the publisher, following an attempt at verification, to commit himself to one side or the other.”

21. In *English & Anr v Hastie Publishing Ltd* (31 January 2002, QBD, Unreported); [2002] All ER (D) 11 Gray J held that, despite this decision, the court should be reluctant to attach qualified privilege to ‘reportage’ in circumstances where Parliament, in enacting section 15 and Schedules 1 and 2 of the Defamation Act 1996, had not chosen to do so. The editors of the 10<sup>th</sup> Edition of *Gatley* comment at 14.90 that *Al Fagih* “comes close in its effect to a doctrine of “neutral reporting”, though it does not adopt that as its basis”. Earlier they state at 6.34 that “there is no equivalent here of the doctrine of “neutral reportage” which prevails in some American jurisdictions”.
22. In the course of our second sitting Mr Robertson stated that he relied upon the defence of ‘reportage’. That had not been clear to us and we doubt whether it was

clear to the judge. Had it been it would have been necessary to consider whether such a doctrine exists under English law. It would also have been necessary to consider a further question. The defence of 'reportage' normally requires the 'report' to be 'fair and accurate'. If qualified privilege can attach to neutral reporting, does the report have to be accurate, or is it enough that the publisher believes that the report is accurate? These questions are particularly important in a case such as the present where the report is of an investigation or of an inquiry, or of monitoring of a nature that carries with it defamatory implications relating to the claimant.

23. The facts of this case also raised questions as to the precise basis of the defence of qualified privilege that the Privy Council held to have been established in *Bonnick v Morris* [2002] UKPC 31; [2003] 1 AC 300. *Bonnick v Morris* was an appeal to the Privy Council from the Court of Appeal of Jamaica. It concerned a claim for libel in respect of an article written by a Mrs Morris. The first part of the article recounted allegations of irregularities in respect of two contracts entered into by a company. The article then recorded the true fact that the plaintiff's services as managing director were terminated shortly after the second contract was agreed. There was an issue as to whether the article was defamatory of the plaintiff at all. This depended upon whether or not the ordinary reader would read the article as implying that the plaintiff had been dismissed because of the irregularities. At first instance the Supreme Court held that such an inference would have been drawn, and the plaintiff succeeded. The Court of Appeal, by a majority reversed that decision. The Judicial Committee restored the finding of the Supreme Court.
24. But the defendant had also pleaded qualified privilege. The Judicial Committee held that *Reynolds* privilege was made out. The subject matter of the article was a matter of public interest. The test of responsible journalism was made out. In the context of considering the latter, the Judicial Committee held that it was relevant that there was room for different views as to whether the article contained a defamatory implication. This raised an issue of principle, which the Committee described as follows:

"19. ... The defamatory imputation was a matter of *implication*. Plainly, there is room for different views on whether the article contained such an implication. Mrs Morris seems to have thought she was not making a statement to this effect in her article. Rather more relevantly and importantly, one of the members of the Court of Appeal was of the same view. Downer JA, on his reading of the article, considered the article carried no such implication.

20. This divergence of view is neither surprising nor unusual. Language is inherently imprecise. Words and phrases and sentence 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. Should the law take this into account when applying the objective standard of responsible journalism? Or should the law simply apply the objective standard of responsible journalism, to the single meaning the law attributes to the offending words, regardless of how reasonable it would

be for a journalist or editor to read the words in a different, non-defamatory sense? ”

25. The Committee answered this question as follows:

“23. Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege. If they are to have the benefit of the privilege journalists must exercise due professional skill and care.

24. To be meaningful this standard of conduct must be applied in a practical and flexible manner. The court must have regard to practical realities. Their Lordships consider it would be to introduce unnecessary and undesirable legalism and rigidity if this objective standard, of responsible journalism, had to be applied in all cases exclusively by reference to the “single meaning” of the words. Rather, 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. Their Lordships note that in the present case the selfsame question has resulted in a division of view between members of the Court of Appeal. 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. In doing so the court will attribute to this feature of the case whatever weight it considers appropriate in all the circumstances.

25. This should not be pressed too far. Where questions of defamation may arise ambiguity is best avoided as much as possible. It should not be a screen behind which a journalist is “willing to wound, and yet afraid to strike”. In the normal course a responsible journalist can be expected to perceive the meaning an ordinary, reasonable reader is likely to give to his article. Moreover, even if the words are highly susceptible of another meaning, a responsible journalist will not disregard a defamatory meaning which is obviously one possible meaning of the article in question. Questions of degree arise here. The more obvious the defamatory meaning and the more serious the defamation, the less weight will a court attach to other possible meanings when considering the conduct to be expected of a responsible journalist in the circumstances.”

26. Was the defendant protected by qualified privilege because Mrs Morris reasonably believed that her article did not carry any defamatory implication? The statements “Mrs Morris seems to have thought that she was not making a statement to this effect in her article” and “a journalist should not be penalised for making a wrong decision on a question of meaning on which reasonable people might reasonably take different views” seem to suggest that Mrs Morris’ subjective belief as to the meaning of her article was relevant to the defence of qualified privilege. Yet, classically, the subjective belief of those responsible for a publication on an occasion of qualified privilege will only become relevant if and when the claimant raises a plea of express malice; see the analysis of Lord Hope of Craighead in *Reynolds* at p.229.
27. It seems to us that, in seeking to demonstrate that a publication accords with the requirements of responsible journalism, a publisher will almost certainly wish to adduce evidence of the subjective belief of those responsible for the publication. To demonstrate that it was reasonable to believe that a defamatory article was true, the writer is likely to be called to give evidence of why he thought that it was true. To demonstrate that it was reasonable to believe that a third party was conducting an investigation, or inquiry, or monitoring, the writer is likely to be called to explain why he believed this to be the case. To demonstrate that it was reasonable not to appreciate that an article bore a defamatory meaning, the writer is likely to be called to say that he did not appreciate this. Issues of subjective belief which hitherto have only been relevant where malice is in issue now become relevant to the inquiry of whether responsible journalism has been exercised. Thus, in *Bonnick* at paragraph 14 Lord Nicholls observed:
- “... Mr Tomlinson rightly accepted that malice does not arise as an independent issue. Matters relating to malice are to be considered in the context of deciding whether the publication attracted qualified privilege in accordance with the common law as developed by the decision of the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.”
28. We have also had our attention drawn to the following statement in an article by Tipping J, who sat in the Privy Council in *Bonnick v Morris*, in (2002) 10 Waikato Law Review 1, 4-5:
- “The *Reynolds* privilege in England now treats considerations which would hitherto have been addressed in the context of malice as part of the question whether the occasion is one of qualified privilege at all. In short, that question, under *Reynolds*, involves the defendant in showing (1) that the subject matter is of sufficient public concern; and (2) if so, that a significant degree of responsibility has been shown in making the publication.”
29. These statements suggest that it may be necessary or at least admissible for a defendant to allege and prove subjective belief in order to establish a defence of *Reynolds* privilege.
30. On 2 December 2004 Eady J gave judgment in *George Galloway v Telegraph Group Ltd* [2004] EWHC 2786. That case raised similar issues in relation to *Reynolds*

privilege to those that we have discussed above. The complexity of attempting to deal with these issues in a jury trial led, it seems, to the parties sensibly agreeing that the trial should be by judge alone. The issues received attention in the judgment. In the present case the issues were not clearly identified as they needed to be in order to decide what questions should be put to the jury. We have not heard argument on these issues and it is not necessary for us to resolve them in order to determine this appeal. We do not propose to do so. We can, however, make a general observation in relation to the pleadings.

