IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(THE HON MR JUSTICE BELL)

QBENF 97/1281/1

Royal Courts of Justice
Strand
London WC2

Wednesday, 31 March 1999

B e f o r e:

LORD JUSTICE PILL
LORD JUSTICE MAY
MR JUSTICE KEENE

- - - - - -

HELEN MARIE STEEL
and
DAVID MORRIS

Appellants

- v -

MCDONALD'S CORPORATION
and
MCDONALD'S RESTAURANTS LTD

Respondents

- - - - - -

(Handed Down Transcript of
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Official Shorthand Writers to the Court)

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MS STEEL & MR MORRIS appeared in person
MR RICHARD RAMPTON QC & MR TIMOTHY ATKINSON (Instructed by Barlow Lyde Gilbert, Beaufort House, 15 St. Botolph Street, London, EC3A 7NJ) appeared on behalf of the Respondents

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J U D G M E N T
(As approved by the Court)

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Part 1

Introduction

LORD JUSTICE PILL:

The appellants, Helen Steel and David Morris, appeal against the judgment of Bell J. given on 19.6.97 in a libel action which took 313 hearing days between 28.6.94 and 13.12.96. The judgment covered 762 pages of single spaced typing. Most of the judgment consisted of a meticulous summary and assessment by the judge of factual evidence. The appellants' Notice of Appeal invites the court to reverse most of the judge's findings, both of law and of fact, which were adverse to the appellants. They have conducted the hearing before us themselves unrepresented by lawyers in court, as for practical purposes they also conducted the case before the judge. They have had some help from lawyers out of court.

We introduce this judgment, which is the judgment of the court to which each member has contributed substantially, by quoting the judge's introduction to his judgment:

> "This is a claim for libel brought by McDonald's Corporation, the First Plaintiff, and McDonald's Restaurants Limited, the Second Plaintiff, against Ms Helen Steel and Mr Dave Morris, the First and Second Defendants, and a counterclaim for libel brought by Ms Steel and Mr Morris against McDonald's Restaurants Limited.
>
> McDonald's Corporation is a company incorporated in the State of Iowa [in fact Illinois], in the United States of America. It started business in 1955. It has its headquarters at Oakbrook near Chicago. It is responsible for a vast chain of McDonald's quick service restaurants throughout the world. The restaurants are owned and run by subsidiaries of McDonald's Corporation, or by franchisees or owner operators, or by joint ventures of McDonald's Corporation or its subsidiaries and outside partners. Together they make up the McDonald's system. The system and any individual part of it, down to individual restaurants, are all loosely referred to as "McDonald's".
>
> These proceedings began with the issue of the writ on 20th September 1990. At the end of 1990, there were about 11,800 McDonald's restaurants in a total of 53 countries. About 8,600 of the restaurants were in the United States. Total systemwide sales were about 18.75 billion U.S. dollars. By the end of 1995, which is the latest time for which I have figures, there were about 18,400 restaurants in a total of 89 countries. About 11,400 of the restaurants were in the United States. Total systemwide sales had grown to nearly 30 billion U.S. dollars. No doubt all those figures are larger still by now.
>
> The first McDonald's restaurant in Britain was opened in 1974 in Woolwich, south east London, as a joint venture between McDonald's Corporation and an American, Mr Robert Rhea,and another partner. Mr Rhea brought Mr Paul Preston, now the President and Chief Executive Officer of McDonald's Restaurants Limited, over from the U.S.A. to manage the Woolwich restaurant. According to Mr Preston it was the first "finger-feeding hamburger restaurant in the U.K." Mr Rhea retired in 1983 and

McDonald's Restaurants Limited which was formerly called McDonald's Golden Arches Restaurants Limited, has been responsible for McDonald's restaurants in Britain since then. It is a wholly-owned subsidiary of McDonald's Corporation.

At the end of 1990 there were about 380 McDonald's restaurants in Britain. There were about 650 by the end of 1995. By May,1996, which is the latest time for which I have figures, there were 674. So new McDonald's restaurants have been opening in Britain at the rate of about one a week since these proceedings began.

McDonald's is very successful, as these figures show. Its success must primarily depend on the provision of what its customers want, which is the quick service of a limited menu of burgers and other fast foods which please their taste, in convenient, disposable containers, at an affordable price. Its success is promoted by vigorous marketing which portrays its brand image as a benevolent, community-based, family-aware, ever-growing, green giant providing consistent quality, service, cleanliness and value.

McDonald's Corporation and its subsidiaries, including McDonald's Restaurants Ltd, see an attractive image as commercially vital to themselves, their joint venture partners and franchisees, all of whom depend on the brand name and, therefore, on the attraction of the brand image to existing and potential customers.

Not everyone, however, loves McDonald's.

From some time in the early or mid 1980s a group of people calling itself "Greenpeace [London]" or "London Greenpeace" ran an anti-McDonald's campaign. From 1986 onwards, a six page leaflet - "What's wrong with McDonald's? Everything they don't want you to know." - was at the heart of the campaign.

The leaflet accused McDonald's of being responsible for starvation in the Third World, of destroying vast areas of Central American rainforest, of serving unhealthy food with a very real risk of cancer of the breast or bowel and heart disease and food poisoning, of lying when it claimed to use recycled paper, of exploiting children with its advertising and marketing, of cruelty to animals, and of treating its employees badly; all the while deceiving the public and hiding its true nature behind a clean, bright image.

The leaflet was published at a time when there was growing public awareness of issues affecting the environment and the relationship of diet to health. Animal welfare and mass media advertising attracted campaigners. Working conditions have always been the subject of debate. A "multinational" like McDonald's has an influence for good or ill in all those areas. That influence grows and spreads as the number of McDonald's

restaurants increases and the system opens up in new countries.

Ever alert to public perceptions, McDonald's became concerned about the leaflet, particularly in this country where it originated. The leaflet was seen as defamatory of McDonald's Corporation as the body responsible for McDonald's as a whole, and of McDonald's Restaurants Limited as the company operating in the country where the leaflet was produced. Its contents were seen by people inside McDonald's as completely untrue and going beyond any legitimate criticism, and as part of a campaign to destroy the businesses of McDonald's Corporation and McDonald's Restaurants Limited, to "smash" McDonald's, regardless of the truth.

In 1989 a decision was made to try to stop further publication of the leaflet. Attempts were made to obtain cogent evidence identifying the members of London Greenpeace, who were responsible for publishing the leaflet, and in September 1990, proceedings were started against Ms Steel, Mr Morris and three others, Paul Gravett, Andrew Clarke and Jonathan O'Farrell. The writ and Statement of Claim sought damages and an injunction restraining further publication of the words complained of in the leaflet.

In due course, Mr Gravett, Mr Clarke and Mr O'Farrell apologised for the contents of the leaflet. They fell from the case. Whether their apologies were given because they had no answer to McDonald's claims, as McDonald's would say, or because they could not face a long and costly court case, as they would say, is immaterial to the decisions which I have to make. Ms Steel and Mr Morris fought on. They denied that they had been involved in the publication of the leaflet. They took some issue as to just what the leaflet meant. They alleged that the words complained of were true or that they were fair comment on matters of public interest. McDonald's Corporation and McDonald's Restaurants Limited denied this.

In the run up to the trial which eventually began on 28th June 1994, the case received publicity, some of which was unfavourable to McDonald's who were portrayed in some quarters as bullies who were trying to stifle freedom of speech. Between March and May 1994, the U.K. company produced and published a press release, a leaflet and a background briefing to explain why McDonald's was going to court. Ms Steel and Mr Morris took these publications to call them liars and to make other defamatory statements about their conduct.

So Ms Steel and Mr Morris counterclaimed damages for libel from the U.K. company which took issue with the meaning of the words complained of and alleged that what had been said was true or protected by qualified privilege as a necessary, reasonable and legitimate response to a public attack made on it, or prompted, by Ms Steel and Mr Morris. Ms Steel and Mr Morris denied this.

Those were the broad battle lines."

We shall refer to the two respondents together as "the respondents" and to Ms Steel and Mr Morris as "the appellants" unless the context requires a distinction.

The respondents alleged that the appellants had published the leaflet in the three years before the issue of the writ and that it was defamatory of them in meanings which they particularised in 16 separate paragraphs of the statement of claim. The appellants denied that they had published the leaflet. They denied that the words complained of had the meanings attributed to them by the respondents. They denied that some or all of the meanings were capable of being defamatory of the respondents in their trading capacity. They contended in the alternative that the words complained of in their natural and ordinary meaning were true in substance and in fact or that they were fair comment on matters of public interest.

The evidence covered all but about 60 days of the hearing. Ms Steel gave evidence. Mr Morris did not.

The judge held that the appellants had published the leaflet. In the main, he held that the words complained of had the meanings contended for by the respondents, or in some instances lesser meanings within the compass of the meanings alleged by the respondents, and that they were defamatory of the respondents. With one exception, he held that the defamatory meanings were statements of fact, not comment, and that accordingly the defence had to rely on justification. Those parts of his judgment which dealt mainly with justification were under the headings:

- Starvation in the Third World and destruction of rainforest.
- The use of recycled paper.
- McDonald's food, heart disease, cancer of the breast and cancer of the bowel.
- Advertising.
- The rearing and slaughter of animals.
- Food poisoning.
- Employment practices.

The judge's summary of his main findings on the respondents' claims (on page 710 of his judgment) was as follows:

"I must next take stock of which allegations I have judged to be defamatory to the

Plaintiffs and untrue, and which I have judged to be defamatory but justified. I must do this for two reasons.

Firstly, section 5 of the Defamation Act 1952, provides that in an action for libel like this action, where the Plaintiffs' claims have been brought in respect of words containing distinct charges, the Defendants' defence of justification shall not fail by reason only that the truth of every charge is not proved, if the words not proved to be true do not materially injure the Plaintiffs' reputations having regard to the truth of the remaining charges. So I must ask whether that provision saves the Defendants in the light of the findings which I have made.

Secondly, I must move on to the Defendants' counterclaims which are essentially based on the Second Plaintiff's public accusation of lying in the leaflet. A fundamental issue there, is the extent to which the Defendants have published untruths.

In summary, comparing my findings with the defamatory messages in the leaflet, of which the Plaintiffs actually complained, it was and is untrue to say that either Plaintiff has been to blame for starvation in the Third World. It was and is untrue to say that they have bought vast tracts of land or any farming land in the Third World, or that they have caused the eviction of small farmers or anyone else from their land.

It was and is untrue to say that either Plaintiff has been guilty of destruction of rainforest, thereby causing wanton damage to the environment.

It was and is untrue to say that either of the Plaintiffs have used lethal poisons to destroy vast areas or any areas of Central American rainforest, or that they have forced tribal people in the rainforest off their ancestral territories.

It was and is untrue to say that either Plaintiff has lied when it has claimed to have used recycled paper.

The charge that McDonald's food is very unhealthy because it is high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, and because eating it more than just occasionally may well make your diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, with the very real, that is to say serious or substantial risk that you will suffer cancer of the breast or bowel or heart disease as a result, and that McDonald's know this but they do not make it clear, is untrue. However, various of the First and Second Plaintiffs' advertisements, promotions and booklets have pretended to a positive nutritional benefit which McDonald's food, high in fat and saturated fat and animal products and sodium, and at one time low in fibre, did not match.

It was true to say that the Plaintiffs exploit children by using them as more susceptible subjects of advertising, to pressurise their parents into going to McDonald's. Although it was true to say that they use gimmicks and promote the consumption of meals at McDonald's as a fun event, it was not true to say that they use the gimmicks to cover up the true quality of their food or that they promote them as a fun event when they know that the contents of their meals could poison the children who eat them.

Although some of the particular allegations made about the rearing and slaughter of animals are not true it was true to say, overall, that the Plaintiffs are culpably responsible for cruel practices in the rearing and slaughter of some of the animals which are used to produce their food.

It was and is untrue to say that the Plaintiffs sell meat products which, as they must know, expose their customers to a serious risk of food poisoning.

The charge that the Plaintiffs provide bad working conditions has not been justified, although some of the Plaintiffs' working conditions are unsatisfactory. The charge that the Plaintiffs are only interested in recruiting cheap labour and that they exploit disadvantaged groups, women and black people especially as a result, has not been justified. It was true to say that the Second Plaintiff pays its workers low wages and thereby helps to depress wages for workers in the catering trade in Britain, but it has not been proved that the First Plaintiff pays its workers low wages. The overall sting of low wages for bad working conditions has not been justified.

It was and is untrue to say that the Plaintiffs have a policy of preventing unionisation by getting rid of pro-union workers.

Looking back with that bird's eye view of my conclusions on the separate sections and charges made in the leaflet complained of, in my judgment it is quite clear that the Plaintiff's reputations must be materially injured by the unjustified charges, despite the defamatory charges which have been shown to be true, to the Plaintiffs' detriment.

In my view the unjustified allegation of blame for starvation in the Third World was and is particularly serious for a multinational corporation such as the Plaintiff, based in the U.S.A., and for any large subsidiary company, like the second Plaintiff, based in a well-fed, even over-fed country like the U.K. The unjustified allegation of destruction of rainforest was and is particularly serious in environmentally conscious times. It is obvious that the unjustified allegations of knowingly selling food with a serious risk of damaging their customers' health, are particularly damaging to companies who run one of the best known catering businesses in this country where publication of the libel is complained of.

> In my judgment, those and the other charges, or parts of charges, which have not been justified, materially injure the Plaintiffs' trading reputations, even giving full weight to the matters which have been shown to be true, distinct charges or not. It follows that the Defendants are not saved by section 5 of the 1952 Act, and that the Plaintiffs must succeed on their claims for damages against both Defendants. I will return to the assessment of damages after considering the Defendants' counterclaims."

Turning to the counterclaims, the judge in short summary held that the sting of the words complained of in the respondents' publications was that the appellants had published a leaflet which they knew to be untrue and that they had tried to avoid responsibility for it. He held that the charges of lying in the leaflet, and trying to avoid responsibility for it, were clearly defamatory. The second plaintiff defended them in two ways - first by contending that they were justified and secondly by claiming that the words complained of were published on occasions of qualified privilege. The judge held that it was true that the appellants had wrongly denied responsibility for the leaflet. But he held that the charges that the appellants had told lies in the leaflet were not justified, since the respondents did not establish that the appellants knew that the contents of the leaflet were untrue (in so far as he had held that they were untrue). He held however that the relevant publications were made on occasions of qualified privilege which was not vitiated by express malice. Accordingly he held that the counterclaim failed.

As we have said, the appellants' Notice of Appeal invites the court to reverse most of the judge's findings, both of law and of fact, which were adverse to the appellants. The respondents do not seek to appeal against those findings which were adverse to them.

Part 2

The Appeal

The Notice of Appeal was served on 3rd September 1997. It contains 63 paragraphs and is substantially set out, section by section, in this judgment. In 1998, the appeal was listed for hearing in January 1999 and there was an interlocutory hearing, (Judge LJ, May LJ, Keene J) on 27th July 1998 at which it was indicated that written submissions would be required by 27th November 1998. At a further hearing on 29th September 1998, before the present constitution of the Court, a comprehensive directions order was made. Following submissions, it included a requirement (paragraph 5) that:

> "Written submissions on all issues to be submitted to the Court and exchanged by 27 November 1998 and to follow the Order set out in the document provided by the defendants and headed "appeal sub-sections in proposed order and time estimate".

The document referred to was one which the appellants had helpfully prepared in which the issues to be raised on the hearing of the appeal were set out under seven headings with numerous sub-headings. The Order of 29th September 1998 also provided for the preparation and submission of bundles, of trial documents and transcripts of the trial.

The respondents complied with paragraph 5 of the Order but at a hearing on 2nd December 1998 it became clear that the appellants had entirely failed to comply with it, no document whatever having been supplied. At that hearing, the appellants referred to the sheer volume of material and the difficulties involved in preparing for the appeal. The Court expressed the view that it was mindful of the difficulties of the appellants but that it was far from convinced that the appellants had cooperated as they should have done to comply with the Order of the Court. It was added:

> "As we made clear at the hearing on 29th September this case is out of the ordinary run. The Court has formed the view that it must be dealt with mainly on paper. The members of the Court must have an opportunity on the basis of written submissions to prepare themselves and consider the documentation. Until the appellants produce their written submissions we are in no position to do that. We will conduct oral hearings. We will do so when we have considered the written submissions on each side and documentary references in them and it seems to us that further elucidation by way of oral submission would be helpful in the interests of justice. We cannot begin to assess the extent of the need for oral hearings until we know how the appellants are putting their case."

Reference was made to the very long interval since the appellants had prepared a comprehensive notice of appeal and since the date of the hearing had been fixed.

The appellants were given further time to prepare written submissions and there were further interlocutory hearings on 9th December, 17th December 1998 and 5th January 1999. At the January hearing, the Court acknowledged that the appellants had by then made substantial efforts to comply

with Court orders to produce written submissions, though they were still incomplete. Documents of substantial length had been prepared and disclosed to the respondents. The appellants sought an adjournment of the hearing of the appeal. In a reasoned ruling, that application was refused. The Court took the view that, since service of their notice of appeal in September 1997, the appellants had had sufficient opportunity to prepare their case and that it was not in the interests of justice to adjourn the hearing of the appeal. A petition to the House of Lords for leave to appeal against that ruling was itself dismissed.

The hearing of the appeal commenced on 12th January 1999 and concluded on 26th February 1999. The timetable was indicated by the Court, week by week, having heard submissions from the parties. The Court heard oral submissions for 22½ days spread over seven working weeks. For four of those weeks the Court sat for four days, in one of them for three days and in the remaining two for two days. While the appellants did request longer intervals, there were eleven days when the Court did not sit, in addition to weekends. On two occasions, first after the hearings of the third week and, second, after the hearings of the fifth week, there was an interval of three working days plus the weekend when the Court did not sit. The second of those intervals occurred at the initiative of the Court because two of its members had commitments elsewhere. The interval was however welcomed by the appellants.

During most sessions of the Court, there was a short break at the request of and at a time convenient to the appellants. They sensibly shared the workload and addressed the Court alternately.

We were assisted by the written and by the oral submissions of the parties. As contemplated by the Court, and as acknowledged by the appellants, the oral submissions were of more value because they had been preceded by written submissions which had been read by the members of the Court. The appellants were permitted to submit further written submissions on several points following the hearing of oral submissions on those points. The appellants and the respondents were permitted to make further written submissions, on agreed points, following the conclusion of the oral hearing and the opportunity to do so was taken.

The appellants had some legal assistance before and during the hearing of the appeal but we accept that it was small in extent. They referred to their lack of legal expertise and invited the Court to do its own research into the points upon which the respondents had made legal submissions. The appellants put this request as a safeguard against their lack of expertise as compared with that of the respondents. With that in mind, the Court has considered for itself the legal issues which arise and authorities which appear to throw light upon them.

Having said that, we acknowledge the fairness with which, in our view, Mr Rampton QC has made his legal submissions. His submissions on behalf of his clients have been forceful but, as we would have expected, he has not neglected his duty to draw the attention of the Court to relevant authorities, of which he knows, whether in his favour or against him.

We have set out the history of the appeal in some detail because of the understandable and frequently

expressed concern of the appellants that they should not be disadvantaged as litigants in person. We have indicated the opportunities they have had to present their case, both in writing and orally. They have taken those opportunities and we believe that, with their help and that of counsel for the respondents, together with our own work, we understand the issues in the case and the arguments presented and are able to do justice as between the parties. We seek to deal with those arguments which are relevant to the outcome of the appeal.

While it does not of course affect the outcome, we do acknowledge the help given by Mrs Patti Brinley-Codd, of the respondents' solicitors, with the documentation and its availability in Court.

Part 3

General Law

The first 4 paragraphs of the Notice of Appeal challenge the judge's decisions on general grounds of law. The appellants essentially contend cumulatively or in the alternative that:

(a) neither of the respondents had a right to maintain an action for defamation because:

- the first respondents are a "multinational" and each of the respondents are a public corporation which has (or should have) no right at common law to bring an action for defamation on the public policy ground that in a free and democratic society such corporations must always be open to unfettered scrutiny and criticism, particularly on issues of public interest.

- the right of corporations such as the respondents to maintain an action for defamation is not "clear and certain" as the judge held (on p. 90 of his judgment). The law is on the contrary uncertain, developing or incomplete (see *Derbyshire CC v. Times Newspapers Ltd* [1992] 1 QB 770; *AG v. Observer Ltd, AG v. Times Newspapers Ltd* [1992] 1 QB 109; *British Coal Corporation v. NUM* (Yorkshire Area), unreported, 28 June 1996; and *Goldsmith v. Bhoyrul*, Times, 20 June 1997). Accordingly the judge should have considered and applied article 10 of the European Convention of Human Rights and cases of the European Court and Commission of Human Rights or alternatively, the judge took too narrow an approach to the application of the European Convention of Human Rights.

(b) the judge was wrong to hold that neither of the respondents need prove any particular financial loss or special damage provided that damage to its good will was likely.

(c) the judge should have held that the burden was on the respondents to prove that the matters complained of by them were false.

(d) the judge was wrong to hold that, to establish a defence of justification, the appellants had to prove that the defamatory statements were true. The rule should be disapplied in the light of article 10 of the ECHR.

(e) it should be a defence in English law to defamation proceedings that the defendant reasonably believed that the words complained of were true.

(f) there should be a defence in English law of qualified privilege for a publication concerning issues of public importance and interest relating to public corporations such as the respondents.

(g) the judge should have held that the publication of the leaflet was on occasions of qualified privilege because it was a reasonable and legitimate response to an actual or perceived attack on the rights of others, in particular vulnerable sections of society who generally lack the means to defend themselves adequately (e.g. children, young workers, animals and the environment) which the appellants had a duty to make and the public an interest to hear.

In so far as some of these contentions may not accord with an orthodox understanding of the English law of defamation, the appellants invite the court to develop law which is incomplete or uncertain particularly in the light of article 10 of the European Convention of Human Rights. They say that otherwise the law would not adequately protect the public interest but would unduly impair the freedom of individuals to express matters of opinion which they regard as important and questions of fact which they believe to be true. They stress what they maintain is the vital public importance of the matters raised in the leaflet. They stress the overwhelmingly dominant commercial position of the respondents and contrast it with their own lack of resources and experience. They say, in effect, that they should be entitled to publish material of the kind which the leaflet contained without the risk of oppressive defamation proceedings, provided only that the publication was in good faith.

"Multinational" corporations

The following passages from the judge's judgment, starting on page 87, dealt with this subject:

> "The essence of the tort of defamation in English law is the protection of the reputation of a person whether a living human person or a legal fiction such as a corporation or a company. A company has a trading character which may be destroyed by libel, but the words complained of must attack the company in the method of conducting its business or affairs. The question for the court is whether the words complained of contain statements with regard to the Plaintiff company's conduct of its business, tending to show that it was so improper or inefficient as to bring it into contempt or discredit."

The judge then referred to passages from the judgment of Balcombe L.J. in *Derbyshire County Council v. Times Newspaper Ltd.* [1992] 1 Q.B. 770 at 809 and the leading opinion in the House of Lords in the same case, at [1993] A.C.534, Lord Keith of Kinkel at page 547B to which we refer later in this judgment. The judge then said:

> "The Plaintiff in the *Derbyshire County Council* case was a democratically elected

local authority, and both the Court of Appeal and the House of Lords decided that notwithstanding the general principle that a trading or non-trading corporation was entitled to sue in libel to protect so much of its corporate reputation as was capable of being damaged by a defamatory statement, a local authority, a public authority or a governmental body should not be allowed to do so. The Court of Appeal relied upon Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides the right of freedom of expression, subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society for the protection of the reputation or rights of others.

The Court of Appeal held 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 since an action for malicious falsehood or a prosecution for criminal libel provided it with the sufficient and necessary protection it required in a democratic society.

The House of Lords reached its conclusions upon the common law of England without finding any need to rely upon the European Convention.

After referring to the position of a trading corporation, Lord Keith said, at page 547E:

> "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 government 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 government body, or indeed any government 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".

Later, at page 549A, Lord Keith said that there were rights which institutions of central government and local authorities were not in a position to exercise unless they could show that it was in the public interest to do so. "In both cases I regard it as right for this House to lay down that not only is there no public interest favouring the right of organs of government, whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it. It is contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech".

In *British Coal Corporation v. N.U.M. (Yorkshire Area) and Capstick*, unreported, 28th June,1996, French J. applied Lord Keith's observations to hold that the Plaintiff which was not a democratically elected body, but which was a body over whose activities the democratically elected government had close control, should not be allowed to sue in libel.

On Day 312 of the trial of this action the Defendants argued that the proceedings brought by both Plaintiffs should be dismissed without proceeding to judgment by application of Article 10 of the Convention or by the application of *Derbyshire C.C. v. Times Newspapers Ltd* and the observations of Lord Keith. They contended that the threat of a civil action for defamation by a vast multinational corporation like the First Plaintiff, or a very large company like the Second Plaintiff, inevitably had an inhibiting effect on freedom of speech and was therefore against public policy, and that it failed the test of pressing social need for the protection of its reputation, required to pass Article 10 of the Convention.

I will not rehearse the arguments put forward in any more detail because it is in my view clear from what Lord Keith said in the *Derbyshire County Council* case that English law makes a distinction between governmental bodies and trading corporations, however powerful. The former cannot maintain an action for defamation. The latter can.

Article 10 has not been incorporated into English domestic law. Nevertheless it may be resorted to in order to help resolve some uncertainty or ambiguity in English law. In the *Derbyshire County Council* case the Court of Appeal held that English law was uncertain as to the extent to which local authorities might sue for libel. So the Court of Appeal carried out a balancing exercise, required by Article 10, between the right to freedom of expression and such restrictions as are necessary in a democratic society for the protection of the reputation of a local authority.

But at the very beginning of his judgment at [1992] 1 Q.B. 818E, Ralph Gibson L.J. said:

> "If by established principles of English law it is clear that *Derbyshire County Council* has the right to sue for libel then this court must say so and let the action proceed. It would not matter that the consequence of so holding might be that the defendants, if they should lose the action, would satisfy the European Court of Human Rights that any verdict against them would constitute a breach of article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 10, as with any other provision of the Convention, is not a rule of the law of this country: see *Reg.v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696.
>
> If the defendants should succeed in such an application, upon the ground that a

> verdict and judgment for libel in favour of the council, as a local authority, would constitute a breach of article 10, it would be for this country to decide whether to leave the law as it would, on that hypothesis, have been declared to be, or to change it to avoid the risk of repetition".
>
> Since it is clear and certain that under English law the trading corporation Plaintiffs in this case have a right to maintain an action for defamation, no balancing exercise or application of the Convention falls to be performed by me. The principles of the English law of libel, substantive, procedural and evidential, to which I will shortly return, apply to this case. If large trading companies are to lose their right to sue for libel under English law, or if their right to sue is to be modified, it is for our democratically elected Parliament, or for the House of Lords in its judicial capacity, not me, a single judge, to say so, having taken account of all material and policy factors."

The appellants submitted that "multinationals" such as the respondents should not have the right to sue their critics for libel. They have the resources to influence the lives of a huge number of people. It is of the highest public importance that corporations such as the respondents should be open to uninhibited public scrutiny and criticism, especially on issues of public interest such as diet and health, advertising, the environment, employment conditions and animal welfare. It is contrary to the public interest that such corporations should have any right to maintain an action for damages for libel. They should be in the same position as local authorities, bodies such as British Coal Corporation and political parties. There are features of "multinationals" which should distinguish them from other trading and non-trading corporations. Their activities are world wide and their commercial power and influence is often as great as government organisations. Their activities should be open to unfettered public debate.

The appellants submit that, if the respondents were unable to sue for libel, they might nevertheless bring proceedings for, for example, malicious falsehood. If they did so, the ingredients of the tort and the burden of proof would be different and, so the appellants submit, fairer. The appellants would also incidentally have been able to apply for legal aid.

The appellants submit that the business conduct of such corporations inevitably raises questions of public interest. The manner in which a substantial multinational corporation produces and retails food is an area for debate wholly unsuited to the law of defamation. The respondents are well able to look after themselves without it. Individual members of the public on the other hand do not have the proper ability to defend themselves and should not be unduly inhibited from discussing questions of public interest by the risk of libel proceedings in which they may have great difficulty in justifying what they have said, especially if they are relying on information derived from others.

The appellants do not define the relevant ambit of "multinationals" or public corporations to which they say the inability to sue for libel should extend. If mere size is relevant, it is evident that McDonald's worldwide is a gigantic enterprise with immense economic strength which would be likely to fall within any such principle, if there is one. The second respondents are a large corporation

in the United Kingdom. The appellants submitted orally that it is not critical to their submission that the respondents should be "multinational". They said that even some small companies which have an influence on people's lives should not be entitled to sue for libel on publications relating to public interest issues which relate to people's lives.

The respondents submit that the appellants should have raised their contention that the respondents had in law no right to sue in defamation early in the proceedings as a preliminary issue or as an application to strike out the claim. The appellants were aware of the point at an early stage, but only took it on Day 312. The respondents submit that the appellants should not in equity be permitted to pursue this issue on appeal unless they provide a satisfactory undertaking that, if this court should decide it in their favour, they will pay all the respondents' costs of the action from the date when an application should reasonably have been made to the conclusion of the appeal.

We disagree. Unless directed to do so by the court, a party is not generally obliged to make an application to strike out a claim or a defence nor to apply for the hearing of a preliminary issue. Generally speaking, a party may take any arguable point of law in their final submissions to the trial judge. Not making an earlier application may result in an adverse costs order, but that is another matter. In our view, the appellants are entitled to raise these points in this appeal and should not, for the reasons advanced by the respondents, be subjected to conditions. If the points were to succeed, we should consider what costs order to make. We note that the respondents have chosen not to make a general application for security for their costs of the appeal.

The respondents submit by reference to the *Derbyshire* and *South Hetton Coal* cases that the judge was right to hold that "a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business" - see Lord Keith in the *Derbyshire* case at page 547B. In deciding in the *Derbyshire* case that a democratically elected local authority was not entitled to sue for libel, neither the House of Lords nor the Court of Appeal detracted from the principle that a trading corporation is entitled to sue for libel. They submit that the essential basis of the *Derbyshire* decision was that to permit an institution or organ of government to sue for libel was contrary to the public interest in a democracy, since it would place an undesirable fetter on the freedom of people to criticise their democratically elected representatives. The *British Coal Corporation* case concerned a governmental body and the *Goldsmith* case a political party. There is a clear distinction between bodies which exist to serve the public interest only and a trading corporation which exists for the benefit of its shareholders and whose commercial success affects its employees, suppliers, customers, creditors and trading partners.

The respondents further submit that the law is clear and that there is no uncertainty sufficient to warrant reference to the European Convention of Human Rights. Nevertheless, Lord Keith in the *Derbyshire* case gave full consideration to the need to promote and preserve freedom of expression in the context of article 10 of the European Convention. The respondents submit that there is no difference in principle between English law and article 10. They submit that there is nothing in ECHR case law which supports the appellants' contentions. The appellants' own application to the

European Commission on Human Rights for a ruling that this action was contrary to article 10 (*S. & M. v. UK* (1993) 18 EHRR CD 172) was dismissed without reference to the Court as being "manifestly ill-founded" within article 27(2) of the Convention.

The respondents submit that, since it is established law that companies can sue for libel which is likely to damage their trading reputation, there is no proper basis for distinguishing between private and public companies; nor between very large companies and smaller companies; nor between companies which operate in one jurisdiction and those which operate in many jurisdictions; nor for that matter between companies (which might be small but diverse) and rich individuals. They submit that the expression "multinational" is quite nebulous and incapable of satisfactory definition and that any distinction of the kind proposed would produce numerous unacceptable anomalies.

In *Derbyshire County Council v. Times Newspapers* [1993] A.C. 534, the House of Lords upheld the decision of the Court of Appeal [1992] 1 Q.B. 770 that a local authority, as a corporate public authority, was not entitled to sue for libel to protect its governing reputation. In the Court of Appeal, the judgments considered three questions, the first two of which were (1) whether a non-trading corporation was entitled to sue for libel, and (2) whether the right to free speech, whether at common law or under article 10 of the European Convention of Human Rights led to a different result for a non-trading corporation which was also a public authority. In answer to the first of these questions, Balcombe L.J. concluded at 809H:

> ""In my judgment the principle established by the authorities.....is that any corporation, whether trading or non-trading, which can show that it has a corporate reputation (as distinct from that of its members) which is capable of being damaged by a defamatory statement, can sue in libel to protect that reputation, in the same way as can a natural person, although there will of course be certain types of statement which cannot defame an artificial person.
>
> This principle seems to me to be in accordance with good sense. Even a non-trading corporation may need to borrow money, and its ability to do so may potentially be affected by an attack on its creditworthiness. Or it may need to employ staff, and a statement that it engages in discriminatory practices may potentially affect its ability to attract staff of the right calibre. These are only two examples of cases where it should be possible for a non-trading corporation, which asserts that its reputation is capable of being damaged by the defamatory statement, to sue for libel."

Butler-Sloss L.J. said at page 829A:

> "Consequently, from the authorities to which I have referred above and a number of decisions in other common law jurisdictions which we have been invited to consider, I have come to the conclusion that there is no difference in principle between a trading company and a non-trading company for the purpose of suing in tort, including the tort

> of defamation. In each case, a corporation has its reputation, separate from its members, capable of being adversely affected by defamatory statements and which it is entitled to protect by recourse to an action for libel."

The authorities to which Balcombe and Butler-Sloss L.JJ. referred included *Metropolitan Saloon Omnibus Co. Ltd v. Hawkins* (1859) 4 H. & N. 87 and *South Hetton Coal Company v. North-Eastern News Association* [1894] 1 Q.B. 133, both of which were binding on the Court of Appeal in the *Derbyshire* case and are binding on us.

The Court of Appeal addressed the second question mainly by reference to article 10 of the European Convention and held that a non-trading corporation which was also a public authority could not sue for libel. To allow it to do so would impose a substantial and unjustifiable restriction on freedom of expression and in particular on the desirable freedom to criticise democratically elected public bodies.

In the House of Lords, the leading opinion was that of Lord Keith of Kinkel. He too considered authorities including those to which we have already referred as being binding on us. Having done so he said at page 547B:

> "The authorities cited above clearly establish that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business. Examples are those that go to credit such as might deter banks from lending to it, or to the conditions experienced by its employees, which might impede the recruitment of the best qualified workers, or make people reluctant to deal with it."

But at page 547E Lord Keith considered that:

> "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 government 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 government body, or indeed any government 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."

Lord Keith considered authorities from this and other jurisdictions including *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 and the English Privy Council decision in *Hector v. Attorney-General of Antigua and Barbuda* [1990] 2 A.C. 312. At page 550D, he said:

> "The conclusion must be, in my opinion, that under the common law of England a local authority does not have the right to maintain an action of damages for defamation."

He then considered article 10 of the European Convention of Human Rights by summarising the consideration given to it in the Court of Appeal. Having done so, he said at page 551F:

> "My Lords, I have reached my conclusion upon the common law of England without finding any need to rely upon the European Convention. My noble and learned friend, Lord Goff of Chieveley, in *Attorney-General v. Guardian Newspapers Ltd. (No 2)* [1990 1 A.C. 109, 283-284, expressed the opinion that in the field of freedom of speech there was no difference between English law on the subject and article 10 of the Convention. I agree, and can only add that I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the Treaty in this particular field."

The conclusions in both the House of Lords and in the Court of Appeal in the *Derbyshire* case that a trading and non-trading corporation is in law able to maintain an action for libel were central to their decisions that a corporation which was also a local authority is not. If it might pedantically be suggested that those conclusions were nevertheless not strictly necessary to the decisions, (a) the conclusion in the Court of Appeal depended on authority to which we have referred which was binding on that court and is binding on this, (b) Lord Keith plainly considered that the conclusion was correct and the other members of the judicial committee all agreed with him, and (c) we respectfully agree with it.

In *British Coal Corporation v. National Union of Mineworkers* (unreported, 28.6.96), French J. held that the British Coal Corporation was a "governmental body" within the ambit of the decision in the *Derbyshire* case. The decision does not extend that ambit and we do not consider that it affects the question raised in this appeal. The same applies to *Goldsmith v. Bhoyrul* (The Times, 20.6.97) in which Buckley J. applied the *Derbyshire* case to a political party.

We do not consider that the basis upon which it was decided in the *Derbyshire* case that a local authority could not maintain an action for libel (viz: that democratically elected public bodies should be open to public criticism unrestrained by the possibility of an action for libel) applies to commercial corporations, however large, which are constitutionally in a quite different position. Nor is it, in our view, open to this court to invent a category of commercial corporation which, as an exception to a state of the law binding on us, should not be able to maintain an action for libel. Some corporations may be very powerful commercially and in homely terms well able to look after themselves. But we consider that there is no principled basis upon which a line might be drawn between strong corporations and weaker corporations, such as is required by the appellants' submissions. It would be open to Parliament to adjust the law of defamation in relation to corporations or to withdraw from some or all of them the right to maintain an action for libel. Parliament did not take this course following the recommendations of the Faulks Committee and it is a course which is not open to us.

The appellants question whether the first respondents have any reputation in the United Kingdom at all

and they say that there is no case in which it has been decided that a multinational holding corporation can sue for defamation alleged against its subsidiaries. The appellants contend that the first respondents have no trading reputation since they do not trade in the ordinary sense, but only act as a holding company for their subsidiaries. This is factually incorrect, since the first respondents do trade in the ordinary sense in the United States, as well as participating in joint ventures and granting franchises to others to operate under the McDonald's name and being the holding company of subsidiaries. The judge so described the first respondents on page 1 of his judgment. The defence admits that the first respondents own the trademark "McDonald's" and through a number of subsidiaries operate a number of fast food restaurants under the trademark.

The judge did not, as we read his judgment, hold that the first respondents had a claim in defamation for a libel against its subsidiary. Additionally in our judgment, these submissions tend to confuse two different points, viz:

(a) whether the leaflet published in this jurisdiction referred to and was defamatory of the first respondents (assuming that they had a reputation in this jurisdiction capable of being damaged), and

(b) whether, if it was, the first respondents have a reputation in this jurisdiction which the publication was apt to damage.

On the first point, the judge in effect held that the leaflet referred to McDonald's generally and was capable of being understood to refer to the first respondents as well as its United Kingdom subsidiary. Parts of the leaflet were really only apt to refer to McDonald's in the United States, for example, their alleged destruction of rainforest by cattle ranching in Latin America for beef export to the United States. In addition, the evil-looking face on the front page has a "$" sign as the pupil of his one visible eye and one of the Arches has "McDollars" written across it, not "McPounds". In our judgment, the judge was correct to hold that the leaflet referred to the first respondents as well as the second respondents for the reasons which he gave. It obviously did so, not least because one overt purpose of the leaflet was to criticise "multinationals".

On the second point, the judge took it without discussion that the first respondents had a reputation in this jurisdiction and that the publication was apt to damage it. Mr Rampton suggests that this reflects the fact that this was never a real issue during the trial.

Mr Rampton submits that the publication was defamatory of the first respondents in that it referred to McDonald's, which people associate with the United States' first respondents. The nature of the publication was that it was apt to damage the first respondents' goodwill. That is all that a plaintiff corporation needs to show for a defamation claim where there is no claim for special damages.

The appellants submit that the first respondents do not trade in the U.K., which we take to mean that they do not themselves operate restaurants in the U.K. They cannot, therefore, have a trading

reputation in the U.K. so that there can be no damage to any trading reputation in this jurisdiction. This has, they say, always been an issue in the proceedings. They also seek to rely on evidence not available at the trial to the effect that these proceedings are seen by a representative of the first respondents in the U.S. as a domestic matter of the second respondents.

The submission that the first respondents have no trading reputation in this jurisdiction, in our judgment, confuses reputation with goodwill. The distinction is that expressed by Evans L.J. in *Lonrho v. Fayed (No. 5)* [1993] 1 W.L.R. 1489 at 1509 as that "between loss of reputation in the defamation sense and loss of reputation which is synonymous with a loss of customer goodwill resulting in a loss of business which can therefore be measured in money terms". In the present context, the appropriate questions are (a) whether the first respondents have a reputation in this jurisdiction and (b) whether the publication is apt to damage the reputation of a corporation. The second of these questions depends on the nature of the publication, not on the monetary consequences which may be shown or predicted to flow from it.

As with an individual plaintiff, where a company brings proceedings for libel, there is no obligation on them to show that they have suffered actual damage. In *English and Scottish Co-operative Properties v. Odhams Press* [1940] 1 K.B. 440, the trial judge in a libel action had conveyed the impression to the jury that the plaintiff limited company had suffered no damage, or at least that it had not been proved that it had suffered any damage and that therefore the damages could be nominal. Lord Goddard said at p. 461:

> "There is no obligation on the plaintiffs to show that they have suffered actual damage. A plaintiff may, if he can, by way of aggravating damages, prove that he has suffered actual damage. But in every case he is perfectly entitled to say that there has been a serious libel upon him; that the law assumes that he must have suffered damage; and that he is entitled to substantial damages."

The effect of this is, not that there is an irrebuttable presumption of substantial damages, but that a corporate plaintiff which shows that it has a reputation within the jurisdiction, and that the defamatory publication is apt to damage its goodwill, has a complete cause of action capable of leading to an award of substantial damages. Other considerations could result in an award of nominal damages.

In *Shevill v. Press Alliance* [1996] A.C. 959, three of the four plaintiffs to a libel action against a French newspaper were French-Registered Companies. Of their claims, Purchas L.J. said at page 976D:

> "In relation to the claims of the second, third and fourth plaintiffs Mr Tugendhat relied on the speech of Lord Reid in *Lewis v. Daily Telegraph Ltd.* [1964] A.C. 234, 262:
>
> > "A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in

> money. The injury need not necessarily be confined to loss of income. Its goodwill may be injured."
>
> Mr Tugendhat submitted that if the second, third and fourth plaintiff had suffered any damage, it could only have been suffered in France and not in England. But this authority only serves to exclude one type of damage in the case of non-personal plaintiffs and does not affect the presumption of damage recognised by English law; ...
>
> Again, the submission that the place where the goodwill or reputation of the second, third and fourth plaintiffs was located was France ignores the fact that they may well have had some goodwill and reputation which would be affected by the publication of the paper wherever it circulates."

After a reference to European Court of Justice on questions which did not affect what Purchas L.J. here said, the House of Lords dismissed an appeal from the decision of the Court of Appeal. The authority shows the law to be that, where a defamatory publication is apt to damage the goodwill of a corporation which has a reputation within the jurisdiction, damage is presumed and the court does not have to enquire into details of likely damage. The words complained of in the leaflet in this case were, in so far as they were defamatory, obviously apt to damage the goodwill of a corporation. The corporation does not have to trade within the jurisdiction, provided that it has a reputation within the jurisdiction, which in this case the first respondents plainly do. However much the appellants may for this purpose disclaim it, both the leaflet and the appellants' conduct of these proceedings were in large measure a criticism in this jurisdiction of the reputation of McDonald's and particularly of the first respondents. As Mr Morris said on Day 283 of the trial at page 16 of the transcript:

> "So the first plaintiff has an interest in every single McDonald's restaurant in the world. ... So, so far as we are concerned, and so far as the public is concerned, so far as 99 percent of the witness evidence is concerned, the word McDonald's applies to all McDonald's stores worldwide, and that is what we have been talking about in this case."

The judge made findings of fact to this broad effect at various places in his judgment, for example on pages 1, 2, 514 and 712.

The fact that the first respondents are a U.S. corporation and that they do not themselves operate restaurants in the U.K. might be relevant to an assessment of the *extent* to which a defamatory publication was apt to damage their reputation and therefore to any quantification of damages.

There is nothing intrinsically difficult (in appropriate factual circumstances) about a parent company and its subsidiary each having a distinct reputation and each having distinct goodwill within a jurisdiction in which only the subsidiary carries on day to day business. *Habib Bank v. Habib Bank AG Zurich* [1981] 1 W.L.R. 1265 was an appeal in a passing off case concerning three related banks

each with "Habib Bank" in their name. The trial judge had found that customers dealing with any of the three banks thought that they were dealing with one and the same organisation. He was criticised for a finding that there was a shared goodwill, which Oliver L.J. at p. 1278 said was perhaps less than precise shorthand. Oliver L.J. then said at p. 1278G:

> "But for my part I cannot see that in the essentials the judge was wrong. Where an internationally known business establishes a branch in this country through a limited company, either incorporated here or abroad, it may be that technically the goodwill and reputation of that business "belongs" to the limited company in the sense that the company may be the proper and only plaintiff in an action taken here to protect it. But it does not cease to be the goodwill and reputation of the international business because it is also the good will and reputation of the local branch. ...
>
> At the base of Mr Aldous's submissions there lies the notion that even in the case of an international group in the sense used above, once there had been established here a corporate entity making use of their goodwill, the goodwill becomes a localised asset forming part of the exclusive property of the corporate entity, and can be attached to another corporate entity established by the international body only by some transfer from the original user in this country, for instance, by assignment or licence expressed or implied. For my part, I think that that displays an unduly and unjustifiably formalistic approach to the matter and to be an approach which ignores substance and reality. Essentially the evidence and the judge's findings seem to me to justify the proposition that the reputation and that the establishment of a branch in this country, whether as a separate corporate entity or not, imports simply that it is part of that international organisation which is run by the Habib family."

In our judgment, these considerations apply by analogy to McDonald's and to the ability of each of the respondents to bring these proceedings. McDonald's generally is a well known name. Its use in this jurisdiction would import to the ordinary reader both the U.S. corporation and (if they are different) whatever company runs the local restaurants. The first and second respondents each have a related but distinct reputation and each have related but distinct goodwill.

Proof of special damage

The judge held that it was not necessary for the respondents to prove any particular financial loss or "special damage", provided that damage to their goodwill is likely.

The appellants submit that the respondents' claims should fail for want of proof of actual financial loss caused by the libels. They submit that the respondents' reputation is artificially constructed by themselves and that they should not be allowed to take advantage of a rule designed to safeguard the reputation of individuals, damage to whose reputation is incapable of being quantified. Otherwise corporations would be treated as having a general reputation, which they do not have, and could be awarded a windfall gain. The Faulks Committee recommended (in March 1975) that trading and non-trading corporations should only be able to bring defamation proceedings if they prove that they have suffered special damage or that they are likely to suffer pecuniary damage.

The appellants submit that this is especially so when the evidence demonstrated that less than 3,000 London Greenpeace leaflet were distributed during the period relevant to this action. This should be contrasted with McDonald's huge advertising budget and the number of customers whom they claim to serve each day.

The respondents submit that the judge was correct to hold that neither respondents need prove any particular financial loss or special damage, provided that damage to goodwill was likely. They refer to *South Hetton Coal v. N-E. News Association* [1894] 1 QB 133, where Lord Esher M.R. said at page 139:

> "With regard to a firm or company, it is impossible to lay down an exhaustive rule as to what would be a libel on them. But the same rule is applicable to a statement made with regard to them. Statements may be made with regard to their mode of carrying on business, such as lead people of ordinary sense to the opinion that they conduct their business badly and inefficiently. If so, the law will be the same in their case as in that of an individual, and the statement will be libellous. Then, if the case be one of libel - whether on a person, a firm, or a company - the law is that the damages are at large. It is not necessary to prove any particular damage; the jury may give such damages as they think fit, hiving regard to the conduct of the parties respectively, and all the circumstances of the case.
>
> In the present case ... the only question would have been whether it contained statements with regard to the conduct by the plaintiffs' company of their business, tending to shew that it was so improper and inefficient as to bring them into contempt or discredit. If the jury found that it did, the plaintiffs would be entitled to damages at large, without giving any evidence of particular damage."

This passage was cited with apparent approval by Lord Keith in the *Derbyshire* case at 545A-D. In the *South Hetton Coal* case, Lopes L.J. said at page 141:

> "With regard to the first point [viz: will the action lie by the plaintiffs, who are a corporation?] I am of the opinion that, although a corporation cannot maintain an

> action for libel in respect of anything reflecting upon them personally, yet they can maintain an action for a libel reflecting on the management of their trade or business, and this without alleging or proving special damage."

At page 148, Kay L.J., having considered a number of authorities, said:

> "I therefore am of opinion that a trading corporation may sue for a libel calculated to injure them in respect of their business, and may do so without any proof of damage general or special. Of course if there be no such evidence the damages given will probably be small."

There is thus clear and binding authority against the appellants' submissions, which we do not, in any event find persuasive. Damage to a trading reputation or goodwill may be as difficult to prove as damage to the reputation of an individual. Damage to a trading reputation or goodwill does not necessarily cause immediate or quantifiable loss. The relevant recommendation of the Faulks Committee was not put into effect.

Burden of proof

The appellants submit that the judge should have held that the burden was on the respondents to prove that the matters complained of by them were false. This would bring the law into line with that in the United States. The appellants say that the first respondents are a United States corporation which has not tried to take legal action in the United States where the public figure defence in *New York Times v. Sullivan* (1964) 376 U.S. 254 effectively precludes actions of the kind which succeeded here. The appellants say that an equivalent defence should be available in this jurisdiction and that the first respondents should not be enabled to avoid the difficulties of the United States law of defamation by suing in this jurisdiction. They refer to a passage in *Derbyshire* to the effect that those who criticise local authorities should not have to prove the truth of what they assert.

The respondents submit that in English law it is clear that a plaintiff who establishes that a publication is defamatory of him does not have to prove that the words complained of are false. They are presumed to be false until the contrary is shown. They refer to *Anon* (1652) Sty 392, 82 ER 804: *Rowe v. Roach* (1813) 1 M&S 304, 105 ER 114; *Roberts v. Camden* (1807) 9 East 93, 103 ER 508 at 509; *Belt v. Lawes* (1882) 51 LJQB 359 at 361; *Sutherland v. Stopes* [1925] A.C. 47; and Gatley on Libel and Slander, 9th Edition paragraph 11.3. A clear expression of this law is in *Belt v. Lawes* at page 361 where Field J. said:

> "... a libel prima facie imports a wrong, which it could not do if the alleged libellous matter were true, and therefore the onus of proving the truth thereof is cast on the defendant."

And Huddleston B. said:

> "The defendant in his statement of defence traverses the falsehood of the statement alleged to have been made by him, and thereby takes the onus of justifying, but this he would have without such traverse."

The respondents submit - with some general force, in our view - that in fact in this case they largely accepted the burden of proving the falsity of the parts of the leaflet on which they succeeded.

It is evident that the respondents submissions correctly state English law. As may be seen from the passage in Gatley to which they refer, there are theoretical arguments either way. This court is not, however, able to change clear and binding law and in particular cannot entertain a submission that English law ought to adopt the United States' position as exemplified by *Sullivan.* Such a course was rejected by both the Faulks Committee and the Neill Committee.

Burden of proof of justification

The appellants submit that the judge was wrong to hold that, to establish a defence of justification, the appellants had to prove that the defamatory statements were true. Such a test is unreasonable and too strict, particularly on scientific matters or questions of subjective opinion, and when the appellants, who were not proved to have written the leaflet, were unrepresented and impecunious and unable to bring before the court all the evidence they would have wished. A short leaflet could not possibly include everything explicitly. The rule should be disapplied in the light of article 10 of the ECHR. They submit that it should be a defence in English law to defamation proceedings that the defendant reasonably believed that the words complained of were true. The contents of the leaflet were an amalgam of allegations made by other organisations and individuals before they were gathered together in the leaflet and it was unreasonable to require the appellants to establish the truth of all the statements.

The respondents submit that it is no defence to an action for defamation that the defendant reasonably believed that the words complained of were true. They submit that the Court of Appeal has no power to create such a defence and that, even if it did, it would be wrong to do so. They refer to what May L.J. said in *Shah v. Standard Chartered Bank* [1998] 3 W.L.R. 592 at 616 (in the rather different context of a submission that credible hearsay should be admissible to prove a publication to the effect that there were reasonable grounds to suspect a person of discreditable conduct) about the balance between freedom of speech and protection of reputation. They submit that an extension of the kind proposed would tilt a balance already supported by existing defences of justification, fair comment and qualified privilege unacceptably in favour of defendants.

In our judgment, the appellants' submission is misdirected, although a version of it may have some force in another context. If a defamatory publication is judged to have a meaning which is an assertion

of fact, then for the reasons which we have given in English law the defendant has to prove the truth of the assertion to establish a defence of justification. If, however, the publication is judged to be a measured and balanced report of a tenable view held by a respectable body of expert scientific opinion, then other considerations may apply. The publication may not be defamatory at all; or it may be true according to its natural and ordinary meaning (provided that its natural and ordinary meaning does not fall foul of the repetition rule - see e.g. *Stern v. Piper* [1997] Q.B. 123 and *Shah v. Standard Chartered Bank* [1998] 3 W.L.R. 592); or there may be a defence of fair comment. In this case, the judge held (in the main) that the words complained of were assertions of fact. But as the judge himself said at page 366 of his judgment:

> "Had the leaflet said that in order to do his or her best to keep any risk of suffering heart disease or cancer of the breast or cancer of the bowel to a minimum the reader would be well advised to keep consumption of fat, particularly saturated fat, and animal products down and consumption of fruit, vegetables and cereals up, should take a fair amount of exercise and, above all, avoid smoking, and had it gone on to say that if the reader ate McDonald's meals several times a week indefinitely, without taking a lot of care with the rest of his or her meals, there would be a very real risk of heart disease in due course and that it was possible that there would be some increase in the risk of cancer of the breast and cancer of the bowel also, and had it concluded that the reader would, therefore, be well advised to ignore any McDonald's advertising which might appear to encourage him or her to eat McDonald's meals several times a week, then, in my view, McDonald's (the Plaintiffs) would have had no just cause for complaint. But that was not the message which the leaflet gave."

The appellants further contend that imposing on them the impossible burden of proving justification (and, so far as it went, fair comment) had the effect of denying them a fair trial and was a breach of article 6 of the European Convention of Human Rights. In our judgment, this submission is misconceived. Article 6 is concerned with the manner in which trials are conducted, not with the substantive law that is applied. We have considered submissions relating to the substantive law elsewhere and we consider submissions relating to the conduct of the hearing in the next section of this judgment.

Qualified privilege

The appellants submitted before the judge that there should be a defence in English law of qualified privilege for a publication concerning issues of public importance and interest relating to public corporations such as the respondents. This is because such publications are a contribution to a public debate about the power and responsibility of powerful corporations. The appellants submit that privilege should apply to the publication in good faith of words, even if defamatory and factually untrue, arising out of information, opinions and arguments concerning the activities of a multinational corporation that have a bearing on people's lives and health, the environment and the welfare of

animals. There is in our judgment no proper basis for such a wide extension of the present law. As Stephenson L.J. said in *Blackshaw v. Lord* [1984] 1 Q.B. 1 at 26:

> "No privilege attaches yet to a statement on a matter of public interest believed by the publisher to be true in relation to which he had exercised reasonable care."

See also the rejection of the New Zealand position in *Reynolds v. Times Newspapers* [1998] 3 W.L.R. 862 at 907G-H.

