Neutral Citation Number: [2004] EWCA (Civ) 1638

Case No: A2/2003/2797

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE TUGENDHAT
Neutral Citation Number: [2003] EWCH 2971 QB

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/12/2004

Before :

THE RIGHT HONOURABLE LORD JUSTICE MAY
THE RIGHT HONOURABLE LORD JUSTICE DYSON
and
THE RIGHT HONOURABLE LORD JUSTICE WALL

- -

Between :

BEN WOOD	**Claimant/ Respondent**
- and -	
CHIEF CONSTABLE OF THE WEST MIDLANDS POLICE	**Defendant/ Appellant**

- -
- -

ADRIENNE PAGE Q.C. and WILLIAM BENNETT
(instructed by CARTER RUCK) for the **RESPONDENT/CLAIMANT**
EDWARD GARNIER QC, RICHARD PERKS and AIDAN EARDLEY (instructed by LEGAL SERVICES DEPARTMENT) for the **APPELLANT/DEFENDANT**
Hearing dates : 26th and 27th October 2004

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice May:

Introduction

1. Vehicle Salvage Group Limited ("VSG") was incorporated in November 1998 by the claimant, Ben Wood, and Gary Hart. Its business in the West Midlands was salvaging motor vehicles which had been damaged beyond repair. By April 1999, the claimant worked full time for VSG.

2. Superintendent Mulligan, then a Detective Chief Inspector, had a responsibility for crime prevention in the West Midlands. He and other police officers received or gleaned information about Hart's salvage activities. On 21st July 1999, Mr Mulligan arrested Hart for alleged offences of theft, handling stolen goods and burglary. Seventeen admittedly stolen vehicles and parts of stolen vehicles were found at Hart's home premises. In due course, he was committed for trial in the Crown Court. In July and October 1999, a local newspaper published two short articles about his arrest and committal.

3. In September 1999, Mr Mulligan wrote and sent three letters. On 6th September 1999, he wrote to John Wagstaff and William Arnold. On 10th September 1999, he wrote to Neil Simpson. Mr Wagstaff was manager of the Association of British Insurers Crime and Fraud Prevention Bureau. Mr Arnold was an independent insurance assessor. Mr Simpson worked for Markfield Insurance Brokers, who handled motor insurance for Tarmac plc.

4. In these defamation proceedings against the Chief Constable of West Midlands Police, Mr Wood maintained that each of the letters was defamatory of him. It is not disputed but that Mr Mulligan wrote the letters in his capacity as a police officer on behalf of the defendant. One of the defences was that the letters were published on occasions of qualified privilege.

Facts

5. The letter to Mr Simpson contained the following:

> "Mr Hart has recently been arrested and charged with numerous offences including stealing motor vehicles and dismantling them in order to re-sell and "ring" further vehicles. He has to date not been convicted at Court as we are awaiting a Crown Court Trial, however, I feel I must bring this to your immediate attention. On this occasion we recovered 17 stolen vehicles, many as stated already "cut up".
>
> Mr Hart was employed for some years by Hunters Salvage, Bott Lane, Lye, West Midlands and now operates under the company name of Vehicle Salvage Group, Chester Road, Cradley Heath, West Midlands. My aim is to inform companies like yourselves of Mr Hart and his attempt to disguise his criminal activities with a veil of legitimacy. I am aware that you are using Mr Hart to salvage Tarmac

> vehicles and would ask that you consider your position with him. If you require any further details please do not hesitate to contact me."

6. The letter dated 6th September 1999 to Mr Wagstaff was in the same terms, except that the last three sentences were not included and in their place was the following:

> "I am aware that he has contracts with companies such as Tarmac and British Gas who hold insurance Bonds and I will be notifying them direct. I would ask that Mr Hart's details are circulated. Accordingly if you require further details please do not hesitate to contact me."

7. On 6th September 1999, Mr Mulligan sent by fax a copy of the letter to Mr Wagstaff. He wrote additionally on the front sheet the following:

> "Further to our telephone conversation last week please find the details of HART as discussed. HART used to be employed at Hunters Salvage, Bott Lane, Lye, West Midlands and now works under the company name of Vehicle Salvage Group, Chester Road, Cradley Heath, West Midlands. HART is presently on bail to Crown Court for many offences including having 17 stolen vehicles found at his home address. Some of which have been "cut up" for resale and use.
>
> I have already contacted John Wagstaff and written to him regarding circulation to the Insurance World however, I would ask that you also circulate his details in order that he is unable to use a legitimate business front to disguise a criminal venture."

8. The letters did not mention Mr Wood specifically, but he was, so he said, the public face of VSG. The letters referred to him because readers would identify him as someone involved in the management of VSG. The words complained of meant and were understood to mean that he aided and abetted Hart in the commission of numerous serious criminal offences.

9. When he wrote the letters, Mr Mulligan had never heard of Mr Wood. It was not suggested that Mr Wood or VSG were involved in Hart's alleged criminal activities. It was noted, for instance, that the 17 stolen vehicles were recovered from Hart's home, not from the premises of VSG.

10. Although Mr Wood knew that Hart had been arrested and that he was again arrested for similar alleged offences in January 2000, he did not then know about the letters. He continued to work for VSG, whose formerly profitable business declined. Mr Wood was to attribute this decline, leading to his resignation and the loss of his employment, to the damaging effect of the letters, and republication of their defamatory content. The defendant's case was that, on the contrary, VSG's

business declined because people came to know that Hart had been arrested and committed for trial.

11. Mr Wood first learned of the letters at Hart's criminal trial in May 2001. The trial judge had to consider allegations of abuse of process and of failure by the prosecution to give adequate disclosure. One matter relied on by the defence was alleged impropriety and bad faith implicit in the letter of 10th September 1999 which Mr Mulligan had written to Mr Simpson. The trial judge rejected the allegation of bad faith, but he deprecated the writing of the letter, saying that it was thoroughly ill-judged. He was told that the letter was written "because this is the sort of thing insurers like to know". It was a chilling thought, he said, that the police, when they have arrested and charged a suspect, may then write to any party who has a relationship with that suspect to suggest they should review that relationship. He directed that Mr Mulligan's actions must be brought to the attention of the Chief Constable. The judge required to be informed of the action which was taken.

12. Having considered questions of disclosure, the judge declined to order a stay, but ordered further disclosure. Rather than making such further disclosure, the prosecution offered no evidence and Hart was acquitted.

13. Following the trial judge's reference, at the direction of the Chief Constable Mr Mulligan was the subject of an internal police investigation under the Police (Conduct) Regulations 1999. It was alleged that he:

> "Wrote a number of letters to insurance companies and other businesses, prior to HART's trial stating that your aim was to warn the "insurance world" of HART's attempt to disguise his illegal dealings with a veil of legitimacy."

The outcome of the investigation was that Mr Mulligan received "advice".

