Case No: HQ08X00922

Neutral Citation Number: [2010] EWHC 1907 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 July 2010

Before :

THE HONOURABLE MR JUSTICE STADLEN

- -

Between :

Kaschke	**Claimant**
- and -	
Gray	**1st Defendant**
Hilton	**2nd Defendant**

- -

The **CLAIMANT** appeared as a litigant in person
The **1st DEFENDANT** appeared as a litigant in person
MR ROBERT DOUGANS (of **BRYAN CAVE SOLICITORS**) for the **2nd DEFENDANT**

Hearing dates: 9 and 12 July 2010

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Judgment

The Honourable Mr Justice Stadlen:

1. There are before the court applications by the two remaining defendants to this libel action to strike it out as an abuse of process. They follow an unsuccessful application to Master Rose by the second defendant, Mr Hilton, for summary judgment based on separate defences under section 1 of the Defamation Act 1996 and Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002. My judgment disallowing Mr Hilton's appeal against the refusal of Master Rose to give summary judgment on the latter ground has the neutral citation number [2010] EWHC 690 (QB).

2. This claim and the background to it are closely related to another libel action brought by the claimant, Ms Kaschke against David Osler. Indeed reliance is placed in support of the applications to strike out this action on the judgment of Eady J given on 13 May 2010 [2010] EWHC 1075 (QB) in which he gave his reasons for striking out Ms Kaschke's claim against Mr Osler in that action as itself an abuse of process.

3. In both actions Ms Kaschke seeks damages for loss of reputation arising out of allegedly libellous blogs, in this action written by the first defendant, Mr Gray and posted on his own and Mr Hilton's websites and in the other action written by Mr Osler and posted on his website. In this action on 9 December 2009 Master Rose ordered that "the claimant's case on meaning in accordance with Practice Direction 53 paragraph 2.3 be limited in the case of her claim against each of the First and Second Defendants to the following meaning, namely that the claimant was once suspected by the West German authorities to be a member of Baader-Meinhof, the terrorist group that carried out bombings, robberies and murder." In the Osler action Ms Kaschke's complaint was that Mr Osler's blog falsely suggested that she had been accused of being a member of the Baader-Meinhof terrorist group.

4. In the Osler action Eady J, having reviewed the background, including things written by Ms Kaschke and admissions made by her, held that even if the jury came to the conclusion that none of the defences raised by Mr Osler could succeed he could not imagine that the damages would be other than very modest. He took the view that any such award would be out of all proportion to the time and money spent on the litigation and in particular to the cost of a two week jury trial. He came to the conclusion that that was one of those unusual cases in which the doctrine of abuse of process as discussed by the Court of Appeal in *Jameel (Yousef) v Dow Jones and Co Inc*. [2005] QB 946 should be applied. Accordingly he struck out the action on that ground.

5. In support of their applications in this action Mr Gray and Mr Hilton advance two submissions. First they submit that the claim in this action is an abuse of process for broadly similar reasons to those found to exist by Eady J in the Osler action. Second they submit that for Ms Kaschke to proceed with this action despite her claim in the Osler action having been struck out is for that reason an abuse. They submit that the meaning to which Ms Kaschke is confined in this case is essentially identical to the initial words of Mr Osler's article, which is if anything even stronger. Mr Osler and indeed anyone else have been free since the Osler action was struck out to repeat the words complained of in the Osler blog. Reliance is placed on the decision of Eady J in *Schellenberg v British Broadcasting Corporation* [2000] EMLR 296 especially at 319.

Background

6. Ms Kaschke is a political activist resident in East London. She is of German birth but has lived in England since 1977 and is now a naturalized British citizen. She has run a number of websites. She was for some time a member of the Labour party, which she left in 2007 to join the Respect party. Mr Gray works for Tower Hamlets Council and is an officer of Unison. He was also elected as a member of Newham Borough Council in the local elections in 2010, representing the Labour party. He writes a weblog called "*John's Labour blog*" at the url http://grayee.blogspot.com. He is also a contributor to the website "*Labour Home*". Mr Hilton is a Labour Party political activist who has operated and managed several websites. He stood as the Labour candidate for Chelsea at the 2010 general election. Amongst his online ventures was the website "*Labour Home*", which he set up to be a forum for members and activists to engage in debate about the Labour Party, and to share information about events and campaigning.

7. It is common ground between Ms Kaschke and the defendants in both this action and the Osler action that in the mid 1970s she was arrested in West Germany by the police and spent 3 months in prison, following which she was paid a sum of money by way of compensation for wrongful imprisonment. It is also common ground that on or shortly before 7 April 2007 Ms Kaschke posted an article on one of her websites in which among other things she referred to her arrest and complained about an article which had been published in the German magazine Der Spiegel in the 1970s. The essence of her complaint was that Der Spiegel had falsely linked her to the Baader-Meinhof gang, the name given by the media to a far left group of urban terrorists who had carried out acts of violence, terrorism and murder.

8. On 7 April 2007 Mr Osler under the heading "Respect member's 'Baader-Meinhof link", published an article alongside a photograph of Ms Kaschke on his blog at www.davidosler.com. The blog was in these terms:

> "Johanna Kaschke – recent defector from New Labour to Respect – was in the 1970s held in custody in her native Germany, charged with support for the ultraleftist Baader-Meinhof terrorist group.
>
> "Ms Kaschke – pictured left – denies any wrongdoing, although she admits to having organised some sort of benefit gig:
>
> *'All I ever did was organise a music concert in the University of Würzburg Mensa. This got me sacked from my job in the University bookshop Schöningh and I also then lost my home.'*
>
> She has recently launched a complaint against leading German news magazine Der Spiegel for an article it wrote three decades ago, naming her in this connection. Rather than trying to hide any of this, Ms Kaschke has commendably chosen instead to post a copy of the story on her own website. She goes on to write:

'I can safely say I never met any of the other persons mentioned in the article and got released after three months of prison on remand and was paid compensation for wrongful arrest and imprisonment two years later.'

If we take this account at face value – and I have no reason not to – the worst she stands accused of is youthful folly. After all, many young people attracted to far left politics in the 1970s were passively sympathetic to groups such as the Baader-Meinhof gang. Most have subsequently been rehabilitated.

Former Angry Brigade suspect Angela Mason these days boasts an Order of the British Empire gong and sits on quangos. Even I used to wear a Brigate Rosse T-shirt, as modelled by Joe Strummer. Ms Kaschke appears to have come to political terms with all this:

'Frankly I cannot understand how such educated university graduates like the Baader Meinhof people fell for this illusion that the state is only a paper tiger and they can win an urban guerrilla war against them.

'Now with al Qaeda again we have people believing they go to paradise after they blow themselves up and that they are good Muslims if they cause a lot of destruction.

'Terrorism is the enemy of all Socialism as it creates exactly the opposite reaction, it makes the state more right wing and is likely to destroy all Socialist advances made by peaceful negotiation.

'If I knew of someone planning a terrorist atrocity I would definitely report them to the authorities because it's not right. I believe that people being put up to those guerrilla activities are being used by some people for exactly the purpose to create a right-wing movement.'

The thing is, she may find that not all of her new colleagues in Respect share her stance. Respect MP George Galloway, for instance, believes it would be morally justified for a suicide bomber to kill Tony Blair.

Posted at 23:58, 7 April 2007."

9. On 8 April 2007 Mr Gray published on his web blog under the heading '"Baader-Meinhof" losing candidate joins diss-Respect' and a picture of a red star with a machine gun and the letters RAF the following blog post:

"Baader-Meinhof" Losing Candidate joins diss-Respect

Former Baader-Meinhof suspect Johanna Kaschke, who was one of the 64 candidates hoping to be nominated as the next Labour Party MP for Bethnal Green and Bow, has resigned to join diss-Respec/SWP. I read about this first in the East End Advertiser where she was quoted as saying that the reason was over the Council's decision regarding its housing policy. I was going to run a post on why the Advertiser had failed to even consider that a reason for her defection could have been her utter failure to pick up any nominations (or I think any individual votes). A case of sour grapes rather than a conversion while on the road to Damascus.

However, this being Tower Hamlets the story developed. Dave Osler blog "Ex-punk. Ex-Trot. Unchanged attitude problem" (definitely not a New Labour Supporter) picked up that Johanna was also a former Baader-Meinhof (Also known as the "Red Army Faction") suspect who was detained for 3 months on suspicion of being involved in terrorist activities. Baader-Meinhof was a particularly nasty Left wing terrorist gang who murdered many people in Germany mainly during the 1970's (and up to late 1990's). They were found to be partly funded and supported by the communist East German secret police, the Stasi.

Johanna is quite open about this (and other things) on her website. It would appear that she was released without charge and that she was given compensation by the German government for wrongful imprisonment. However, she does give the impression that she was involved in fund-raising activities for the terrorists although this is unclear. To be fair, she is now firmly and openly against terrorism, Dave points out that she is a small business woman who is opposed to the minimum wage and wants more support for businesses.

I (think) that I have met her a couple of times and she seemed quite pleasant. However, reading her "New Labour, New Britain" Parliamentary Section CV again, I now understand her declaration on it that she managed to get through life without any convictions whatsoever". I am a little concerned that she should describe her family as working class, and then state her father was a Chartered Accountant. It seems she had only been active in the Party since Feb 2007. I note that she does not appear to be a member of a trade union, so she should fit in well with diss-Respect/SWP."

