Neutral Citation Number: [2010] EWHC 2726 (QB)

Case No: HQ08X04988

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2010

**Before** :

**THE HONOURABLE MR JUSTICE TUGENDHAT**

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**Between :**

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| **(1) Mark McLaughlin (2) Greg Martin (3) Alan John (Jim) Davies** | **Claimants** |
| **- and -** | |
| **(1) London Borough of Lambeth (2) Mohammed Khan** | **Defendants** |

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**Justin Rushbrooke** (instructed by **Carter-Ruck**) for the **Claimants**
**Andrew Caldecott QC & Timothy Atkinson** (instructed by **Kennedys**) for the **Defendants**

Hearing dates: 19, 20, 21 October 2010

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# Judgment

**Mr Justice Tugendhat:**

1. The First Defendant is a local authority. It has various statutory responsibilities in respect of schools. The Second Defendant is the Chief Internal Auditor, Internal Audit and Corporate Fraud Division of the Finance and Resources Department of the First Defendant. In their Particulars of Claim the Claimants plead that at all material times he was acting for and on behalf of the First Defendant, which is accordingly vicariously liable for his acts complained of in this action.

2. The Claimants describe themselves in the Particulars of Claim as follows. The First Claimant is and has been since 1 January 2008 the Head Teacher of the Durand Primary School ("the School" or "Durand"). He has been a Governor of the School since about 1996. The Second Claimant is the Director for Education Development at the School. He was the Head Teacher from 1986 until 31 August 2007, when the First Claimant became acting Head Teacher until his appointment as Head Teacher. The Third Claimant is and has been for thirteen years the Chairman of the Governors of the School.

3. The School was until 1st September 2010 a Foundation Primary School based in Stockwell, London SW9. That is within the London Borough of Lambeth. It was until 1st September 2010 maintained by the First Defendant pursuant to its statutory

obligations. The School is now an Academy. That means that it is no longer maintained by the First Defendant, but by central government.

4. The Defendants' application before me is for an order striking out the claimants' claim commenced by claim form issued on 15 December 2008. It is said that the proceedings are an abuse of the process of the Court. The claims are for libel, and under the Human Rights Act ("HRA"). The application is solely under CPR 3.4(2)(b). There is no application under CPR 3.4(2)(a). CPR 3.4(2) reads:

> "The court may strike out a statement of case if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings..."

THE LIBEL CLAIMS

5. There are three acts complained of in this action, each being the alleged publication of a libel. On 19 December 2007 the Second Defendant sent to Lucy Reynolds of the School Funding Unit at the Department of Children Schools and Families ("DCSF") an email with an attachment. Ms Reynolds is a Civil Servant in the Department for Education. The attachment has been referred to as the Briefing Paper.

6. The second publication complained of is an email dated 3 January 2008 sent by the Second Defendant to the First Claimant. This email was published to Kate Hoey MP and to five employees of the First Defendant: Nilesh Jethwa, Verdal McGowan, Phyllis Dunipace, Chris Ashton and Mark Hynes.

7. The third publication complained of is an email dated 15 January 2008 sent by the Second Defendant to Ms Reynolds.

THE HUMAN RIGHTS ACT CLAIM

8. The HRA s.6 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. It is not in dispute that reputation is a right within Art 8 of the Convention (respect for private life). Under HRA s.8 the court may grant such relief or remedy within its powers as it considers just and appropriate. Damages may be awarded if the court is satisfied that an award is necessary to afford just satisfaction to the person in whose favour it is made. This claim is commendably brief and is as follows:

> "16. Further or alternatively by reason of the matters aforesaid, the First Defendant is in breach of the Claimants' rights under Article 8 of the European Convention of Human Rights (ECHR), in particular the right to reputation embraced by Article 8.
>
> Particulars

16.1 The First Defendant is a public authority within the meaning of the Human Rights Act 1998 and the ECHR;

16.2 By publishing and/or causing or permitting to be published and/or failing to withdraw the allegations complained of, which allegations are false, the First Defendant has acted and is acting incompatibly with the Claimants' rights under Article 8, contrary to Section 6 of the 1998 Act.

17. The Claimants are entitled to and will seek at trial

17.1 A declaration of falsity pursuant to Section 8 (1) of the 1998 Act in relation to the said allegations; and/or

17.2 Substantial damages pursuant to Section 8 (1) of the said Act. For the avoidance of doubt the Claimants will contend that in all the circumstances, which include the facts and matters set out under paragraph 15 above, which demonstrated a wilful and flagrant disregard for the Claimants' rights an award of such damages [as are] necessary to afford just satisfaction to the Claimants".

THE APPLICATIONS TO STRIKE OUT

9. The grounds for the application to strike out are set out in the Application Notice dated 10 September 2010. Referring to the claim the grounds are:

"(a) Its effect and, it is to be inferred, its purpose is to circumvent the rule in *Derbyshire v Times Newspapers Limited* [[1993] AC 534 (*"Derbyshire")*] which prevents the Governing Body of Durand School, as a governmental body, from suing for libel; and/or

(b) its effect and, it is to be inferred, its purpose is to circumvent the rule which prevents the Governing Body of Durand School, as a public authority and hence a body without Article 8 ECHR rights, from suing for breach of such rights; and /or

(c) it has been brought not for the dominant purpose of vindicating the Claimants' individual reputations but rather for the dominant collateral purpose of putting pressure on the Defendants as a tactical ploy to assist Durand in its long-

> running dispute with the First Defendant concerning the First Defendant's carrying out of its statutory functions in regard to Durand [*Goldsmith v Sperrings* [1977] 1 WLR 478; *Lloyds Bank v Rogers* CA unreported 20 December 1996]; and/or
>
> (d) it does not on its particular facts justify the expenditure of the Court time and costs which it entails [*Jameel v Dow Jones* [2005] QB 946].

10. The Defendants also made an application by the same Notice for summary judgment pursuant to CPR 24. The grounds for this application were that on the evidence the Claimants had no real prospect of succeeding on the claim and there is no other compelling reason why the case should be disposed of at trial. This alternative application has not been pursued.

11. Applications to strike out a claim as an abuse of the process of the court pursuant to CPR 3.4 (2)(b) are normally advanced on the pleadings. There is normally either no supporting evidence, or very little supporting evidence. Applications under CPR 24, on the other hand, are commonly supported by evidence. For the Defendants there have been submitted witness statements from each of the publishees of the three emails complained of other than Kate Hoey MP. These and the exhibits to them, consist of over three hundred pages. They are primarily directed to demonstrating that the publications complained of had no effect on the estimation in which the publishees held the Claimants.

12. For the Claimants there is evidence consisting of witness statements from each of the three of them. These are primarily directed to explaining that they are not circumventing or attempting to circumvent the rule in *Derbyshire* and are suing to vindicate their own individual reputations. These statements and their exhibits cover over three hundred pages. There is some duplication in the exhibits of the parties.

13. The Claimants have been available for cross-examination but Mr Caldecott has asked the court to proceed on the basis of the documents alone.