14. In the present proceedings, the defendant claimed public interest immunity against disclosure of the written outcome of the investigation, which, contrary to the trial judge's direction and the terms of a letter dated 14th March 2002 written by the Deputy Chief Constable, had not by October 2003 been communicated to the trial judge. Conrad Seagroatt QC, sitting as a Deputy High Court Judge, decided that the document was material to the defendant's defence of qualified privilege in the present proceedings, and that the public interest in disclosure outweighed the public interest in preserving confidentiality. The material parts of the report were accordingly disclosed. These included that Mr Mulligan "offers no explanation why he [wrote the letters] prior to Hart being convicted".

15. The report concluded that the letters were written before Hart was convicted and that they implied that the recipients should consider whether or not to cease doing business with Hart. This had left the West Midlands Police open to a civil action. There was evidence therefore to substantiate a misconduct charge under "Fairness and Impartiality" against Superintendent Mulligan contrary to identified Regulations of the Police (Conduct) Regulations 1999. Mr Mulligan was accordingly given "advice", but there was no written record of its terms. Mr Mulligan said in evidence in the present proceedings that there was no finding of

guilt against him and that he was not criticised. That does not appear to accord entirely with the written record disclosed pursuant to Mr Seagroatt's order.

16. Mr Wood issued his claim on 20th March 2002. This was well outside the statutory one year period of limitation for libel actions in section 4A of the Limitation Act 1980 as amended by the Defamation Act 1996. But he had not known of the letters until May 2001 and he successfully applied to the court for a direction under section 32A of the 1980 Act that section 4A should not apply to his libel claim. I refer to section 32A in greater detail later in this judgment.

The trial

17. The claim was listed for hearing before Tugendhat J on 8th December 2003. On 2nd December 2003, the judge heard an application on behalf of Mr Wood that he should strike out the Chief Constable's plea of qualified privilege under rules 3.4 and 24 of the CPR. Miss Adrienne Page QC contended on behalf of Mr Wood that this plea sustained no reasonable ground for defending the claim and that the Chief Constable had no reasonable prospect of successfully defending the claim upon it. Mr Perks for the Chief Constable contended that the application was at best premature, because oral evidence was likely to affect the issue. Miss Page persuaded the judge that the pleadings and exchanged witness statements taken at their highest in favour of the Chief Constable were sufficient for a summary determination. The judge decided that the plea of qualified privilege had no real prospect of success and gave summary judgment striking it out.

18. On 8th December 2003, before the case was opened to the jury, the Chief Constable applied to the judge to strike the claim out or for summary judgment. It was contended that the letters were not capable of referring to Mr Wood; that the words complained of were not capable of defaming him; and that there was no evidence that any known recipient of the letters thought they referred to Mr Wood, and no evidence of republication. The judge rejected each of these contentions.

19. The trial proceeded. Mr Simpson was one of the witnesses called on behalf of Mr Wood. He had provided witness statements to both parties. The one provided to Mr Wood contained the following:

> "In about September 1999 I received a telephone call from DCI Mulligan of the West Midlands Police. With the passage of time I am unable to recall the precise details of this conversation. However, Mr Wood's solicitors have shown me a copy of a letter addressed to me from West Midlands Police dated 10th September 1999 that I understand was sent to me at Markfield. I do not recall receiving this letter but my conversation with DCI Mulligan was essentially in the same terms as the letter; DCI Mulligan said that Gary Hart was using VSG as a cover for ringing salvage vehicles."

20. The witness statement which Mr Simpson provided to the Chief Constable contained the following:

> "I have been shown a copy of a letter of 10th September 1999 addressed to myself from DCI Mulligan. I have to say that I have no recollection whatsoever of having received this letter. However, I do recall a telephone discussion with Mr Mulligan around that date which I think was very much in the terms of the letter and in which Mr Mulligan only made reference to Mr Hart."

21. If the substance of either of these statements had been his oral evidence, no doubt the jury would have concluded that he did receive the letter which was admittedly sent, although he did not recall receiving it. When he came to give oral evidence, however, to everyone's surprise Mr Simpson said that in September 1999 he had received a telephone call from DCI Mulligan, but that he did not receive the following letter. As to the telephone call, he could not recall what Mr Mulligan had said, but the purpose of the call was to inform him that Hart had been arrested in connection with criminal allegations. He could not recall if VSG was mentioned, but the telephone call made him uncomfortable in dealing with VSG to whom he subsequently sent fewer vehicles. Mr Simpson's evidence that he did not receive the letter of 10th September 1999 of course meant that there was no written publication of its defamatory content to him, and therefore no libel.

22. Mr Wagstaff was called to give evidence on behalf of the Chief Constable. Mr Arnold's witness statement was read because he was ill. Each of these witnesses said that they had had no knowledge of Mr Wood.

23. All this meant that at the close of the defendant's case, there had been no written publication to Mr Simpson and the publications to Mr Wagstaff and Mr Arnold would not sustain a libel claim because they did not read the letters as referring to Mr Wood. Mr Wood's libel claim thus hung on the thread of his largely unparticularised contention that the jury could infer republication by Mr Wagstaff and Mr Arnold to the "insurance world" and to companies such as Balfour Beatty, Tesco, British Gas and British Waterways whom Mr Wood had himself spoken of in his evidence. The jury would then have to consider, as the judge subsequently directed them, whether anyone to whom there was republication could reasonably have understood them to refer to Mr Wood.

24. On Friday 12th December 2003, after the Chief Constable had closed his case, the judge heard a very late application by Miss Page to re-re-amend the particulars of claim to add a claim for slander comprised in the admitted telephone conversation between Mr Mulligan and Mr Simpson which preceded the sending of the letter of 10th September 1999. This was in substitution for the claim in libel based on the letter. The contention was that the evidence sustained a case that what Mr Mulligan had said in the telephone conversation was substantially the same as he had confirmed in the letter. Mr Edward Garnier QC, for the Chief Constable, opposed the application on the basis that it would be a hopelessly late amendment to plead a new cause of action outside the limitation period and impermissible under rule 17.4 of the CPR. The judge on balance and with hesitation allowed the application.

25. On Monday 15th December 2003, the judge summed the case up to the jury. His summing up was full and fair and no relevant criticism is made of it. He dealt

with the crucial question of whether the jury could conclude that the substance of Mr Mulligan's telephone conversation with Mr Simpson was substantially the same as the subsequent letter, including the critical and disputed issue whether Mr Mulligan had spoken with reference to VSG. He dealt in detail with the issues of republication by Mr Wagstaff and Mr Arnold and with damages. The jury found for Mr Wood and awarded him damages of £45,000. They were not invited to divide their award between damages for the slander published to Mr Simpson and any republication of the libel by Mr Wagstaff or Mr Arnold.