31. It is important that the pleadings should make clear where a defendant is relying on reasonable belief in the truth of matters published, or their implications, and where he is not. It is also important that the claimant should make clear whether or not he denies that the belief was held, or whether he merely contends that the belief was not reasonable. To a large extent this was ultimately achieved by the pleadings in this case, which we now propose to analyse.

#### **The issues raised by the pleadings**

32. We understand the publishers' case, as stated in or inferred from the pleadings, to have been as follows:
  - i) The article did not bear any defamatory meaning.
  - ii) Those responsible for the publication could reasonably have believed that the article did not bear a defamatory meaning.
  - iii) Those responsible for the publication reasonably believed that the article did not bear a defamatory meaning.
  - iv) Those responsible for the publication did not believe, nor intend to suggest, that the Jameel group had any connection with terrorists.
  - v) It was no part of the publishers' case that, nor was it relevant whether, the list naming the Jameel group that was referred to in the article actually existed.
  - vi) Those responsible for the publication reasonably believed that the list bearing the name of the Jameel group existed.
  - vii) Reliable sources had told those responsible for the publication that the list bearing the name of the Jameel group existed.
  - viii) In these circumstances, those responsible for the publication had practised responsible journalism in publishing an article in circumstances where this was in the public interest.
33. It followed implicitly from the defence that we have set out above that, if the article proved to have a defamatory meaning, the publishers had no belief that it was true. With hindsight their defence in this eventuality seems to have been that they had nonetheless acted as responsible journalists and without malice because (1) the report of the monitoring was reportage of facts which they reasonably believed to be true and (2) they reasonably failed to appreciate that the article bore a defamatory meaning.

34. The matters alleged in the Defence were put implicitly in issue by virtue of CPR 16.7. The Jameels never expressly challenged Mr Dorsey's honesty. In the interlocutory proceedings they did, however, demonstrate that it was their case that the Jameel group was never on any list or subject to monitoring and that Mr Dorsey's sources could not have told him to the contrary. Thus the Jameels served notices under the Civil Evidence Act of their intention to put in evidence eleven witness statements. One of these was from SAMA. The other ten were from Saudi banks. The publishers raised an issue as to whether this evidence was relevant or admissible. On 7 October 2003 Eady J ruled on this issue. He summarised the reason why the respondents wished to adduce this evidence as follows:

“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.”

35. Eady J described the issue of principle that arose. There was a presumption that the defamatory words were false. There was no plea of justification. Why should the Jameels be permitted to adduce evidence apparently directed to the unnecessary exercise of disproving the truth of the libel? We observe that Eady J appears to have treated the allegation that the Jameels were being monitored as the central defamatory allegation to which the presumption of falsity applied. Mr Price QC for the Jameels submitted that the evidence would serve three purposes. First it would show that Mr Dorsey's account of what he had been told by his sources could not be correct, for the evidence would prove that no monitoring had been carried out. Secondly it would support the Jameels' claim to aggravated damages by proving conclusively that the central allegation in the article was false. Thirdly it would rebut Mr Simpson's evidence that he was convinced that the article was accurate.

36. Eady J was persuaded by these arguments and gave permission for the evidence to be adduced in rebutting evidence to be given by Mr Dorsey and Mr Simpson. The appellant appealed against this ruling. In a judgment dated 26 November 2003 [2003] EWCA Civ 1694, to which we are about to turn in another context, Simon Brown LJ, with the agreement of the other two members of the Court of Appeal, dismissed the appeal. It is noteworthy that he, like Eady J, referred to the evidence as:

“going to the truth or falsity of the article's central assertion – that the respondents' accounts are now being monitored by the Saudis”

37. The judgment does not suggest that there was any debate before the Court of Appeal as to the relevance, if any, of the presumption of falsity in the context of *Reynolds* privilege. Simon Brown LJ did, however, record the following, at paragraph 32:

“ ... 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 not be compatible with Article 10 of the European Convention on Human Rights.”

**The range of meanings that the article might bear**

38. Another issue which arose at the interlocutory stage was the meaning or meanings which the article was capable of bearing as a matter of law. What, if any, defamatory inference could be drawn from the words used? When the matter was debated before Eady J reference was made to the three tiers of gravity of defamation identified in *Bennett v News Group Newspapers* [2002] EMLR 39 and *Chase v News Group Newspapers* [2003] EMLR 218. The Jameels did not suggest that the article was capable of bearing the most serious of the three defamatory meanings which, in the present context, would be that the Jameels were involved in funding terrorists. The Jameels contended that the article bore the second tier of defamatory meaning, namely that there were reasonable grounds for suspecting that they had been involved in funding terrorists. Mr Robertson was recorded by the judge to have contended that the words were capable of bearing the lowest of the three tiers of gravity, namely that there were grounds merely for investigation. As we understand it the publishers’ case went further than this inasmuch as they contended that the article bore no meaning defamatory of the Jameels at all. In any event, Eady J held that the words complained of were not capable of bearing a lesser defamatory meaning than the second tier of gravity, namely ‘reasonable grounds to suspect’ the Jameels of involvement with terrorists.
39. The publishers appealed against this ruling. The appeal was considered by the Court of Appeal in the course of the hearing that dealt with the admissibility of the hearsay statements. The Court allowed the appeal. Simon Brown LJ held that:

“28. ... 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.”

**Questions for the jury**

40. Counsel for each of the parties invited the judge to ask the jury what meaning the words in the article bore. The judge declined to do so. The questions posed to the jury and the answers which, in due course, the jury gave to those questions were as follows:

“

(1)	Have the Claimants proved on the balance of probabilities that reasonable readers of the Wall Street Journal Europe (WSJE) in this country who knew of Mohammed Jameel (ie not merely those who knew him personally) would have understood the article to refer to	Yes
-----	--	-----

	him by implication?	
(2)	If yes, was the article defamatory of him?	Yes
(3)	Have the Claimants proved on the balance of probabilities that there would be reasonable readers of the WSJE in this country who would have understood the article to refer to Abdul Latif Jameel Company Limited?	Yes
(4)	If yes, was the article defamatory of the company?	Yes
(5)	Has the Defendant proved on the balance of probabilities that:	
(a)	James Dorsey was informed by a prominent Saudi businessman (referred to as Source A) in December 2001 that the ALJ group was on an unpublished list of names whose accounts were being monitored by SAMA at the request of the United States?	Yes
(b)	a banker (referred to as Source B) confirmed the above to Mr Dorsey in January 2002?	No
(c)	a US diplomat (referred to as Source C) confirmed the above to Mr Dorsey in the days before publication of the article?	No
(d)	a US embassy official (referred to as Source D) confirmed the above to Mr Dorsey on the same occasion?	No
(e)	A senior Saudi official (referred to as Source E) confirmed the above to Mr Dorsey?	No
(6)	Has the Defendant proved on the balance of probabilities that Mr Dorsey contacted the ALJ offices at about 9am on 5 February 2002	No



	and left a recorded message?	
(7)	In the telephone conversation in the evening of 5 February 2002 did Mr Munajjed ask Mr Dorsey to wait until the following day for a comment?	Yes
(8)	Subject to the Court's ruling, in due course, on the defence of qualified privilege:	
(a)	if the answer to questions 1 and 2 is yes, how much would you award by way of damages to Mohammed Jameel?	£30,000
(b)	if the answer to questions 3 and 4 is yes, how much would you award by way of damages to Abdul Latif Jameel Company Limited?	£10,000

”

### The judge's direction to the jury

41. Before addressing the jury on the issues that they had to decide, the judge gave them this direction on the law:

“Before I come to the evidence on these issues, which you have to consider, can I just say one or two more things about the general shape of this case. First, if you decide that it is defamatory of one or both claimants, we must all proceed on the basis that any such defamatory allegation is untrue. We take that as a given. The defendants would be entitled to prove the truth of the allegation they have made, and that would, needless to say, always be a complete defence in a libel action.