THE MEANINGS COMPLAINED OF

14. There is no application before me to determine the meaning of the words complained of. It is accepted on behalf of the Defendants that the Particulars of Claim disclose a cause of action. It is not therefore necessary to set out the lengthy words complained of. The meaning pleaded in respect of the email of 19 December 2007 is as follows:

> "7. In their natural and ordinary and/or inferential meaning and in the context in which they were published, which context included defamatory complaints about Durand already sent to the DCSF and passed to Ms Reynolds by one Jeff Newall, the email of 19 December 2007 and the briefing paper attached thereto meant and were meant to understood to mean:
>
> 7.1 That there are a number of serious concerns regarding the running of Durand School which previous investigations have failed to put right and for which the Claimants as Head

> Teachers and Chairman of the Governors respectively are culpably responsible, in particular:
>
> (a) failing to implement proper training standards or provide proper support for newly qualified Teachers ["NQTs"] who start their careers at Durand,
>
> (b) unreasonably dismissing able teachers before completion of their induction year simply because they do not fit into the way the school works,
>
> (c) giving a false and/or misleading explanation to Lambeth Council, the body responsible for NQT Induction for the unacceptably high number of NQTs who leave before the completion of their induction,
>
> (d) wilfully breaching the school's obligations under employment law towards teaching staff, in that contracts of employment are not given to NQTs
>
> (e) failing to comply with the Lambeth Borough Council issued following an audit in 2003 of the school's finances carried out by the Chief Internal Auditor that the governors and head teacher adhere to proper financial controls in the running of the schools and in particular that the governing body ensure complete and transparent separation of duties and activities between the school and its commercial partners. This has resulted in justifiable concern on the part of the local authority that there remains a lack of transparency in the arrangements between the school and the third party management company, G M G, and that the Second Claimant is being allowed to benefit improperly and/or unfairly from these arrangements to the detriment of the school.
>
> 7.2 That these concerns are so serious and so pressing that they warrant the involvement of the Department of Children Schools and Families in helping the local authority to resolve them".

15. The meaning in respect of the email dated 3 January 2008 is pleaded more briefly. In two respects the meaning pleaded summarises the rather longer pleaded meaning in respect of the earlier email. In brief it is said that the words complained of meant that the Claimants were culpably responsible for failure to provide properly for NQTs, and secondly for failing to ensure a transparent relationship between the school and the Second Claimant's company GMG Educational Support (UK) Ltd ("GMG"). There is in relation to this email a third matter. It is said that the Claimants are culpably responsible for retaining an external consultant who is in a position of conflict of interests. This third point has not figured largely in the argument before me. Only in respect of this email it is pleaded that it meant that:

> "Unless and until these concerns are resolved the school is properly to be regarded as disreputable, suffering from poor

> governance and unfit to be granted FMSiS accreditation" and that the Claimants are culpably responsible for that.

16. The meaning pleaded in respect of the email dated 15 January 2008 is in substance similar to the meaning complained of in respect of the email dated 19 December 2007.

17. Thus the two main meanings complained of can be summarised as being that the Claimants are personally responsible for the mistreatment of and failure to give proper provision to NQTs, and for arrangements between the school and GMG whereby the Second Claimant is allowed to benefit improperly and/or unfairly to the detriment of the school.

THE SERIOUSNESS OF THE PUBLICATIONS COMPLAINED OF

18. The seriousness of a publication complained of depends on a number of factors. One is the meaning. Another is the extent of publication, that is, the number of persons to whom the publication has been communicated. Another is the risk of republications. Another is the injury to the feelings of a claimant.

19. In support of the third and fourth grounds on which the application to strike out is based the Defendants stress that the first and third emails were published only to one publishee, Ms Reynolds, who is a civil servant. In relation to the second email, they stress that five of the publishees were officials of the First Defendant Local Authority, and that the sixth is a Member of Parliament.

20. The Defendants also attach importance to a plea of aggravated damages and to the correspondence. Much of the hearing was spent in a prolonged examination of the correspondence. A Claimant is never obliged to make a claim for aggravated damages, but if he chooses to do so, the rules require that he should plead his grounds for claiming them: CPR 16.4 (1)(d), Practice Direction 53 para 2.10 (2).

21. The plea of aggravated damages in this case includes the following:

> "15.1 The Defendants (through the second Defendant) knew that there was no basis for making the allegations he was making. In particular, he knew that there was no basis for alleging that (a) the Claimants were failing in their duties to train or support NQTs, (b) that there were outstanding issues in relation to the financial arrangements to the school, its management company and the Second Claimant. As regards the latter allegations, the Second Defendant had personally instigated and audited the school as long ago as 2003 and all the issues raised in connection with it had been addressed to the satisfaction of the Nominated Financial Representative appointed by the defendants themselves in order to carry out the audit (as expressly stated in the latter's final report on the subject).
>
> 15.2 The Second Defendant's conduct in making the allegations complained of was not carried out *bona fide* or for

> any legitimate purpose connected with the DCSF's request for advice, but was by way of continuation of a campaign which has been waged for years against Durand School by the First Defendant and its employees, in particular the Second Defendant; Phyllis Dunipace, Executive Director of Education (later Director for Children and Young People); Kevin Ronan, Recruitment and Retention Manager; and Mark Hynes Director of Legal and Democratic Services.
>
> 15.3 In particular the Second Defendant had recently attempted to use his false claims that there were outstanding issues that required resolution with the school as a pretext to block the granting of Financial Management in Schools (FMSiS) accreditation to Durand, notwithstanding that they had no proper relevance to the process of granting such accreditation and that the Second Defendant had no basis for intervening in this process. The lack of substance in the various objections raised by the Defendants is evidenced by the changing nature of the objections put forward, and by the fact that the First Defendant has finally (albeit belatedly) had to agree to recommend such accreditation."

22. A request by the Defendants for Further Information for the plea of aggravated damages produced a response covering over twenty five pages of particulars. For the Defendants it is stressed, that on analysis (which is carried out in their skeleton argument) it can be seen that most of the paragraphs contain either no reference to the Second Defendant or little reference to him, but the thrust of the matters set out refer to Ms Dunipace and Mr Ronan, neither of whom are defendants in this action.

THE DEFENCE AND SUBSEQUENT STEPS IN THE ACTION

23. The contents of a defence are not normally relevant to an application to strike out a claim. In this case the Defence pleads both abuse of process and inordinate delay in the pursuit of the claim. It also contains, in respect of each of the publications complained of, a defence of qualified privilege and a defence of justification or truth. The Defence was served on 26 March 2010. Although the claim form had been issued on 20 December 2008, it was not served until 8 April 2009, with the Particulars of Claim.

24. It is also to be noted that in para 4 of the Particulars of Claim the Claimants include, over some ten lines, what they say are the achievements of the School under their leadership. It has grown in number, and in the success of its pupils and has been classed as Outstanding by Ofsted. In the Defence, the defendants do not dispute that, but they include some ten lines to the effect that the achievements of the school are by no means unique among schools in Lambeth. The Defendants plead that 30% of Lambeth schools have been judged outstanding by Ofsted and that other schools in Lambeth have achieved results as good as or better than Durand. It was unnecessary to plead that in the Defence, since it is irrelevant to any cause of action or defence. This part of the pleading has given rise to a request by the Claimants for Further Information dated 3 September 2010 (also unnecessary). That request invites

provision of very extensive information about all the other schools in Lambeth referred to in the Defence.

25. No Reply has been served. A Reply should have been served in accordance with para 2.8 of Practice Direction 53. It is this failure which the Defendants say is a delay in proceeding with the action.

26. Mr Rushbrooke explains the delay in serving the Reply as being in part due to the fact that no answer has been given to the request for Further Information of the Defence.

27. Mr Rushbrooke submits that the plea of aggravated damages contained matter that would subsequently be relied on in support of the plea of malice, ultimately to be put in the Reply. Thus the absence of a Reply at this stage is of little significance.

THE CLAIM FOR AN INJUNCTION

28. In paragraph 18 of the Particulars of Claim there is the following pleading in support of a claim for an injunction:

> "Unless restrained by this Honourable Court, the Defendants will further publish or cause or permit to be published the words complained of or similar defamatory words of and concerning the Claimants or one or other of them".