Since the trial before Bell J, the nature and extent of the defence of qualified privilege has been considered in this Court (*Reynolds* v *Times Newspapers Ltd* [1998] 3 WLR 862). The plaintiff, a former Taoiseach of the Republic of Ireland brought proceedings for defamation based on an article contained in a British national newspaper. The publication related to the political crisis in Ireland which culminated in the plaintiff's resignation as Taoiseach. The defendants relied, *inter alia*, on the defence of qualified privilege on the ground that the public interest in the general publication of information and discussion relating to political issues and the public conduct of elected politicians engaged in them justified such protection.

Having considered the English authorities, Sir Thomas Bingham MR, giving the judgment of the Court, stated (p 899B):

> "It seems to us on the strength of this very powerful and consistent line of authority, that the ultimate question in each case is whether the occasion of the particular publication, in the light of its particular circumstances, contains the necessary ingredients to give rise to the privilege, always bearing in mind that the rule is an aspect of public policy as epitomised in Parke B's statement in *Toogood* v *Spyring*, 1 CM & R 181, 193, that the protection must be `fairly warranted by any reasonable occasion or exigency'."

The Court added:

> "It follows that in our judgment, when applying the present English law of qualified privilege, the following questions need to be answered in relation to any individual occasion.
>
> 1. Was the publisher under a legal, moral or social duty to those to whom the material was published (which in appropriate cases, as noted above, may be the general public) to publish the material in question? (We call this the duty test).
>
> 2. Did those to whom the material was published (which again in appropriate cases may be the general public) have an interest to receive that material? (We call this the interest test).

3. Were the nature, status and source of the material, and the circumstances of the publication, such that the publication should in the public interest be protected in the absence of proof of malice? (We call this the circumstantial test).

We make reference to "status" bearing in mind the use of that expression in some of the more recent authorities to denote the degree to which information on a matter of public concern may (because of its character and known provenance) command respect: see the *Perera* case [1949] A.C. 1, 12; the *Webb* case [1960] 2 Q.B. 535,568; *Blackshaw v. Lord* [1984] Q.B. 1, 26 and 35; and also the judgment, in chambers, of Eady J. in *Youngerwood v. Guardian Newspapers Ltd.* (unreported), 13 June 1997. The higher the status of a report, the more likely it is to meet the circumstantial test. Conversely, unverified information from unidentified and unofficial sources may have little or no status, and where defamatory statements of fact are to be published to the widest audience on the strength of such sources, the publisher undertakes a heavy burden in showing that the publication in "fairly warranted by any reasonable occasion or exigency." In *Blackshaw v Lord* [1984] QB 1, 27, Stephenson LJ gave some examples which put the requirement quite high:

> "There may be extreme cases where the urgency of communicating a warning is so great, or the source of the information so reliable, that the publication of suspicion or speculation is justified; for example, where there is a danger to the public from a suspected terrorist or the distribution of contaminated food or drugs; but there is nothing of that sort here.""

The court in *Reynolds* had cited with approval a passage from the judgment of Fox L.J. in *Blackshaw v. Lord* at page 42 which included:

> "I think there are cases where the test of `legitimate and proper interest to English Newspaper readers' would tilt the balance to an unacceptable degree against the individual. It would, it seems to me, protect persons who disseminate `any untrue defamatory information of apparently legitimate public interest, provided only that they honestly believed it and honestly thought that it was information which the public ought to have'. See *London Artists Ltd. v. Littler* [1969] 1 W.L.R. 607, 615."

and

> "In my opinion the defendants were under no duty to the public to publish the article in the form in which it appeared having regard to the actual degree of knowledge available to them."

The judgment of Eady J. in *Youngerwood*, to which the court referred, included at page 3 of the transcript:

> "Was there ... a duty on the part of the defendants to publish the allegations ... to the general public, and I emphasise the following words, irrespective of their truth or falsity?"

The Court in *Reynolds* went on to consider recommendations upon the law of qualified privilege in official reports and statutes, the election cases, the *Derbyshire* case, the European Court of Human Rights jurisprudence, the Commonwealth jurisprudence and the decision of the United States Supreme Court in *New York Times Co v. Sullivan* (1964) 376 US 254. Having done so, the Court upheld the tripartite test already stated. In doing so, it said at p. 909E:

> "As it is the task of the news media to inform the public and engage in public discussion of matters of public interest, so is that to be recognised as its duty. The cases show acceptance of such a duty, even where publication is by a newspaper to the public at large. In modern conditions what we have called the duty test should, in our view, be rather more readily held to be satisfied.
>
> Corresponding to the duty of the media to inform is the interest of the public to receive information. Article 10 of the Convention lays down a right to receive information. We have no doubt that the public also have an interest to receive information on matters of public interest to the community (as opposed, of course, to information about matters in which the public may happen to be interested). The cases have accepted that the public generally may have an interest to receive information published in a newspaper, so satisfying what we have called the interest test. In modern conditions the interest test should also, in our view, be rather more readily held to be satisfied.
>
> It would, however, in our judgment, run counter to English authority and do nothing to promote the common convenience of our society to discard the circumstantial test. Assuming in each case that a statement is defamatory and factually false although honestly believed to be true, it is one thing to publish a statement taken from a government press release, or the report of a public company chairman, or the speech of a university vice-chancellor, and quite another to publish the statement of a political opponent, or a business competitor or a disgruntled ex-employee; it is one thing to publish a statement which the person defamed has been given the opportunity to rebut, and quite another to publish a statement without any recourse to the person defamed where such recourse was possible; it is one thing to publish a statement which has been so far as possible checked, and quite another to publish it without such verification as was possible and as the significance of the statement called for. While those who

> engage in public life must expect and accept that their public conduct will be the subject of close scrutiny and robust criticism, they should not in our view be taken to expect or accept that their conduct should be the subject of false and defamatory statements of fact unless the circumstances of the publication are such as to make it proper, in the public interest, to afford the publisher immunity from liability in the absence of malice. We question whether in practice this is a test very different from the test of reasonableness upheld in Australia."

The court rejected a broader test on the ground that it would "expose those who are properly the subject of political speech to false and defamatory factual statements about them with no protection save on proof, which will often be difficult or impossible, that the publisher lacked an honest belief in the truth of the statement."

The appellants submit that they should be accorded qualified privilege under the *Reynolds* principles. They say that the case exemplifies the need for free flow of information without hindrance. They say that the duty and interest tests defined in that case should be liberally interpreted and should apply in this case. The information in the leaflet was such that there was a public interest that it should be communicated to the public urgently. London Greenpeace had a clear, urgent, moral and social duty to impart information of this kind because that was what London Greenpeace was set up to do. The privilege should apply when the sources of material published on issues of public interest cannot be shown to have been unreasonably believed. They emphasise that one of the circumstances to be taken into account for the circumstantial test is that the respondents agreed to permit Veggies to continue to distribute a leaflet in substantially the same terms (other than those relating to the rainforest) as the leaflet complained of in this case. It was reasonable to suppose that McDonald's were content with the sources of the information. The appellants submit that the publication of the leaflet was reasonable because it was reasonable to inform the public of the matters which it contained. They submit that the views coming from, for example, the World Health Organisation and a publication called "Ecology 2000" (to which Ms Steel referred in her evidence) and other publications referred to in their written submissions should command respect and that London Greenpeace were raising these and other matters of concern to inform the public and not as a polemic against McDonald's. The appellants were, at the highest, mere distributors of a leaflet which they were not proved to have written and were not in a position to prove that its contents were factually true. The test should be whether the appellants reasonably believed that the contents were true. The appellants submit that, by the time the leaflet was published, McDonald's had had opportunities to rebut it but had not done so. They had had the clearest opportunity to deal with the allegations in their negotiations with Veggies. They were in protracted negotiations with Veggies over an identical publication.

Veggies was not an issue in this respect at trial and so there was no relevant evidence. There may have been many reasons why another organisation was differently treated. There was evidence that McDonald's regarded the appellants in this case as the source of the libel. The defence of qualified privilege was never raised nor was any issue of estoppel depending on the respondents' treatment of Veggies.

It is evident that *Reynolds* and many of the cases considered in it concerned publications by the press or in broadcasts where the respondents were (broadly speaking) politicians. That there is a public interest in political matters is clear. The relevant public interest is not, however, as the court in *Reynolds* made clear at p. 909D, confined to politicians and political matters. It can relevantly extend to the governance of companies, or at least those companies which have features sufficient to attract public interest. McDonald's plainly comes into that category and the respondents accept that the matters contained in the leaflet met the interest test as formulated in Reynolds. They submit, however, that the appellants had no duty to publish the words complained of and that the publication of the leaflet plainly failed to meet the circumstantial test.

On the question of duty, the respondents submit that the appellants are not a newspaper or broadcasting organisation. They are under no general moral, legal or social duty to inform the public or engage in public discussion of matters of public interest. They may choose to do so, but they are no more under a duty to do so than any other ordinary member of the public. There is no general duty cast on citizens to protest or agitate or educate on matters of public interest and no particular duty on the appellants to publish the leaflet.

In *Reynolds* at p. 909E, the court equated the "task" of the news media with its "duty". *Reynolds* was a case involving a publication in a newspaper and it is not surprising that the Court has considered the position of the media specifically.

Mr Rampton submits that "the media" are in a special category and can avail themselves more readily of the defence of qualified privilege. The media have a unique role, he submits, in supplying information which members of the public need in order to regulate their lives. Further, the media have resources, by way of researchers, producers, editors and legal advice which enable them to ensure that published information is accurate. Newspapers are regulated by the Press Complaints Commission. Because of their special role, they are likely to enjoy the defence of qualified privilege when publishing appropriate information to the public. For those reasons, it is submitted, a report in a national newspaper might be covered by qualified privilege when the same report published elsewhere would not. Mr Morris submits that, since London Greenpeace consider themselves under a duty to instruct and warn the public about the consequences of the activities of multi-national organisations, their publications should not be treated differently from other publications.

We cannot accept as a general proposition that, when considering whether the requisite "duty" exists, a publication which can be brought within the category of "media" is for that reason to be treated differently from a publication which cannot be brought within that category. It is a feature of modern society that groups with particular interests and concerns exist to persuade the public to their points of view. The nature of the organisations, the views they promulgate and the way in which they promulgate them cover a very broad spectrum. Some are concerned to protect the environment and with such fundamental matters as food production and nutrition. They perform a valuable role in public life. At the fringes, it may be difficult to determine whether a publication is, or is not, a

newspaper. There may be extreme circumstances in which an individual might have a duty to publish to the public generally defamatory information believed to be true, and where it would be absurd to distinguish between that publication and publication of the very same information in a newspaper. "The land of Milton, Paine and Mill" (*Reynolds* p 909E) should not, when considering duties, necessarily put their publications in a different category from those of newspapers on the ground only that they are not part of the media. Once the concept of the publisher's "task" is introduced as the hallmark by which the existence of a duty is assessed, we see no justification for excluding at the outset environmental groups from those who satisfy the first step of the tripartite test when publishing material which the general public have an interest to receive.

Although the court in *Reynolds* propounded the duty test separately and placed it before the circumstantial test, we consider that it will not always be sensible to address each in isolation. Indeed it may be that all three tests could be seen as aspects of a single composite test. In some circumstances, the duty cannot be divorced from the subject matter of the information and other matters relevant to the circumstantial test. As Stephenson L.J. said in *Blackshaw v. Lord* at page 27A:

> "There may be extreme cases where the urgency of communicating a warning is so great, or the source of information so reliable, that publication of suspicion or speculation is justified: for example, where there is danger to the public from a suspected terrorist or the distribution of contaminated food or drugs: but there is nothing of that sort here."

It is necessary to apply the circumstantial test, as expressed in *Reynolds*, to the facts of the present case. The respondents submit that the publication of the leaflet plainly failed to meet the *Reynolds* circumstantial test. It was the work of bitter opponents of the respondents who were campaigning against them. It had no status so as to command respect by virtue of its character or provenance. It was, submit the respondents, an utterly unbalanced propaganda sheet. No opportunity was given to the respondents to rebut the words complained of. The contents of the leaflet were never properly verified by reference to the respondents. The respondents submit that the only cases in which the defence of qualified privilege has succeeded where the publication was to the world at large were where there were reports of a properly constituted body of investigation and where an opportunity had been given to the plaintiff to rebut what was alleged. There was no hint in the leaflet that it purported to have any status of the kind which *Reynolds* envisages. If the status is not claimed, then the reader will suppose that what is stated is simply a fact. The court in *Reynolds* said at 899H that "unverified information from unidentified and unofficial sources may have little or no status". Mr Rampton submits that at the least the defendant has to demonstrate the status. Qualified privilege of this kind was not in issue at the trial, since *Reynolds* had not then been decided. We do not know what the evidence might have been about the sources of this information if qualified privilege had been raised at trial.

It is, we think, important to remember that the subject matter of the inquiry is a publication of one or more statements of fact believed to be true and that the privilege asserted claims protection even if the

facts are untrue. Any duty to publish must therefore override a requirement to verify the facts and arise even though it may often be possible to adjust the terms of the publication so that it is, for instance, no longer defamatory. The balance between freedom of expression and protection of reputation does not, we think, generally require protection for those who publish indiscriminately unverified facts irrespective of their truth.

The circumstantial test in *Reynolds* is not, as the appellants submit, concerned with their own subjective belief. The Court must consider the "nature, status and source of the material and the circumstances of the publication". Where a publication is balanced, properly researched, in measured terms and based on sources of high repute, the Court will more readily hold the publication privileged. The leaflet complained of is admitted to be a campaigning leaflet. That would not of itself necessarily exclude the possibility of qualified privilege but where a claim for qualified privilege is made for a one-sided, campaigning document, composed in strong terms, the Court will scrutinise the document for the status of its sources and the care with which it has been researched. The authors themselves, with respect, are not clothed with such status or authority as entitle them to protection as a matter of course. They have produced a document which lacks balance and makes scant reference to authoritative sources. The leaflet complained of does not demonstrate that care in preparation and research, or reference to sources of high authority or status, as would entitle its publishers to the protection of qualified privilege.

Reasonable and legitimate response to attack

The appellants submit that the judge should have held that the publication of the leaflet was on occasions of qualified privilege because it was a reasonable and legitimate response by concerned members of the public to an actual or perceived attack on the rights of others, in particular vulnerable sections of society who generally lack the means to defend themselves adequately (e.g. children, young workers, animals and the environment) which the appellants had a duty to make and the public an interest to hear.

In our judgment, this submission is misconceived. The privilege which attaches to a measured but defamatory defence undertaken in good faith to an actual or anticipated attack arises where the attack is a defamatory attack upon oneself. Here there was no defamatory attack and there was no attack on the appellants. Their publication might attract privilege upon other principles - although we have held that it does not - or there might be defences of justification or fair comment - although in this case there were not. But there is no proper basis for asserting this brand of qualified privilege.

Article 10 of the European Convention of Human Rights

Article 10 provides:

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

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The appellants submit that this guarantees freedom of speech and that its restrictions should be narrowly applied. As Lord Keith said in the *Derbyshire* case (at page 550H) restrictions upon freedom of expression should be proportionate to a legitimate pressing social need. The appellants submit that the respondents have not demonstrated a pressing social need sufficient to make it proportionate and necessary to interfere with their freedom of expression. They point to French J.'s observation in the *British Coal Corporation* case that Lord Keith did not confine his reasoning in the *Derbyshire* case to democratically elected bodies. They submit that privatisation of public bodies in this country has blurred the distinction between public authorities and private corporations.

Historically limits have been put on the circumstances in which English courts might refer to and apply the European Convention of Human Rights and cases decided in the European Court of Human Rights - see *R. v. Home Secretary, ex parte Brind* [1991] 1 A.C. 696 at 761; the *Derbyshire* case at [1992] 1 Q.B. 770 at 812D and [1993] A.C. 534 at 551B. Those limits still apply, although the Human Rights Act 1998 has now been enacted and, although it is not yet in force, the Convention is soon to be part of the law of England. In the present case, the judge held that the relevant English law was clear and that recourse to the Convention was unnecessary and inappropriate. We are inclined to agree. We have however considered Convention cases in the light of the appellants' various submissions. We note that Lord Keith concluded in the *Derbyshire* case that "the common law of England is consistent with the obligations assumed by the Crown under the Treaty in this particular field" - see also *Attorney-General v. Guardian Newspapers (No. 2)* [1990] 1 A.C. 109 at 283. We also note that the court in *Reynolds* considered European Convention cases and concluded at 906A that "there is nothing either in article 10 itself or in the Convention cases cited above which is inconsistent with the principles of English Common law qualified privilege ...".

In 1993, the appellants themselves made complaint to the European Commission on Human Rights in relation to these proceedings. Their complaints were dismissed under article 27(2) as being manifestly ill-founded - *S. & M. v. UK* (1993) 18 EHRR CD 172. Their complaints were that:

(a) they were being denied effective access to court under article 6 of the Convention to defend their right of free speech. They contended that they were unable to defend

themselves properly against such a weighty adversary as McDonald's without legal aid.

(b) the initiation of the proceedings against them constituted an unjustified interference with their article 10 freedom of expression. The failure of the United Kingdom to provide legal aid or simplified procedures or to limit the amount of damages also constituted a breach of article 10.

(c) the lack of effective domestic remedies for their convention claims constituted breaches of articles 6, 14 and 13.

The Commission found that the unavailability of legal aid was not contrary to article 6(1); that the case did not disclose any appearance of a violation of article 10; and that there were no breaches of articles 13 or 14. The complaints were held by a majority to be inadmissible. Of the article 10 complaint, the Commission stated (at page 173):

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

The Commission also stated of the appellants:

> "They have published their views, upon which there was no prior restraint, and, if those views are subsequently found to be libellous, any ensuing sanction would in principle be justified for the protection of reputation and rights, within the meaning of Article 10(2) of the Convention."

The decision of the Commission does not explicitly deal with a substantive contention that it was contrary to article 10 for corporations such as McDonald's to be able to maintain actions for libel. The appellants did not make that contention in their written application. But the explicit decision that there was no appearance of a violation of article 10 in the context of the parties' disparate abilities to conduct the litigation strongly suggests that the Commission considered these proceedings to be properly within the restriction in article 10(2). The appellants submit that the European Convention law has developed since their application was dismissed and they rely on the later cases.

The appellants rely on article 10 for a variety of submissions. In essence, however, they are all to the same effect, viz: that the English law of defamation should be interpreted or, if necessary, adjusted so that by one means or another it provides a defence for appellants such as they are to claims by

respondents such as McDonald's for libel in publications such as the leaflet where the libels are untrue defamatory statements of fact which the appellants nevertheless believed to be true.

The appellants submit that a number of principles may be derived from cases decided in the European Court of Human Rights. Wide criticism (whether true or not) of government should be permitted on matters of general interest and the same should apply to dominant corporations. Greater tolerance of criticism should be allowed in public debate on matters of public importance. Businessmen actively involved in the affairs of large public companies are properly susceptible to wider criticism than private individuals and are (or should be) open to scrutiny by bodies, such as Greenpeace London, purporting to represent the public interest. It is unacceptable to censor debate on public health and similar issues concerning fast food chains. A requirement to prove the truth of opinions held about public figures is not compatible with the Convention. Proof of the truth of an allegation should not ordinarily be required in matters of public debate since article 10 encourages assertion and comment rather than caution. Freedom of expression extends to publications which offend, shock or disturb and the freedom extends to cover a degree of exaggeration or even provocation. These latitudes should be accorded to the leaflet. The appellants submit that the leaflet was a political statement which ought to be protected.

These submissions are, to a large extent, a synthesis of a number of general observations made in individual Convention cases. We consider the more pertinent of these, observing however that the synthesis is loosely structured and without a clear analysis of how English law should be interpreted or adjusted to achieve the submitted conclusion.

In *Castells v. Spain* 14 E.H.H.R. 445, the applicant was an elected representative of an opposition party in Spain. He published in a weekly magazine an article criticising the government. He was convicted of insulting the government and disqualified from public office. During his trial, the Spanish court ruled that evidence of the truth of his statements was inadmissible. He complained that his prosecution and conviction violated his right to freedom of expression within article 10 of the Convention. The court unanimously upheld this part of his complaint. In doing so, it said at page 477:

> "The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In the democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion."

This accords with the *Derbyshire* case, but does not add to it.

Fayed v. UK 18 E.H.R.R. 393 concerned a complaint by the Fayed brothers which included the contention that, contrary to article 6(1), the DTI report into the House of Fraser takeover had determined their civil rights to honour and reputation and denied them access to a court to determine these civil rights. The complaint was rejected by the ECHR. The appellants refer to a passage at

paragraph 75 of the Court's judgment where it is said:

> "As to the enforcement of the right to a good reputation under domestic law, the limits of acceptable criticism are wider with regard to businessmen actively involved in the affairs of large public companies than with regard to private individuals, to paraphrase a principle enunciated by the Court in the context of the State's power to restrict freedom of expression in accordance with Article 10(2) of the Convention. Persons, such as the applicants, who fall into the former category of businessmen inevitably and knowingly lay themselves open to close scrutiny of their acts, not only by the press but also and above all by bodies representing the public interest."

The decision referred to was *Oberschlick v. Austria* (see below) which concerned the denial of a defence of fair comment to a critic of a politician. The context of paragraph 75 was as part of a consideration of whether the publication of the DTI Inspectors' Report which was privileged under English law was proportionate to the legitimate objectives which the Report served. The question was whether the limitations on the ability to challenge adverse findings of the Inspectors was contrary to article 6. We do not derive any material help from this case. London Greenpeace are not in a position in any way comparable with that of DTI Inspectors. The respondents accept that there may be circumstances in which criticism of businessmen involved in the affairs of a large public company may attract defences of fair comment or qualified privilege (provided that the other conditions for those defences are fulfilled).

In *Hertel v. Switzerland* 25.8.98, the applicant produced a reasoned research study about the pathological effect of food cooked in microwave ovens. He sent the article to a journal which over-simplified and exaggerated its conclusions and added images which associated the use of microwave ovens with death. An Association of Manufacturers and Suppliers brought proceedings under the Federal Unfair Competition Act which failed. The Association then sought an injunction under the UCA. The Commercial Court allowed the application. The Federal Court dismissed an appeal. The European Court held that the relevant Swiss statute served a legitimate aim but decided on the facts that the imposition of an injunction was disproportionate and not necessary in a democratic society. The decision includes at page 23:

> "The adjective "necessary" within the meaning of Article 10(2) implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision ...
>
> The Swiss authorities thus had some margin of appreciation to decide whether there was a "pressing social need" to impose the injunction on the applicant. ...
>
> It is however necessary to reduce the extent of the margin of appreciation when what is at stake is not a given individual's purely "commercial" statements, but his participation

in a debate affecting the general interest, for example, over public health"

The court noted a disparity between the effect of the injunction and the behaviour it was intended to rectify. A significant element of that behaviour was that the article had criticised microwave ovens generally rather than just an individual manufacturer and so was more clearly a contribution to a general public debate. The decision therefore turned not on whether substantive provisions of law were proportionate and necessary, but whether the granting of the injunction was so on the facts.

In *Lingens v. Austria* (1986) 8 E.H.R.R. 407, the applicant was convicted in Austria of criminal defamation in publishing in a magazine articles critical of the Austrian Chancellor accusing him of protecting former members of the Nazi SS for political reasons and of facilitating their participation in Austrian politics. The court held that there had been a violation of article 10. The court in *Reynolds* quoted extensively at p. 905 from the reasons in *Lingens*, including the passages at page 420:

> "The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual."

and

> "In the Court's view, a careful distinction needs to be made between facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The Court notes in this connection that the facts on which Mr Lingens founded his value judgments were undisputed, as was also his good faith."

The court in *Reynolds* then said at 905G:

> "This again vividly exemplifies the importance both of freedom of speech and of maintaining the proper balance, though no doubt tilting the latter in favour of the newspaper in publications concerning politicians. It is also noteworthy how carefully the distinction is drawn between, on the one hand, respect for the truth of statements of fact, and, on the other, the widest possible scope for criticism and comment (cf. Lord Diplock's classic statements quoted above [in *Silkin v. Beaverbrook Newspapers Ltd.* [1958] 1 W.L.R. 743, 746-7]). These same two themes are repeated in subsequent cases, such as *Oberschlick v. Austria* (1991) 19 E.H.R.R. 389, *Barfod v. Denmark* (1989) 13 E.H.R.R. 493, *De Haes and Gijsels v. Belgium* (1997) 25 E.H.R.R. 1 and *Oberschlick v. Austria (No. 2)* (1997) 25 E.H.R.R. 357.
>
> In our judgment there is nothing either in article 10 itself or in the Convention cases cited above which is inconsistent with the principles of English common law qualified privilege ..."

Two of the Convention cases referred to in this passage as repeating the themes in *Lingens* are relied on by the appellants in the present case, but it is not necessary to refer to them in detail in this judgment.

In *Thorgeirson v. Iceland* 14 E.H.R.R. 843, the applicant published two articles in an Icelandic newspaper in which he made allegations of brutality against unspecified members of the Reykjavík police force. He was found guilty of criminal defamation and fined. It was held that the defamation proceedings had interfered with his right to freedom of expression in violation of article 10. The admitted interference was not proportionate and not necessary in a democratic society. The right to freedom of expression extends to information and ideas which offend, shock or disturb. The exceptions in article 10(2) are to be interpreted narrowly and established convincingly. There was no warrant in the case law to distinguish between political discussion and discussion of other matters of public concern. Because the applicant was relating rumours and information given by others about police brutality, it was unreasonable for the national authorities to require him to establish the truth of his statements. The circumstances of the case showed that the applicant's aim was to encourage public investigation into complaints of police brutality, not to defame the Reykjavík police force and so bore on matters of serious public concern.

It is, we think, clear that the court considered that what was reported were stories or rumours giving rise to a need for investigation. The appellants say that this case should be applied because the leaflet in the present case was reporting what had been said by others. It would be unreasonable to require that the truth of these statements should be established. This should apply with greater force where the appellants were not the authors of the leaflet.

Thorgeirson was a decision mainly on the facts. It concerned the imposition of a criminal sanction. Although the offence was criminal defamation, no individual was defamed. The court in *Reynolds* said of it at p. 906.

> "We gain no assistance from that case, where the decision of the court turned primarily on the unreasonableness of requiring the defendant to prove the truth of a statement which did not implicate any specified police officer."

In our view, *Thorgeirson* illustrates particular circumstances in which restrictions on freedom of expression may offend article 10, but it does not support a general principle that those who publish what has been said by others should be immune from proceedings for defamation whatever the circumstances. We consider that these Convention cases generally illustrate how article 10 is to be applied in particular cases, but that they give no support for any submission that the composite balance of the English law of libel contravenes the article.

Article 10 provides for the right to freedom of expression, including freedom to receive and impart information without interference by public authority. The exercise of these freedoms is expressly subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputation of others. Thus restrictions on freedom of expression imposed by the English law of libel are in accordance with article 10 and would only fall foul of it if the law was more restrictive than was necessary in a democratic society. As was emphasised by the court in *Reynolds* (at page 900G) quoting from paragraph 19 of the report of the Faulks Committee:

> "The law of defamation has two basic purposes: to enable the individual to protect his reputation, and to preserve the right of free speech. These two purposes necessarily conflict. The law of defamation is sound if it preserves a proper balance between them."

The court in *Reynolds* emphasised in a number of passages the need to achieve this proper balance.

In judging that balance in this case, there are, we think, two important considerations:

(a) we must look at the English law of defamation as a whole. It would be erroneous, for instance, to conclude that the English law relating to justification was not in accordance with article 10 in isolation from the fact that the law also provides in appropriate circumstances defences of fair comment and qualified privilege. A defendant does not have to justify untrue publications believed to be true if the publication attracts qualified privilege.

(b) the English law of defamation is itself a mature body of law developed over several centuries in a democratic society with the very purpose of providing a proper and necessary balance between freedom of expression and protection of reputation. This means that an enquiry to determine what the English law of defamation is or ought to be asks the very same questions as an enquiry to determine whether the English law of defamation is in accordance with article 10. The advent of the European Convention as part of the law of England will not therefore affect or add to the debate.

In our judgment, the question whether the judge's decisions in this case offend article 10 is one of principle about the integrity of the English law of defamation and not one of detail about the particular facts of this appeal. A short version of the composite question of principle may be posed by asking whether self-appointed campaign groups who publish indiscriminately untrue defamatory statements of fact about identified corporations whose activities affect people's lives should be protected from actions for libel provided only that they believe that their publications are true. In our judgment, the proper answer to this question is no, because we consider that:

(a) corporations should be capable of suing for libel for untrue defamatory statements of

fact apt to damage their business reputations. Distinctions relating to the size of the corporation or the nature of its business activities are illusory;

(b) campaign groups (or individuals) are quite able to moderate their publications so as to attract a defence of fair comment without detracting from any stimulus to public discussion which the publication might give;

(c) in appropriate circumstances, balanced and properly researched publications will attract a defence of qualified privilege; and

(d) the relaxation of the law contended for would open the way for partisan publication of unrestrained and highly damaging untruths. There is a pressing social need to protect particular corporate business reputations, upon which the well-being of numerous individuals may depend, from such publications.

In our judgment, the relevant English law to which we have referred does provide a proper balance between freedom of expression and protection of reputation. We respectfully agree with the observation of Lord Keith in the *Derbyshire* case at page 551F which we have quoted earlier in this judgment.

Part 4

Fairness of trial and abuse of process

The notice of appeal states:

> "5. Further or in the alternative, the trial judge erred in law in rejecting the Defendants' contention that the Plaintiffs' action should have been stayed as an abuse of process (J. pp. 90-91) on the following grounds (taken as individual factors and cumulatively):
>
> (a) The denial of legal aid to the Defendants in a case of such nature and public importance, in particular:
>
> (i) the impossibility of the Defendants being able to adequately and fully prepare, organise and administrate the paperwork and other legal work from their homes and in their spare time, especially in the light of the case length, the extent of documentation, the scope of the issues, the international territory of relevance to be covered and the complex legal and factual research needed;
>
> (ii) the impossibility of the defendants being able to effectively challenge or even challenge at all the Plaintiffs' counsel's approach and interpretation of the law throughout the trial, bearing in mind his inevitable commitment to the interests of his clients. This is particularly noteworthy (with no disrespect intended to him) in the light of Mr Justice Bell's acknowledged inexperience in this area of law.
>
> (b) Lack of equality of arms, particularly relevant in the context of an adversarial legal system, and therefore the impossibility of a fair trial.
>
> (c) Oppression - as well as relevant aforementioned points, the case was personally oppressive to each of the defendants who had to endure the relentless pressure and stress of such a long, detailed, high profile, stressful and continuous (unbroken) action unaided to any significant degree. The case dominated our time for at least 4 years, and the

paperwork dominated our homes - our personal lives suffered unacceptably. Mr Morris is a single parent with sole responsibility for a 8 year old child (age 1 when the writs were served). Ms Steel suffered from stress related eczema and exhaustion. Such a trial is an abuse of the principle of a fair and equal hearing. In particular the trial Judge was wrong to fail to take into full account domestic circumstances and grant adjournments where necessary, for example

(i) When Mr Morris's son broke his leg

(ii) When Ms Steel's doctor advised that Ms Steel needed a break from court for health reasons.

(d) The absence of a jury to decide on meaning of the words complained of, the allegations of malice (in both the Claim and Counterclaim), to evaluate the facts and right to fair comment based on their own experience and common sense, and to intervene should they consider any injustice or oppression to be resulting during the trial or at the end. However efficient, fair-minded and worldly-wise a judge may be he cannot displace the advantage, the value and the right of defendants to be tried by their peers. Where there is an issue of how to try the case with 'convenience' in mind, then the tribunal is empowered to consider any administrative and procedural improvements necessary for the smooth-running and fairness of the trial. This is an entirely separate (and purely technical) matter from the fundamental right of a jury trial.

(e) The unfair and inconsistent approach to witness statements due to the effects of the new 'practice direction' on limiting evidence in chief being introduced halfway through the trial. This affected the defendants unfairly, especially in the light of the impossibility of their being able to provide clerks etc to facilitate their witnesses in the making of their statements.

(f) For about half of the case we were denied the official transcripts available to the Plaintiffs. This inevitably resulted in an unfair advantage to the Plaintiffs regarding preparations for cross-examination, ability to take notes and therefore preparation for closing submissions, dealing with the myriad points of law that arose, consulting with our witnesses and so on.

(g) In the light of the delay in the case, it was impossible for the

defendants to gather a substantial amount of the material relevant to the 'publication' issue and other issues (regarding research, and to contact witnesses from the relevant years etc).

(h) Further we submit that the Plaintiffs, by their agreement with Veggies Ltd over the continued distribution of the London Greenpeace Factsheet (with minimal changes to the leaflet complained of) guaranteed the continued circulation of the words complained of before, during and after the current action. There was therefore no proper legal basis for the action in accordance with the spirit of the defamation laws.

(i) The wide range of non-defamatory and/or 'everyday' criticisms contained in the words complained of an the Statement of Claim (for example the nature of McJobs, existence of litter, poor quality food and links between diet and disease, advertising being unethical etc) are all part of the fabric of valid public opinion and criticism and should not be subjected to a libel action and judgment. On the contrary the right to hold such opinions without fear of writs should be robustly protected. This was the main cause for the oppressive and inconvenient length and scope of this case. The extensive legal attack by the Plaintiffs on almost the entirety of the issues raised in the Factsheet shows the clear political nature of their legal strategy. Their strategy can only have been that there were seeking to use the court case as a 'show trial' against people they thought would be unable to defend themselves, and having successfully denied the defendants a jury trial were aiming for a quick judgment which would be publicly used to 'vindicate' their Corporate image - ie as just another tool for their global publicity directed at the public. This is clearly an abuse of the legal process.

(j) The delay caused the trial judge to prefer Plaintiff's witnesses (e.g. hired enquiry agents) where there were notes to hand, over Defendants' evidence (J. p. 39)

(l) The refusal to order the Plaintiffs to disclose full and complete notes relied upon by these witnesses compounded the disadvantage faced by the Defendants.

(m) That at least 7 agents were hired by the Plaintiffs to infiltrate the small London Greenpeace collective over an 18 month period, and in particular, that at least two agents were engaged by the Plaintiffs in London Greenpeace after the issue of the writ.

It is plain that what at the beginning of this part of the Notice of Appeal the appellants describe as "abuse of process" covers also allegations that the trial was unfair.

It is also alleged that the judge failed to take into account the legal submissions already considered when he was evaluating the evidence and legal arguments and that the judge fundamentally misunderstood a number of important aspects of the defendants' case (paragraphs 6 and 7 of Notice of Appeal).

Legal Aid

By statute, legal aid is not available to parties to defamation proceedings (Schedule 2, Part II, Legal Aid Act 1988). At the commencement of the trial, the appellants sought to challenge the refusal of legal aid, and other matters, before the European Court of Human Rights. Reliance was placed on article 10 of the European Convention on Human Rights which has been set out in the immediately preceding section of this judgment.

In *S and M v. United Kingdom* (1993) 18 EHRR CD 172 the Human Rights Commission ruled as follows:

> "The Commission notes, first, that it has no competence to deal with that aspect of the complaint directed against McDonald's, being a private company not incurring the State's responsibility under the Convention.
>
> Secondly, it notes, that the freedom conferred by Article 10 of the Convention is not of an absolute, unfettered nature. It does not authorise the publication of defamatory material. On the contrary, the second paragraph of Article 10 offers specific protection for the 'reputation or rights of others'. McDonald's are, therefore, entitled to seek the determination of their civil rights to a good reputation and, if successful, the protection of that reputation against an alleged libel. Similarly the applicants are entitled to defend themselves against McDonald's writ in the determination of their civil right to free speech and fair comment in matters of public interest.
>
> The Commission does not find that the matters which may involve the responsibility of the respondent Government under the Convention, namely a lack of legal aid, simplified procedures or restrictions on damages, essentially interfere with the applicants' freedom of expression. They have published their views, upon which there was no prior restraint, and, if those views are subsequently to be found to be libellous, any ensuing sanctions would in principle be justified for the protection of the reputation and rights, within the meaning of Article 10(2) of the Convention.

> The Commission considers, therefore, that the present case does not disclose any appearance of a violation of Article 10 of the Convention. It follows that this aspect of the case is manifestly ill-founded within the meaning of Article 27(2) of the Convention."

The appellants accept that it is not open to this Court to hold that legal aid ought to have been granted to them. They submit however that the absence of legal aid rendered the trial unfair and, further, that their other complaints about the manner in which the trial was conducted must be considered both cumulatively and in the context that they were litigants in person appearing against parties who had enormous resources with which to instruct lawyers and to prepare their case. Lack of funds also meant that they did not have the opportunity to go abroad to seek and obtain statements from potential witnesses.

Fairness of trial

The appellants refer to the length and intensity of the trial. It involved "relentless pressure and stress" for them. The documentation was vast. There were also many pre-trial hearings and appeals to the Court of Appeal.

The appellants were very considerably hampered by their lack of legal expertise, it is submitted. Legal debate during the trial was characterised by a two-way exchange between the respondents' leading counsel and the judge which gave at least an appearance of partiality.

Such legal advice as the appellants were able to obtain, on the basis of limited funds raised, became less frequent and more patchy. As the trial proceeded, it became more difficult and time consuming to go to a new lawyer who was prepared to offer his services. It was time consuming to brief the new lawyer as to what had already occurred at the trial. The absence of legal aid constituted a fundamental inequality between the parties to the litigation. Had its members known how long the trial would be, the Commission might have formed a different view of the need for legal aid.

The appellants were unable to obtain the rest they needed as the trial proceeded and at the same time prepare their case. Of the numerous applications for breaks for preparation time and rest only a minority were granted. They needed more time. In addition to appearing as advocates, they had themselves to do the administration involved in taking witness statements and getting the witnesses to court. This was a task with which they were unfamiliar. They also had domestic responsibilities including, in Mr Morris' case, looking after his young son who unfortunately broke a leg while the trial was in progress. The appellants were not trained in taking notes of proceedings. They did not have the space to store the vast amount of documentation generated by the trial. To have to defend themselves in a complex area of law was oppressive.

It was accepted by the appellants that there were breaks in the proceedings and that it was necessary

for the programme to accommodate the appearance of witnesses on both sides. In the event, the breaks did not occur at times which would have helped the appellants.

It is alleged that the respondents were slow in disclosing documents. Many documents requested before the trial were only disclosed during the trial. For example, by letter of 6 October 1993, the appellants requested notes taken by the enquiry agents at each of the London Greenpeace meetings they attended. At the time it was claimed by the respondents that there were no such notes but notes were subsequently disclosed.

Late disclosure added to the burden of preparation and advocacy. Moreover, the decision of the respondents to sue on so much in the leaflet, including points on which they had no case, put the appellants as litigants in person in an impossible position. The respondents' aim, it is submitted, was to stop all criticisms of them. There came a time when a fair trial was not possible and this trial should have been stopped by the judge.

Complaint is made of the late application in April 1996 to amend the statement of claim to allege publication of the leaflet complained of during a longer period. It was, however, held by the trial judge, and on appeal by the Court of Appeal, that the amendment could be permitted without unfairness or prejudice to the appellants. In relation to the dismissal of interlocutory appeals to the Court of Appeal, the appellants submit that the Court of Appeal held that decisions taken by the judge were within the ambit of his discretion and should not be reversed. Had the appellants had legal assistance before the judge, it is submitted, the exercise of his discretion might well have been in the appellants' favour.

Reference is made to the trial proceeding in the absence of Ms Steel when she was unwell, an adjournment having been refused. She was not prepared to have the name and address of a doctor who provided a medical report disclosed to the respondents. The appellants accept that their case was, and is, essentially a case jointly presented but submit that, because the appellants discuss the case with each other during its progress, it might have been better presented if both of them had been present on the days Ms Steel was absent. Moreover, a witness, Ms Barnes, was called in the absence of Mr Morris who was the appellant familiar with the subject matter of her evidence.

The appellants were prejudiced, it is submitted, during the period when they were not permitted to have copies of the daily transcripts obtained by the respondents. It is submitted that withdrawing the transcripts was part of a strategy against the appellants.

In support of the submission that the practice direction mentioned at paragraph 5(e) of the Notice of Appeal caused unfairness, the appellants submit that the need to obtain written statements from witnesses caused them more work and also that the judge (day 166/8) made a restrictive ruling upon the giving of oral evidence. The practice direction affected the appellants' witnesses disproportionately because most of the respondents' witnesses had given evidence before the practice direction was introduced.

The appellants further rely (paragraph 5(g)) on the respondents' delay in commencing proceedings.

There was a lapse of time of four years between the publication of the leaflet complained of and the service of the writ. There was a delay of a year after the alleged distribution of the leaflet outside the respondents' head office on 16 October 1989. Those delays made the gathering of evidence by the appellants more difficult. Moreover, the lapse of time before the trial made it more difficult for witnesses to recall relevant events on the issue, for example, of publication. The alleged unfairness was compounded by the fact that the enquiry agents called by the appellants as to those events were permitted to refer to their contemporaneous notes. The respondents should not have been "able to manipulate the outcome of proceedings" by delaying their claim.

The submission of abuse of process is based on the circumstances in which the claim was brought, including the existence of the Veggies agreement, which we consider in more detail separately, and the motives of the respondents.

It is submitted that the respondents were seeking to use the court case as a "show trial". By attacking the leaflet so comprehensively, the respondents were trying to "throw a blanket" over all criticism. It demonstrated the "political nature of their legal strategy". The general point is made that, having made many admissions, and having made an agreement with Veggies, the respondents are abusing the process of the Court when suing the appellants on much the same material. The leaflet contains no more than what were widely held and expressed views. The appellants submit that "all, or at least the bulk of the case was about what we would call basic common sense and matters of opinion and we submit that the extensive legal attack by the plaintiffs on almost the entirety of the issues raised in the factsheet shows the clear political nature of their legal strategy".

The appellants maintain their objection to the refusal to them of a trial by jury but have to accept that, the refusal having been upheld in the Court of Appeal, it is binding upon this Court. It is submitted that in considering the points on the nature and length of the trial, this Court should bear in mind that a jury might have exercised its right to stop the trial before it was completed.

In their written submissions, the respondents set out in some detail the events of the trial. The 313 hearing days were spread over two and a half years. Of the 90 weeks in which the Court sat, fewer than half were five day weeks. There were 21 four day weeks, 23 three day weeks, 13 two day weeks, 6 one day weeks and one week during which two half days were sat. The appellants were represented by counsel on a number of important occasions and twice by leading counsel. The usual legal vacations were observed.

While the respondents do not themselves complain about the length of the trial, they submit that the conduct of the appellants prolonged the hearing substantially. The appellants introduced a number of issues, for example litter, about which the respondents had not taken action against them. They attempted to make an issue of the effect of CFCs and HCFCs, the effect of recycling polystyrene and the dangers of food additives which were not in the event relevant. Over two thirds of the time taken by evidence was taken by the appellants either examining or cross-examining. It is submitted that the appellants were responsible for much repetition when cross-examining. Their closing speeches lasted a

total of 26½ days.

Far from wilting under pressure, the appellants seemed to gather strength during the trial. Their stamina and capacity is demonstrated by the contents of the transcripts, it is submitted. Their health did not fail.

The further point is made by the respondents in relation to the length of the trial that there is no principle that a case is so complicated that it cannot be brought. Such a principle would undermine the rule of law. It would encourage a defendant to put in a range of defences so extensive that he could argue that an action could not be brought against him.

The daily transcripts of the hearing were obtained and paid for by the respondents. The respondents were justified in stating on 3 July 1995 that they would no longer provide the appellants with daily transcripts unless the appellants undertook not to use them for any purpose other than the conduct of their case. The judge was correct in declining to order the respondents to supply transcripts in the absence of such an undertaking. Upon an application for leave to appeal to the Court of Appeal, Kennedy LJ stated that it was quite clear that if the appellants were prepared to give the undertaking sought, they would still be able to receive the transcripts they wanted. In those circumstances, the Court of Appeal refused leave to appeal. In the event, the appellants were able to purchase transcripts at a reduced cost 21 days after the evidence was given.

The trial proceeded at a leisurely pace, the respondents submit, and adjournments were granted when appropriate. The appellants were allowed considerable time in which to prepare their closing submissions. They were able to lessen the burden, which it is accepted was considerable, by working together.

As to the practice direction, it was correct that the judge ruled (day 166\8) that “employment witnesses should from now on have their statements taken as read or read out as their evidence in chief unless I give leave to ask further questions in chief”. The judge added: “That is the presumption with which we start. It means anyone can ask for leave to ask more substantial questions in elaboration of what was in the statement”. In the event no objection was taken to further oral evidence from the appellants’ witnesses. The respondents’ objection, which was a reasonable one, was to new matters being brought up which had not been considered by the respondents’ witnesses and were not set out in the written statements.

The judge did not operate the practice direction, or his ruling, restrictively against the appellants and permitted witnesses to give oral evidence. Moreover, the appellants have given no examples of situations in which the presentation of their case was prejudiced either by the practice direction or by the judge’s ruling.

Replying to the alleged delay in bringing the claim, the respondents submit that, subject to the law on limitation of actions, plaintiffs are entitled to decide for themselves when the moment for any legal action has come. The judge’s preference for the evidence of the enquiry agents over that of Ms Steel,

and other witnesses called by the appellants on the issue of publication, was based on his view that the appellants' evidence was unreliable and unsatisfactory and not on any actual or supposed lack of recollection.

The passage of time, and the publicity which the trial attracted, permitted the defendants to call many additional witnesses. Moreover, many supplementary witness statements could be and were prepared before witnesses gave evidence. An application to amend the statement of claim was made at a late stage of the trial because the contents of the Haringey affidavit, considered elsewhere in this judgment, became known to the respondents at that stage. The judge ruled that the appellants would not be prejudiced by the amendment and was upheld by the Court of Appeal.

Enquiry Agents

We now consider specifically a point raised in the Notice of Appeal at paragraph 5(m) and developed by further submissions at the hearing. The appellants contend that the fact that enquiry agents acting on behalf of the respondents remained undercover at London Greenpeace for a time after the writ was issued amounts to an abuse of process. It is alleged that the agents were engaged in monitoring the response of the appellants to the writ, so as to discover their strategy in the litigation. In particular, the appellants rely on evidence that one agent, Mr Bishop attended a London Greenpeace meeting on 27th September 1990, the writ having been issued on 20th September 1990, and that another agent, Michelle Hooker, continued to be involved in the group's activities until about April or May 1991.

Mr Bishop himself gave evidence that he attended a meeting on 27th September 1990, which he thought was the last one he ever attended. He was unaware when he went to that meeting that the writ had been served but he was told that at the meeting, and he gathered that those served were taking legal advice. There was no evidence that he went to any further meetings. The agent most emphasised by the appellants is Michelle Hooker. There was evidence from several witnesses called by the appellants that she continued participating in the group's activities until about April or May 1991. There was certainly video film and still photographs of her handing out A5 leaflets at a demonstration in October 1990. She was not called as a witness by either party.

The judge made no finding as to the length of her involvement with the group, probably because this issue was not canvassed before him. But there was evidence from Mr Nicholson that the last agent, presumably Ms Hooker, was withdrawn by the firm employing her in January 1991. He said that any attendance by an agent after that date was not on behalf of McDonald's and "not at my expense". That is not inconsistent with the evidence about Ms Hooker's continuing involvement after that date: as the judge noted, she was said to have formed a relationship with another member of the group and become an enthusiastic participant in its activities and those of the Hackney and Islington Animal Rights Group. According to Mr Gravett, it was about the time when her relationship with the other person broke up that she ceased to take part in the London Greenpeace activities, in about April or May 1991.

It may well be, therefore, that as Mr Nicholson indicated, her continued involvement with the group after January 1991 was not on behalf of McDonald's, but happened because she remained for her own reasons.

Nonetheless, this still means that two agents were kept on for a few days after the issue of the writ and one agent was kept on undercover with the group on behalf of McDonald's until January 1991, some four months after the writ in these proceedings had been issued. Does this amount to an abuse of process?

This came about partly because the enquiry firm in question wanted a phased withdrawal so as to ensure the safety of its agents and partly because McDonald's were concerned about whether some members of London Greenpeace might so react to the service of the writ that there would be a potential threat to the safety of McDonald's premises and staff. That was the evidence of Mr Nicholson, who also denied that the agents were kept on after the writ had been issued in order to discover whether any of the then defendants were going to fight the case. There was no evidence that the agents remained in order to gain any advantage for McDonald's in this litigation, nor that any advantage was in fact obtained from the agents' presence. The respondents say that no reports from the agents were passed to McDonald's solicitors once the writ had been issued.

We are bound to say that any litigant who keeps an agent in the opposing side's camp after litigation has been started runs a grave risk of the Court regarding this as improper. It could in certain circumstances lead to such an agent obtaining and relaying information about the litigation which ought properly to be regarded as privileged. The court will look closely at any evidence of such activities to ensure that no abuse has taken place. Nonetheless, having scrutinised with care what happened in the present case, we are satisfied that neither Mr Bishop nor Ms Hooker was kept on undercover in order to gain any forensic advantage for the respondents and that no such advantage was in fact obtained. In those circumstances there was no misconduct on the respondents' part. We reject the submission that these events can be seen as amounting or contributing to an abuse of process.

Conclusion

Litigants in person who bring or contest a High Court action are inevitably undertaking a strenuous and burdensome task. This action was complex and the legal advice available to the appellants was, because of lack of funds, small in extent. We accept that the work required of the appellants at trial was very considerable and had to be done in an environment which, at least initially, was unfamiliar to them.

As a starting point, we cannot however hold it to be an abuse of process in itself for plaintiffs with great resources to bring a complicated case against unrepresented defendants of slender means. Large corporations are entitled to bring court proceedings to assert or defend their legal rights just as individuals have the right to bring actions and defend them. Having considered the many issues which

arise in this case, we conclude that it was not an abuse of process for the respondents to bring the action they did or to bring it in the manner they did or at the time they did. In reaching that conclusion, we have regard to the respondents' agreement with Veggies Ltd which is considered in detail elsewhere in this judgment. The respondents were unsuccessful at trial on some of the issues they had raised but we are quite unable to hold that they abused the process of the Court by raising them.

Moreover the proposition that the complexity of a case may be such that a judge ought to stop the trial on that ground cannot be accepted. The rule of law requires that rights and duties under the law are determined. The rule of law must not be frustrated by the complexity of a case, the complexity of points raised to defeat it or the amount of evidence called by the parties.

Many applications for interlocutory rulings were made by both sides both before and during the hearing. Some of the resulting rulings were challenged by the appellants on appeal to this Court. We find nothing oppressive in the rulings made. Those made by the Court of Appeal are in any event binding upon us.

As to the conduct of the trial, we note that the 313 hearing days were spread over a period of two and a half years. The timetable had proper regard to the fact that the appellants were unrepresented and to their other difficulties. They were given considerable time to prepare the final submissions to which they understandably attached considerable importance and which were of great length. For the purpose of preparing closing submissions, the appellants had possession of a full transcript of the evidence given at the trial. The fact that, for a part of the trial, the appellants did not receive transcripts of evidence as soon as they were made does not render the trial unfair. Quite apart from the absence of an obligation to provide a transcript, there is no substantial evidence that the appellants were in the event prejudiced by delay in receipt of daily transcripts during a part of the trial.

On the hearing of the appeal, we have been referred to many parts of the transcripts of evidence and submissions and have looked at other parts on our own initiative. On such references, we have invariably been impressed by the care, patience and fairness shown by the judge. He was well aware of the difficulties faced by the appellants as litigants in person and had full regard to them in his conduct of the trial. The appellants conducted their case forcefully and with persistence as they have in this Court. Of course the judge listened to submissions from the very experienced leading counsel appearing for the respondents but the judge applied his mind robustly and fairly to the issues raised. This emerges from the transcripts and from the judgment he subsequently handed down. The judge was not slow to criticise the respondents in forthright terms when he thought their conduct deserved it. Moreover, it appears to us that the appellants were shown considerable latitude in the manner in which they presented their case and in particular in the extent to which they were often permitted to cross-examine witnesses at great length.

We have considered the detailed submissions made by the appellants under the present heading. We substantially accept the submissions of the respondents, as summarised above, though we would not regard the word "leisurely" as appropriate to describe any aspect of the trial. Procedural issues also

arise under other headings in this judgment and submissions as to fairness are considered at the appropriate place. We can state at this stage, however, our conclusion that we are quite unpersuaded that the appeal, or any part of it, should be allowed on the basis that the action was an abuse of the process of the Court or that the trial was conducted unfairly.

Part 5

Publication

We turn next to the issue of whether the appellants and each of them were responsible for publication of the leaflet complained of, a responsibility which is fundamental to any liability in libel.

The judge dealt with this matter in some detail: it occupies no less than 74 pages in his judgment. His conclusions were as follows:

> "I have no doubt that Mr Morris published the leaflet complained of between 21st September, 1987 and 20th September, 1990, and that Ms Steel published it between early 1998 and 20th September, 1990. My particular findings are as follows.
>
> At all material times Greenpeace (London) or London Greenpeace was a small group of people who worked together with the common aim of campaigning against McDonald's. Members of the group had other interests, but McDonald's remained an important target for collective attack.
>
> Both Ms Steel and Mr Morris were core members of that small group and they were active in its anti-McDonald's campaign up to the commencement of the proceedings on the 20th September 1990: Mr Morris from the beginning of the campaign in about 1984, and Ms Steel from early 1988 at the latest.
>
> A major feature of the group's anti-McDonald's campaign was the publication, including the publication in England and Wales, of the leaflet complained of, the London Greenpeace "factsheet". Publication was achieved by handing the leaflet out at demonstrations, by putting it out for collection at meetings and events and by sending it through the post in answer to requests for information. Publication was indirectly achieved by encouraging other groups to distribute it.
>
> Whether or not a decision was made in 1987 to use the single sheet, A5 leaflet to hand out in the street rather than the leaflet complained of, exceptions were made for the annual October demonstrations outside McDonald's head office in 1987, 1988 and 1989. The leaflet was also available for collection at the October Anti-Mcdonald's Fayres in 1988 and 1989 and at some of the meetings at Endsleigh Street and Caledonian Road. It was sent in reply to postal queries about McDonald's and in response to requests from other groups as each October World Day approached. It was sent to the mass media under cover of the August, 1988, press release. However low stocks of the leaflet complained of, the group's "famous factsheet", may have fallen

from time to time, there were always sufficient copies for those publications, whether the copies came from the initial print run or from reprints or photocopies.