They have chosen not to do that in this case and, therefore, the claimants are entitled to that presumption of innocence. It is not for them to prove anything. Of course, if you do not find that the article defames, then that is the end of the case anyway. We do not get to this stage. If it does reflect in any way in a defamatory sense upon either of them, and you come to the view, after due consideration, that the article does in some way link one or other or both of them to the funding of terrorism, then we accept, as an absolute fundamental assumption in this case, that such allegation is untrue. The defendants could have taken the course of proving it if they wished, but they have chosen not to. It is not for the claimants to prove anything.

You and I therefore proceed on the basis that neither claimant was being monitored nor suspected nor on any list of suspects provided to the Saudis by the United States Government or anyone else. You have heard evidence from bankers and in written form from SAMA in this case, but that is not because the claimants have to prove their innocence. They do not. That is for reasons which I will explain more fully later, but it is partly said to be relevant to Mr Dorsey's evidence on what his sources told him. To put it simply, what Mr Price argues is that if in fact it was not true that they were on the list and it is not true they were being monitored, how can his sources have given him that information? What matters at this stage is that I am stating, as the law requires me to state, that they are fully entitled to the presumption that they are not guilty of funding terror or on any list or suspected of doing so."

42. The judge then addressed the jury on questions 1 to 4. This part of his summing up occupies 33 pages of the transcript. After a short adjournment he turned to question 5. He introduced this question as follows:

"There is, as you know, a huge clash here that could not really be clearer or starker. It is a classic jury issue to be resolved by you in the light of your impression of the witnesses, primarily, but also of course the documents and of counsels' rival submissions on them. Mr Robertson argues that the sources are genuine and invites you to find that, and that this very experienced journalist, Mr Dorsey, would not have dreamt of making any of it up. He set out yesterday, you will remember, 13 reasons why you should believe him. I am sure you will have those arguments well in mind."

He then summarised at length the evidence that Mr Dorsey had given of what he was told by sources A to E.

43. The judge then addressed the jury on questions 6 and 7. Finally, and 21 transcript pages on from dealing with question 5, he turned to question 8. In the context of this question he said this:

"Of course people may decide not to do business with a company or may be wary of doing business with a company, but much greater damages no doubt, you would think, would be appropriate for a human being than a corporate entity. Of course, even so, there has to be something sufficient to serve the object of vindicating the company, assuming always that you decide that the article bears some defamatory meaning of the company.

Here, as you know, you heard evidence from the bankers and in writing from SAMA. As I said to you earlier, it is somewhat disconcerting because there is here a presumption of innocence to which the claimants are entitled. They do not have to prove

anything. In this case, the defendants have not made it part of their case that the allegations were true in any defamatory sense, but they do still maintain, as a justification for not publishing the SAMA denial, that they do not actually believe the SAMA denial.

In judging the reasonableness of that stance in the context of damages, you were asked to take that evidence into account. Three bankers were called before you in person, and you had statements read to you from others, to say, “We were not asked to monitor any accounts relating to the Jameel Group and we have not done so,” and SAMA has also issued the denial, saying that they were not given a list on which that name appeared.

The defendants do not believe that. That is their privilege. Of course, we also heard evidence from various people in the banking world that SAMA is respected internationally as a central bank. It operates within the standards required by the International Monetary Fund and those people, at any rate, would take statements from SAMA seriously and would pay regard to what they said. You have got a conflict there. It may not matter very much at the end of the day, because, as I say, in this context we are only concerned with how it plays on damages.”

### **The Judge’s ruling on qualified privilege**

44. The judge considered the publishers’ suggestion that *Reynolds* had reduced the test of qualified privilege to the question of whether the publication of the article in question constituted ‘responsible journalism’. He concluded that it had not. The fundamental test laid down by *Reynolds* was whether it was in the public interest for the article to be published and, the obverse of this, whether the publisher had a social or moral duty to publish the article.
45. The judge purported to follow the guidance given by the House of Lords in *Reynolds*, with particular regard to the 10 matters identified by Lord Nicholls as relevant to the question of whether a publication attracted qualified privilege. The judge addressed these relevant matters as follows:

#### **1. The seriousness of the allegation published**

46. The judge had regard to the ruling in the interlocutory proceedings as to the possible range of meanings which the words could bear, to the jury’s finding that the words were defamatory of the Jameels and to the sums which the jury had specified as representing the appropriate damages. He concluded:

“8. I must assume that the words are defamatory in some sense but not in one that is pitched any higher than “reasonable grounds to suspect” involvement in the funnelling of money to terrorists.

9. Mr Robertson invited me to conclude that the jury must have decided, in the light of their awards of damages (£30,000 and £10,000 respectively), that the words conveyed a meaning corresponding to the lowest tier of gravity listed by Brooke LJ in *Chase* – that is to say that there must have been merely some “grounds for investigating”. I am not prepared to make that leap, since it is by no means an obvious inference ...”

47. In the middle of his judgment the judge added:

“I turn first to the gravity of the underlying defamatory imputation here (i.e. possible involvement at some level in funnelling funds to terrorists), which is plainly at the higher end of the scale. Whatever the precise meaning to be attributed to the article, which is a matter for the jury, it plainly contemplates at least the possibility of “witting” involvement. One interpretation would be that the 150 accounts allegedly being monitored belonged to persons suspected of terrorist involvement. It is not suggested that what was taking place was a purely routine monitoring, such as would not reflect adversely upon anyone (e.g. analogous to screening luggage at an airport). In any event, the finger is clearly pointed at no more than a handful of entities or institutions.”

48. Towards the end of his judgment he returned to this question:

“Here the Defendant contends that the words were not defamatory in any sense, but for present purposes I am constrained by the jury’s finding that the words bore a defamatory meaning. In general terms, it was the Claimants’ case that the meaning which an ordinary reader would infer is that there were grounds to suspect them of some degree of involvement in the funnelling of funds to terrorists – and that there is at least the possibility of “witting” involvement. (Mr Hudson’s suggestion, as the former Managing Editor, that no reasonable reader could conclude that the phrase “potential terrorist ties” in the headline could apply to the Jameel group was, I thought, disingenuous). It does not, in the present context, seem to me to matter where on the scale of gravity this defamatory allegation falls, since the effect of the article was to link the Jameel group and Mr Jameel to terrorism at some level.”

**2. The nature of the information and the extent to which the subject matter is a matter of public concern;**

**6. The urgency to publish**

49. The judge dealt with these two matters together. He observed that the general subject-matter of terrorism, its prevention and the tracing of those responsible were matters of

the plainest public interest. He went on to comment, however, that this was not the relevant issue:

“What matters is whether the public interest required that the Wall Street Journal, as published here, should identify these Claimants on 6 February 2002 as being on a list, emanating from law enforcement agencies in the United States, of persons whose financial transactions it would be appropriate to monitor.”