Grounds of appeal

26. The Chief Constable applied for permission to appeal. There were five proposed grounds of appeal. The first ground was that the judge's decision on qualified privilege was wrong. The second ground was that the judge was wrong to hold that the three letters were capable of referring to Mr Wood, or, if they were, that they were capable of bearing the pleaded defamatory meaning. The third ground was that the judge was wrong to permit Mr Wood to make the amendment to plead a new cause of action in the slander. The fourth ground was that the judge was wrong to permit the jury to consider republication of the libel and that no reasonable jury could have found that there had been republication. The fifth ground was that no reasonable jury could have reached a verdict in favour of Mr Wood, alternatively that the award of £45,000 was excessive.

27. Rix LJ refused permission to appeal on the papers. The Chief Constable renewed the application for permission orally. Peter Gibson and Rix LJJ gave limited permission to appeal. They gave permission on ground 1 (qualified privilege) and ground 3 (the amendment to plead slander). They also gave limited permission on ground 5 (damages). They refused permission on ground 2 (reference and meaning) and ground 4 (republication). The permission on ground 5 was limited to circumstances in which the appeal on ground 1 failed, but the appeal on ground 3 succeeded. It would then be necessary to remove from the damages any element referable to the slander. There was no ground of appeal (nor permission to appeal) to contend that the judge was wrong to decide the qualified privilege issue at the time he did. This is not surprising, since counsel for the Chief Constable had stated before the trial began that the Chief Constable did not intend to seek to appeal the qualified privilege ruling. We note that defence counsel's written submissions for this appeal contained a significant amount of material which sought, or needed, to challenge matters for which permission to appeal was not given.

Ground 1 - Qualified privilege

28. In *Kearns v General Council of the Bar* [2003] EWCA Civ 331; [2003] 1 WLR 1357, Simon Brown LJ cited, at paragraphs 23 to 27, certain of the classic statements of the law relating to qualified privilege to be found in the authorities. He referred to *Toogood v Spyring* (1834) 1 CM & R 181 at 193; *Coxhead v Richards* (1846) 2 CB 569 at 595-596; *Whiteley v Adams* (1863) 15 CBNS 392 at 414; *Stuart v Bell* [1891] 2 QB 341 at 350; *Adam v Ward* [1917] AC 309 at 334; *Watt v Longsdon* [1930] 1 KB 130 at 147-148; and *Horrocks v Lowe* [1975] AC 135 at 149. For present purposes it is sufficient to cite the short passage from the opinion of Lord Atkinson in *Adam v Ward* at 334:

> "… a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

29. The essence of the Chief Constable's particulars in support of the plea that the publications occurred on occasions of qualified privilege was that Mr Mulligan had a duty to publish the information in the letters to the recipients who had a legitimate interest to receive it. The West Midlands Police had information about Hart's alleged criminal activities and that he was working at the premises of VSG. Hart had been arrested, charged and released on bail. Mr Mulligan believed that further offences were likely to be committed if the insurance trade was not warned of Hart's activities. Mr Mulligan therefore had a legal or moral duty to give information to insurers who might be adversely affected, and they had an interest to receive it.

The judge's decision

30. The judge considered submissions and authority relating to the court's jurisdiction under orders 3.4 and 24 of the CPR. This included that the court should not conduct a mini-trial; but that, if all the essential facts had been deployed and there was no reason to think that the defendant would be in a position to advance his case at trial, the court should not shy away from careful consideration and analysis of the facts relied on to decide whether the line of defence advanced was no more than fanciful – see *Downtex v Flatley* [2003] EWCA Civ 1282.

31. The judge, who is of course a specialist in defamation (as were counsel appearing before him), did not, other than allusively, spell out the basic necessary legal ingredients of a successful plea of qualified privilege. It is, however, in my view entirely clear that he addressed the issue before him by applying orthodox law.

32. The judge accepted a submission by Miss Page that, since no additional facts were relied on, the defence of qualified privilege could not be stronger in relation to republication than in relation to the original publications.

33. The defence had referred to a Memorandum of Agreement between the Association of Chief Police Officers and the Association of British Insurers in 2002, which had replaced Guidelines on the Exchange of Information between Police and Insurers issued by the Crime Committee in 1978. The 2000 Memorandum came into existence after the publications complained of in these proceedings and after the Human Rights Act 1998 and the Data Protection Act 1998 came into force. Neither of these statutes was in force at the time of the publication. I refer further to the 1978 Guidelines later in this judgment. Miss Page submitted to the judge that the duties of the police to the public, and the relationship between the police and the public, insofar as the giving of information was concerned, are now set out in a number of authorities, most notably *R v Chief Constable of North Wales Police, ex parte Thorpe* [1999] QB 396 and *R (on the application of Ellis) v the Chief Constable of Essex Police* [2003] EWHC 1321 Admin. Miss Page submitted that the duty or relationship to be considered in the

law of qualified privilege must be governed by the same principles as the public law duties and rights of the police in relation to disclosure of information about crimes or alleged crimes.

34. The judge referred to *Thorpe* quoting from the judgments at some length. He noted that all that is said in *Thorpe* was in the context of information about convicted paedophiles. He said in paragraph 32 of his judgment:

> "(i) As a matter of principle, the same principles apply to disclosure of information concerning individuals convicted of other offences, albeit that the application of the principles may differ in such cases;
>
> (ii) The same principles also apply, but with greater force, to disclosure of information concerning individuals who have not been convicted of any offence, but who are on bail awaiting trial, or who are not currently facing any charges at all;
>
> (iii) Each case does fall to be considered on its own facts, both by the police officer making, or proposing to make a disclosure, and by a court asked to decide an issue as to whether a disclosure was lawful or not, or made on an occasion protected by qualified privilege or not."

35. Miss Page supported her submissions by reference to the provisions as to "Fairness and Impartiality" in the Police (Conduct) Regulations 1999, which the Chief Constable's internal inquiry had held Mr Mulligan to have contravened.

36. Miss Page further supported her submissions by reference to Home Office Circular No. 45/1986, which was cited by Lord Bingham CJ in *Thorpe* at 408D-E. It was still in force. It was not confined to convictions or related information about offences involving children, but envisaged separate guidance for such cases. Paragraph 2 provided:

> "The general principle governing disclosure remains that police information should not be disclosed unless there are important considerations of public interest to justify departure from the general rule of confidentiality. The three areas in which the exceptions are made are the protection of vulnerable members of society; the need to ensure probity in the administration of law and national security. Annex A to this Circular sets out specific groups within these areas on which the police are asked to provide information about relevant past convictions and other background information in connection with pre-employment and other checks (Schedule 1), and those groups whose convictions the police are asked to report as they occur."

The judge noted that insurers were not on the lists in the Schedule to this Circular. Although the Circular dealt primarily with information about convictions, paragraph 8 contained specific provision about "cases pending". There was guidance for the police on providing such information at their discretion on the groups in Schedule 1 to specific public authorities. None of the groups or authorities identified had anything to do with insurance or car theft or fraud.

37. The judge considered that Miss Page's submissions relating to these documents fortified the conclusion that the principles established in *Thorpe* were those applicable to the case before him. He considered that *Halford v Chief Constable of Hampshire* [2003] EWCA Civ 102 was an illustration of a disclosure which was consistent with those principles.