10. As appears from Mr Gray's blog it included links to Mr Osler's blog and to Ms Kaschke's website.

11. On 9 April 2007 Mr Gray posted the same blog on a page on Mr Hilton's Labour Home website.

12. As can be seen both in Mr Gray's blog and in Mr Osler's blog there was express reference to the fact that Ms Kaschke was released after 3 months detention and paid compensation for wrongful imprisonment. Both blogs referred to a Baader-Meinhof connection. The Osler blog said that she had been charged with support for the ultra-leftist Baader-Meinhof terrorist group. The Gray blog referred to her as having been a former Baader-Meinhof (also known as the "Red Army Faction") suspect who had been detained for 3 months on suspicion of being involved in terrorist activities. Both Mr Osler and the defendants in this action accept that in fact Ms Kaschke was not suspected of or arrested or charged with membership of the Baader-Meinhof group. They also all accept and have always accepted that Ms Kaschke never committed any offence and was not in fact a member or supporter of the Baader-Meinhof group or indeed any other terrorist gang. At the hearing in front of Mr Justice Eady Mr Dougans who appeared for Mr Osler and who appeared before me on behalf of Mr Hilton (Mr Gray who was not represented adopted Mr Dougans' submissions), said on instructions that Mr Osler did not believe that Ms Kaschke was a victim of anything other than a miscarriage of justice.

13. The article posted by Ms Kaschke on her website which was referred to in Mr Osler's blog and to which there were links in both the Osler blog and the Gray blog was not produced in evidence either in the application to strike out the Osler action or in the applications to strike out this action. At the hearing before me as appears below there was some controversy as to its contents.

14. In his judgment in the Osler action Eady J said that had he not struck out the action as an abuse of process he would have given leave to amend Mr Osler's defence to raise defences of justification on a very limited basis, fair comment, qualified privilege and limitation. He also noted that in the alternative to Mr Osler's application for the whole claim to be struck out as an abuse of process, Mr Dougans relied on part of the words complained of as having been published with Ms Kaschke's consent since the words in question were said to derive from her own website and should be struck out for that reason in any event.

15. The following extracts from Eady J's judgment set out the basis on which the application to strike out the Osler action as an abuse of process was advanced by Mr Dougans and granted by Eady J:

> "8. It is Mr Osler's case that he only posted the material about Ms Kaschke because he had seen an article published by her on her own website, at some stage prior to 7 April 2007. Indeed he provided a link to this, but unfortunately the article does not appear any longer to be available on the Internet and Ms Kaschke herself has not disclosed it. It appears that she attached a copy of an article published in *Der Spiegel* in September 1975 by way of background. This is of some significance, having regard to the proposed defence of consent, since it makes reference to Ms Kaschke in these terms (as translated):
>
> "Suspected of having assisted a 'criminal gang' is also the bookseller Johanna Kaschke, arrested on 10 July, while she worked in anarchistic organisations like 'Red Help' and 'Black

> Help'. Near a weapons depot she has been seen with two left accomplices, and she is under suspicion of having planned bank robberies. Names appear, says a police officer, 'that we have never heard before'."

9. I should make it clear that it is no part of Mr Osler's case to suggest that Ms Kaschke was in any way herself involved in bank robberies, violence or terrorism, and he accepts that although she came under suspicion and was imprisoned for a time, she was not guilty of any criminal offence. In due course, she was paid compensation in Germany for the wrongful arrest. Ms Kaschke produced in the course of the hearing the original German prosecutor's document, which makes no reference to the Baader-Meinhof terrorist group. Contrary to what is said in Mr Osler's blog, she was never "charged" with supporting that body or "linked" to it.

10. It is now pleaded in the "Amended Defence" that there is a defence of accord and satisfaction. This is based on the proposition that an agreement was entered into between the parties by way of an exchange of emails on 26 May 2007. Ms Kaschke was undoubtedly at that time given a right of reply, but Mr Dougans goes so far as to suggest that there had been a concluded agreement that she would not pursue a claim against Mr Osler by way of consideration for the "right of reply". At all events, the publication of the "right of reply" is a relevant factor to take into account when assessing the application based on abuse of process.

11. What appeared on 26 May 2007 was the following:

> "Johanna Kaschke: right of reply
>
> Johanna Kaschke (pictured) – the woman who defected from Labour to Respect after not making the Labour parliamentary candidate shortlist in Bethnal Green & Bow – has emailed me, following an earlier post on Dave's Part highlighting her arrest in West Germany in the 1970s as a terrorism suspect.
>
> In line with best practice for leftwing publications, members of the labour movement subject to criticism on this blog have the right of reply:
>
> *Dear reader*
>
> *Please accept my humble apology for bombarding you with press releases lately but this is mirroring my emotional state of shock and dismay over the untrue, recent allegations in the press that I had once been accused of being a member of the Baader-Meinhof gang and that has been blown right out of*

proportion by the British and German press including some online blogs.

The reason for my emotional response is that I am a simple and poor person, living partly on disability related benefits and also because of some smear campaigns I obviously lost customers, and so do not have the money to either seek legal advise [sic] *before I make statements nor to employ a lawyer to defend a libel case, as unfortunately the legal system does not provide legal aid for defamation cases, meaning the poor are not protected against press smear attacks.*

Therefore I spend £50 out of my own benefits trying to get a High Court judge to stop a particularly nasty blog appearing on Google, visually connecting me with Baader-Meinhof and also displaying their RAF symbol. Those who think it is funny to report in this manner are seriously misguided.

I particularly object to this gutter press reporting and cyber bullying because it is simply that, sensationalist reporting, playing on the fears of the ordinary people and reporting about things, which are completely unimportant, who would possibly want to know that I had been wrongly arrested in 1975 and gotten compensation for it, here in the UK whilst it would have been very important if Der Spiegel had reported that fact besides their unrealistic reporting about me in 1975 being sold on the Internet for 30 years.

In fact I would not even object if just this simple little fact was reported without all the guerrilla paraphernalia around it, which in fact promotes it. I object to the promotion of guerrilla warfare as it is not in the interest of the people right now.

We are suffering a right-wing renaissance and any talk of guerrilla, Baader-Meinhof, Al-Qaeda only serves to fill the people with fear and to urge the governments to put in more repressive measurements to prevent, freedom of movement and freedom of speech.

I do not deny there is a class-struggle going on and there was one going on in Germany in the 60s and 70s but I would strongly suggest you read the explanation in Wickipedia [sic] *about Baader-Meinhof, which I think is a fair one, if you want to know about it.*

I consider myself a victim of cyber bullying in this matter to create a smear campaign to discredit my life and reduce it to this. I strongly object to being visually, verbally or connected in written form to Baader-Meinhof as I personally never met a single one of them and neither did the arrest warrant mention the word Baader-Meinhof, it mentioned criminal association.

Was accused of being 'near' a storage area, which contained one toy pistol and other legal items. The German justice system found it reasonable at the time to lock up ordinary citizens on flimsy suspicions such as this for 3 months in total isolation. My arrest warrant never mentioned anything about participation in a bank robbery like Der Spiegel mentions.

I want to especially express that the worst of the smear campaigns originate from a New Unison Labour blog and I am especially disappointed that a Labour and Union supporter can make such smears and misguide people by wrongly informing them as I have been a strong supporter of the recent Unison campaign for council housing.

The most prolific of smear campaigns is from Private Eye who also mentions my name; want to create a connection between Baader-Meinhof and Respect. I strongly object to this gutter press sensationalism playing on people's fears, trying to create the impression that Respect is sympathetic of guerrilla warfare by using the terminology.

The ordinary citizen has enough to cope with being in fear of Al-Qaeda attacks, which I strongly oppose, they indiscriminately kill ordinary citizens anywhere anytime and so the people are rightly in fear about them but now to put them under even more fear by creating a Baader-Meinhof smear campaign about me is totally unreasonable.

I have contacted each and every publication I know of who exploits this gutter press reporting and asked them to remove all mention of Baader-Meinhof with my name, I also have written a warning that I consider prosecution of each publication mentioning me in connection with Baader-Meinhof and I am hoping to bring legal action against those who think they can earn easy money out of misguiding ordinary citizens with their Baader-Meinhof smears.

Please note, I have never ever in my life been convicted of any crime ever. I can be a member of any left-wing political organisation as it is my democratic right to do so as a citizen.

I am a member of the GMB Union, the Respect Party, the Communist Party, I support Defend Council Housing, I support any legal people's movement, which is in the interest of the people but I totally object to the attempts to criminalise people's movements and left-wing political parties, which is really what is behind the smear campaigns of the gutter press.

Yes I am aiming to pursue those people writing rubbish about me and mislead the public for compensation and I could use that money for my political work and to compensate me for the

> *damage that has been done to my reputation by the libellous press reporting.*
>
> *I can only apologise that I was unable to far* [sic] *to take legal action but this is due to the very bad rule that there is no legal aid for defamation, which in fact opens the floodgates for rubbish press reporting, defamation and sensationalism because the press know that if they write about poor people they are very unlikely to press for action as lawyers are very expensive and some charge as much as £500 per hour.*
>
> *I tried what I could to create a counter effect to the misleading reports about me and hope to put an end to it once and for all once legal action has commenced if I find a lawyer who believes in justice and can pursue the case for me.*
>
> *Thank you for reading this, which has been written as personal information and is not meant to represent any political party.*
>
> *Johanna Kaschke [Telephone number]*
>
> Although I believe the story to be both factually accurate and within the realms of fair comment, I have decided to unpublish it as a gesture of goodwill to Ms Kaschke.
>
> Posted at 19:32, 26 May 2007"

12. What is more, Mr Osler made it clear in the course of the hearing that he would be prepared to join in any reasonable and proportionate statement reaffirming his acceptance of Ms Kaschke's innocence.