Mr Morris participated in the production of the leaflet complained of in 1986, although the precise part which he played in its production cannot be identified. He must have done so with the intention that copies should be published whenever and wherever possible in the future which included the period from the 21st September, 1987, to the 20th September, 1990. There is no evidence that Mr Morris ever tried to arrest the publication which he helped set in train. On the contrary, after the initial production of the leaflet by members of the group, Mr Morris remained a member of the group and encouraged its anti-McDonald's campaign which included the publication and distribution of the leaflet, until the commencement of proceedings on the 20th September, 1990. Although his "hands-on" participation in London Greenpeace activities may have grown less as time went by, particularly for some time after August, 1989, because of his interest in other matters and a family misfortune, he remained interested in McDonald's as a multi-national target, and he was active in anti-McDonald's activities.

He probably attended to help at the Anti-McDonald's Fayre in October, 1988, where copies of the leaflet complained of were collected by members of the public from the London Greenpeace stall. He attended to help the Anti-McDonald's Fayre in October 1989, when copies of the leaflet complained of were collected by members of the public from the London Greenpeace stall. He promoted London Greenpeace at the debate on the 26th October, 1989. He took part in the meeting on the 25th January, 1990, to plan the future of the group. On the 1st March, 1990, he took part in a joint letter answering exercise which probably involved publication of the leaflet complained of. He spoke in terms which indicated his support for the Anti-McDonald's campaign. He took a very active part in the meeting on the 26th April, 1990, when anti-McDonald's activity was discussed and copies of the leaflet complained of and copies of the aims and objectives leaflet boasting of the success of the anti-McDonald's campaign and the leaflet complained of, were collected. He played an active part in meetings on the 19th July and 2nd August 1990. On the latter occasion he encouraged Mr Bishop to answer a letter with the aims and objectives leaflet. He helped with the group's mail out on the 20th September 1990. He must have known of and concurred in the anti-McDonald's publicity for the October, 1990, World Day and Fayre, which was prepared in the summer of 1990.

My conclusion is that, jointly with others, Mr Morris caused, procured, authorised, concurred in and approved all publications of the leaflet complained of in England and Wales, as well as elsewhere, between the 21st September 1987 and the 20th September 1990."

The judge then went on to deal specifically with the position of Ms Steel:

> "Ms Steel did not participate in the initial production of the leaflet and it has not been proved that she took part in London Greenpeace's anti-McDonald's activities in the Autumn of 1987. But by her participation in the group's activities, sharing its anti-McDonald's aims, from early 1988, Ms Steel jointly with others including Mr Morris, caused, procured, authorised, concurred in and approved all publications of the leaflet complained of in England and Wales, as well as elsewhere, between that time and 20th September, 1990.
>
> Ms Steel's involvement in the anti-McDonald's campaign, involving distribution of the leaflet, was considerable. She attended to help at the Anti-McDonald's Fayre in October, 1988, when copies of the leaflet complained of were collected by members of the public from the London Greenpeace stall. She took part in a team effort to distribute copies of the leaflet complained of outside McDonald's head office on the 16th October 1989. She attended to help at the Anti-McDonald's Fayre a few days later when copies of the leaflet complained of were collected by members of the public from the London Greenpeace stall.
>
> She took part in the 25th January, 1990, meeting to plan the future of the group and she took part in a large number of meetings through that year when the anti-McDonald's campaign was discussed and plans were made to publicise World Day and the group's fayre in October, 1989. She was a signatory of the group's building society account which demonstrated her place at the heart of its affairs. She answered letters on the 7th June 1990, and she must have done so on other occasions., Some of the answers must have contained the leaflet complained of. She produced "Behind the Arches" on the 13th September 1990, and she helped with the group's mail on the 20th September. She must have known of and concurred in the anti-McDonald's publicity for the October, 1990, World Day and Fayre, prepared in the Summer of 1990.
>
> Ms Steel's responsibility for publication of the leaflet in England and Wales coincided with that of Mr Morris from early 1988, but she has not been shown to be responsible for publication of copies of the leaflet before that."

It will be seen from those passages that the judge distinguished between the two appellants both in the roles which they played and as to the period of time to which their responsibility related. Although it had originally been alleged by the plaintiffs that each appellant had produced the leaflet in question for publication and distribution, that allegation was eventually dropped as against Ms Steel. The judge found that Mr Morris participated in the initial production of the leaflet in 1986, but found that Ms Steel did not participate in that initial production. Her responsibility, according to the trial judge, began in early 1988 and took the form of involvement in the anti-McDonald's campaign involving distribution of the leaflet. Mr Morris was also found to be responsible on that basis as well because of

his involvement in the initial production.

The judge's formulation of the legal tests applicable in this area has not been directly attacked in this appeal. He stated that:

> "As a matter of law, any person who causes or procures or authorises or concurs in or approves the publication of a libel is as liable for its publication as a person who physically hands it or sends it off to another. It is not necessary to have written or printed the defamatory material. All those jointly concerned in the commission of a tort (civil wrong) are jointly and severally liable for it and this applies to libel as it does to any other tort."

He then noted that the burden of proving publication rested on the plaintiffs.

His formulation of the law seems to this court to be a sound one. It accords with what was said in *R. v. Paine* (1696) 5 Mod. 163, at 167, and with the general principles applicable to joint tortfeasors. *Paine* was cited with approval in the decision of the High Court of Australia in *Webb v. Bloch* (1928) 41 CLR 331, at 364, where Isaacs J. sets out a helpful survey of the law on responsibility for publication. We would only emphasise that the phrase used by the trial judge "approves the publication" does not mean merely approves *of* the publication, in the sense of regarding publication as a desirable event, but requires a defendant to have sanctioned the publication, so that he or she is shown to have acted with the intention that publication should occur. This is the meaning which the learned judge undoubtedly attached to those words.

As we have noted, his formulation of the legal principles is not in issue. However, the conclusions which he reached on this topic are challenged by the appellants on a number of bases. The relevant parts of the notice of appeal are as follows:

> "8. Further or in the alternative, the trial judge erred in law and/or came to conclusions manifestly against the weight of the evidence and/or unsupported by evidence, in holding that the Defendants and each of them had published the leaflet complained of (J. p. 78 and 79). In particular:
>
> (a) The trial judge erred in law by reversing the burden of proof on the issue of publication, wrongly requiring the Defendants to establish that they had not published and/or were not responsible for publishing the leaflet complained of. See for example J. p.26-27.
>
> (b) The trial judge was wrong to hold that mere participation in some of the activities of an unincorporated association, without membership, rules or constitution, by the Defendants thereby constituted publication.

(c) The trial judge was wrong to hold that failure by the Defendants to disassociate themselves from the activities of such an unincorporated association amounted to publication of the leaflet complained of.

(d) The trial judge erred in presuming that the reason for the Defendants participating in some of the activities of London Greenpeace was to further publication of the leaflet complained of (J. p. 16).

(e) The trial judge was wrong to admit in evidence a disputed extract from an affidavit sworn by the Second Defendant in other proceedings on 31 August 1995, or give any weight to it whatsoever.

Alternatively, the trial judge should have (a) indicated to the Second Defendant that he was minded to take the extract from the affidavit into account and (b) advised him to consider calling live evidence to support the documentary evidence already submitted by the Second Defendant in rebuttal.

(f) The trial judge's findings on joint enterprise were overbroad and contravened Article 11 of the European Convention on Human Rights by reason of their unwarranted inhibition on the right of freedom of association.

(g) There was no continuity in the Plaintiffs' evidence that the exhibits produced in court had been published by the Defendants. The Judge erred in accepting in evidence copies of the leaflet complained of, when there was no evidence as to their provenance. In particular in accepting a photocopy of the factsheet produced during the course of the trial by the Plaintiffs with no evidence as to where it had come from, (it could in fact have been a photocopy made by the Plaintiffs from a copy previously obtained), and in accepting the suggestion, without any evidence that it was copied on 'recycled paper' and must therefore have come from London Greenpeace. (J. p 35).

9. On the issue of publication where the consequences are particularly severe a higher standard of proof should have been imposed on the plaintiffs.

10. Further or alternatively, the trial judge erred in law in holding the Defendants responsible for publication of the leaflet complained of when there was no or no sufficient evidence to prove any positive act of publication by either of them. In particular

(a) The trial judge erred in ruling that Mr Morris published the leaflet

complained of between 21st September 1987 and 20th September 1990, and that Ms Steel published it between early 1988 and 20th September 1990.

(b) The trial judge erred in ruling that at all material times Greenpeace (London) or London Greenpeace was a small group of people who worked together with the common aim of campaigning against McDonald's.

(c) The trial judge erred in ruling that both Ms Steel and Mr Morris were core members of that small group and they were active in its anti-McDonald's campaign up to the commencement of the proceedings on the 20th September 1990: Mr Morris from the beginning of the campaign in about 1984, and Ms Steel from early 1988 at the latest.

(d) The trial judge erred in finding that the leaflet complained of was a major feature of the anti-McDonald's campaign and that it was distributed at demonstrations, meetings and fayres during the period between Sept. 1987 and Sept. 1990. And that however low stock of the leaflet complained of may have fallen from time to time, there were always sufficient copies for those publications, whether the copies came from the initial print run or from reprints or photocopies.

(e) The trial judge erred in finding that Mr Morris participated in the production of the leaflet complained of in 1986. And in finding that he must have done so with the intention that copies should be published whenever and wherever possible in the future which included the period from the 21st September 1987, to the 20th September 1990. The trial judge erred in finding that there was no evidence that Mr Morris ever tried to arrest the publication which he had helped set in train. The trial judge erred in finding that after the initial production of the leaflet by members of the group, Mr Morris remained a member of the group and encouraged its anti-McDonald's campaign which included the publication and distribution of the leaflet, until the commencement of proceedings on the 20th September 1990. The trial judge erred in finding that he was active in anti-McDonald's activities.

(f) The trial judge erred in finding that jointly with others, Mr Morris caused, procured, authorised, concurred in and approved all publications of in England and Wales, as well as elsewhere, between the 21st September 1987, and the 20th September 1990.

(g) The trial judge erred in finding that Mr Morris shared responsibility, for the publication of several thousand copies worldwide, both directly and consequentially by those to whom it was originally handed or sent handing or copying it on, including several thousand copies within England and Wales.

(h) The trial judge erred in finding that by Ms Steel's participation in the group's activities, sharing its anti-McDonald's aims, from early 1988, Ms Steel jointly with others including Mr Morris, caused procured, authorised, concurred in and approved all publications of the leaflet complained of in England and Wales, as well as elsewhere, between that time and the 20th September 1990.

(i) The trial judge erred in finding that Ms Steel's involvement in the anti-McDonald's campaign, involving distribution of the leaflet, during that period, was considerable.

(j) The trial judge erred in finding that Ms Steel's responsibility for publication of the leaflet in England and Wales coincided with that of Mr Morris from early 1988.

(k) The trial judge erred in taking into account alleged publication of the leaflet complained of in places outside the jurisdiction of the High Court.

(l) The trial judge erred in finding that the leaflet complained of was published by Ms Steel and/or Mr Morris and/or at all on

16th October 1987 (pp 23-24)

16th October 1988 (pp 24-25)

16th October 1989 (pp 31-38)

21st October 1989 (pp 40-43)

1st March 1990 (p 49)

26th April 1990 (pp 52-56)

30th June 1994 (pp 72-73)

(m) The trial judge erred in finding that Ms Steel and/or Mr Morris attended the Anti-McDonald's fayre on 29th October 1988 (J. pp25-27) and must therefore have known of and concurred with the publication of the leaflet complained of on that date.

(n) The trial judge erred in finding that Ms Steel had answered letters including the sending out of the leaflet complained of (J. p58).

(o) The trial judge erred in finding that the leaflet complained of was published by Ms Steel and/or Mr Morris on 16th June 1990 (J. pp58-60).

(p) The judge erred in attaching any weight to the opinions and/or hearsay evidence of private investigators, for example that the Defendants were lead or core persons in London Greenpeace (e.g. J. p63) or that they needed to be present before decisions were made.

(q) The trial judge erred in finding that as Mr Morris had asked Mr Bishop to answer a letter from West Germany asking for more information about the group 'Mr Morris must have known that the aims and objectives leaflet, with its acclamation of the anti-McDonald's campaign and the leaflet complained of, was the standard response to request for information about the group' (J. p66) and/or in holding that this was relevant.

11. In relation to each of the grounds of appeal set out above, it is contended that there was no or no sufficient evidence to support the finding under challenge or that the said findings were against the overwhelming weight of the evidence.

12. The trial judge erred in finding that the reference in a London Greenpeace aims and objectives leaflet was a reference to the letter which Mr Nicholson thought that he had asked solicitors to write in 1987 or 1988, and that this offered support for his recollection although no copy of such a letter has been discovered (J. p28), when there was no evidence to support this finding and the suggestion had not been countenanced at any stage during the trial by the Plaintiffs or anyone else. (See also J. p733)."

In their written and oral submissions, the appellants gave particular emphasis to some of these arguments and less to others.

First, it is contended that the judge was wrong to hold that mere participation in some of the activities

of London Greenpeace or attendance at its meetings was sufficient to establish responsibility for publication. The appellants argue that London Greenpeace was not even an unincorporated association, but something much looser, no more than a collection of individuals, with no formal membership. Reference is made to a passage from the judgment where the judge acknowledged that there was no formal membership and that "no-one had formal authority over anyone else". Consequently, it is said, each individual participant would be responsible only for his or her own actions. Evidence of some positive act by a defendant should have been required before a finding could have been made that that defendant caused, authorised or procured the distribution of the leaflet. Otherwise the situation could arise where anyone attending a few meetings of an organisation could be held liable for any acts committed by another in that organisation.

In support of this argument, the appellants cite *Mercantile Marine Service Association v. Toms* (1915) K.B. 243, where the plaintiffs in a libel action sought an order that the officers of a guild be appointed to represent all members of the guild as defendants to the action. The court there made it clear that the members of the guild were not prima facie liable unless they had themselves authorised the publication. Only those members who actually published or authorised publication would be liable, a point made also in *Ricci v. Chow* (1987) 3 All E.R. 534, another case concerning an unincorporated association.

The appellants submit that there was no evidence that they either distributed the leaflet complained of or induced others to do so. It is also said that there was no evidence that they were personally involved in the Anti-McDonald's campaign, certainly not to the extent of running it or playing a central role. The group had many other activities apart from the Anti-McDonald's campaign, with the result that mere attendance at meetings cannot properly be seen as implying involvement in that campaign. The appellants contend that the judge's conclusion that they were active in that campaign was simply an assumption on his part. His view of the significance of that campaign in the activities of London Greenpeace had been distorted because of the attention inevitably focused on it in this litigation.

We accept the proposition to be derived from *Mercantile Marine Service Association v. Toms* and *Ricci v. Chow*. In the case of an unincorporated association or any other body lacking corporate identity, a member will only be liable for defamatory material published in the name of the association or group if it can be shown that he was personally responsible for that publication, either by publishing it directly himself or by producing it with a view to publication or by causing, inciting or authorising its publication. Mere membership alone will not suffice. However to attack the judgment in this case upon such a basis seems to us to be misconceived. At no point did the learned judge proceed on the footing that mere "membership" of London Greenpeace would suffice to render someone liable for the publication of the leaflet in question. On the contrary, he seems to have approached this aspect of the case with great care and accuracy. What he said was this:

> "Whatever a number of people's ideas may be about lack of authority or formality, they must organise themselves to work together, to act collectively, if they are to be effective in achieving their aims. People acting collectively and effectively under a

> particular name are accurately described in ordinary English as the "members" of a "group", and in my view those who attended London Greenpeace meetings or events with the intention of actively supporting joint aims which they believed in are rightly described as "members" of the London Greenpeace "group". Moreover, in my view, membership of the group in that sense at any particular time is some evidence of participation in the activities of other "members" of the "group" at the time. One still has to look for evidence for or against actual participation in any particular activity, such as publication of a leaflet like the one complained of, or involvement in a campaign which in turn involves publication of a leaflet; but if a group appears to be promoting a particular campaign by a particular means, it may be an easy inference that those who attend its meetings or events or contribute to them from a distance are encouraging campaigning by that means, unless there is evidence to the contrary such as evidence of an altogether different motive for being there."

That is a proper approach. If a campaign involves the publication of a leaflet, then those who involve themselves in that campaign may be found to be responsible for that publication, and involvement in the campaign may itself be inferred from the various activities to which the judge referred. It is true that the anti-McDonald's campaign was only one of the activities of the group of people describing themselves as London Greenpeace, as the judge expressly recognised, but he found that the anti-McDonald's campaign was "a prominent objective" of London Greenpeace. We do not accept that that finding was not open to him. This court has seen photographs of the group's office, with a drawer in a filing cabinet marked "Muckdonalds" and a cardboard box marked "McD Factsheets," and there were major events organised each year by the group as part of that campaign. Significantly, the group's "Aims and Ideals" leaflet, published in about 1990, states:

> "Perhaps the most successful campaign we have initiated in recent years has been the one against the McDonald's hamburger corporation".

The charge that the judge's picture of the significance of that campaign in the group's activities was distorted is an unfounded one.

Moreover, we are in no doubt that the judge did not regard participation in other group activities as sufficient to establish responsibility for publication. He concentrated on the appellants' roles in the anti-McDonald's campaign, of which the publication of the leaflet in question was (he found) a major feature. We can see no justification for the assertion that he regarded mere membership of the group or attendance at its meetings as by itself sufficient to establish responsibility for publication. On the contrary, he found that both appellants were active in the anti-McDonald's campaign.

Was there evidence from which the judge could properly make that finding? In the case of Ms. Steel, there were, first, answers which she gave to interrogatories before trial, which included the admission that at times in 1989 and 1990 she took part in the Anti-McDonald's campaign run by London Greenpeace. It was also not in dispute that she became a signatory to London Greenpeace's building society account in early 1990.

But the evidence went considerably further than that. When she herself gave evidence, she stated that she had begun attending London Greenpeace meetings in 1987 and had become a regular attender by the beginning of 1988, by which time the leaflet in question was already in circulation. She stated that the aims of the Anti-McDonald campaign were consistent with her own. The judge examined the evidence about various events organised by London Greenpeace between 1987 and 1990. He found that there was a demonstration outside the second plaintiff's head office in East Finchley on 16th October each year during that period, often described in the literature as "World Day of Action against McDonald's". He found that Ms. Steel not only attended the demonstration in 1989 but played an active part at it in the distribution of the leaflet complained of.

This finding was itself attacked before us. It is right that Ms. Steel, in her evidence at trial, denied handing out that leaflet at that demonstration and indeed denied that that leaflet was distributed by anyone on that occasion. She was supported on those points by two other defence witnesses. However, there was evidence from two witnesses called by the plaintiffs, Mr. Nicholson and Mr. Carroll, to the effect that Ms. Steel was handing out leaflets. Mr. Carroll said that he saw her and others handing out copies of the leaflet complained of. Mr. Nicholson thought that the leaflets she was distributing were copies of the one complained of, and he went and obtained a copy from another demonstrator. According to Mr.Nicholson, it was the leaflet complained of. Some ten or eleven copies of that same leaflet were collected by staff of the second plaintiff and brought to Mr. Carroll during the course of the next two days.

Two arguments were advanced before us by the appellants about that evidence given by Mr. Nicholson and Mr.Carroll. First, it is said that Mr. Nicholson may well have mistaken some other anti-McDonald's leaflet for the one complained of in these proceedings. The latter was, it is argued, in short supply at the time and it was only a single sheet leaflet, A5 in size, which was being handed out at this demonstration; alternatively, Mr. Nicholson must be confusing the leaflet complained of with one produced by Veggies Ltd, which had the same front page. As it was only from the front page that Mr.Nicholson and Mr.Carroll identified the leaflet, they cannot be seen as credible witnesses on this topic. Mr. Nicholson's credibility was also undermined, it is said, by his evidence about a similar demonstration on the 16th October 1987 when he could not remember that there had been a devastating hurricane the night before, as a result of which the demonstration had not taken place.

The judge considered the possibility that the leaflets being handed out by Ms. Steel were not copies of the one complained of but were instead generally similar ones produced by Veggies Limited or were single sheet A5 leaflets. He rejected that possibility for reasons which seem sound to this court.

In particular, he noted that by this date Mr. Nicholson must have been very familiar with the leaflet complained of, with its folded six page format, which was very different from the Veggies leaflet with its eight pages formed by two A4 sheets folded one inside the other. The front cover may have been the same, but Mr. Nicholson actually obtained a copy of the leaflet which he identified at trial as having been a copy of the leaflet complained of. As for the single sheet A5 leaflet, we agree with the judge that it was even less likely that Mr. Nicholson would have mistaken that for the leaflet complained of. His evidence about the 1987 demonstration and the arguments about the well-known hurricane were dealt with in detail by the judge, and his conclusion that those matters did not cast doubt on Mr. Nicholson's credibility cannot be faulted. In respect of the demonstration on 16th October 1989, the judge considered that Mr. Nicholson and Mr. Carroll were not mistaken in what they said they saw and he regarded them as credible witnesses. These are matters which the trial judge is in a much better position to assess than is this court.

Secondly it is contended that this evidence about the leaflets at the 1989 demonstration should have been ruled inadmissible at trial, because the plaintiffs were unable to produce the original documents which had been obtained on that occasion by Mr. Nicholson or by others employed by the plaintiffs. This amounted to a breach of the "best evidence" rule and means that there was a failure to prove that the leaflets which were produced in court had been distributed by either appellant. The same point was made about other occasions.

It is factually correct that the plaintiffs were unable to identify the precise original document which Mr. Nicholson obtained himself at the 1989 demonstration and the same was true of other originals. What happened at trial was that he looked at a copy of the leaflet complained of and said that it was the same as the one he had been handed. A similar process was gone through with other witnesses. This, however, involved no breach of what is sometimes called the "best evidence" rule, which generally requires an original document to be produced in order to prove its contents. This was not a case of an original plus a copy, but a case of many copies of a document being printed, some of which were produced at trial. As was said in *R. v. Watson* (1817) 2 Stark 116, the copies were "in the nature of duplicate originals; and it is clear that one duplicate may be given in evidence without notice to produce the other". Consequently another duplicate is not to be seen as secondary evidence, so long as a witness identifies it as a duplicate. The issue in the present case was simply whether the leaflet produced in court was identical to the one obtained on the occasion in question. That was a matter properly to be dealt with by oral evidence from Mr. Nicholson and the other witnesses.

We therefore cannot accept either of the arguments put forward as criticism of the judge's approach to the evidence about the 1989 demonstration. There clearly was a proper evidential basis for the finding of fact made by him as to Ms. Steel's active part in the distribution of the leaflet complained of at the demonstration on 16th October 1989. That being so, it would not be right for this court to interfere with that finding.

He also dealt with what happened at an "Anti-McDonald's Fayre" organised by London Greenpeace just 5 days later on 21 October 1989. There was no dispute that both appellants were present on this

occasion. There seems to have been, however, an issue as to whether the leaflet complained of, "the famous factsheet" as it was described in some of the London Greenpeace literature, was there and available to the public. There was evidence that leaflets of some kind were there, and one of the plaintiffs' enquiry agents, Mr. Pocklington, said in his witness statement, which he averred to be true, that he obtained there a copy of the leaflet complained of. He was more hesitant when he had to rely solely on his memory in the witness box. Mr. Gravett, called by the defence, said at one point that to the best of his knowledge that leaflet was not at that fayre but he then added that possibly a few copies were there. As the judge noted, neither Ms. Steel nor another defence witness present on that occasion gave evidence that that leaflet was not there. There was documentary evidence that the leaflet was available at the Fayre, this evidence being in the form of another leaflet referring to this Fayre and ending with the words "if you want to know more about McDonald's and what it does, pick up a copy of London Greenpeace's factsheet "What's wrong with McDonald's: Everything they don't want you to know" from the London Greenpeace stall in the foyer."

In the event the judge concluded on the balance of probability that the leaflet complained of was available at that 1989 Fayre. It is contended now by the appellants that he should not have made such a finding. But as the judge observed, this was London Greenpeace's Anti-McDonald's Fayre and the leaflet complained of was their leaflet with Anti-McDonald's material in it. He coupled all this with the evidence to which we have referred and with the evidence which he had heard about the same leaflet being distributed only five days earlier at the demonstration in East Finchley. It seems to us that these are all matters which point strongly to the probability that that leaflet was available at the 1989 Fayre, and it follows that the judge's finding to this effect was an entirely proper one. He then concluded that both appellants must have known of and concurred in the publication of the leaflet at that Fayre. Given the active role played by both appellants in the activities of London Greenpeace, an aspect to which we turn next, his conclusion as to their knowledge and concurrence cannot be faulted.

The appellants challenged the judge's conclusion that they were "core members" of the small group of people involved in London Greenpeace. As part of their submissions they put in an analysis of the notes made by the enquiry agents at meetings and other activities of the group. These related to the period October 1989 to September 1990. They show, as the judge noted, that Ms. Steel attended some 30 of the 44 meetings and events. Mr. Morris is shown as attending only 8. However, the judge regarded Mr. Morris' role as being more significant than those figures might indicate. He was described in evidence as the "elder statesman" of the group and had been involved in its activities for a considerable number of years, "over 10 years", according to the evidence of Mr. Pocklington, one of the enquiry agents. There was evidence that, when Mr. Morris did attend meetings, he took a very active part. That was the judge's finding, for example, in respect of a London Greenpeace meeting on 26th April 1990. According to the evidence of Mr. Bishop, another enquiry agent, when Ms. Steel, Mr. Morris and Mr.Gravett were not at meetings

> "there was concern that any decisions would be overruled by them if they disagreed. When they were at meetings, decisions seemed to be taken. When they were not present, not much seemed to happen."

The judge seems to have accepted that evidence and the evidence of Mr.Pocklington, who expressly described the two appellants as "core members" of the group and major participants in its activities. They now argue that such evidence should have been excluded as opinion evidence. We do not agree. When a witness says of the appellants, as Mr. Bishop did, that

> "decisions they made were followed by the rest of the group", (Day 259),

that is a statement of fact. Insofar as at any stage the evidence became one of inference rather than of fact, it would in any event have been admissible as a compendious way of conveying facts observed by the witness : see *Cross and Tapper* on *Evidence*, 8th edition, page 559.

The judge was clearly entitled to accept that evidence and to reach the finding that he did that they were core members. Therefore, on the issue of his inference that they were encouraging the anti-McDonald's campaign, of which the distribution of the leaflet complained of was a major feature, we conclude that the inference was a proper one from the facts which the judge found and that there was in turn a proper evidential basis for those findings of fact.

It is said by the appellants that to hold them responsible for publication because of their involvement in London Greenpeace amounts to an unjustified restriction on their right to freedom of association and is therefore contrary to Article 11 of the European Convention on Human Rights. It is a prerequisite of this submission that the judge regarded mere membership of London Greenpeace as giving rise to responsibility for publication. We have already concluded that he did no such thing, so that this argument fails at the outset. Their right to freedom of association was in no way impeded by the judge's findings, which were based on the appellants' participation in the anti-McDonald's campaign together with specific instances of publication by each of them. The right to freedom of association is not a right to commit civil wrongs so long as one joins together with others in so doing. To adopt such an approach would bestow unjustified privileges on joint tortfeasors not possessed by tortfeasors who act alone, and that is neither the domestic law of this country nor the law of the European Convention on Human Rights.

It is next submitted by the appellants that the trial judge was wrong to hold that failure by them to disassociate themselves from the activities of the group amounted to publication of the leaflet. Reliance is placed on that passage set out earlier in this judgment where reference was made by the judge to the absence of evidence that Mr. Morris ever tried to arrest the publication which he had helped set in train. This argument is linked to a submission that the judge reversed the burden of proof on publication by requiring the appellants to establish that they had not published and were not responsible for publishing the leaflet: his approach to the evidence about the 1988 Fayre is said to be a further example of this.

We do not accept that the learned judge adopted the approach which is now attacked. The passage relating specifically to Mr. Morris comes in the judgment immediately after a finding that he had participated in the production of the leaflet in 1986, and the passage is one of several factors from

which the judge inferred that Mr. Morris produced the leaflet with the intention that copies should be published whenever and wherever possible in the future. Intention is normally a matter of inference, and in drawing an inference a judge is entitled and required to look at all the relevant circumstances, including the absence of action on the part of the person concerned. The absence of evidence that Mr. Morris had ever tried to stop publication of a leaflet which he had been found to have produced was a relevant consideration in this context. It went along with other evidence of positive actions on his part, such as the encouragement of the anti-McDonald's campaign, of which publication of the leaflet formed part. Put into this proper context, the passages complained of provide no basis for the argument that the judge reversed the burden of proof or proceeded on the basis that a mere failure to disassociate themselves from the group's activities amounted to publication. It is an unfounded criticism.

As for the Anti-McDonald's Fayre in October 1988, the criticism here arises in relation to the judge's finding that both appellants attended it and that Ms.Steel helped while there. There was no direct evidence of their presence, and in the course of his judgment on this the judge referred to the fact that no reason had been put forward for either of them not to have attended. Hence the argument that he was reversing the burden of proof.

However, that reference by the judge once again needs to be seen in context. In relation to Ms. Steel, the relevant paragraph reads as follows:

> "Ms Steel said that it was possible that she went along to the 1988 fayre, but she would not agree that it was likely. She said that she certainly would not have had anything to do with organising it. She was attending London Greenpeace meetings by this time. The fayre was a high point of the group's year and she shared its anti-McDonald's aims. She did not put forward any reason for not attending. Whether or not she took part in advance organising, I am satisfied, to the standard of probability required, that she attended the fayre and helped when she was there. I consider that her refusal to accept the obvious likelihood that she attended the fayre was evasive."

It can be seen that the reference to her not putting forward any reason for non-attendance was merely one factor taken into consideration in the judge's reasoning, along with her active involvement in the group by then and the importance of the Fayre in the group's activities. Seen in that light, the judge's approach is not open to any valid criticism, nor is the finding which he reached.

In relation to Mr. Morris, the judge adopted a similar approach, which likewise is unassailable. In neither case was he reversing the burden of proof: the absence of a reason for non-attendance was a relevant factor amongst a number of such factors.

The appellants specifically attack the finding that Mr. Morris participated in the production of the leaflet in 1986. There are two main arguments advanced by them. The first is that the judge should not have admitted in evidence an affidavit sworn by Mr. Morris in other proceedings or should have attached no weight to it, or at least should have warned Mr. Morris that he was minded to take it into account and advised him to consider calling evidence to rebut it. It is therefore necessary to set out something of the circumstances in which this affidavit came into existence and the relevance which it had to the present action.

The affidavit was sworn by Mr. Morris in the course of proceedings brought against him in the Edmonton County Court by the London Borough of Haringey. In it he sought to oppose that county court matter being set down for trial, on the ground that his time was already being fully taken up with the present libel action. The affidavit is dated 31st August 1995 and states that there had by then been 162 days in court in the libel action. At paragraph 2 of the affidavit, Mr. Morris referred to the libel writ issued against himself and Ms. Steel and then stated:

> "This arose from leaflets we had produced concerning, inter alia, nutrition of McDonald's food, their employment policies, and the effect of their operations on the environment."

The trial judge admitted this document, which had come into the possession of the plaintiffs' solicitors, because he regarded the reference to leaflets "we had produced" as an admission against interest by Mr. Morris. Prima facie, it was such an admission because it could potentially be seen as an admission by Mr. Morris that he (amongst others) had produced the leaflet which was the subject of this libel action. Mr. Morris sought to resist that interpretation, on the basis that the word "allegedly" had been omitted by error in front of the word "produced" when his solicitor drafted that affidavit and that he himself had failed to notice that omission. However, Mr. Morris did not give evidence at trial, nor did his solicitor. There was an attempt made at trial to put in evidence by way of a letter and affidavit from the solicitor about such an error, but the judge ruled them to be inadmissible, as he did a further affidavit by Mr. Morris seeking to give similar evidence.

That decision has been attacked before us. It is argued that the judge led the appellants to believe that he would take those further documents into account. This argument is based on the fact that those documents were read by the judge when he was dealing with an application by the plaintiffs to re-amend their Statement of Claim. But the use of an affidavit and exhibits on an interlocutory application does not render them admissible at trial: *Blackburn Union v. Brooks* (1877) 7 Ch.D. 68. At trial, the basic rule, set out in R.S.C. Order 38, rule 1, is that "any fact required to be proved ... shall be proved by the examination of the witnesses orally and in open Court." The statements in these documents could not fall within the exception relating to statements against interest nor was there any prospect of them being admitted under the Civil Evidence Acts.

We have, of course, been concerned about the position of the appellants as litigants in person, who might not be expected, even with their lengthy experience of litigation in the High Court in this case,

to be fully aware of the procedural rules applicable. We have therefore looked with care at the circumstances of the present case. It is to be noted that, about two weeks before Mr. Morris made his decision not to give evidence at trial, the Court of Appeal had in a ruling on 27th June 1996 emphasised the potential value against him of the "Haringey affidavit". At that stage Mr. Morris had available to him legal representation and advice from both leading and junior counsel.

When it came to the crucial moment for him to decide whether or not to go into the witness box, he sought and obtained a delay until the next morning because he wanted to get some advice. The judge expressly warned him against assuming that any particular conclusion was likely to be reached on the evidence so far available. Mr. Morris had already made it clear that he was not seeking advice from the court on whether he should give evidence. In the event he decided not to.

We cannot see that Mr. Morris was misled by the judge in any way. In the circumstances, if Mr. Morris proceeded on the assumption that he could rebut the Haringey affidavit by means of his affidavit and the other documents used on the interlocutory application, then that was his error and not one which can lead this court to interfere with the judge's decision to exclude those documents. That decision was a lawful one. It was also fair as between the parties. A person who consciously decides not to give evidence has to accept that admissible evidence which he might have given will not be before the court.

Mr. Morris then advances an argument as to the weight to be attached to his apparent admission in the Haringey affidavit. He says that errors in affidavits are always possible, and he points to other errors, as he describes them, in various rulings and judgments in this case, such as the ruling of the European Commission of Human Rights which recited that the appellants had "produced" the leaflet complained of. In addition, he contends that it can be seen that the affidavit was drafted by a solicitor because he would not have used a phrase such as "inter alia", which appears in that document.

We accept that there is always the possibility of error in an affidavit, but the mere existence of that possibility does not provide evidence that there was in fact an error in the present case. The affidavit was no doubt drafted by a solicitor, as some of the phraseology indicates. But it was duly sworn by Mr. Morris, and he did not give any admissible evidence at trial to the effect that the words "we had produced" were a mistake in relation to him. It was accepted that, insofar as those words seemed to relate to Ms. Steel as well, they were inaccurate, but that in itself does not mean that they were inaccurate when referring to Mr. Morris. The judge gave his reasons for rejecting such an argument, saying that in his view that passage in the affidavit "would have jarred (with Mr. Morris) unless the truth was that he had produced copies of the leaflet complained of". We see the force of that.

The judge also relied on Mr. Morris' longstanding involvement with London Greenpeace during the period when the leaflet in question was produced, and on some evidence given by Mr. Clare, another enquiry agent. According to Mr. Clare, he was told by Mr. Morris at a meeting on 1st March 1990 that he had helped produce the leaflet/s for the anti-McDonald's campaign. Mr. Clare's notes of that meeting supported that evidence.

The appellants criticise the judge's reliance on that evidence from Mr. Clare, and it is true that the judge took the view that, for reasons which need not be set out in this judgment, generally

> "it would be unsafe to rely upon his evidence."

The appellants rely upon that statement. However, the same sentence continues:

> "save where it is supported by other, reliable evidence or by some strong inherent likelihood of the situation as I see it, or where it might be thought to weigh against his or McDonald's interests."

As a result, the learned judge disregarded Mr. Clare's evidence except where it passed one or more of those tests. That was the situation in respect of the reported comment by Mr. Morris that he had produced the leaflet for the anti-McDonald's campaign. It was, as the judge saw it, in accord with Mr. Morris' long-standing membership of the group and consistent with his own affidavit in the Haringey proceedings. As a result, the judge accepted that part of Mr.Clare's evidence.

In our judgment, he was entitled to do so. It met the criteria which the judge had earlier set out, criteria which themselves embody a reasonable approach to such evidence. In consequence the judge's finding that Mr. Morris had participated in the production in 1986 of the leaflet complained of was one which was open to him on the evidence. We can see no basis for interfering with it or with his conclusion that that production was done with the intention that copies of it should be published whenever and wherever possible in the future.

Therefore, although it is right that there was no direct evidence of Mr. Morris subsequently distributing copies of that leaflet, his responsibility for its publication during the relevant period was clear. It rested on the twin pillars of his involvement in the anti-McDonald's campaign, of which distribution of the leaflet was an integral part, and of his participation in the original production of the leaflet. We are in no doubt that the conclusion reached by the learned judge that both appellants were responsible for publication, albeit for somewhat different periods of time, was right.

Part 6

Consent

The notice of appeal states:

> "13. The trial Judge erred in finding that there was no evidence that anyone employed by either Plaintiff in this case authorised or consented to publication or any act of distribution of the leaflet complained of or of any other anti-McDonald's material. (J.pp.79-84)
>
> 14. Further or in the alternative, the trial judge erred in law in rejecting the Defendants' contention that the Plaintiffs, and each of them, had consented to publication of the whole, or substantial parts, of the leaflet complained of (J.pp.79-84). In particular, the trial judge erred in holding that no inference of consent to publication could be drawn from:
>
> > (a) the fact that the Plaintiffs chose to complain about limited parts only of the 'Veggies' leaflet which was a reprint of the leaflet complained of (J.p.80) and/or
> >
> > (b) the fact that the Plaintiffs chose not to complain about the leaflet complained of in these proceedings for over three years from their knowledge of its existence (during which time the Plaintiffs consented to the publication of nearly all of the 'Veggies' leaflet - see above) (J.p.80) and/or
>
> 15. Further or in the alternative, if, which the Defendants contend was wrong in law, anyone participating in the activities of Greenpeace (London) was responsible for all publications of the leaflet complained of, the trial judge erred in not finding that the Plaintiffs consented to such publication by or through their enquiry agents who participated in the said activities.
>
> 16. Further or in the alternative, the trial judge should have applied the same standard as he applied to the alleged publication by the defendants and therefore accepted the defence of consent as covering all publication by enquiry agents instructed by the Plaintiffs, including any copying and onward publication by recipients of such initial publication as is referred to by the trial judge at pp.83-84 of his judgment.
>
> 17. The trial judge erred in holding that the motive of the agents engaged by the

> Plaintiffs in participating in the activities of London Greenpeace, including distributing the leaflet complained of and/or the motives of the Plaintiffs in hiring them, were relevant to the issue of consent (J.p.83)."

Thus there are three main strands to the submission that the respondents' case was defeated by the defence of consent: the activities of the enquiry agents instructed by the respondents, the Veggies agreement and delay. It must be borne in mind that in defamation "consent, as in other areas of the law of tort, is a narrow defence" (*Gatley* 9th edn para 18.18). While the matter will need to be considered again under the heading of damages, consent to publication is not established simply because the allegation made by a defendant has been made previously by another person and has not been challenged (*Dingle v. Associated Newspapers Ltd* [1964] AC 371, 396, per Lord Radcliffe). Clear and convincing evidence of consent is required (*Cook v. Ward* (1830) 6 Bing 409). We consider first the activities of the enquiry agents.

In support of the general submission that "the trial judge erred in not finding that the respondents consented to publication of the leaflet 'by or through their enquiry agents who participated in the said activities' ", the appellants rely upon the judge's statement of the law, which is not in dispute (J.p.79):

> "It is a defence to an action in defamation that the plaintiff consented to the publication of which he now complains, by participating in or authorising it. Thus, if the plaintiff has consented to the publication of the words used substantially as they were, there is a good defence to the action."

It is submitted that, if the test is correctly applied, the respondents consented to the publication.

The respondents were responsible for the actions of the enquiry agents who were instructed by them, were carrying out their instructions and were acting within the limits of the authority given them. Seven agents were involved over a period of 18 months and there were very many attendances at meetings of London Greenpeace. The respondents had notice of the activities of the agents who were supplying to them notes of what they observed and did at meetings. The respondents were aware that the agents might have to distribute leaflets to become and remain accepted by the group members they met at the meetings. Taking part in group activities was known by the respondents to be a necessary part of maintaining the cover. Knowing of the activities of the enquiry agents, the respondents did nothing to limit or stop them.

None of those facts are or could be disputed by the respondents. However, it remains to consider whether they provide a defence of consent in law.

The further submission is made that the substantial presence of enquiry agents had a material influence upon the campaign and activities of London Greenpeace. By their presence and involvement, they encouraged those activities which included the perpetuation of the campaign against the respondents.

The judge stated that "the defendants' real case was that consent to publication was to be inferred from

the nature of the plaintiffs' instructions to enquiry agents and from the activities of those enquiry agents with, it was said, the approval of the plaintiffs". Having summarised the evidence, the judge stated (J.p.82):

> "However, I accept the evidence of Mr Preston and Mr Nicholson that the sole purpose of instructing the firms of enquiry agents was to find out who was responsible for the publication of the leaflet so that they could stop it, and I accept Mr Nicholson's evidence that he told the directors of each of the two firms that the method of operation was for them to decide but that the agents were not to act as 'agents provocateurs'."

The appellants submit that the motives of the respondents were irrelevant. While it is accepted that clear and convincing evidence of consent was required, there was clear and convincing evidence of acts of distribution by the enquiry agents. That conduct amounted to consent.

The judge found motive or reason relevant stating (J.p.83):

> "In my judgment it is clear that the enquiry agents did what they did the easier to remain apparent members of the group in order to pursue their investigations which were in fact directed by the Plaintiffs at obtaining evidence in order to stop publication of the leaflet complained of."

He went on to find as a fact that neither the appellants nor Mr Gravett "needed any encouragement to continue the anti-McDonald's campaign and publication of the leaflet between October 1989 and September 1990 or at all: nor did the group need any encouragement to keep going".

The judge concluded that "the whole idea of either plaintiff consenting to, let alone encouraging, the publication of the leaflet complained of is bizarre". Having so found, the judge went on to find for the appellants to the limited extent of stating that he would not hold them liable for any publication of the leaflet complained of actually made by an enquiry agent. That included an enquiry agent sending off a copy of the leaflet complained of when answering correspondence.

For the respondents, Mr Rampton submits that the enquiry agents had no general authority to consent to the publication of the leaflet. The instructions given to the enquiry agent did not involve consent to publication. Those instructions did not in the circumstances amount to a permission to the appellants to say what they liked about the respondents. Reliance is also placed upon the fact that no consent was conveyed to the appellants. Mr Rampton did not argue for a proposition of law that there cannot be a consent unless the defendant knows of it, but submits that it is difficult to establish consent in circumstances where consent is not expressly conveyed to the defendant. Reliance is placed upon the judge's finding of fact and the absence of evidence that any enquiry agent in fact shared the anti-McDonald aims of London Greenpeace.

Mr Rampton submits that it is arguable that even the publications actually made by the enquiry agents could found a claim for damages. The ground would be that in the circumstances the publications were

made at the request of the group and remained the responsibility of the group and not that of individual agents. That argument is not however pursued. As a fall-back position, Mr Rampton submits that any consent would operate only from the date when enquiry agents were instructed. Such consent would not cover earlier publications and could only go to reduce damages.

In our judgment, the judge was entitled to make the findings of fact he did. Indeed, they were fully justified upon the evidence. That being so, the argument we find compelling on this part of the case is that the overriding purpose of the instruction of enquiry agents was to discover the identity of the wrongdoer or wrongdoers with a view to taking legal action against them. It was an honest investigation to ascertain the source of the publication. Any publications by the enquiry agents were incidental to that purpose and indeed were necessary to preserve the cover of the agents. The authority given for such incidental publications did not amount to a consent in law.

We find persuasive support for the conclusion we have reached in the Canadian case of *Rudd v. Cameron*, Ontario Law Reports XXVII 327 decided in 1912. The plaintiff relied, as defamatory words, upon a statement made by the defendant to detectives employed by the plaintiff to find out who was slandering him. In the Ontario Court of Appeal Meredith, JA accepted (p.330) that "if the plaintiff had by subterfuge induced the defendant to speak defamatory words of him merely for the purpose of having an action for damages", an action would not lie. Meredith JA continued: "It was however quite a different thing for one, who has been defamed by a secret enemy, and who, in honest and not unusual or unreasonable endeavours to discover the wrong-doer, is again defamed by one whom he suspected of the secret defamation, to bring such an action as this. ... The plaintiff was not seeking a new defamation of his character with a view to recovering damages because of it; he was seeking knowledge with a view to putting a stop to the secret slanders which he neither desired nor had induced; and so, in this action, is not taking advantage of his own wrong, or answered by a defence of leave and license."

The facts of the present case are different in that the publication relied on was that allegedly made by the appellants to third parties and not the publication to the enquiry agents instructed by the respondents. On the other hand, the agents themselves were involved in publications in this case. The factual differences do not in our view diminish the relevance or persuasiveness of the reasoning of Meredith JA.

On the judge's findings in the present case, the respondents were "seeking knowledge with a view to putting a stop to the [alleged libels] which they neither desired nor had induced". The Court should look at all the circumstances and those include a consideration of the reason why agents of the respondents were cloaked with an authority to publish. The judge was also entitled to find that the appellants needed no encouragement to continue with the publication of the leaflet and the evidence did not establish activities of the enquiry agents beyond what was reasonably necessary to maintain their cover.

The appellants argument that the respondents consented to the publications complained of, by reason

of the activities of the enquiry agents, must fail.

Veggies Agreement

The appellants refer to the Veggies agreement in the context of consent. Veggies Ltd have printed leaflets using material from the leaflet complained of. In the Veggies leaflet, there is a page setting out the aims and activities of Veggies Ltd. An address in Nottingham is given above the motto "Helping people to save the lives of animals" and below the statement "All Veggies food is vegan: it contains no animal products". The organisation was established in 1984. It is stated that "Veggies Ltd is a cooperative, working to inform the public about their health, their relationship with animals and the environment, and the part that their diet plays in the distribution of food world-wide".

A representative of Veggies, Mr Patrick James Smith, gave evidence for the appellants at the trial. In his written statement, which was in evidence, Mr Smith stated:

> "Since 1985 Veggies have supported and drawn inspiration from Greenpeace London and its wide ranging campaign for the well-being of people, animals and the planet. As the 'business' part of Veggies works to promote soya based Veggies Burgers as a healthy, humane and economic alternative to those made from cows, it was natural that Veggies should back the Greenpeace London information campaign against the multinational burger corporation McDonald's, especially in that it highlights far more issues than simply the cruel and wasteful use of animals for food. In support of the campaign, Veggies Limited reprinted the Greenpeace London fact sheet, adding an additional page highlighting the conditions in which cattle are slaughtered and a page of information about the work of Veggies. The fact sheet otherwise contained exactly the same information as that published by Greenpeace London, which we understand to be the basis of the current libel action by McDonald's Hamburgers Limited against London Greenpeace."

Mr Smith went on to explain that one page in the Veggies leaflet was slightly different from the equivalent page in the London Greenpeace leaflet but added that "the rest of the leaflet was exactly identical to the London Greenpeace fact sheet".

The Veggies leaflet was considered by the judge but in the context of publication and not in the broader context now claimed to be relevant (J.p.10). The judge held that "a number of leaflets critical of McDonald's were in circulation at the material time. Two of them bore particular similarities to the leaflet complained of, and it was suggested that witnesses for the plaintiffs mistook publication of those leaflets for publication of the leaflet complained of. One was produced by Veggies Ltd and it was closely based on the leaflet complained of".

The judge stated: "The evidence of Mr Patrick Smith, one of Veggies workers, which was not disputed so far as production of the Veggies leaflet was concerned, was that from 1985 he supported and drew

inspiration from London Greenpeace and backed what it saw as the information campaign against McDonald's. In support of the campaign Veggies reprinted the leaflet complained of, which Mr Smith called 'the Greenpeace London fact sheet", with an additional page entitled "Hungry children and fat cattle" and a further additional back page with a very bold headline, "VEGGIES VEGGIES" across the top followed by text about Veggies Ltd. ... . The front page of the Veggies leaflet with the distinctive headline, cartoon and sub-title, and the remainder of the contents of the Veggies leaflet were the same as those of the London Greenpeace leaflet complained of ... ."

Concerned as he was with the issue of publication of the leaflet complained of, the judge made a detailed comparison of the form of the two leaflets and concluded that its form "made it readily distinguishable from the London Greenpeace fact sheet, once a reader advanced beyond the identical front page". The similarity between the text of the Veggies leaflet and the leaflet complained of was not however challenged.

The judge went on to describe the events which led to what has been described as the Veggies agreement:

> "The Veggies leaflet must have been first published not long after the leaflet complained of first appeared because on 8 October 1987 the first plaintiffs' English solicitors wrote to Veggies complaining of the allegations of murder and torture of animals and destruction of the rain forest, which were made in the Veggies leaflet. The solicitors demanded an apology and public correction in respect of the rainforest allegation.
>
> Veggies took legal advice. While they were doing so, Peace News published an article on 30 October 1987 pointing out that although the leaflet had criticised working conditions at McDonald's, the 'ill effect of junk food' and the torture and murder of animals, McDonald's solicitors had only asked for a retraction of the allegation concerning destruction of the rain forest.
>
> On 23 November 1987 the first plaintiffs' solicitors wrote to Veggies. They referred to the article in Peace News and demanded that the apology and correction should be extended to cover the allegation of torture and murder of animals. Veggies' solicitors corresponded with the solicitors who were by now acting, it would appear, for both plaintiffs. In May 1988, Veggies agreed to have an apology to the second plaintiff published in the following terms:
>
> <u>'McDONALD'S HAMBURGERS LIMITED</u>
>
> We have been asked to retract the following allegations made in the leaflet "What's wrong with Big Mac?":-
>
> (1) that McDonald's are implicated in the destruction of Rain-forest, and

(2) that McDonald's are responsible for the torture and murder of animals.

Our response to this demand for retraction is as follows:-

(1) we are now willing to apologise for having repeated claims for which we have been unable to trace specific evidence concerning the connection with McDonald's and the raising of beef on former Rain-forests;

(2) we are willing to concede that, by common usage, the words "murder" and "torture" are not yet widely used in connection with the killing of animals (although by our standards this is indeed the case) and we regret any embarrassment suffered by McDonald's Hamburgers Limited due to this statement."

Amendments were made to the Veggies leaflet in accordance with the correction and apology and in about 1990 or 1991 a 'not so ozone friendly' box was added".

It is common ground that Veggies Ltd printed and published their leaflet, as amended, on a considerable scale following those events. Their leaflet contained a number of the statements which, in their action against the appellants the respondents claim are defamatory.

Mr Smith was taken through a written statement he had made and it became part of the evidence:

"Veggies continued to print the fact sheet which, other than modifications described, contained all text and graphics from the original fact sheet. Veggies Limited received no further communication from McDonald's Corporation or their agents to indicate that they have had further concerns about the contents of the fact sheet. Since 1987 until the present date Veggies has printed and distributed various A5 fliers." Do you mean leaflets?

A. Leaflets yes.

(As we have indicated earlier, Greenpeace London had produced a leaflet similar but somewhat different, both in form and substance, to the leaflet complained of and it was referred to as the A5 leaflet)

Q. "With extracts from the 'What's wrong with McDonald's fact sheet. These fliers contain the text from the original fact sheet as well as the modified paragraphs. Throughout the period 1988 to 1994 quantities of full fact sheets (as modified) and the

A5 fliers extracted from it were supplied to Greenpeace London". Do you corroborate that statement?

A. That is correct yes. That is my statement.

Q. Can I just ask you a couple of questions about that? Was there — in terms of Veggies A5 leaflets, was it always the same one that was being printed throughout that period?

A. It did vary.

Q. Or were there different versions?

A. There were different versions. What Veggies did, it was really more a printer than a publisher. We would simply take leaflets supplied to us by other groups and print them at their request. So sometimes other groups would ask us to reprint their versions of the fact sheet.

Q. You mean the fact sheet or?

A. Of the A5 leaflets. The full fact sheet would always have been as the ones have been described in Court today."

Mr Smith's evidence that Veggies Ltd printed leaflets is consistent with documents issued by London Greenpeace during the same period. In a document signed "London Greenpeace Collective 8/88" it is stated:

> "Where all this ties in with this year's anti-McDonald's campaign is the question of leaflets for local groups. Many produce their own leaflet and others need to get them from elsewhere. If you wish to use the revised leaflet, contact either Veggies (see their McCatalogue which is enclosed with this mail for full details) or ... who will print them". (T 27).

In a London Greenpeace document prepared for the 1989 "anti-McDonald's campaign", it is stated:

> "Many groups have used our famous fact sheet, 'What's wrong with McDonald's': and we will supply a copy on receipt of a large sae (please don't request large quantities because we don't have any ourselves and can't pay the printing bills!.) There are two groups who will print leaflets for local groups in bulk ... ."

Veggies, at their Nottingham address, are named as one.

The appellants submit that in those circumstances the respondents have consented to the publication of

the leaflet complained or at least substantial parts of it which are now claimed to be defamatory. Further or in the alternative, it was an abuse of the process of the Court to sue the appellants when the respondents had agreed that Veggies Ltd could print a leaflet only slightly different from the leaflet complained of. The respondents' failure, at the conclusion of the trial, to seek an injunction against the appellants illustrates the fact that the action against them was oppressive.

For the respondents, Mr Rampton accepts that court procedures must be used in good faith and properly and not as a means of vexation or oppression. Having satisfied themselves that the ultimate responsibility for the allegedly defamatory statements was with members of London Greenpeace, and that London Greenpeace was responsible for the widespread distribution of the defamatory material, the respondents were entitled to sue its members. By September 1990, it had been possible to identify five "core ringleaders" in the anti-McDonald campaign and in distributing the leaflet. The respondents were entitled to sue the appellants having perceived, as Mr Rampton put it, that it was they "who were the source of the poison".

Mr Preston, President and Chief Executive Officer of the second respondents, stated that in the circumstances "action simply had to be taken". (Day 3/46). The aim was "to establish the truth". He was "not trying to silence fair criticism of McDonald's". When recalled much later in the trial, Mr Preston stated that he wanted to "stop the repetition of that which is contained in that leaflet". He had "gotten wind of this aims and objectives leaflet of London Greenpeace" He continued: "I had seen comments in it about smashing McDonald's. I said earlier I had seen the support for animal liberation. I had been through the fire incendiary device issues on four occasions in Britain, in restaurants here, and I thought that that combined with documents which are attached to my supplementary statement "regardless of the verdict in this case, we are going to continue to distribute this document". I thought the combination of those took this to an entirely different level".

What was described as the "aims and objectives" leaflet is a document in which it is stated:

> "We take the anarchist view (though some of us dislike the use of the word 'anarchist' as just another label) that it is futile and immoral to collaborate with the existing power structure, so we do not place any trust in politicians or political parties. Meaningful change can come only through the struggle of ordinary people in their daily lives. The scant freedoms we possess today (which are disappearing fast) were won by the blood and sweat of our ancestors. What we must realise is that that resistance, as well as oppression, forms a totality. Every aspect of our lives — the food we eat, our sexuality, the job we choose to do (or not to do), our behaviour towards others — can be either a statement of dissent or of acceptance ... . Taking action is vital because in the end deeds, not words, really matter. That's why we support groups such as the Animal Liberation Front who break the law. If property is used to abuse others it should be destroyed, and that isn't violent because inanimate objects don't feel pain. Some of us go further and would support violent resistance to oppression, for example the uprising by people on Broadwater Farm in Tottenham in 1985".