29. There are no particulars to this paragraph. It is in a form which is to be found in very many claims in libel. However, in his submissions Mr Rushbrooke argued that the contents of para 15.2 and 15.3 of the Particulars of Claim were relevant to the claim for an injunction, as well as to aggravated damages and malice.

THE DERBYSHIRE PRINCIPLE

30. In the Defence it is admitted that the First Defendant is a public authority but it is pleaded that the claim is an abuse of process and (in respect of the HRA claim) discloses no reasonable cause of action. That is the point on which the application to strike out is made before me.

31. In *Derbyshire* the House of Lords decided that a local authority does not have the right to maintain an action of damages for defamation: page 550E. The argument for the Defendants is, in summary, along the following lines. The reasons which led the House of Lords to that conclusion in relation to a local authority are equally applicable to a school funded or maintained by a local authority or by central government. The words complained of in the present case relate to the activities of the school, and referred to the Claimants only in so far as they carried on the day to day management of the School's affairs. Therefore the principle established in *Derbyshire* must also mean that the Claimants do not have the right to maintain an action for damages for defamation.

32. There is an analogous argument in relation to the HRA claim. The school is a public authority. Alternatively it is not within the words of ECHR Article 34:

> "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by [the United Kingdom] of the rights set forth in the Convention…"

33. So the school has no right under Article 8. And it follows that, in so far as the words complained of relate to the management of the School's affairs by the Claimants, neither do the Claimants have an Article 8 right.

34. It is accepted, in the words of the Defendants' skeleton argument, that:

> "A genuine claim of substance by an individual governor brought for the purpose of vindication of his or her reputation is sustainable in defamation and, where appropriate as an Article 8 claim."

35. Logically, the first step to take in addressing the Defendants' argument on *Derbyshire* or under Article 8, is to ask the question whether the School is a body such as is referred to in *Derbyshire*, namely a "governmental body". If it is such a body, the second question would be whether the policy which precludes an action by a governmental body, also precludes an action by claimants who have the day to day management of that body's affairs. The first question is the subject of very detailed submissions from the First Defendant, including references to many provisions of the statutes governing the provision of education in the UK. I shall start with the second question first.

36. Immediately before reaching the conclusion that he did, Lord Keith explained it as follows at p550C:

> "In the case of a local authority temporarily under the control of one political party or another it is difficult to say that the local authority as such has any reputation of its own. Reputation in the eyes of the public is more likely to attach itself to the controlling political party, and with a change in that party the reputation itself will change. A publication attacking the activities of the authority will necessarily be an attack on the body of counsellors which represents the controlling party or on the executives who carry on the management of its affairs. If the individual reputation of any of these is wrongly impaired by the publication any of these can then himself bring proceedings for defamation. Further it is open to the controlling body to defend itself by public utterances and in debate in the council chamber".

37. In an earlier paragraph at page 547E Lord Keith had said:

> "There are however features of a local authority which may be regarded as distinguishing it from other types of corporation whether trading or non-trading. The most important of these features is that it is a governmental body. Further it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It

> is of the highest public importance that a democratically elected governmental body or indeed any governmental body should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech".

38. Later in his judgment at page 550E Lord Keith noted that the Court of Appeal had reached the same conclusion as he did, principally by reference to Article 10 of the ECHR. At page 551C he said:

> "Having examined other authorities [Balcombe LJ] concluded, having carried out the balancing exercise requisite for the purposes of Article 10 of the Convention, that there was no pressing social need that a corporate public authority should have the right to sue in defamation for the protection of its reputation".

39. It would appear that from these passages that no distinction is drawn between "a governmental body" such as is referred to at page 547E and a "public authority" such as is referred to at page 551D. Both phrases are to be found in the ECHR. In Arts 8 and 10 there appears the phrase "public authority" and in Art 34 the phrase "non-governmental body". No reference has been made before me to any distinction there might be between these two expressions. In Lester Pannick and Herberg: Human Rights Law and Practice at para 2.6.3 there is a footnote 1 which reads: "The phrase 'a public authority' is 'essentially a reference to a body whose nature is governmental in a broad sense of that expression." I shall proceed on the assumption that the two expressions are the same.

40. However, as the editors of Duncan and Neill on Defamation 3rd ed write at para 10.07, the precise scope of the rule in *Derbyshire* remains unclear. The submission of Mr Caldecott as summarised in Duncan and Neill is as follows:

> "It is also submitted that the courts will scrutinise closely claims brought by individuals which in reality may be attempts by governmental bodies to circumvent the rule in *Derbyshire*".

There is a footnote referring to *R (on the application of Comninos) v Bedford Borough Council* [2003] EWHC 121 (Admin), [2003] LGR 271 [39]–[40] ("*Comninos*").

41. Mr Rushbrooke submits that argument is misconceived. He submits that it is part of the reasoning which led Lord Keith to the conclusion that he did reach, that, if the individual reputation of any person controlling or carrying on the day to day management of the affairs of a governmental body is impaired by the publication, then those individuals can bring proceedings for defamation. Moreover, Lord Keith at page 551D, repeats with apparent endorsement the view expressed by the Court of Appeal, that governmental bodies retain the right to sue for malicious falsehood. In the present action there is a claim for malice, albeit that the action is not framed in malicious falsehood.

42. The applicant in *Comninos* was the auditor appointed by the Audit Commission to audit the accounts of the defendant council in that case. His claim was that a local authority does not, as a matter of principle, have power under any circumstances to fund libel proceedings by its officers, or to indemnify them against the costs of such proceedings: see para [2]. Sullivan J, as he then was, dismissed the application for judicial review on grounds of delay. It followed, he said, that his view on the issue of principle was of academic interest. He dealt with it relatively briefly (para 32). At paras 39-40 he said this:

> "39. Although Mr Faulks referred to a number of authorities during the course of his submissions, the claimant's contention that there is a "defamation exception" rests solely upon the *Derbyshire* case. I accept that the important public policy expressed by the House of Lords in the *Derbyshire* case must not be circumvented. It follows that it would be an unlawful exercise of the power conferred by section 111 of the 1972 Act for a local authority to attempt to do so. But that does not lead to the conclusion that defamation proceedings should be treated as an exception to the propositions agreed in respect of all other kinds of litigation, see above. If a local authority's true purpose is to sue for damage to its own reputation, and it gives its officers an indemnity in respect of the costs of defamation in order to circumvent the rule that it has no right to commence such proceedings itself, then it will have acted for an improper purpose and/or taken irrelevant considerations into account and its decision will be liable to be quashed on normal public law principles. Given the importance of the right in question, now enhanced by article 10 of the European Convention on Human Rights, appointed auditors and the court would no doubt be astute to prevent any attempt by a local authority to circumvent the *Derbyshire* decision. However, in the present case there has never been any suggestion of improper purpose. The reasons why the council gave the indemnity are recited in the Agreement (see above) and are not challenged by the claimant. The claimant did not pursue the "relevancy" or the "irrationality" grounds of his challenge.
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> 40. Mr Faulks submitted that it was not sufficient that the council believed that giving the three employees an indemnity would be conducive or incidental to the discharge of its employment functions. Ultimately, it was for the court to decide whether a particular course of conduct was or was not authorised by section 111, see *Credit Suisse v Allerdale Borough Council* [1997] QB 306, and *Hazell v Hammersmith and Fulham London Borough Council and Others* [1992] 2 AC 1. In both of those cases local authorities had been engaged in schemes which were intended to circumvent statutory controls upon local authority borrowing. The courts concluded that such schemes were not capable of falling within section 111 of the 1972 Act. The position in the present case is not at all

> comparable. For the reasons set out above, the council was not attempting to circumvent any statutory or other limitation upon its powers".