13. In another email dated 26 May 2007 Ms Kaschke wrote to Mr Osler, *inter alia*:

> "You can write Johanna had been arrested within the national hysteria whereby the state arrested everyone meeting their suspicious criteria and threw them into jail. Johanna was one of them. In her case she was accused to be a member in a criminal gang with the aim to commit terrorist offences. However her release and subsequently compensation paid to her for wrongful arrest cleared all suspicion."

It seems clear that she was troubled by the identification of the "criminal gang" as being the Baader-Meinhof group. It is thus necessary to focus on the distinction between the general and the specific, since this would appear to be the nub of her complaint.

14. It is suggested by Mr Dougans that there is nothing of substance to be gained from these proceedings by way of

giving Ms Kaschke any greater vindication of her reputation, if such was needed, than that already obtained three years ago by the publication of her response on 26 May 2007. He submits that, in all the circumstances, the case falls within the doctrine explained by the Court of Appeal in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946. It is said that there is no realistic prospect of a trial of these issues yielding any tangible or legitimate advantage, such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources, and that "the game is not worth the candle".

15. Following the right of reply, it appears that Ms Kaschke did not resurrect her complaint about Mr Osler's posting until 28 March 2008 (i.e. after a lapse of ten months). Although Ms Kaschke is not prepared to admit that she posted the *Spiegel* article, or exactly what she herself posted in relation to it on her website, the evidence of Mr Osler seems clear enough. His article derived from her posting rather than from his own independent research or some other posting.

16. Mr Dougans has summarised the overall effect of Ms Kaschke's posting, in the light of Mr Osler's recollection. I do not think that Ms Kaschke herself quarrels with the accuracy of the summary, which is to the following effect:

a) Ms Kaschke suffered prejudice because she had played a minor role in organising a benefit concert in aid of "Red Help", which provided legal assistance to left-wing radicals in Germany at that time.

b) She was arrested in Germany in July 1975 and suspected of links to left-wing extremists.

c) This was mentioned in the *Spiegel* article.

d) She was released without any finding of guilt and compensated for wrongful arrest and imprisonment.

e) Ms Kaschke was never involved in violence and did not meet any of the supposed extremists mentioned in the article.

f) She is firmly opposed to terrorism.

17. Mr Osler accepts that the *Spiegel* article does not actually mention any "link" between Ms Kaschke and the Baader-Meinhof group and also that her criminal proceedings made no mention of that group. On the other hand, from the context of German political life in the 1970s, it would be clear to most readers that the Baader-Meinhof group was one of the main sources of left-wing extremism at that time. Most people would

assume, therefore, that funds collected for the "Red Help" organisation would be likely to be directed, at least in part, to the assistance of members of that group. In other words, according to Mr Osler, it would have been implicit to any reader of the *Spiegel* article that her arrest would have been based on some suspicions linking her with that group. He suggests that there is little substance in the distinction drawn between being suspected of involvement with a "criminal gang" in the 1970s in Germany and being suspected of links to Baader-Meinhof in particular.

18. It is clear from Mr Osler's wording in the offending post that he was quite prepared to accept Ms Kaschke's denial of any wrongdoing and the fact that she had been compensated for wrongful imprisonment. I am quite satisfied that the posting does not link her to terrorism, in the sense of suggesting in any way that she was directly linked with it or that she approved of the extremist activities. He was merely choosing to highlight an unusual event in the history of someone who was at the material time active in politics in London. He was, in effect, taking her own assessment of the situation at face value. He went on, as a matter of comment, to point up the irony that she was now linking herself with another political grouping, the Respect Party, which contained members who thought (at least according to Mr Osler) that terrorism or assassination could in certain circumstances be morally justifiable.

19. The headline, taken by itself, would appear to suggest a "link" with Baader-Meinhof. But it is necessary to have in mind two matters. First, it is clear from *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 that the reasonable reader should be taken to have read beyond the headline. Secondly, Ms Kaschke is not named in the headline and no reader would understand it to refer to her unless he or she read into the article. (Moreover, the headline puts inverted commas around the word "link" and any such reader would assume it was an allegation that had originally been made by someone else. Thus it could be seen as akin to "reportage". That would not necessarily afford a defence in itself, but it is certainly a relevant factor to take into account when assessing the meaning of the offending post and the degree of gravity to be attached to it.)

20. The question arises, therefore, whether in the light of what actually appeared on Mr Osler's posting, in April 2007, and in the light of the right of reply published on 26 May 2007, there is anything to be gained from the continuation of these proceedings by way of the legitimate objectives of any defamation action, namely the vindication or restoration of the claimant's reputation. Is there anything requiring vindication?

Needless to say, that question has to be judged by reference to any marginal damage that may have been done to Ms Kaschke's reputation by Mr Osler's posting over and above the impact on it of her own posting coupled with the republication of the 1975 *Spiegel* article.

21. In *Jameel*, the Court of Appeal addressed abuse of process in the context of defamation in the following passages:

> "40. We accept that in the rare case where a claimant brings an action for defamation in circumstances where his reputation has suffered no or minimal actual damage, this may constitute an interference with freedom of expression that is not necessary for the protection of the claimant's reputation. In such circumstances the appropriate remedy for the defendant may well be to … seek to strike out the action as an abuse of process.
>
> …
>
> 54. … An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice. If Dow Jones have caused potential prejudice to the claimant by failing to raise the points now pursued at the proper time, it does not follow that the court must permit this action to continue. The court has other means of dealing with such prejudice. For instance, appropriate costs orders can compensate for legal costs unnecessarily incurred and relief can be made conditional on Dow Jones undertaking not to raise a limitation defence if proceedings are now commenced in another jurisdiction.
>
> 55. There have been two recent developments which have rendered the court more ready to entertain a submission that pursuit of a libel action is an abuse of process. The first is the introduction of the new Civil Procedure Rules. Pursuit of the overriding objective requires an approach by the court to litigation that is both more flexible and more proactive. The second is the coming into effect of the Human Rights Act 1998. Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, in so far as it is possible to do so. Keeping a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation,

> which includes compensating the claimant only if that reputation has been unlawfully damaged.
>
> …
>
> 69. If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.
>
> 70. … It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake. Normally where a small claim is brought, it will be dealt with by a proportionate small claims procedure. Such a course is not available in an action for defamation where, although the claim is small, the issues are complex and subject to special procedure under the CPR.
>
> 71. [Leading counsel for the claimant] submitted that to dismiss this claim as an abuse of process would infringe Article 6 of the Human Rights Convention. We do not consider that this article requires the provision of a fair and public hearing in relation to an alleged infringement of rights when the alleged infringement is shown not to be real or substantial. …"

22. This jurisdiction to strike out as an abuse of process, on the basis that the claimant cannot establish that a real and substantial tort has been committed, has been exercised in relatively few cases since the decision of the Court of Appeal in February 2005. Examples are, however, to be found in *Williams v MGN Ltd* [2009] EWHC 3150 (QB) and *Lonzim Plc v Sprague* [2009] EWHC 2838 (QB). In each of those cases, very different on their facts, the court applied the test of whether or not a "real and substantial tort" had been committed and also considered the question of whether any damages recovered might be so small as to be totally disproportionate to the very high costs that any libel action involves. It is an important consideration for the court to have in mind on any abuse application that the fact of being sued at all is a serious interference with freedom of expression. That may be appropriate in the majority of libel actions, where it is necessary to countenance such interference in order to vindicate the rights of another person in respect of whom a real and substantial tort has occurred. But the court must be vigilant to recognise the small minority of cases where the legitimate objective of vindication is not required or, at least, cannot be

achieved without a wholly disproportionate interference with the rights of the defendant(s).

23. Mr Dougans submits that this case falls within that small minority of cases. He says it is a case of "no or minimal actual damage" (see *Jameel* at [40]). That is primarily for the reason to which I referred earlier; namely, that the marginal impact of Mr Osler's posting, as compared with the revelations to be found on Ms Kaschke's own blog prior to 7 April 2007, would be insignificant and, therefore, likely to attract a very small award of damages (assuming all the defences fail). He prays in aid a number of considerations:

i) Mr Osler made it clear that he saw no reason to reject Ms Kaschke's protestations as to her innocence of any implication in violence or terrorist activity.

ii) Accordingly, the only possible defamatory imputation of any substance is that, at one point in the distant past, she came under suspicion by the German police in the troubled climate of the mid 1970s (albeit subsequently vindicated by the recognition of wrongful imprisonment). To that extent, and to that extent only, the defamatory imputation would, on her own admission, be true.

iii) The only new material introduced by Mr Osler would appear to be the reference to Baader-Meinhof. Most reasonable readers would know, however, of the active involvement of that group, rather loosely defined, in political extremism at the time. It is a name which would, accordingly, spring to mind purely from the context – as it seems to have done in Mr Osler's case. It has to be remembered that it is not suggested that Ms Kaschke had any direct involvement with Baader-Meinhof. The specific reference to that group, therefore, can in practical terms add virtually nothing to the suggestion that for a period she came under suspicion of involvement with extremist activities. It merely identifies one particular group within that broad category.

iv) It is true that Mr Osler added the comment that "the worst she stands accused of is youthful folly". That is not a particularly serious allegation in any event, but in context it plainly relates to the activities (whatever they were) which led her to be arrested and (albeit wrongfully) imprisoned. He refers to "many young people attracted to far left politics", which he assumes is an apt description of Ms Kaschke's standpoint at that time, but he is not even suggesting that she was "passively sympathetic to groups such as the Baader-Meinhof gang". It is a general comment about young people of the period who have become subsequently "rehabilitated".