50. The judge answered this question in the negative for a number of reasons. First he held that there was no urgency that required the publication to be made before the Jameels had been given a reasonable opportunity to comment on the matters alleged. Secondly he held that the public interest had not required the names of those alleged to be the subject of monitoring to be published. It would have been sufficient to use a phrase such as ‘prominent Saudi businesses’. Thirdly he held that it was, in fact, contrary to the public interest to publish the names of those being monitored. This was because the consequence of so doing was to “blow the gaffe” on a secret monitoring operation. Furthermore, on the publishers’ own account, the United States Government had assured the Saudi Government that it would not reveal the names of those whose accounts were supposed to be being monitored.

#### **7. Confirmation sought from the claimant**

51. Here also the judge was critical of the publishers. Mr Dorsey had said that he left a recorded message at the Jameel Group offices at about 9 am on 5 February 2002, the day before publication. The jury’s answer to question 6 showed that they did not accept this evidence. Their answer to question 7 showed that they accepted the evidence of the Jameel’s representative, Mr Munajjed, that on the evening of 5 February, he asked the publishers to postpone publication so that he could contact Mr Jameel, who was in Japan on business, for his comments. Mr Dorsey declined to do so, although the judge took the view that there was no reason why he should not have acceded to the this request.

#### **3,4. The sources of the information and the steps taken to verify it**

52. The judge remarked that the publishers’ case was founded to a significant extent on the quality and number of the sources. He observed that the jury had accepted that source A had informed Mr Dorsey that the Jameel group was on an unpublished list of names whose accounts were being monitored by SAMA at the request of the United States, but that their answers in relation to sources B to E had been negative. As to these answers the judge commented:

“Mr Robertson asks me not to proceed on the footing that the jury’s answers entailed dishonesty on Mr Dorsey’s part. I do not propose to do so. I am strictly bound by the answers of the jury, save in so far an answer may inevitably carry some implication. I accept, naturally, that the jury may have concluded that Mr Dorsey’s evidence about the sources was mistaken, through faulty recollection, or that his evidence about the sources was prompted to an extent by wishful thinking.

Nevertheless, I have to accept, it seems to me, that they rejected the Defendant's evidence in respect of those sources. Since Source A was only "a lead", it would appear that the remaining four corners of the Defendant's case on sources have been knocked away by the jury's answers."

53. A little later the judge commented:

"It is true that Mr Dorsey and Mr Glenn Simpson, based in Washington, also gave evidence of some degree of confirmation of the story (or at least of answers or declination to comment, which they interpreted as confirmation). That evidence was, however, fundamentally disputed in cross-examination and the parties did not suggest formulating any question for the jury's decision on any of these points."

### **The applications for permission to appeal in respect of the presumption of falsity**

54. At paragraphs 41-43 above we have set out the passages from the judge's direction to the jury that bear on the second application, and it is convenient to deal with both applications at this point. The proposed Grounds for Appeal, dated 6 February 2004, included the following:

#### "THE PRESUMPTION OF FALSITY APPEAL

6. The learned judge erred:

- a. In directing the jury that any words they found to be defamatory were necessarily false;
- b. In directing them that this presumption meant that the article was false in implying that either Claimant was (a) on a US list, (b) that had been supplied to SAMA, and (c) in respect of which SAMA had ordered monitoring."

These two grounds of appeal were distinct the one from the other, as the appellant's accompanying skeleton argument made plain:

"D contends in respect of (a) and (b) above that:

- a. The common law presumption that defamatory words are false is irrational and unnecessary and gravely prejudicial, and in breach of Article 10 and Article 6 of the Human Rights Act 1998, and
- b. that the direction based on this presumption was (i) a misdirection, since it was applied to allegations which were not defamatory, (ii) severely prejudiced the defence, because in the circumstances of the case it amounted to a direction that the jury could not find that D had proved affirmatively that sources B – E had confirmed the information because that information had to be false."

55. The first ground of appeal contends that the common law presumption of falsity infringes Articles 6 and 10 of the European Convention on Human Rights. This is a far-reaching submission. If correct, a major change of our law of defamation is required in order to make it compliant with the Convention. If correct, the Jameels should have been required to plead and prove that the defamatory meaning or meanings of the publication were untrue, notwithstanding that there was no plea of justification.
56. Mr Price submitted that it was far too late for the publishers to raise this point now. It should have been raised at the interlocutory stage. The parties on both sides had conducted the case on the premise that any defamatory meaning that the article bore was presumed to be untrue unless the publishers pleaded and proved justification. The publishers could not at this stage be permitted to seek to undermine the hearing before the judge by attacking an approach to which they had been party. There was, in short, nothing against which the publishers could properly appeal.
57. We were in no doubt that this submission was well-founded. Accordingly, in the course of the second sitting we refused Mr Robertson permission to advance this ground of appeal.
58. The second ground of appeal is much narrower. An important issue raised on the pleadings in relation to the publishers' claim to *Reynolds* privilege was whether Mr Dorsey reasonably and honestly believed that the Jameels were on a list of names whose accounts were being monitored by SAMA at the request of the United States authorities. This was the issue to which the Jameels' hearsay evidence from the Saudi banks was directed. This was the issue to which the oral evidence was predominantly directed. Early in his charge to the jury the judge directed the jury that they must proceed on the presumption that the Jameels were not on any such list. Mr Robertson complained that the judge should not have directed the jury that the presumption of falsity extended to the existence of a list with the Jameels' names on it. This is how Mr Robertson put it in his skeleton argument:

“The judge erroneously applied the presumption as to falsity in relation to statements (a) that the Cs were on any list provided by the US to the Saudis (information provided by two US embassy officials, source C and source D); and (b) that the Cs were in consequence monitored (information from source B and source E). These statements were not defamatory. The only allegation to which the presumption could properly, in its own terms, apply was the defamatory implication that they were suspected of terrorist funding. By directing the jury to apply the presumption to the information given by the sources, the judge effectively foreclosed them from finding that D had proved on the balance of probabilities that the journalist Dorsey had received confirmation from them of the information that he published. The jury had no alternative but to return negative answers – the “presumption of innocence” (as the judge miscalls the quite different presumption of falsity) meant that the Cs could not have been on a US list and could not have been monitored. Thus the judge was wrong to find, in his decision on qualified privilege at paragraph 13, “since source A

was only ‘a lead’, it would appear that the remaining four corners of the defendant’s case on sources have been knocked away by the jury’s answers”. In fact they were knocked away by the judge through his use of the presumption of falsity in his summing up.”

59. We consider that there is force in Mr Robertson’s submission that the presumption of falsity applied only to the defamatory sting and not to the existence of the list, although as Mr Price remarked, the two were closely interlinked. The problem was that the pleadings had treated the existence of the list as part of the defamation. There was, however, a more general ground for attacking the judge’s direction to the jury. We do not consider that it was appropriate for the jury to apply the presumption of falsity when considering the issues of fact that were relevant to *Reynolds* privilege.
60. When considering whether *Reynolds* privilege attaches to the publication of a potentially defamatory article it is necessary to decide whether the publishers acted as ‘responsible journalists’ in publishing the article. This question has to be addressed having regard to the position as it should have appeared to those responsible for the publication at the time of publication. Whether or not the article was true is not normally relevant to this question – see *GKR Karate v Yorkshire Post* [2001] 1 WLR 2571. What has to be considered is whether it was responsible to publish the article having regard to the risk that the defamatory imputation in the article might prove to be untrue. Relevant to that question may be the information given to the publishers by the sources of the article, the nature of the sources, and the extent to which they backed that information.
61. Where, as in this case, an issue is raised as to whether those responsible for the publication of an article have accurately described the information supplied to them by their sources, the question of whether the information allegedly supplied was true or false will have obvious relevance. In that context it does not seem to us right that the jury should apply a presumption that the article was false. It follows that the jury are required to perform some mental gymnastics. They must presume that the defamatory allegation is false when considering liability and damages, but must not apply this presumption when resolving issues of fact that are relevant to the claim of *Reynolds* privilege. The judge should give a careful direction to this effect. In this case he did not do so.
62. When seeking permission to adduce the hearsay evidence from the Governor of SAMA and others, Mr Price had suggested to the judge that it would not be appropriate to apply the presumption of falsity when considering the *Reynolds* privilege plea. Before us he did not suggest that the jury could properly have had regard to the presumption when considering whether to accept Mr Dorsey’s evidence as to the information that he had received from his sources. But he objected to the grant of permission to appeal in relation to this issue on three grounds:
  - i) Mr Robertson had taken the point too late;
  - ii) The jury had not been influenced when considering the questions under 5 by the judge’s direction on the presumption of falsity;