Under the heading “Campaigns”, the leaflet continued:

> “Perhaps the most successful campaign we have initiated in recent years has been the one against the McDonald’s hamburger corporation. This has become a nationwide and worldwide movement uniting many disparate campaigners in the aim of smashing a multinational that epitomises everything we despise — a junk culture, the deadly banality of capitalism. McDonald’s themselves are so frightened that they are resorting to threatening legal action — a sure sign we’re winning! For World Food Day 1986 (Oct 16th) we produced a factsheet, ‘What’s Wrong with McDonald’s’, which is now established as a classic. We’ve received requests for copies from all over the world, and many groups have used it to make their own leaflets.”

Reference was made by the respondents to the London Greenpeace leaflet in support of the submission that the respondents were entitled to sue members of London Greenpeace notwithstanding their agreement with Veggies Ltd. When he was cross-examined, it was put to Mr Preston (Day 245/60):

> “Q. Veggies are still distributing the fact sheet. You have several copies in your publication bundle spanning over several years and you have not taken any action against them since you asked for these minor changes?
>
> A. We have not, that is correct.
>
> Q. Do you accept that that is effectively giving the green light to campaigners to distribute that leaflet?
>
> A. No, it is not, no.”

Mr Nicholson gave similar evidence.

In support of his submission that the respondents had been consistent in their actions, Mr Rampton referred to other libel actions commenced by them and the apologies, by way of statements in open court, they had received. The respondents take action, it is submitted, when they perceive significant damage to their business reputation. Mr Rampton makes the further point that the appellants are to be distinguished from Veggies Ltd on the ground that Veggies Ltd were mere printers or distributors. The respondents did not need to seek an injunction to show their good faith. What they sought was vindication, the world being made aware of the falsity of allegations against them.

The Veggies agreement and consent

Mr Rampton submits that the appellants are not entitled before this Court to use the Veggies agreement to support a submission that the respondents consented to the publication of the leaflet

complained of. During the hearing of the evidence at the trial, the defence of consent was put forward only in relation to the activities of the enquiry agents. The Veggies agreement was not pleaded in support of a defence of consent. It was only during the closing submissions (Day 308) that the appellants sought to rely on the Veggies agreement as a consent.

On day 2 of the trial, Mr Morris raised the question that Veggies were circulating their leaflet at the material time. Mr Morris stated: "This is quite important, certainly in terms of the malice allegations". He also stated (page 27):

> "So, from 1987 onwards when those minor changes were made, this leaflet is still being circulated in large numbers — in fact much greater than London Greenpeace ever did — so it is inevitable that in terms of malice the malice allegations of the plaintiffs have absolutely no substance whatsoever because by their own actions they have effectively sanctioned virtually the entire London Greenpeace fact sheet in their correspondence and dealing and lack of legal action against Veggies of Nottingham".

Malice was relevant to a possible defence of fair comment and in relation to the counterclaim and claim for an injunction.

In March 1996, when the respondents sought to re-amend their statement of claim in relation to allegations of publication, the appellants applied to amend their defence to allege "that the plaintiffs expressly or impliedly authorised and/or assented to the publication of the leaflet and the words complained of which it contains". The application to amend the defence was however limited to alleging consent by virtue of the activities of the enquiry agents. It was not sought to allege that consent arose from the respondents' attitude to the Veggies leaflet. It was also argued that failure to take any action against the appellants earlier than 1990 amounted "expressly or impliedly to assent" (Day 235/14).

The appellants submit that they made known the nature and purpose of their reliance upon the Veggies agreement even though it was not formally put under the heading "consent".

Moreover, the appellants submit that the absence of a pleading alleging consent by virtue of the Veggies agreement is not fatal to its consideration because it had been accepted by the judge and the parties that written statements prepared on behalf of the parties, which included an allegation of consent by virtue of the Veggies agreement, were to stand as the pleadings. As early as 16 December 1993, the judge put the position generally in this way: "What Mr Rampton is saying is 'although it is not pleaded, we have seen it in a statement or report and therefore we are on notice so far as that is concerned'." In a ruling on 18 November 1995, the judge noted that Mr Rampton "said that his clients were prepared to accept as if they had been pleaded as particulars relevant matters appearing in a disclosed statement of a witness for the defence" (p 2). When stressing the importance of the appellants giving proper notice of additional evidence which they proposed to call, the judge added that "it is particularly important when evidence of such matters is to be taken to stand as if it had been

part of the pleadings in the case" (p 11).

In a ruling on 7 October 1996 the judge stated (Day 281/3): "primarily the purpose of pleadings is to let the other side know what your case is ... that was relaxed to an extent by what was said about things being in your witness statements". In those circumstances, the appellants submit, the fact that the case based on consent was not put in a "legalistic way" should not be taken against the appellants as litigants in person. Mr Morris had made the point in the course of argument (Day 245/56) that the plaintiffs had "effectively sanctioned the continued distribution of the London Greenpeace fact sheet by Veggies". When questioning Mr Preston, Ms Steel stated: "effectively you gave the green light to Veggies to reprint the fact sheet with minor changes ...". Referring to the role of Veggies, Ms Steel asked: "do you not accept that that is effectively giving the green light to campaigners to distribute that leaflet?" Mr Preston denied giving the green light to anybody but the point is made that the line of questioning, together with the allegation in written statements, effectively brought the issue of consent arising from the Veggies agreement into play. The judge himself put this question to Mr Preston (Day 245/62):

> "What is being put to you is this: if you were prepared to let Veggies publish a leaflet which contains many of the allegations which you complain of in the leaflet, which is the spring for this case, the only, it is suggested relevant changes being in relation to destruction to rain forest and torture and murder of animals, if that is so, how could you say, as it is suggested you did in the press releases etc that the leaflet was all lies because it is suggested that the defendants, among others, might think that many of the allegations in it are true because you did not complain about them when Veggies made the publication."

That of course puts the point in a different way but reinforces, it is submitted, that the effect of the Veggies agreement was on the agenda. Mr Preston, in evidence cited in part earlier, replied:

> "I think, your Lordship, time had moved on from 1987 to 1990 I had gotten wind of the aims and objectives leaflet of London Greenpeace. I had seen comments in it about smashing McDonald's. I said earlier I had seen the support for Animal Liberation. I had been through the fire incendiary device issues on four occasions in Britain, in restaurants here, and I thought that that, combined with statements in documents that are attached to my supplementary statement 'regardless of the verdict in this case, we are going to continue to distribute this document'. I thought the combination of those took this to an entirely different level. What I might have been willing to do, or the company through the solicitor's advice in willing to deal with the Veggies organisation had entered a local new plateau, one where my customers, my staff, had been endangered in one restaurant. There had been an incendiary device go off on a very busy Saturday afternoon and the blatant disregard for the law and 'we are going to continue to distribute this regardless' very much affected me in my thinking."

(The transcript appears to be corrupt in the last but one sentence but the gist of the answer is clear.)

What was alleged by the appellants, in relation to the Veggies leaflet, was as follows (Day 235/44):

> "The plaintiffs' solicitors acquiesced to the continued distribution in bulk — Veggies, we will contend, being the main distributors of the London Greenpeace factsheet throughout all the material time. The reason I [Mr Morris] bring that up is that the plaintiffs' intent was not to identify all the distributors to cease the publication of the leaflet. The plaintiffs' intent, we will argue, after all the evidence, was to mount a show trial against unrepresented individuals from London Greenpeace at a time suitable to the plaintiffs after some polishing up of their policies. But the point being that all this is a matter of evidence. Mr Smith from Veggies will come to court and explain about that court case and Veggies Ltd continue today to distribute the fact sheet in bulk".

That, submits Mr Rampton, is a submission based on abuse of process and did not alert the respondents to a defence of consent based on the Veggies leaflet. We comment in passing that one person's "show trial" is another person's attempt to stop "the source of the poison".

The respondents submit that they were led away from considering a defence of consent based on the Veggies publication by the conduct of the appellants. Had the defence been made explicit, Ms Steel and defence witnesses would have been cross-examined as to what effect the Veggies agreement in fact had upon their minds. The status and content of the Veggies agreement would have been considered in more detail. Mr Smith would have been cross-examined upon the circumstances in which the agreement was made.

Moreover, the willingness of the appellants to go on publishing, if it is so proved, the leaflet complained of, rather than the Veggies' version tolerated by the respondents, suggests that the idea of consent was not operating on their minds. The determination of the London Greenpeace Collective, as expressed in the August 1988 leaflet, (T 27) to encourage publication regardless of consequences, does not fit easily with a belief in consent or with consent being a factor in the situation; it is submitted. It is stated in that document: "Only individuals within the group can be taken to court but McDonald's would then have to prove that those individuals were responsible for writing and being responsible for distributing leaflets. In practice this is virtually impossible to do." And later, "secondly we think it is wrong for local groups to 'apologise' because, quite simply, there is nothing to apologise for".

We do not accept Mr Rampton's submission that Veggies Ltd can be likened to mere printers or distributors. The evidence, including documentary evidence, demonstrates that they were working with and supporting London Greenpeace. They were printing the leaflet complained of with the amendments they had agreed with the plaintiffs. The two organisations, one a limited company and the other a "collective", were for the purposes of publication similar in status and in function. They were each concerned with the substance of the publication and each wished to propagate the material in it. Moreover, in the case of two such similar publishers, we reject the submission that a plaintiff who

consents to publication of a document by one of them may whatever the circumstances bring proceedings against the other with respect to the same document.

The respondents agreed to the trial proceeding upon a basis which was informal in that allegations in written statements were taken to be pleaded allegations. That degree of informality was established at an early stage of the trial. Moreover, as litigants in person, the appellants could not always be expected to know under which headings, by way of defence in this complex field of law, each of their factual allegations should be pleaded. Before the close of the evidence, the appellants, by using such expressions in argument and questions in relation to the Veggies agreement, as giving the "green light" and as "effectively sanctioning" the distribution of the leaflet, suggested that they were relying on consent.

Having said all that however, we consider that there is considerable force in Mr Rampton's submission on this point already summarised. Many issues arose in this trial and there is nothing complicated or technical about alleging consent as such, as a result of the Veggies agreement, if that had been the appellants' intention. Indeed, it was one of the more obvious points to identify. The respondents, and the judge, were entitled to know, at least when the appellants amended their defence to allege consent, that the point was taken. It was not expressly taken when the issue of amendment arose and the course of the trial was affected by the failure to take the point expressly. While the defence was raised in the course of the appellants' closing speech, the judge was entitled to dismiss it as briefly as he did. It is not open to the appellants to rely on the point on the hearing of this appeal. We are nevertheless prepared to express our conclusion on the substance of the matter.

We have come to the conclusion that the circumstances of the two publications are different. When agreeing to publication of a leaflet by Veggies, the respondents were not consenting to publication of the material in it in all possible forms, by all persons and for all time. When they decided to commence proceedings against the appellants, the respondents were attempting to deal with a document significantly different in content from the one they had tolerated. The claim was brought against parties whom they believed to be involved in a sustained campaign against them, as revealed in the London Greenpeace documents to which reference has been made. Those believed to be responsible for the distribution of the leaflet complained of were acting not in pursuance of any agreement but with a view to claiming credit for promoting the unamended document and doing so in the expectation that they could not be brought to account. In those circumstances, the Veggies agreement does not provide a defence of consent.

Delay and Abuse of Process

In the result, the bringing of proceedings against the appellants in the circumstances existing in 1990 does not constitute an abuse of the process of the court. Neither does the lapse of time before proceedings were brought constitute acquiescence or involve an abuse of process. The respondents were not debarred from suing the appellants by any action they had taken, or failed to take, or by

reason of admissions made on their behalf or by an improper motive. The respondents were entitled in 1990 to assert their rights by bringing an action for defamation in the Courts. They were entitled to make the comprehensive attack they launched upon the contents of the leaflet.

We add that there was no evidence to suggest that the use of violence by these appellants was in fact a real possibility. When asked by Ms Steel about his enquiries of Special Branch, Mr Nicholson stated (Day 249/34):

> "Well, I mean, they told me they were not particularly interested in London Greenpeace. They regarded you as a small organisation of very little importance. What they were interested in was the possible connections with the animal liberation groups, and they did not indicate either of you two were involved in that."

(The "two" referred to were Ms Steel and another but there is no evidence that the statement did not also apply to Mr Morris.)

While concluding that the respondents were entitled to bring proceedings, we record our view that it is difficult to take as serious a view as one otherwise might of statements which the respondents also tolerated in a leaflet intended for general distribution by a campaigning organisation, namely Veggies Ltd. The respondents' strictures about the impact those statements would make upon the ordinary reader do not rest easily with the respondents' agreement to permit their distribution in a similar leaflet. The Veggies agreement may also be relevant to the quantum of damage, if liability is established.

It follows from our consideration of the activities of the enquiry agents, the Veggies agreement and delay that the judge was right to conclude that in these proceedings the defence of consent is not available to the appellants.

Part 7

Admissions and Alleged Bias

The appellants maintain that the judge failed to give due weight to admissions made by or on behalf of the respondents and that he was systematically biased in favour of evidence called by the respondents and against evidence called in support of the appellants' case. Their grounds of appeal on these topics are as follows:

> "18. The trial judge erred in not giving full and/or unassailable weight to admissions against interest made by a number of Plaintiffs' representatives, especially those of management grade and above, and other Plaintiffs' witnesses in the witness box, and in company documentation. He further erred in failing to halt the continuing evidence scheduled for such an issue, in the light of the admission removing any real remaining dispute between the parties. For example, McDonald's UK Vice President and Head of Personnel had admitted that employees `would not be allowed to carry out any overt union activity on McDonald's premises' and that `to inform the union about conditions inside the stores' would be a breach of the employee's contract, `gross misconduct' and as such a `summary sackable offence'.
>
> 19. The trial judge erred and/or displayed bias in making numerous unjustified assumptions about the cogency of the Defendants' evidence and the reliability of their witnesses in sharp contrast to the assumptions made about the Plaintiffs' evidence and witnesses. For example, the trial judge erred in law in finding that the first defendant was not being honest because she held a different view to the judge's preferred meaning (not at that time declared) of the words complained of in the main action (J. p.727) when the Courts recognise that 'a combination of words may in fact convey different meanings to the minds of different readers' (J. p.86).

20. Further or alternatively, the trial judge erred in giving equal or greater weight to the evidence of the Plaintiff's representatives and consultants still in the employ or financial ambit of the company as compared and contrasted to the evidence of the independent defence witnesses. For example: his judgment states that he preferred the evidence of Plaintiffs' cancer treatment expert Dr Sydney Arnott over the internationally eminent Defence cancer causation research experts Professor Campbell and Crawford."

The appellants' case is that all (or most) of the witnesses called on behalf of the respondents were employees of the respondents or people committed to them and that admissions made by them in evidence should carry great weight. In addition, admissions made by representatives of the respondents out of court should carry equivalent weight. They say that the higher the position of the representative of the respondents, the greater weight should be given to admissions and that the greatest weight should apply to admissions made under oath in the witness box, especially if the witness was called by the respondents to give evidence on the subject to which the admission relates. The appellants say that admissions against interest made in the witness box which run counter to other evidence by the same witness should discredit that witness. They submit that some admissions against interest made by a plaintiff in defamation proceedings should by themselves constitute a defence. If a publication complained of says no more than has already been said in public by a representative of the plaintiff, that should not be regarded as defamatory, or the publication should be taken as being unchallengeably true. The appellants give as examples of this statements which they say are attributable to the respondents about McDonald's attitude to unions.

The appellants produced a very long list covering many pages of parts of the evidence on which they relied as admissions against interest in this context. Their written submissions counted these as numbering 106. The general submission was that these parts of the evidence were "wrongly not treated as admissions against interest, and/or not given enough weight, and/or not treated as an estoppel, and/or meant a wrong decision was made on the facts on each discrete issue, and/or meant that that witness should have been discredited." The evidential extracts were grouped under the various sections of the case, but in many instances were not directed towards any more specific submission than that the judge ought to have made findings of fact more favourable to the appellants. Examples of items from this list are:

> "Dr Sidney Arnott (McDonald's expert on cancer) was asked his opinion of the following statement: "A diet high in fat, sugar, animal products and salt and low in fibre, vitamins and minerals is linked with cancer of the breast and bowel and heart disease". He replied: "If it is being directed to the public then I would say it is a very reasonable thing to say". This statement is the key extract on this issue from the London Greenpeace Factsheet."

and

> "McDonald's admitted responsibility for a serious food poisoning outbreak in Preston in 1991, when several customers were hospitalised as a result of eating under cooked burgers contaminated by potentially deadly E. Coli 0157H bacteria. They also admitted responsibility for a similar outbreak in 1982 caused by the same type of bacteria, which affected 47 people in Oregon and Michegan, USA."

and

> "Mr Beavers admitted that in the early 1970's McDonald's employed an official, John Cooke, who had a responsibility "to keep the Unions out". John Cooke was quoted in the book, "Behind The Arches" (written with McDonald's backing and assistance): "Unions are inimical to what we stand for and how we operate. They peddle the line to their members that the boss will be forevermore against their interests." The book also stated that "of the 400 serious organisation attempts in the early 1970's none was successful". Mr Beavers admitted this was due to "steps" taken by McDonald's "to try to prevent trade union organisation ... around that time when it was actually a problem."

These are individual items in the list and should, of course, not be taken out of context. Each of them is placed together with other parts of the evidence relevant to their respective subject matters. For immediate purposes, we note only that the judge referred to and considered each of these three parts of the evidence explicitly on pages 336, 485-8 and 677 respectively. These are just examples, but they are representative of the fact that the judge dealt explicitly in his judgment with a very large proportion of all the evidential items in the appellants' list.

Paragraph 19 of the Notice of Appeal accuses the judge of bias in his evaluation of the witnesses. The appellants stress that they do not say that this alleged bias was conscious or intentional. The essence of the submission is that the judge's treatment of witnesses called by the respondents was systematically more favourable than his treatment of witnesses called by the appellants. They say that discrimination in favour of the respondents' case arose in part because they were represented and therefore better off. The judge was more likely to understand their case and attach greater weight to it. They say that their experience of pre-trial hearings was that, since they were unrepresented and not respected, what they said was treated with less weight than what Mr Rampton said. The respondents were also part of a capitalist establishment to which the appellants are opposed and the judge will have had preconceived views in favour of the establishment. Any unrepresented litigant who tries to challenge establishment views has a double hurdle.

The appellants submit that the judge often and unfairly attacked defence witnesses but failed to evaluate the respondents' witnesses by the same standard. They contend that almost every respondents' witness was discredited because they used rhetoric, exaggerated, were ambiguous, avoided difficult

matters or made ludicrous statements while trying to defend the McDonald's line come what may. They suggest that few of these witnesses were criticised by the judge in the way that many of the appellants' witnesses were. They maintain that many of the respondents' witnesses were shown to lack independence and genuine honesty out of loyalty to McDonald's, but that this was not acknowledged by the judge. They suggest that the judge appears to have approached the evidence on the basis that the appellants' witnesses were generally not reliable unless there was other confirming evidence, whereas the respondents' witnesses were generally assumed to be telling the truth unless there was compelling evidence to show that they were not. It was only where the appellants' case was overwhelming that they succeeded. They suggest that they only succeeded in relation to pigs and chickens in the Rearing and Slaughter of Animals section of the case because McDonald's had admitted the points on which they succeeded.

The appellants assembled for each of the main topics long lists of references to passages in the judge's judgment which they say supports their general submission. We have taken these references into account in the parts of this judgment which deal with the particular topics. The appellants say, for example, that the way in which the judge treated the evidence of Dr North unfavourably in comparison with that of Dr Arnott. He treated the evidence of Mr Walker too favourably. He should have been found to have lied about the frequency with which patties were tested, but the judge "saw no reason to doubt what he said" - see page 506 of the judgment.

Speaking generally, many of the appellants' examples, taken individually, give no support whatever for the contention of judicial bias or discrimination. They are no more than a series of points where for one reason or another the appellants believe that a different finding should have been made. The submission as a whole is, in our view, itself unbalanced because it fails to take due account of those parts of the judgment in which the judge made findings favourable to the appellants.

The appellants submitted that there were many instances where the respondents or their representatives were shown to have been deceptive. They gave examples, one of which was that the respondents had obtained an apology for an article in the Bournemouth Advertiser upon what the appellants say were false pretences. [The judge referred to this matter on page 465 of his judgment.] The whole point of these examples was, they submitted, that, if individuals had been shown to be deceptive in this way, they would have been thoroughly discredited and their case would have been thrown out of court. This should have happened to McDonald's.

It is instructive on the subject of alleged bias and the judge's evaluation of the evidence generally to compare his assessment of the evidence of Mr Clare and of Mr Beech.

Mr Clare was one of the private investigators instructed by the respondents to make inquiries about the activities of London Greenpeace. The main relevance of their evidence was on the subject of publication and it is considered in the publication section of this judgment. The judge expressed the view that Mr Nicholson's decision to instruct two firms of enquiry agents, so that each would inadvertently be checking on the other without it knowing, demonstrated a scrupulous approach to the

enquiry which he instigated, and that it resulted in exposing some unreliability in reports of one of the agents, Mr Clare. On page 46 of his judgment, the judge said:

> "By the beginning of January,1990, the other agency, Bishop's, had instructed a nineteen year old private investigator called Allan Clare to attend meetings of London Greenpeace.
>
> Like the other private investigators, Mr Clare started his evidence in chief by saying that his written statements, made on the 24th May,1993, the 19th June,1995, and the 19th June,1996, were true.
>
> The statements were largely based on notes which he made in a book after each meeting which he attended. The book was produced in Court. He made the notes about ten minutes after each meeting. He thought that his notes were substantially accurate. However, as his evidence developed it became clear that his notes were wrong in respect of two matters about which there could be no innocent mistake.
>
> On the 19th April,1990, Mr Clare made a note of going to 5 Caledonian Road. Only Jane Laporte was there. They killed time by answering letters, which involved putting anti-McDonald's leaflets in envelopes in response to enquiries about McDonald's. No meeting was held as no one else arrived. Mr Clare's witness statement and his evidence accord with his notes. Yet Mr Pocklington noted and gave evidence of a meeting on that day attended by himself, Mr Clare when he knew him as "Alan from Catford", Jane Laporte, Ms Steel, Mr Morris and two others. The meeting went on until 9.45pm and he recorded no mention of McDonald's.
>
> On the 14th June,1990, Mr Clare noted a meeting at 5 Caledonian Road. He noted "nothing important" and that Ms Steel was present and that the meeting ended early as she and Paul Gravett were going for a drink with friends. But Mr Bishop, another enquiry agent who was there, did not record Ms Steel being present. She gave evidence that she was not there because she was on holiday on Barra, and I accept her evidence, supported as it was by a post card sent by her and a friend from Barra on 18th June by which time she thought that she had been there a week.
>
> Much of Mr Clare's evidence was challenged by the Defendants, and as a result of the matters to which I have just referred I have concluded that it would be unsafe to rely upon his evidence save where it is supported by other, reliable evidence or by some strong, inherent likelihood of the situation as I see it, or where it might be thought to weigh against his or McDonald's interests. I will refer only to the parts of his evidence which in my view pass one or more of those tests and which add something to the case."

A significant part of Mr Clare's evidence which the judge did not reject was relevant to the respondents' case that Mr Morris, who did not give evidence, published the leaflet complained of. We consider this issue in the publication section of this judgment. Part of the relevant evidence was in what was referred to as Mr Morris' Haringey affidavit. On page 18 of his judgment, the judge said of Mr Clare's evidence relevant to this issue:

> "An enquiry agent, Mr Clare, gave evidence that at a meeting on the 1st March,1990, Mr Morris said that he had helped to produce the leaflet for the anti-McDonald's campaign. I have serious reservations about Mr Clare's evidence generally, but that part of it accords with Mr Morris's affidavit and Mr Morris's longstanding involvement with London Greenpeace covering the period of production of the leaflet complained of."

On page 49 of his judgment, the judge said:

> "Mr Clare also attended the meeting on the 1st March. He said that during discussions Mr Morris made it clear that he had been heavily involved in the anti-McDonald's campaign and that he had been a member of the group for some time. He also said that he had organised the 1989 Anti-McDonald's Fayre and that he had produced the leaflet for the anti-McDonald's campaign. Mr Gravett and Ms Steel said that this was quite wrong save for Mr Morris's long association with the group. However, what Mr Clare recalled Mr Morris saying is all of a piece. It accords with his long-standing membership of the small group. The part about producing the leaflet is consistent with Mr Morris's affidavit to that effect five years later. I do not believe that it would be beyond Mr Morris to claim that he organised the fayre even if he only contributed to prior discussions and attended for the day. I accept this part of Mr Clare's evidence.

Other issues concerned the prominence within London Greenpeace of the campaign against McDonald's and whether copies of the leaflet complained of remained available in 1990. On page 50 of his judgment the judge summarised Mr Clare's evidence as follows:

> "On the 6th March,1990, Mr Clare and one of his principals got into the office at 5 Caledonian Road when no one else was there. He said that were let into the building by the Gay/Lesbian switchboard which controlled access by entry phone, and they slipped the lock of the London Greenpeace Office with a plastic card. Mr Clare took a number of photographs, prints of which were produced. One shows shelves on one of which is a brown cardboard box with "McD FACTSHEETS" written on it. Mr Clare said that the box contained copies of the leaflet complained of. What appears to me to be a copy of the leaflet complained of is to be seen sticking out of one side of the box. Although one can only see what appears to be part of the back page, it does appear to have the same format as the back page of the leaflet complained of, with two columns of text save for the bottom of the page where the text extends across the page. This is not the format of the back page of the Veggies leaflet, and it is clearly not a single sheet. It was suggested to Mr Clare in cross-examination that he had planted the leaflet there. He denied doing so.
>
> Mr Pocklington said that the box accorded with his recollection.
>
> Ms Steel said that the box shown in the photograph was the box used for taking material including various leaflets, scissors, sellotape, a stapler, a pen and sometimes a banner, to stalls; but not the leaflet complained of."

The judge then referred to evidence of Mr Gravett (one of the original defendants in these proceedings) and Mr Bishop, another private investigator, and then said on page 51:

> Despite the strong reservations which I have expressed about Mr Clare's evidence, I think that this is an instance where the strong inherent likelihood of the situation and other evidence about the availability of the leaflet complained of supports Mr Clare's evidence that the photograph taken on the 6th March, 1990, is genuine in what it shows. I do not believe that he thought that there was any real issue about London Greenpeace having copies of the leaflet complained of at the time. If he had wanted to plant a copy of the leaflet complained of he could have made a much better job of making its identity clear to the lens of the camera. If it was a plant it was an extremely subtle one. In my judgment, despite the evidence of Ms Steel and Mr Gravett to the contrary, the clear inference to be drawn from the photograph is that by March,1990, there were still enough copies of the leaflet complained of in the London Greenpeace office to justify a box to hold them, marked to that effect, I do not doubt that the box was used to take them out and about when required.

The judge also referred to other evidence of Mr Clare attending meetings, sometimes with Mr Bishop. The evidence included instances where Mr Clare was concerned with sending letters with anti-McDonald's leaflets and literature, which was against the respondents' interest in the proceedings.

Of a meeting on 19th July 1990, the judge said at page 62 that Mr Morris

> "... allowed Mrs Tiller to read the minutes of the last meeting on the 12th July. They referred to a letter from New Zealand about McDonald's, which is some support for Mr Clare's account of that meeting, and I accept that part of his evidence supported as it was by the minutes and accepting as it did that he answered letters himself.

[Ms Frances Tiller, previously Davidson, had acted as a private investigator into the activities of London Greenpeace but came to sympathise with the Defendants.]

In our judgment the judge here made an entirely fair and balanced appraisal of the evidence of a witness whose credibility was suspect. It may sometimes occur that the credibility of a witness is so completely destroyed that a judge would reject that witness' evidence in its entirety. But proof that some evidence is wrong does not automatically falsify other evidence which is not so proved and the evidence of one witness is never judged in isolation from the evidence as a whole. It is open to a judge, just as it would be to a jury, to accept parts of a witness' evidence while rejecting other parts. The judge set out unimpeachable criteria for judging Mr Clare's evidence and proceeded to apply them fairly and faithfully.

The judge's main consideration of the evidence of Mr Beech began on page 613 of his judgment, where he said:

> "The Defendants' case of poor conditions of employment at the Second Plaintiffs' restaurant and Drive-Thru on the A4, Bath Road, near Heathrow airport depended on Mr Alan Beech. The restaurant opened in 1991, and Mr Beech worked there from early November,1993, until he left to go to university in September,1994. Mr Beech passed his eighteenth birthday on 5th April,1994, halfway through his period at McDonald's. He worked part-time, two or three times a week usually, with a maximum of four times a week. ... Mr Beech's scheduled shifts were usually 12 noon to 8pm or 4pm to 11pm or midnight.
>
> Most of Mr Beech's evidence relating to events and practices at the Heathrow restaurant revolved around the pressure under which crew worked, due to understaffing.
>
> His original statement, written by him in the expectation of giving evidence, included the statement that "you are ... shouted at to work faster because you are doing the work

of 4 or 5 due to understaffing and can't possibly keep up. On one occasion in the summer of 1994, for over 90 minutes I was running the entire kitchen and one till. Normally the kitchen should have about 15 people working in it ..."

I doubt that one man could do the full work of four or five or that the kitchen required fifteen staff to run it. When Mr Beech gave evidence it became clear that it was about 11.20pm or 11.30pm when he was asked to run the kitchen on his own. By his own account it was a time when people were mostly ordering drinks, shakes or a coffee or perhaps a pie. There were two or three other staff on tills and they could prepare and serve drinks from the machines or fountains. It was not a period when a lot of food was being sold, and Mr Beech took orders on his till when called by the manager on the front because he was not doing much in the kitchen. Even then he only took four or five orders on his till: he was mainly in the kitchen. It was honest of Mr Beech to volunteer this extra information when he came into the witness box, but the picture of the incident given in his original statement was completely misleading in my view.

Moreover, Mr Beech said that it became obvious to him that McDonald's was not the place for him about three hours after he started work and that when he finally left the Heathrow restaurant ten months later it was with great relief. His main complaints boiled down to having had to work too hard and too fast for too long. However, he accepted that when he was interviewed for the job he said that he liked fast, active work; that three weeks after he started he wrote under "Employee's Comments" on his Probationary Performance Review: "Enjoying the work and people. Keen to do well"; and that when he told Mr Roberts that he was leaving, to go to university, he said that he would be coming back in December. Having listened to Mr Beech's evidence, I believe that what he said at his job interview was untrue but said to get a job. Mr Beech said that what he said at he Probationary Performance Review was untrue but made to ensure that he kept his job, and that what he said when leaving untrue but made to keep his options open in case he was short of money at the end of term, although he had no intention of going back to McDonald's when he spoke to Mr Roberts. Clearly Mr Beech was prepared to be untruthful about his work when it suited his purpose.

As a result of all these matters, taken together, I must treat Mr Beech as an unreliable witness save where there was some evidence from McDonald's own witnesses or documents to support it, or the nature of the system means that his evidence is inherently likely to be true. As it happens there was support for a number, but not all, of Mr Beech's allegations.

Mr Beech's first allegation was that he and other crew who were under eighteen regularly worked after midnight, until as late as 2.15 am. He said that he worked past midnight on 75% of the shifts where he was scheduled to work to midnight, but it was

usually for less than an hour past midnight. ..."

Having considered a body of evidence on this topic, the judge concluded on page 616:

> "... Taking this factor with the admittedly high proportion of young crew, some of whom must have worked evening shifts, and Ms Moffatt's evidence and the evidence of what happened at Colchester, I have no hesitation in accepting Mr Beech's evidence on work after midnight and pressure to do so, despite my reservation about his general reliability. I reject any suggestion that the practice only prevailed under Jon Nevison. It was happening before he took over.
>
> ...
>
> Mr Beech's next complaint was that crew worked very long hours at the Heathrow restaurant. His evidence about others' long shifts was hearsay."

The judge again considered a body of evidence and concluded on page 617:

> In my view there was sufficient evidence of long shifts from McDonald's own witnesses for me to accept that Mr Beech worked long shifts of up to fourteen hours on a few occasions, but it could not have happened very often when one considers his fortnightly totals. I think that it is inherently likely that he and some other crew worked on beyond the end of their scheduled shifts under management pressure to do so and without warning. It must be difficult for young crew to say "no" when there are insufficient staff to replace them at the end of their scheduled shifts and they know that future scheduling and work allocations are in the gift of the managers. Two thirds of the crew were under twenty-one according to Mr Khazna and many of them were students.
>
> Mr Beech next complained that breaks were given only when managers thought that the store was quiet enough. He was once given his 45 minute break only nine minutes into a ten hour shift, without any choice in the matter. He was told: "Go on a break or go home". He was only told that once, but "if you did not take your break when offered in a quiet period even if it was near the beginning of your shift, there was no guarantee that you would get it until 45 minutes before the end of your shift, with the result that you worked through it or went home early if allowed." Mr Beech did not usually feel that he had a choice about when he took his break, although some managers were more accommodating than others. On occasions he worked eight, ten or twelve hours without a break."

The judge's conclusion on this topic on page 618 was:

"Ms Moffatt told me that she had never come across anyone being told to go on a break or go home. I accept that it happened to Mr Beech on one occasion because I heard acceptable evidence of a number of instances of autocratic management at McDonald's in relation to the taking of breaks at other restaurants; there was the pressure of understaffing at the Heathrow restaurant, and there was pressure to have all staff who were in the restaurant working during busy periods which often coincided with the middle of shifts. However, I do not find that a direct ultimatum to take a break early or to go home was typical. Mr Beech did not suggest that it was. I do find, for the same reasons, that breaks were frequently taken early in shifts under the implicit threat that if they were not taken then the demands of business would mean that they were taken very late if at all.

Mr Beech also complained about the pressure under which staff worked at the Heathrow restaurant due, he said, to the shortage of staff. In his statement adopted in evidence, he said that "hustle" was used in the kitchen all the time. It meant running and scrambling about, possibly while being shouted at, and frequently burning oneself and colleagues. ...

I have no doubt that staff were worked hard and fast at Heathrow. This accords with the McDonald's system and must be accentuated if a restaurant is understaffed, as McDonald's witnesses accepted. ...

The evidence of "work faster" and "get more staff" has the ring of truth in a restaurant which was understaffed, but it also shows that crew were far from cowed by management."

...

Mr Beech said that he was not paid his due holiday pay when he left; but this allegation fell on neutral ground in the sense that it turned out that it was paid into his account, in my view, but he was given the impression that he had not been paid by his incomplete reading of documents which were new to him.

...

Mr Beech said that on several occasions he and other crew members suggested that they should investigate starting or joining a union. The suggestions were not particularly serious, but one discussion was overheard by a manager who said: "Don't even say that". Shortly afterwards a large notice in red marker pen capital letters appeared on a noticeboard in the crewroom, saying something to the effect that "McDonald's is a non-union company. Anyone found to be conspiring to start or join a union will be subject to instant dismissal." No McDonald's witness admitted to seeing

such a notice although Mr Beech said that it remained in place for a week, in August or perhaps July,1994. Mr Roberts was the store manager by then. He was very positive that no such notice was in the crew room while he was store manager. McDonald's witnesses accepted that there were occasional jokes about going on strike or joining a union, and, as I say elsewhere I believe that there was a widespread antipathy to unions amongst McDonald's managers.

I have not found this an easy issue to decide, but the specific allegation relating to the poster relies entirely upon Mr Beech's evidence. I think that some notice deterring union activity was probably put up, but in the light of my view of Mr Beech's reliability I am not confident of his account of just what it said.

...

In summary I accept the allegations of pressure on crew under the age of eighteen to work after midnight and of pressure on crew generally to work long shifts, occasionally very long, beyond the hours scheduled and of inadequate breaks from November, 1993, until June, 1994, at least, when Mr Roberts arrived at the Heathrow restaurant. There were some late performance and pay reviews. I consider that crew were driven to work very hard for their money, for certain periods at least. I reject the rest of the allegations, in substance."

These extended references show that Mr Beech was, as was Mr Clare, a witness whose credibility the judge for good reason regarded as suspect. The judge applied to Mr Beech's evidence substantially the same criteria as he applied to that of Mr Clare with the result that he accepted substantial parts of Mr Beech's evidence. The judge's treatment of these two witnesses is, in our view, representative of his judgment as a whole.

Another example of the meticulous way in which the judge performed his task of considering and evaluating the evidence may be seen in the extended extracts from his judgment, which we have set out in the Employment section of this judgment, where he considered evidence relating to events in Orangeville, Ontario. As we say in considering that evidence, the judge's treatment of it only has to be read to demonstrate that he considered the evidence properly, fairly and comprehensively in performing one of a trial judge's primary duties of weighing the evidence, judging the credibility of each of the witnesses and deciding which evidence to accept and which evidence to reject. Submissions to the contrary are quite unpersuasive both because we are sure that the judge took all the evidence which he heard into consideration, and also because the judgment itself makes it clear beyond any doubt that his findings of fact were balanced and properly available to him on the evidence taken as a whole.

One of the appellants' strongest complaints was that, on the subject of nutrition, the judge preferred the evidence of Dr Arnott to that of experts called by the appellants, in particular Professors Crawford and

Campbell. We have discussed this evidence in detail in the Nutrition section of this judgment. We have drawn attention to the assessment of the witnesses which the judge made, starting on page 342 of his judgment, and we have considered in detail the appellants' submissions on this topic. We have concluded that in the end, the appellants' submissions do no more than complain because the judge preferred evidence which he found more persuasive rather than other evidence which he rejected. But that is a trial judge's function.

In paragraph 20 of their grounds of appeal, the appellants contend that the judge was wrong to give equal or greater weight to the evidence of the respondents' representatives and consultants still in the employ or under the financial influence of the company when greater weight should have been given to the evidence of the defence witnesses who were independent.

The appellants submit that most of McDonald's witnesses were either loyal management employees of McDonald's or consultants over whom McDonald's had a financial influence. These witnesses came to court with carefully prepared statements and the case was presented by a team of expert lawyers. The appellants were individuals with no experience and little financial or other support. Their witnesses just came along to court. The appellants themselves had never met many of them before. The witnesses had had no access to documents. They just gave their evidence and, say the appellants, it was staggering how accurate the defence witnesses were compared with the respondents'. Yet none of the plaintiffs' witnesses were discredited by the judge even though they made damaging admissions. It was remarkable that the judge found so much in the appellants' favour.

The appellants suggest that it is a matter of law or principle that the evidence of independent witnesses should carry greater weight than that of those employed by or within the financial influence of a party. Thus stated, there is no such legal principle. A judge has to evaluate the evidence as a whole taking account of all relevant circumstances. It is relevant if a witness is employed by the party calling him or her, since there is the possibility that the witness' evidence may be influenced by loyalty to the employer. It is just as much relevant if a witness is a committed supporter of a campaign or particular point of view relevant to the matter in issue, since there is a possibility that the witness' evidence may be influenced by a predisposition to favour the campaign or point of view. It is a common place of litigation well known to judges that those who are called to express opinions very frequently express opinions favourable to the case of the party who calls them as witnesses. The cynic might say that that is what they are paid to do. The judge's task is to assess the credibility, reliability and, where the question arises, the honesty of each witness. These matters are relevant to that task. But there is no principle that one class of witness should necessarily carry greater weight than another.

So far from underestimating the effect which loyalty to McDonald's may have had upon the evidence of McDonald's witnesses, the judge on occasions conspicuously emphasised that possibility. For instance, he said of Mr Preston and Mr Beavers on pages 752 and 753 of his judgment that each of them "reveres McDonald's and all it stands for."

We reject each of the appellants' submissions that the judge gave too little weight to admissions made

by or on behalf of the respondents; that the judge was biased in favour of the respondents' witnesses and discriminated against those called by the appellants; and that he failed to take proper account of the submission that many of the respondents' witnesses may have had an interest to support McDonald's whereas witnesses called by the appellants were independent. An objective reading of the judgment as a whole shows beyond doubt that these submissions are quite untenable. They were made by appellants with a single-minded obsession that everything which they believe in and support is unquestionably right, and that everything which McDonald's does, and which those associated with it say and do, is viciously wrong and often dishonest. It is scarcely surprising that their view of this litigation lacks objectivity.

The appellants began this appeal with a misunderstanding of the law relating to admissions against interest. We believe that they now understand that the first relevance in law of an admission against interest is that out of court statements of that nature are admissible in evidence. Admissibility is one thing: the weight to be given to such evidence, once it is admitted, is another. It has no special status but has to be assessed as part of the evidence as a whole. The weight to be attributed to a particular witness' evidence is principally a matter for the trial judge.

The appellants also, we think, have an erroneous idea about how evidence should be assessed by a tribunal of fact. Their constant submission was that a witness was, or ought to have been, "discredited" because some part of the witness' evidence was, according to the appellants, shown to be wrong or otherwise unacceptable. By discredited, the appellants sometimes meant that the whole of the witness' evidence should have been regarded as unreliable because parts of it were shown to be wrong. They also submitted that, regardless of the outcome, the judge should have been descriptively more critical of the respondents' witnesses. The first submission overlooks the fact that the judge has to assess the evidence as a whole. There may be instances when a witness is so unreliable and lacking in credibility that the judge would reject the witness' entire evidence. But in other instances a judge may reject part of a witness' evidence, but accept other parts. This might especially be so where several witnesses are called on the same subject and where, for instance, evidence of a credible witness supports parts of the evidence of another witness whose evidence is for some reason suspect.

We consider those of the appellants' points of detail which require consideration in the sections of this judgment which deals with particular parts of the leaflet. Long lists of points of evidence cannot sensibly be considered other than by reference to the particular topics to which they are relevant. We conclude here that our reading of the judge's judgment shows beyond any doubt that he considered the evidence as a whole with meticulous fairness. He did not underestimate the importance of evidence which the appellants have characterised as admissions against interest. He was not biased in favour of the respondents' witnesses. In our judgment, the suggestion even of bias in this case is itself grossly unfair to a judge who himself did everything possible, both procedurally and in his judgment, to be fair and even handed. We have no hesitation in rejecting it.

Part 8

Meaning - General

Paragraph 21 of the Notice of Appeal contends that "where the words complained of were capable of an innocent meaning, the trial judge erred in ignoring the innocent meaning and in finding that the actual meaning was the allegedly defamatory meaning". This raises particular issues about the meaning of particular sections of the leaflet which we consider in subsequent sections of this judgment. There are, however, a number of general submissions which the appellants raised more than once and it is convenient to deal with them first.

The passage in his judgment in which the judge considered the relevant law begins on page 85 and is as follows:

> "The main legal principles which I apply to those questions are as follows.
>
> The Court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary, reasonable reader.
>
> It is for the Court to decide how much attention the ordinary, reasonable reader would give to the material complained of, having regard to the relevant circumstances of the publication in question, including the method of publication, the form in which it is published, to whom it is published, its context and presentation, and the purpose for which it is read including whether the reader might act on it in some way, among other matters. It is necessary to take all these matters into account in order to determine the natural and ordinary meaning of the words complained of.
>
> The question of whether material complained of bears a defamatory meaning has to be answered by reference to the response of the ordinary, reasonable reader to the entire publication. A claim for libel can not be founded on a headline or picture or cartoon in isolation from the related text. Whether the text of a publication will, in any particular case, be sufficient to neutralise the defamatory implication of a prominent headline will sometimes be a nicely balanced question for the court to decide and will depend not only on the nature of the libel which the headline conveys and the language of the text which is relied on to neutralise it but also on the manner in which the whole of the relevant material is set out and presented. By the same token, the text cannot be read without any relevant headline or picture or cartoon unless it clearly unpicks the impression created by those features. Neither can be read in isolation from the other. This is important in this case where there has been a tendency to take individual sentences in the leaflet, with a view to justifying them, without regard to their context.

> The Court should not be too literal in its approach. The hypothetical, reasonable reader can read between the lines. He can read in an implication more readily than a lawyer, and he may indulge in a certain amount of loose thinking. He is not naive but he is not unduly suspicious. He must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.
>
> Whilst limiting its attention to what the Defendants are actually alleged to have published, the Court should be cautious of an over-elaborate analysis of the material in issue.
>
> Although a combination of words may in fact convey different meanings to the minds of different readers, the Court is required to determine the single meaning which the publication would convey to the notional, reasonable reader and to base its verdict and any award of damages on the assumption that this was the one sense in which all readers would have understood it.
>
> In deciding what impression the material complained of would have been likely to have had on the hypothetical reasonable reader the judge is entitled, if not bound, to have regard to the impression it has made on him.
>
> The meaning intended to be conveyed by the author or publisher of the material complained of is irrelevant.
>
> Where the alleged defamatory meaning is said by the Plaintiffs to be the literal meaning of the words complained of or a natural inference or implication which a reasonable reader would draw from the words, guided only by his general knowledge and ordinary commonsense, no evidence is admissible as to the meaning of the words complained of, or as to what particular readers thought that the leaflet meant.
>
> When deciding the meaning of the words complained of the Court is not concerned with the merit or demerit of any possible defence to the Plaintiffs' claims. That comes later if the meaning is defamatory."

We did not understand the appellants to submit that this was other than a correct statement of the law. It accords, for instance, with the well known passage in the judgment of Sir Thomas Bingham M.R. (as he then was) in *Skuse v. Granada Television* [1996] E.M.L.R. 278 at 285. The appellants do, however, submit that much of the leaflet complained of has an innocent meaning, not a meaning defamatory of the respondents. They say, for example, that the entire food safety section in the leaflet does not mention the respondents at all, but is about the meat production industry as a whole. They submit that the judge was wrong to find that this section was an attack on McDonald's specifically.

They say that the nutrition section is not defamatory of McDonald's. It is disparaging of the kind of products sold by McDonald's and points to a link between diet and disease. More generally, they say that the leaflet is criticising an industry, an economic process and a political system and that it cannot be defamatory of McDonald's other than as part of a collective set up. It is a campaigning leaflet which should not be read as if it were an article in a scientific journal. They further submit that the judge took undue account of the graphics and cartoons in the leaflet which were ambiguous and satirical and should not be taken literally; that he failed to take account of the fact that parts of it were satirical; and that he was wrong not to hold that some of the parts of the leaflet complained of were comment rather than statements of fact. This last submission can only be considered by reference to individual parts of the leaflet.

There are, we think, two general points to consider here. These are, first, the submission that the leaflet is not defamatory of McDonald's because it is a criticism of an economic system of which McDonald's are only a part; and, secondly, the submission that graphics and cartoons should not have been taken, or were unduly taken, as part of the context so as to affect what the appellants say the meaning of parts of the leaflet otherwise would be.

We see no force in the first submission. It is true that the final page of the leaflet is mainly devoted to general material aimed at persuading people to stop eating meat and fast food burgers and to turn to vegan or vegetarian recipes instead. Even that page is headed with a reference to "Worldwide Anti-McDonald's Protests on United Nations `World Food Day', October 16" and the first sentence of text on that page starts with the words "Stop using McDonald's, ... etc. ..." It is also true that some other parts of the leaflet refer to "giant corporations" or to other fast food chains by name in addition to McDonald's. However, the front page of the leaflet has the main heading "What's wrong with McDonald's?" above a picture of a person wearing a jacket with the McDonald's "M" emblem on it. The next four pages all have a row of the same McDonald's emblems across the top, each emblem having written over it a word of plain criticism preceded by the prefix "Mc", for example "McDollars", "McGreedy", "McCancer" and "McMurder". The first sentences of the leaflet read:

> "This leaflet is asking you to think for a moment about what lies behind McDonald's clean, bright image. It's got a lot to hide".

All the main headlines on the first four pages refer explicitly to McDonald's as do many of the individual paragraphs. The proposition that the main parts of the leaflet do not refer to McDonald's is plainly incorrect. The fact that it may also in places refer to other or wider organisations does not detract from this. This does not of course necessarily mean that every single sentence in the leaflet is to be taken as referring to McDonald's. That is a question for separate individual consideration. But the appellants' general submission is not supportable.

As to the second submission, it is common place that, in determining meaning, a publication must be taken as a whole and that words must be read in their context. This means that the judge was correct to have regard to the two cartoons and to the McDonald's emblems with the words written over them.

He was also correct to say that a claim for libel cannot be founded on a headline or picture or cartoon in isolation from the related text. The immediately succeeding part of the judge's judgment is a direct quotation from the opinion of Lord Bridge in *Charleston v. News Group Newspapers* [1995] 2 A.C. 65 at 72H. In that case, the plaintiffs founded their claim for libel on a newspaper headline and photographs alone. They submitted that these could be read in isolation from succeeding text which, it was agreed, neutralised any defamatory sting to be derived from the headline and photographs alone so that the publication taken as a whole was not defamatory. It was held that the question whether an article was defamatory had to be answered by reference to the single response of the ordinary, reasonable reader to the publication.

The appellants submit that the judge went well beyond the *Charleston* case. They submit that the words of the leaflet are clear; that there is no conflict between the text and the headings, graphics or cartoons; that the graphics mean nothing by themselves; that the text explains the purpose of the graphics; that there is no need to look at context; that satirical graphics should not be taken literally; and that at most the headings can be seen as comment. They submit that the McDonald's emblems are in random positions and cannot be taken to refer to any particular section of the text. They should therefore not affect the meaning of the text. The appellants submit that the judge indulged in over-elaborate textual analysis and that, contrary to what was said by Sir Thomas Bingham M.R. in *Skuse* at page 285, he selected bad meanings where other non-defamatory meanings were available.

Mr Rampton submitted that this Court should be slow to interfere with a meaning found by the judge. He referred to *Skuse* at page 287, where Sir Thomas Bingham M.R. said:

> "The Court of Appeal should be slow to differ from any conclusion of fact reached by a trial judge. Plainly this principle is less compelling where his conclusion is not based on his assessment of the reliability of witnesses or on the substance of their oral evidence and where the material before the appellate tribunal is exactly the same as was before him. But even so we should not disturb his finding unless we are quite satisfied he was wrong."

Where a libel action is tried by a jury, it is for the judge to direct them as to the meaning or meanings which the words complained of are capable of bearing, but for them to determine in accordance with that direction the single meaning which the words complained of do bear. To that extent meaning is a jury question. As Salmon L.J. said in *Slim v. Daily Telegraph* [1968] 2 Q.B. 157 at 186:

> "No doubt, even when a libel action has been tried by a judge alone an appellate tribunal may sometimes approach the case by considering, as a matter of law, whether the words complained of are capable of the defamatory meaning which they have been found to bear. If they are, the appellate tribunal will not lightly interfere with judge's finding of fact. If, however, the appellate tribunal is satisfied that the judge's finding of fact is wrong, it is its duty to reverse him."

There is, we think, an element of unreality in making a distinction, where the action has been tried by a judge alone, between a judge's decision as to the meaning which the words complained of bear and as to that which they are capable of bearing. Few trial judges would truly make that distinction. Since evidence is not admissible on meaning, the appellate tribunal will have the same material on which to judge the question as did the trial judge. Yet the meaning which the words complained of bear is a question of fact and the appellate tribunal should have due regard for the meaning found by the judge. The passages from *Skuse* and *Slim*, which we have cited, are clear statements of the proper approach.

Mr Rampton also submits that the text of the leaflet cannot be taken out of context by ignoring the headings and the cartoons. He accepts that no one would take the cartoon on the second and third inside pages literally, but it and the words attached to it - "If the slaughterhouse doesn't get you, the junk food will!" - are not to be ignored. He submits that the leaflet is a polemic. The intention of the writer is not to make mild statements. The front page, the emblems and the headings all suggest things that are wrong, and so the meaning of the text has to be "toughened up", as Mr Rampton put it. There were occasions when Mr Rampton, in making submissions about particular parts of the text, went so far as to submit that, since the nature of the leaflet is as he described it, the text must be read as critical of McDonald's and in consequence defamatory. We do not accept this submission. The text has to be read for what it says in its context. It cannot acquire a defamatory meaning which it does not bear simply because the leaflet as a whole is generally critical of McDonald's.

In our judgment, the true debate here is a narrow one. This is not a case, such as was *Charleston*, where headings or pictures alone are said to be defamatory but where that defamatory sting is neutralised by the text. Rather is it one where the respondents submit that the leaflet should be read as a whole, including the front page, the headings, the emblems and the cartoons, but the appellants submit (or come close to submitting) that these should be ignored and that meaning should be derived from the text alone. We have no doubt but that the leaflet should be read as a whole. The judge was correct to take account of the front page, the emblems and the cartoons. Of course proper account should be taken of the fact that, for instance, a cartoon is a cartoon and it may be that some of these elements might be described as satirical. But the front page, the emblems and the cartoons are not simply jokes, to be disregarded other than for their humour. "McCancer", "McMurder" and "McDisease", for instance, have an essentially serious import and are part of the context of the leaflet as a whole. The headings are part of the text of the leaflet and are properly available for consideration with reference to particular meanings. Whether they do or not, and what the particular meanings are, are questions for individual consideration. They are part of the context in which particular paragraphs and sentences are to be read.

Part 9

Starvation in the Third World and Destruction of Rainforest

The judge found that defamatory statements of fact in the leaflet dealing with McDonald's and third world starvation and the destruction of rainforest had not been justified. The appellants now challenge that finding.

Under the heading "What's the connection between McDonald's and starvation in the `Third World'?", the leaflet stated:

> "There's no point in feeling guilty about eating while watching starving African children on TV. If you do send money to Band Aid, or shop at Oxfam, etc., that's morally good but politically useless. It shifts the blame from governments and does nothing to challenge the power of multinational corporations.
>
> HUNGRY FOR DOLLARS
> McDonald's is one of several giant corporations with investments in vast tracts of land in poor countries, sold to them by the dollar-hungry rulers (often military) and privileged elites, evicting the small farmers that live there growing food for their own people.
>
> The power of the US dollar means that in order to buy technology and manufactured goods, poor countries are trapped into producing more and more food for export to the States. Out of 40 of the world's poorest countries, 36 export food to the USA - the wealthiest.
>
> ECONOMIC IMPERIALISM
> Some "Third World" countries, where most children are undernourished, are actually exporting their staple crops as animal feed - i.e. to fatten cattle for turning into burgers in the "First World". Millions of acres of the best farmland in poor countries are being used for our benefit - for tea, coffee, tobacco, etc. - while people there are starving. McDonald's is directly involved in this economic imperialism, which keeps most black people poor and hungry while many whites grow fat".

There was then a picture of a woman holding a food bowl and a small child, with the legend:

> "A typical image of "Third World" poverty - the kind often used by charities to get

"compassion money". This diverts attention from one cause: exploitation by multinationals like McDonald's."