> v) If there had been any sting in the original 7 April posting, it would surely have been drawn for practical purposes by the "right of reply" published three weeks later.
>
> 24. The reference to the possible assassination of Tony Blair is one to which Ms Kaschke seemed to attach particular importance in her submissions, but it relates to other members of the Respect Party, with which for a time Ms Kaschke became associated. It cannot be taken to suggest that she herself would have anything to do with political assassination.
>
> 25. It is necessary, therefore, to try and assess what a jury would make of the alleged injury to Ms Kaschke's reputation against the background I have described. If the jury came to the conclusion that none of the defences raised could succeed, I cannot imagine that the damages would be other than very modest. I would take the view that any such award would be out of all proportion to the time and money spent on this litigation and, in particular, to the cost of a two-week jury trial.
>
> 26. In the circumstances, I have come to the conclusion that this is indeed one of those unusual cases in which the doctrine of abuse of process, as discussed by the Court of Appeal in *Jameel*, should be applied."

Discussion

16. Eady J's critical conclusion was that even if none of Mr Osler's defences succeeded any damages awarded to Ms Kaschke would be very modest and out of all proportion to the time and money spent on the litigation and in particular to the cost of a two week jury trial. Mr Dougans invites me to reach the same conclusion in this action. Central to Eady J's conclusion in my view was his focus on the distinction between the general fact that Ms Kaschke had been suspected of being a member of criminal gang with the aim of committing terrorist offences and the specific identification of the "criminal gang" in the Osler article as being the Baader-Meinhof group. He appears to have accepted Mr Osler's submission that there is little substance in the distinction drawn between being suspected of involvement with a "criminal gang" in the 1970s in West Germany and being suspected of links to Baader-Meinhof in particular. He was quite satisfied that the posting did not link her to terrorism in the sense of suggesting in any way that she was directly linked with it or that she approved of the extremist activities. Mr Osler was in effect taking Ms Kaschke's own assessment of the situation at face value. Eady J held that the question whether in the light of what actually appeared on Mr Osler's posting and the right of reply published on 26 May 2007 quoted above there was anything to be gained from the continuation of the proceedings in the sense of whether there was anything requiring vindication had to be judged by reference to any marginal damage that might have been done to Ms Kaschke's reputation by Mr Osler's posting over and above the impact on it of her own posting coupled with the republication of the 1975 Spiegel article.

17. As Eady J recorded in paragraphs 15 and 16 of his judgment Ms Kaschke was not prepared to admit that she posted the Spiegel article or exactly what she herself posted

in relation to it on her website. However he also stated that he did not think that Ms Kaschke quarrelled with the accuracy of Mr Dougans' summary of the overall effect of her own posting in the light of Mr Osler's recollection which he then set out. His reference to Mr Osler's recollection was to a witness statement which in email correspondence after the oral hearing on this application Ms Kaschke said she received on 20 April 2010 by courier in advance of the 23 April 2010 hearing.

18. In support of their applications before me, Mr Gray and Mr Hilton relied on a number of witness statements deposing to the contents of Ms Kaschke's own blog on which Mr Osler and Mr Gray said that they based their blogs. However Ms Kaschke did not accept the accuracy of the description in those statements of the contents of her own blog and applied to cross examine the makers of the statements. Faced with the inevitable delay and further expense which that would have involved, Mr Dougans on behalf of the defendants elected to withdraw his reliance on the description in those witness statements of the contents of Ms Kaschke's blog for the purpose of these applications.

19. That left a somewhat unsatisfactory situation. Eady J appears to have based his decision in part on Mr Dougans' summary, itself based on Mr Osler's witness statement in the Osler action, of the contents of Ms Kaschke's blog. At the hearing in front of me Ms Kaschke in response to the defendant's applications for disclosure of her blog, stated that the blog no longer exists and that she does not accept the accuracy of Mr Osler's summary of its contents. Mr Dougans told me that at the hearing in front of Eady J Ms Kaschke did not challenge the accuracy of the contents of Mr Osler's witness statement in that action in which he described those contents. Ms Kaschke's submissions on this topic were somewhat confused. She accepted that she wrote in her blog that there had been an article in Der Spiegel about her about which she had complained to Der Spiegel and that the gist of her complaint to Der Spiegel to which she referred in her blog had been that the article had couched her among terrible terrorists and in Baader-Meinhof language without apologising. She also said that she mentioned in the blog that she had received compensation. Initially I understood her to accept that it was probable that she included a link to the whole of the Spiegel article in her blog but she subsequently clarified that what she had intended to say was that it was probable that she included an English language translation of the passage from the article which referred to her. She also accepted that the passages in the Osler blog in quotation marks were probably extracts from her own blog. She did not tell me that she had challenged the accuracy of Mr Osler's witness statement at the hearing in front of Eady J. In an email dated 14 July 2010 two days after the end of the hearing Ms Kaschke said that she had had no time to make a written reply to Mr Osler's witness statement in the Osler action prior to the hearing in front of Eady J on 23 April 2010 and added "I deny that I did not challenge the submissions of Mr Osler during the hearing or otherwise but the problem is that no transcript of the hearing exists. I object that only notes of the defendants or verbal assurances of the defendants are taken into account." It is not clear whether her reference to "the submissions of Mr Osler" was intended to be a reference to his description in his witness statement of the contents of her blog.

20. In principle if and to the extent that Ms Kaschke takes issue with Eady J's apparent findings in relation to the contents of her blog as set out in Mr Osler's witness statement in that action as summarised by Mr Dougans and/or with his impression

that she did not quarrel with that summary, her remedy lies in an appeal to the Court of Appeal. I was told that Eady J refused her permission to appeal against his decision and that an application for permission to the Court of Appeal is outstanding. On 15 July 2010 I was sent a copy of a decision of Laws LJ made on the 12 July 2010 refusing permission to appeal on the papers giving as his reason that he considered that Eady J was plainly right for the reasons he gave. Strictly it could be argued that it would be an abuse of process for Ms Kaschke on this application to challenge the broad accuracy of Mr Osler's description of the contents of her blog as found by Eady J in his decision in the Osler action. However precisely what was and what was not challenged by Ms Kaschke at the hearing in front of Eady J is not entirely free from doubt and in my judgment it is not necessary for me to reach a definitive conclusion on that issue.

21. The reason for that is that there is in my judgment sufficient other material emanating from Ms Kaschke to which my attention has been drawn to lead to the conclusion that there is no realistic prospect of an award of more than very modest damages in this action and that for similar reasons to those identified by Eady J it would be an abuse of process for this action to proceed to trial.

22. In her Particulars of Claim in this action Ms Kaschke asserts that she was "detained initially without a warrant. When a warrant was produced on the second day of her arrest it contained the possibility that she was seen near a depot that contained items which could be used possibly for criminal or terrorist activity."

23. In her Particulars of Claim in the Osler action Ms Kaschke asserted that:

> "The fact is for the avoidance of doubt that the claimant was arrested in 1975 under suspicion to be part of a criminal gang that could use material for terrorist activities but no proof was provided for those charges. The fact is that the claimant received damages three years later."

24. In the right of reply published by Mr Osler on 26 May 2007 quoted in Eady J's judgment Ms Kaschke wrote that: "…I had been wrongly arrested in 1975 and gotten compensation for it…neither did the arrest warrant mention the word Baader-Meinhof, it mentioned criminal association. I was accused of being 'near' a storage area, which contained one toy pistol and other legal items…I have contacted each and every publication I know of who exploits this gutter press reporting and asked them to remove all mention of Baader-Meinhof with my name…"

25. In the further email dated 26 May 2007 written by Ms Kaschke to Mr Osler also quoted by Eady J she wrote: "You can write Johanna had been arrested within the national hysteria whereby the state arrested everyone meeting their suspicious criteria and threw them into jail. Johanna was one of them. In her case she was accused to be a member in a criminal gang with the aim to commit terrorist offences. However her release and subsequently compensation paid to her for wrongful arrest cleared all suspicion."

26. On 9 August 2007 Ms Kaschke in an email to Mr Hilton wrote that she had decided to accept his offer of a right of reply on his site endorsed by him instead of asking for monetary compensation. She asked him to print the whole article. She said she was

concerned to prevent people getting the wrong idea that there was a connection between Baader-Meinhof and herself and/or the Respect party. Included in the piece which she wished him to publish on his website was the following:

> "…My brush with the law was over 30 years ago now…during the hysteria that broke out in Germany over the Baader-Meinhof activities the press tried to bunch every antifascist person into the town guerilla movement and when I was arrested in 1975 I was thrown into jail at first without as much as a warrant and then released and given compensation for wrongful arrest two years later. Incidentally the press in Germany at the time wanted to connect everyone to Baader-Meinhof who was only remotely under suspicion, a communist, unionist or socialist, lawyer etcetera…it actually took 40,000 police at the time to locate the real Baader-Meinhof terrorists but everyone moving around frequently because they had to find work or had been asked to leave by the landlord became suspicious. I didn't have a good time then like everyone undergoes good and bad times and as in Germany at the time there was still quite an atmosphere with many old fascists still being sat in local authority positions businesses and so forth I didn't have it easy to cope with the result of having organised a music concert which featured progressive American/UK style music. I had to move to find work and they threw that back into my face."