- iii) The jury's answers to questions under 5 were not determinative of the qualified privilege issue.
63. Mr Price was correct to submit that Mr Robertson had taken the point very late in the day. On 17 December 2003, towards the end of his directions to the jury the judge paused "to give counsel an opportunity of pointing out mistakes or omissions that I may have made". Mr Robertson made no mention of the directions in respect of the presumption of falsity. On 20 January 2004, after considering the reasons for the judge's ruling on privilege, Mr Robertson made a detailed application for permission to appeal, giving a number of reasons why permission should be granted. The direction in relation to the presumption of falsity was not among them. The point only surfaced in the written grounds of appeal in support of his application to Sedley LJ dated 6 February 2004.
64. Mr Price referred us to a substantial body of relevant authority in footnote 40 to paragraph 36.4 of the 10<sup>th</sup> Edition of *Gatley on Libel and Slander*. This gives strong support to the proposition that this court will not entertain a complaint of misdirection in a defamation action if counsel has failed to avail himself of the chance of raising the matter at the trial. We consider that this principle is particularly significant in the present case. The only remedy for a misdirection is a re-trial. The trial of this action spanned nearly three weeks. The costs incurred must dwarf the damages awarded. We would be very reluctant to permit a point to be raised on appeal which could and should have been taken below in circumstances such as this. Were it plain that the misdirection had resulted in a miscarriage of justice we might have been persuaded to grant permission to appeal none the less. But that is far from the case, as we shall explain.
65. The only explanation for the fact that Mr Robertson did not raise this objection to the judge's summing-up at the appropriate time is that he and his team had not appreciated that the summing-up was objectionable in this respect. Mr Price submitted that he also could have been expected to raise objection to this aspect of the summing-up had it occurred to him that it was flawed. The judge's directions on the presumption of falsity were given in passages of his judgment remote from that in which he dealt with the questions under 5. The judge directed the jury to answer these questions in the light of their impressions of the witnesses, the documents and the rival submissions of counsel. Mr Price submitted that this is precisely what the jury must have done. This was demonstrated by the fact that they gave an affirmative answer to question 5(a).
66. In paragraph 16 of his judgment on the issue of qualified privilege the judge remarked that the answers given by the jury to their questions were "to a large extent based on the impression the witnesses made in court, and also upon how consistent the contemporaneous documents appeared to be with their evidence". We consider that this is almost certainly correct. If this were a criminal trial and if the result turned upon the answers of the jury to the questions under 5, we might none the less have been left with a lurking doubt as to whether those answers might have been influenced by what the judge had said at other parts of his summing-up about the presumption of falsity. In the circumstances of this case, such lurking doubt is not enough to justify permitting the publishers to seek to secure a re-trial on the ground of a misdirection. This conclusion is reinforced by the final point made by Mr Price.

67. The jury's negative answers to questions 5(b)(c)(d) and (e) dealt a formidable blow to the publishers' case that those responsible for the publication had exercised responsible journalism. But it was not the only reason why the judge rejected the defence of *Reynolds* privilege. The judge found the publishers wanting in respect of each of the relevant matters considered in accordance with Lord Nicholls' guidance in *Reynolds*. We consider that Mr Price was correct to submit that the juries' answers to the questions under 5 were not determinative of the issue of qualified privilege. We have concluded that the judge would have reached the same result on the basis of his conclusion that it was not in the public interest to publish the names of those said to be the subject of monitoring and his conclusion that Mr Dorsey was at fault in not permitting Mr Jameel the time that had been requested to comment on the proposed publication. For the reasons that we are about to give, we have concluded that the judge was entitled to reach the conclusions that he did about these matters.
68. For all these reasons we have concluded that we should refuse the application for permission to appeal on the ground of a misdirection in relation to the presumption of falsity.

### **The Respondents' Notice**

69. Having refused permission to appeal on the ground of an alleged misdirection in relation to the questions under 5, it is appropriate to turn to the Respondents' notice in relation to the answers given to the jury questions. The respondents obtained permission to serve a Respondents' Notice out of time contending that the judge should have held that the answers given by the jury to the questions put to them were fatal to the defence of qualified privilege. This permission was granted on terms that the Notice should introduce no more by way of supporting material than the judge's charge to the jury and the jury's verdicts. Mr Robertson complained that the respondents' skeleton argument disregarded this limitation by setting out, over 15 pages, what Mr Robertson described as a one-sided evaluation of the evidence. Lest we should be beguiled by this evidence, Mr Robertson provided a summary of his own selection of the evidence. We propose to consider the issue raised by the Respondents' Notice on the basis of the charge to the jury and the jury verdicts without reference to all this additional material.
70. What conclusions could properly be drawn from the jury's answers in relation to questions B to E? What bearing did they have on the crucial issue of whether Mr Dorsey reasonably and honestly believed that there was such a list bearing the name of the Group? It seems to us regrettable that this should have been a matter for speculation. The division between the role of the judge and that of the jury when *Reynolds* privilege is in issue is not an easy one; indeed it is open to question whether jury trial is desirable at all in such a case. But we wonder whether it would not have been appropriate in the present case to have asked the jury whether Mr Dorsey honestly believed in the existence of a list with the name of the Jameel Group on it.
71. As it is the judge proceeded on the basis that the jury's answers did not carry the implication that Mr Dorsey was dishonest. He proceeded on the basis that the jury might have concluded that his evidence was mistaken as a result of faulty recollection or wishful thinking. The judge went on to say that the jury's answers gave rise to formidable difficulties as far as the publishers' case on privilege was concerned but

that, although that case appeared ‘somewhat forlorn’ the jury’s decisions were not necessarily, as a matter of law, fatal.

72. The Respondents’ Notice invites us to rule that the judge was wrong and that he should have ruled that the jury’s answers to questions B to E were fatal to the defence of *Reynolds* privilege. Having regard to the comments that we have just made in relation to the judge’s direction on the presumption of falsity it would not be appropriate to accede to this invitation. If this appeal is to be dismissed, it should be on the basis of the findings in favour of the Jameels in respect of the other issues before us. We turn to consider these issues.

### **The grounds of appeal**

73. We can summarise the various grounds upon which Mr Robertson has attacked the judgment in relation to qualified privilege as follows:
- i) The judge applied an erroneous and over-strict test of *Reynolds* privilege.
  - ii) The judge failed to obtain from the jury a definitive meaning of the words used.
  - iii) The judge wrongly imposed his own meaning on the words used.
  - iv) The judge attached undue weight to the US/Saudi confidentiality agreement.
  - v) The judge construed the subject matter of the article too narrowly.
  - vi) The judge failed to put a question to the jury in respect of Mr Simpson’s evidence and attached insufficient weight to this evidence.
  - vii) The judge failed to leave to the jury the question of whether any of those involved in the publication intended to defame either respondent.
  - viii) The judge wrongly ruled that *Bonnick* had no application to the facts of the case.