38. The judge considered and quoted in full the witness statement of Mr Mulligan dated 11th September 2003. The judge assumed for the purposes of the issue before him that its contents and those of paragraph 9 of the defence were true. In the statement, Mr Mulligan stated that the three letters were sent to alert the insurance industry regarding Hart's activities and involvement in crime "from a crime reduction stance". They were sent only to organisations and individuals whom he believed had a reasonable need to be aware of Hart's activities. The judge did not note, as he might, that Mr Mulligan's explanation for the letters did not accord with what he is recorded as saying in the Chief Constable's internal enquiry.

39. Mr Perks submitted to the judge, with reference, I think, to *Kearns*, that it was necessary to establish the nature of the relationship between the Chief Constable and the recipients of the letters. The judge did not consider that the relationship was anything other than that of persons concerned with motor insurance and the police, except that Mr Simpson's principals might be one of a number of suppliers to VSG of cars which required lawful salvage. In my view, the judge was correct here. There was no relevant pre-existing relationship, as Mr Garnier accepted before this court. What the judge said simply, but correctly, described who the relevant parties were.

40. The judge considered witness statements. He did not find anything which led him to think that oral evidence would bear additionally on the issue of qualified privilege. Mr Simpson's witness statement said nothing about his interest in receiving Mr Mulligan's information, except that on receipt of it he did divert future salvage business from VSG to other providers. Mr Wagstaff's witness statement expressed a belief that, in view of the role of the Bureau, it was right and proper of Mr Mulligan to advise as he did. Mr Wagstaff and the Bureau had a legitimate need for this type of information so as to protect the concerns of the insurance trade and the public. Mr Arnold's witness statement contained nothing further that was material.

41. The judge considered that he was left without an explanation of the mechanism by which the publication of the words complained of would achieve the purpose of preventing or detecting crime. He said at paragraph 50:

> "That persons charged with, but not yet convicted of, handling stolen goods should be deprived of their

> businesses on the recommendation of a police officer who personally believed that person to be guilty is a matter which was described by His Honour Judge Tonks, the judge before whom Mr Hart was tried, as a chilling and daunting thought. He called for the matter to be investigated. The impositions of sanctions is a matter for the courts, after conviction, and never for the police. (cf. *Ellis* para [30]). Mr Perks made clear that the defendant does not rely on any such justification for the publications complained of in the present case."

42. The judge recorded a submission by Miss Page to the effect that Mr Mulligan appeared to have acted on a personal initiative alone, unsupported by any policy document, where there was no emergency, and with no regard for any potential harm to Hart or those connected with VSG. She also relied on the fact and outcome of the internal police investigation into Mr Mulligan's conduct, the details of which were produced under Mr Seagroatt's order. I have referred to this earlier in this judgment. She referred to the 1978 Guidelines as giving no support for the view that a police officer might volunteer information to insurance companies. On the contrary, these Guidelines stated that police forces would take no action in response to routine letters or inquiries from insurance companies, adjustors or claims assessors requesting information regarding the arrest of offenders. There was no evidence to suggest that Hart's arrest was other than routine. It was noted in argument before this court that it would be very odd if a request from Mr Simpson for information about Hart's arrest would or should have resulted in no action by Mr Mulligan under the Guidelines, when he nevertheless had a duty sufficient to sustain a plea of qualified privilege to volunteer the disclosures which he did.

43. The judge's conclusion in paragraph 56 was as follows:

> "On the basis of the evidence and facts that I am assuming to be true, and absent evidence of the kind which might have been, but is not, to be adduced, I am satisfied that there is no prospect of the Defendant establishing the defence of qualified privilege. In my judgment there was no lawful justification, still less any duty, on Mr Mulligan disclosing the information that he did disclose in so far as it concerned Mr Hart. In so far as I assume that the information related to the Claimant, there can be even less justification."

In paragraph 57, the judge summarised his reasons, and felt able to form a confident view, as follows:

> "i) Mr Mulligan was acting in his capacity as a police officer;
>
> ii) It seems likely that the information he disclosed was not generally available to the publishees (otherwise he would not have thought it necessary

> to write to them), but I assume Mr Mulligan's statement to be true at para 24 when he says that the information was already in the public domain, and as a matter of law that makes no difference;
>
> iii) The disclosures were potentially damaging not only to Mr Hart but also to any other person, such as the Claimant who might be involved in or dependent upon the business of VSG;
>
> iv) The disclosure of the information was neither necessary nor, in my view materially effective, in preventing crime or enabling the detection of crime;
>
> v) No careful judgment was exercised before publication as to whether it was necessary or desirable to make the publication for the purpose of preventing crime or alerting the publishees to an apprehended danger;
>
> vi) There were no safeguards, such as consultation with more senior police officers, other agencies, or a written policy applying to such disclosures which was being complied with;
>
> vii) No attempt was made before disclosure to enquire of those potentially affected, namely Mr Hart and the Claimant, to enable Mr Mulligan to assess the risk of damage;
>
> (viii) There was no urgency;
>
> ix) The public had not been warned that the WMP might consider themselves free to make disclosures otherwise than in accordance with the 1978 Guidelines or the Home Office Circular;
>
> x) The person to whom Mr Mulligan has admitted he wrote had no interest in receiving the information which materially distinguished them from any other member of the public who is interested in the prevention and detection of crime, in particular because it is not explained how these publishees might have been expected to act on the information."

The case of *Thorpe*

44. *Thorpe* concerned the publication by the police of information about convicted paedophiles. The applicants for judicial review, a married couple, had been

released from long sentences of imprisonment. They had difficulty in establishing a home, away from the area where they had committed the offences, because of adverse press publicity and angry responses from neighbours. They moved to a caravan site in North Wales. The local police had received a report from the area where they had served their sentences that they both presented a considerable risk to children and vulnerable people. The police had meetings with members of the local authority social services department and probation service. A police officer met the applicants to persuade them to move before the Easter holidays, warning them that if they did not do so, the owner of the site would be informed of their record. The applicants stayed where they were. The local police authority had a policy document addressing the risk of re-offending by convicted paedophiles. The policy included that information about such people could be released to those who needed to know it to protect potential victims, after specific consideration of the particular case and with the agreement of senior officers and advisors. Under this policy, an officer, after discussion with senior officers, showed the owner of the caravan site press material relating to the applicants' convictions. The Divisional Court dismissed the application for a declaration that the policy and the decision to inform the site owner were unlawful.

45. Lord Bingham of Cornhill CJ referred, not only to the policy document of the North Wales Police, but also to Home Office Circular 45/1986, which stated that, subject to exceptions, the general principle governing disclosure remained that police information should not be disclosed unless there are important considerations of public interest to justify departure from the general rule of confidentiality. The exception, relevant in *Thorpe*, was the protection of vulnerable members of society.