27. In 2004 on the url http://www. Whizzuk.demon.co.uk/author.htm Ms Kaschke wrote:

> "I moved around a bit, got to know people involved in the then student protests, got myself arrested under the terrorism law because Baader-Meinhof caused a lot of destruction at that time and my lifestyle was highly suspicious to German authorities, held in jail for 3 months, to be released without charge."

It is accepted by the defendants that that posting has been deleted by Ms Kaschke. It is however still accessible on an interest archive site known as the Wayback Machine. In its original form it appeared as part of what appeared to be autobiographical notes.

28. In 2010 Ms Kaschke drew attention to the 2004 posting in an article written on her new web log at the url http://j.kaschke.wordpress.com/home/i-am-about/libel-cases/wayback-machine :

> "I have recently been aware that some old web pages from my personal website have become visible on the Wayback Machine those pages were written around 2003/04 and were for a book I was planning to write. …I was arrested under a generic charge under the then Criminal Justice Act using terrorist legislation."

29. In a letter dated 1 June 2008 to Davenport Lyons, solicitors to Pressdram Limited who were then the third defendant in this action arising out of an article in Private Eye on 11 May 2007 Ms Kaschke wrote:

> "Further to my letter from 30 May 2008 I would now like to amend the contents and turn this into an official letter of claim. Unfortunately this content was not in the previous one and a lot of correspondence about ideologies has been passed between ourselves that was not even present in my mind at the time my arrest happened or all incidences occurred and your paper reported about in a libellous manner. Also unfortunately my previous representatives Employment Lawyers did not provide a full picture in their letter of claim to represent a full picture of what led to my arrest and why I got into such circumstances, which could make the German authorities suspicious of me…therefore I would like to ask you to provide a substantial reply to this letter within 21 days as I am engaging a top barrister to represent me on 8 July 2008 in regard to the case issued under claim HQ08X00922 in order to enable an out of court settlement to avoid further costs for either side. I shall also send a copy of this letter to the court…I left the job in Cologne voluntarily and got to the home of another friend when I was surrounded by police who took me into custody without any kind of warrant and then the next day they produced one. But I was so upset of being accused under the (what is now called the Terrorism Act here in the UK, then it was called suspicion being a member of a criminal gang) that I decided not to speak to the police who asked whether I wanted to answer questions. I was held in isolation and was not allowed to see a solicitor for 6 weeks and was then suddenly released without reasons or bail conditions in September… I shall compile a statement to submit to the court for the hearing on 8 July 2008 and shall provide you with a copy in good time for the hearing, this letter shall be included. So in summing up the proceedings, I could either have the content of this letter included as evidence as soon as you file eventually your defence or have it used in new proceedings against you depending on the outcome of the hearing on 8 July 2008."

30. Before addressing the issue of any link to Baader-Meinhof, it is in my view clear beyond argument that the defendants are right to submit that, in the material referred to above, Ms Kaschke has openly accepted that she was arrested by the West German police in 1975 on suspicion of involvement in a criminal terrorist gang, although later released and compensated for wrongful imprisonment. Indeed she has admitted that she was arrested on suspicion of being part of a criminal gang that could use material for terrorist activities and was not only content that this should be in the public domain but positively invited Mr Osler in response to his offer of a right of reply to write that she had been accused of being a member of a criminal gang with the aim of committing terrorist offences.

31. It is no part of the case of the defendants in this action any more than it was part of Mr Osler's case that Ms Kaschke was a member either of the Baader-Meinhof gang or of any terrorist organisation. Nor do they seek to defend this action by suggesting that there is any truth in the underlying suspicions once held by the West German

authorities against Ms Kaschke. Just as Mr Osler offered Ms Kaschke a right of reply so Mr Hilton, having received Ms Kaschke's email dated 7 August 2007 complaining that she had not received a response to a letter of complaint allegedly sent on 21 June 2007 responded in a letter dated 8 August 2007 by offering the most prominent position on his website in which to write any piece of her choice either addressing the personal points made about her in Mr Gray's blog or addressing the political opposition to her by way of offering her a right of reply. He said he was happy for her to publish it in her own name or to publish a piece in his name that adopted her copy as a quote from her. He mentioned that he had immediately removed the blog from the website having received her email the day before. Moreover just as Eady J expressed himself as being quite satisfied that the Osler posting did not link her to terrorism in the sense of suggesting in any way that she was directly linked with it or that she approved of the extremist activities, so I am quite satisfied that Mr Gray's blog did not link Ms Kaschke to terrorism in the sense of suggesting in any way that she was directly linked with it or that she approved of terrorism in general or the Baader-Meinhof group in particular. Just as the words "Baader-Meinhof" link in the heading of the Osler blog were in quotation marks so the word Baader-Meinhof in the heading "'Baader-Meinhof' losing candidate joins diss-Respect" in the Gray blog was in quotation marks. In the body of the article Ms Kaschke is described as a former Baader-Meinhof suspect who was detained for 3 months on suspicion of being involved in terrorist activities. However the article goes on to say: "Johanna is quite open about this (and other things) on her website. It would appear that she was released without charge and that she was given compensation by the German government for wrongful imprisonment."

32. At the hearing Ms Kaschke for the first time sought to exclude as covered by without prejudice privilege her email dated 9 August 2007 to Mr Hilton and her letter dated 1 June 2008 to Davenport Lyons.

33. In my judgment there is no merit in either objection. It is right that Ms Kaschke's email dated 9 August 2007 was in response to an email from Mr Hilton dated 8 August 2007 which was headed without prejudice in capital letters. That was the email to which I have referred offering her a right of reply. The email mentioned that Mr Hilton was seeking legal advice and concluded "please do let me know if you wish to take me up on this offer. …nothing in this letter should be deemed an acceptance of liability until I have received advice that this is indeed the case." On its face it is in my view at least strongly arguable that as a letter written in response to a without prejudice offer which did not itself culminate in a compromise Ms Kaschke's email dated 9 August 2007 was when it was written covered by the protection of without prejudice privilege.

34. However at the hearing Mr Dougans produced two emails to him from Ms Kaschke dated July 7 and July 8 2010. In the former she wrote: "As I am working through your folder I am getting to know the discrepancies between what you are showing to the judge and between what really happened. You are leaving out vital pieces of evidence to turn the judge in your favour and so far Mr Justice Eady was easily impressed by you. However I enclose the Right of Reply I sent to your client on 9 August 2007, which he said he lost. …All in all it cannot work in your favour that you do not attempt to give the judge a full picture but only enclose the bits that suit you. …" In the latter she wrote: "I shall also bring along the print out of the Right of Reply I

asked Mr Hilton to print on 2007." It is apparent from these two emails that it was the intention of Ms Kaschke herself to rely on her email dated 9 August 2007 in the hearing before me and in answer to a question from me she confirmed that that had indeed been her intention. In those circumstances it seems to me that Mr Dougans was right to assume when he received the emails and subsequently to submit to me when Ms Kaschke took the without prejudice point that she had plainly waived her privilege in the 9 August 2007 letter.

35. As to the letter dated 1 June 2008 to Davenport Lyons that letter was headed "Letter of claim", it described itself in terms as an official letter of claim and Ms Kaschke said that she would be sending a copy of the letter to the court. The fact that she mentioned in passing that she wanted a reply within 21 days because she was engaging a barrister on 8 July 2008 to enable an out of court settlement to avoid further costs for either side does not in my judgment render the contents of the letter without prejudice. The matter is put beyond doubt in the closing paragraph when she required the letter to be included in the bundle to be placed before the court at the hearing scheduled in front of Master Rose on 8 July 2008 and in which he said she wished the letter to be included as evidence. Moreover I was told by Mr Dougans and it was not challenged by Ms Kaschke that this letter was in the event included in the file of papers placed before Master Rose at the hearing on 8 July 2008 and as such even if, which I do not consider to be the case, the letter had initially been covered by a without prejudice privilege Ms Kaschke waived any such privilege by not objecting to its inclusion in a bundle placed before the court.

36. A third point was taken by Ms Kaschke in relation to the 2004 autobiographical notes. She submitted that this blog appeared on a website which had attracted no more than 64 visitors since its inception in 1999. This does not seem to me to assist her. The significance of the passage in that blog relied on by the defendants is that it constituted yet a further admission on her part as to the underlying facts as well as evidence that she was prepared and indeed content for that admission to enter the public domain.

37. As to the question of the significance of the link in Mr Gray's blog to the Baader-Meinhof group Eady J referred as part of the background to Mr Dougans' reference to the fact that the only new material introduced by Mr Osler as compared with the revelation to be found on Ms Kaschke's own blog would appear to be the reference to Baader-Meinhof and his submission that the specific reference to the Baader-Meinhof group could in practical terms add virtually nothing to the suggestion that for a period Ms Kaschke came under suspicion of involvement with extremist activities. It merely identified one particular group within that broad category. In my judgment that submission, which by implication in my view Eady J accepted, has mutatis mutandis equal force in this application. Ms Kaschke has shown herself content for it to be placed in the public domain that she had been accused of being a member of a criminal gang with the aim to commit terrorist offences and has admitted in her Particulars of Claim in the Osler action that she was arrested in 1975 under suspicion of being part of a criminal gang that could use material for terrorist activities. Given that in the Gray blog it was made clear that she had been released without charge and compensated for wrongful imprisonment it is in my view unrealistic to suppose that Ms Kaschke would obtain more than very modest damages by reason only of the additional mention in the Gray blog that the criminal gang intent on terrorism of

which she was accused/suspected of being a member was the Baader-Meinhof gang. In so far as there is a sting in the reference to Baader-Meinhof it lies in the notorious fact that the Baader-Meinhof group was a criminal gang that carried out terrorist offences.