The last two questions are relevant to *Bonnick*. The second question is relevant to both *Reynolds* and *Bonnick*.

We shall deal first with those grounds of appeal that relate to matters of detail before dealing with those that are more general.

### **Mr Simpson’s evidence**

74. Mr Robertson complained that the judge failed to put a question to the jury in respect of Mr Simpson’s evidence. The judge, when dealing with Mr Simpson’s evidence, had said (judgment paragraph 15):

“It is true that Mr Dorsey and Mr Glenn Simpson, based in Washington, also gave evidence of some degree of confirmation of the story (or at least of answers or declination to comment, which they interpreted as confirmation). That

evidence was, however, fundamentally disputed in cross-examination and the parties did not suggest formulating any question for the jury's decision on any of these points ”

75. Mr Robertson drew our attention to a passage in the transcript at the end of day 11 where he suggested to the judge that the jury might be asked whether Mr Simpson's US Treasury source confirmed the accuracy of the story. That suggestion was raised as an afterthought some time after the period when lengthy discussion had taken place as to the questions that should be left to the jury. Mr Price objected to the question on the ground that there was no issue of primary fact as to what the Treasury source had said; the issue was as to the implication to be drawn from this.
76. The judge had obviously forgotten about this passage. So, possibly, had Mr Robertson when he drafted his skeleton argument. He commented of Mr Simpson's evidence:

“It is correct that no question was left to the jury concerning his evidence but neither did the Cs ask that it should be. (In any case, any such question would not have been straightforward: the jury would have had to have been asked if Mr Simpson's source had *effectively* confirmed what Mr Dorsey had been told). But this did not release the Learned Judge from the obligation to evaluate that evidence and express his view about it. The fact that no question was formulated for the jury as to this evidence does not have the consequence that D is prevented from relying upon it.”

77. Mr Simpson's evidence was not that his Treasury source confirmed the story that the Jameel Group was on the list, but that his failure expressly to deny this was tantamount to confirmation. Having been referred to the evidence we consider that the judge was entitled to attach no more weight to it than he did.

#### **The US/Saudi confidentiality agreement**

78. The judge remarked that according to the appellant's own story the United States Government had assured the Saudi Government that it would not reveal the names of any of the persons or entities whose accounts were supposed to be monitored. The judge suggested that it was not in the public interest to undermine this agreement and 'blow the gaffe' on the fact that monitoring was being conducted. The publishers contend (skeleton argument paragraph 38) that the judge overlooked the evidence as to why that confidentiality "was respectably being breached". This contention is unjustified. The judge referred to evidence that personnel in the United States government were in fact content that the information should be released but he was not convinced by this evidence.

#### **The subject matter of the article**

79. Mr Robertson complained that the judge construed the subject matter of the article too narrowly. He approached the case on the basis that the article was about the fact that the named individuals were on the list of those whose accounts were being monitored. This was not the significance of the article. The significance of the article was that the Saudi Arabian government was in fact cooperating with the United States in the war

against terrorism. That was something which had been in doubt and which it was in the public interest to make clear. The names on the list were published not because it was in the public interest to know who was on the list but because the publication of the names was necessary to demonstrate that the monitoring was being conducted in earnest. Reference was made to passages in the speeches of the House of Lords in *Campbell v MGN Ltd* [2004] 2WLR 1232 in relation to the importance of the freedom of the press and the need to accord to the press reasonable latitude in the manner of publication of a story which is in the public interest.

80. The judge was not impressed by this argument. He considered that the defamation of the Jameels was serious (as to this see below) and that there was no need for their names to have been published. More particularly, he considered that the publication of their names was unwarranted when the publishers had afforded the respondents insufficient time to comment on the proposed publication.
81. We are prepared to accept that the story with names was more compelling than the story without names. Nonetheless the names were not the essential feature of the story. Before adding names in order to add weight to the story, responsible journalism required the exercise of care to ensure that the names were correct. It seems to us that this was implicitly conceded by the number of sources from whom Mr Dorsey alleged he sought confirmation.
82. We turn to the Judge's observation that the Jameels were not given sufficient time to comment on the proposed publication. It was to this matter that the jury's questions 6 and 7 were addressed. Mr Dorsey had given evidence that he had telephoned the Jameels' offices on the morning before the publication and left a recorded message. The jury found that this did not take place. What the jury did find had taken place was that Mr Dorsey had spoken to the Jameels' representative, Mr Munajjed, on the evening before publication, that the latter had asked for the publication to be postponed so that he could contact Mr Jameel, who was in Japan on business, and that Mr Dorsey had declined this request. The judge found that there was no compelling reason why Mr Jameel could not have been afforded 24 hours to comment on the article. We can see no basis for challenging this conclusion, nor did Mr Robertson suggest that there was one.

### **The meaning of the article**

83. Mr Robertson complained that the judge failed to obtain from the jury the meaning that they attached to the article, but instead accorded the article his own meaning. He further attacked the meaning accorded to the article by the judge. We shall deal at this point with these criticisms in the context of the relevance that the severity of the defamation has to the test of *Reynolds* privilege. We shall return to the criticism when we deal with *Bonnick v Morris*.
84. The judge dealt with the meaning to be attached to the article in the passages we have set out at paragraphs 46 to 48 above. No criticism can be made of the judge's reasoning. The only issue is whether he should have required the jury to define precisely the gravity of the defamatory meaning of the article. It seems to us the choice was between 'reasonable grounds to suspect' and 'grounds for investigating'. The difference between the two can be a narrow one. Had the issue of *Reynolds* privilege been likely to turn on whether the words bore the more or the less serious

meaning, it might have been necessary to invite the jury to choose between the two. But the judge plainly did not consider that the precise nature of the defamatory sting was capable of affecting the outcome. We share that view. In these circumstances, we consider that the judge was well advised not to seek a meaning from the jury – subject always to the effect of *Bonnick v Morris*, which we have yet to consider.

**The test for *Reynolds* privilege.**

85. The judge devoted 18 paragraphs of his judgment to discussing how the test for *Reynolds* privilege should be formulated and it is not easy to produce a short synthesis of this lengthy passage of his judgment. In his skeleton argument Mr Robertson submitted that the judge approached the issue by asking whether the appellant had an *obligation* to publish the article and whether the public had a *need* to have the information contained within it in the sense that it would have been *wrong to deprive the public of it*. Mr Robertson submitted that this was too stringent a test. He advanced as the correct test the following passage from the decision of this court in *Loutchansky v Times Newspapers Ltd (Nos 2-5)* [2001] EWCA Civ 1805; [2002] QB 783 at paragraph 36:

“The interest is that of the public in a modern democracy in free expression and, more particularly, in the promotion of a free and vigorous press to keep the public informed. The vital importance of this interest has been identified and emphasised time and again in recent cases and needs no restatement here. The corresponding duty on the journalist (and equally his editor) is to play his proper role in discharging that function. His task is to behave as a responsible journalist. He can have no duty to publish unless he is acting responsibly any more that the public has an interest in reading whatever may be published irresponsibly ...” (emphasis added)

The emphasis is Mr Robertson’s and his submission was that the essence of the test was whether the publisher had exercised *responsible journalism*.