After a passage referring to the wastefulness of grain being fed to cattle in South America to produce the meat in McDonald's hamburgers, the leaflet turned to the topic of rainforest, with a box headed "FIFTY ACRES EVERY MINUTE". Within that box the text read:

"Every year an area of rainforest the size of Britain is cut down or defoliated, and burnt. Globally, one billion people depend on water flowing from these forests, which soak up rain and release it gradually. The disaster in Ethiopia and Sudan is at least partly due to uncontrolled deforestation. In Amazonia -where there are now about 100,000 beef ranches - torrential rains sweep down through the treeless valleys, eroding the land and washing away the soil. The bare earth, baked by the tropical sun, becomes useless for agriculture. It has been estimated that this destruction causes at least one species of animal, plant or insect to become extinct every few hours."

This box was followed by the headline "Why is it wrong for McDonald's to destroy rainforests?" and the text:

"Around the Equator there is a lush green belt of incredibly beautiful tropical forest, untouched by human development for one hundred million years, supporting about half of all Earth's life-forms, including some 30,000 plant species, and producing a major part of the planet's crucial supply of oxygen.

PET FOOD & LITTER

McDonald's and Burger King are two of the many US corporations using lethal poisons to destroy vast areas of Central American rainforest to create grazing pastures for cattle to be sent back to the States as burgers and pet food, and to provide fast-food packaging materials. (Don't be fooled by McDonald's saying they use recycled paper: only a tiny per cent of it is. The truth is it takes 800 square miles of forest just to keep them supplied with paper for one year. Tons of this end up littering the cities of "developed" countries.)

COLONIAL INVASION

Not only are McDonald's and many other corporations contributing to a major ecological catastrophe, they are forcing the tribal peoples in the rainforest off their ancestral territories where they have lived peacefully, without damaging their environment, for thousands of years. This is a typical example of the arrogance and viciousness of multinational companies in their endless search for more and more profit.

It's no exaggeration to say that when you bite into a big Mac, you're helping the

McDonald's empire to wreck this planet."

The judge took these sections of the leaflet together because at trial the appellants linked the issues of starvation in the third world and the destruction of rainforest together when they presented their case on justification. No complaint is made about that course of action which he took.

The appellants' grounds of appeal are as follows:

"22. The trial judge erred in his findings as to the meanings of the words complained of in that the following meanings found by him were not the natural or ordinary meanings of the said words:

(a) McDonald's is to blame for starvation in the Third World; firstly because it has bought vast tracts of land in poor countries (for cattle ranching, presumably) and evicted the small farmers who lived there growing food for their own people; secondly because the power of its money has forced poor countries to export food (beef, most obviously) to it in the United States, and thirdly because it has drawn some Third World countries to export staple crops as cattle feed.

(b) The Plaintiffs are guilty of the destruction of rainforest; that they use and have used lethal poisons to destroy vast areas of Central American rainforest to create grazing pastures for cattle to be sent to the United States as burgers and to provide fast-food packaging materials; that the Plaintiffs are through this conduct causing wanton damage to the environment and contributing to a major ecological catastrophe, and that they are forcing the tribal people in the rainforest off their ancestral territories where they have lived peacefully for thousands of years, without damaging their environment.

(c) Further the trial judge erred in ruling that "rainforest" in the context of the leaflet, must mean more than tropical forest of any kind and that it would mean luxuriant, broad-leaved, evergreen, very wet, canopy forest - very wet because of very heavy rainfall - to the ordinary reader of the leaflet.

23. Further or alternatively the trial judge wrongly relied upon satirical cartoons, graphics, colloquialisms and/or the supposed context to alter the clear natural and ordinary meaning of the words complained of.

24. Further or alternatively, when determining the meaning of the words complained of, the trial judge failed to put the words complained of into their

proper context. Without prejudice to the generality of the foregoing, the trial judge in particular failed to distinguish at all between the criticisms of and comments about McDonald's and the criticisms and comments about the hamburger industry and or US Corporations in general.

25. Further or alternatively, the trial judge erred in his failure to recognise the existence of comment in the words complained of.

26. Further or alternatively, the trial judge erred in not finding that the natural or ordinary meaning of the words complained of were either fully justified or fair comment on the basis of the overwhelming weight of the evidence presented at trial. For example, it was clearly established (based on the trial judge's findings, admissions by Plaintiff's representatives in the witness box or in official company documents, by expert testimony, and/or by the evidence of independent witnesses of fact) that:

- McDonald's is the worlds largest user and promoter of beef products and has been for over 10 years.

- the rise in global consumption and promotion of beef products is a major cause of tropical forest and/or rainforest destruction, and the eviction of small farmers and indigenous peoples.

- McDonald's use and have used beef products from tropical forest/rainforest countries.

- McDonald's use and have used beef from ex-tropical forest/rainforest areas.

- McDonald's use and have used for their products animals fed with soya feed grown in Brazil thereby contributing to processes leading to forest destruction and displacement of peoples.

- McDonald's are an integral part of the international cash crop economy, which is a major cause of third world poverty and hunger."

It will be seen that these grounds broadly raise issues as to meaning and justification. Some of the matters raised on meaning are common to a number of the topics dealt with in the leaflet and at trial, and they have already been covered earlier in this judgment. We deal in this section with the remaining matters raised by the grounds of appeal.

Meaning

The appellants challenge first the findings made by the judge as to the meanings of these passages. On the topic of starvation in the third world, he found that:

> "The first section of headings and text plainly bears the meaning that McDonald's is to blame for starvation in the Third World; firstly because it has bought vast tracts of land in poor countries (for cattle ranching presumably) and evicted the small farmers who lived there growing food for their own people; secondly because the power of its money has forced poor countries to export food (beef, most obviously) to it in the United States, and thirdly because it has drawn some Third World countries to export staple crops as cattle feed."

The respondents did not complain of the second and third parts of the meaning as there found, but the judge took the view that if either of those parts was shown to be true, the general sting of the starvation allegation would have been substantially justified.

The Notice of Appeal does not set out the meanings now contended for by the appellants, but their written submissions refer to those set out in their pleadings when they gave particulars of justification. They were as follows:

> "That the First Plaintiff, along with other large corporations, by its practices, such as the purchasing of meat from Central and Latin America by restaurants operated or franchised by it and/or its subsidiaries, by investing in long-term business arrangements there and, more generally, by increasing the world-wide demand for hamburgers, bears some responsibility for the catastrophic ecological and economic situation that has developed over a number of years whereby rainforests have been destroyed by methods including defoliation and small-scale farmers in those areas have been forced to leave their land. Further, that by increasing and satisfying the demand for food as hamburgers in the developed world the First and Second Plaintiffs have contributed to a situation whereby Third World countries are exporting crops to the developed world, in some cases as animal feed, when there are many people within those countries who are starving or undernourished. Further that such practices contribute to the inequality economically between the developed world and the Third World."

In oral argument before us the appellants submit that the reference to "investments in vast tracts of land" meant not the ownership of land by McDonald's but their interest in what was happening on the land, in the shape of cattle-rearing and crop-growing. The appellants point to the paragraphs in the leaflet which follow this reference to investments. In essence they say that the reference should be read as being to the business arrangements entered into by the respondents, whereby they were to be supplied with beef from these poor countries. The ordinary reader of the leaflet would be aware that McDonald's do not own the land themselves on which the cattle are reared and so would not take the words literally.

We find this argument no more persuasive than did the judge. The same sentence in which these words about "investments in vast tracts of land" appear continues by saying "sold to them by the dollar-hungry rulers". That clearly refers to land, and reinforces the natural meaning which one would attach to the earlier phrase. The words taken in context mean, as the judge held, that McDonald's had bought vast tracts of land in poor countries. The ordinary reader of the leaflet is not to be taken as knowing previously whether or not McDonald's had invested in land in such countries but would merely be aware that it was a very large business entity which might well be capable of such investment.

It is then submitted that these passages are not to be read as referring specifically to McDonald's, who are being used merely as a symbol of an economic system and as a part of an industry. It is, say the appellants, the cash-crop economy which is being attacked, since it is that which leads to starvation, and it is only to the extent that McDonald's are involved in that they have a share of the responsibility. That is all that is meant by these paragraphs and all that requires justification.

We have referred to this argument already when dealing with the approach to ascertaining the meaning of statements generally. In respect of these specific statements the argument is as untenable as it is generally. The front page of the leaflet identifies McDonald's as the target, as does the introductory text. The paragraphs containing the allegations about poverty and hunger appear beneath a heading expressly referring to McDonald's in connection with third world starvation. Merely because the text indicates that McDonald's are not the only corporation being criticised does not alter the meaning of the words insofar as they refer to McDonald's. Nor are these statements expressed merely as an attack on an economic system, even though it is clear that such a system is being criticised along with the allegations about McDonald's. To the ordinary reader the statements made would be seen as relating directly to McDonald's.

However, the respondents accept that, in respect of both this topic and rainforest destruction, they might be seen in certain circumstances as responsible for the consequences of their significant role at the end of the supply chain of beef. As Mr. Rampton put it in argument before us, if the respondents knew about and took the benefit of companies in Latin America evicting small farmers or cutting down rainforest so as to raise cattle and did nothing to stop this happening, then a case of justification might well have been made out. That concession reflects what was said at the start of the trial itself on behalf of the respondents, when the issue about rainforest destruction was formulated in terms of whether they had been responsible for such destruction "directly or indirectly". (Day 1/48). It was no doubt this which led to the very substantial amount of evidence about the location of the ranches and farms which supplied cattle to the companies supplying beef to McDonald's restaurants in Latin America and elsewhere. In our view, the concession represents as far as it would be proper to go in interpreting the statements in the leaflet as referring to an indirect responsibility for the matters referred to in this part of the leaflet.

In particular, we do not read the allegations in these paragraphs about starvation and the destruction of rainforest as referring merely to the respondents' part in "increasing the world-wide demand for

hamburgers". Whether or not such a mechanism operates and irrespective of any part played in it by the respondents, such an interpretation is remote from the wording of the leaflet, with its references to McDonald's investments in land and to McDonald's using lethal poisons to destroy rainforest for grazing pastures. This argument about McDonald's part in a "worldwide hamburger connection", as it was called at trial, and the consequences thereof was described by the judge as "a thin, watery gruel compared with the allegations made in the leaflet". We agree. It is not how the ordinary reader would have interpreted the allegations about McDonald's responsibility for starvation in the Third World and for the destruction of tropical rainforest.

On the rainforest sections of the leaflet, the judge found that they bore the meaning:

> "... that the Plaintiffs are guilty of the destruction of rainforest; that they use and have used lethal poisons to destroy vast areas of Central American rainforest to create grazing pastures for cattle to be sent to the United States as burgers and to provide fast-food packaging materials; that the Plaintiffs are through this conduct causing wanton damage to the environment and contributing to a major ecological catastrophe, and that they are forcing the tribal people in the rainforest off their ancestral territories where they have lived peacefully for thousands of years, without damaging their environment."

Having characterised (rightly, in our view) the words complained of here as statements of alleged facts, not comment or opinion, the judge went on to reject an argument advanced by the appellants that the word "rainforest" in these paragraphs meant to the ordinary reader all tropical forest, including dry forest. He said:

> "In my judgment "rainforest" in the context of this leaflet, not otherwise defined, must mean more than tropical forest of any kind. After all, the leaflet could have said simply "tropical forest" throughout, but did not. In my view "Rainforest" would mean something special to the ordinary reader. In my view it would mean luxuriant, broad leaved, evergreen, very wet, canopy forest - very wet because of very heavy rainfall - to the ordinary reader of this leaflet. That is what it means to me. That is what it means for the purpose of judging justification of what the leaflet complained of says."

The appellants now challenge that finding. They submit that in the leaflet the words "rainforest" and "tropical forest" are used interchangeably, and that is why there is the reference under the heading "Fifty Acres Every Minute" to Ethiopia and Sudan. It is argued that the statement that one billion people depend on water flowing from these forests would indicate to the ordinary reader that all tropical forest was meant and not just rainforest. The definition is really provided in the sentence beginning

> "Around the Equator there is a lush green belt of incredibly beautiful tropical forest, untouched by human development ..."

That, it is said, shows that all tropical forest is being referred to. In addition the appellants argue that the term "rainforest" is a quasi-scientific one, on which the evidence of experts was admissible, contrary to the ruling given at trial by the judge.

The respondents contend that the word means what it says as an ordinary piece of English, namely a particular kind of forest in the tropics characterised by heavy rainfall. There is both wet and dry tropical forest, and the latter would not be embraced by the term "rainforest". Expert witnesses cannot give evidence as to what the term as used in the leaflet means.

We accept that last proposition. The respondents had relied in their claim on the natural and ordinary meaning of the word, and it is well established that evidence is not admissible to prove such a meaning: *Charleston v. News Group Newspapers* [1995] 2 A.C.65; *Slim v. Daily Telegraph Ltd* [1968] 2 Q.B. 157.

This court is concerned, therefore, with the natural and ordinary meaning of the word `rainforest' as used in the passages complained of. The context may, of course, affect the meaning attributed to the word by the reader. In our view, the reader is unlikely to have been influenced in that respect by the reference to one billion people being dependent on water flowing from "these forests", since such a reader is unlikely to have any clear idea as to how many people depend on water flowing from all tropical forest on the one hand or from rainforest on the other. The sentence referring to uncontrolled deforestation in Ethiopia and Sudan seems to be more of an attack upon deforestation generally than anything specifically to do with rainforest. As the judge noted, any significance it would have had in the mind of the reader would have been swamped by the reference in bold type in the headline to `rainforest' and by the later references in the text to "Central American rainforest" and to forcing tribal peoples in the forests off their ancestral territories.

There is force in the point that the sentence "Around the Equator there is a lush green belt of incredibly beautiful tropical forest" would have had a marked effect on the mind of the reader of this leaflet, but such a person would have noted the adjective "lush" and found that it confirmed the impression that rainforest was wet and luxuriant. The ordinary reader might not have been able to give the careful, detailed definition provided by the trial judge, but we are in no doubt that the natural and ordinary meaning of the word "rainforest" does not cover both dry and wet tropical forest. It refers only to wet, luxuriant evergreen forest in the tropics. It is in relation to that meaning, therefore, that the statements of fact in this part of the leaflet require justification. We shall turn next to the issues raised in this appeal on justification on these topics.

Justification

The trial judge rejected the defence raised of justification of the defamatory statements of fact made on these topics in the leaflet about McDonald's. The reference to them "wrecking the planet" he regarded

as a comment, and that decision is not challenged, but he found that it was not fair because the allegations of fact relating to the destruction of rainforest, on which the comment was based, were not true. He concluded that McDonald's had not been to blame for starvation in the Third World and had not been guilty of destruction of rainforest. In his judgment, he found:

> "Neither Plaintiff has ever bought or owned vast tracts of land in poor countries or in the Third World, or in Costa Rica, Guatemala or Brazil. They have not bought or owned farming land there. They have not themselves evicted small farmers or anyone else from their land, nor have they directly caused anyone else to do so ...
>
> Neither of the plaintiffs have used lethal poisons to destroy vast areas or any area of Central American or Latin American rainforest or any rainforest to create grazing pastures or to provide fast food packaging materials, or for any other reason.
>
> Neither the Plaintiffs nor any McDonald's company has directly destroyed any rainforest."

Those findings are not challenged by the appellants. They attack the judge's findings on what may be called the indirect involvement of McDonald's in such processes and consequences. The evidence produced in the court below by the appellants by way of justification related to three countries: Costa Rica, Guatemala and Brazil. But the judge concluded that there was no evidence that any farmers or ranchers whose cattle had been slaughtered and processed into McDonald's patties had dispossessed small farmers or tribal people in any of those countries or elsewhere. On the destruction of rainforest, it was accepted by the judge that the expansion of beef cattle production had led to such destruction in those countries, but he found that it had not been proved that cattle ranchers whose cattle had gone to make McDonald's burgers were implicated:

> "In my judgment the farmers and ranchers in Costa Rica, Guatemala and Brazil who have reared cattle which have eventually become beef for McDonald's burgers, have done so on land in each country which had been pasture from a time before McDonald's decided to open up in each country."

The judge took the view that McDonald's could not be held responsible for destruction of rainforest in those countries before McDonald's began operating there. He considered whether the defamatory statements could be justified on the basis of beef exports from those countries, as opposed to the use of beef in McDonald's restaurants within each of those countries, but he concluded that they could not.

> "On evidence which I have heard and read there have been no imports of beef into the United States from anywhere for processing into McDonald's burgers there. The exports of beef from Brazil to the U.K., for McDonald's use, in 1983, and to Argentina and Uruguay occasionally in pattie form, have been minimal and inconsequential so far as hunger or deforestation in Brazil is concerned."

The judge also rejected the argument that McDonald's could be held responsible on the basis that continued grazing of cattle on land which had been rainforest before McDonald's arrived on the scene prevented the regeneration of rainforest. He found the evidence seeking to establish that this would have happened but for McDonald's "uncompelling". Finally, he concluded that McDonald's had not been shown to be responsible for any pressure on the rainforest caused by soya farming in Brazil, which had been largely directed at producing oil for human consumption.

Before dealing with the specific points raised by the appellants about these findings of fact by the judge, it is worth making two more general points. First, many of their arguments were directed towards denigrating those who gave evidence for McDonald's and seeking to enhance the reliability of their own witnesses. This may sometimes be a legitimate exercise, especially where evidence is given wholly in writing. But the trial judge had the benefit, denied to us, of listening to some of the witnesses on this topic giving oral evidence and being cross-examined in great detail over a number of days. He had to assimilate and evaluate conflicting detailed evidence, which he did in a meticulous fashion, and this court will rarely interfere on the basis of an examination of "the fine detail of the judge's factual investigation": Practice Direction, 17th November 1998, para.13.

Secondly, it is to be observed that the grounds of appeal, in asserting that the judge erred in not finding justification in respect of this part of this leaflet, do not allege that the judge should have found that rainforest had been destroyed in order to rear cattle for beef to be supplied to make McDonald's burgers, or that beef for McDonald's burgers in the three identified countries had come from cattle reared on land which had been rainforest when McDonald's began operating in the country in question. The grounds of appeal go no further than to contend that on the evidence McDonald's have used beef products from rainforest *countries* (which does not imply that the beef has come from rainforest areas in those countries) and from ex-rainforest areas (without asserting when those areas ceased to be rainforest). We are bound to comment that, even if those grounds were made out, they would not establish a responsibility on McDonald's part for the destruction of rainforest.

Thus, the appellants refer to the admission, made by the General Manager of the supplier in Guatemala to the McDonald's restaurants in that country, that the beef supplied was from regions "deforested in the 1940's and early 1950's." Yet the first McDonald's restaurant in Guatemala opened only in 1974, an unchallenged finding of fact. In the same way, reliance is placed by the appellants on the statement by leading counsel for McDonald's in opening their case at trial that in Costa Rica some of the land on which beef for McDonald's was raised had been rainforest up to the 1960's. It was made clear then and later that none had been deforested since the mid 1960's. But there is no dispute that the first McDonald's restaurant did not open in Costa Rica until 1970. In our judgment reliance by the appellants on such evidence is misplaced, since it cannot establish any responsibility, even indirectly, for the destruction of rainforest.

That, of course, is subject to the issue of exports of beef from Costa Rica, which would not have been tied to the date of the opening of the first McDonald's restaurant within Costa Rica. Here the

appellants criticise the judge's treatment of evidence consisting of statements made to the makers of a film called "Jungleburger", a film released in 1985 and made by Herr Peter Heller of Munich. Mr. Heller gave evidence by way of a Civil Evidence Act Statement. In it he said that Sr. Sergio Quintana, the Marketing Director of Coope Montecillos in Costa Rica, had stated to camera in 1984 that that company was selling meat to the U.S. meat plants supplying McDonald's in the U.S.A. The judge saw a video of the film, as have we, and transcripts were also made available. However, Sr. Quintana made a Civil Evidence Act Statement in these proceedings, in which he denied saying what he appeared to say in the film. He said that parts of interviews on different topics had been joined together, creating a false impression.

The judge was not satisfied that that had happened, but in due course he came to the conclusion that McDonald's in the United States had not used beef imported from Costa Rica, despite the filmed evidence. The appellants say that he was wrong to reach that conclusion and to reject the filmed evidence of Sr. Quintana, on which they place great emphasis.

The process of reasoning by which the judge reached that conclusion is clearly set out in his judgment. He correctly observed that the film contained not only the statements by Sr.Quintana and others that Costa Rican beef was exported to the U.S.A. for use by McDonald's but also statements by others that such meat did not go to McDonald's. Given those conflicting statements, the judge went on to consider the other evidence available on this issue. It is unnecessary to set it out in detail, but it included statements by the big five suppliers of beef patties in the U.S.A. to McDonald's that the McDonald's Corporation in that country had always required that the patties supplied to them there should contain no imported beef and that they had always complied with those requirements. In addition, there was evidence, including expert legal evidence, about the marking in the U.S.A. of all imported carcasses and meat products, so that there was little chance, short of fraud, of imported beef remaining unidentified as such and becoming confused with beef from cattle reared in the U.S.A. As a result of this and other evidence, there was, said the judge, a compelling picture of a corporation determined from the start to use only home-grown, non-imported beef in its U.S. patties:

> "It is very unlikely that anyone has tried or managed to slip Costa Rican beef or any imported beef to McDonald's pattie suppliers in the U.S."

Consequently the judge took the view that, if Sr. Quintana did say what he appeared to say on the film, then what he said was incorrect, either because he was misinformed or because he was mistaken or for some other reason.

We can see no flaw in this careful analysis conducted by the judge. It was thorough and entirely rational. It had regard to all the relevant evidence on the issue, and not just to that which favoured the appellants' case. It follows that the judge was entitled to reject the filmed evidence of Sr. Quintana, because it conflicted with other evidence to which he attached greater weight.

The judge's approach to that filmed evidence is one of the matters on which the appellants rely in

making their general submission that he discriminated consistently and unfairly against their witnesses and in favour of those called by McDonald's. Insofar as that argument refers to his treatment of the evidence about the exporting of Costa Rican beef to the USA for McDonald's, we can see no basis for it. The judge did what he was required to do, namely to evaluate the evidence and, where it conflicted, to decide which he accepted and which he rejected. As we have already said, that duty was performed by him on this aspect of the case in a rational and proper manner.

He had to perform a similar task when dealing with the evidence about Brazil. Again, the appellants criticize the extent to which the judge accepted evidence produced by McDonald's and did not accept that produced on their own behalf. The main issue at trial was whether certain areas from which the cattle came to supply McDonald's in Brazil with beef had been rainforest areas and, if so, up until what date. The judge found that cattle ranching generally was a primary cause of deforestation in Brazil and that it involved the dispossession of small farmers and indigenous people. It is to be noted that, in so finding, he preferred the evidence of the appellants' witnesses to that given by Mr. Cesca, the Director of Global Purchasing and Worldwide Trade for the McDonald's Corporation. But whether McDonald's bore any responsibility for the destruction of rainforest depended on the evidence about the location of rainforest and the timing of the destruction of it. The judge noted that the rainforest was mainly located in Amazonia, that is to say in the northern part of Brazil, but with tendrils reaching south along some river basins. The first McDonald's restaurant opened in Brazil in 1979, and by 1983 there were 10 restaurants operating.

The evidence was that, between 1979 and 1982, a company called Sadia had been the sole supplier of beef patties to McDonald's restaurants in Brazil, and that from 1982 onwards a new company called Braslo took over and continued as sole supplier. This evidence came in the form of Civil Evidence Act statements from Signor Morganti, who had worked for Sadia and had set up Braslo in 1982. He identified four suppliers of beef to Braslo (excluding those in the south of Brazil) and said that Sadia had used the same suppliers plus an additional one at Cuiaba in the southern part of Mato Grosso state. He produced a map showing the places from which Braslo's four suppliers obtained the cattle which they slaughtered and he defined by place names the area of Cuiaba which had supplied Sadia between 1979 and 1982. Mr. Morganti's evidence was that he was personally familiar with all the places marked on his map and had known them since 1965, at which date none of them had been rainforest. He also said that between 1979 and 1982 he had visited many of the farms in the Cuiaba area supplying Sadia and they were not new or recently established.

The appellants relied heavily at trial on the evidence of Ms. Susan Branford, a Latin American specialist with the BBC World Service, and on that of Professor Susanna B. Hecht, Director of Research for Latin American Studies at the University of California at Los Angeles, to show that some at least of the areas from which cattle had come were rainforest until the early 1980's. Professor Hecht's evidence was in the form of Civil Evidence Act statements but Ms. Branford gave oral evidence. She referred to the area of Cuiaba from which Sadia had obtained cattle between 1979 and 1982, an area bounded by Pontes e Lacerda to the west and Sinop to the north. According to Ms.Branford, the former was in the early 1970's heavily forested with what she would call tropical

forest and the majority of the area around Sinop was humid tropical forest in the mid to late 1970's. She also described an area west of Goiania, within which some of Signor Morganti's collection points came, as having been humid tropical forest in the early 1970's, with only the areas around the roads having been cleared by the early 1980's. There was broad support for these points in Professor Hecht's statements.

The judge was thus faced with a conflict of evidence. But he had available to him other evidence to assist in resolving this conflict, including a number of maps marking tropical rainforest and other vegetation as at various dates. These included two maps produced in court by Mr. Monbiot, a witness called by the appellants. One of these was a detailed official vegetation map of Brazil, reflecting information collected between 1973 and 1983. In respect of the area west of Goiania, this map showed a very large area as including agricultural activities, mixed with a lot of savannah and seasonal forest. As the judge said, this is difficult to reconcile with Ms. Branford's recollection that only the area around the roads had been cleared by the early 1980's. The other map, known as Dr.Cotter's map, likewise did not show tropical rainforest in that area, certainly by 1982 and perhaps even by 1940.

In the light of this evidence, the judge concluded that at the very least there must have been substantial clearings for pasture and other agriculture and substantial areas of savannah and other non-rainforest in the material areas well before McDonald's arrived in Brazil in 1979.

As for Pontes e Lacerda, the government vegetation map shows, as the judge said, that the nearest areas of canopy forest were about 400 km (250 miles) to the north. There were patches of rainforest or transitional forest not far from Sinop, but there were also areas of agricultural activity nearby. The defence witness Mr. Monbiot agreed that Sinop and Pontes e Lacerda were well-established agricultural areas by 1983.

As a result, the judge was prepared to accept Sr.Morganti's evidence that the farms from which the cattle came for McDonald's in Brazil were established before they opened their first restaurant there in 1979. The appellants allege that it shows judicial bias to prefer his evidence to that of Ms.Branford. We do not agree. There was a proper evidential basis for the preference ultimately given to Sr. Morganti's evidence. It is also asserted by the appellants that Sr. Morganti was discredited and unreliable, if only because he was himself involved in the exporting of beef from Brazil and hence in the destruction of rainforest. It is of course true that Sr.Morganti has and had an interest in the beef industry in Brazil. That will be true of many who have first-hand knowledge of the facts about that industry and its effects. One may wish to approach the evidence from such sources with caution, but it is not inherently unreliable, and in the present case it was largely corroborated by the detailed vegetation maps available at trial. There was no reason why the judge could not properly accept it.

It also needs to be borne in mind that the evidence showed that cattle were coming from the Cuiaba area only when Sadia was the supplier, that is between 1979 and 1982. As the judge noted, there were very few McDonald's restaurants in Brazil during that period, rising to only 10 by 1983. A calculation was put before him in one of Sr. Morganti's statements, indicating what a tiny proportion of Brazil's

beef output was taken by McDonald's, even ten years later in 1993. It amounted, according to Sr. Morganti, to only 0.22% of the national total. The judge thought that this did not reflect the fact that McDonald's used only one-tenth of the carcass of each animal slaughtered and that therefore the true proportion of beef output used by their Brazilian restaurants was even smaller. The appellants contend that he was wrong in coming to that view and the respondents agree. We have looked at the figures and are satisfied that Sr. Morganti's figure did take account of the fact that McDonald's used only one-tenth of each carcass. So the judge was wrong on this. But does it matter? The fact is that even on the correct basis and even as at 1993 the proportion of Brazil's annual beef output taken by McDonald's restaurants was about one-fifth of 1%, a very tiny proportion. More significantly for present purposes, at the time when Sadia was supplying the beef patties between 1979 and 1982, the proportion would have been even smaller, since McDonald's then had at most 10 restaurants, compared to the 63 they had by 1990. This was a point properly emphasised by the judge.

Some of that would have been coming from the Cuiaba area between 1979 and 1982, but that was only one of the areas supplying Sadia. There clearly was ample scope for the limited numbers of cattle involved from the Cuiaba area to be coming from non-rainforest land, even around Pontes e Lacerda and Sinop. It means that the judge was entitled to accept the evidence of Sr. Morganti that the cattle from that area were coming from old established farms.

The appellants rightly make the point that the figures quoted do not include beef exported from Brazil for use by McDonald's restaurants elsewhere. They emphasise that there was evidence of the export of beef to the United Kingdom and elsewhere, and that cattle ranching for export was a major cause of deforestation in Amazonia. The judge looked in some detail at the evidence about the export of Brazilian beef to the U.K., including evidence given by Lord Vestey, Chairman of Vestey Group Limited, who was called by the appellants. The judge found that a Vestey company, Frigorifico Anglo S.A., had supplied 83 tons of Brazilian beef in 1983 for use by McDonald's in the U.K., and that there was no evidence that any more than that had been exported to the U.K. then or at any other time. That finding seems to this court to be unassailable. It was a one-off supply, and its limited size means that it has little role to play in this case. In any event, the fact that it was Brazilian beef did not make it beef from an area or areas which had previously been rainforest. The cattle in question were slaughtered at the Barretos plant, which is in the area of Sao Paulo, more towards the south of the country and a very long way from any rainforest areas. While Lord Vestey could not identify where those cattle came from, he did say that they were all bred in areas well within 1000 kms. of the plant and would not have been transported to Barretos the long distances required from rainforest areas. There was in fact no evidence that these cattle came from areas which had been rainforest recently. The nearest the appellants got to providing such evidence came in the form of a sweeping generalisation in one of Professor Hecht's statements, namely that she was "certain" that a "substantial proportion" of the cattle slaughtered at Barretos would have come from former rainforest areas. The judge commented that he could see no basis at all for that opinion in her statement. The appellants argue that the basis is to be found in the preceding paragraphs of her statement. We do not accept that. Her statement speaks in general terms about cattle being brought southwards from former rainforest areas, sometimes for fattening, but provides no detail about the scale of this operation nor about how it compares with the

number of cattle available in the Sao Paulo area from non-rainforest land. Brazil, as the judge remarked, is a vast country and has long been a major beef producer. An assertion of the kind made by Professor Hecht would require much more detailed evidence in support before it could be seen as soundly based.

Apart from that limited amount of beef exported to the U.K. in 1983, there was some evidence of exports from Brazil to Switzerland, Uruguay and Argentina. Dr. Gonzales, a senior manager of McDonald's, spoke of beef being exported in 1993 by Braslo for a McDonald's supplier in Switzerland, and another McDonald's witness referred to "rare occasions" when Braslo would send beef to their suppliers in Uruguay and Argentina. Again, the appellants place reliance on this evidence. But such evidence does not advance their case. These supplies were being made by Braslo, Sr. Morganti's company, and we have already dealt with the evidence as to the places from which Braslo obtained its beef. The conclusions arrived at earlier in this judgment on that aspect are equally applicable to the export of beef by Braslo.

The final matter on this part of the leaflet concerns soya farming. The appellants argue that McDonald's are responsible for loss of rainforest in Brazil because soya feed grown on such land has been fed to animals used in McDonald's products. They rely in this connection on evidence given by Mr. Monbiot about the impact of soya farming on forested areas in Brazil. Indeed the judge noted that this evidence seemed to be

> "... not so much directed at the causation of starvation by the appropriation of human staples, which appeared to be the original place of soya in the case, but rather at the effect of the hamburger and the hamburger connection on the rainforest and displacement of peasants."

Mr. Monbiot's evidence was that soya was produced in Brazil principally for export for cattle feed. The judge, however, did not accept that this was the main purpose of soya bean production in Brazil. He noted that what had been used "as a small part of the feed of some German cattle" was soya bean *meal*, not the beans themselves. The meal was, he found, a by-product obtained after the oil had been abstracted from the beans for human consumption, and it was that obtaining of oil to provide food for people which was the main purpose of soya bean production in Brazil. He had heard evidence to this effect from witnesses for McDonald's, and he observed that much more soya bean meal was exported than soya beans. There was no evidence from which he could conclude that "significantly less quantities of soya bean would have been grown in Brazil, had it not been for the value of the meal by-product as animal feed." That reasoning we find persuasive. There is nothing in the evidence to show that the use of soya bean meal as animal feed materially affected the amount of soya beans grown in Brazil, even less that the limited amount of such meal by-product used for cattle or other animals that ended up in McDonald's restaurants could be blamed for any rainforest clearance or displacement of peasants. The judge's findings on this aspect of the case cannot be criticised.

It follows that in our judgment he was right to conclude that the appellants had failed to make out a

case of justification for any of the defamatory statements contained in the sections of the leaflet dealing with starvation in the Third World and destruction of rainforests. Nor, for the reasons he gave, could the comment about "helping the McDonald's empire to wreck this planet" be seen as fair. His conclusions on this part of the case cannot be faulted.

Part 10

Packaging

The terms of the appellants' notice of appeal relevant to this section are as follows:

"27. The trial judge erred in his findings as to the meanings of the words complained of in that the following meanings found by him were not the natural or ordinary meanings of the said words:

(a) That the Plaintiffs are lying when they claim to use re-cycled paper and that the Plaintiffs are to blame for tons of the Plaintiffs' paper packaging ending up littering the cities of developed countries.

(b) That it takes 800 square miles of rainforest just to keep McDonald's supplied with paper for one year.

28. Further or alternatively the trial judge wrongly relied upon satirical cartoons, graphics, colloquialisms and/or the supposed context to alter the clear natural and ordinary meaning of the words complained of.

29. Further or alternatively, when determining the meaning of the words complained of, the trial judge failed to put the words complained of into their proper context.

30. Further or alternatively, the trial judge erred in his failure to recognise the existence of comment in the words complained of.

31. Further or alternatively, the trial judge erred in not finding that the natural or ordinary meaning of the words complained of were either fully justified or fair comment on the basis of the overwhelming weight of the evidence presented at trial. For example, it was clearly established (based on the trial judge's findings, admissions by Plaintiff's representatives in the witness box or in official company documents, by expert testimony, and/or by the evidence of independent witnesses of fact) that:

- At the time of the alleged libel only a very small percentage of McDonald's packaging was made from recycled material.

- McDonald's use and have used and encourage the use of vast quantities of

instantly disposable paper and plastic packaging.

- the production and disposal of such packaging involves damage to the environment.

- a considerable amount of McDonald's packaging ends up as litter, and companies can be held legally accountable by local authorities in the UK for the litter they generate.

- McDonald's recycles an insignificant percentage of such packaging, and that this is despite giving an impression to the contrary.

32. The trial judge erred in ruling that both the general, factual sting and the comment referred to clearly relate to damage to the environment by destruction of rainforest and discounting or disallowing evidence about damage to the environment by other means such as the use of CFC or HCFC or pentane gases to make polystyrene foam packaging or the simple use of non-biodegradable polystyrene foam packaging, or by the cutting down of forests generally, or by the processing of pulp to make paper or paperboard packaging, or by incineration of waste, or by methane emissions from cattle."

The relevant text of the leaflet reads, under the heading "Petfood & Litter":

> "McDonald's ... destroy vast areas of Central American rainforest ... to provide fast-food packaging materials. (Don't be fooled by McDonald's saying they use recycled paper: only a tiny percent of it is. The truth is it takes 800 square miles of forest just to keep them supplied with paper for one year. Tons of this end up littering the cities of `developed' countries.)"

Two of the McDonald's arches along the top of the leaflet have the words "McWasteful" and "McGarbage".

The judge held, on page 106 of his judgment, that the reference to 800 square miles of forest was in its context a reference to "rainforest". He then said on page 107:

> "There was no evidence that any rainforest timber has ever been used to make McDonald's paper or paperboard packaging. In fact there was no evidence that McDonald's packaging required anything like 800 square miles of any kind of forest, whether cut down each year, which is what I take the leaflet to mean ("just to keep them supplied with paper for a year"), or as an area of sustained forest from which McDonald's requirements could be met indefinitely. In his final submissions, Mr Morris presented some calculations which were designed to justify the figure of 800

> square miles on the latter basis, but they did not in my view hold water, quite apart from the fact that they had never been put to any witness, let alone been proposed by one."

On page 182 of the judgment, the judge said:

> "In my judgment, the words "don't be fooled by McDonald's saying they used recycled paper: only a tiny percent of it is", purport to state what McDonald's say in comparison with what the truth actually is. Taken with the leaflet's introductory theme that McDonald's has a lot to hide, they amount to a clear allegation that McDonald's is lying when it claims to use recycled paper."

The judge held that the allegation of lying was clearly defamatory of both respondents and that it was a simple statement of fact. He then said:

> "The defendants contended that the charge of lying when claiming to use recycled paper was justified; that it is true in substance and in fact. They contended that when McDonald's say in publicity material they are committed to using recycled paper, or when they print on packaging or literature a message that it is "recycled", they give a knowingly false impression because only a tiny percent of their paper packaging is recycled at all and much of it is not, so the defendants said, genuinely recycled in the sense of having gone through its useful life before being put back into the manufacturing process. In addition it is deceptive because some annotations refer to recycled paper when only a percentage not the whole of it is recycled fibre. So the defendants alleged.
>
> The plaintiffs said that the charge of lying when claiming to use recycled paper was completely false.
>
> There are four essential questions to answer: what has the recycled content of McDonald's paper packaging been; what public statements has either plaintiff made about this; were any of those statements lies, and what does "recycled" paper mean?"

The evidence on this subject was called entirely by the respondents. There was a distinction between paper containing fibres recycled from waste such as manufacturing off-cuts which had never yet reached a consumer ("post industrial" or "pre-consumer waste") and that which may contain fibres recycled from waste reclaimed after use by a consumer ("post-consumer waste"). Paper may contain a combination of the two.

A report published by the first plaintiff in April 1991 gave the average recycled content used by McDonald's for their packaging in the United States as 53% for post-consumer waste and 37% for post-industrial waste. The judge accepted evidence to the effect that the overall recycled content of

McDonald's paper used in the United States for the years 1987 to 1992, excluding 1990, was 1987 - 16%, 1988 - 17%, 1989 - 17%, 1991 - 51% and 1992 51%. These figures did not distinguish between post-industrial and post-consumer recycled content. There was much evidence about the recycled content of various particular items used by McDonald's, much of it for dates later than those relevant to the defence of justification in these proceedings.

The appellants contended that all the evidence showed that McDonald's used very little recycled paper before 1990 or 1991. The judge disagreed. He held at page 192:

> "On the evidence which I have heard and read I conclude that between 1987 and 1989 McDonald's paper in the U.S. contained a small but nevertheless significant proportion of recycled fibre, certainly more than a tiny percentage, although I cannot say what the proportions of post industrial and post consumer were then because the distinction was not generally perceived to be important. By 1990 McDonald's U.S. packaging contained a substantial proportion of recycled post consumer waste.
>
> The proportion of recycled paper in the U.K. was less clear because there was less information, but upon what I did hear and read I conclude that from the early 1980s McDonald's paper contained a small but nevertheless significant proportion of recycled fibre. I do not consider that the proportion of the recycled fibre in the second plaintiff's paper can fairly be said to have been tiny at the time of the relevant publication of the leaflet (September 1987 to September 1990), even though many paper items appear to have contained no recycled fibre at all ..."

On page 193, the judge said:

> "I have considered the defendants' contention that "recycled" would mean recycled after use by the ultimate consumer, in the mind of most members of the public and the ordinary reader; but I do not accept this, although that might be a first and unjustified reaction because he or she may not think of the ways in which waste can arise after paper has been milled and sent off to a paper product manufacturer elsewhere, yet before the ultimate product has served its purpose.
>
> I thought that Mr Van Erp was a young man with a genuine concern for the environment, who had taken a job where he thought he could do some practical good. As I have already indicated, his view was that if material was internally recycled in a conversion plant or paper mill it should not be termed "recycled", but if off-cuts which occurred elsewhere at a different manufacturing plant were sent for recycling, he would consider that "recycling" because they are being kept out of the local industrial waste stream and being put back to good use which lessens the use for virgin fibre.
>
> This seems sensible to me and I believe it would seem sensible for most people

> whatever the perception has been in the U.S. since 1991/2. No doubt the more information people have the better, and now that the practice has changed in the U.S. it might well be deceptive in the U.S. to say simply that something is "recycled" if it consists substantially of post industrial recycled fibre. But there was no evidence that the first plaintiff has taken any such deceptive course in the U.S. since 1992, indeed the evidence was that it has not, and I do not consider that that course of action would be seen as deceptive in the U.K., yet at least.
>
> I consider that Mr Morris' argument that material cannot fairly be called "recycled" until it has completed a full circle or cycle from milling through manufacture and consumer use and back to milling, over technical even by lawyers' standards.
>
> I do not accept the defendants' argument that it is misleading to put "recycled paper" on paper which is less than 100% recycled. Paper cannot be recycled for ever, and much "recycled" paper has a proportion of virgin fibre to give it the necessary quality".

The judge considered that there was no case that before the periods which he had considered either plaintiff claimed to be using recycled paper when it was not. The dates of the respondents' claims to use recycled paper which the appellants specifically drew to his attention were not always clear but they all appeared to be from 1989 onwards.

The judge considered that the evidence did produce two incidents of deception by the second plaintiff about what they recycled, but these concerned other matters and were not relevant to any statements by the respondents about the recycled content of their paper packaging.

The judge heard evidence about litter which was a problem in the area of some of McDonald's restaurants. He was satisfied that the two plaintiff companies themselves took the problem of litter seriously and that litter patrols and other attempts to limit litter were a genuine company policy. There were failures at restaurant level which were against company policy. The judge held that what had been established in this small part of the case did not help the appellants. First, he considered that the litter charge in the leaflet was separate and distinct from any other charge and was not relied upon by the respondents. As a matter of law, the appellants were not entitled to assert the truth of a separate and distinct defamatory statement about which the respondents had not chosen to complain. The judge's conclusion from the evidence was that McDonald's restaurant frontages had been kept clear of litter, but that the system of regular patrols to clear up litter rather further afield had often broken down. He did not however consider that failure to achieve their objective of more extensive clearance made McDonald's culpably responsible for what is left in the streets away from the actual fronts of their stores, nor responsible at all for items of their packaging which had been dropped some munching or drinking distance away. In the judge's view, the blame for that lay firmly on the inconsiderate customer.

For these summary reasons the judge found that the defamatory charge that the first and second

respondents were lying when they claimed to use recycled paper was not justified, even in part.

The appellants' notice of appeal contends that the meanings found by the judge were not the natural and ordinary meanings of the relevant words relating to packaging. The notice of appeal does not say what meanings the appellants contend the judge should have found. The appellants contend that the judge should have held that the words complained of were comment, not statements of fact. They contend that the judge should have held that the words complained of were either fully justified or fair comment. It is further contended that the judge was wrong to disallow evidence about damage to the environment by other means than paper.

In their written submission to this court, the appellants submitted that the relevant passages of the leaflet mean that McDonald's have glossed over the detrimental effects of their packaging and instead focused on `positive' matters such as the use of recycled paper. "Effectively it says `McDonald's try to fool people by public pronouncements about their use of, or commitment to, recycled paper, when the reality is that many trees have to be cut down since only a tiny percent of their paper is recycled (and tons of it is not recycled by the company because it ends up as litter)'." In our view, in so far as this is different from the respondents' meaning, it is not the ordinary meaning of the words complained of. The words complained of do not include a meaning that McDonald's do not recycle their own paper, nor is not recycling their own paper to be derived from what is said about litter.

In his submissions to the judge on Day 292 of the trial, Mr Morris said that the meaning of this section of the leaflet was that the huge scale and nature of McDonald's business inevitably involves them purchasing many tons of paper, most of which is not recycled and which therefore contributes to the destruction of trees and forests; further, that for many years McDonald's used materials for food packaging which were harmful to the environment, and that they continue to use packaging which is harmful to the environment. That, in a nutshell, he said, was what the appellants set out to demonstrate in the case. The allegations were about a system to which McDonald's contribute. Global demand for hamburgers has been proved to be seriously detrimental to rainforest and McDonald's are the world's largest purveyor of hamburgers.

In his oral submissions to this court, Mr Morris submitted that the general sting of the relevant words is that McDonald's packaging is wasteful and damaging to the environment. This applied as much to plastic containers as to paper. In addition to the words which the judge addressed, Mr Morris relied on enlarged inferences from the two McDonald's arches and the phrase in the next column of the leaflet where it is said that McDonald's junk food is "served up in paper and plastic containers." In our view this last phrase in its context is innocuous and adds nothing. Mr Morris also submitted that the sentence about litter carried the implication that McDonald's did not recycle their litter as they should.

In our judgment, the meanings contended for stray a long way from the words complained of, which are confined to claims by McDonald's about their use of recycled paper and the allegedly vast area of forest consumed by McDonald's each year to produce the paper they require. We consider that the

judge's rulings here on meaning were correct. In the light of the evidence about the annual timber requirement needed for McDonald's paper, it is immaterial whether the particular reference to "forest" was to rainforest or not. In our judgment, the words complained of in their natural and ordinary meaning were statements of fact, not comment.

We consider that the sentence "the truth is it takes 800 square miles of forest just to keep them supplied with paper for one year" in its context naturally means, as the judge held, that that area of forest is consumed each year to satisfy McDonald's annual paper requirement. It does not naturally mean that the 800 square miles is the area required to sustain McDonald's paper requirement indefinitely. Mr Morris showed us a 1972 newspaper article which reported that a Mr Hannon had stated that "it takes the sustained yield of 315 square miles of forest to keep McDonald's supplied with paper packaging in one year." Mr Morris said that 800 square miles was derived from this with the figure increased for the expansion of McDonald's business between 1972 and 1986. The passage in the leaflet does not, however, refer to "sustained yield" and the meaning of the words complained of does not import that concept.

It is accepted that this statement is defamatory. On the evidence it was not justified. A calculation made by Mr Rampton from the evidence suggested that McDonald's annual paper requirement would not consume more than 13.8 square miles of any kind of timber. This calculation had been verified in evidence by Mr Kouchoukos. The judge referred to a calculation proffered by Mr Morris in his final submission. Mr Morris put a different calculation to us, necessarily not put to any witness. It was an adjustment of Mr Rampton's calculation with reference to parts of the evidence producing a total of 73.6 square miles of forest as McDonald's annual requirement. The main elements of this calculation which produced the difference were (a) an increase in the amount of virgin pulp used by McDonald's by selecting a figure for 1989 instead of for 1992, (b) an increase for additional items of packaging which the appellants say were omitted from Mr Rampton's calculation -a suggestion which is on the face of it generally inconsistent with Mr Morris' calculation of McDonald's use of recycled paper - and (c) a doubling of the resulting figure for material said to be lost in production. Mr Rampton did not accept this calculation, but it is not necessary to consider the merits of it in detail since even 73.6 square miles is so small that it would not justify the charge that McDonald's consume 800 square miles annually. Mr Morris' calculation of sustainable forest is also irrelevant.

The appellants contend that the judge was wrong to rule that the general sting of the words complained of did not clearly relate to damage to the environment by destruction of rainforest and to disallow evidence about damage to the environment by other means such as the use of CFC or HCFC or pentane gases to make polystyrene foam packaging or the simple use of non-biodegradable polystyrene foam packaging, or by the cutting down of forests generally, or by the processing of pulp to make paper or paperboard packaging, or by incineration of waste, or by methane emissions from cattle. A ruling by the Judge to this effect was made on 15th December 1995 when he ruled that proposed evidence of Anne Link on the subject of processing of wood via pulp into paper and about incineration had no relevance to any issue in the case. In our judgment, he was correct to do so. The words complained of did not raise any issue to which that evidence, nor evidence about CFC, polystyrene and

so forth, was relevant. The same goes for evidence about litter.

As a matter of law, the respondents were entitled to select what they chose for complaint and the appellants were not entitled to assert by way of justification the truth of separate and distinct defamatory statements not relied on. Whether a defamatory statement is separate and distinct from other defamatory statements contained in the publication is a question of fact and degree in each case - see *Polly Peck v. Trelford* [1986] Q.B. 1000 at 1032A-F and *Bookbinder v. Tebbit* [1989] 1 W.L.R. 640 at 646H-647A. It does not matter to this point that the words relating to litter might not be textually severable from those relating to recycled paper provided that the statement is in substance distinct - see *Cruise v. Express Newspapers* [1999] 2 WLR 327 adopting *United States Tobacco International v. B.B.C.* (unreported, C.A., 11.3.88). We agree with the judge that the litter charge is separate and distinct from any other charge made in the leaflet. The sting of the charge about recycled paper was that McDonald's lied about it and this had no bearing on the charge about litter. The sting about destroying rainforest is similarly distinct from any charge about litter. The respondents did not rely on the litter charge as defamatory in the proceedings.

The appellants contend alternatively that they were entitled in relation to the counterclaim to call evidence to justify, and were entitled to findings from the judge about, matters (such as those relating to CFCs, polystyrene and litter) which are not relied on by the respondents as lies in their defence to the counterclaim but which are in the leaflet and which the appellants said they wanted to prove to be true. We consider the appellants' grounds of appeal in relation to the counterclaim elsewhere in this judgment. We only say here that, in our judgment, this submission is misconceived. The only issue on the counterclaim in this appeal is that of qualified privilege, since the judge found that the appellants were not proved not to have believed that the contents of the leaflet were true and the respondents do not seek to disturb that finding on appeal. It was for the respondents to justify what they said were lies. Therefore the only questions of fact relevant to the counterclaim were those which the respondents attempted to say were untrue. Those were expressly limited by paragraph 8 of their answer to a request for particulars served on 15th July 1994 to those on which they themselves relied for their own claim. Other questions of fact were not relevant to any issue on the counterclaim, even before the judge, and he rightly declined to make findings on them. He was also correct when he said at page 724 of the judgment:

> "I do not find it necessary to go through every statement or allegation in the leaflet (let alone some which are not, like alleged responsibility for damage to the ozone layer) making findings as to what is true and what is untrue, where I have not already done so. The fact is that the majority of the defamatory charges are untrue, although some are true, and some of the inoffensive or less consequential statements of alleged fact are true, but some are untrue or misleading in their context.
>
> In my view the important thing so far as the counterclaim is concerned is to see whether there is anything untrue in the leaflet, which Ms Steel or Mr Morris knew to be untrue, it being for the Second Plaintiff to prove not only that it was untrue but also that

Ms Steel or Ms Morris knew full well that it was untrue, that is a lie."

The evidence of relevant assertions made by McDonald's about their use of recycled paper was slender. The judge said on page 194 of his judgment:

> "The dates of the Plaintiffs' claims to use recycled paper, which Ms Steel specifically drew to my attention, were not always clear but they all appeared to be from 1989 onwards."

There were McFact sheets, which the judge considered were probably produced in 1989 or 1990, which were referred to in Readers Digest as "printed, of course, on recycled paper". There was a Factsheet dated June 1990 headed "Recycling - The Facts" which included the statement: "McDonald's is already the largest user of paper in the quick service restaurant industry, we use it for non-food containment such as Happy Meal.....and paper towels as well as stationery at our Head Office. Waste stationery paper is also being collected for return to a recycler." There was a presentation given around 1989 or 1990 in which it was stated "Well, we are heavily committed to the use of recycled paper. Kitchen towels, toilet tissue and various promotional material are all made from recycled paper, and we are presently looking at head office stationery and even business cards." There was a large U.K. carry bag with three arrows in a circle with "Recycled Packaging" and "Made From Recycled Paper" underneath. A small U.S. carry bag had "Made With Recycled Paper" in bold capitals in an obvious place near the handles. The three arrows appear, and then "* 50% Post-Consumer Content 50% Pre-Consumer Content" in much smaller print but immediately under an obvious legend "Please Put Litter In Its Place" near the bottom of the bag. Among its contents is a fry carton with the three arrows in a circle and "Recycled Paper." The judge said at page 195 of his judgment:

> "The trial bundles have a large number of documents published by both Plaintiffs which trumpet their use of recycled paper. By way of example only I note that a 1990 publication of the First Plaintiff entitled "McDonald's and the Environment" has McDonald's arches in three recycled paper arrows and "Printed on Recyclable Paper."

A 1991 document from the First Plaintiff, also entitled "McDonald's and the Environment." said, under the heading "Recycling", "McDonald's is one of the nations largest users of recycled paper products. ...". It spoke of a "McRecycle U.S.A." programme introduced in May,1990, and of the use of recycled items to build and furnish restaurants.

The First Plaintiff's Environmental Policy Statement, which the judge found was published in 1992, spoke of reducing, reusing and recycling what might otherwise be waste where possible and said: "We are committed to the maximum use of recycled materials in the operations of our restaurants. We are already a large user of recycled paper, applying it to such items as tray liners, Happy Meal boxes, take-away bags, take-away trays, napkins, kitchen rolls and toilet tissue. We specify that a minimum percentage of recycled material be used in the packaging of our food and paper products where

possible."

The judge said that the documents to which he had referred pointed to a growing consciousness of the benefits and appeal of recycling from 1989 by which time both respondents were already using some small but significant amounts of recycled paper, as he had found.

The judge's conclusion that the relevant use by McDonald's of recycled paper was more than tiny followed from his findings as to the percentages used in the years from 1987. We disagree with Mr Morris' submission (made without conviction) that "small but significant" should not be seen as different from "tiny". The appellants challenged these findings on two grounds. First, they said that the judge's percentages wrongly included pre-consumer, as well as post-consumer waste. Secondly, they challenged the respondents' arithmetic for 1990, to which the judge referred.

Taking the second of these first, the appellants submit that the 1990 Chart on page 184-5 of the judge's judgment is selective and misleading. The two averages add up to an absurd 90%. If such entries as plastic trays and shipping packaging are left out, and the figures are confined to "the main consumer items likely to go with each meal", the proportion of post-consumer recycled material is 3-10% and of pre-consumer material 50%. [The calculation also leaves out trayliners.] If the proportions were the same for 1987-1989, that would make the post-consumer material for 1987-9 around 3% or less, that is no more than 20% of 16-17%. That, it is submitted, would properly be described as tiny. That submission only has force if the first submission is correct.

The judge was, in our view, fully entitled to conclude that the reference in the words complained of to recycled paper in the context of "fast-food packaging" was to its use by McDonald's for their food packaging generally, including plastic trays, trayliners and shipping packaging. The leaflet was, after all, contending that McDonald's paper requirements consumed 800 square miles of forest each year, which suggests that it is a reference to their entire paper requirement.