38. Moreover in my view the matter goes further even than the fact that any reputational damage flowing from the difference of it being thought that Ms Kaschke was suspected of being a member of the Baader-Meinhof gang and it being thought that she was suspected of being a member of some unidentified criminal gang whose aim was committing terrorist offences is in my view likely to be viewed by a jury as marginal. Even on the basis of disregarding the evidence of the defendant's witnesses as to their recollection of what was in Ms Kaschke's April 2007 blog, it is in my view clear that there is in the other material emanating from her sufficient to enable a reader to connect the criminal gang intent on terrorism of which he has admitted she was suspected of being a member with the Baader-Meinhof gang.

39. Thus in relation to her own blog she accepts that she probably published on it the English translation of the passage from the article in Der Spiegel which referred to her. She also accepted that the gist of her article would have been her complaint that the Spiegel article wrongly implicated her to the Baader-Meinhof gang. Even allowing for the fact that I proceed on the basis that there is no evidence before me that Ms Kaschke included a direct link to or attached the full Der Spiegel article in German (which is full of references to the Baader-Meinhof gang) the English language translation of the extract relating to her which she accepts she probably did include in her blog itself refers to her having been suspected of having assisted a criminal gang while working in anarchist organisations like Red help and Black help and having been under suspicion of having planned bank robberies. There is even in that extract in my view enough to enable a reasonably well informed reader to make the Baader-Meinhof connection.

40. Moreover in her email to Mr Hilton dated 9 August 2007 the right of reply which she invited him to afford her itself made explicit reference to Baader-Meinhof. "It actually took 40,000 police at the time to locate the real Baader-Meinhof terrorists but everyone moving around frequently because they had to find work or had been asked to leave by the landlord became suspicious." Although in the previous paragraph of her proposed right of reply she made the point that the press in Germany at the time wanted to connect everyone to Baader-Meinhof who was only remotely under suspicion such as communist, unionists, socialists or lawyers, in the passage cited it seems to me that Ms Kaschke was herself implying that she had along with many other people been falsely suspected of being a member of the Baader-Meinhof group. By the same token in her 2004 blog Ms Kaschke explicitly linked her arrest under the terrorism law with the fact that Baader-Meinhof caused a lot of destruction at the time.

41. However I wish to make clear that I regard this latter point as merely reinforcing my view that it would be an abuse of process for this action to proceed. That view is not dependent on this latter point since even without what I regard as the express in two cases and implied in another links to the Baader-Meinhof group in her own blogs and email, the fundamental point is that there is in my view little substance in the distinction which Ms Kaschke seeks to draw, in opposing these applications, between being suspected of involvement with a "criminal gang" with the aim to commit

terrorist offences in the 1970s in Germany and being suspected of links to the Baader-Meinhof group in particular.

42. It is the case that in the Gray blog after the sentence: "It would appear that she was released without charge and that she was given compensation by the German government for wrongful imprisonment." Mr Gray added: "However she does give the impression that she was involved in fund-raising activities for the terrorists although this is unclear. To be fair, she is now firmly and openly against terrorism." These additional words are complained of by Ms Kaschke in the Particulars of Claim in this action as carrying an implication that she had previously not been firmly against terrorism and that she may have been involved in raising funds for terrorists. They arguably go further than the corresponding passage in the Osler blog, although it was stated in that blog that: "Ms Kaschke…denies any wrongdoing, although she admits to having organised some sort of benefit gig: 'All I ever did was organise a music concert in the University of Wurzburg Mensa. This got me sacked from my job in the University bookshop Schonigh and I also then lost my home. …If we take this account at face value – and I have no reason not to – the worst she stands accused of is youthful folly. After all many young people attracted to far left political in the 1970s were passively sympathetic to groups such as the Baader-Meinhof gang. Most have subsequently been rehabilitated.", and there is arguably in that latter passage a suggestion that her involvement in the benefit gig was some evidence of passive sympathy to groups such as the Baader-Meinhof gang.

43. I have given careful consideration to whether these additional words in the Gray blog give rise to a realistic prospect, unlike in the Osler action, of Ms Kaschke being awarded more than very modest damages. In my judgment they do not. The fact is that her case on meaning in this action is confined by Master Rose's order to the meaning that "the claimant was once suspected by the west German authorities to be a member of Baader-Meinhof, the terrorist group that carried out bombings, robberies and murder." In assessing the prospects of damages it seems to me that the relevant comparison is between the admissions emanating from Ms Kaschke on the one hand and that meaning on the other.

44. I accept Mr Dougans' submission that the various written statements of Ms Kaschke to which I have referred would be admissible in mitigation of damages. In my view the material falls within the principles explained by the Court of Appeal in *Burstein v Times Newspapers Limited* [2001] 1 WLR 579 and *Turner v Newsgroup Newspapers* [2006] 1 WLR 3469.

45. In *Burstein* May LJ held that:

> "Permitting the defendants to rely on the directly relevant background contents in the way in which I have described would not offend anything said in *Scott v Samsung* 8 QBD 491 or *Speidel v Plato Films Limited* [1961] AC 1090. The material to which I have referred as directly relevant background context was, as I have indicated, recognised in *Speidel v Plato Films Limited* as being admissible as the circumstances in which the publication came to be made. In the present case, those circumstances are not sensibly limited to the concert in memory of John Smith and the fact that the claimant's music

> was played at it. For practical purposes, every publication has a contextual background, even if the publication is substantially untrue. In addition, the evidence which *Scott v Samsung* excludes is particular evidence of general reputation, character or disposition which is not directly connected with the subject matter of the defamatory publication. It does not exclude evidence of directly relevant background context. To the extent that evidence of this kind may also be characterised as evidence of the claimant's reputation, it is admissible because it is directly relevant to the damage which he claims has been caused by the defamatory publication." (Para 42).

May LJ also cited the following dictum by Parker LJ in *Atkinson v Fitzwalter* [1987] 1 WLR 201 at 214: "A defendant is entitled to rely in mitigation of damages on any evidence which is properly before the jury and this can include evidence in support of an unsuccessful plea of justification: see the judgment of Neill LJ in *Pamplin v Express Newspapers Limited*"

46. In *Turner* Keene LJ held that counsel for the claimant was right to concede that the defendant does not have to show a causal connection between material sought to be admitted in mitigation of damage and the publication of the libel. "It was expressly stated in *Burstein's* case that there was no causal connection between anything the claimant may have said or done and the publication of the defamatory words: see para 24. The latter was in no sense provoked by the claimant's conduct. As for the limitations suggested on behalf of the claimant in the present case to the *Burstein* decision I cannot see that any of the judgments in *Burstein's* case support the proposition that the defendant must have had the directly relevant facts in mind when publishing the words complained of. It is true that May LJ does refer to "particular facts directly relevant to the context in which a defamatory publication came to be made" (see para 28) but the emphasis there seem to be more on the context than any mental process gone through by the defendant. Again it is right that Sir Christopher Slade attached importance in *Burstein's* case to the fact that the claimant had sought for himself a particular kind of reputation. That, however, was not a necessary part of the principle expanded by May LJ, endorsed by Aldous LJ and "fully" agreed to by Sir Christopher Slade at para 53. …The Court of Appeal in *Burstein's* case was concerned to avoid juries having to assess damages while wearing blinkers. If evidence is to qualify under the principle spelled out in *Burstein's* case, it has to be evidence which is so clearly relevant to the subject matter of the libel or the claimant's reputation or sensitivity in that part of his life that there would be a real risk of the jury assessing damages on a false basis if they were kept in ignorance of the facts to which the evidence relates." (Paras 54, 55, 56).

47. Moses LJ held: "The word "context" may itself be misleading. It is accepted that following *Burstein's* case facts may be admitted notwithstanding that they did not themselves cause or provoke the publication of the defamatory material; that must follow from the decision in *Burstein's* case itself. Further there is no requirement that the facts should have been known to the publisher at the time of publication; there is no logic in such a requirement to achieve that which the principle seeks to achieve, a fair measure of damages. …A claimant's life may appropriately be considered in sectors: see Lord Denning in *Speidel v Plato* 1 QB 33, 34 1A. A defendant may seek

to reduce the damages by adducing evidence which is directly relevant to a claimant's conduct or reputation in the particular sector to which the defamatory material relates for the purpose of mitigating damage." (Paras 88, 89).

48. There was some debate at the hearing whether evidence admissible on *Burstein* and *Turner* principles is confined to matters in existence at or prior to the date of publication of the defamatory statement. In my view on analysis nothing turns on that question in this case. Although some of the statements made by Ms Kaschke to which I have referred were made prior to Mr Gray's blogs and others thereafter, reliance is placed in this context on the latter statements as evidence of admissions by Ms Kaschke of the facts surrounding her arrest in 1975 and are thus relevant as evidence of facts preceding the publications. A possible exception is the article written by Ms Kaschke in 2010. To the extent that it contains an admission as to the circumstances of her arrest in 1975 in my view it falls within the same category as the other material. To the limited extent to which reliance is in addition placed on it as showing the reputation contained in her 2004 article to which she was drawing attention and by which it is to be inferred she was content to be judged it seems to me that Mr Dougans is right to submit that it would be absurd if the jury were not entitled to be aware of that fact when assessing what if any incremental damage she suffered to her reputation by the reference to Baader-Meinhof in the Gray blog. However even if I am wrong about that it does not affect the admissibility of all the other material and does not affect my overall conclusion about the obstacle which that material would present to Ms Kaschke obtaining an award of more than very modest damages.