86. There is no doubt that the judge rejected a simple test of *responsible journalism*. He described this as imprecise and carrying the suggestion that the test was subjective (paragraph 17). He held that the primary question was whether the particular circumstances gave rise to a duty to publish. The question of whether there had been *responsible journalism* or *the exercise of due professional skill and care* were matters to be addressed when answering that primary question (paragraph 23). The judge made it plain that the duty in question was a *social or moral duty* and that the obverse of this test was whether it was in the public interest at the time for the words to be published (paragraphs 30 and 31).
87. We agree with the judge that the phrase *responsible journalism* is insufficiently precise to constitute the sole test for *Reynolds* privilege. It seems to us that it denotes the degree of care that a journalist should exercise before publishing a defamatory statement. The requirements of responsible journalism will vary according to the particular circumstances and, in particular, the gravity of the defamation. Responsible journalism must be demonstrated before *Reynolds* privilege can be established. But there is a further element that must be demonstrated. The subject matter of the

publication must be of such a nature that it is in the public interest that it should be published. This is a more stringent test than that the public should be interested in receiving the information; see *A v B plc* [2002] EWCA Civ 337; [2003] QB 195 at p. 208 D.

88. On the facts of this case it does not seem to us that the precise definition of *Reynolds* privilege was material. Assume, contrary to the judge's finding, that the publication of the article, names and all, would have been in the public interest if appropriate checks had been made. Quite apart from the jury's rejection of Mr Dorsey's evidence in relation to his four sources, their rejection of his evidence of having sought the Jameels' comments on the morning before the publication, coupled with the jury's findings that Mr Dorsey was requested to give Mr Jameel the time to comment were, so it seems to us, fatal to the appellant's case that they had satisfied the test of responsible journalism.
89. Had the judge appreciated that Mr Robertson was seeking to rely on reportage, he would have held that this defence, even if available under English law, was not made out. It is clear that he did not consider that the article was one which it was in the public interest to publish without adequate attempts at verification and without belief in the truth of its defamatory implications. We are of the same mind.

***Bonnick v Morris***

90. It remains to consider Mr Robertson's arguments in relation to *Bonnick v Morris*. As we understand it the defence that he sought to found on this decision was as follows: Mr Dorsey did not consider that the article bore a defamatory meaning. His understanding was that of a reasonable journalist. In these circumstances publication of the article constituted responsible journalism.
91. The judge was plainly puzzled by *Bonnick v Morris*. This is apparent from the following passage in his judgment:

“There are at least two potential problems in the light of *Bonnick v Morris*. First, I raised the question with counsel whether the “alternative” meaning that their Lordships were contemplating (at paragraph [24] of the judgment) would necessarily be a defamatory meaning or whether it might also be non-defamatory. The answer may depend perhaps on how the alternative meaning fits into the particular case. If one is considering whether there would have been a duty to publish words bearing that meaning, it would only make sense if it was indeed defamatory. Otherwise, judges would find themselves in the position sometimes of recognising, in the light of a jury's decision, that the offending article was defamatory but holding that it was nevertheless privileged because some people (including perhaps the author) thought it had a non-defamatory meaning. The matter could not surely be judged on the basis of a duty to publish a non-defamatory imputation.”

92. The other problem that troubled the judge was how to apply *Bonnick* where the meaning of the publication was a matter for a jury. Ultimately, he concluded:

“no responsible journalist could conceivably disregard the defamatory meaning pleaded by the Claimants (i.e. of “reasonable grounds for suspicion”) since it was “obviously one possible meaning of the article in question”. Had it not been at least a “possible” meaning, no doubt it would have been struck out of the Particulars of Claim. I have no hesitation in also characterising it as an “obvious” meaning.”

93. Mr Robertson attacked the judge’s conclusions. First he submitted that the judge was wrong to conclude that the principle in *Bonnick* could only apply where a publication bore alternative meanings each of which was defamatory. Thus far we are in agreement with Mr Robertson. In *Bonnick* it seems that Mrs Morris gave evidence that she did not appreciate that her article had a defamatory meaning (see paragraph 19 of the Privy Council’s judgment). The Committee considered that she could be forgiven for this and therefore had not acted irresponsibly in publishing the article.
94. Mr Robertson’s second complaint was that the judge had refused to ask the jury to set out the definitive meaning of the article. We do not see why this was necessary in order to apply the reasoning in *Bonnick*. For that purpose the issue was not what the article meant. The issue was whether those responsible for the publication may reasonably have believed that the article was not defamatory.
95. As to that, Mr Robertson complained that the judge did not ask the jury to make a finding as to the meaning that Mr Dorsey had intended to convey by the article.
96. If the judge’s conclusion that we have set out in paragraph 92 above was correct, it mattered not what Mr Dorsey thought that his article meant. But Mr Robertson attacked this finding also. We consider that the judge was justified in holding that no reasonable journalist could have ignored the fact that the article was capable of bearing a defamatory meaning. We note that Mr Simpson, when giving evidence that he believed that the article was correct, commented:

“these are all people with reputations to protect and, you know, if you are an experienced reporter you know the consequences of your story”

That comment can properly be applied to Mr Dorsey.

97. For these reasons we have concluded that the judge was correct to rule that *Bonnick v Morris* had no application to the facts of this case. It is therefore not necessary for us to consider whether the Privy Council’s decision represents the law of England and Wales. For all the reasons that we have given the appeal in relation to the issue of qualified privilege is dismissed.



## **The Presumption of Damage Appeal**

### **Introduction**

98. The jury concluded that the Jameel Company had been defamed by the article published by the publishers and that the appropriate award of damages was £10,000. These findings were made after directions on English law given by the judge. Those directions were true to English law as expounded in the authorities and the text books. In short the jury were directed that they should award appropriate damages if they found that the Jameel Company had a trading reputation in England and that the article bore a defamatory meaning that was apt to damage that trading reputation. The Jameel Company had not attempted to prove that the article had caused it any specific financial loss by way of special damages
99. In interlocutory proceedings a week before the trial had begun Mr Robertson had made a radical submission of law. His contention was that the Human Rights Act 1998 required the court to redefine the English law of libel in so far as it related to corporations or, alternatively, foreign corporations. If English law was to be compatible with Article 10 of ‘the Convention’ (‘Article 10’) it had to require proof of special damage as an essential element in the cause of action in libel.
100. In a judgment delivered on 5 December 2003 [2003] EWHC 2945; [2004] 2 All ER 92 the judge rejected this submission. The publishers have appealed against that judgment, with permission granted by the Sedley LJ on 11 March 2004.
101. In *Yousef Abdul Latif Jameel v Dow Jones & Co Inc* what appeared to be a similar preliminary point was taken on behalf of Dow Jones at a hearing on 6 July 2003. Certainly both counsel for Dow Jones, Mr Gavin Millar QC, and the judge, Eady J, proceeded on the premise that if the judge’s decision on the point in this case was sound, Mr Millar’s submission on the similar point was doomed to failure. On this premise the judge dismissed Mr Millar’s submission without additional reasons.
102. We have heard appeals against the judge’s decisions on the presumption of damage point in each action at a conjoined hearing. In the event there proved to be little overlap in the arguments advanced in each and it is convenient to deal with each in a separate judgment.