43. Mr Rushbrooke submits that the focus of the judge's attention in that case was on the decision by the local authority to fund the litigation by its officers. The judge was not concerned at all with the question whether, assuming the officers could issue their claim without funding from the local authority, the claim by them as individuals would be an abuse of process, or could be characterised as an attempt to circumvent the *Derbyshire* decision. He submitted that it is not open to a defendant to seek to strike out a claim by individual claimants on the basis that it is an attempt to circumvent the *Derbyshire* decision. What a defendant might be able to do, in an appropriate case, is to challenge the decision of the governmental body which has provided the funding. In the present case the Defendants did, in correspondence, question the right of the school to fund the litigation. It is not in dispute that the school is funding the Claimants' action. But the Claimants replied in correspondence that they had taken the advice of counsel specialist in the relevant field (that is not defamation counsel), and that their view was that the School was entitled to fund the action. The Defendants have not taken proceedings to challenge the decision of the School. They simply raise the point as Defendants to this action, to which the School is not a party.

44. As already noted, there has been no challenge at this hearing before me to the pleaded claim that the words complained of refer to these individual claimants and are defamatory.

45. The editors of Gatley on Libel and Slander 11th edition chapter 8.20 state as follows:

> "The *Derbyshire* case makes clear that the decision does not affect the right to sue of an individual member or officer of a governmental body if the statement about the body is capable of being interpreted as referring to the individual. Indeed the ability of the individual to sue seems to be regarded as a reason for denying such a right to the body. The governmental body may have power to give an indemnity to an officer in respect of libel proceedings brought by him in respect of statements about the discharge of his duties. To do so is lawful, but if the body's true purpose is to sue for damage to its own reputation and it gives its officers an indemnity in respect of the costs of defamation in order to circumvent the rule that it has no right to commence such proceedings itself, then it will have acted for an improper purpose and/or taken irrelevant considerations into account and its decision would be liable to be quashed on normal public law principles."

46. I prefer the submissions of Mr Rushbrooke. It does seem clear that the House of Lords was contemplating that the right to sue of any individual who carried on the day to day management of the affairs of a governmental body was subject to no limitation other than the requirement that the words complained of should refer to, and be defamatory of, that individual. If this be the case, it would follow that the individual would always have a right to sue in defamation, provided that he can fund the

litigation from his own resources, or obtain funding from the resources of someone other than the governmental body. Thus the effect of *Derbyshire* would be that everything turns on the choice of the right claimant, if there is an individual claimant referred to and defamed. There is no principle precluding individuals from suing in cases where what is impugned is their conduct in the carriage of the business of a governmental body.

47. What Mr Caldecott is contending for seems to me to be a different principle, which might have been, but was not in fact, considered in *Derbyshire*. That would be a principle that would preclude an individual from suing, even if he is referred to and defamed, if the meaning relates in some (so far unspecified) way to the carrying out of his official functions, rather than to his private life.

48. Apart from the uncertainty as to whether the *Derbyshire* principle applies at all to a claim by individuals, the meanings pleaded in this case are not so clearly confined in their impact to the individual Claimants' official activities as to make this a case suitable for determining the issue of law as to the precise scope of the principle. The meanings are not disputed before me. I would not be prepared at this stage to say that they do not significantly engage the Claimants' private lives.

49. The extent to which attacks on reputation engage Art 8 depends upon the nature of the attack and the circumstances. In *Karako v. Hungary* 39311/05 [2009] ECHR 712 (28 April 2009) the applicant was a member of a regional assembly. He complained in libel about words impugning the way he had voted in that assembly. The Court said at para 23:

> "However, in the instant case, the applicant has not shown that the publication in question, allegedly affecting his reputation, constituted such a serious interference with his private life as to undermine his personal integrity. The Court therefore concludes that it was the applicant's reputation alone which was at stake in the context of an expression made to his alleged detriment."

50. In the present case the meanings complained of do not relate to aspects of the Claimants' reputations which are exclusively private. Nor do they allege actual impropriety in the management of the affairs of the school. The meaning is at the level of concerns, sometimes referred to as a *Chase* level 2 meaning. But it is at least arguable that any suggestion of financial impropriety may be said to undermine an individual's personal integrity, and so be a serious interference with that person's private life. If there were to be a limit on their entitlement to sue along the lines suggested by Mr Caldecott, then the court might have to answer a question along the lines: were the words complained of so closely connected to the management of the governmental body' affairs that, as a matter of principle, they should not be permitted to sue in defamation? But I have seen nothing to indicate in any authority that any such limitation exists, or exactly what the question for the court should be in such a case.

51. There is a further point to be noted. As Lord Keith remarked, the reasoning of the Court of Appeal, and his own reasoning, reflected the high importance attached to freedom of expression, and in particular that any governmental body should be open

to uninhibited public criticism. In the present case the defendant is itself a governmental body, indeed a local authority. As such it has no rights under Article 10. Public authorities have only duties, and it is that that exposes them to claims under HRA, when non-governmental bodies have no such exposure. Accordingly, that part of Lord Keith's reasoning does not apply directly to a claim against this Defendant.

52. It is well established that the court should not strike out a claim save in circumstances where it is clearly and obviously right to do so, and that it should not do so where the applicable law is itself unclear. I am quite satisfied that this is not an appropriate case for me to strike out the present claim on the basis that it is an attempt to circumvent the *Derbyshire* principle.

53. Accordingly, I do not need to consider whether the School is a public authority or governmental body. Nor do I need to consider further grounds (a) and (b) relied on by the Defendants in support of the application to strike out the claim.

ABUSE OF PROCESS BY PURSUIT OF A COLLATERAL PURPOSE

54. In *Broxton v McLelland* [1995] EMLR 485 Simon Brown LJ set out the central principles emerging from the case law:

> (1) Motive and intention as such are irrelevant (save only where "malice" is a relevant plea): the fact that a party who asserts a legal right is activated by feelings of personal animosity, vindictiveness or general antagonism towards his opponent is nothing to the point. As was said by Glass JA in *Champtaloup v Thomas* (1976) 2 NSWLR 264 , 271 (see *Rajski v Baynto*n (1990) 22 NSWLR 125 at p 134):
>
> To impose the further requirement that the donee [of a legal right] must be actuated by a legitimate purpose, thus forcing a judicial trek through the quagmire of mixed motives would be, in my opinion, a dangerous and needless innovation.
>
> (2) Accordingly the institution of proceedings with an ulterior motive is not of itself enough to constitute an abuse: an action is only that if the Court's processes are being misused to achieve something not properly available to the plaintiff in the course of properly conducted proceedings. The cases appear to suggest two distinct categories of such misuse of process:
>
> (i) The achievement of a collateral advantage beyond the proper scope of the action - a classic instance was *Grainger v Hil*l where the proceedings of which complaint was made had been designed quite improperly to secure for the claimants a ship's register to which they had no legitimate claim whatever. The difficulty in deciding where precisely falls the boundary of such impermissible collateral advantage is addressed in Bridge LJ's judgment in *Goldsmith v Sperrings Limited* at page 503D/H.

> (ii) The conduct of the proceedings themselves not so as to vindicate a right but rather in a manner designed to cause the defendant problems of expense, harassment, commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted litigation.
>
> (3) Only in the most clear and obvious case will it be appropriate upon preliminary application to strike out proceedings as an abuse of process so as to prevent a plaintiff from bringing an apparently proper cause of action to trial".