49. In striking out Ms Kaschke's action against Mr Osler Eady J emphasised that: "It is an important consideration for the court to have in mind on any abuse application that the fact of being sued at all is a serious interference with freedom of expression. That may be appropriate in the majority of libel actions, where it is necessary to countenance such interference in order to vindicate the rights of another person in respect of whom a real and substantial tort has occurred. But the court must be vigilant to recognise the small minority of cases where the legitimate objective of vindication is not required or, at least, cannot be achieved without a wholly disproportionate interference with the rights of the defendant." (Para 22). He held that the Osler action was such a case and that any award of very modest damages would be out of all proportion to the time and money spent on the litigation in that action and, in particular, to the cost of a two-week jury trial. I respectfully agree with Eady J's general observation and conclude as he did in that case that I cannot imagine that Ms Kaschke would receive anything other than very modest damages in this action even if she succeeded on liability and that any such award would be out of all proportion to the time and money spent on this litigation and in particular to the cost of a trial. Although I was given no trial estimate there is no reason to believe that it would be materially less than the two weeks referred to by Eady J in the Osler action.

50. In addition to all the matters to which I have referred and which on their own in my opinion justify the conclusion which I have reached, I would also draw attention to the context of the publication of the Gray blog on Mr Hilton's website. As referred to in my judgment on the previous unsuccessful application to strike out Ms Kaschke's claim against Mr Hilton in this action there was no pleaded allegation that there was any publication of the blog to any person between 21 June 2007 and 7 August 2007 when Mr Hilton accepted that he read a copy of Ms Kaschke's original letter of

complaint dated 21 June 2007 whereupon he immediately removed the blog from the website (it being his case, although not accepted by Ms Kaschke, that the letter of complaint sent in June 2007 was never received by him because it was sent to an office where he was not working or residing. Moreover as already mentioned the next day on 8 August 2007 he immediately offered a right of reply in the most prominent position on the website). Nor was there any evidence adduced in response to that application to strike out of there ever having been any such publication between those dates. To the contrary Mr Hilton's evidence was that the link to the blog in the Recent Blogs section of the homepage of his website would have disappeared after approximately five days thus removing the homepage as a means by which anyone visiting the website would have been aware of the existence of the Gray Blog. As to publication between 9 April 2007 and 21 June 2007 there was evidence that as at 10 June 2007 five comments had been made in respect of the blog all of which were posted on 9 or 10 April 2007. While this does not exclude the possibility of the blog having been read by more than the four persons who posted those comments, there is no reason to believe that the offending words came to the attention of more than a very limited number of people. I repeat however that while this fortifies me in the conclusion which I have reached my conclusion is not dependent on it.

51. For these reasons in my view the claims should be struck out in accordance with the principle spelled out in *Jameel* and applied in *Williams v MGN*, *Lonzim Plc v Sprague* and the Osler action.

The effect of Ms Kaschke's action against Mr Osler having been struck out

52. Mr Dougans advanced two submissions on this aspect of the applications as additional grounds for striking out the action. First the fact that Mr Osler and others have been free since Ms Kaschke's action against him was struck out by Eady J to repeat the words complained of in his blog which are essentially identical to the pleaded meaning to which Ms Kaschke is restricted in this action is itself a reason for striking out the action in this case. The reputation to which Ms Kaschke is entitled and against which any damages recoverable from these defendants would fall to be assessed must be considered in the light of the freedom of Mr Osler and others to republish the opening words of the Osler blog. Second he submitted that the very fact that allegations similar to those made in this action have been struck out in the Osler action render the claim in this action an abuse of process.

53. For both submissions Mr Dougans relied on the decision of Eady J in *Schellenberg*. In that case the claimant had brought claims against the Guardian and the Sunday Times in respect of publication of articles in those newspapers which he had settled in circumstances which amounted to an admission of defeat. The allegations in those actions arose out of Mr Schellenberg's stewardship of the Scottish Island of Egg and the issue of how Mr Schellenberg treated a Mr and Mrs Carr was described by Eady J as fairly and squarely in play in his action against those newspapers. After his action against the newspapers was settled Mr Schellenberg sought to continue with an action brought against the BBC in respect of a claim arising out of his treatment of the Carrs. Eady J struck out the action. It is necessary for the purpose of considering Mr Dougans' two applications to identify the basis on which he did so.

54. Eady J held:

"I have seen nothing to suggest that the CPR are to be applied any less rigorously, or that judges are to be less interventionist, in litigation of the kind where there is a right to trial by jury. That important right is sometimes described as a 'constitutional right' although the meaning of that emotive phrase is a little hazy. Nevertheless I see no reason why such cases require to be subjected to a different pre-trial regime. It is necessary to apply the overriding objective even in those categories of litigation and in particular to have regard to proportionality. Here there are tens of thousands of pounds of costs at stake and several weeks of court time. I must therefore have regard to the possible benefits that might accrue to the claimant as rendering such a significant expenditure potentially worthwhile.

It is in this context that, it seems to me, Mr Stadlen's submissions come into play about the damage done to the claimant by the outcome of the previous litigation and the adverse publicity following in its wake. Mr Milmo is quite right of course in saying that a defendant cannot pray in aid damage done to reputation after the date of publication for the purposes of mitigating damages; see Gatley on Libel and Slander (9th ed.), at paragraphs 33.31 and 33.33 . For present purposes, on the other hand, those principles are beside the point. I am here taking those matters into account not in the context of damages but for the purposes of applying at a pre-trial stage the overriding objective at Part 1 of the C.P.R. I am therefore not only entitled, but indeed bound, to ask whether, in the old colloquial phrase, the game is worth the candle.

Mr Stadlen has emphasised several times the particular objectives that libel actions are intended to achieve, including the restoration of reputation or character and, where an injunction is sought, the prevention of similar allegations in the future. Here, he submits, it would be wholly unrealistic to ignore what happened following the collapse of the Guardian action. The Guardian and other newspapers have been free since this time to repeat the allegations originally complained of and they have apparently taken full advantage of it. I need not refer to the articles which have been put in evidence; it is the principle that matters. Moreover, the earlier case was abandoned even though the claimants' meanings put upon the words complained of could only be described as seriously defamatory … Those meanings are, as will be apparent from a comparison, very close to the one complained of in this action.

Against that background, the pursuit of the present action in the hope of salvaging something from the disastrous outcome of the previous action can only, in my judgment, be characterised as a desperate exercise in damage limitation. It represents one last throw of the dice. In all the circumstances I am afraid I cannot accept that there is any realistic prospect of a trial yielding any tangible or legitimate advantage such as to

outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources.

I should say a few words about the separate very closely related subject of abuse of process I indicated I have been referred by the parties to the recent decision of the Court of Appeal in *Bradford & Bingley Building Society v Seddon* [1999] 1 WLR 1482. I can cite certain helpful passages from the judgment of Auld LJ in that case. He said at an early stage: "The broad question is whether the second claim falls foul of the well established principle in *Henderson v Henderson* [1843] 3 Hare 100 that a party should, save in special circumstances, not bring forward his whole case in one go and not subsequently seek to reopen the same subject matter by reference to claims against different persons and/or in respect of different issues…"Auld LJ continued: 'In my judgment it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the court's subsequent application of the above dictum. The former in its cause of action estoppel form, is an absolute bar to re-litigation, and in its issue estoppel form save in the 'special cases' or 'special circumstances': see *Thoday v Thoday* [1964] P191 CA per Diplock LJ at 197G to 198G and *Arnold v Natwest Bank Plc* [1991] 2 AC 93 HL. The latter which may arise where there is no cause of action or issue estoppel is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter.' He continued a little later: 'Thus, abuse of process may arise where there has been no earlier decision capable of amounting to res judicata either or both because the parties or the issues are different for example where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings, or where there is such an inconsistency between the two that it would be unjust to permit the later proceedings to continue. The first of these examples is an adaptation of Sir James Wigram V-C's inclusion in the principle of res judicata of a requirement that a party should be bound by what he and the court has not done before as well as what they have done.'

I bear in mind also what was said by Sir David Cairns in *Brag v Oceanus Mutual* [1982] 2 Lloyd's rep 132 at 138 to 139: "I consider that it is for him who contends that the retrial of the issue is an abuse of process to show some special reason why it is so. Since the cases in which the retrial of an issue (in the absence of an estoppel) has been disallowed as an abuse of process are so few in number it would be dangerous to attempt to define fully what are the circumstances which should lead to

a finding of an abuse of process. Features tending that way clearly include the fact that the first trial was before the most appropriate tribunal or between the most appropriate parties for the determination of the issue or that the purpose of the attempt to have it retried is not the genuine purpose of obtaining the relief sought in the second action, but some collateral purpose. It would in my judgment be a most exceptional course to strike out the whole or part of a defence in a commercial action or to refuse leave to amend defence in such an action simply because the issue raised or sought to be raised had been decided in another commercial action brought against the same defendant by a different plaintiff. The facts that the first action had been fairly conducted and that the issue had been the subject of lengthy evidence and argument could not, in my view, be sufficient in themselves to deprive the defendant of his normal right to raise any issue which he is not estopped from raising…"