46. Lord Bingham accepted as an important and necessary principle to guide the conduct of the police that there is a general presumption that information should not be disclosed. He said at page 409:

> "When, in the course of performing their public duties, a public body (such as a police force) comes into possession of information relating to a member of the public, being information not generally available and potentially damaging to that member of the public if disclosed, the body ought not to disclose such information save for the purpose of and to the extent necessary for the performance of its public duty or enabling some other public body to perform its public duty. This principle would not prevent the police making factual statements concerning police operations, even if such statements involved a report that an individual had been arrested or charged, but it would prevent the disclosure of damaging information about individuals acquired by the police in the course of their operations unless there was a specific public justification for such disclosure. This principle does not in my view rest on the existence of a duty of confidence owed by the public body to the member of the public, although it might well be that such a duty of confidence might in certain

> circumstances arise. The principle, as I think, rests on a fundamental rule of good public administration, which the law must recognise and if necessary enforce."

47. Lord Bingham said that the general rule against disclosure was not absolute. The police have a job to do. They are obliged to take all steps which appear to them to be necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. He then said at page 410:

> "It seems to me to follow that if the police, having obtained information about an individual which it would be damaging to that individual to disclose, and which should not be disclosed without some public justification, consider in the exercise of a careful and bona fide judgment that it is desirable or necessary in the public interest to make disclosure, whether for the purpose of preventing crime or alerting members of the public to an apprehended danger, it is proper for them to make such limited disclosure that is judged necessary to achieve that purpose."

48. Lord Bingham regarded it as necessary and important that each case should be considered carefully on its own particular facts, assessing the risk posed by the individual offender, the vulnerability of those who may be at risk and the impact of the disclosure on the offender. In the present case, of course, Mr Mulligan's publication affected, not only the unconvicted Hart, but also VSG, for whom the publication was potentially very damaging, and who are accepted not to have been implicated in Hart's allegedly criminal activities.

49. Buxton LJ agreed with Lord Bingham CJ. He said at page 415:

> "Just as the police have claimed this protection, if protection is the right way to characterize it, to facilitate their public law duties, equally they are limited by their public law obligations. As Lord Bingham CJ has said, those obligations include observance of the fundamental rules of good public administration, which this court will if necessary enforce. Another way of looking at the matter, although it may in practice produce the same results, is to say that the police only act in their public capacity, and thus can only claim to be using information in the public interest, when they observe those rules of good public administration. Those rules therefore not only constrain how administrators may act but also define when administrators are performing their public duties and when they are not."

50. When the appeal in *Thorpe* came before this court, the applicants did not substantially challenge the reasons given in the Divisional Court for dismissing their application. There were additional interested parties and fresh policy guidance published by the Home Office – see page 420. The applicants advanced a new argument that the North Wales police had treated them in a procedurally

unfair manner – see page 426. I do not read the judgment of this court, handed down by Lord Woolf MR, as in anyway detracting from the Divisional Court judgments.

51. In dismissing the appeal from the decision of the Divisional Court, this court held that the police, as a public authority, could only publish the information if it was in the public interest to do so. Under domestic law and the Human Rights Convention, the police were entitled to use the information if they reasonably concluded, after taking into account the applicants' interest, that its publication was necessary to protect the public, children in particular. The police had not been motivated by improper considerations and their decision was not irrational. It was further held that to disclose the identity of paedophiles to members of the public was a highly sensitive decision which should only be taken when there was a pressing social need to do so. The police needed as much information as could reasonably be obtained, including in the particular circumstances information from the applicants themselves.

Submissions

52. Mr Garnier submitted that the qualified privilege defence in this case was a standard common law defence based on a common and corresponding interest and duty of Mr Mulligan to impart information, and of the recipients of the information to receive it. The defence, he said, is based on the status of the relationship between the publisher and the recipient. He helpfully referred to *Kearns*.

53. The judgment of Simon Brown LJ in *Kearns* contains, as I have said, a valuable collection of orthodox authority on qualified privilege. The defendants had published to members of the Bar unverified mistaken information received from a member of the Bar to the effect that the claimants were not solicitors and entitled to instruct counsel. It was held that there was an established relationship between the defendants and the Bar which required the flow of free and frank communication between them on all questions relevant to the discharge of the defendants' functions. The occasion of the communication was protected by qualified privilege, even though no steps had been taken to verify the communication. As Simon Brown LJ said at the beginning of his judgment, the question raised by the appeal was when is verification a relevant circumstance in determining whether or not a defamatory communication is protected by qualified privilege. The answer turned on the fact that the defendants' publication was made in the context of a recognised existing relationship and a common and corresponding interest in the subject matter of the publication – see paragraphs 21, 34, 39 and 41 of Simon Brown LJ's judgment. Simon Brown LJ substantially adopted relevant analyses of Eady J in *Kearns* itself and in *Komarek v Ramco Energy plc* [2002] EWHC 2501 (QB). These are quoted in paragraphs 38 and 40 of Simon Brown LJ's judgment, to the effect that, where there is such a recognised existing relationship, the issue is not fact sensitive in the sense that it would become necessary, as it had been in *Stuart v Bell* [1891] 2 QB 341, to investigate the particular circumstances surrounding each individual publication.

54. Interesting and helpful as *Kearns* is, Mr Garnier accepted that there was no recognised existing relationship between the Chief Constable and the recipients of

Mr Mulligan's letters or the insurance world generally. The defence of qualified privilege in the present case turned on an orthodox analysis of duties and interests and might be fact sensitive.

55. The essence of the factual basis advanced by Mr Garnier on behalf of the Chief Constable in support of the plea of qualified privilege was and is that Mr Mulligan, acting on behalf of the Chief Constable, had a duty to detect and prevent crime. He had been investigating offences concerning the disposal of stolen motor cars and stolen car parts. Hart had been arrested for such alleged offences and numerous stolen cars or their parts were found at his home premises. Inquiries indicated that he was working at the premises of VSG. The main victims of offences of this kind are motor insurers. Hart had been charged and released on bail. Mr Mulligan believed that further offences were likely to be committed. He therefore had a legal and moral duty to give information about Hart to insurers who might be adversely affected. The police are, says Mr Garnier, under a duty, both legal and moral, to warn the potential victims of crime, "no matter if they are not immediate neighbours, literally or metaphorically, of the suspected criminal." Some of the offences investigated by Mr Mulligan were thought (wrongly as it turned out) to concern cars belonging to the Tarmac Group with whose salvage business Mr Simpson was concerned. Mr Simpson, Mr Wagstaff and Mr Arnold had a sufficient insurance interest to receive the information and a shared interest with the police in preventing crimes involving motor cars.

56. Mr Garnier seeks to rely on the 1978 Guidelines, but in my view the Chief Constable's case receives no support from them. Mr Garnier submits that the claimant's reliance on the Home Office Circular 45/1986 is misplaced. It confuses the policy concerned with the publication of true information affecting an individual with a defence of qualified privilege which protects defendants from the consequences of publishing untrue defamatory statements.