55. To this Mr Caldecott adds the following propositions, which are not in dispute:

i) that a claimant's purpose "must be objectively ascertained, that is, by reference to what a reasonable man placed in his situation would have in mind when initiating or pursuing the actions": *Goldsmith v Sperrings* p499F; *Wallis v Valentine* [2003] EMLR 8 para [32]. It was on this basis that Mr Caldecott made his submissions without having taken the opportunity to cross-examine the Claimants: he did not need to.

ii) that in relation to defamation actions, the courts have emphasised that expedition or the lack of it is the touchstone by which to judge whether it is a genuine claim to vindicate reputation: *Lloyds Bank v Rogers* CA unreported 20 December 1996, Hobhouse LJ, citing *Grovit v Doctor* (unreported 28 October 1993) Glidewell LJ at para 15 of the transcript;

iii) that the second category referred to by Simon Brown LJ in *Broxton* at para (2)(ii) of the above citation is not confined to the conduct of the proceedings, but includes the initiation of the claim itself: *Wallis v Valentine* [2003] EMLR 8 para [32].

56. Mr Caldecott emphasises what he submits is the failure of the Claimants in the pre-action correspondence to formulate any complaint by the individual Claimants. On the contrary, the correspondence throughout contained complaints on behalf of the School. After the proceedings had been brought the School made a public statement about the issue of the proceedings, but did so without referring to the individual Claimants. The aggravated damages plea is wholly disproportionate and an attempt to bring into the case matters immaterial to the Second Defendant's conduct in sending the emails complained of. If the claim had been genuine it would have been pursued expeditiously by the individual Claimants. In addition he relies on the matters also relied on in relation to the *Jameel* form of abuse. He submits that the true purpose of the proceedings, as it appears from the correspondence, was to obtain from the Defendants surrender on a number of issues which are outside the scope of libel action which has been brought by individual Claimants but for the benefit of the School. The disproportionate plea of aggravated damages gives rise to the inference that a further purpose of the proceedings is to put undue pressure upon the Defendants.

57. In *Broxton* the plaintiff brought proceedings for libel some 20 months after the publications complained of. The defendants contended that the claim was of minimal value to the plaintiff and was being maintained by her employer as part that of

company's long-running campaign to harass the defendants. There was no dispute that the employer was funding the action. Mr Rushbrooke notes that the Court in *Broxton* declined (at p495-6) to find that the plaintiff in that case must have had a collateral purpose, saying

> "there is presently before the court ample and unchallenged evidence of the Plaintiff's personal upset at this libel, her concern as to its possible effect on her career prospects, and her anxiety to pursue her claim against the Defendants … there is simply no evidence before us to justify so harsh a judgment on the plaintiff at this stage".

58. There is evidence from the Claimants in their witness statements. The First and Second Claimants each state that the words complained of strike at the heart of what he and his fellow claimants have achieved at the School and at what they want to achieve in the future, and that it is for that reason that they are so potentially damaging and offensive. The suggestion of financial impropriety is an attack on his integrity. He relies for his professional success on his ability to attract good newly qualified teachers. The suggested collateral purpose is not his true purpose. He is genuinely aggrieved.

59. The Third Claimant states that he is recently semi-retired, having previously worked as civil servant. He found the allegations against him offensive and represent an indelible stain on his reputation. He wishes to refute the attacks on his integrity and independence. He understands that the report of the Second Defendant (enclosed with the e-mail of 19 December 2007) remains lying on the files of the Department for Education (formerly the DCSF), he does not know how far it has circulated within the Department and fears where it may surface in the future. He maintains contact with many individuals who work within the field of education in Lambeth and wishes to ensure that any present or future projects in which he may involve himself are not affected by the words complained of. There may be legislative changes in the future which return control of the School to the First Defendant. Others in the Department for Education may not be as fair minded as Ms Reynolds appears (from her witness statement) to be. He has no intention of preventing the First Defendant from lawfully carrying out its statutory duties. He refers to the correspondence (summarised below) as evidencing complaints that he had made about attacks on the Claimants. He states that attacks on the School imply attacks on the Claimants. The litigation is being funded by the School, but not out of monies received from central or local government. It is from income generated through the commercial exploitation of the properties and facilities built and developed by the School. He and his fellow Claimants have declared their intention to give to the School any damages which are recovered in the proceedings, although this is not a condition of the funding they have received.

ABUSE OF PROCESS WHERE THERE IS NO REAL OR SUBSTANTIAL TORT

60. In *Jameel v Dow Jones* [2005] QB 946 the Court of Appeal explained this form of abuse of process. The action in that case related to libel in a publication effected by the Internet. The article was posted on the web servers in New Jersey. Dow Jones pleaded in their defence that it was this which constituted publication of the article, so that no publication occurred in England. The claimant identified five publishees

within this jurisdiction, three of whom the Court described as being "members of the claimant's camp". The Court of Appeal said this:

> "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 challenge the claimant's resort to English jurisdiction or to seek to strike out the action as an abuse of process. We are shortly to consider such an application....
>
> 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.
>
> 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".

61. In support of the Defendant's case on this head of abuse Mr Caldecott relies on the following. The publication in each case was extremely limited. Apart from Ms Reynolds each of the publishees had already adopted a position in relation to the dispute between the School or the Claimants and the Defendants. The witness statements from the publishees are to the effect that the emails complained of had no effect on the Claimant's reputations in the eyes of those readers. Since 1st September the School has been an Academy, with the result that the potential for repetition of the words complained of by the Second Defendant is negligible. It appears from the correspondence that what stimulated the Claimants to issue the proceedings against the Second Defendant was the conduct of Mr Ronan in October 2008, although that is not itself the subject of a claim for defamation. The prospects of the Court granting injunctive relief, assuming a finding of liability, are negligible in view of the delay

and of the fact that the First Defendant no longer has any role in relation to the supervision of the School since it has become an Academy. The time, expense and court resources, which resolution of the issue is in this action would require and the practical irrelevance of the reputation of the School and the Claimants in the future, make the pursuit of this claim disproportionate and abusive.

62. Mr Rushbrooke submits that para [67] of the *Jameel* judgment is significant, in that in the present case there is a plea of justification, and a claim for a declaration of falsity under the HRA claim. In *Jameel* a defence had been served. It did not include a plea of justification, but only one of qualified privilege. It was in that context that at para [69] the Court concluded that the cost of the proceedings would be out of all proportion to what could be achieved by it. Paras [67] and [74] read:

> "67 To what extent will this action, if successful, vindicate the claimant's reputation? English law and procedure does not permit the court to make a declaration of falsity at the end of a libel action. Where justification has been pleaded the verdict of the jury will determine whether the defendant has justified the defamation. Where there is no plea of justification, the jury is directed to proceed on the presumption that the defamatory allegation is untrue. The damages that they award will indicate their view of the injustice that has been done to the claimant by the allegation that is presumed to have been untrue. To this extent an award of substantial damages provides vindication to the plaintiff. The presumption of falsity does not however leave the judge in a position to make a declaration to all the world that the allegation was false….
>
> 74 Where a defamatory statement has received insignificant publication but there is a threat or a real risk of wider publication, there may well be a justification for pursuing proceedings in order to obtain an injunction against republication of the libel".

63. Whether or not there is a need for an injunction, Mr Rushbrooke submits that the document sent by the Second Defendant was sent to Ms Reynolds at the Department for Education. So long as it remains on files in that Department there is a risk of republication to persons whose estimation of the Claimants is a matter of importance to them. How great that risk may be is not clear at this stage of the proceedings.

64. Mr Rushbrooke submits, as is not in dispute, that an action can be maintained even if the publishee did not understand the words complained of to be defamatory, or did not believe them: *Jameel* para [30]. He refers to recent cases which have not been struck out. They do not establish any new principles, and I need not refer to them.