Equally, in our view the judge was entitled to conclude that, at least up to 1990, the expression "recycled paper" could include post-industrial recycled paper. People who have not thought much about the subject might well at first think that the expression "recycled paper" naturally refers to paper which had already served a consumer use. If, however, it were pointed out that there is a post-industrial type of paper to be considered, we think that the understanding expressed by Mr Van Erp, which the judge accepted, would be a natural reaction. Mr Morris' submission here included that in the United States it is now necessary to distinguish between post-consumer and post-industrial material and that Mr Langert and Mr Van Erp accepted this. He submitted that this should be seen as representing common understanding in 1990 and before. But the position in the United States resulted from a Federal Trade Commission Report of April 1991 and the judge was, we think, entitled on the evidence to hold that the distinction was not commonly understood in the United Kingdom at least up to 1990. It is also, we think, important to remember that what the appellants had to justify was that McDonald's had lied in their claims to use recycled paper. Whatever campaigners may have considered, there was no evidential basis for concluding that McDonald's themselves did not understand at the relevant time that recycled paper included post-industrial material.

For these reasons, we are not persuaded to disturb the judge's findings on this topic.

Part 11

Nutrition

Introduction

The appellants' grounds of appeal relating to nutrition were in these terms:

> 33. The trial judge erred in his findings as to the meanings of the words complained of in that the following meanings found by him were not the natural or ordinary meanings of the said words:
>
> (a) That McDonald's food is very unhealthy because it is high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, and because eating it more than just occasionally may well make your diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, with the very real, that is to say serious or substantial risk that you will suffer cancer of the breast or bowel or heart disease as a result; that McDonald's know this but they do not make it clear; that they still sell the food, and they deceive customers by claiming that their food is a useful and nutritious part of any diet.
>
> 34. Further or alternatively the trial judge wrongly relied upon satirical cartoons, graphics, colloquialisms and/or the supposed context to alter the clear natural and ordinary meaning of the words complained of.
>
> 35. Further or alternatively, when determining the meaning of the words complained of, the trial judge failed to put the words complained of into their proper context.
>
> 36. Without prejudice to the generality of the foregoing, the trial judge in particular failed to distinguish at all between the criticisms of and comments about McDonald's food and the criticisms and comments about fast food and diet in general.
>
> 37. Further or alternatively, the trial judge erred in his failure to recognise the existence of comment in the words complained of.
>
> 38. Further or alternatively, the trial judge erred in not finding that the natural or

ordinary meaning of the words complained of were either fully justified or fair comment on the basis of the overwhelming weight of the evidence presented at trial. For example, it was clearly established (based on the trial judge's findings, admissions by Plaintiff's representatives in the witness box or in official company documents, by expert testimony, and/or by the evidence of independent witnesses of fact) that:

- McDonald's falsely promote their food as 'nutritious', and also influence dietary habits of substantial numbers of the population

- McDonald's promote and sell food products, in particular mass produced, processed burgers, fries and shakes, which are high in fat, animal fat, salt and sugar and low in fibre and vitamins.

- a diet of this type is unhealthy and causally linked to degenerative diseases (including cancers of the breast and bowel and heart disease), and also this is a standard view of informed and responsible medical opinion (such as the World Health Organisation)

- substantial numbers of the population are at serious risk of diet-related degenerative diseases

- McDonald's sales depend substantially on regular 'heavy' and 'super heavy' users of their products, a substantial number of whom also eat similar food much of the rest of the time. Despite knowing this, McDonald's deliberately target such customers to increase their usage."

The section of the leaflet which referred to nutrition was under the heading, in large letters,: "What's so unhealthy about McDonald's food?". The text beneath the headline read as follows:

"McDonald's try to show in their "Nutrition Guide" (which is full of impressive-looking but really quite irrelevant facts and figures) that mass-produced hamburgers, chips, colas, milkshakes, etc., are a useful and nutritious part of any diet.

What they don't make clear is that a diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals - which describes an average McDonald's meal - is linked with cancers of the breast and bowel, and heart disease. This is accepted medical fact, not a cranky theory. Every year in Britain, heart disease alone causes about 180,000 deaths.

FAST = JUNK

> Even if they like eating them, most people recognise that processed burgers and synthetic chips, served up in paper and plastic containers, is junk-food. McDonald's prefer the name "fast food". This is not just because it is manufactured and served up as quickly as possible - it has to be eaten quickly too. It's a sign of the junk food quality of Big Macs that people actually hold competitions to see who can eat one in the shortest time.
>
> PAYING FOR THE HABIT
>
> Chewing is essential for good health, as it promotes the flow of digestive juices which break down the food and send nutrients into the blood. McDonald's food is so lacking in bulk that it is hardly possible to chew it. Even their own figures show that a "quarter pounder" is 48% water. This sort of fake food encourages over-eating, and the high sugar and sodium content can make people develop a kind of addiction - a "craving". That means more profit for McDonald's, but constipation, clogged arteries and heart attacks for many customers".

The judge additionally took account of other parts of the leaflet in this passage from page 206 of his judgment:

> "Beneath that part of the text is the cartoon showing a man or a woman and a cow or steer, held in a burger with the legends "if the slaughterhouse does not get you" and "the junk food will!" in bubble speak.
>
> Again, the front page subtitle "Everything they don't want you to know" and the opening section of text including the words "It's (McDonald's) got a lot to hide" are relevant to the meaning of the leaflet in this part of the case, as are the legends "McCancer", "McDisease" and "McDeadly", printed across McDonald's arches."

The meaning of this part of the leaflet was hotly contested. The appellants sought to strike out a part of the statement of claim on the basis that if you took the meaning for which they contended together with admissions made by witnesses for the respondents, the claim based on nutrition could not survive. The parties agreed, after considerable evidence upon nutrition had been given and when the trial had proceeded for over a year, that the judge should decide the meaning of the paragraph entitled "What's so unhealthy about McDonald's food".

The appellants submit that the respondents were seeking a meaning which, notwithstanding the admissions which had been made by respondents' witnesses, the appellants would not be able to justify. In the event, the judge gave a reasoned ruling on 20th November 1995 in which he did not accept the submission of either party as to meaning. He also determined that the meaning was defamatory of the respondents and that the meaning fell within the scope of the meaning pleaded by

the plaintiffs. He reproduced in his final judgment much of the material which appeared in his ruling, which concluded that the leaflet bore the meaning:

> "... that McDonald's food is very unhealthy because it is high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, and because eating it may well make your diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, with the very real risk that you will suffer cancer of the breast or bowel or heart disease as a result; that McDonald's know this but they do not make it clear; that they still sell the food, and they deceive customers by claiming that their food is a useful and nutritious part of any diet."

The judge said in his final judgment that, when all the evidence had been heard and the parties' arguments were deployed, it became clear that the meaning which he had found needed elaboration in two respects, so that the merits of the matter could properly be decided. First, the words "eating it [McDonald's food] ..." should be read as meaning "eating it more than just occasionally", since the reader of the leaflet would not expect to be adversely affected by the occasional McDonald's meal. Secondly, the words "very real risk" were meant in the sense of "a serious or substantial risk, although falling short of probability; a risk which the ordinary, sensible reader of averagely robust temperament would worry about; not a minimal or bare risk which is there, but which one can get through life without undue concern for."

The judge held that the meaning which he had found was defamatory of both respondents. It went beyond mere disparagement of their food products. He saw the defamatory meaning as a series of statements of fact, and not opinion. He said that the overall sting, that the respondents' food is very unhealthy and known to be so, could be opinion if it were expressed as opinion. But he considered that it was expressed as simple fact. On this basis, he expressed the essential issues for this part of the case as follows:

> "Firstly, is McDonald's food "high" in fat, sugar, animal products and salt (sodium), and "low" in fibre, vitamins and minerals?
>
> Secondly, if so, is it right that eating McDonald's food more than just occasionally might well make your diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals?
>
> Thirdly, if so, will it bring the very real risk that you will suffer cancer of the breast or bowel or heart disease as a result, i.e. does a diet high in fat, sugar, animal products and salt (sodium) and low in fibre, vitamins and minerals lead to a very real risk of those degenerative diseases?
>
> Fourthly, in the light of the answers to those questions, is McDonald's food very unhealthy as the First and Second Plaintiffs must know?

> Finally, do McDonald's (including the First and Second Plaintiffs) knowingly deceive customers by claiming that their food is a nutritious part of any diet despite it being so unhealthy?"

On the first of these questions, the judge heard a substantial amount of evidence, both before and after his ruling as to meaning, including opinion evidence. From this evidence, he reached the following conclusions:

> "In summary I find that at the material time of publication of the leaflet between September,1987, and September 1990, McDonald's food was high in fat (including saturated fat) and salt (sodium) and animal products and that it has continued to be so. I find that it was low in fibre at the material time of publication of the leaflet, but that it has not been proved to be so now. It has not been shown that McDonald's food generally is high in sugar, although some individual items are. It has not been shown that McDonald's food is low in vitamins or minerals."

The judge then turned to the second essential issue, that is, whether it was right that eating McDonald's food more than occasionally might well make your diet high in fat, animal products and salt and, when the leaflet was published by the appellants, low in fibre. The essence of the appellants' case was that a significant number of people ate McDonald's food often enough to make their diets high in fat, animal products and salt and low in fibre. The respondents took issue with this. They said that a typical McDonald's customer would balance McDonald's food with a variety of other foods.

There was a lot of evidence about the frequency with which people ate McDonald's food. The judge's conclusions from that evidence were:

> "The overall picture which I took from the plethora of figures put before me was that in the U.K. where publication of the leaflet is complained of, there was and is a very small proportion of all McDonald's customers eating their food nearly every day; a still very small proportion eating their food more than once a week; about 10% of all McDonald's customers eating their food about once a week and the remainder, probably about 85%, eating their food less often than once a week.
>
> ...
>
> The important gloss on the picture is that there was really no evidence that those who eat McDonald's food once a week or more often do so or have done so for a significant proportion of their lives, or will continue to do so.
>
> In the U.S. the proportion of frequent users appears to be greater and heavy use continues into the 35 to 44 age bracket, no doubt because McDonald's has been

established there for longer than it has been here, but also no doubt because of slightly different lifestyles. Even then the great majority of McDonald's U.S. customers eat its food less than once a week. Again, however, there was really no evidence as to how long the habitual McDonald's customers have been so."

He then considered evidence about how frequently it was necessary to eat a typical McDonald's meal to achieve a diet with the characteristics that he was considering. His conclusion from this evidence was:

"Having considered all the evidence on the point and all the calculations put forward by the Defendants, I find that it is possible to eat a typical McDonald's meal several times a week, without making the diet high in fat (including saturated fat) and salt (sodium) or low in fibre, by the standard of the recommendations which I have applied, provided that one takes a lot of care with the rest of one's meals. If one eats several McDonald's meals a week without taking a lot of care with the rest, one's diet is likely to be high in fat (including saturated fat) and salt (sodium) and it may be low in fibre, and since several meals a week must in my judgment form a significant part of one's diet, the frequent McDonald's meals would bear a real part of the responsibility for that result, for so long, but for so long only, as they continued.

On the other hand, if one ate a typical McDonald's meal, high in fat (including saturated fat) and salt (sodium) to the extent which I have found, and low in fibre to some extent in 1989 but not now, just once or twice a week, one would not in my view have to take much trouble with the remainder of one's meals in order to keep to the COMA 41 recommendations. (Committee on Medical Aspects of Food Policy). If one ate quite a lot of the same kind of food during the rest of the week, one would be in trouble; but in that case I do not consider that it would be right to hold the one or two McDonald's meals responsible. Whether one's diet was high in fat (including saturated fat) and salt (sodium) and low in fibre would be far too dependant on what one ate for the rest of the week to blame the one or two McDonald's meals for the result.

The same obviously applies even more strongly to the effect or lack of effect, of eating McDonald's meals less than once a week."

The judge had held that only a small proportion of those who visit McDonald's in the U.K., and therefore an even smaller proportion of the general public, eats McDonald's food more than once a week. The proportion of those who visit McDonald's in the U.S. more than once or twice a week appeared to be larger, but still small. From these findings he concluded:

"In my view it must follow that it is not true to say that eating McDonald's food, albeit more than just occasionally, might well make your diet high in fat, animal products and salt (sodium), let alone sugar, or low in fibre, let alone vitamins and minerals. Such a

> statement is not justified. It is not true in substance and in fact because it is only true (so far as fat, animal products, salt and fibre are concerned) in relation to a small proportion of people, who eat McDonald's food several times a week. The leaflet does not say that if you eat McDonald's food several times a week it might well make your diet high in fat, animal products and salt (sodium), and low in fibre. It leads the reader to believe that this is to be expected from anything more than the occasional McDonald's meal.
>
> It follows that it cannot be right to say that eating McDonald's food more than just occasionally will bring the very real risk that you will suffer cancer of the breast or bowel or heart disease as a result of making your diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, even if such a diet carries such a risk."

Upon these findings and reasoning, the appellants' defence of justification for this part of the leaflet failed, since a factual element which the judge considered to be necessary to that defence was not established. Nevertheless, he went on to consider the other essential issues, in case there was an initial appeal against his findings. We shall pause here in our summary of the judgment to consider first the findings upon which the defence failed.

Paragraph 33 of the Notice of Appeal challenges the meaning of this part of the leaflet found by the judge, but without saying what meaning the appellants contend for. Paragraphs 34 and 35 contend that the judge failed to put the words complained of in their proper context and that he wrongly relied upon satirical cartoons, graphics, colloquialisms or the supposed context to alter the clear, natural and ordinary meaning of the words complained of. Paragraph 36 contends that the judge failed to distinguish criticisms and comments about McDonald's food from criticisms and comments about fast food and diet in general. Paragraph 37 contends that the judge should have found that the meaning of the words complained of was comment. Paragraph 38 contends that the defence of justification ought to have succeeded and reference is made to a number of evidential matters.

The essence of the appellants' case on meaning was that the words

> "... a diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals - which describes an average McDonald's meal -is linked with cancers of the breast and bowel, and heart disease. This is accepted medical fact, not a cranky theory ..."

speak for themselves. The Court is concerned with "ordinary, reasonable, fair-minded readers" (*Charleston v. News Group Newspapers Ltd* [1995] 2 AC 65, 73 per Lord Bridge) and their meaning should not be affected by, for instance, the Arches headings "McCancer" or "McDisease" nor the cartoon with the words "if the slaughterhouse doesn't get you, the junk food will!". The passage refers to junk food generally and only incidentally to McDonald's food. The words do not mean that

McDonald's food causes cancer and heart disease as a surely established fact, but that there is a respectable (not cranky) body of medical opinion which links a junk food diet with a risk of cancer and heart disease. Changes in medical opinion over the years are such that there can be no final medical fact and the words "accepted medical fact" include views expressed in responsible medical opinions which were not merely cranky theory. The appellants' case on the facts then was that this link was accepted both in literature published by McDonald's themselves and by one or more of McDonald's own experts and in medical publications of high repute. That should have been an end of this part of the case which, say the appellants, should not have been extended evidentially in the way that it was. We have to say that we have considerable sympathy with these submissions, given the wide range of medical opinions to which we have been referred.

Meaning - Court of Appeal ruling

After the judge had made his ruling on meaning on 20th November 1995, the appellants appealed against his order by Notice of Appeal dated 12th February 1996. The grounds of appeal recited the words of the meaning which the judge had found, and also his findings that the meaning fell within the scope of the meaning pleaded by the respondents and that the words complained of were defamatory. The grounds of appeal were expressed in 7 paragraphs. The first paragraph contended that the judge was wrong to find that the words complained of were defamatory of the respondents. The second paragraph contended that the judge was wrong to find that the word "linked" meant "causally linked". The third paragraph contended that the judge should not have imported "very real risk" into his meaning, since the mere fact that there is a link between a particular diet and disease should not mean that the link would be established in a high proportion of cases. The fourth paragraph contended that the judge failed to give the material complained of its natural and ordinary meaning. The fifth and sixth paragraphs contended that the judge relied wrongly on the title, headings and cartoons and that he failed to give adequate weight to the satirical nature of this and other material. The seventh paragraph contended that the judge was wrong in that he determined a meaning which was more serious than that pleaded in the Statement of Claim. It was said that, before the judge determined the preliminary issue of meaning, the respondents had made admissions which they contended removed the need for the appellants to call evidence about heart disease. But the meaning found by the judge now made it necessary for the appellants to call evidence on this issue.

The appeal was heard on 2nd April 1996 by a constitution of this Court presided over by Hirst L.J. By letter dated 1st April 1996, Ms Steel had written on behalf of both appellants to the Listing Officer of the Civil Appeals Office giving notice that the appellants were withdrawing the first 6 grounds of their appeal and saying that the sole question which they now asked the Court of Appeal to consider was the seventh ground. At the beginning of the hearing of the appeal, Hirst L.J. confirmed that this was the single point which remained for determination. Mr Morris confirmed that it was, saying that, in the appellants' view, the issue was the purpose of admissions made by the respondents which were intended to remove issues from the case and to reduce the need for further witnesses which would extend the length of the trial. The court heard the appeal on this limited basis and decided the one

remaining issue against the appellants holding that the meaning determined was significantly less severe than that pleaded. The essence of the decision was that the meaning determined by the judge was significantly less severe than that pleaded by the respondents in their statement of claim as amended. Hirst L.J. gave the leading judgement, concluding that:

> "From now on the case will, as I understand it, proceed on the basis of the meaning as upheld by the judge."

The order of the Court of Appeal was drawn up, sealed and entered. It recited the terms of the appellants' Notice of Motion and ordered that the appeal be dismissed and that the judge's order of 20th November 1995 be affirmed.

The issues about the meaning of this part of the leaflet which the appellants want to raise before us are substantially the same as the issues raised in their 1996 grounds of appeal which they withdrew. The contention that the words complained of were not defamatory of the respondents was also a ground of appeal in 1996 which the appellants withdrew. The order of the Court of Appeal in terms affirmed the judge's meaning and the finding that it was defamatory. The appellants submit that they should nevertheless be permitted to reopen these questions. They say that they have never been determined by the Court of Appeal. They give reasons why they withdrew them in 1996. These include the submission that, because of constraints of time and lack of legal advice, they had no real opportunity to pursue these grounds of appeal. The appellants tell us that it was their understanding that it would remain open to them to raise these matters at a full appeal after the conclusion of the trial. They say that they were advised that if they went ahead and the result was adverse to them it would have a bad effect on other peoples' cases. In the exceptional circumstances of this case, the appellants submit that they should be allowed to pursue the withdrawn grounds of appeal upon the hearing of the present appeal. Mr Rampton submits that there is authority binding on this court that the appellants should not be permitted to revisit matters which they raised, but withdrew, on the previous occasion.

The authority to which Mr Rampton referred was *Knight & Others v. Ogwr Borough Council* (11th January 1994), a decision of this court consisting of Sir Thomas Bingham M.R. (as he then was) and Staughton and Peter Gibson L.JJ. In December 1992, the Borough Council applied for leave to appeal out of time from part of an order made in May 1989 of Mervyn Davies J. by which the judge allowed an appeal from part of a decision of a Commons Commissioner made in May 1988. The personal representative of one of the successful appellants from the Commons Commissioner's order applied to strike out the Borough Council's application. In June 1989, the Borough Council had appealed the judge's order of May 1989, but they had notified the Civil Appeals Office in July 1989 that they no longer wished to continue with the appeal and that they wished to apply for the appeal to be dismissed with costs. In August 1989, the Registrar of Civil Appeals acceded to that request and an order to that effect was drawn up and entered. The application to strike out the 1992 application for leave to appeal out of time succeeded. The court referred in particular to *Re Samuel* [1945] Ch. 364. Peter Gibson L.J. said that the general rule is that, once an order dismissing an appeal has been perfected, the court has no jurisdiction to revive the appeal or to allow a fresh appeal to be brought. In the light of *Re*

Samuel, as a matter of jurisdiction this court cannot reinstate an appeal unless the matter falls within an exception which has been recognised by this court. One such exception is where an appellant has not appeared and the appeal has been dismissed without a hearing or a determination of the appeal. But the exceptions were all distinguishable from the facts of the case before the court, where the appellant Borough Council itself had sought the dismissal of the appeal and that had been acted upon and the order dismissing the appeal had been perfected. The policy for this was to be found in the fundamental principle that there should be finality in litigation. Staughton L.J. agreed that the court had no power to hear and determine an appeal by the Borough Council. The appeal had been determined already by the court, when at the Borough Council's request an order dismissing the appeal was drawn up and sealed. Sir Thomas Bingham M.R. said at page 10 of the transcript:

> "For nearly half a century, since the decision of the Court of Appeal in *Re Samuel*, it appears to have been accepted in this court that if an appellant asks that his appeal should be dismissed with costs, and an order of the court is formally drawn up dismissing the appeal with costs, that is final and the court cannot allow the appeal to be pursued under that Notice of Appeal or revived by another Notice of Appeal. I can see no reason to question the general correctness of that understanding which is reflected in the current practice of the court."

In our judgment, the part of the present appeal which we are considering is indistinguishable from the *Ogwr Borough Council* case. The appellants raised the relevant grounds of appeal against the judge's decision in their 1996 Notice of Appeal. They had the opportunity to argue them before the Court of Appeal but decided to withdraw them. This case is in one respect stronger against the appellants than the *Ogwr* case, since in this case the appellants appeared before the full court, withdrew the six grounds of appeal personally in open court, and proceeded to make submissions about the seventh ground. The order of the court dismissing the appeal and affirming the judge's order was drawn up, entered and sealed (notwithstanding misconceived submissions by the appellants to the contrary). We are bound by the court's previous indistinguishable decision and the circumstances in which the earlier appeal was made do not permit us to consider the withdrawn grounds even though they were not in the event argued before the Court of Appeal. What Sir Thomas Bingham MR described in *Ogwr* as the "fundamental principle that there should be finality in litigation" must be applied in present circumstances. It is therefore not open to us to entertain the appellants' submissions about the meaning of this part of the leaflet.

On the other hand, this also means that the respondents, and indeed the judge, were bound by the order of the Court of Appeal, as were the appellants. Although the meaning which the Court of Appeal upheld was the judge's meaning, it was not open to him to depart from it certainly not when it had been upheld by the Court of Appeal. It was in particular not open to the judge, as Mr Rampton accepted, to elaborate the meaning, if the elaboration would change it.

The judge did elaborate the meaning in two respects. We do not consider that the second of these elaborations materially changed the meanings. If anything, it was a marginal shift in favour of the

appellants. But the first of the judge's elaborations did, in our judgment, change the meaning. The meaning that "eating [McDonald's food] may well make your diet high in fat [etc.] ... with the very real risk that ..." does not, in our view, carry with it the gloss "eating it more than just occasionally". Although, as Mr Rampton pointed out, the concept of eating McDonald's food more than just occasionally may feature in parts of the judge's discussion leading to his decision on meaning on 20th November 1995, his actual decision was that which we have quoted and it was that meaning which the Court of Appeal upheld. There is arguably a degree of absurdity if, when a court has determined a meaning of a defamatory publication, the court then needs to determine the meaning of the meaning. The fact remains that the determined meaning is there to be applied, not altered. In our view, the determined meaning does not import the limitation "eating it more than just occasionally". On the contrary, we consider that the word "diet" in the determined meaning conveys the frequency of eating McDonald's food which the meaning has and imports the concept of people whose regular diet has the ingredients described. The effect is that, if you eat enough McDonald's food, your diet may well become high in fat etc.

The judge's decision on this part of the case depended centrally on his addition to the meaning of the words complained of "eating it more than just occasionally". It follows, in our view, that the decision itself cannot stand.

There is another and separate reason why, in our view, it cannot stand. The judge's factual finding was that only a small proportion of those who visit McDonald's in the U.K., and therefore an even smaller proportion of the general public, eats McDonald's food more than once a week. He made a broadly equivalent finding for those who visit McDonald's in the U.S. He then said that it must follow that it was not true to say that eating McDonald's food, albeit more than just occasionally, might well make your diet high in fat etc., because it is only true (so far as fat, animal products, salt and fibre are concerned) in relation to that small proportion of people who eat McDonald's food several times a week. In our judgment, this conclusion does not follow from the premise. An assessment of the extent of the risk involved in taking a particular course of action does not depend on how many people in fact take that risk. The quality of food of a particular type and the possible effects of eating it with any specified frequency do not depend on how many people in fact eat it with that frequency. The proposition "arsenic is very poisonous" is not rendered untrue because very few people take arsenic.

For these reasons, in our judgment the judge's finding that the appellants' defence of justification failed for the reasons which he gave cannot stand, and it is necessary to consider the appellants' grounds of appeal by reference to the unelaborated meaning which the Court of Appeal upheld.

Abuse

The appellants submit that for the judge to permit the respondents to amend their pleaded meaning of the nutrition part of the leaflet and then to allow them to call further evidence two years after the original evidence had been given resulted in an abuse. The relevant amendment changed the meaning

contended for from one by which McDonald's meals "are linked" with cancers and heart disease to one by which they "cause" cancers and heart disease. The appellants say that their original understanding was that they had to establish only a link, which did not need to be causal, between McDonald's food and heart disease and cancer. They reckoned that they had established such a link. They submit that public policy should not allow plaintiffs with a feeble claim contradicted by their own evidence to put unrepresented individual defendants to expense, stress and anxiety by improving the claim by amendment. The amendment introduced a causal link and the additional evidence should not have been allowed because it was unduly burdensome especially for unrepresented litigants. The appellants did not appeal the judge's order permitting the amendment because they understood at the time that an appeal would be likely to fail because the decision was one of discretion. They contend nevertheless that it remains open to them to advance an abuse of process submission in this appeal.

In our judgment, there is no merit in these submissions. The amendments were allowed after submissions in November 1994 and for reasons given by the Judge on 14th December 1994. Mr Rampton submits that they were inconsequential and that it was always apparent that the respondents' case was that the relevant meaning required a causal link. Whether this is correct or not, the appellants did not appeal the order granting leave to amend. It was the appellants' contention that the respondents' case should be struck out and this led to the judge's ruling in November 1995 on meaning. The appellants appealed the ruling but were not successful. After that, the respondents' pleaded meaning was immaterial. It was as a result of the ruling of the Court of Appeal that the judge gave leave for additional evidence. This resulted, not from the respondents' amendment, but from the judge's ruling on meaning, which the Court of Appeal held was within the respondents' pleaded meaning. The appeal to the Court of Appeal and its order subsumed the grant of leave to amend. From that time at the latest it became too late to complain about the amendment. There was no abuse in the original grant of leave to amend in December 1994. There was no abuse in permitting each party to call additional evidence once the Court of Appeal had upheld the judge's meaning.

Reference etc.

The meaning upheld by the Court of Appeal is expressed in words which specifically refer to McDonald's. The appellants suggest that the relevant words complained of are to be seen as referring to fast food generally, with McDonald's as no more than an example. The reference to McDonald's is, however, quite plain from the front page of the leaflet, the two Arches "McCancer" and "McDisease", the heading of the part of the leaflet with which we are concerned and the express mention of McDonald's in every paragraph. Further, the judge was correct to decide that the meaning which the Court of Appeal upheld contained a number of statements of fact, not comment.

The appellants submit that statements in the leaflet to the effect that McDonald's food is unhealthy for the reasons given are not defamatory. They say that the only part of the meaning which is defamatory is that which says that McDonald's advertising was deceptive, which they justified. It is not open to the appellants now to submit that the meaning which the Court of Appeal upheld is not defamatory,

since that is one of the contentions which they withdrew and which has been determined against them by the perfected order of the Court of Appeal.

Justification

The judge held on the facts that McDonald's food was high in fat (including saturated fat) and salt (sodium) and animal products, and that it was low in fibre at the material time of the publication of the leaflet. It had not been shown that McDonald's food was generally high in sugar, although some individual items were. It had not been shown that McDonald's food was low in vitamins or minerals. The extent to which the appellants' case did not succeed in these respects was not, we think, critical to a successful defence of justification, if the findings about fat, salt, animal products and fibre were sufficient for the very real risk which the meaning contained.

The judge considered evidence about heart disease and cancer at very great length and at two separate stages of the trial. Much of this evidence had been given before he made his ruling about meaning on 20th November 1995. After that meaning had been upheld by the Court of Appeal, the judge made a further ruling enabling witnesses to be recalled and some additional evidence to be given. One of the difficulties which arises is that by this means different evidence about cancer was given in the later stages of the trial than had been given earlier on the basis that medical knowledge and research had developed meanwhile. This was an inevitable consequence of a very long trial. We consider that Mr Rampton is correct in submitting that the truth of a statement as to the existence of a risk is to be judged by evidence available at the date of trial. Upon the meaning determined by the judge, evidence of medical opinion subsequent to the publication is admissible to assess whether the "very real risks" exist.

The expert evidence called by the appellants about heart disease and cancer included that of Dr Barnard, Professor Crawford, Professor Campbell and Mr Cannon. Their evidence was extensive and the judge summarised and considered it fully and very carefully. Dr Barnard concluded that medical consensus held that an increased consumption of high fat, low fibre foods affected the composition of the diet in such a way that there was a very real risk of cancer of the breast or bowel or heart disease as a result. The judge described Dr Barnard as being clearly a committed campaigner for his view that we would all be healthier if we were vegetarian or vegan. Professor Crawford said that there was unanimous agreement world-wide from over 60 expert committees that cardio-vascular disease was closely and causally related to a diet high in saturated fats. He said that there was also increasing evidence that a high intake of fat and a low intake of dietary fibre were associated with breast cancer and colon cancer. Although hard experimental evidence was not so far available for those cancers, the epidemiological evidence linking western diets and those cancers was compelling. Professor Campbell ended his evidence by saying that there was a causal relationship between overall diet, of which fat was a part and to which it was a contributor, and breast cancer and colon cancer. The same was especially so with regard to animal products.

The respondents' expert witnesses on these topics included Professor Wheelock, Professor Naismith, Dr Arnott and Professor Keen. References in the judge's judgment to Professor Wheelock's evidence included the following:

> "It was Prof. Wheelock's view that diet did play an important role in the development of the so-called degenerative diseases which included coronary heart disease. The Plaintiffs admitted that there was a considerable amount of evidence of a causal relationship between a diet high in saturated fat, and sodium, and obesity, high blood pressure and heart disease; and at the time when Prof. Wheelock gave evidence in July, 1994, the Defendants took the view that there was the end of the contest so far as heart disease was concerned.
>
> ...
>
> Prof. Wheelock thought that there was a high level of probability of a causal relationship between intake of saturated fat and cardiovascular disease. It was above the level of proof at which an ordinary person ought to "watch it".
>
> ...
>
> He actually went as far as to agree with Mr Morris's suggestion that he was "pretty certain.... that heart disease comes from high saturated fat content". He would "go along with that". But one had to consider whether a person smoked, the amount of exercise they took and, arguably, the amount of stress they were subjected to.
>
> So far as cancer was concerned "we may be pretty sure that diet is a factor in the development of ..... the different cancers.... but being able to pin point precisely what it is in the diet which is responsible for that is another matter altogether."
>
> Prof. Wheelock was sceptical of the proposed relationship between consumption of fat and cancer of the breast or cancer of the colon. There was some evidence suggestive of a relationship, but there was extreme difficulty in trying to establish a causal relationship of cause and effect and one would not be justified in concluding that there was a causal relationship. There was no reliable, credible, scientific literature which convincingly proposed such a relationship, in his view."

Professor Naismith's evidence included the opinion that the relationship between fat ingestion and the development of coronary heart disease was far from clear, largely because of many confounding variables, dietary, behavioural and environmental. He considered that the claim that McDonald's food promoted it was not supported by any scientific evidence. He ended his evidence by saying that one must consider diet and other aspects of life style as a whole and not look at individual components of the diet because one could be very misled by that.

Dr Arnott gave evidence that he did not know any epidemiological work which had established the cause of cancer of the breast or cancer of the bowel. In his view this suggestion remained extremely controversial. The studies suggested that a great deal more research was needed. He considered that there was no clear evidence that fat was responsible for the development of breast cancer. There was suggestive evidence that it might be over-nutrition in a general sense with the calories coming from other sources than fat. On page 336 of his judgment, the judge said this about Dr Arnott's evidence:

> "Mr Morris put to Dr Arnott a quote from the leaflet complained of that: "A diet high in fat, sugar, animal products and salt and low in fibre, vitamins and minerals is linked with cancer of the breast and bowel and heart disease".
>
> Dr Arnott thought that was a reasonable thing to say to the public; and at the time (September, 1994) the Defendants appeared to treat Dr Arnott's answer as the end of the matter on this part of the case. It was not the end of the matter because that single sentence was unspecific about the nature of the link and it did not reflect the meaning of the whole of the relevant parts of the leaflet.
>
> Dr Arnott's last word on diet and cancer of the breast and cancer of the bowel was that whereas he would say that if someone continued to smoke cigarettes in any substantial numbers he would create a very real risk for himself of getting cancer of the lung, he could not say someone taking a diet high in fat and low in fibre created a very real risk of getting cancer of the breast or cancer of the colon (bowel) because he did not think the evidence was there.
>
> Dr Arnott did say that he was convinced by the evidence associating a high intake of fat, particularly saturated fat, with coronary heart disease. He would say that there was "a good relationship between coronary artery disease and fat intake"."

The judge's consideration of these and other witnesses who gave evidence on the subjects of heart disease and cancer occupied about 90 pages of his single-spaced judgment. He then gave an assessment of the main expert witnesses. In the light of submissions made to us by the appellants in this appeal, it is appropriate to set out this assessment in full starting on page 342 of the judgment:

> "Dr Barnard had a wide knowledge of the copious literature on diet and disease, and no doubt his medical training gave him some additional insight into the research, but I found him an unsatisfactory witness. I agree with Dr Arnott's criticism that Dr Barnard failed to give a balanced presentation of the evidence for and against diet and components of diet as causes of cancers. Dr Barnard was far too adept at stressing what accorded with his long-held views and dismissing what did not. He showed no perception of the difficulties which clearly face the genuinely open-minded researcher

in this field. He took an over optimistic view of what some reports, like the U.S. Surgeon General's for instance, meant rather than noting what they actually said. Even then he overstated his case, casting blame on individual meals or at least intermittent meals or diet and likening them to the one bullet in Russian roulette. I thought that his example of some search parties finding what they were looking for, thereby enabling one to ignore not only those which found nothing, but also by inference at least, those which found evidence pointing in another direction, was seriously flawed and demonstrated his own flawed approach. His reference to the pearly gates, even if meant light-heartedly, was a serious blow to his credit as a genuine, expert witness, in my judgment. I would not accept his account of the effect of papers to which he referred unless those papers were available to be checked in full.

Prof. Crawford was a serious expert and an engaging man, but he was clearly a considerable enthusiast for his own theories which he saw in simple terms in a very difficult area of conflicting research. This left me wary. I was not concerned by his theory about the meat of domestic animals when compared with that of the wild animals which our distant ancestors fed on, in part; that ultimately boiled down to the difference in various kinds and quantities of fat in the animals' meat, and I see no reason to doubt Prof. Crawford's expertise on that. I am not, however, prepared to accept his theory of a common denominator between dietary fat, particularly saturated fat, as a cause of coronary heart disease and as a cause of cancer. It is pure theory, unsupported by any kind of investigation, in an area, medicine and particularly oncology, in which Prof. Crawford is not an expert, in my view. It did not make sense to Dr Arnott who is an expert in medicine and particularly oncology, and I am surprised that it has not been picked up with enthusiasm if it has any possible, apparent merit, despite Prof. Crawford's own explanation of why this might be. Indeed I am surprised that Prof. Crawford has not taken the theory farther than he has with his evidence in court and his mention of it at two conferences, if he sees it as a serious, new hypothesis in an area where any possible advance is very important.

Moreover, I could see no sound basis for Prof. Crawford's view that since the science of diet and cancer is where the science of diet and heart disease was many years ago, the former will come to the same conclusion as the latter in due course.

I thought that his arithmetical calculations, attempting to quantify the risk of heart attack or stroke from eating at Mcdonald's, were bizarre for a scientist.

Prof. Campbell is a distinguished man, but I was wary of what I saw as his personal enthusiasm for the benefits of a diet completely free of animal products and the harm done by even small additions of foods of animal origin to an otherwise all plant diet. He endorsed Dr Barnard's 1993 book "Food for Life". He is perfectly entitled to his personal views, of course, and they may have stemmed from his scientific enquiries,

but they made it difficult for me to be confident that the views which he expressed as an expert witness were soundly based on what he had found, particularly in China, in an area where there is so much room for interpretative judgment.

Prof. Campbell acknowledged genetics and other non-dietary life events so far as increased susceptibility to degenerative disease was concerned, but he seemed unwilling to accept them as real risk factors in their own right. His view that any death from degenerative disease before the age of eighty-five or ninety was premature put him on another planet from me. I thought that, for such a distinguished scientist in such an important field, he had a rather scattergun approach to his evidence on diet as a cause of "these diseases". Like Dr Barnard he seemed quite unable to attach any weight to material which might cast doubt on his own committed views.

I thought that Prof. Wheelock, Dr Arnott, Prof. Naismith and Prof. Keen were all balanced witnesses so far as the relationship between diet and heart disease and cancers of the breast and bowel was concerned. Dr Arnott, Prof. Naismith and Prof. Keen had no axe to grind or committed view one way or the other. Neither did Prof. Wheelock on this topic, in my view, although he was attacked for being in the pay of the Second Plaintiff. I thought that his evidence on diet and heart disease was particularly candid, and he made no bones about his view that diet was a factor in the development of the cancers.

All four witnesses showed a scientific approach to what had been proved and what was merely plausible hypothesis and to the difficulties in the way of proving that diet or particular elements of diet caused or significantly increased the risk of a particular disease. I thought that Dr Arnott who has devoted most of his professional life to enquiry into the causes of various cancers and to their treatment was the most impressive witness so far as diet and cancer was concerned. He made a strongly favourable impression. He was also the most naturally reserved when it came to the question of what was necessary for proof. I doubt that mere balance of probabilities is enough for his literally and metaphorically clinical mind when it comes to ascribing a cause or causes for an illness, especially when he is giving evidence in public. I believe that he was quite the opposite of Dr Barnard, Prof. Crawford and Prof. Campbell in this respect. I do not, however, consider that he was oversceptical so far as diet and the particular components of diet in the aetiology of disease were concerned, as his evidence on high dietary fat and heart disease showed.

As a general approach in this highly contentious area, I value the opinions of Prof. Wheelock, Dr Arnott, Prof. Naismith and Prof. Keen more than those of Dr Barnard, Prof. Crawford and Prof. Campbell, and I value the opinions of Dr Arnott above all other witnesses so far as the question of diet in the aetiology of cancer is concerned."

Having made this assessment, the judge considered the detail of some of the evidence and, on page 346 reached this conclusion about heart disease:

> "Putting all these factors together my own judgment is that a diet high in fat (including saturated fat) and animal products, and low in fibre, sustained over very many years, probably does lead to a very real, that is serious, risk of heart disease in due course.
>
> This conclusion does not help the Defendants to justify the meaning and message of this part of the leaflet because of my finding that it is not true to say that eating McDonald's food, more than just occasionally, might well make your diet high in fat and animal products and low in fibre. It does mean, in my judgment, that the small proportion of McDonald's customers who eat McDonald's food several times a week will take the very real risk of heart disease if they continue to do so throughout their lives, encouraged by the Plaintiffs' advertising to which I will come."

Thus the judge's conclusion, that the appellants' defence in relation to the heart disease part of the defamatory meaning failed, depended on his elaboration of the defamatory meanings of the words complained of upheld by the Court of Appeal by his insertion of the words "eating it more than just occasionally". We have held that the judge was not entitled to make this elaboration and that, on the contrary, the word "diet" imports the concept of people whose regular diet has the ingredients described as typical of McDonald's food. In our judgment, the unelaborated meaning as upheld by the Court of Appeal is, for heart disease, substantially justified by the judge's findings. There is no substantial difference, in our view, between a diet "sustained over very many years" or "throughout their lives" and the regular diet which we have held the meaning imports. In substance, the judge held that, if you eat enough McDonald's food, your diet may well become high in fat etc. with the very real risk of heart disease in due course. We consider therefore that the defence of justification should succeed for heart disease.

The judge's summary conclusions about cancer were in these terms from pages 349 and 350 of his judgment:

> "... at the end of the day I have come to the conclusion that the state of the evidence is too unclear for it to be proved, on balance of probabilities, that a diet high in fat,including saturated fat, and animal products, and low in fibre, even if sustained for very many years, leads to a significantly increased risk of cancer of the breast, let alone to a very real, that is serious or substantial, risk. It is possible that it increases the risk to some extent, but that is as far as the evidence takes me.
>
> ...
>
> In my judgment it has not been proved to the required standard of balance of

> probability, although it is strongly arguable, that even a lifelong diet which is high in fat, including saturated fat, and animal products, and low in fibre, significantly increases the risk of cancer of the bowel. In any event, the evidence fell short of showing that any increased risk amounted to a very real, that is serious or substantial, risk. It is strongly possible that a sustained diet which is high in fat, including saturated fat, and animal products, and low in fibre, increases the risk of cancer of the bowel, but that is as far as the evidence takes me."

The appellants mount a strong challenge to these findings. They submit that the judge was biased and wrong to prefer the evidence of Dr Arnott to that of witnesses who expressed different opinions. They submit that Dr Barnard and Professors Crawford and Campbell were eminent experts who had considerable authority in their fields and who had the support of the World Health Organisation and other bodies and authorities. Professors Crawford and Campbell had both worked in the field of diet, nutrition and cancer and it was inappropriate for the judge to prefer Dr Arnott, who was a cancer treatment expert whose direct experience in the causes of cancer was not great. They complain that the judge did not set out the evidence and expertise of Professors Crawford and Campbell at as great a length as that of some of the respondents' expert witnesses. They say that Professor Wheelock conceded much of the appellants' case, and so the respondents called Professor Naismith; but the judge gave too little weight to the concessions made by Professor Wheelock. They say that the respondents' experts were not independent, but were food industry spokespersons, and that accordingly the weight of their evidence should have been diminished. They submit that, given that the World Health Organisation and many other experts say that there is a causal link between a diet such as McDonald's and cancer, Dr Arnott's scepticism should have been insufficient to push the balance of probability the other way. They submit that Mr Cannon's evidence should have been taken more into account. He is not a scientist but he has extensive experience (which the judge, incidentally, carefully described on page 311 of his judgment).

The appellants emphasise that Dr Arnott himself had agreed in evidence given in September 1994 that the statement "A diet high in fat, sugar, animal products and salt and low in fibre, vitamins and minerals is linked with cancer of the breast and bowel" was a very reasonable thing to say if it was being directed to the public. He also agreed that there was a body of evidence and respectable organisations which supported the theory that some dietary factors may be involved in the development of breast and colon cancer. He agreed that the World Health Organisation considers there to be a link between obesity and cancer.

They submit that most of the witnesses agreed with what was said by the World Health Organisation and that such and similar organisations should have been regarded as authoritative. The judge referred to this, for instance, on page 251 of his judgment as follows:

> "Dr Barnard would agree with the conclusions of the 1990 World Health Organisation Report on Diet, Nutrition and the Prevention of Chronic Disease that: "Dietary factors are now known to influence the development of a wide range of chronic diseases, e.g.

coronary heart disease, various cancers, hypertension, cerebrovascular disease, and diabetes." He believed that most other physicians would agree with the WHO position. There had been calls for changes in diet including the reduction of fat in diet since a report of the National Cancer Research Council in 1982."

The appellants submit that WHO committees are convened as experts to study expert opinion and that the judge could not hope to make such an extensive investigation. Their reports and those of many other public bodies should be considered authoritative. They ask whether it can be seriously submitted that all these committees would be doing and saying what they do and say if the risks were not considered to be serious.

The appellants emphasise the terms of McDonald's own literature to which the judge referred on page 270 of his judgment:

"Dr Barnard thought that the Second Plaintiff's own publication "Good Food, Nutrition and McDonald's", which was produced in 1984 and 1985, simply stated what had been known for quite a period of time and was commonly accepted, when it said:

"In recent years, doctors and nutritionists have also become aware of other important factors in healthy eating. There is a considerable amount of evidence to suggest that many of the diseases which are more common in the western, affluent world - diseases such as obesity, diabetes, high blood pressure, heart disease, stroke and some forms of cancer - are related to diet. The typical western diet is relatively low in dietary fibre (roughage) and high in fat, salt and sugar.

Many countries have therefore published "Dietary Guidelines" - general recommendations concerning diet which are aimed at the whole population in order to prevent these diseases and to promote good health.

These recommendations suggest that on average, people should eat more foods rich in dietary fibre (cereal foods, vegetables and fruit), and less of the foods rich in fat, sugar and salt (sodium).

It is important to remember that although diet is an important contributory factor to these diseases, it is not the only one. Smoking, lack of exercise, an excess of alcohol, stress and many other factors also affect the incidence of the so-called diseases of affluence."

Dr Barnard would not take exception to any of that. He said that it seemed to convey more than suspicion but less than conclusive evidence that the diseases mentioned were caused by diet."

Mr Morris submits that this was written in terms which presuppose that diet is causative of the diseases mentioned. The appellants also emphasise that Professor Wheelock agreed with the publication as the judge recorded on page 313 of his judgment as follows:

> "[Professor Wheelock] agreed with what was said about dietary fat in the Second Plaintiff's Good Food, Nutrition at McDonald's in March, 1995 [*sc. 1985*], to the effect that: "Total fats, saturated fats and cholesterol in the diet are all thought to be linked to incidence of coronary heart disease, but the importance of dietary cholesterol has been largely discounted. The effects of the total amount of fats, particularly saturated fats, on increasing blood cholesterol is generally believed to be important. Hence, current advice is to reduce the total intake of fat in the diet but also to replace some of the saturated fats with unsaturated fats from vegetable oils and fatty fish."
>
> He also agreed with the dietary advice given in the October, 1995 [*sc. 1985*], Good Food, Nutrition at McDonald's to which I have already referred."

When asked about the links between diet and cancer, Professor Wheelock stated (Day 21/47): "As I say, the Doll and Peto is the best -- well, I have given it. They say that diet in total, that the role of diet in cancer, I think, is of the order of about 35 per cent, and that has everything to do with diet. It is not necessarily making a judgment on what it is in diet that is responsible for, or at least it makes a contribution towards the causation of cancer."

The appellants emphasise Professor Crawford's evidence to the effect that there is an association between a high fat diet and increased risk of cancer of the breast, colon and prostate. Professor Crawford said that this was evident from population studies and migration studies and from a large increase in heart disease and cancer in countries such as Japan where a modern western diet is fast replacing traditional diets. The appellants also stressed Dr Barnard's opinions, which we have already referred to in our summary of the judge's findings; Professor Campbell's opinions about diet and cancer; Jane Brophy's evidence about health education and Mr Cannon's references to research works and other publications. The appellants' written submissions contain a mass of particular references to details of the evidence, all of which we have carefully considered.

Mr Rampton made submissions in support of the judge's assessment of the evidence and the expert witnesses. He submits that, of all the experts, only Dr Arnott gave a fair and balanced picture of the evidence to date on cancer. By "evidence" he meant the learned papers considered. These were of much greater value, submits Mr Rampton, than the "utterances of public bodies" which he was "not sure were even persuasive". Dr Barnard was seriously selective. Professor Crawford did not pay attention to scientific papers and had interesting but implausible theories. Professor Campbell focused almost entirely on his own work in China. The vast bulk of the material was in learned papers referred to by Dr Arnott, not in government and other admonitory publications whose purpose was to warn against possibilities, not to make determinative pronouncements on causes. Dr Arnott had taken a full and fair view. Mr Rampton emphasised that the burden to establish justification was

on the appellants. He submits that, for cancer, the defence of justification was bound to fail, since "very real risk" could not be proved. There is suggestive evidence and it is sensible to be prudent, but it goes no further. Mr Rampton points to publications by Sir Richard Doll in 1988 and by the Committee on Medical Aspects of Food Policy (COMA) in 1991.

Mr Rampton first submitted that it cannot be said that the link between diet and cancer is causal in nature. He later modified that submission, sensibly in our view having regard to evidence such as that of Professor Wheelock, to a submission that a causal link could not be said to be established with the particular diet in issue in this case. The position is, submits Mr Rampton, that there is no more than a risk that in the future a causal link may become a probability. The leaflet however asserts that the very real risk is "accepted medical fact". On the judge's unvarnished meaning, the wording of the leaflet does not permit of qualification, such as "some doctors think", or uncertainty.

The judge was meticulous to consider and refer to in his judgment the qualifications and experience of each of the expert witnesses. He did this for, among others, Dr Barnard on pages 223-4, Professor Crawford on page 225, Dr Lobstein on page 227, Professor Campbell on pages 294-5 and Mr Cannon on page 311. His consideration of Dr Barnard's evidence on heart disease and cancer occupied no less than 30 pages of his judgment, Professor Crawford's 13 pages and Professor Campbell's 14 pages. He treated the experts called by the respondents in a similarly meticulous, but in no sense more favourable way. There is, in our view, no merit in the appellants' contention that the judge skated over expert and other evidence which they called and was biased in favour of evidence called by the respondents.
Dr Arnott's qualifications are described in this passage from the judge's judgment at p. 322:

> "Dr Arnott has been Consultant in Radiotherapy and Oncology at St Bartholomew's Hospital, London, for about twelve years now. For about ten years before that he was Senior Lecturer in Clinical Oncology at the University of Edinburgh. The remit of that particular appointment was to conduct research into a variety of treatments of cancer, but his work did have a clinical component, treating patients. His work at Barts is more treatment orientated. The radiotherapy involves treatment by X-rays and by the insertion of radioactive substances in tumours. His work has always involved a necessary concern for the aetiology of cancers, that is the science of the causes of cancer, which could take a variety of different forms including genetic predisposition, biological causes such as viral infections, chemical induction and physical causes such as exposure to radiation.
>
> Dr Arnott has particularly written on the subject of colo-rectal cancer and its pathology, aetiology and treatment. He has examined medical undergraduates and postgraduates and when he first gave evidence in July,1994, he was an examiner for the Royal College of Surgeons of Edinburgh."

Whether these qualifications and experience should be regarded on paper as more or less impressive than those of other experts who were called was not the most important matter for the judge to

consider. The important considerations were (a) whether Dr Arnott was appropriately qualified to express the opinions which he did, which he plainly was, and (b) the judge's assessment of the credibility and persuasiveness of each of the experts and of the content and force of their evidence. We have reproduced in full the passage from his judgment in which the judge made this assessment. It only has to be read to see that it was full, well reasoned, persuasive and fair. The judge heard all this evidence over many, many days and as part of the case as a whole. His assessment depended, not only on the intellectual content of the evidence on paper, but importantly on his judgment of the credibility and persuasiveness of the witnesses, both individually and taken as a body and matched the one with the other. We do not have that advantage and where there is, as we think, no flaw in the process by which the judge reached his conclusions, there is no basis for this court to disturb those conclusions. In the end, this part of the appellants' case is no more than a complaint that the judge preferred evidence which he found more persuasive rather than other evidence which he rejected. But that is a trial judge's function.

The judge's findings, in our judgment, went some way to justifying for cancer of the breast and bowel the defamatory meaning upheld by the Court of Appeal. "Very real risk" was not established. A possibly increased risk was established for breast cancer and a strongly possibly increased risk for cancer of the bowel. For cancer of the bowel, the appellants submit that "strongly possible" should be enough to justify the publication, especially in a scientific area such as this. They say that Dr Arnott did not say that it was wrong to say that there was a causal link between McDonald's food and cancer - only that it could not be established. They point here to admissions made by respondents' witnesses, especially Professor Wheelock. We are not persuaded by these submissions. On questions whether particular kinds of food cause cancer, there is a substantial difference between a possibility, even a strong one, that they may and a very real risk that they do. The "very real risk" sting was not justified. Accordingly the defence of justification for the cancer part of the defamatory meaning should fail but, since the appellants went some way along the road to success here, they would be entitled to the benefit of the principles stated by Neill L.J. in *Pamplin v. Express Newspapers* [1988] 1 W.L.R. 116 at 120 that, where a defence of justification fails, "nevertheless the defendant may be able to rely on such facts as he has proved to reduce the damages, perhaps almost to vanishing point".

The judge then considered the last part of the defamatory meaning, that is whether McDonald's knowingly deceived customers by claiming that their food is a nutritious part of any diet, despite knowing it to be very unhealthy as stated in the leaflet. He said that with the appellants' failure, as he had held, to justify the allegation that the respondents' food is very unhealthy in the way described in the leaflet, a large part of the sting had gone from the allegation that they deceived customers by claiming that their food is a useful and nutritious part of any diet. But he said that this last defamatory charge could be partially justified if any substantial deception in McDonald's nutritional information could be proved. The appellants' case was that both respondents put out material which gave nutritional information and advice, but whose dominant purpose was to paint McDonald's food as "nutritious" and of real benefit to the diet, in order to persuade the public to eat more of it, however much they ate already; and that this was misleading and deceived the public. The judge considered material from an advertising campaign in 1987 in the U.S. which Attorneys General then perceived to

be misleading. The judge found on the evidence that some of it was misleading. For instance, he considered that an advertisement concerning salt was misleading because it would lead consumers of the popular regular fries, regular cheese burger, 6-piece McNuggets and vanilla milk shake to believe that their salt content was down. He considered that a cholesterol advertisement must have left a lot of readers with the impression that McDonald's food met dietary recommendations, when in the judge's view it made it more difficult to avoid the government's guide lines "avoid too much fat, saturated fat". The judge then said on page 356 of his judgment:

> "... The overall impact of the advertisements together was quite clearly to give the consumer the impression that he would be doing himself a good turn, so far as his health and nutrition were concerned, by eating at McDonald's. The First Plaintiff must have known that and seen it as a selling point in the current mood of interest in healthy eating.
>
> In my view it needed a lot of gall to paint McDonald's food in such a beneficial light, to refer to salt and cholesterol recommendations in precise figures, to refer to recommendations to "avoid too much fat [and] saturated fat" but not to tell the consumer how to relate the total fat figures given in the charts to the recommendations for total fat and not to give saturated fat contents at all, save in respect of regular fries, thereby, in my view, completely sidelining the soundest criticism of McDonald's food, that a significant number of its menu items are high in fat and saturated fat. The fact that, as Mr Horwitz said, charts in stores gave full nutritional breakdowns, did not heal the partiality of the advertising campaign.
>
> Mr Horwitz said that any claim that McDonald's acted with an intent to deceive was false and totally unwarranted, but in my view anyone who knew something about nutritional issues at the time, including the perceived benefits of keeping down dietary fat, saturated fat, cholesterol and sodium, must have appreciated that the campaign stressed the lowered sodium and cholesterol in some items without drawing attention to the continuing high fat and saturated fat. It may be said that "that's advertising", but the advertisements purported to provide a public service by giving nutritional advice and information. Mr Horwitz did not purport to be an expert on nutrition. In fact none of the First and Second Plaintiffs' employees called to give evidence, were."