57. Mr Garnier submitted that the judge was wrong (or confused) (a) to regard the defendant exclusively as a public authority, and (b) to rely on the case of *Thorpe* as circumscribing a duty of disclosure integral to a plea of qualified privilege. As I understand it, the bones of these related submissions were as follows. Although the law relating to qualified privilege is rooted in public policy, it is essentially a private law defence available as much to Mr Mulligan personally as to the Chief Constable in his public capacity. *Thorpe* is a public law decision in which a policy as to disclosure of sensitive and damaging information which was true was called in question. The public law duty of the police deriving from such considerations is misapplied to the essentially personal question whether Mr Mulligan, an individual police officer with a job to do, had a sufficient personal duty or interest to publish defamatory information which in part turned out to be untrue. If Mr Mulligan did not make sufficient enquiries before publishing the information, that was relevant, not to the question whether the publications were on occasions of qualified privilege, but to malice, and possibly, if malice were established, to exemplary damages.

58. I do not accept these submissions. First, Mr Mulligan was at all times acting, not as a private individual, but as a police officer. His duties were the public duties of a police officer, acting on behalf of the Chief Constable, the defendant in these

proceedings. The question is whether the Chief Constable, acting through his subordinate, had a sufficient duty or interest to publish the defamatory letters. It does not help in a search for that duty or interest to characterise the defence of qualified privilege as a private law defence. Second, *Thorpe* was indeed a judicial review application which questioned a police policy of disclosure of information of the kind under consideration in that case. But the extent and limits of a police duty of disclosure in the circumstances of that case illuminate, without necessarily defining, the extent and limits of their duty of disclosure in other circumstances. As Lord Bingham CJ said in *Thorpe* in the passage at page 409-410 which I have quoted, the police, as a public body, ought not generally to disclose information which comes into their possession relating to a member of the public, being information not generally available and potentially damaging to that member of the public, except for the purpose of and to the extent necessary for the performance of their public duty. The principle rests on a fundamental rule of good public administration which the law must recognise. The principle does not by definition inhibit the police in the performance of their public duties, including that of detecting and preventing crime and of protecting, so far as reasonably possible, those who may become the victims of crime. The principle is directly relevant to the question whether the Chief Constable in the present case had a sufficient duty or interest to publish the material defamatory of VSG and Mr Wood to sustain a plea of qualified privilege. The existence of, and limitations upon, a duty of disclosure do not in the present context turn on whether the information is true or untrue. The question is whether the occasions of publication were privileged. That said, a decision to publish information which may be untrue may well call for even greater care than a decision to publish information which is known to be true.

59. Mr Garnier submits that the police cannot be expected to carry out a detailed analysis of the potential commercial consequences of every publication which their duty might otherwise require them to make. The duty, he submits, is to warn potential victims of criminals and suspected criminals so that the victims can take such steps as they think sensible to protect themselves. The police need to know where they stand. If the publications in the present case are held not to have been on occasions of qualified privilege, this could have a chilling effect on the proper performance by the police of their duties.

60. Mr Garnier argues that the existence and contents of circulars and guidance may be relevant to the defendant's state of mind (and therefore malice) but not to the existence of a duty or interest to disseminate information. I disagree. Certainly, if a police officer were, exceptionally, to publish information in deliberate defiance of official guidance known to him, he might in appropriate circumstances be held to have been malicious. But the existence of the guidance can generate a duty to act in accordance with it.

61. Mr Garnier suggested that the defamatory statements about VSG and Mr Wood might be seen as irrelevant matter outside the ambit of what were essentially publications about Hart on occasions of qualified privilege. This could, he suggested, raise possible questions of malice, but would not impugn the plea of privilege. I find this suggestion quite unpersuasive. The publications were defamatory of VSG and Mr Wood. The fact that they were also defamatory of

Hart does not turn a publication also defamatory of VSG and Mr Wood into an irrelevance.

62. Mr Garnier referred us to *Halford v Chief Constable of Hampshire Constabulary* [2003] EWCA civ 102 as a case in which this court upheld a plea of qualified privilege by the police on orthodox grounds without any overlay of considerations derived from *Thorpe*. This seems to me to go nowhere to show that the judge in the present case was wrong to derive help from *Thorpe*. Mr Garnier also pointed out what Sedley LJ said in paragraph 64 of *Halford*:

> "It would be lamentable if a police office who gave accurate information to a public authority with a need to know could be sued for defamation because the information redounded to someone's discredit."

In the present case, however, Mr Mulligan did not give accurate information about VSG; it was not given to a public authority; and the insurance world did not sufficiently need to know it in the reciprocation with Mr Mulligan's supposed duty to disclose it.

Discussion and decision

63. As Lord Bingham CJ said in *Thorpe*, the police have a job to do. They should not generally disclose damaging information, other than for the purpose and to the extent necessary for the performance of their public duties. They have a duty to detect and prevent crime and protect potential victims of crime. The principle does not prevent factual statements about police operations, even if such statement includes a report that an individual has been arrested or charged. Any disclosure must be properly considered at any appropriate level of seniority. Disclosure of damaging information about individuals requires specific public interest justification. Ill-considered and indiscriminate disclosure is scarcely likely to measure up to this standard.

64. That said, each case depends on a careful consideration of its own facts. Upon such consideration, I have no doubt but that the judge in the present case reached the correct conclusion on the issue of qualified privilege. Hart had been arrested and charged, but he had not been convicted (and was not in the event convicted). Accordingly, particular care was needed. The police had no business, let alone duty, to make statements anticipating that he would be convicted. The 17 stolen vehicles and parts were not found at the premises of VSG, nor did the police have secure information sufficient to justify statements that VSG were complicit with Hart's alleged criminality. Factual statements about Hart's arrest were one thing. But defamatory statements about VSG and, as it turned out, about Mr Wood were quite another. These statements were, in my view, ill-considered and indiscriminate. They did not, as the judge held, sufficiently contribute to the prevention of crime or the protection of victims of crime to sustain a duty of disclosure. Mr Simpson, Mr Wagstaff and Mr Arnold, and the insurance world generally, were not in any sufficient sense potential victims of crime. Such victims would rather be the owners of motor cars which might be stolen or ringed. The insurers' interest was a commercial interest which did not reciprocate with the police interest to prevent crime. Mr Mulligan passed commercial information to

the insurance world which tended to pre-judge Hart's alleged criminality and which was commercially damaging to VSG and Mr Wood. I do not see how Mr Mulligan can sustain a duty to volunteer the defamatory disclosure, when the 1978 Guidelines indicated that a direct request from insurers should receive no answer. I do not see how the Chief Constable can sustain a requisite duty, when his own internal inquiry found that Mr Mulligan acted contrary to the 1999 Regulations. In so far as the requisite duty needed also to measure up to human rights considerations, Mr Mulligan's publications, defamatory of VSG and Mr Wood, were not in the circumstances proportionate to the legitimate aim Mr Mulligan was pursuing. But I think that that is really saying the same thing in a different language.