65. Further Mr Rushbrooke submits that libel proceedings are not simply to compensate a claimant for harm already done. It is to prevent harm being done in the future if the falsity of the allegations is not publicly established: *Broome v Cassell & Co Ltd* [1972] AC 1027, 1125, citing *Ley v Hamilton* 153 LT 384, 386 ("'It is impossible to track the scandal, to know what quarters the poison may reach'. So long as its withdrawal is not communicated to all those to whom it has reached it may continue

to spread"). That factor is much more important today than it was in the past, because documents are stored electronically where they may very easily be searched and distributed onwards.

66. Mr Rushbrooke notes that Ms Reynolds' witness statement is confined to stating what she says was the effect of the words complained of on her estimation of the Claimants (she says they had no impact at all). But she says nothing of how or where the documents are stored, or what may be done with them in the future. Similarly there is no evidence as to these matters in relation to the storage of the documents within the First Defendant's offices.

67. Further Mr Rushbrooke submits that in the present case, unlike *Jameel*, the defence of justification means that there will be an opportunity for the Claimants to obtain vindication. He also submits that the claim for an injunction is a fundamental part of the relief sought.

VICARIOUS LIABILITY AND THE ACTS OF NON-DEFENDANT OFFICERS

68. Mr Caldecott notes that the First Defendant is sued on the basis that it is vicariously liable for the Second Defendant's actions. It is not alleged that the First Defendant is vicariously liable for the wrongful actions of any other officer or employee, nor is it alleged that the First Defendant is primarily liable. He submits that malice is concerned with the state of mind of the Second Defendant, and not with the state of mind of any other officers or employees of the First Defendant. See *Eggar v. Chelmsford* [1965] 1 QB 248, 265B-D, 271G; *Broadway Approvals v. Odhams Press Limited* [1965] 1 WLR 805 at 813H where Sellers LJ said:

> "… a company's mind is not to be assessed on the totality of knowledge of its servants".

69. So, he submits, the Claimants cannot advance their case on the malice of Mr Khan, or increase his liability for damages, by reference to historic disputes or other disputes in which he is not alleged to have had any role. Even in the case of multiple tortfeasors aggravated damages are assessed by reference to the conduct of the least culpable defendant (ie the lowest common denominator). This is confirmed in *Berezovsky v. Russian Television and Radio Broadcasting Co* [2010] EWHC 476 para [174].

70. Mr Rushbrooke did not dispute these propositions of law. But he submitted that the allegations pleaded concerning officers or employees of the First Defendant other than the Second Defendant were relevant to the claim for an injunction.

THE CORRESPONDENCE

71. The matters set out below are relied on by the parties for quite different purposes. For the Claimants the history of the matter is relied on in support of the claim for aggravated damages and, it is submitted, it is also relevant to the claim for an injunction, and will be relevant to a plea of malice in the Reply when it is served. The Claimants submit that they did sufficiently make known their individual complaints,

albeit that the correspondence is largely devoted to the complaints made on behalf of the School.

72. For the Defendants two main points are advanced. First it is said that the correspondence shows how the Claimants are attempting to bring within the scope of this action historic matters which are of little or no relevance, whilst demonstrating that they have a collateral purpose in pursuing this litigation, being a purpose other than the vindication of their reputation. Further it is said for the Defendants that the course of the correspondence and the delay in the proceedings shows that the Claimants are not conducting themselves in the manner which they would be if their real complaint was libel on themselves. Then, in relation to the *Derbyshire* point, the Defendants submitted that the real complaint, such as it is, is one made on behalf of the School and not on behalf of the claimants personally. For reasons stated above, I do not now need to consider this last point.

73. As already noted the Claimants have been in responsible positions at the school since the mid 1990s and, in the case of the Second Claimant much earlier.

74. In 1995 the school became grant maintained. This is pleaded in the Further information by the Claimants. In particular they allege that Ms Dunnipace, Mr Ronan and the Second Defendant were all personally active in opposing that change of status by the school.

75. In 1996 it is pleaded in the Further Information that the First Defendant's employees picketed the school.

76. In 2003 there took place the internal audit by the Second Defendant which gave rise to the allegations of mismanagement made by the Second Defendant about the School and the Claimants. In February 2004 the First Defendant commissioned an independent report into the Second Defendant's allegations. The First Defendant appointed Mr Boyd. In February 2004, so the Claimants plead, he concluded that the concerns raised by the previous internal audits had been addressed to his satisfaction subject only to minor matters. The report concluded

> "I have not identified any concerns that would suggest that the school would not continue in the foreseeable future the success it has achieved for pupils in the past".

77. It is the conclusions of this report commissioned by the First Defendant that is relied on by the Claimants primarily to prove that the Second Defendant knew that what he was saying was false when, in the words complained of written nearly four years later, he repeated that there were concerns.

78. On 17 October 2006 and 12 December 2007 two reports were issued on the induction support programme at the school for newly qualified teachers. The first was by Mr Fitzgerald and the second by Mr Evans. It is said that they were communicated to Ms Dunipace, and, in the case of the first such report, to Mr Ronan. These are relied on as what is said to be "a comprehensive evidence based rebuttal of the First Defendants criticism of the School's provision for NQTs". On the basis of these reports it is said that the Second Defendant knew that there was no basis for making the allegations in the words complained of in relation to NQT.

79. The allegations about NQTs are closely related to a complaint made by Mr Newall on 14 August and 25 September 2007. He made a complaint about the Second Claimant to Mr Knight MP, then Minister for State for Schools and Learners, amongst others. In the autumn of 2006 Mr Newall's daughter had been a newly qualified teacher at the School. She was dismissed for misconduct on the grounds that she had absented herself from School between 19 October and 15 November 2006 without authorisation, and had failed to obey a managerial instruction to work her notice up to 19 December 2006.

80. On 30 October 2007 the First Defendant requested access to the School to investigate the position of NQTs. The School refused, on what the Claimants plead were reasonable grounds, namely that Mr Ronan had shown himself to be incapable of carrying out his duties in a fair, professional and impartial manner.

81. On 16 November 2007 Ms Reynolds of the Department for Children Schools and Families wrote to Mr Suarez, then chief finance officer of the First Defendant. She referred to correspondence received from Mr Newall and asked the First Defendant to carry out an investigation and report back. Whilst that matter was pending, on 28 November 2007 two inspectors visited the School with a view to assessing it for accreditation for FMSiS. In the Further Information, the Claimants plead that the Second Defendant intervened in that process by introducing objections based on alleged inadequacies in the School's NQT provision.

82. On 12 December 2007 there was the report, already referred to, by Mr Evans on the School's induction support programme for NQTs.

83. The first email complained of, dated 19 December 2007, was a response to the request that Ms Reynolds had made on 16 November 2007 relating to Mr Newall's complaints and the investigation she asked to be carried out. It is to be noted that the contents of that email did not become known to the Claimants at that time. They first obtained copies of that, and the third email complained of, on about 22 May 2008.

84. On 30 December 2007 the First Claimant wrote an email addressed to, or copied to, those to whom the second email complained of was also addressed. In it the First Claimant complained about what he referred to as the intervention of the Second Defendant in the assessment of the School, and complained that the Second Defendant had a record of bias against the School. He also complained of victimisation against Ms Dunipace. It was in response to that email that the Second Defendant wrote the second email complained of, namely that dated 23 January 2008. That was addressed to the Claimant, but copied to those to whom the First Claimant had complained on 30 December.