Having considered marketing material by the second respondents in the U.K. the judge said on page 361 of his judgment:

> "In my view the overall impact of the Plaintiffs' publications in the U.K. and the U.S., to which I have referred, was to create for the ordinary reader the impression that McDonald's food was positively good for him, not just in the sense of giving him some needed energy intake or some protein, some fibre, vitamins and minerals, but in the broader sense of being a positively useful contribution to a healthy diet. Why else

> should McDonald's go to such promotional lengths to trumpet dietary advice while describing their food in complimentary terms, including "nutritious" which must impute something more than "containing nutrients" which is true of every food.
>
> Both Plaintiffs must have known that this would be the impact of the material to which I have referred. Certainly Mr Rensi said so in his December,1986, letter. I am not prepared to say that there was not a real element of public benefit in the provision of nutritional information to which I have referred. But I consider that the way in which it was presented in the publications to which I have referred demonstrated its main purpose to be marketing, it pretended to a nutritional benefit which its food, high in fat and saturated fat, and sodium and low in fibre at the relevant time, did not match."

The appellants also relied on some of McDonald's television advertising, which the judge considered, before finally concluding on page 363 of his judgment:

> "... The various advertisements, promotions and booklets to which I have referred have pretended to a positive nutritional benefit which McDonald's food, high in fat and saturated fat, animal products and sodium, and at one time low in fibre, did not match.
>
> To this extent the last charge in this part of the meaning of the leaflet complained of has been partially justified."

Although the judge here said that the meaning of the last charge in this part of the leaflet was partially justified, this was in the context of his finding that the first part of the plea of justification had failed. The import of his judgment is that McDonald's promoted advertising which they knew to be misleading.

The appellants submit that, even if they did not fully justify the cancer part of the meaning, their defence should succeed in full because it was sufficient that they did establish their case for heart disease. They say that these are two degenerative diseases, each of which people fear and that fear of both is no greater than fear of one. We disagree. There is a sting in each of these subjects and justifying one does not neutralise the sting of the other. The sting that eating McDonald's food will bring the very real risk that you will suffer from cancer cannot be neutralized in this way.

The effect of our decisions taken with the findings of the judge which are favourable to the appellants' case and which the respondents do not challenge, is that, with the significant exception of the charge in relation to cancer, the defence of justification should succeed upon the "nutrition" aspect of the case.

Nutrition - further general considerations

Having reached the conclusion that the appeal fails on the subject of nutrition,for reasons already

given, we propose to consider the subject further having regard to the importance which has been attached to this part of the case and to the course which events have taken. Upon the meaning he determined, the judge was left with the task of determining a scientific truth upon a matter of great public importance, namely whether a particular diet presents a very real risk of cancer of the breast or bowel or heart disease. In determining that question, the judge had the advantage of evidence from many distinguished scientific witnesses. It took a very long time.

We acknowledge that in a defamation action it will sometimes be necessary for a judge to make a general scientific judgment, however complex the issues and evidence may be. The Court should not however lose sight of the fact that its task in a libel action is to decide the meaning of particular words in a particular document and what follows from that determination. That is especially important when one side positively welcomes a general and wide-ranging scientific enquiry and the other is not averse to it. It was accepted on behalf of the respondents (day 20) that they were content that the trial should be a wide-ranging investigation of the matters pleaded against them.

When the parties embarked upon the present action, nobody contemplated that it would last for 313 days or anything approaching that time. Very much shorter estimates were given, even when wide-ranging issues were raised in the opening statements of the parties. At a comparatively early stage, the respondents sought leave to amend their statement of claim in relation to two of the defamatory meanings which they alleged that the leaflet bore. One of them was at paragraph 4F in which it was alleged: "The said words in their natural and ordinary meaning meant and were understood to mean that the plaintiffs and each of them ... .

> F. Are deliberately misleading the public as to the nutritional value of goods they sell when they know full well the contents of an average McDonald's meal are linked to cancers of the breast and bowel and heart disease."

For the words at F, the respondents sought to substitute:

> "(1) Sell meals which cause cancer of the breast and bowel and heart disease in their customers.
>
> (2) Despite knowing that is an accepted medical fact, deliberately and dishonestly conceal that fact from the public by publishing nutritional guides which
>
> (a) suppress that fact;
>
> (b) falsely claim that their meals are a useful and nutritious part of any diet."

On 14th December 1994, the judge gave a reasoned ruling permitting that amendment. He stated that he would not "make a finding of the actual meaning of the relevant parts of the leaflet at this stage". He

added that "the leaflet is capable of bearing the meaning expressed in the draft amendment of paragraph 4F that ... they sell meals which cause cancer of the breast and bowel and heart disease in their customers". That ruling permitted the respondents subsequent submissions that the leaflet meant that any significant consumption of McDonald's products created a very real risk of cancer and heart disease. The message in the leaflet, it was and is submitted, was "don't eat McDonald's food again". If meaning is open to discussion, Mr Rampton submits, the leaflet must be read literally and on its face it reads "one meal is sufficient".

The judge went on to rule that he could "see no real difference in substance between paragraph 4F as presently pleaded and paragraph 4F as proposed if the words "linked with" in the original pleading are taken to mean "causally linked with". The judge went on to deal with the appellants' submission that they had never understood the original pleading to allege a causal link and that the respondents were attempting to "adapt their case" in the "light of the evidence which has been heard". It is not necessary to revisit those arguments and we mention them only to indicate that in December 1994, when considering the application to amend, the judge was well aware of the issues involved.

After a detailed consideration of the evidence which had already been given, the judge ruled that the appellants would suffer no prejudice or injustice if the respondents were given leave to amend paragraph 4F. He did not consider that "the recall of witnesses will add significantly to the strain which the defendants are already bearing in defending the plaintiffs' claim and pursuing their own counterclaim".

The judge added:

> "Finally, I feel strongly that it is in the public interest that the issue of whether a diet and McDonald's meals high in fat etc and low in fibre etc cause or lead to a risk of developing the relevant diseases should be tried out. In fact I believe that the Defendants and those who support them would be disappointed if this did not happen."

Thus long before the judge had determined the meaning of the relevant paragraph, he had committed himself to making a general scientific judgment upon a point of considerable public importance. We readily acknowledge the pressures upon the judge in what had become a high profile case but with great respect to him he should not have given that undertaking at that stage. It meant that, whatever meanings were eventually determined, the trial would include a comprehensive investigation into, and findings of fact upon, general scientific issues. But upon the appellants' submission, the expression in the leaflet that something is "accepted medical fact, not a cranky theory", would be taken by the ordinary reader, who would know something of the vicissitudes of medical opinion, to mean no more than that reputable public bodies or a reputable body of medical opinion hold a view. Upon that view of meaning, the judge would not have had to determine for himself which medical opinion was correct.

While holding ourselves bound by the meaning determined by the judge, and upheld by the Court of

Appeal, we have already expressed some sympathy for the submissions of the appellants along those lines. We do not consider it would be helpful in the circumstances if we were to express our own conclusion upon the meaning of the relevant paragraph, in context. We do also see the force of the respondents' submission that the expression "accepted medical fact" is unqualified and that the appellants could have protected themselves from action on this point by substituting for that expression words such as "a responsible body of medical opinion". The appellants' response is that the ordinary, reasonable, fair-minded reader with his knowledge of the swings of medical opinion with further research and experience, would readily read in the qualification. He or she would especially do so when knowing that a medical statement made in 1986 is to be judged by the medical knowledge available at the time of trial, which was in the event ten years later. Mr Rampton submits that the tide has turned against the causal link theory since the leaflet was published. That submission is not accepted by the appellants.

Because of the public importance of the health issues involved in the judge's decision of fact, we think it right to highlight some of the material on which the appellants rely. Its impact would of course be greater upon a more relaxed interpretation of the expression "accepted medical fact and not a cranky theory". It should be pointed out that the judgment is not short of references to the documents upon which the appellants seek to rely. The judge referred to many of them. Upon the judge's meaning however, the issue was whether the judge was entitled to accept Dr Arnott's conclusion (in the face of evidence from several witnesses to the contrary) upon the extent of the risks, which was based on his assessment of the learned papers (and his own experience of treating sufferers). There was no evidence that Dr Arnott had done research of his own. The question was not whether the appellants were entitled to make a statement upon the allegedly unhealthy character of McDonald's food in reliance upon a body of medical opinion.

We have no doubt that reference could properly be made to many of the documents cited in the judgment with the aim of establishing the existence of a responsible body of medical opinion. We refer only to documents mentioned in the judgment. McDonald's own 1985 document "Good food, nutrition and McDonald's", has already been cited in this judgment with its reference to the recommendation that people should eat less of the foods rich in fat, sugar and salt. In a book entitled "*Diet, Nutrition and Cancer*" published in 1982 by the Committee on Diet, Nutrition and Cancer of the United States Assembly of Life Sciences, National Academy of Science it was stated that "the committee concluded that of all the dietary components it studied, the combined epidemiological and experimental evidence is most suggestive for a causal relationship between fat intake and the occurrence of cancer".

The US Surgeon-General's report on "Nutrition and Health" published in 1988 by the US Department of Health and Human Services stated that "substantial epidemiologic and animal evidence supports the relationship between dietary fat and the incidence of both breast cancer (*Kakar and Henderson* 1985) and colon cancer (*Kolonel and LeMarchand* 1986) though considerable uncertainties remain to be resolved about these relationships". In a study in 1989, entitled "*Calorie Providing Nutrients and Risk of Breast Cancer*" Paulo Toliono and others conducted a "case controlled study" in Italy to investigate the role of diet in breast cancer. Published by the Journal of the US National Cancer Institute, it

concluded that the data suggested that "during adult life, a reduction of dietary intake of fat and proteins of animal origin may contribute to a substantial reduction in the incidence of breast cancer in population sub-groups with high intake of animal products".

The report of a WHO Study Group in 1990 entitled "*Diet, Nutrition, and the Prevention of Chronic Diseases*" stated that "an excess intake of fat has been linked to an increased incidence of cancers of the breast and colon". The report went on to state that "the evidence cannot be considered sufficiently strong to be termed causal but most expert groups now consider it prudent to reduce fat intakes in Western societies from the prevailing figure of about 40% energy towards the 20-30% figure". Under the heading "Intakes of Saturated Fatty Acids", the report stated that "these fatty acids may also be specifically involved in promoting cancers, particularly of the colon and breast, although the evidence remains inconsistent. The main justification for limiting saturated fatty acid intake should therefore be the prevention of coronary heart disease".

Of the more recent papers, the British Nutrition Foundation's Task Force on Unsaturated Fatty Acids concluded in 1992 that "on the basis of the evidence available from the experimental and epidemiological studies, it appears that a reduction in total fat intake may decrease the risk of developing cancer". A report of the Working Party to the Chief Medical Officer for Scotland dated December 1993 commented that" the adoption of the prudent diet ... should reduce the cancer burden but it would be unrealistic to expect tangible evidence for perhaps 20 years". The report also concluded that "evidence indicates that a diet that is low in total unsaturated fat, high in plant foods ... and low in alcohol, salt, pickled, smoked and salt preserved foods is consistent with a low risk of many of the current major cancers, including cancer of the colon, prostate, breast, stomach, lung and oesophagus". The judge set out both these references. (J.p.285).

The judge also quoted the "Ten Commandments" from the European Code Against Cancer (EAP). That is a ten point code approved by the European Community's Committee of Experts and claims to be "based on current knowledge about prevention and early detection". It is stated that the points "sum up the practical advice that is available to help *reduce our risks* of developing certain types [of cancer]. The fifth was "Frequently eat fresh fruit and vegetables, and cereals with a high fibre content". The sixth was: "Avoid becoming overweight and limit your intake of fatty foods".

It may be said that these references are selective, as indeed they are. Having considered them and others, however, we do not accept Mr Rampton's submission that the appellants can gain support from just one document. The link between diet generally and cancer is well established. Professor Wheelock, citing earlier authorities including Sir Richard Doll, stated that the role of diet in cancer was of the order of 35%. There is substantial support in the medical literature for a link between the particular diet in question in this case and cancers of the bowel and breast. There is also substantial evidence that no link has been established, some of it coloured by the understandable reluctance of scientists to accept a link unless and until a pathological mechanism is proved.

Significant admissions were made by the respondents' witnesses. Reference has been made to them

earlier in this judgment. Asking the question he did, the judge was entitled to dismiss Dr Arnott's statement, referred to at p.336 of his judgment, in the way he did. But in our view Dr Arnott's evidence that the passage on nutrition in the leaflet quoted to him was "a reasonable thing to say to the public" was important when considering the likely impact of the statement upon the ordinary reader.

In seeking to demonstrate the current state of knowledge on the link between the diet in question in this case and cancer of the bowel and breast, Mr Rampton placed considerable reliance upon the article by Mr M J Hill entitled "*Diet and Cancer: A Review of Scientific Evidence*" which appeared in the European Journal of Cancer Prevention in December 1995. Mr Hill is Chairman of the European Cancer Prevention Organisation. In his "overall conclusions", Mr Hill stated: "It is important that any advice given on dietary modifications for cancer prevention is solid and likely to be long lasting, thus reducing the risk of the COMA working group on diet and cancer being forced to alter advice in the light of subsequent evidence". Later he stated that:

> "From this analysis of the currently available scientific literature on diet and cancer, it is clearly debateable whether the reliability of any conclusions is sufficient to justify advice being given to the public. Thus the overall conclusion must be that only the two following recommendations might be considered justifiable:
>
> 1. Maintain a healthy body weight: many cancers as well as other diseases with a high mortality risk are associated with overweight. Avoidance of obesity may decrease the risk of cancer at a number of sites and is unlikely to increase the risk of cancer at any site. Obesity can be avoided by increased exercise, especially in young people, since maintenance of a healthy body weight should ideally be started from an early age.
>
> 2. Eat plenty of raw and preserved fruit, salads and vegetables: there is evidence to suggest that these may be protective against a wide range of cancers and are not positively related to any although much of the evidence is obtained from observational studies.
>
> There are theoretical and practical reasons for suggesting dietary advice such as this should be targeted particularly at the young.
>
> As the results emerge from current intervention studies, it is likely that it will be reasonable to advise the general public to eat decreased amounts of total fat and saturated fat as is consistent with the specific UK Government Health of the Nation White Paper targets, and to eat greater amounts of cereals and complex carbohydrates. That point has probably already been reached for groups of people at high risk of cancer (such as first degree relatives of patients with cancer of the breast, colorectum or endometrium) in whom the balance of risk and benefit is tilted toward benefit."

These conclusions support the view that it is debatable whether advice should be given to the public but Mr Hill goes on to conclude that the point has already been reached where advice to eat decreased amounts of total fat and saturated fat should, because of the cancer risk, be given to groups of people at high risk of cancer. Those groups, as defined, inevitably include a large number of people.

Plainly there is force in Mr Rampton's submission that scientists will not accept the claimed risk until a pathological mechanism is established and tested. The question which Mr Hill poses is however in our view more relevant when considering what the ordinary reader would make of a leaflet such as that complained of. Reading a reference to medical fact, he or she is likely to want to know the medical profession's view as to the extent of the risk. Mr Hill undoubtedly has reservations but concludes that, for many people, advice to eat decreased amounts of total fat and saturated fat is appropriate in the context of cancer prevention. Mr Hill's study does not in our view establish the proposition that there is insufficient evidence responsibly to warn the public that there may be a causal link between the diet under consideration in this case and cancer of the bowel and breast. On the contrary, Mr Hill takes the view that a warning is appropriate for a significant proportion of the population. Moreover, his concern about a link between obesity and cancer fits with the sixth of the ten point "European code against cancer". "Avoid becoming overweight and limit your intake of fatty foods". The link between fatty foods and obesity is obvious.

In our view, a warning of the relevant risks, in appropriate terms, would be justified on the evidence. On the judge's meaning, however, upheld in the Court of Appeal, he was entitled upon the evidence to reach the conclusion that the statement actually made in the leaflet was not justified. It does not follow from this Court's dismissal of the appeal on this point that the Court has come to a positive conclusion that the risk of cancer of the bowel or of the breast is in the circumstances no more than minimal. The judge himself rightly acknowledged (J.p.350) that "The overall picture still remains unclear" and that it is "strongly arguable that even a life long diet which is high in fat, including saturated fat, animal products, low in fibre, significantly increases the risk of cancer of the bowel". He also acknowledged (J.p.349) that it was possible that the diet "increases the risk [of cancer of the breast] to some extent". We agree with the judge that the overall picture remains unclear. However, on the evidence, warnings given to the public about the real possibility of a causal link between a diet high in "total fat and saturated fat", and cancer of the bowel and breast, provided they are expressed in appropriate language, could not form the basis for defamation proceedings and we did not wish to leave this part of the case without expressing that view.

Part 12

Food Poisoning

In a box with the heading in capitals "WHAT'S YOUR POISON?", the leaflet contained the following text:

> "MEAT is responsible for 70% of all food-poisoning incidents, with chicken and minced meat (as used in burgers) being the worst offenders. When animals are slaughtered, meat can be contaminated with gut contents, faeces and urine, leading to bacterial infection. In an attempt to counteract infection in their animals, farmers routinely inject them with doses of antibiotics. These, in addition to growth-promoting hormone drugs and pesticide residues in their feed, build up in the animals' tissues and can further damage the health of people on a meat-based diet."

Earlier, when dealing with the exploitation of children through advertising, the leaflet referred to the way in which McDonald's promoted the consumption of meals as a `fun event' for children and added:

> "all the gimmicks and routines with paper hats and straws and balloons hide the fact that the food they're seduced into eating is at best mediocre, at worst poisonous, and their parents know it's not even cheap."

The judge acknowledged that, the text in the box "taken literally and on its own, without regard to its context, was certainly capable of bearing the inoffensive meaning" contended for by the appellants, namely that there was an additional risk of food-poisoning inherent in a meat-based diet. Mr Rampton accepted that in a different context the paragraph could be quite unexceptionable as containing generalities. Three of the four sentences could not be challenged. The appellants submit that to categorise generalised criticisms such as these as libellous was an unjustified restriction upon freedom of speech.

However the judge did not accept that the text in the box should be approached in that way. He said in his judgment at page 470:

> "... the text in the box must be taken with the description `at worst poisonous' and the headline `What's your poison?' to get their combined message, and in my judgment the message and meaning of the leaflet is that the First and Second Plaintiffs sell meat products which, as they know, expose their customers including children, to whom they promote their meals, to a serious risk of food poisoning and of poisoning by the residues of antibiotic drugs, growth-promoting hormone drugs and pesticides.

No other kind of poisoning is referred to in the leaflet.

McDonald's could hardly have sold as many meat products as the ordinary reader of the leaflet must know that they have, without being well aware of any serious risk of food poisoning or residue poisoning that existed."

He also concluded that the ordinary reader of this leaflet would take what was said to refer to McDonald's. The meaning which he had identified went beyond that pleaded by McDonald's, in that they did not rely upon the charge of poisoning by drug or pesticide residues, but he found that there was a common sting of a serious risk of food-poisoning by McDonald's food as alleged in the text. In consequence the appellants were entitled to rely upon any serious risk to the health of McDonald's customers which they could prove to arise from drug or pesticide residues in McDonald's food, as well as from food poisoning as normally understood, in justification of the charges. However, the judge ruled that nothing in the leaflet could be taken as a reference to bovine spongiform encephalopathy (BSE), nor was there any suggestion of a risk to health from the use of food additives.

After reviewing the evidence called by way of justification, he concluded that the risk of food poisoning (which he defined as any gastro-intestinal infection by food-borne organisms) from eating McDonald's food was minimal:

"From time to time people will no doubt get food poisoning from eating McDonald's foods but the risk is very small indeed." (p. 517)

He also found that there was no evidence that antibiotic or growth promoting hormone drug residues had actually been found in McDonald's food and no evidence that pesticide residues had been found in their food. There was, he said, no suggestion, let alone any evidence, that any customer had been shown to have been harmed by drug or pesticide residues. Consequently he concluded that the charge as contained in the meaning he had found was not justified and was not true.

The appellants grounds of appeal on this topic were as follows:

"39. The trial judge erred in his findings as to the meanings of the words complained of in that the following meanings found by him were not the natural or ordinary meanings of the said words:

(a) That the Plaintiffs promote the consumption of meals at McDonald's as a fun event when they know full well that the contents could poison the children who eat them.

(b) That the First and Second Plaintiffs sell meat products which, as they must know, expose their customers including children, to whom they promote their meals, to a serious risk of food poisoning and of

poisoning by the residues of antibiotic drugs, growth-promoting hormone drugs and pesticides.

(c) Further that the judge erred in ruling that the comment ‘the food they're seduced into eating is at best mediocre, at worst poisonous' could only refer to food poisoning.

40. Further or alternatively the trial judge wrongly relied upon satirical cartoons, graphics, colloquialisms and/or the supposed context to alter the clear natural and ordinary meaning of the words complained of.

41. Further or alternatively, when determining the meaning of the words complained of, the trial judge failed to put the words complained of into their proper context. Without prejudice to the generality of the foregoing, the trial judge in particular failed to distinguish at all between the criticisms of and comments about McDonald's and the criticisms and comments about the meat industry and modern agricultural practices in general.

42. Further or alternatively, the trial judge erred in his failure to recognise the existence of comment in the words complained of.

43. Further or alternatively, the trial judge erred in not finding that the natural or ordinary meaning of the words complained of were either fully justified or fair comment on the basis of the overwhelming weight of the evidence presented at trial. For example, it was clearly established (based on the trial judge's findings, admissions by Plaintiffs’ representatives in the witness box or in official company documents, by expert testimony, and/or by the evidence of independent witnesses of fact) that:

- Meat, especially minced beef and chicken, is responsible for the majority of food poisoning incidents

- McDonald's have been found to be responsible for a number of serious outbreaks of food poisoning

- A high percentage of McDonald's raw meat products (including chicken and beef) contain pathogenic bacteria (including salmonella, campylobacter and Ecoli 0157) and this is due to rearing, slaughter and manufacturing processes which magnify and spread pathogenic organisms at each stage

- the risk of undercooking is endemic in the fast food system. In particular at McDonald's because of the speed of the operation.

- McDonald's cooking time/temperatures for their beef products have been raised since 1990 (the time of the alleged libel) yet still don't conform to minimum standards as recommended by the statutory authorities - modern agricultural and husbandry practices have resulted in the widespread and routine use of pesticides, and of antibiotic and hormonal growth promoters and therapeutic agents, leading to public and statutory bodies' concerns over risks to public health.

44. He further erred in excluding areas of evidence as irrelevant to any disputed issue, such as BSE and McDonald's use of additives."

A number of the matters raised in the grounds as to meaning are common to several topics and have already been covered earlier. Of the remaining grounds, some were particularly relied on by the appellants in their written and oral submissions. It is helpful to summarise those upon which reliance is particularly placed.

The appellants stressed four main grounds of appeal. First, they assert that the text in the box in the leaflet is not referable to McDonald's. Secondly, and linked with the first point, they say that on its true meaning these passages are not defamatory. The arguments on these two points overlap. Thirdly, it is said that the judge was wrong to exclude from his consideration evidence about BSE and additives. Finally, they argue that if this part of the leaflet is defamatory, then on the evidence it was justified. We will take these grounds of challenge in that order.

It is contended that the text in the box cannot be taken to refer to McDonald's. There is no mention of them in the text, which simply sets out some statements of a general nature about meat and the meat industry. Those statements do not criticise even the burger industry as such, quite apart from not mentioning McDonald's specifically. The reference in the earlier passage about McDonald's food being "at worst poisonous" should not be seen as a forerunner of the text in the box: it means that eating such food gives rise to a risk of degenerative diseases, not to one of food-poisoning and refers back to earlier paragraphs in the leaflet. Moreover, it was a "worst case scenario" and not an allegation of a frequent occurrence.

It would in our judgment be wrong to treat the text in the box in isolation from the rest of the leaflet. The ordinary reader would not do so. He or she would read this part in the context of the leaflet as a whole, including the title page "What's Wrong with McDonald's?" What follows that title page are a large number of references to McDonald's, some passages dealing solely with McDonald's. The introductory paragraph concludes with the words:

"The more you find out about McDonald's processed food, the less attractive it becomes, as this leaflet will show. The truth about hamburgers is enough to put you off them for life."

The ordinary reader would in our judgment take the text in the box as referring to McDonald's, especially given the express mention of "chicken and minced meat (as used in burgers) being the worst offenders." He or she would regard this passage as a further attack on McDonald's and as indicating a further reason for not eating their food.

The presence of the earlier paragraph, with its reference to "at worst poisonous", and clearly referring to McDonald's, reinforces that conclusion. Like the judge, we do not believe that that earlier passage can be read as referring to a risk of degenerative disease. He stated that:

> "No ordinary reader of the leaflet ... would think of the high fat or high sodium or low fibre content, for instance, of food as `poisonous', even if it led to a risk of degenerative disease."

We agree. The word "poisonous" is one in normal usage as part of the English language. It does not bear the meaning suggested by the appellants. Moreover, it links naturally with the heading to the box "What's Your Poison?" and with the references in the text in the box to food-poisoning incidents. Having read the words "at worst poisonous", the reader will treat the contents of the box as particulars of that allegation. Therefore the earlier sentence with its words "at worst poisonous" supports the finding that the text in the box is referring to McDonald's. When that is the role played by the phrase "at worst poisonous", it matters not whether it is seen as comment rather than as a statement of fact. We conclude that the text in the box, taken in context, does refer to McDonald's. Consequently this first argument advanced by the appellants cannot succeed.

Next, they assert that, even if referable to McDonald's, this part of the leaflet is not defamatory. The text does not allege that McDonald's *knowingly* serve food which causes food poisoning. It merely contains factual statements about the risks associated with eating such food. For statements about the goods sold by a trader to be defamatory, they must allege that he knowingly sells adulterated goods: *Broomfield v. Greig* (1868) 6 M. 563. Furthermore the judge was wrong in finding that the meaning of this part of the leaflet was that McDonald's meat products exposed customers to a *serious* risk of food poisoning, when the passage in the box merely refers to the proportion of food-poisoning incidents caused by meat. The words in the box refer to potential risks and do not claim that the risk will materialise at McDonald's. They would be read as doing no more than promoting vegetarian diets. If context is to be considered, the words in the box should be considered in the context of the last page of the leaflet in which a vegetarian diet is advocated.

We do not accept that allegations about the goods sold by a trader have to amount to a charge of dishonesty before they can be defamatory. While it is true that they will not be defamatory merely because they damage his business, without injuring his reputation (*Ratcliffe v. Evans* [1892] 2 Q.B. 524), there are other ways in which that reputation may suffer without there being a charge of dishonesty. An allegation of incompetence in the conduct of his business may well be defamatory and has been held to be so in a number of cases, as was recognised in *Griffiths v. Benn* (1911) 27 T.L.R.

346. In the *South Hetton* case [1894] 1 Q.B. 133, Lord Esher M.R. emphasised at pages 138-9 that a statement about goods sold by a trader might be defamatory of the trader if it was "... such as to import a statement as to his conduct in business." He gave the example of a wine merchant, about whose wine a statement had been made:

> "If the statement were so made as to import that his judgment in the selection of wine is bad, it might import a reflection on the conduct of his business, and show that he was an inefficient man of business. If so, it would be a libel."

That passage was quoted with approval by the Court of Appeal in *Drummond-Jackson v. British Medical Association* [1970] 1 W.L.R. 688. There was therefore no necessity for the words in the present case to be shown to imply dishonesty by McDonald's.

In any event, the conclusion reached by the judge that the words meant that McDonald's must know that they were selling such meat products as would expose customers to a serious risk was a proper one in the circumstances. Given the scale of McDonald's trading, of which the ordinary reader would know, one would expect them to be aware of such a serious risk of food poisoning or residue poisoning if such a risk existed. Moreover, that meaning would be strengthened by the earlier reference to "at worst poisonous", already considered. It comes in a paragraph which speaks of paper hats, straws and balloons "hiding the fact" that the food children are seduced into eating is at best mediocre, at worst poisonous. The clear implication there is that such "gimmicks" are used to conceal the dubious nature of the food products, and that provides support for the judge's conclusion that the food-poisoning text meant that McDonald's knew that there was the risk to which he referred.

The judge's finding that the words meant that there was a serious risk of food poisoning and of residue poisoning was based not on the text within the box in isolation but on the context. He noted the heading to that box: "What's Your Poison?", as well as the earlier reference to "poisonous". The text also refers to chicken and minced meat as used in burgers being the worst offenders, and it ends with a reference to drug and pesticide residues "further" damaging the health of people on a meat-based diet. We accept that the question "what's your poison?" is sometimes facetiously posed when asking a drinking partner what he or she wants to drink, but its use in the present context cannot be dismissed as a humorous comment lacking real meaning. It was directly related to allegations of food-poisoning which immediately followed it. We have concluded that the judge's finding that the words meant that there was a serious risk of food-poisoning and residue poisoning was soundly based, once the words are read in context. In short, he was right in the meaning which he found and that meaning was a defamatory one.

The appellants then complain that he was wrong to prevent them from seeking to justify these statements by evidence about BSE and food additives. They contend that these are ways in which McDonald's products, including of course the beef burgers, could be shown to be poisonous, and that, even though there is no mention in these passages of BSE or additives, they should have been allowed to rely on evidence of such ways.

The judge ruled specifically on BSE during the course of the trial, holding that it was not a legitimate subject of evidence because there was no statement in the leaflet which could fairly be taken to be a reference, express or by implication, to BSE. He noted that there was no mention of it by name or by description, which was not surprising since according to the appellants' witness on this subject BSE had not been diagnosed before 1986, which was when the leaflet was probably written. (Mr Gravett said that it was handed out on the World Day of Action in October 1986.) The references to "food poisoning" pointed, he said, to bacterial infections, which would not include BSE, while the word "poisonous" in the phrase "at worst poisonous" was a reference to the contents of the "What's Your Poison?" box or perhaps arguably to the conditions mentioned under "What's so unhealthy about McDonald's food?". In that latter case the reference would be to cancers of the breast and bowel and to heart disease, not to BSE.

In the same way the judge observed that there was no reference to food additives in the box dealing with food poisoning and residues poisoning. The only place in the leaflet which could be taken to refer to such additives was a reference in an earlier section of the leaflet to the use of chemicals to keep a lettuce leaf the right colour and crispness for the required length of time. But the judge noted that there was no suggestion that any risk to health resulted from this. In consequence he concluded that additives had no relevance to any issue in the case.

We can find no flaw in his reasoning in respect of BSE and additives. Neither is expressly mentioned in any part of the leaflet dealing with food-poisoning or damage to human health, nor can either of them be brought in by implication. However much the appellants may have wanted to raise these matters, they simply were not relevant to the issues in this case. The judge pointed out at page 474 of his judgment, that the trial "was not a public inquiry into the safety or otherwise of McDonald's food or of meat eating generally. It was a trial of claim and counterclaim relating to the contents of this leaflet." There is no valid basis for challenging his approach on this aspect of the trial.

As to justification, the appellants argue that the judge should have found on the evidence that there was a serious risk of food poisoning or poisoning from drug and pesticide residues, at least for some customers. The risk was acknowledged in government guidelines. The appellants emphasise one of the judge's findings, that "from time to time meat products have been undercooked at the Second Plaintiff's restaurants." He went on to say:

> "I see no reason why it should be any different at the First Plaintiff's restaurants, mostly because of pressure to produce large quantities of meat quickly at busy times. The risk of this happening is endemic in the fast food system, whatever protective measures the Plaintiffs put in place".

The significance of this, say the appellants, is that meat will often in its raw state carry organisms such as salmonella, E.coli 0157, campylobacter and others, which may cause disease when consumed by humans. The extent of such contamination will depend on slaughterhouse practices, but there was

evidence that with meat from chickens supplied to McDonald's there was salmonella present in about 25 per cent. A crucial defence against food poisoning lies in the proper cooking of meat. A number of McDonald's witnesses gave evidence to this effect. Therefore the finding that there is an endemic risk of undercooking in McDonald's fast food system demonstrates that there is a real risk of food-poisoning from eating McDonald's products. That finding was borne out by substantial evidence from former employees of McDonald's about undercooked burgers and chicken. As for pesticide and other residues, the appellants rely on the judge's acceptance that some degree of pesticide residue may be retained in beef and may pass to human tissue, about which there is some public concern. The appellants also point to evidence about the use of antibiotics in the feed of chickens and pigs. There were risks at each stage of the process and the risks were cumulative.

We deal first with the issue of food-poisoning, in the sense used by the judge, that is to say gastro-intestinal infection by food-borne organisms. There is no doubt at all that the judge accepted that there was some degree of risk of food-poisoning from eating food produced by McDonald's. Mr Rampton accepted that it would have been true to say that there was a minimal risk. The judge concluded that there was some risk of contamination of food by such organisms all through the food supply pipeline - at slaughterhouses and subsequently. He also found that on occasions at busy times undercooked minced meat products were served, with a resulting risk of food poisoning. However, he rightly observed that all this begged the question of the scale of the problem. On that, he found that the incidents of food poisoning attributable to eating McDonald's food were very few indeed when compared with the vast number of meals sold by both respondents over the years. For our part we note that by the end of 1995 there were 650 McDonald's restaurants in Britain and a total worldwide of some 18,400, with sales of nearly 30 billion U.S. dollars. Dr. North, one of the appellants' witnesses, spoke of 500 million meals, or more accurately, till transactions a year. The judge's reference to the vast number of meals sold was obviously correct, and it does provide the context for any assessment of the scale of food-poisoning incidents and the risks involved.

The judge considered the evidence with care. He found that the number of occasions when undercooking occurred was very small, and made the further point that even then the risk of food poisoning was small

> "... because of the need for a sufficient number of food poisoning organisms in the part of any undercooked product which the customer actually goes on to eat and because of the human body's protective systems."

Hence the judge's conclusion that the risk of food-poisoning from eating McDonald's food was minimal.

The judge's approach to the assessment of this evidence was an entirely proper one. Risk-assessment in an area such as food-poisoning cannot be conducted without regard to the total volume of meals served and consumed. The general public is aware that there is a degree of risk in eating various kinds of food, but it is the actual degree of risk which is relevant. That can only be assessed by setting the

number of food poisoning incidents in the context of the number of meals served and assessing the effectiveness of the precautions taken. The judge was justified in having regard to the total volume of meals served by the respondents when he was dealing with this topic.

Moreover, it is to be observed that the appellants' witness, Dr. North, did not criticise the time or temperatures at which McDonald's food products would be cooked if its systems were adhered to, though as the judge said it would have been easy for him to say that they were inadequate if that was what he thought. We also see considerable force in the judge's view that, given the scale of McDonald's operations in Britain and elsewhere, if there was a serious risk of food-poisoning from eating their products, they would have got a reputation for gastric problems. We can find no reason to criticise the judge's conclusion that the risk of food poisoning was very small indeed.

As for pesticide and drug residues, the judge considered the evidence and concluded at page 526:

> "With all these matters in mind I find that the message and meaning of the leaflet that the First and Second Plaintiffs sell meat products which, as they must know, expose their customers, to whom they promote their meals, to a serious risk of food poisoning and poisoning by the residues of antibiotic drugs, growth-promoting hormone drugs and pesticides, is not justified. It is not true."

The judge found the appellants' witness, Dr.North, an unsatisfactory witness on the presence and effects of pesticide residues.The judge was entitled to make that finding. There were dramatic changes in the evidence which he gave on the subject between his original witness statement and his later evidence, and he did not have neurological expertise. Nor did he support a case that there was a risk of antibiotic or hormone drug residues harming the health of McDonald's customers. In any event, there was no evidence of such residues being found in McDonald's food, any more than there was of pesticide residues having been found. In those circumstances, the judge was fully entitled to find that the appellants had failed to show a serious risk of poisoning from such substances.

His conclusion that the appellants had not justified the allegation that there was a serious risk of food poisoning and poisoning from drug and pesticide residues cannot be faulted. On the evidence the risk was minimal, as he himself said.

Part 13

Employment

Introduction

The appellants' grounds of appeal relating to employment were:

> "45. The trial judge erred in his findings as to the meanings of the words complained of in that the following meanings found by him were not the natural or ordinary meanings of the said words:
>
> (a) That the First and Second Plaintiffs are only interested in recruiting cheap labour and exploit disadvantaged groups, women and black people especially, as a result.
>
> 46. He further erred in ruling that: it is defamatory of a commercial, trading company to say that it pays its workers low wage. It is more defamatory to say that it is only interested in recruiting cheap labour and that it exploits disadvantaged groups, women and black people as a result. It is also and separately defamatory to say that it provides bad working conditions, but the real, general sting of this part of the leaflet is the combination of low pay and bad working conditions: low pay for bad conditions.
>
> 47. He further erred in ruling that it isn't defamatory of a corporation to say simply that it is "anti-union" but that it is clearly defamatory to say that the Plaintiffs have a policy of sacking employees who have union sympathies.
>
> 48. Further or alternatively the trial judge wrongly relied upon satirical cartoons, graphics, colloquialisms and/or the supposed context to alter the clear natural and ordinary meaning of the words complained of.
>
> 49. Further or alternatively, when determining the meaning of the words complained of, the trial judge failed to put the words complained of into their proper context. Without prejudice to the generality of the foregoing, the trial judge in particular failed to distinguish at all between the criticisms of and comments about McDonald's and the criticisms and comments about the catering industry in general.
>
> 50. Further or alternatively, the trial judge erred in his failure to recognise the

existence of comment in the words complained of.

51. Further or alternatively, the trial judge erred in not finding that the natural or ordinary meaning of the words complained of were either fully justified or fair comment on the basis of the overwhelming weight of the evidence presented at trial. For example, it was clearly established (based on the trial judge's findings, admissions by Plaintiff's representatives in the witness box or in official company documents, by expert testimony, and/or by the evidence of independent witnesses of fact) that:

- workers in catering do badly in terms of pay and conditions.

- McDonald's pay is low even compared to the already low average wage in a low-paid industry (catering), and some workers have even been illegally underpaid

- McDonald's profits depend on the labour of young workers (two thirds of their workers are under 21)

- Many youth, women and black people, who are generally considered to be sections of society facing various forms of general discrimination, have restricted choice in the labour market and therefore end up working for low paying employers like McDonald's

- Regarding wages, McDonald's main concern is cheap labour rather than some claimed benevolent or charitable motive as in their stated opinion of 'providing jobs for school leavers regardless of sex or race'

- McDonald's store management are under pressure to meet strict labour cost percentage targets on a daily or even hourly basis, and continually and obsessively monitor such costs. The balance lies with the saving of a few pounds rather than the interests of the individual worker.

- McDonald's workers have an exceptionally high turnover rate, and its not unusual for workers to quit after a few weeks

- their workers generally have no guaranteed hours and no guaranteed employment or conditions of employment, except where statutory protection applies

- the work is hard, sometimes noisy and hectic, with occasionally long and extended shifts including late at night, breaks are very often inadequate and

unreliable (often unlawfully short), and workers can be compulsorily sent home or kept on against their wishes by management

- workers are under pressure to 'hustle' (a company culture condemned by the Health and Safety Executive) despite being in a hot, kitchen environment, and the risk of injury is ever present

- management power is autocratic and workers have no third party representation in the case of individual or collective grievances

- McDonald's is strongly opposed to any idea of unionisation of crew in their stores, and their contract of employment contains unlawful and/or repressive clauses outlawing (with the threat of disciplinary action) any overt union-type activity on the premises, and outlawing workers contacting a Trade Union to discuss in-store conditions (deemed 'gross misconduct', a 'summary sackable offence'). This is a clear policy of preventing unionisation by getting rid of pro-Union workers."

The words in the leaflet relating to Employment of which McDonald's complained began with a headline, "What's it like working for McDonald's?"

After the headline, the text complained of reads as follows:

"There must be a serious problem: even though 80% of McDonald's workers are part-time, the annual staff turnover is 60% (in the USA it's 300%). It's not unusual for their restaurant-workers to quit after just four or five weeks. The reasons are not hard to find.

NO UNIONS ALLOWED
Workers in catering do badly in terms of pay and conditions. They are at work in the evenings and at weekends, doing long shifts in hot, smelly, noisy environments. Wages are low and chances of promotion minimal.

To improve this through Trade Union negotiation is very difficult: there is no union specifically for these workers, and the ones they could join show little interest in the problems of part-timers (mostly women). A recent survey of workers in burger-restaurants found that 80% said they needed union help over pay and conditions. Another difficulty is that the 'kitchen trade' has a high proportion of workers from ethnic minority groups who, with little chance of getting work elsewhere, are wary of being sacked - as many have been - for attempting union organisation.

McDonald's have a policy of preventing unionisation by getting rid of pro-union

workers. So far this has succeeded everywhere in the world except Sweden, and in Dublin after a long struggle.

TRAINED TO SWEAT

It's obvious that all large chain-stores and junk-food giants depend for their fat profits on the labour of young people. McDonald's is no exception: three-quarters of its workers are under 21. The production-line system deskills the work itself: anybody can grill a hamburger, and cleaning toilets or smiling at customers needs no training. So there is no need to employ chefs or qualified staff - just anybody prepared to work for low wages.

As there is no legally-enforced minimum wage in Britain, McDonald's can pay what they like, helping to depress wage levels in the catering trade still further. They say they are providing jobs for school-leavers and take them on regardless of sex or race. The truth is McDonald's are only interested in recruiting cheap labour - which always means that disadvantaged groups, women and black people especially, are even more exploited by industry than they are already."

After considering the meanings pleaded by the respondents and discussing the text, the judge concluded:

"In my judgment this part of the leaflet bears the meaning that the First and Second Plaintiffs pay their workers low wages and provide bad working conditions, helping to depress wages for workers in the catering trade in Britain; that they are only interested in recruiting cheap labour and exploit disadvantaged groups, women and black people especially, as a result; and that they have a policy of preventing unionisation by getting rid of pro-union workers."

The judge then said:

"In my judgment, it is defamatory of a commercial, trading company to say that it pays its workers low wages. It is more defamatory to say that it is only interested in recruiting cheap labour and that it exploits disadvantaged groups, women and black people as a result. It is also and separately defamatory to say that it provides bad working conditions, but the real, general sting of this part of the leaflet is the combination of low pay and bad working conditions: low pay for bad conditions.

The allegation that the Plaintiffs have a policy of preventing unionisation by getting rid of pro-union workers is not just part of the general sting, it is a specific defamatory charge of its own.

On balance I do not believe it to be defamatory of a corporation to say simply that it is

> "anti-union" which is what the Defendants were determined to prove to be true of each of the Plaintiffs. But it is clearly defamatory to say that the Plaintiffs have a policy of sacking employees who have union sympathies. In my view such a policy, were it to exist, would be likely to affect the Plaintiffs adversely in the estimation of reasonable people generally because it is generally and rightly accepted that, save perhaps in exceptional circumstances which do not exist here, any employee should be allowed to join and promote a union without fearing for his job provided, at least, that his union activities do not cut into his working time."

The evidence relating to the respondents' employment practices lasted nearly 100 court days spread over nearly 11 months. This was, we think, plainly excessive as was the total time which the case as a whole took. We refrain from expressing any view which allocates responsibility for this, except to say that both the appellants and the respondents appear to have been content to allow the case to develop along the lines of a public enquiry rather than litigation confined to defined issues capable of adjudication by a court of law.

On the issue of low wages, the judge concluded that, in the United Kingdom, McDonald's hourly starting rates were significantly below the average general rates for similar retail and catering work over the period with which he was concerned, and rather below the starting rates of similar employers in catering work. There was a reasonable opportunity for the McDonald's crew member to catch up by reason of regular but small pay increases if, but only if, he or she stayed for at least several months and got a number of good pay reviews. The judge said that the evidence that wage rates at specific US restaurants were low was very sparse and limited to the occasional statement that a witness started at or near the minimum wage. After further consideration of the evidence, the judge concluded that the charge contained in the leaflet that the second respondents pay their workers low wages was justified. With some hesitation he decided that he was not able to find that the charge that the first respondents pay low wages was proved.

The judge then considered the question whether it had been established that the respondents were solely interested in cheap labour. Of this he said:

> "In my judgment there are four particular matters which point to neither Plaintiff being solely interested in cheap labour.
>
> Firstly there are the standardised starting rates which have not necessarily been the legal minimums where they existed, and which prevail across the nation in the U.K. subject to increases in London and where there are recruitment problems, and across each region in the U.S. There is no discretion for a manager to pay less than the standard starter rate even though there is now no statutory minimum in the U.K., and some people might well be prepared to work for less in his area.
>
> Secondly, there is the practice of performance-related, periodic increases, whether or

not the employee would be prepared to stay without them.

Thirdly, there is the willingness to take back trained staff at levels above basic rates, whether or not they would come back for less.

Fourthly, both companies are keen to have crew who appear cheerful to please the customer."

The judge said that the evidence certainly fell far short of proving that the first respondents targeted black people in order to pay them less. He rejected the charge that the respondents were only interested in cheap labour. They were interested in inexpensive labour, but they were also keen to have people who would work well. It did however follow from what he had said that the charge that the second respondents had helped to depress wages for workers in the catering trade in Britain was justified. Its wages were low because they could be competitive with the wages of their competitors in the catering trade and still be low. In keeping to the low common denominator, the second respondents made their contribution to what are depressed wages. The judge could not say the same of the first respondents because he could not say that their wages were low.

Turning to working conditions, the judge saw no merit in the complaint of working during evenings and at weekends. There was no real evidence that McDonald's restaurants were unduly hot, or cold for that matter, or smelly, other than on exceptional occasions. There was little or no evidence that a significant proportion of the employees was disturbed by noise.

As to chances of promotion, there were real opportunities to move up at lower levels for the relatively small number of full time crew members who wanted to do so. There was little room for crew to move into salaried management. The judge's conclusion was that McDonald's is a pyramid with a very wide base and initially shallow pitched sides which, however, grow rapidly steeper once people are on the management ladder. Although it would be accurate to say that the statistical chances of significant promotion for crew members were small, it was not true to say that the chances of any promotion were minimal.

The judge heard evidence and made determinations about general working conditions at about 17 of the second respondents' restaurants. The three which were most extensively examined were at Colchester, Bath and Heathrow. His consideration of all this evidence occupied about 56 pages of his single-spaced judgment. We will summarise his particular conclusions on all this evidence a little later in this judgment. He said that the evidence of working conditions at the first respondents' own stores in the U.S. was very limited. Having considered such evidence as there was, the judge then said:

> "It is convenient to take stock of the evidence of the Plaintiffs' employment practices and conditions which I have so far summarised, before going on to their complaints procedures, their attitudes towards trade unions and the question of safety, all of which to some extent depend on my assessment of the general working practices and conditions.
>
> The evidence from the particular restaurants involved less than twenty U.K. restaurants, and even by the end of 1990 there were 380 McDonald's restaurants in the U.K. Moreover, most of the well-founded allegations related to some only of the particular restaurants.
>
> Of course this may be the result of litigants in person being unable to find further witnesses, rather than lack of general application. ...
>
> I will not speculate on whether more witnesses from more restaurants should have been available if the allegations had general application in McDonald's restaurants. I will just look at the evidence which I have. In my view the number of restaurants at which events or practices complained of have been shown to have occurred, is just too small for me to hold that the events or practices occurred widely in McDonald's restaurants unless the Plaintiffs' evidence provides some support for their wide occurrence or the McDonald's system of operation means that they are likely to be widespread."

The judge then considered evidence which in his view supported certain systematic practices which were likely to be widespread.

The judge considered the evidence about the second respondents' crew complaint, reporting and disciplinary procedures. The system included "Rap Sessions" which were small, informal discussions between crew and a company representative for the purpose of discussing ideas, suggestions and problems. Of these, the judge concluded:

> "All in all I was in no doubt that both Plaintiffs wanted Rap Sessions to work. I can see that if they do work they are a real benefit to the employer. I do not believe that they are all "a show" as Mr Morris suggested, although some crew clearly mistrust them. So

> far as the Plaintiff companies are concerned they are a genuine system for eliciting and dealing with crew grievances. Moreover, Rap Sessions notes which I saw did report forthright criticisms of management practices."

The judge then considered crew safety at McDonald's which, he said, had taken up a lot of time. He referred in particular to a report prepared in August 1992 with the second respondents' full and voluntary co-operation by the Accident Prevention Advisory Unit of the Health and Safety Executive. The appellants took this report to be a damning comment on the second respondents' attitude to crew safety, but the judge did not read it in that way. The judge had referred to some accidents when he summarised some of the evidence in relation to particular stores. He said that slight burns were fairly common but that cuts seemed less common. Serious injuries, including falls leading to serious injury were rare. He concluded this part of his judgment by saying:

> "I take into account the pressure of work at some times at least, and most of the time in some restaurants, and the occasional long hours which must lead to tired crew at times, but in my judgment none of the evidence put before me comes anywhere near proving that crew work in the Plaintiffs' restaurants is unsafe or dangerous. It is not. The risk of significant injury is negligible."

The judge then turned to McDonald's attitude to unionisation. He said that the appellants' case was that both respondents were opposed to unionisation of any part of McDonald's work force at any cost, legal or otherwise; that by sacking or discrimination of one kind or another they got rid of pro-union workers; and that pay and working conditions suffered as a result. The judge described the respondents' case as follows:

> "The Plaintiffs' case was that so far as McOpCo restaurants in the U.S. and restaurants in this country were concerned, they would rather do without unions because they would rather run their businesses themselves and their employees did not need union representation anyway. There had been little crew interest in unions. Any crew member was entitled to join a union although neither company would negotiate with that union unless compelled by law to do so. But they would always observe the law and neither company would countenance the sacking or constructive dismissal of crew members for union activities. With regard to franchised restaurants around the world the First Plaintiff's position it was said, was essentially one of neutrality in an advisory role. Operators were largely autonomous and attitudes varied from country to country according to local conditions, both legal and cultural, which the First Plaintiff was happy to abide with."

The judge's consideration of the evidence about unionisation occupied about 51 pages of his single-spaced judgment. For the United Kingdom, the judge summarised briefly evidence from employees who had worked at, among other places, Sutton, West Ealing, Colchester and Kentish Town. But the only evidence of real interest in union organisation at McDonald's restaurants in this country related to

Hackney in 1985, East Ham in 1987 and Liverpool in 1988. He considered the evidence in relation to each of these and, having done so, concluded:

> "In my view the Second Plaintiff has never had a policy of preventing unionisation by getting rid of pro-union workers. It is a law-abiding company, but in any event it has never needed such a policy to avoid unionisation and set its own terms. With its inexhaustible supply of mostly young, mostly temporary and mostly part-time labour it has held all the aces."

The judge then turned to consider the evidence about unionisation in other countries. This generally concerned franchised restaurants run by independent owner operators, but the judge said that it was clear that the first respondents took a close interest in them. He said:

> "Time and again Mr Stan Stein who joined the corporation in 1974 as a Labour Relations Attorney and rose, as I have already said to be its Senior Vice President of Personnel and Labour Relations, went to the scene of disputes and spent time there advising the owner operator and ensuring proper, local, legal representation.
>
> Mr Stein spent nine days in the witness box, nearly seven days of it under cross-examination. He is a committed servant of McDonald's Corporation, but he has a clear view of what is legal and what is illegal in labour relations on the part of employer, employee and interested union. He was a very direct witness and I accept that his evidence of fact was his honest recall and generally reliable. I accept his evidence as generally accurate unless I indicate otherwise.
>
> ...
>
> If local operators sought the First Plaintiff's or Mr Stein's advice, they would be told to comply with all the laws and customs of the country. Mr Stein had no problem with unionisation in accordance with the law or the wishes of the workforce, although McDonald's would definitely prefer to negotiate with employees, given the choice.
>
> Mr Stein said that it was rubbish and totally untrue that McDonald's had a policy of getting rid of pro-union workers. "That would not only be illegal but probably one of the dumbest things a company can do. You would create a martyr situation. Your employees would never stand for that and they would rise up against you. Either you have integrity as a company or you will go out of business". "

The judge heard and considered extensive evidence relating to nine places in America and Canada, including in particular Chicago, Illinois and Orangeville, Ontario. Of Orangeville he concluded:

> "I believe that Orangeville demonstrates the First Plaintiff's attitude to unionisation of

> franchisees' stores. It encouraged and helped Mr Ballantyne to do everything legal to avoid unionisation, but neither it nor the franchisee did anything to get rid of pro-union workers."

He then considered briefly evidence from Australia and New Zealand, before moving to Europe where he considered evidence from eight countries other than the United Kingdom including in particular Ireland (Dublin), Spain (Madrid) and France (Lyon).

The judge's conclusions about unionisation were:

> "My conclusion so far as the Plaintiffs' attitude to unionisation of crew in their restaurants are concerned is that they are strongly antipathetic to the whole idea.
>
> ...
>
> Having said this I am equally sure that there has been no real or general interest in unionisation from McDonald's crew in the U.S. for many years. There has been no real or general interest in the U.K. at all.
>
> Moreover, I accept that it is the real policy of the First Plaintiff, its partners, franchisees and subsidiaries to observe labour relations laws and conventions in the countries where they involve union representation of McDonald's crew.
>
> There have been occasions where McDonald's crew have lost their jobs or been victimised for union activity. Dublin and Lyon are examples. But the examples are minimal in comparison with the very large number of McDonald's operators.
>
> Neither Plaintiff has a policy of preventing unionisation by getting rid of pro-union workers as the leaflet alleges. The Defendants have not produced any evidence which comes anywhere near proving such a policy. I accept the Plaintiffs' evidence that there is no such policy. The allegation is untrue.
>
> Nor does either Plaintiff have a policy of victimising pro-union workers in any way short of loss of employment."

The judge then turned to the reference in the leaflet to ethnic minority groups. He said that the defendants had made no attempt to prove that McDonald's companies had sacked many or any workers from ethnic minority groups for union activities. He said that Mr Stein was very upset by it and the judge accepted that it was totally untrue. He found that the evidence overwhelmingly supported the plaintiffs' contentions that they were equal opportunities employers.

The judge then considered the turnover of McDonald's employees and its causes. The figures for the

first respondents' U.S. monthly crew turnover for the years 1987 to 1990 ranged from a low of 80% to a high of 214%. The annualized figures for the United Kingdom for dates between 30th September 1989 and 30th September 1990 ranged from 159% to 196%. Not surprisingly, the judge characterised these figures as high. He said that the figures did support the respondents' case that turnover was influenced by employees returning to school or college and by the fact that some were only employed on a temporary basis. But he did not consider that these and similar matters could completely explain the large turnover. He held that McDonald's turnover was high by comparison with the industry of which it is a part. His final conclusion on this topic was:

> "My conclusion is that a significant proportion of McDonald's crew do not judge the pay and conditions good enough to make them want to stay for long. They either come to McDonald's with that view and retain it, or they form it while they are there."