### **English Law Before the Human Rights Act Came into Effect**

103. The Human Rights Act came into effect on 2 October 2000. There is no dispute as to the relevant principles of English law prior to that date.
104. In *South Hetton Coal Company Ltd v North Eastern News Association Limited* [1894] 1 QB 133 the plaintiff company successfully sued for libel in respect of an article which alleged that it neglected its workforce. In the Court of Appeal the defendants contended that no action for libel would lie on the part of a company unless actual pecuniary damage was proved. This submission was rejected. The clearest statement of principle is to be found in the judgment of Kay LJ at p. 148:

“a trading corporation may sue for a libel calculated to injure them in respect of their business, and may do so without any

proof of damage general or special. Of course if there be no such evidence the damages given will probably be small.”

The other two members of the court gave judgments to similar effect.

105. The principle stated has never since been judicially doubted. The Defamation Act 1952 section 2 introduced a similar principle in relation to slander:

*“Slander affecting official, professional or business reputation*

2 In an article for slander in respect of words, calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.”

106. In *Lewis v Daily Telegraph* [1964] AC 234 at p. 262 Lord Reid observed that a company cannot be injured in its feelings, it can only be injured in its pocket. The injury must sound in money. But he added that the injury need not necessarily be confined to loss of income. Its goodwill may also be injured.

107. In *Derbyshire CC v Times Newspapers* [1993] AC 534 at 574 Lord Keith of Kinkel, after reviewing the relevant authorities, remarked that they

“clearly establish that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business.”

108. Mr Robertson argued that this well established principle of English law has been swept away by the requirement, imposed on the court by sections 6 and 12 of the Human Rights Act, to act in a way which is compatible with Article 10 of the Convention. Article 10 provides, in so far as material:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”

“2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ...for the protection of the reputation or rights of others...”

109. It is Mr Robertson’s submission that it is not necessary in order to protect the reputation of others to allow a corporation to recover damages for libel when it has not demonstrated that the libel has caused it pecuniary damage. The effect on freedom of the press of the protection afforded by this area of English law before the Human Rights Act was introduced was disproportionate to the object that it was intended to achieve.

110. There is high authority which, while not strictly binding on us, suggests that there is no incompatibility between the principles of the English law of defamation and the Convention. Sir John Donaldson MR so stated in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 178 and, in the same case, Lord Goff of Chieveley agreed at pp 283-4. The authors of the 10<sup>th</sup> Edition of *Gatley on Libel and Slander* rightly observe at footnote 73 to paragraph 8.16 that the proposition that a trading corporation can maintain an action for defamation was central to the decision of the Court of Appeal and of the House of Lords in *Derbyshire CC v Times Newspapers* [1992] 1 QB 770; [1993] AC 534. In the Court of Appeal the result was largely influenced by the recognition that, where the common law was in doubt, policy dictated that it should be developed in harmony with the Convention. In the House of Lords, Lord Keith of Kinkel, with whom the other members of the House agreed, did not find it necessary to have resort to the Convention in order to decide the appeal, but concluded that the common law of England was consistent with the obligations assumed by the Crown under it.
111. Putting this guidance on one side, we turn to consider whether a requirement for a corporation to prove special damage in order to establish a cause of action in libel would produce a fairer balance between the freedom of the press and protection of individual reputation. The 1975 Report of the Faulks Committee on Defamation considered a submission that a corporation should be required to allege and prove special damage in order to establish a cause of action for libel. The Committee rejected this suggestion “since it is naturally very difficult for a plaintiff, whether corporate or personal, to prove actual financial damage specifically flowing from a defamation”. The Committee did, however, recommend that a trading corporation should have to establish that “the defamation has either caused, *or is likely to cause*, financial loss”.
112. The difference between a defamation which is ‘calculated to injure’ in respect of business or ‘having a tendency to damage’ in the way of business and one that is ‘likely to cause financial loss’ is nebulous in theory and unlikely to be encountered in practice. In his skeleton argument Mr Robertson urged that the Faulks Committee’s recommendation should be adopted, before giving notice that this was a mistake and that his case was actually that proof of special damage should be required. Mr Price, not unnaturally, made much of this. It was, forensically, something of an ‘own goal’.
113. The difficulty that a trading corporation will often have in proving that a defamation calculated to cause damage to its trading reputation has resulted in specific financial loss is obvious. This impressed Eady J as much as it impressed the Faulks Committee. He pointed out that an important object of the law of defamation is to provide a means for those defamed to achieve vindication. A requirement to prove special damage would leave many an injured corporation without remedy. We agree. We do not consider that such a requirement would go far enough to provide necessary protection for the reputation of corporations that are at risk of being damaged by inaccurate press reports.
114. What of the position of a foreign corporation which has a trading reputation in this country but which does not actually trade here? Mr Robertson’s alternative submission was that at least for such a company there should be a requirement to prove special damage. No presumption should be made that defaming such a company will cause it damage. In *McDonalds Corporation & McDonalds Ltd v Steel*

& *Morris* [1999] All ER (D) 384 the first claimant was a US corporation which did not trade in this jurisdiction. The second claimant was its subsidiary. Both claimants sought damages for defamation against the two defendants. Eady J cited the following statement by Pill LJ, which applied to each of the claimants:

“As with an individual plaintiff, where a company brings proceedings for libel, there is no obligation on them to show that they have suffered actual damage ... The effect of this is, not that there is an irrebuttable presumption of substantial damage, but that a corporate plaintiff which shows that it has a reputation within the jurisdiction, and that the defamatory publication is apt to damage its goodwill, has a complete cause of action capable of leading to an award of substantial damages. Other considerations could lead to an award of nominal damages ...”

115. The defendants, who were acting in person, sought to make a complaint to the Strasbourg Court that the proceedings infringed their Article 10 rights of freedom of expression: *S & M v United Kingdom* (1993) 18 EHRR CD 172. One of their grounds was that the law of the United Kingdom did not place ‘restrictions on damages’ which might be awarded. The Commission found their complaints to be ‘manifestly ill-founded’. It observed:

“... the freedom conferred by Article 10 of the Convention is not of an absolute, unfettered nature. It does not authorise the publication of defamatory material. On the contrary, the second paragraph of Article 10 offers specific protection for the “reputation or rights of others”. McDonalds are, therefore, entitled to seek the determination of their civil rights to a good reputation and, if successful, the protection of that reputation against an alleged libel. Similarly the applicants are entitled to defend themselves against McDonald’s writ in the determination of their civil right to free speech and fair comment in matters of public interest.

The Commission does not find that the matters which may involve the responsibility of the respondent Government under the Convention, namely a lack of legal aid, simplified procedures or restrictions on damages, essentially interfere with the applicants’ freedom of expression. They have published their views, upon which there was no prior restraint, and, if those views are subsequently found to be libellous, any ensuing sanctions would in principle be justified for the protection of the reputation and rights, within the meaning of Article 10(2) of the Convention.”

116. Mr Price sought to rely on this decision as demonstrating that the publishers’ attack on the presumption of damage was without merit. Having regard to the general nature of the decision we do not consider that it goes this far. It does suggest, however, that the Commission saw no objection in principle to a foreign corporation receiving the same protection for its reputation within the British jurisdiction as a British

corporation. For our part, we can see every reason why they should receive the same treatment. Differential treatment would be likely to constitute discrimination in the accordance of Article 6 rights, contrary to the prohibition imposed by Article 14.

117. It is likely in practice that a foreign corporation which trades outside this jurisdiction but does not trade within it will have greater difficulty in establishing that it has a trading reputation within this jurisdiction. If it succeeds, however, the interests of justice require that the same principles of law should apply to its claim for defamation.
118. We have dealt with this ground of appeal more shortly than did the judge but we endorse and commend his judgment. For the reasons that we have given the appeal against the judge's ruling of 5 December 2003 is dismissed.