85. On 11 January 2008 the First Claimant wrote a four paged letter to the Second Defendant in response to the email of 3 January. It is copied to the same people and to Kate Hoey MP. The letter includes numerous complaints against the Second Defendant including that he attempted to tarnish the reputation of the School. He refers to an anonymous allegation of child abuse. He ends the letter stating:

> "We look forward now to receiving our FMSiS accreditation and would suggest you stop using Mr Newall as he is subject to

> legal action for his libellous attacks upon numerous people within the School".

86. Mr Caldecott refers to this, and to subsequent letters in which the complaint is made on behalf of the School, drawing attention to the fact that complaint is not made on behalf of the Claimants personally.

87. The 15 January 2008 is the date of the third email which, as already noted, did not come to the attention of the Claimant at that time. The Claimants complain that during 2008 the Second Defendant continued to ignore the report of Mr Boyd in his correspondence concerning FMSiS accreditation for the School. The School was continuing to pursue this matter through solicitors Carter-Ruck. As Mr Caldecott points out, although they were instructed on the School's accreditation for FMSiS, they are as a firm very well known for their specialism in libel litigation. Thus, comments Mr Caldecott, it is striking that in a letter dated 2 May 2008 no reference is made to any complaint for defamation on behalf of the Claimants personally in a letter written to the First Defendant, if the Claimants' claim is genuine.

88. On 12 May 2008 the Third Claimant wrote to Mr Suarez. He referred to a letter of 10 March 2008 in which Mr Suarez had stated that FMSiS accreditation would not be provided to the School. The ground given for withholding the accreditation was First Defendant's assertion that the School had failed to provide sufficient evidence to show that the recommendation made in 2004 audit had been implemented. The Third Claimant protested that this was an issue now four years old, which had been resolved when the School had implemented the recommendation of Mr Boyd. The point made by Mr Caldecott is that the letter was pursuing FMSiS accreditation on behalf of the School and was not a complaint on behalf of himself for defamation.

89. On about 22nd May 2008, as already noted the Claimants obtained copies of the first and third emails complained of in this action. On 6 June 2008 the Third Claimant wrote again to Mr Suarez. He stated that the situation had been made far worse by the decision to send to the DCSF in the first email complained of (dated 19 December 2007) a copy of the paper by Mr Khan. The Third Claimant complains that there is no mention of Mr Boyd's report. He required an explanation for what prompted the sending of Mr Khan's report to DSCF, and why there was no reference to Mr Boyd's finding. The letter also complains about what he refers to as "the same age old insinuations about the NQT programme that we have in place at the School" made in the email complained of. The letter ends by requesting a recommendation for FMSiS accreditation to be given immediately, and adds: "I hope you will consider it appropriate to write to Ms Reynolds of the DSCF to clarify the situation". Mr Caldecott again comments that there is no reference to any claim on behalf of the claimants individually for libel.

90. On 25 June 2008 Carter-Ruck wrote to Mr Suarez in respect of the recent correspondence in relation to FMSiS accreditation. The letter is written on behalf of the School. It ends with a paragraph noting the failure of the First Defendant to provide answers to the request made in the letter of 6 June in respect of the email of 19 December 2007. Again Mr Caldecott comments that although the solicitors are specialists in defamation proceedings, no reference is made to any such claim on behalf of the Claimant.

91. On 11 July 2008 Carter-Ruck wrote again to Mr Suarez complaining of the failure to recommend FMSiS accreditation. The letter complains of the lack of response to the previous letters and contains the threat of proceedings. Mr Caldecott notes that the proceedings threatened are judicial review on behalf of the School, not a claim for defamation on behalf of the Claimant.

92. On 30 July 2008 the Third Claimant wrote to Mr Anderson, Chief Executive of Lambeth. He refers to the meeting agreed to take place the following day. Section 2 is headed "A Formal Apology and Retraction to the DSCF". Again he complains of Mr Khan's report and the failure to accept Mr Boyd's findings. The letter goes on:

> "We are rightfully proud of our achievements and we are simply not prepared to have our name dragged through the mud any longer. The continuing failure to apologise or at the very least take steps to correct the misleading nature of the documentation, serves only to demonstrate the malice behind Mr Khan's actions. It would be naïve of us to think that Mr Khan would apologise for his comments or take steps to mitigate the damage that he has caused. However, rest assured this is not a matter we are simply going to let lie….
>
> Broader Issues
>
> We are prepared to accept criticism of the school provided such criticism is reasonable and backed by evidence. However, we will not tolerate unsubstantiated and incredibly serious attacks on professional reputations. …"

93. Mr Caldecott submits that this is still a complaint only on behalf of the School. However, it seems to me that it can also be said to be a complaint on behalf of the individual Claimants. The word "We" has to be read in the light of the first paragraph in the letter, referring to the meeting on the next day. There it is stated that "our team will be Mark McLaughlin (Head Teacher) Greg Martin (Director of Education) Nigel Tait (Carter-Ruck) and me". The words "professional reputations" must also be read in that light.

94. On 14 August Mr Suarez wrote referring to the meeting on 31 July. He also addressed the complaints raised in the previous correspondence. He stated that Mr Khan had dealt with the DCSF diligently and complained this, and another accusation (which was refuted in more detail) had been levelled against Mr Khan.

95. On 11 August 2008 Carter-Ruck wrote to Mr Suarez again. The letter addresses a number of points, including those previously raised, which it is said are questions to be asked by a judge in the Administrative Court. This, and subsequent correspondence, is in the context of the recommendations for FMSiS accreditation.

96. In October 2008 there took place before the Professional Conduct Committee of The General Teaching Council for England the hearing to consider the cases of two teachers, one of whom was the daughter of Mr Newall. Mr Newall conducted the case on behalf of his daughter. As is recorded in the Determination dated 23 October 2008, Mr Newall called Mr Ronan as a witness. In the further Information under

paragraph 15.2 of the Particulars of Claim, the Claimants plead, with detailed particulars, that Mr Ronan used the occasion as a platform to attack the School's provision for NQTs in biased, misleading and damaging terms. On 3 November 2008 the Third Claimant wrote to Mr Anderson complaining about Mr Ronan's behaviour on this and previous occasions. He said that "we have been forced to seek legal advice over this matter".

97. On 7 November 2008 solicitors for the First Defendant wrote to Carter-Ruck stating "our client now recognises the School as accredited for FMSiS." On 4 December 2008 Carter-Ruck replied welcoming the fact that "the propriety and effectiveness of the school's financial management structure has now been acknowledged by your client" and added that the School expected a line to be drawn under the matter. The letter goes on to list a number of matters which had been raised by the First Defendant in the course of the correspondence about accreditation, including the issue of NQTs. The letter asked for provision to be made for the costs incurred by the school in resolving these issues. The letter ends with an expression of the School's hopes that both parties can "move on".

98. A week later on 11 December 2008, in a letter copied to the other two Claimants, the Third Claimant wrote to Mr Anderson. The letter referred to Mr Ronan's evidence at the hearing in October, and to the £50,000 in legal fees which was the estimated cost to the School incurred in relation to FMSiS accreditation. The letter refers to a meeting in August. It goes on to say:

> " …far more difficult to remedy is the third issue that we raised namely the continuing campaign of disinformation and defamation that is being conducted by a small group of Lambeth officials against Durand…
>
> The strict timetable applied by the courts to defamation cases means that within the next few days, Durand must deposit Particulars of Claim with the High Court against Lambeth and one or more of its officials or forego the possibility of legal remedy. We do this only to protect our position not because this is our preferred course of action."

99. As Mr Caldecott observes this is not a letter in accordance with the Pre-Action Protocol on Defamation. It does not identify the intended claimants, the intended defendants or the words complained of.