65. Rejecting the defence of qualified privilege in this case should not inhibit the proper performance of the police of their public duties. This case turns on its particular facts. It should normally be possible to make such limited disclosure as is necessary for the proper purpose of protecting individuals from suspected possible future crime without making statements which may be untrue and which are unnecessarily defamatory of individuals. I should also stress that, contrary to submissions which Mr Garnier made on the oral application for permission to appeal, I do not consider that any decision in this appeal should be seen as having implications of principle beyond its particular facts. This is not least because the Human Rights Act 1998, the Data Protection Act 1998 and section 115 of the Police Act 1997 have all come into force since the disclosures in the present case.

The amendment to add a claim for slander

The judge's decision

66. As I have said, the application to amend Mr Wood's case to add a claim in slander was made after Mr Garnier had closed the Chief Constable's case, when all the evidence had been given and when Mr Garnier was on the point of addressing the jury. The judge explicitly recognised that the application was made at a very late stage indeed.

67. The judge first rejected, with reference to paragraph 13 in the judgment of Keene LJ in *Best v Charter Medical of England Limited* [2001] EWCA Civ 1588, Mr Garnier's submission that the draft amendment insufficiently particularised the words complained of. The complaint was faintly raised again in this court, but I regard it as entirely insubstantial.

68. Mr Garnier's next objection was that the evidence, which had already been given, did not raise a case of slander fit to be left to the jury. The judge rejected this submission, in my view rightly. There was no dispute but that there had been a telephone conversation, and quite enough evidence to sustain a tenable finding by the jury that the letter confirmed in substantially the same words what Mr Mulligan had said on the telephone.

69. Mr Garnier's substantial objection was that this was an exceedingly late application for permission to amend after the expiry of the statutory limitation period and after all the evidence had been called. A proper consideration of rule 17.4 of the CPR should lead the court to reject this prejudicial application.

Among other things, witnesses had not given their evidence, nor had they been questioned, with reference to any possible claim in slander.

70. The judge considered that circumstances required him to make his decision without a proper opportunity for appropriate consideration. I have considerable sympathy for this. He would have preferred not to reach a conclusion on rule 17.4 of the CPR. The alternative route offered to him was under section 32A of the Limitation Act 1980. Having cited the section, he concluded that the essential question was whether it appeared to the court that it would be equitable to allow a claim in slander to proceed.

71. Miss Page had submitted that, although the claim for slander could in theory have been pleaded at the same time as the claim for libel, it is not usual, in a case where an oral and written publication are in identical or substantially the same terms, to plead both. To do so would lead to unnecessary complication for the jury. Mr Garnier had relied on a variety of prejudice. The most important prejudice was that there were further questions which he said could have been put to Mr Simpson, if the application to amend had been made and allowed earlier. To this Miss Page had submitted that the evidence was as high in the Chief Constable's favour as it could have been, consistently with Mr Simpson's two witness statements. It was fanciful to suggest that Mr Simpson could ever have given precise evidence of the words spoken by Mr Mulligan in the telephone conversation, in particular whether Mr Mulligan said that Hart was attempting or might attempt to disguise his criminal activities with a veil of legitimacy and whether he named VSG as the company providing the veil. The judge considered that there was force in that submission. Mr Garnier had further submitted that the case had been prepared and decisions taken by and on behalf of the Chief Constable on the basis that the plea to be met was one of libel only. Of this the judge said:

> "I bear that in mind. It is not an insubstantial point. On the other hand, standing back and doing the best I can and with I have to say some hesitation, it seems to me that it would be equitable to allow the claimant's claim in slander to proceed as proposed. I bear in mind in reaching this decision that the jury have already heard the evidence of Mr Simpson and whatever conclusion I reach on this application, they are going to have to be given directions as to how they are to treat that evidence. It is not going to be easy to tell them to disregard much of what they have heard since it is so closely bound up with matters which would be relevant, assuming I were to refuse permission. On balance, and I repeat with some hesitation, it seems to me that for the reasons I have given I ought to allow the amendment."

72. As I have said, no criticism relevant to this appeal is made of the judge's summing up. He gave full and proper directions relating to the slander claim, the unexpected turn in Mr Simpson's evidence, and how the jury should approach their task of deciding what Mr Mulligan had said in the telephone conversation with Mr Simpson. The jury's verdict was composite, so that it is not possible to

be sure what their decision was on this part of the case. But it is likely, I think, that they will have found that the words of the telephone conversation were substantially the same as the words of the letter.

Legislation

73. Section 32A of the Limitation Act 1980 gives the court a discretionary power to exclude the statutory time limit in actions for defamation. It provides:

> "(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which –
>
> (a) the operation of section 4A of this Act prejudices the plaintiff or any person whom he represents, and
>
> (b) any decision of the court under this sub-section would prejudice the defendant or any person whom he represents,
>
> the court may direct that that section shall not apply to the action or shall not apply to any specified cause of action to which the action relates.
>
> (2) In acting under this section the court shall have regard to all the circumstances of the case and in particular to –
>
> (a) the length of, and the reasons for the delay on the part of the plaintiff;
>
> (b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A –
>
> (i) the date on which any such facts did become known to him, and
>
> (ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and
>
> (c) the extent to which, having regard to the delay, relevant evidence is likely –

> (i) to be unable, or
>
> (ii) to be less cogent than if the action had been brought within the period mentioned in section 4A. ”

74. Section 35 of the 1980 Act relevantly provides:

> “(3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor any county court shall allow a new claim … to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.
>
> …
>
> (4) Rules of court may provide for allowing a new claim to which sub-section (3) above applies to be made as there mentioned, but only if the conditions specified in sub-section (5) below are satisfied, and subject to any further restrictions the rules may impose.
>
> (5) The conditions referred to in sub-section (4) are the following –
>
> (a) In the case of a claim involving a new caurse of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and
>
> (b) … ”

75. Rule 17.4 of the CPR applies where a party applies to amend his statement of case in one of the ways mentioned in the rule, and a period of limitation has expired under the Limitation Act 1980. Rule 17.4(2) provides:

> “The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.”

76. Miss Page pointed out to us the possibility that parliament may have accidentally omitted to add a reference to section 32A to its reference to section 33 as an introductory exception to section 35(3). She may be right, but I do not consider this to be critical to the court’s decision in this appeal.

77. In *Goode v Martin* [2001] EWCA civ 1899; [2002] 1 WLR 1828, the claimant suffered serious head injury in an accident on board a racing yacht owned by the defendant, against whom she issued proceedings alleging negligence. She suffered pre-accident amnesia. Her claim pleaded a factual version of the accident and its cause. A draft amended defence pleaded a different factual version. The claimant applied outside the statutory limitation period to amend her claim adopting in the alternative the defendant's factual version. The defendant opposed the application to amend, saying that it was not within the wording of rule 17.4(2). The master and the judge reluctantly felt constrained to agree. This court, proceeding under section 3(1) of the Human Rights Act 1998 construed the rule as if it read:

> "The court may allow an amendment whose effect will be to add … a new claim, but only if the new claim arises out of the same facts or substantially the same facts as *are already in issue on* a claim in respect of which a party applying for permission has already claimed a remedy in the proceedings."