Of course what is a special reason may change with time. What would not count as a special reason in 1982 might be counted special in the modern era of the Civil Procedure Rules. The court may now limit issue in accordance with the overriding objective, for example. Mr Stadlen submits that I should not look at the earlier proceedings and the outcome in too technical a fashion. He says that although there was no determination the situation is now to all intents and purposes as though there had been. Mr Schellenberg was doing no more than graciously conceding defeat and saving everyone time and money. In paragraph 9 of his witness statement he recognised in effect that he was likely to lose on the plea of justification and fair comment given the judge's various interventions but particularly that of May 14 which I have already read. It is necessary to look at the claimants own meaning (d) in the *Times* action which I also read relating to the Carrs. As I have indicated it seems to me to be clear that that is one which Mr Schellenberg abandoned when he settled the proceedings, effectively against both the Guardian and the Times. That is the reality of the situation. The principle is that all disputes should be brought into one piece of litigation in so far as they can and not left to be dealt with piecemeal in serial court hearings. Of course the publication on the radio was different from the articles published in the newspapers. But the issue of how Mr Schellenberg treated the Carrs was fairly and squarely in play in the *Guardian* and *Times* action by virtue of the pleaded case. **It could have been resolved in the practical sense, a resolution of that issue would to all intents and purposes have resolved the corresponding issue in this action. That never happened because Mr Schellenberg chose to terminate the trial shortly before verdict**…

> I agree with Mr Stadlen that in those circumstances the public policy considerations underlying such cases as *Henderson v Henderson* and *Greenhalgh v Mallard* [1947] 2 All ER 255 are entirely apposite. In the words of Somervell LJ in the latter at 257: 'Res judicata for this purpose is not confined to the issues which the court is actually asked to decide but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceedings to be started in respect of them. I could also refer to some other illuminating passages in the judgment of Auld LJ in the *Bradford & Bingley* case but I think that would be superfluous. …In the result…I will acceded to the BBC application. I will strike out the pleading and dismiss the action." (Pages 318-321). (Emphasis added).

55. It is in my view clear that there were two separate reasons for Eady J's decision to strike out Mr Schellenberg's pleading and dismiss the action. The first was his conclusion that there was no realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and for the wider public in terms of court resources. The second was his conclusion that since the subject matter of the claim against the BBC could have been resolved in the context of the *Guardian* case and since Mr Schellenberg in settling the *Guardian* action had effectively abandoned the subject matter of his libel action against the BBC it would be an abuse to allow a new proceeding to be started in respect of it.

56. That these were the two grounds unpinning Eady J's decision was also the view expressed by Gray J in *Pedder v Newsgroup Newspapers Limited* [2003] EWHC 2442 (QB), [2004] EMLR 19 at paragraph 26. Both aspects were also emphasised by Lord Phillips of Worth Matravers MR (as he then was) in *Jameel*:

> "In *Schellenberg v British Broadcasting Corpn* [2000] EMLR 296 the claimant had settled defamation actions against the "Guardian" and the "Sunday Times" on disadvantageous terms, when it seemed likely that he was about to lose. He then pressed on with this almost identical action against the BBC. Eady J struck this out as an abuse of process. He rejected the submission that he should not do so as this would deprive the claimant of his "constitutional right" to trial by jury. He said, at p 318:
>
>> "I see no reason why such cases require to be subjected to a different pre-trial regime. It is necessary to apply the overriding objective even in those categories of litigation and in particular to have regard to proportionality. Here there are tens of thousands of pounds of costs at stake and several weeks of court time. I must therefore have regard to the possible benefits that might accrue to the claimant as rendering such a significant expenditure potentially worthwhile."

> He added that the overriding objective's requirement for proportionality meant that he was bound to ask whether "the game is worth the candle". He concluded at p 319:
>
> > "I am afraid I cannot accept that there is any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources.""

57. In relation to Eady J's first reason, a close analysis of that part of his judgment shows in my view that in reaching his conclusion that there was no realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and for the wider public in terms of court resources, one of the factors on which he relied (but not the only one) was the fact that the Guardian and other newspapers had been free since the settlement of the Guardian action to repeat the allegation originally complained of in circumstances where the meaning put upon the words complained of by Mr Schellenberg were very close to the one complained of in the BBC action. Notwithstanding the principle that a defendant cannot pray in aid damage to reputation caused after the date of publication for the purposes of mitigating damages, Eady J plainly took into account in concluding that the game was not worth the candle the consequences flowing from the freedom of the newspapers to republish the words complained of in the earlier action.

58. In my view a similar approach is appropriate in this case. The fact that Mr Osler and others are free without legal redress on the part of Ms Kaschke to repeat the contents of the Osler blog is not in my view a freestanding or determinative ground for dismissing this action. It is however in my view a matter fairly and properly to be weighed in the balance in considering whether, as Eady J found both in the Schellenberg action and in the Osler action, the advantages to the claimant in the event of success did not justify the disadvantages to the parties in terms of expense and to the public in terms of resources. I have already found that even without this additional factor the balance lies strongly in favour of striking out the action. In my judgment the significance of this additional factor is that it tips the scales even more strongly in favour of the conclusion that the game is not worth the candle. Of course in *Schellenberg* the freedom of the papers to repeat the original words complained of in the action against the Guardian and the Sunday Times was not the only factor which led Eady J to conclude that the game was not worth the candle. There were other factors which are not present on this application, such as the finding that pursuing the BBC action was a desperate exercise in damage limitation and the fact that the Guardian and other newspapers had taken full advantage of this freedom to repeat the allegations originally complained of thereby generating it is to be inferred considerable publicity for them. But so in this case are there other factors, not present in Schellenberg, to which I have already referred which militate very strongly against an award of other than very modest damages.

59. In relation to Eady J's second ground for striking out Mr Schellenberg's action, it seems to me that there are material distinctions between that case and this. It is clear that central to his decision on abuse of process was his conclusion that it was an abuse for Mr Schellenberg to seek to litigate in the BBC action an issue which could and would have been resolved in the Guardian action but for his deliberate decision to abandon that action. There is no parallel consideration in this case. Second the

practical effect of Mr Schellenberg's abandonment of the Guardian action was his tacit admission that his claim in that action was likely to fail and that the defence of justification was likely to succeed. There was thus a necessary inconsistency between the positions he had adopted in the Guardian action and was seeking to adopt in the BBC action. Again there is no parallel. Eady J did not strike out the Osler action because it was bound to fail or because Mr Osler's defences on liability were bound to succeed. Rather he did so because in his view the damages which Ms Kaschke was likely to recover if she succeeded would not be other than very modest.

60. The question arises whether there is a necessary inconsistency between Eady J's view as to the balance between likely damages and the countervailing disadvantages of a trial in the Osler action and Ms Kaschke's desire to proceed to trial in this action. I have of course independently found that there is a similar imbalance on the facts as I have found them in this action. However there is not a direct overlap between the matters which led Eady J to reach his conclusion and those which have led me to reach mine. In particular he relied on the account in Mr Osler's witness statement in that action of the contents of Ms Kaschke's April 2007 blog and the Spiegel article. I have relied among other things on a series of admissions made by Ms Kaschke not referred to by Eady J. I bear in mind that abuse of process as explained by Auld LJ in *Bradford & Bingley* is a more elusive and elastic principle than res judicata and issue estoppel, the burden in the former being on the claimant to establish the abuse and there being a requirement in the ordinary case of some additional element beyond that of potentially inconsistent findings. Mr Dougans submits that the additional element is provided in this case by the fact that Ms Kaschke is by her own admission impecunious, the fact that Mr Hilton has already incurred substantial legal costs which can only increase should the action proceed to trial and the fact that in *Pedder* Gray J accepted that an additional element in an abuse of process case could include the ability of the claimant to pursue a claim at no risk in costs, the exposure of the defendant win or lose to a costs burden and the consequent "chilling effect" upon the defendant's freedom of expression (para 41).

61. In *Pedder* Gray J held that those three circumstances combined to give rise to a real unfairness to the defendants if the action were to proceed. Ms Kaschke submitted that it would be wrong, all other things being equal, to penalise a claimant by reason of impecuniosity. All litigants should have equal access to legal redress. In principle is seems to me that there is force in that submission. However it seems to me a matter which is capable of being taken into account and given weight if it has the effect of exposing defendants to costs which are in practice likely to be irrecoverable even if they succeed where a claim similar to that sought to be advanced has already been abandoned or failed in an action against different defendants.

62. In my view each case needs to be considered on its merits against its own particular background circumstances. In this case the abuse alleged is not that of pursuing a claim which has failed on its merits or been abandoned in another action. It is pursuing a claim alleged to be similar to one which has been struck out on the ground that even if it did succeed the likely damages would not justify the expense involved in pursuing the claim to trial. Ms Kaschke did not abandon the Osler action and in theory might have succeeded had it not been struck out. Nor would it in my view be fair to describe her pursuit of this action as being done in the hope of salvaging something from the disastrous outcome of the previous action such as to be

characterised as a desperate exercise in damage limitation and one last throw of the dice as was found by Eady J in the Schellenberg action. Ms Kaschke entertains a genuine sense of grievance at having been incorrectly linked to the Baader-Meinhof gang in the sense of it having been stated that she was arrested on suspicion of being a member of it. Both Eady J and I have found that in circumstances where in each case it was made clear in the relevant article that she was not convicted and received compensation for wrongful imprisonment and where in each case the defendant(s) openly acknowledge that they were not suggesting that there was any underlying truth in the conduct of which she was suspected and where she has herself admitted that she was arrested on suspicion of membership of a criminal gang with terrorist aims she is unlikely to recover more than very modest damages. Given that I have held that the claim in this action should be struck out because in effect the game is not worth the candle, it does not seem to me to add anything to hold that the action is in addition an abuse of process on the separate ground that Eady J has reached a similar conclusion in the Osler action.