100. On 15 December 2008 the claim form was issued naming the three individuals as Claimants. The words complained of were identified as those contained in the report of Mr Khan and the emails dated 19 December 2007, 3 January 2008 and 15 January 2008. The claim also claimed a declaration of falsity and/or damages under HRA s.8 (1).

101. On 7 January 2009 the First Claimant wrote to Ms Dunipace complaining of the damage done by Mr Ronan to the reputation of the School. The letter requested, amongst other matters, that a letter should be sent to the GTC informing them that Mr Ronan's evidence was flawed because it failed to mention the positive evidence Mr Ronan was fully aware of and failed to include in his statement. On 29 January 2009

the First Claimant pursued this issue. There is no reference to defamation proceedings by the Claimants.

102. On 31 January 2009 the Third Claimant wrote to Mr Anderson. This letter did refer to defamation, but again does not contain the information that would be required to comply with the Pre-Action Protocol. The letter informs Mr Anderson that

> "we have with regret started action for defamation against one of your staff and have initiated a request for judicial review that will closely involve others".

103. On 23 February 2009 the First Claimant wrote to Mr Anderson. The letter complains of the unprofessional behaviour and misconduct of a number of the First Defendant's officers. The second matter complained of is Mr Khan's continued statements, described as "false and misleading", to the effect that the concerns expressed in 2003 were continuing. The letter requires an apology from Mr Khan and a formal withdrawal of the paper he had sent to the DCSF (that being a reference to the email of 19 December 2007). The letter also refers to other matters including the evidence of Mr Ronan. It refers to what the First Claimant calls "a sustained and well documented campaign of disinformation and direct lies against staff and governors over the past 14 years". Mr Caldecott submits this is the first reference to the complaints against Mr Khan since the previous June.

104. On 8 April Carter-Ruck wrote to the First Defendant enclosing by way of service the Claim Form and the Particulars of Claim issued on behalf of the three claimants. The letter ends:

> "These proceedings have been served upon you in the absence of a letter of claim due to the fact that the period within which Particulars of Claim can be served is due to expire shortly…."

105. The proceedings took the course described earlier in this judgment.

DISCUSSION

106. From the summary of the pleadings already given, it appears that, if all the matters raised by the Claimants are litigated, they will cover a very extensive field, much of it very far removed from the three emails which constitute the cause of action. The trial would be prolonged, costly and difficult to manage. The action calls for case management. But neither party has sought to address their concerns by inviting me to make limited case management decisions. As in many libel actions, the relationship between the Claimants and the Defendants is highly adversarial. The Defendants want the whole action struck out, and are interested in less than that only as a fall back position. The Claimants want to keep all their complaints before the court and ask me to make no case management decisions until after service of a Reply.

107. I accept Mr Caldecott's submissions to a limited extent. The contents of para 15.2 of the Particulars of Claim, the Further Information, and the Request for Further Information of the Defence, are all unnecessary and disproportionate. The claim is against the Second Defendant personally, with the First Defendant said to be liable vicariously for his wrongs, and for no others. The alleged "campaign" is relevant if

and only if it is one carried out by the Second Defendant. That case is not, in my judgment, properly advanced by the pleading in para 15.2 involving unidentified

> "employees, in particular the Second Defendant; Phyllis Dunipace, Executive Director of Education (later Director for Children and Young People); Kevin Ronan, Recruitment and Retention Manager; and Mark Hynes Director of Legal and Democratic Services."

108. I would therefore be minded to strike these out. I would do this on grounds of relevance, and, in any event, on grounds of case management. If and to the extent that these matters, or any of them, can properly be pleaded in a Reply alleging malice, then that will be the time and place for the Claimants to plead them. It is not a reason for leaving these irrelevant and disproportionate allegations in this plea of aggravated damages, that they might become relevant in a Reply.

109. I do not accept Mr Rushbrooke's submission that these matters are relevant to the claim for an injunction. They are not pleaded in that way. But if that were the only point, it would be remediable, and not a ground for striking out parts of para 15.2 of the Particulars of Claim. It is true that an injunction is commonly included in the order at the end of a libel action in which a claimant is successful. But it is not common for the scope of a trial to be enlarged to bring in matters which are relevant only to whether or not the relief granted at the end should include an injunction, when they are not relevant to the substantive issue of liability. Further, I am not at this stage persuaded that an injunction will be necessary if the Claimants succeed. It might be or it might not be. The Second Defendant holds a responsible position with the First Defendant. It may well be that if he fails in his Defence, he will do so in circumstances where no injunction is necessary.

110. If a trial were to encompass all the matters pleaded in para 15.2 of the Particulars of Claim, the Further Information and the Request for Further Information, then it would be much longer than if it did not encompass these matters. Even assuming that these matters were relevant to aggravated damages or an injunction (contrary to my view), then the inclusion of these matters would still be disproportionate. Aggravated damages are for injury to feelings. They are not capable of amounting to so large a sum as to justify litigating these matters in Court. That is obvious. Damages for injury to feelings may be large, perhaps in five figures, but not so large as to be proportionate to the cost likely to be incurred in preparing for trial, and then trying, the issues that the Claimants have chosen to plead. So Mr Caldecott is on strong ground when he submits that the purpose of pleading these matters and making the Request for Further Information of the Defence must be a collateral purpose. I would accept that that inference should be drawn in this case.

111. But it does not follow that the whole action should be struck out. I do not accept that the whole action has been brought for a collateral purpose. There is a Defence of justification, so, unlike the position in *Jameel*, there is a real prospect of vindication on that basis. Further, there is a claim for a declaration of falsity under the HRA claim. That too raises a prospect of vindication, even if the plea of justification were not pursued (as sometimes happens when there is also a plea of qualified privilege). Mr Caldecott has not argued at this hearing that there can be no declaration of falsity in a claim under the HRA. I cannot dismiss as incapable of belief the evidence of the

Claimants as to their purpose in bringing these proceedings. And on the evidence as it stands at present, the Claimants have a case for saying that there is a real risk of republication in the future within the First Defendant and the Department for Education.

112. It is true that the number of addressees of the e-mails complained is small. But they are all persons who are or have been concerned with education and with the School. The words complained of are in electronic form. They may be stored indefinitely, and easily searched and republished, both generally to those concerned with education, and in particular to others in the Department for Education or in the First Defendant. The damage so far suffered by the Claimants may be small. I express no view on that, but simply assume that the Mr Caldecott may be right so to submit. But the main point of defamation proceedings is vindication. Vindication includes preventing, or reducing the risk of, future publications of the words complained of. The fact that the damage suffered so far may be small (if it is), is no indication of the extent of the damage which is prevented from occurring in the future, when a claimant in a libel action obtains a public retraction or a judgment in his favour from the court.

113. I do not accept that the correspondence provides a basis for concluding that the whole action is brought for a collateral purpose or is otherwise an abuse of process. It is true that there has been a striking failure to comply with the Pre-Action Protocol. But the proper response to that failure in this case should not be to strike out the whole action. That would be disproportionate. I do not draw an inference from the correspondence that the only complaints being advanced by the individual Claimants were complaints on behalf of the School. The complaints on behalf of the School were certainly the main complaints referred to, and the primary purpose of the letters written by or for the Claimants was to obtain FMSiS accreditation and other benefits for the School. But I cannot infer from that that the Claimants do not now genuinely seek vindication of their individual reputations.

114. In my judgment, in the present case it is not possible to conclude that there is here no real or substantial tort, or that the pursuit of this action is a disproportionate exercise, or an abuse of the process of the court.

CONCLUSION

115. For these reasons the Defendants' application to strike out the Claimants claim fails. But I will hear further argument from the parties, if they are so advised, as to the way by which the case should be managed so as to limit the issues to those which are relevant and proportionate.