Submissions

78. Mr Garnier submits that the judge was wrong to allow the amendment. The claim was brought, prepared and contested in libel. Mr Simpson's witness statements had expressed obvious doubts about his receipt of the letter. Mr Wood could have pleaded slander earlier. The application was made so late that the defendant was prejudiced. The examination in chief of Mr Mulligan and cross-examination of Mr Simpson had not been directed to a claim in slander. In particular, the questioning had not centred on the content of the telephone call. There was no reasonable opportunity to recall Mr Simpson, although Mr Garnier accepted that it would have been possible to recall him. As to the court's jurisdiction to permit the amendment, the judge failed to apply the correct tests under section 32A of the 1980 Act. Further, he should have considered section 35 and rule 17.4 of the CPR. The slander claim did not arise out of the same facts or substantially the same facts as were already in issue in the original action. The real dispute between the parties concerned the letters, not the telephone calls. The question whether a new claim satisfies the test in section 35(3) and rule 17.4(2) is not a question of discretion. The question cannot be side stepped by applying the purely discretionary considerations of section 32A.

79. In my view, there is little force in the submission, taken by itself, that slander could have been pleaded earlier. The undisputed evidence was that Mr Mulligan had sent the letter to Mr Simpson, and I have no doubt that both parties expected little difficulty in the jury finding on Mr Simpson's written evidence that he had received it, notwithstanding his uncertain memory on the point. The receipt of the letter was not in reality an issue and pleading slander would have been unnecessary duplication. There was also, nothing in the pleading point.

80. As to the content of the telephone conversation, the critical questions were whether its substance was the same as in the following letter, and whether Mr Mulligan specifically mentioned VSG. Miss Page showed us that Mr Mulligan was questioned at some length about what he had said to Mr Simpson on the

telephone. His evidence under cross-examination was that he had not mentioned VSG – see pages 66, 84-86 and 140-141 of the transcript for 11.11.03. In the last of these passages, Miss Page specifically said to Mr Mulligan:

> "I am going to invite the jury to conclude – and I will give you an opportunity to say anything you want to about this – that in your telephone conversation with Mr Simpson of Markfield, you said to him substantially the same as you wrote in your letter to him. Do you want to comment on that? "

Mr Mulligan answered that he told Mr Simpson entirely about Mr Hart, but that he could not recall VSG being mentioned. Miss Page reminded Mr Mulligan of the terms of his witness statement. In a later question, she said that she was going to suggest to the jury in due course that Mr Mulligan's categorical denial that he mentioned VSG on the telephone to Mr Hart was incredible and a lie. To this Mr Mulligan said that he had told her exactly what he had said. He proceeded to elaborate the evidence he had given.

81. As to Mr Simpson, Miss Page submits that his evidence about the telephone conversation could scarcely have been more helpful to the Chief Constable's case, whilst remaining credibly consistent with his witness statements. In one of these he had said:

> "I do not recall receiving this letter, but my conversation with DCI Mulligan was essentially in the same terms as the letter: DCI Mulligan said that Gary Hart was using VSG as a cover for "ringing" salvage vehicles … during the telephone call from DCI Mulligan, he suggested that I consider whether I wanted to continue doing business with VSG. I was surprised and disappointed that VSG were involved with criminal activity and did, as suggested by DCI Mulligan divert future salvage from VSG to other providers."

Mr Simpson's oral evidence was to the effect that he could not remember what had been said about the purpose of the telephone call, nor whether VSG was mentioned. Miss Page suggests that further questioning could scarcely have improved the position for the Chief Constable. As I have said, the judge gave the jury proper directions on this topic.

82. Miss Page accepts that this was a very late application to amend. The circumstances in which the application to amend was made were highly unusual. Both parties had been taken by surprise. No application was made to recall Mr Simpson. The judge's decision was a pure exercise of discretion with no substantial error of law or principle.

Discussion and decision

83. In my view, Mr Wood's application to amend his statement of case to plead slander raised two related questions: first, whether the amendment should be

permitted notwithstanding that it would add a new cause of action after the expiry of a limitation period; second, whether the amendment should be permitted notwithstanding that it was very late. An answer to the first of these did not formally dispose of the second.

84. As to whether the judge had a choice to proceed under section 32A of the 1980 Act or rule 17.4(2) of the CPR, there was a degree of circularity. If the judge was, as he was, persuaded to direct under section 32A(1) that section 4A of the 1980 Act should not apply to the cause of action in slander, on one view, the period of limitation under the 1980 Act for that cause of action had not expired, so that rule 17.4 would not apply. I regard this as somewhat artificial dialectic. The judge still had to consider whether to permit a very late amendment. It was, I think, substantially, if not technically, necessary for the judge to consider the question raised in the limiting clause of rule 17.4(2). He in fact did so in argument (although not in his decision), accepting that the condition contained in that clause was not satisfied. Had he so concluded in his decision, he would, in my view, have been wrong. I reject Mr Garnier's submission to the contrary. The fact and content of the telephone call were already an intrinsic part of the narrative leading to the sending of the letter. They were integral to the issue whether the letter referred to Mr Wood sufficient to make them the same facts as were already in issue on Mr Wood's libel claim in the proceedings. In my view, therefore, the condition in rule 17.4(2) was fulfilled, so that the judge would have a discretion under that rule to permit the amendment. Thus the judge had at least two, and perhaps three, sources for the discretion which he had to exercise or decline to exercise – section 32A; rule 17.4(2); and a general discretion as to amendments (rule 17.1). In my judgment, the factors bearing upon the exercise of discretion from each of these sources in the present case were in substance the same. They were substantially encompassed in the terms of section 32A. The judge had to decide whether it was equitable in all the circumstances, in particular those referred to in section 32A(2), to permit this very late amendment outside what would otherwise be the statutory limitation period. It was relevant to this, although not determinative, that the condition in rule 17.4(2) was fulfilled.

85. The judge, being understandably pressed, did not address the questions in this laboriously analytical way. But he did, in my judgment, address the one substantial question. I am quite unpersuaded by Mr Garnier's submission to the effect that the judge was wrong because he did not plod through the literal terms of section 32A(2), ticking each box as he went. He did address the substance. On a finely balanced issue, he reached with hesitation a tenable conclusion. The fact that he did so with hesitation is no basis for this court to conclude that he was wrong. I do not do so, and would reject this ground of appeal.

86. The contingency for which permission to appeal was granted against the jury's award of damages does not therefore arise.

Conclusion

87. For these reasons, I would dismiss the appeal.

88. **Dyson LJ:** I agree.

89. **Wall LJ:** I also agree.