The judge summarised his conclusions about employment practices in the following lengthy passage from his judgment:

> "The Second Plaintiff does pay its workers low wages, thereby helping to depress wages for workers in the catering trade in Britain. To this extent the defamatory charge in the leaflet is partly justified.
>
> It may be that the First Plaintiff also pays its workers low wages, but the evidence is insufficient to prove that this is so.
>
> Despite the Second Plaintiff's low wages it is not true to say that it is only interested in recruiting cheap labour and that it exploits disadvantaged groups, women and black people especially as a result. Nor is this true of the First Plaintiff. Both Plaintiffs are interested in inexpensive labour, but they are also keen to have people who will work well and appear cheerful to please the customers. They treat women and black crew members the same as the rest so far as pay and other conditions of employment are concerned. They do not target them as cheap labour. They are genuinely equal opportunity employers.
>
> So far as working conditions apart from pay are concerned the Plaintiffs' crew do work in the evenings and at weekends as alleged in the leaflet, but there is nothing bad about this; indeed it suits many employees.
>
> While the statistical chances of significant promotion for the Plaintiffs' crew members are small, it is not true to say that chances of promotion are minimal. There is a real chance of anyone who is really interested moving to some level of responsibility but most people who work in McDonald's restaurants are not interested in significant promotion in their part-time jobs with McDonald's.

The work of a McDonald's crew member is hard and sometimes noisy, and it is hectic for significant parts of some shifts, for the whole of the middle of Saturdays in all restaurants and for a lot of every day in some particular busy restaurants. There are occasions of particularly intense pressure on some occasions when some restaurants find themselves short-staffed. All this appears to be the same in both the U.S. and the U.K.

It has been common for full-time workers at the Second Plaintiff's U.K. restaurants to work more than the so-called maximum 39 hours a week, but it has been unusual for crew to work more than 45 hours a week. As often as not, weeks over 39 hours have been worked willingly because crew have wanted to earn more money. 45 hours is not an unduly long week for McDonald's crew to work from time to time, in my view, even for someone in his or her late teens working hard for a lot of the time.

The significance of such weekly hours relates to pay (absence of an increased overtime rate in U.K. McDonald's and the need to work those hours to collect something like a decent wage) rather than to bad working conditions.

Weeks over 40 hours are less likely in the U.S. because of the requirement to pay overtime rates.

Double shifts or unduly long shifts have been comparatively rare in the U.K. I had no real evidence of them being common in the U.S., and they are less likely there because of the risk of running into overtime with its extra expense.

On the other hand it is not unusual to be asked to stay on after the end of a shift for a while, and there is a significant risk of substantial, unwarned extensions from time to time. I would expect the position to be much the same in the U.S., but modified by the need to avoid overtime costs.

Very late cleaning up "closes", sometimes going on through the night, have occurred from time to time in the U.K., but generally speaking they only occur on very few occasions each year for any one crew member. I would expect the position to be the same in the U.S., but yet again moderated by the need to avoid overtime if possible.

Proper breaks are subject to the demands of custom in the Second Plaintiff's restaurants. This means that they are often taken early or late in a shift, or cut short. Adequate drink breaks are not always easy to come by. The result is that crew can work hard for long periods without adequate breaks. I would expect the position to be the same in the U.S. because the pressures are the same.

There was evidence of young people working unlawful hours, but this did not in itself help me to decide whether conditions were generally bad.

The complete reverse of the practices to which I have just referred, is that from time to time U.K. crew are invited to go home early if a restaurant is quiet. Some crew agree to go but the very act of asking puts pressure on young crew to agree and there have been occasions when direct and unfair pressure has been put on crew to agree. Sometimes crew have been sent home for reasons, like an untidy uniform, which would not have bitten if the restaurant had been busy. If a crew member agrees to go home, he or she is not paid for the balance of the shift. This practice is most unfair as it deprives crew, mostly young, of pay for time which they have set aside to earn money at McDonald's. On the evidence before me I cannot say that it happens often but it should not happen at all, and in my judgment it shows where the ultimate balance lies in the Second Plaintiff's judgment, between saving a few pounds and the interest of the individual, often young employee. I had no direct evidence of the extent to which it happens, if it happens at all, in the U.S. However, it is the kind of systemic practice which is passed from an international holding company to its national offshoot, and on that basis I find that it probably happens in the U.S. too.

This must bear on job satisfaction, as must the fact that there are no contractually guaranteed hours from week to week, but both are primarily relevant to pay.

There have been instances of autocratic management in individual stores in the U.K. Although this does not surprise me with so many young managers working under pressure to provide fast service according to regimented procedures, the evidence fell short of showing that it was a standard characteristic of work in U.K. stores. The Defendants' case to this effect assumed a policy of breaking crew morale, which I found totally implausible. There was little evidence of the U.S. in this respect.

Because of the lack of union representation, there is no third party for any member of crew to go to in the event of a serious grievance relating to his or her employment by either Plaintiff, but generally speaking the Plaintiffs' system of Rap Sessions and Crew Meetings at which criticisms can be voiced and paid heed to, works, although some crew are suspicious of it. The Plaintiffs intend it to work.

Although one might expect that the pace of work at McDonald's, and the long hours on

occasions, might lead to an element of risk, and although it has been thought necessary to improve the Second Plaintiff's safety management systems since the company appointed a Safety Officer in 1990 and voluntarily subjected itself to a Health and Safety Executive inspection and report in 1992, crew work in the Plaintiffs' restaurants is not unsafe or dangerous. People suffer minor burns as one would expect in any work involving kitchens and they suffer other injuries from time to time. But even the number of burns has not been extravagant and the number of serious injuries, including serious burns, has been modest. I was told of only one fatal injury to a crew member employed by the Second Plaintiff. Although that was one too many it occurred after eighteen years of operation in the U.K. There is no reason to believe that the safety picture is different in the U.S.

The Defendants made much during the evidence, although not in final submissions, of the Plaintiffs' insistence that crew should smile at customers. I could not understand their criticism. Many normal people greet strangers as well as friends with a smile anyway, and I do not see why a retail company should not expect its staff to welcome customers in that way. It costs the employee nothing, and the evidence that crew found it difficult was negligible. The Plaintiffs' keenness that crew should smile, which was common ground, to my mind shows that both companies want crew to appear cheerful to please the customer, and they are unlikely to achieve that if working conditions are bad.

Despite the hard and sometimes noisy and hectic nature of the work, occasional long, extended shifts including late closes, inadequate and unreliable breaks during busy shifts, instances of autocratic management, lack of third party representation in cases of grievance and occasional requests to go home early without pay for the balance of the shift, if business is slack, I do not judge the Plaintiffs' conditions of work, other than pay, to be generally "bad", for its restaurant workforce.

Although a number of the witnesses disliked the work, even some of those who came to Court with strong criticisms stayed in their jobs for quite a while. There was evidence that young crew liked the buzz of being busy together. One of the Second Plaintiff's big store managers, now a franchisee, agreed with responses to a crew questionnaire, which said that crew most liked the atmosphere and least liked the money. One of the Second Plaintiff's severest critics said that the satisfaction which he gained from the work was quite high, but the satisfaction from pay was non-existent. So there was the same picture from both ends of the spectrum of evidence.

The success of the restaurants of both Plaintiff companies has relied on smart, cheerful staff providing brisk service and it seems to me that it is inherently difficult to achieve this unless crew are reasonably happy at their work. I take full account of the indomitability of the human spirit in the face of adversity, but I find it difficult to see

how either Plaintiff could have grown so fast in countries where there is a high expectation of living and working conditions if McDonald's working conditions had been truly and generally bad.

The First and Second Plaintiffs are strongly antipathetic to any idea of unionisation of crew in their restaurants but they do not have a policy of preventing unionisation by getting rid of pro-union workers as the leaflet alleges. That allegation is untrue.

The result of all this is that the message of this part of the leaflet to the effect that the Second Plaintiff pays its workers low wages, helping to depress wages for workers in the catering trade in Britain has been proved to be true. It is justified.

The message that the Second [sc. First] Plaintiff pays its workers low wages has not been proved to be true.

The charge that the Plaintiffs are only interested in recruiting cheap labour and that they exploit disadvantaged groups, women and black people especially, as a result, has not been proved to be true. It is not justified.

It has not been proved that the Plaintiffs provide bad working conditions. That charge has not been justified.

The charge that the Plaintiffs have a policy of preventing unionisation by getting rid of pro-union workers is not true.

The evidence has disclosed unsatisfactory aspects of the Plaintiffs' working conditions, and these are to be taken into account in assessing damages, but the real, general sting of low pay for bad conditions has not been shown to be true. It has not been justified."

Appellants' case

The meaning which the judge determined for this part of the leaflet was in three parts, (1) that referring to low wages and bad working conditions, (2) that referring to cheap labour and exploiting disadvantaged groups, and (3) that referring to a policy about unions. He held that the general sting was the combination of low pay and bad working conditions, but that the allegation about a policy of preventing unionisation by getting rid of pro-union workers was not part of that general sting, but a specific defamatory charge on its own.

In paragraph 45 of their Notice of Appeal, the appellants appear to challenge only the second part of the judge's meaning. Ms Steel in her oral submission more or less agreed that this was the only challenge, but said that the appellants were not happy with the way in which the judge had applied his

meanings. Paragraph 46 of the Notice of Appeal is a blanket challenge to the whole of the paragraph, which we have quoted, in which the judge held that the meaning which he had found was defamatory. Paragraph 47 of the Notice of Appeal is a similar challenge to the paragraph of the judgment in which the judge found that it might not be defamatory of a corporation simply to say that it is "anti-union" but that it is defamatory to say that the respondents have a policy of sacking employees who have union sympathies. Paragraph 48 of the Notice of Appeal makes a now familiar point about satirical cartoons, graphics and colloquialisms and contends that the judge was wrong to use context to alter the clear natural and ordinary meaning of the words complained of. Paragraph 49 contends that the judge failed to distinguish between criticisms and comments about McDonald's and criticisms and comments about the catering industry generally. Paragraph 50 contends that the judge was wrong not to find that the words complained of were comment. Paragraph 51 contends that the words complained of were either fully justified or fair comment on the basis of what is said to be the overwhelming weight of the evidence presented at the trial. The paragraph then goes on to make a number of particular points about the evidence.

The appellants' written and oral submissions to this court may be summarised as follows:

(a) the words complained of in this section referred to the catering industry generally and only to McDonald's as part of the catering industry.

(b) the words complained of are all about low pay in the catering industry. Working conditions are a consequence of a systemic policy of low pay; and the references to unionisation are concerned (or mainly concerned) with workers' inability to improve their pay by that means.

(c) the words complained of do not mean that McDonald's are interested in cheap labour to the exclusion of all other considerations. Of course they want their business to run in a way which will be profitable generally and having crew who are apparently enthusiastic is part of their interest to that end.

(d) the words complained of do not mean that McDonald's intentionally discriminate against disadvantaged groups. They mean only that an effect of McDonald's paying low wages, thereby helping to depress wage levels in the catering trade, is that disadvantaged groups in the catering industry continue to do badly in terms of pay and conditions.

(e) the main topic of this section of the leaflet is in the sentence "Workers in catering do badly in terms of pay and conditions." This is comment, not a statement of fact. The facts upon which it is a comment are substantially true and the comment is fair. The appellants were equivocal about whether these words were defamatory. Mr Morris had accepted before the judge that they were defamatory, although of the catering industry (D301/17). He said however, that he could not see "how it could damage the catering

industry's reputation, because everybody in the world knows the catering industry does badly in terms of pay and conditions."

(f) the words complained of about unionisation are defamatory, but they are true. McDonald's do have an anti-union policy which includes "getting rid of" pro-union workers. This was shown to be true, not only by the evidence from particular countries and stores, but especially from the terms of employment to be found in the Crew Handbook. This, it is submitted, forbids as "sackable offences" activities during working hours at McDonald's restaurants which are essential to unionisation. Mr Morris claimed that the contract was illegal and a denial of basic human rights. By itself, it showed that there was a policy of getting rid of pro-union workers.

(g) some of the judge's findings of fact were against the weight of the evidence.

Meaning

The appellants submitted that the words complained of in this section referred to the catering industry generally and only to McDonald's as part of the catering industry. In our view, this submission has no force. The leaflet as a whole quite plainly refers to McDonald's. The heading of this section refers to McDonald's. The first, fourth, fifth and sixth paragraphs all refer in terms to McDonald's. Although the second and third paragraphs and part of the fifth paragraph are in more general terms, their obvious sense is as references to McDonald's as part of the catering industry generally. The second and third paragraphs are under the sub-heading "No Unions Allowed", which is a clear trailer of the fourth paragraph in which it is said that McDonald's have a policy of preventing unionisation by getting rid of pro-union workers.

We are agreed that the charge that McDonald's have a policy of preventing unionisation by getting rid of pro-union workers refers to each of the first and the second respondents. The three members of this court are not agreed on the question whether the pay and conditions part of the employment section of the leaflet refers to pay and conditions in the U.K. only or to pay and conditions in McDonald's restaurants worldwide.

Pill L.J. considers that the paragraphs in the leaflet under the heading "What's it like working for McDonald's?" would be read as referring to employment in the United Kingdom, save for the paragraph alleging a policy of getting rid of pro-union workers which includes the words "everywhere in the world". We have held that allegation, as did the judge, and as alleged by the respondents, to be a separate and distinct allegation. Parts of the leaflet, notably those dealing with starvation in the third world and rainforests, do involve attacks on McDonald's practices in countries other than the United Kingdom. Moreover, McDonald's do seek to present an image which is readily recognisable throughout the world and it is accepted that it is in that context that the particular sections of the leaflet should be considered. The man depicted on the cover of the leaflet has a $ sign as an eyeball and wears

headgear more common in the New World than in the United Kingdom.

Within that context, however, the meaning of each section of the leaflet must be considered on its own merits. That practice is followed throughout this judgment. It includes a consideration of the country to which the section applies. The employment section is based on several references to statistics and the ordinary reader would be expected to give some consideration to the question of the country referred to. In the context of a leaflet written primarily for a U.K. readership, the statistics given and the "recent survey" mentioned would be read and understood to be United Kingdom statistics, as indeed they were. An equivalent U.S. statistic is placed in brackets, by way of contrast.The ordinary reader would not assume that the mammoth task of collecting worldwide statistics had been performed or that the "recent survey of workers in burger restaurants" cited in the leaflet was other than a U.K. survey.

The paragraph dealing with disadvantaged groups, which forms the basis of one of the respondents' three allegations under employment, opens with the words "As there is no legally-enforced minimum wage in Britain". These words govern the paragraph, which would be taken to refer to British conditions. That is reinforced by the reference to women and black people as disadvantaged groups which, like other parts of the paragraph, read as references to alleged social conditions in Britain. The fact that we have held that the first respondents have a business reputation in the United Kingdom is not relevant to a consideration of the geographical application of these paragraphs. The question is a different one.

It is right to say that it was the appellants who sought the worldwide employment enquiry which led to a vast amount of evidence heard over a hundred days. Their wish to do so did not absolve the judge from the task of keeping the case within the bounds which the publication complained of required. It would have been an incidental benefit of a ruling that two of the three allegations in the employment section of the leaflet referred to the United Kingdom, which on this view could have been given, that a great deal of time would have been saved.

May L.J. and Keene J. consider that this part of the leaflet refers to pay and conditions in McDonald's restaurants worldwide. The appellants' case was that references in the leaflet to McDonald's were both to whoever runs McDonald's restaurants in the U.K. (the second respondents) and to the giant multinational corporation (the first respondents) whose global activities the leaflet seeks to criticise. They also claimed that the leaflet has been used or copied all over the world. The leaflet, including the employment section, refers to the first, as well as the second respondents. This suggests that what is said is not confined to pay and conditions in the U.K. Specific references in the leaflet include the characteristics of the evil-looking face on the front page with the "$" sign as the pupil of his eye. One of the headline arches has the word "McDollars" across it (not "McPounds"), which is particularly apt for the allegation in the employment section about "fat profits" of "junk-food giants". In the employment section of the leaflet itself, there is a specific reference to the USA in the first paragraph and, although the other statistical details would probably be seen as relating to the U.K., they would be read as illustrative of problems throughout the McDonald's organisation. There are references to Sweden and Dublin and "everywhere in the world" in the 4th paragraph. The allegation that McDonald's have a policy of preventing unionisation by getting rid of pro-union workers refers to McDonald's generally and indicates that the whole passage about unions is general and not limited to the U.K. The reference to there being no legally enforceable minimum wage in Britain is in contrast with the other statements which are to be read as applying to the McDonald's organisation as a whole. The ordinary reader would not construe the individual sentences of the employment section as a lawyer might, but would read it as referring to the same world-wide organisation as is referred to in other sections.

As will be seen, however, this disagreement is not critical, since all members of the court are in agreement that, whichever view is correct, the outcome of the appeal on this section of the leaflet is the same.

Subject to one gloss and one important qualification, we agree with the judge when he said at page 531:

> "... the real, general sting of this part of the leaflet is the combination of low pay and bad working conditions: low pay for bad conditions.
>
> The allegation that the Plaintiffs have a policy of preventing unionisation by getting rid of pro-union workers is not just part of the general sting, it is a specific defamatory charge of its own".

The gloss to our acceptance of the judge's decision about meaning is that we do not consider that the words complained of mean either that the sole interest of McDonald's is to recruit cheap labour or that they have a policy of intentionally exploiting disadvantaged groups. It is over-literal to emphasise the word "only" in the sentence "The truth is McDonald's are only interested in recruiting cheap labour". The word is, we think, used more loosely for colloquial emphasis in refuting the previous sentence and does not import the suggestion that McDonald's are interested in nothing else. As to exploiting

disadvantaged groups, we are not sure that the judge's meaning imports more than that disadvantaged groups continue to be disadvantaged in employment because McDonald's low wages help to depress wage levels in the catering trade. But the judge's meaning does include the word "exploits" and his factual findings included the emphatic conclusion that the totality of the evidence overwhelmingly supported the respondents' contentions that they are equal opportunities employers. In our view, the words complained of do not carry a meaning that McDonald's deliberately exploit disadvantaged groups.

The important qualification goes back to the more expanded three part meaning, which we have already quoted, of which this sting was a synthesis. The first part of that expanded meaning was that "the First and Second Plaintiffs pay their workers low wages and provide bad working conditions, helping to depress wages for workers in the catering trade in Britain". This meaning is expressed as a statement of fact so that it forecloses on the possibility that the critical sentence "Workers in catering do badly in terms of pay and conditions" may be comment. In our judgment that sentence in its context means "Workers in catering (including those working for McDonald's) do badly in terms of pay and conditions". The addition of the words in brackets to supply the reference to McDonald's is the only addition to or change in the words which an exposition of its meaning requires. We say in parenthesis that, in our view, the habit of defamation practitioners of translating words in allegedly defamatory publications whose meaning is perfectly clear into different words is not always necessary or helpful.

Fact or comment?

The Judge decided that the defamatory statements in this part of the leaflet were statements of alleged facts. He acknowledged that to say that workers do "badly" in terms of pay and conditions or that wages are "low" might appear to be expressions of opinion or comments in many contexts. But he considered that the headline question "What's it like working for McDonald's?" indicated that what followed were the facts, or alleged facts about working for McDonald's. In holding that the general sting of this part of the leaflet was the combination of low pay and bad working conditions, he held - correctly, we think - that the main sting was in the words "Workers in catering do badly in terms of pay and conditions" insofar as this referred to McDonald's.

It is a defence to an action for libel that the words complained of are objectively fair comment on a matter of public interest. Such matters are those in which the public has a legitimate interest or with which it is legitimately concerned and it is a fundamental right of free speech that all should be able to comment freely so long as they do so honestly and without malice. The words must be recognisable as comment, not statements of fact. There must also be a factual substratum for the comment contained in or indicated in the matter complained of. To be objectively fair, the comment must be such that an honest or fair minded person could hold that view. The defences of fair comment and justification are mutually exclusive since a defamatory statement cannot be both a statement of fact and comment. The defence of fair comment is in part less exacting than a defence of justification. The defendant

does not have to prove that the comment is true: he has to show that it is a comment which might fairly be made on the facts indicated. The defence of fair comment will, however, fail if the defendant is actuated by malice. The burden of establishing malice is on the plaintiff.

Some statements are obviously statements of fact: some are obviously capable only of being expressions of opinion amounting to comment. Others are capable of being either statements of fact or comment depending on their context. Bare statements, which are not obviously capable only of being expressions of opinion, will usually be statements of fact. The same such statements may be comment, if there are also facts stated or indicated upon which the statements are comment. The defence will fail if the facts upon which the statements are comment are not shown to be sufficiently true to support the comment as objectively fair. There may be difficulties if this requirement is applied formalistically to facts which may themselves contain elements of evaluation. On the other hand, a statement which might be regarded as comment may be so intermingled with statements of fact that it must be regarded as a statement of fact for want of a sufficient separate identity.

Mr Rampton came close to submitting by reference to paragraph 12.13 of *Gatley (9th Edition)* at p. 256 that, in contending that a comment is fair, a defendant is limited to relying on those facts which are stated in the publication complained of. We do not consider this to be correct. That paragraph in *Gatley* refers to cases where "the publication contains a statement that comment is based on facts contained within it", that is where the publication itself limits the factual basis for the comment. Ms Steel was, we think, correct to refer us to the preceding paragraph in *Gatley* and in particular to that part of it which is based on *Kemsley v. Foot* [1952] A.C. 345. In that case, under the heading "Lower than Kemsley", which referred to a well-known newspaper proprietor, a publication criticised the conduct of an unconnected newspaper. Lord Kemsley sued for libel and the defendants relied on a defence of fair comment. It was held that it is unnecessary for a defence of fair comment for all the facts upon which the comment was based to be stated in the publication complained of. It is enough if there is a sufficient substratum of fact stated or, where the subject matter is well known or easily ascertainable, indicated in the publication - see Lord Porter at p. 356 and also *O'Brien v. Marquis of Salisbury* (1889) 54 JP 215 at 216. Lord Porter also said in *Kemsley* at p. 358:

> "In the present case, for instance, the substratum of fact upon which the comment is based is that Lord Kemsley is the active proprietor of and responsible for the Kemsley Press. The criticism is that that press is a low one. As I hold, any facts sufficient to justify that statement would entitle the defendants to succeed in a plea of fair comment. Twenty facts might be given in the particulars and only one justified, yet if that one fact were sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the defendants' plea."

Thus most of the facts relied on as the basis for the defence of fair comment were not explicitly stated. But a substratum for them was indicated by a combination of the headline and the subject matter of the succeeding article with other facts which were generally well known. In the same case, Lord Oaksey, who agreed with Lord Porter, said at p. 361:

> "A defendant who has made a defamatory comment on a matter of public importance must be entitled to adduce any relevant evidence to show that the comment was fair, and in order to do so must be entitled to allege and attempt to prove facts which he contends justify the comment."

Lord Tucker, who also agreed with Lord Porter, said at p. 362:

> "I also desire to express my concurrence in his opinion that where the facts relied on to justify the comment are contained only in the particulars it is not incumbent on the defendant to prove the truth of every fact so stated in order to establish his plea of fair comment, but that he must establish sufficient facts to support the comment to the satisfaction of the jury."

It was previously the law that "if the defendant makes a misstatement of any of the facts upon which he comments, he at once negatives the possibility of any of his comments being fair" - Collins M.R. in *Digby v. Financial News* [1907] 1 K.B. 502 at 508. But by section 6 of the Defamation Act 1952, "In an action for libel ... in respect of words consisting partly of allegations of fact and partly of expressions of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair having regard to such facts alleged or referred to in the words complained of as are proved." The expression "facts alleged or referred to in the words complained of" appears to us to import the same factual ambit as that referred to in *Kemsley v. Foot*. We reject so much of Mr Rampton's submission as may have contended that, if the words complained of state facts upon which the comment is based without limiting the factual basis of the comment, the basis for the comment has to be limited to those facts even where other facts are indicated.

If one (or more) of the stated facts upon which a comment is based is itself defamatory, the defence of fair comment is not available for that fact, which the defendant must, if he can, justify. The practical effect of section 6 may be that a defendant would often not succeed in a defence of fair comment unless he proves that the published allegations of fact are substantially true - see the judgment of Lord Denning M.R. in *London Artists v. Littler* [1969] 2 Q.B. 375 at 391. But it is, we think, possible that sufficient underlying facts may be proved to support a comment as objectively fair, even though some separable stated fact is both defamatory and untrue.

Mr Rampton submitted that the question whether this part of the leaflet was comment was not an issue during the trial. We have some sympathy with this submission. Although the judge decided in terms in his judgment that it was not comment, there is little more than passing reference in the 313 days' transcripts to this as being a real issue. There was a general pleading only to the effect that the leaflet was comment. Further and Better Particulars of the Particulars of Justification and Fair Comment served on 23rd October 1991 gave five meanings of parts of the leaflet which the appellants sought to support as comment, but these did not include any meaning deriving from the employment section of

the leaflet. A party represented by professional lawyers would not therefore have been permitted to contend that this section was comment without also being permitted to amend his pleadings. Speaking generally, the chances of a party represented by professional lawyers being permitted to do so for the first time in the Court of Appeal would not be great. Where, as in this case, the appellants have been unrepresented in court and largely without the support of professional lawyers out of court, the question is less clear. Over the years that this case has occupied, the appellants have become quite proficient in litigation procedure and now have more than a passing knowledge of the relevant substantive law. The trial before the judge was conducted on generous procedural lines for their benefit and strict rules of pleading were not adhered to.

We have to consider whether it is fair to the respondents to permit the appellants to maintain a case in this court that this part of the leaflet is comment. The submission that this part of the leaflet was comment was made before the judge (see, for instance, Mr Morris at Day 301/17). Mr Rampton agreed that the respondents were not unfairly disadvantaged except in one respect. The facts about the employment issues were very extensively canvassed before the judge. The judge made ample findings of fact on those issues for the purposes of a defence of comment. Mr Rampton is well able to make full submissions of law in this court. The one issue which the judge did not address was that of malice. Mr Rampton submits that, if the defence of comment had been a real issue, the respondents would undoubtedly have contended more actively that malice on the part of the appellants vitiated the defence, as was pleaded in paragraph 2 of their Reply. But the question was raised and the respondents presented the judge with written submissions on malice towards the end of the hearing. He did not deal with malice only because he found that almost all of the words complained of bore meanings which were statements of fact.

The judge did, however, consider evidence relevant to the question whether the appellants were actuated by malice. This was in the context of their counterclaim. In the present context, we approach it with caution because it was differently directed. We consider some of this evidence and the context in which it was given in greater detail in the section of this judgment which deals with the counterclaim issues. For present purposes, it is sufficient to say in summary that the publications of which the appellants complained in their counterclaim asserted that the appellants had published a leaflet which they knew to be untrue so that its contents were lies. The respondents pleaded justification and one of the issues was whether the appellants knew that the contents of the leaflet were untrue. The judge concluded that the respondents, upon whom the burden lay, had not established that either Ms Steel or Mr Morris believed that the contents of the leaflet were untrue. The plea of justification of the counterclaim, to the effect that each of them had persistently spread lies and intentionally made numerous false statements about McDonald's, did not succeed. This finding encompasses the employment section of the leaflet.

The question of malice arose in the counterclaim. The question there was whether the respondents' defence of qualified privilege was vitiated by their malice. The judge held that it was not. We consider the appellants' appeal against that finding in the counterclaim section of this judgment, in which we discuss the law relating to malice with particular reference to the opinion of Lord Diplock in

Horrocks v. Lowe [1975] A.C.135 at 149F. We do not repeat that discussion here. The relevant principles apply equally to the question whether the appellants' dominant motive in publishing the leaflet was malicious. The burden would be on the respondents to establish malice. The judge's finding that it had not been established that either appellant published the leaflet knowing its contents to be untrue would not preclude the possibility that nevertheless their dominant motive was malicious, but it would be an important ingredient in support of a conclusion that this had not been established.

There are additional particular findings which the judge made in the counterclaim section of his judgment. At page 725 of his judgment, the judge said:

> "In her first witness statement, made in July,1993, and confirmed in her oral evidence in July,1996, Ms Steel said: "I am motivated to campaign against McDonald's, and other multinationals, because of my love for the planet we live on, and my love and respect for the people and animals living on it, and because of my desire to see a world free from exploitation and oppression". I have no doubt that those words genuinely express her own view of what her basic motives have been since she first joined London Greenpeace, and perhaps before that."

On page 726, the judge said:

> "Ms Steel said that she had her own experience of McDonald's litter and she had read pamphlets about the links between diet and heart disease and cancer and she had read about how minced beef and chicken caused food poisoning, and she had a concern about pesticide residues. She had views of McDonald's advertising. She had studied Agricultural Science at school and what she saw during her studies, including a visit to a slaughterhouse when she was about sixteen, turned her off her original wish to work in farming.
>
> Save in two respects relating to land in poor countries and the use by McDonald's of lethal poisons to destroy rainforest, I accept all this from Ms Steel, and it seems to me that a lot of her feelings about topics covered in this case were well set before she developed her antipathy to multinationals including McDonald's, although I believe that her involvement in the publication shows that she had a strong antipathy to McDonald's in particular before this action was started and that when the Plaintiffs sued her that antipathy grew even stronger."

The judge was then critical of some of her answers in cross examination. He referred to *Horrocks v. Lowe*, quoting Lord Diplock. He then went on:

> "Throughout the trial, and throughout what I know of their involvement with London Greenpeace, Ms Steel and Mr Morris have adopted what they see as superior, high, moral ground in relation to McDonald's, and I believe that Ms Steel was telling me the

> truth in the evidence which I have quoted earlier, to the effect that it did not come as a surprise to her to read what she found in the leaflet complained of, and that she trusted the author or authors to have checked what they were writing and that it was not contradicted by anything she personally knew about McDonald's. So she believed it. Ms Steel did not say this specifically in respect of lethal poisons, as she did in respect of the purchase of vast tracts of farming land, but as I heard her evidence, the clear inference was there."

The judge's consideration of Mr Morris' motivation was less detailed because Mr Morris did not give evidence. The judge did say that he started from the firm view that Mr Morris is by nature an honest man of strongly held beliefs, well founded or not. The judge was not satisfied that Mr Morris knew that the contents of the leaflet were untrue.

In considering the question of the respondents' dominant motive in publishing the matters complained of in the counterclaim the judge quoted extensively from Lord Diplock's opinion in *Horrocks v. Lowe*, including the observation at page 150 that judges and juries should be "very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity." The judge emphasised these considerations on page 740 of his judgment, observing that "the burden of proving express malice is not one that is lightly satisfied." For the respondents' witnesses whose motivation was central to the issue of malice in the counterclaim - Mr Preston and Mr Nicholson - the judge concluded that they were essentially honest and that improper motive was not established. In the light of the evidence about Ms Steel's motivation to which we have referred, we are confident that the judge would have found, had he considered the matter for the purposes of the employment section of this publication, that it had not been established that her dominant motive in publishing the leaflet was malicious. He would have reached the same conclusion for Mr Morris, although the evidence for him was less extensive. We, for our part, are independently confident that the findings which the judge did make justify these conclusions. We further consider that in all the circumstances it is not unfair to the respondents so to conclude, taking into account the fact that the issue of the appellants' malice scarcely featured at the hearing before the judge. The issue of the appellants' honesty was fully investigated and we do not believe that the respondents' evidential position would have been materially improved if the appellants' dominant motive had been clearly in issue.

Accordingly in our judgment it is fair, in the unusual circumstances of this appeal, that this court should entertain the submission that the relevant meaning is comment. If in other respects the defence is made out, it would not fail on the ground that the appellants were actuated by malice.

In our judgment, the sentence "Workers in catering do badly in terms of pay and conditions" is the central summary of this part of the publication. In its context, it plainly refers to McDonald's (at least to the second respondents) and is, in our view, defamatory of them. But it is recognisable comment. It is a composite expression of deductive opinion to the effect that the workers' employment package is a poor package. The pay and the conditions together make up the package. The judge was correct to take them together in expressing the real sting of this part of the leaflet. He was not, we think, correct to regard this sting as a statement of fact. To say that the package which constitutes workers' employment conditions is bad is not to make a statement which may be judged to be correct or incorrect on purely factual considerations. There is a strong element of subjective evaluation. Modest pay for an easy and comfortable employment might not be judged bad. Much higher pay for a disagreeable and arduous job might by contrast be judged bad. The quality of "working conditions" is scarcely a finite factual concept. There is also an element of evaluation in the concept of low pay even taken by itself.

The conclusion that the critical sentence is comment is reinforced by the context in which it appears. The context both includes and, we think, indicates facts which are the substratum for the comment. The principal facts stated may be summarised as high staff turnover; workers leaving after a short period; evening and weekend work; long shifts; hot, smelly and noisy environments; low wages; minimal chances of promotion; improvement through trade union negotiation very difficult; three quarters of the workers under 21; production-line system deskills the work; cleaning lavatories; compulsory smiling at customers. Some of these facts themselves import an element of deductive opinion. These include hot, smelly and noisy environments; low wages; and chances of promotion minimal. Although it is conventionally necessary to distinguish comment from its substratum of fact, there is, we think, nothing intrinsically objectionable if a summary comment which is the sting of the words complained of depends on a substratum which includes elements of deductive opinion. The law would part company with common sense if this were not so. It would also produce an absurd legalistic minefield if the kind of analysis appropriate to the principal comment and its factual substratum had to be applied again to any part of the factual substratum which was itself a matter of deductive opinion. We must not lose sight of the fact that the broad policy of the law relating to comment is to afford a wide freedom to express opinions upon matters of public interest and importance.

The substratum facts which are stated in the leaflet in our judgment in their context sufficiently indicate other possible facts, unstated in the leaflet but well known as applying generally to the catering industry, which might have been available to support the comment. The appellants were here not limited evidentially to those matters expressly referred to in the leaflet.

We have no doubt but that this was comment on a matter of public interest. Mr Rampton did not contend otherwise.

Was the comment "fair"?

The first ingredient of the employment package upon which the comment is made was pay. The judge considered a substantial amount of evidence relating to the pay of McDonald's workers in the U.K. and concluded in the appellants' favour that the charge in the leaflet that the second respondents pay their workers low wages was justified. It is unnecessary to consider the details leading to that conclusion. The finding is sufficient for the appellants' purpose in the present context and the respondents do not challenge it.

The judge's conclusion about the pay of the first respondents' workers in the U.S., on page 557 of his judgment, was:

> "With some hesitation, I have decided that I am not able to find that the charge that the First Plaintiff pays low wages is proved. The evidence does not in my view establish that it does. There was evidence from some U.S. witnesses that they started on a minimum wage or very close to it. Mr Beavers did. But there was also evidence of crew earnings well above the starting rate, and I do not have the material to judge what is or has been "low" in the U.S. I do not have any feel for U.S. wages and living costs as I do of the U.K. However, the Second Plaintiff's crew wages are low in this country because it follows the First Plaintiff's example of paying a market rate in what is, in this country, a low market."

His summary conclusion on page 704 of his judgment was:

> "It may be that the First Plaintiff also pays its workers low wages, but the evidence is insufficient to prove that this is so."

We were urged by the appellants to depart from this finding and hold that the evidence did establish that the pay of McDonald's workers in the U.S. was low. The essential submission was that it had been established that McDonald's system throughout the world was to insist that individual restaurants kept their weekly wage costs below a stipulated percentage of the weekly turnover; that the evidence did establish that McDonald's workers in the U.S. started at or near the minimum legal wage; and that the system worldwide would inevitably lead to pay in the U.S. being low.

One important difference between the first and second respondents was that, as the judge found, at all material times the first respondents were obliged by U.S. law to pay for overtime, and they did so if overtime was worked. The evidence indicated that in consequence the U.S. restaurants generally were managed so far as possible so as to avoid having to pay overtime rates. Workers might therefore receive less pay than if they did work overtime, but their working hours might be fewer.

The judge said on page 534 of his judgment that the position with regard to pay and conditions in the U.S., where most McDonald's restaurants are run by franchisees, was less clear than in the U.K. There was evidence from Mr Beavers that in the U.S. there tended to be no significant difference in employment conditions, pay and hours between the first respondents' own restaurants and the franchisees' restaurants. But the first respondents provided franchisees with "pretty broad parameters in which to operate" and they did not dictate to the franchisees what they should do with regard to employment. Mr Stein's evidence was that the average number of hours worked by hourly paid employees in the U.S. was a fraction over 23. There was evidence that in the U.S. 80% of McDonald's crew were part time. A little less than 75% of the U.S. hourly paid employees were under 21. About 48% of the first respondents' own U.S. hourly paid employees were under 19. Ex-employees who returned to work for McDonald's in the U.S. after a break were often taken back at enhanced rates appropriate to their previous experience. There has always been a Federal minimum wage in the U.S. and a higher one in some States.

Mr Beavers' evidence was that McDonald's in the U.S. were competitive with overall working conditions including pay in the same kind of industry. Its pay was "probably generally better". Apart from Mr Beavers' evidence the judge said that there was really no material upon which he could compare the first respondents' starting rates in the U.S. with other employers' rates for equivalent work. There is this passage on page 547 of the judgment:

> "Mr Beavers said that starting wages in the U.S. varied from state to state. There were Federal and State minimums. The starting wage was the minimum wage which Mr Beavers put at about $3.35 per hour in the middle of 1994. He said that the McDonald's starting wage was the minimum wage, but McDonald's was not a minimum wage employer. In a few months or less the wage would go up and the average wage of McDonald's restaurants throughout the U.S. was about $1 more than the minimum wage. The vast majority of crew were making about $4.35.
>
> Mr Beavers said that a wage of $3 to $4 an hour was not low pay. It was a fair wage for the work expected.
>
> Mr Stan Stein said that there had always been a Federal minimum wage which referred to large employers only. Some states adopted a higher State minimum for large businesses but had minimum rates which were lower than the Federal minimum for small businesses. He said that McDonald's basic U.S. starting rates were fixed by forty regions rather than by head office in Oakbrook. The regions did their own surveys of competitors for the same labour force to decide what the basic rate should be.
>
> Mr Stein produced a table of the hourly rates of McDonald's own employees in the U.S. up to Swing Manager, which would mean all hourly paid restaurant crew. The figures ran from 1980 to 1993. On the 1st January, 1981, the Federal minimum wage

was raised to $3.35 when the McDonald's average was $3.68. Up to March, 1990, the Federal minimum remained at $3.35 while the First Plaintiff's average rose to $4.84. On 1st April, 1990, the Federal minimum rose to $3.80. On the 1st January, 1991, the Federal minimum rose to $4.25. McDonald's average was then about $5.

The table was eventually agreed but there were limits on the help which it gave me. It set out average wages, so some McDonald's crew would be above and some below. It did not set out starting rates for comparison with the Federal minimum. It did show that the First Plaintiff was not a minimum wage employer in the sense of a large proportion of crew being paid the minimum wage.

Mr Stein said that McDonald's rates for hourly paid workers in the U.S. were not low. They were at the "higher end of the competitive scale".

There was not really any other evidence to enable me to compare McDonald's U.S. wages with its competitors' wages or with the wages paid for comparable work in other industries..

The U.S. periodic wage increases, if awarded, were 10c, 15c and 25c until 1992 when the higher two were raised to 20c and 30c. Mr Stein said that about 10% got the highest figure; the bulk got the middle one, and a smaller percentage got the minimum.

Mr Morris used those figures and the table to which I have referred to develop an argument that if a proportion of crew were training squad and swing managers or had enhancements the starter rate must be on or within a few cents of the Federal or State minimum, but Mr Stein disagreed and there was no sound basis upon which I could fault his denials of Mr Morris's suggestion.

The evidence that wage rates at specific U.S. restaurants were low was very sparse and limited to the occasional statement that the witness started at or near the minimum wage."

Mr Morris addressed a similar argument to us in relation to the figures in the table to that which Mr Stein and the judge rejected. We were no more persuaded by Mr Morris' submissions than was the judge.

It was upon this evidence that the judge concluded, with some hesitation, that he was not able to find that the charge that the first respondents pay low wages was proved. He did not have any feel for U.S. wages and living costs as he did of the U.K. It is clear that he came quite close to finding that McDonald's pay in the U.S. was low. Importantly however, he was considering the finite question whether the charge of low pay, taken by itself, was justified. Since we have concluded that the central charge which we are considering was comment, we are concerned with the different question whether the comment concerning McDonald's package of pay and conditions was fair. We shall return to the question of pay in the U.S. later in this judgment.

With regard to employment conditions other than pay, the appellants submitted that in some respects the judge's findings should have been more favourable to them than they were. In the main, they did not challenge the judge's detailed findings of fact, but in some instances did challenge his summary conclusions. For instance, Mr Morris submitted that weekend working was bad because it contributes to poor pay and conditions. He did not disagree with the judge's conclusions about promotion, but submitted that the leaflet put promotion in the context of wages. He submitted that short staffing was endemic because of the policy to keep the wage bill down to a low percentage of turnover. He submitted that the evidence was that 25% of all full time McDonald's workers in the U.K. worked more than 39 hours a week. He suggested that they did not do so willingly, but because wages were low. He submitted that the judge gave insufficient emphasis to evidence that workers were required to take their breaks at times when the restaurant was not busy; and that this resulted in long periods of work without proper breaks. He accepted that work at McDonald's was no more dangerous than other catering work. He submitted that it was degrading for workers to be forced to smile against their will and that pay should not depend on smiling. He challenged the judge's conclusion that the respondents' conditions of work, other than pay, were not generally "bad" for its restaurant work force. Mr Morris submitted that the character of the employment was that workers were under pressure and received low wages for their work.

The appellants' main submission here was that the general sting of this part of the leaflet was established. The message was all about low pay which, they submitted, had been justified. The conditions did not justify the low pay. There was no evidence of anything good about the conditions. There were a lot of bad things about them. They submitted that many of the conditions flowed from the low pay.

The judge's conclusions that the respondents' conditions of work, other than pay, were not generally bad and that the real, general sting of low pay for bad conditions had not been shown to be true were findings of fact. They necessarily had to be findings of fact, because he had held that the relevant defamatory meanings were statements of fact and the issue was whether these had been justified. They were, we think, uncomfortable findings of fact because, as we have indicated, the quality of working conditions is not a finite factual concept readily amenable to a finite answer and there is an element of evaluation in what is low pay.

Since we have concluded that the main defamatory sting of this part of the leaflet is comment, the critical question is, not the factual question which the judge asked and answered, but the different question whether the comment was objectively fair, that is whether upon the relevant factual substratum an honest or fair-minded person could hold that view. Mr Rampton submitted that on the judge's findings of fact a defence of fair comment was doomed to failure. But we think that his submission concentrated unduly on the judge's findings about working conditions to the exclusion of those about pay. For the second respondents, the judge found that the low pay element of the package was established and we consider that this, with the judge's other findings about employment conditions, should result in a finding that the comment to the effect that the employment package for McDonald's workers in the U.K. was bad was objectively fair. It is a comment which was open to a range of opinion and not everybody would agree with it. But it was such that, upon the relevant facts found, an honest or fair minded person could hold that view.

Once the judge's decisions of fact are seen and understood, our conclusion for the second respondents scarcely bears elaboration. It was established that the workers' pay at the second respondents' restaurants was low; there was substantial evening and weekend work; the statistical chances of significant promotion for crew members were small, although it was not true to say that the chances of any promotion were minimal; the work was hard and sometimes noisy; there were occasions of intense pressure when some restaurants were short staffed; some full time workers worked more than 39 hours a week; there were sometimes long shifts or long periods of work without a break; there was significant risk of substantial, unwarned extensions after the end of a shift; there were occasionally very late "closes"; crew could work hard for long periods without adequate breaks; on occasions young people worked unlawful hours; crew were sometimes, most unfairly, told to go home early if a restaurant was quiet; they have sometimes been sent home for reasons which would not have bitten if the restaurant had been busy; young managers working under pressure were sometimes autocratic; there was no union representative to take serious grievances to; accidents sometimes occurred. There was of course other evidence more favourable to the second respondents' case to balance findings such as these. There was undoubtedly room for more than one view as to the quality of the second respondents' workers' employment package. But in our judgment this catalogue of summary findings provides an ample basis for the conclusion that the comment was objectively such that an honest or fair-minded person could hold the view stated.

If the view that this part of the leaflet also embraces pay and conditions outside the U.K. (about which the members of this court are in disagreement) were correct, it would refer to the McDonald's organisation worldwide and not only to that part of it in the U.S. The judge heard extensive evidence from a number of countries on the topic of unionisation, but most of the other evidence about pay and conditions concerned the U.S. and the U.K. only. His findings about pay and conditions did not extend elsewhere, as strictly they should have on the meaning which he found.

As we have said, he was unable to find that McDonald's pay in the U.S. was low, although he came close to making such a finding. We are confident however that, had the judge been considering whether the comment that McDonald's workers do badly in terms of pay and conditions was

objectively fair, he would have concluded that it was fair for McDonald's generally as well as for the second respondents. We, for our part, independently so conclude. We consider that there is general force in the appellants' submission that on the evidence as a whole the McDonald's structure leads to uniformity. The judge was hesitant in declining to find as a finite fact that pay alone was low in the U.S., but the general evidential picture was that crew members in the U.S. were paid on average no more than $1 an hour above the minimum wage and that the number of hours which they worked was generally fewer than in the U.K. in order to avoid overtime payments. The judge's findings about employment conditions other than pay applied generally to the U.S. There are sufficient references in the summary which begins on page 704 of his judgment to show that he regarded most of his findings based to a considerable extent on U.K. evidence as probably applying also in the U.S. Although strictly the question might need to be asked for any country in which McDonald's operates, we consider that the substratum of fact established for the U.S. and the U.K. was sufficient for a conclusion that the comment was objectively such that an honest and fair-minded person could hold that view of McDonald's generally. This is especially so since the first respondents are known to be a U.S. corporation with their base in the U.S.

Unions

The words complained of included "McDonald's have a policy of preventing unionisation by getting rid of pro-union workers." The judge held that this was not just part of the general sting of this part of the leaflet, but a specific defamatory charge of its own. We agree, and we also agree that this is a statement of fact. We do not understand the appellants to contend otherwise. On balance, the judge did not believe it to be defamatory of a corporation to say simply that it is "anti-union" which is what he said the defendants were determined to prove to be true of each of the respondents. The appellants contended before us that such a meaning is or would be defamatory. The respondents contended otherwise. It is, in our view, unnecessary to determine this point. First, the judge held on the evidence that both respondents are strongly antipathetic to any idea of unionisation of crew in their restaurants and the respondents do not invite us to disturb that finding of fact. There is accordingly no element of the judgment for damages adverse to the appellants to which this point is relevant. Secondly, the sting of the defamatory meaning is, not that the respondents have a general attitude to unions, but that they have a policy of preventing unionisation by getting rid of pro-union workers.

The appellants submit that McDonald's have deliberately fostered a reputation for being an anti-union company and that they should not therefore be permitted to make a claim about a leaflet which accuses them of anti-union policies and practices. The appellants refer to a book by John Love entitled "Behind the Arches", said to have been written with McDonald's encouragement, which described the job in the early 1970s of John Cooke, McDonald's "labor relations chief", as being "to keep the unions out" and gave details of what he did. So far as it goes, we consider that this submission is misconceived. A claim of this kind may fail on the evidence, but that would not disentitle McDonald's from bringing it in the first place before the evidence was heard. Importantly, however, it is necessary first to decide what the publication means and whether it is defamatory and, if it is, then to consider whether evidence of this nature contributes to a successful defence.

The judge held explicitly that "getting rid of pro-union workers" meant "sacking employees who have union sympathies". The appellants submitted that "getting rid of" was wider than plain "sacking" so as to include discrimination against pro-union workers to the end that they would leave, nominally of their own accord. In our judgment, this is not the meaning of the words complained of in their context. The immediately preceding sentence refers to ethnic minority groups "who, with little chance of getting work elsewhere, are wary of being sacked - as many have been - for attempting union organisation." The judge was, in our view, plainly correct to equate "getting rid of" in its context with "sacking".

The appellants further submitted that it was not necessary, to justify the defamatory sting, to prove that the respondents had in fact sacked any pro-union workers, since you can have a policy without the occasion to implement it ever arising. In our view, this submission is unrealistic in the context of this publication. The words complained of explicitly say that many workers from ethnic minority groups have been sacked for attempting union organisation and it is scarcely possible for an organisation as large as McDonald's to have a policy of getting rid of pro-union workers without actually doing so. In its context, the words "McDonald's have a policy of preventing unionisation by getting rid of pro-union workers" imports the factual allegation that the policy is put into practice.

We have summarised the judge's findings about unions. There was a great deal of evidence and he considered it very carefully. He concluded that the respondents were strongly antipathetic to the whole idea of unionisation. But he was equally sure that there had been no real or general interest in unionisation from McDonald's crew in the U.S. for many years, and no real or general interest in the U.K. at all. He accepted that it is the real policy of the first respondents, its partners, franchisees and subsidiaries to observe labour relations laws and conventions in the countries where they do involve union representation of McDonald's crew. He held that there had been occasions, for example in Dublin and Lyon where the restaurants were run by franchisees, when McDonald's crew have lost their jobs or been victimised for union activities. But he held that the examples were minimal in comparison with the very large number of McDonald's operators. They did not exemplify a policy of preventing unionisation by getting rid of pro-union workers. He held that neither of the respondents has a policy of preventing unionisation by getting rid of pro-union workers. The appellants' evidence came nowhere near proving such a policy. He accepted the respondents' evidence that there was no such policy. Nor was there a policy of victimising pro-union workers in any way short of loss of employment. The appellants made no attempt to prove that McDonald's companies had sacked many or any workers from ethnic minority groups for union activities. He said that Mr Stein was very upset by this allegation and he accepted that it was totally untrue. Upon these findings, he held that the charge that McDonald's have a policy of preventing unionisation by getting rid of pro-union workers was not justified.

The findings of fact upon which the judge based his conclusion are, in our judgment, unassailable in this court. He gave due weight to the evidence and his detailed findings in relation to the many places which the evidence covered. One of these was Orangeville, Ontario. For both present and other purposes, we reproduce substantial excerpts from the judge's detailed consideration of Orangeville starting on page 668:

> "A crew member called Sarah Inglis who was a student at the local high school joined the Service Employees International Union (SEIU), and in August,1993, when she was still only sixteen years of age, she began to sign up crew at the store as members of the SEIU. She was assisted by a small number of like-minded friends and a Union Officer, Mr Rui Amorim.
>
> ...

Ballantyne Foods Ltd opposed the union's application for certification on the grounds that a number of crew who had signed applications for union membership were under eighteen and that in any event many had signed as the result of intimidation and as the result of misrepresentations about the benefits of union membership and misrepresentations to the effect that their union cards would be returned if requested. In fact, it was said, requests for the return of cards were refused.

Thirty-nine crew members intervened in the application complaining that they had been misled before signing. Lawyers were instructed on their behalf. The evidence did not reveal just who instructed and paid those lawyers. It was not the comparatively impecunious crew members. In my view it must have been Ballantyne Foods Ltd or McDonald's Restaurants of Canada Ltd or some parents who were unhappy that their children had joined the union, or a combination of those.

In any event the union denied the allegations and hearings began before the Ontario Labour Relations Board at the beginning of November,1993. By February,1994, about twenty of the intervening crew had been called to give evidence and had been cross-examined by the union lawyers. There were many more witnesses to come. The union had not even started to call its own evidence and no end to the hearing was in sight, so at the instigation of and with the approval of the Board the proceedings were settled on detailed terms, the most important of which was that there should be a secret ballot to take place on 24th February,1994. If the ballot went in favour of the union its application would be restored. If it went against the union its application would be withdrawn without prejudice to its right to make a further application in the future.

Both union and employer agreed not to discuss the rights and wrongs of the past before the vote and they agreed that the best way to ensure that employees were able freely to choose whether they did or did not want a union to represent them was to put the past behind them. When the vote came, about 20% voted for the union and 80% against, and there, so far as I am aware, the matter has rested with no further claim for union recognition at the Orangeville store.

Nevertheless the Defendants called detailed evidence designed to establish that Mr Ballantyne treated his company's employees badly in a number of respects; that as a result the unionisation attempt took off with about two thirds of crew willingly signing union cards within about five weeks; that when he got to hear of the attempt to organise, Mr Ballantyne put undue pressure on crew to change their minds and to turn against the union; that Mr Ballantyne improved conditions, only to return to his old ways after the secret ballot; that Mr Ballantyne used unfair tactics in the run up to the ballot; and that the First Plaintiff and its Canadian subsidiary supported Mr Ballantyne to the hilt in what amounted to a fight for unionisation of one store.

...

Despite the effort put into the contest by both sides, I have two important difficulties with the part played by the Orangeville issue in this case.

Firstly, there were limitations in the evidence itself.

... I heard Ms Inglis, and Ms Sabina Iurillo and Ms Michelle Wetli, both of whom signed union cards but then actively supported Mr Ballantyne against the union. There were direct conflicts between Ms Iurillo and Ms Wetli on the one hand and Ms Inglis on the other, in relation to a large number of allegations made by Ms Inglis, and although all three witnesses seemed to be thoroughly decent young people, no one of them seemed to me to be an entirely dependable witness, if only because they had clearly taken firm sides in a small community which was to some extent divided by the dispute. ...

I did not see or hear Mr Ballantyne, the central figure, but I do not hold this against the First Plaintiff. ...

Secondly, and in any event, the dispute most directly involved a franchisee who was and is an independent businessman, treating his employees as he saw appropriate, and no doubt with his own views about union representation of his workforce.

In these circumstances I propose to make findings only on the main points as I see them, and I stress that I do so on the balance of probabilities only.

I do not believe that Mr Ballantyne treated his crew badly after his arrival at the store. ...

I accept that Mr Pinkney could be moody and that crew were apprehensive of this. There was evidence from both sides' witnesses to this affect, and since Mr Pinkney was seen by crew as Mr Ballantyne's man, this no doubt reflected on Mr Ballantyne in the minds of some crew members.

However, I consider that Ms Inglis's statement that about six months after Mr Ballantyne bought the store "it became miserable for everyone" was untrue. At the very least it was an exaggeration which left me unable to rely upon Ms Inglis's more detailed allegations about the way Mr Ballantyne ran the store. ...

... I am convinced that her attempts to unionise the Orangeville Store had much more to do with her political views than with Mr Ballantyne's treatment of crew members. ...

I believe and find that a significant number of those who signed union cards did so because they had been told that unionisation would guarantee a wage increase and job security and would lead to other improvements, rather than merely leading to negotiations towards those ends. I also find that a number of people who hesitated to sign were reassured that if they changed their minds later they could have their cards back on request, which was in fact denied them.

These matters were strongly denied by Ms Inglis. The allegations and denials of misrepresentation about union benefits and about entitlement to have one's card back went together. Ms Iurillo's evidence was to the effect that at a meeting at Sarah Inglis's house, Mr Rui Amorim told those present that unionisation would guarantee a wage increase and job security and that there would be other benefits. Ms Inglis asked her to sign on a number of occasions. She was eventually persuaded to sign by Mr Chris Morrison who had been her boyfriend. He told her that he had been told by Sarah that her membership card could be returned at any time upon request. On two occasions she asked Ms Inglis for her card back without success. On the second occasion which was only two days before the union filed its application for certification, Ms Inglis asked Ms Iurillo how she could leave her "to hang and dry". Those words had the ring of truth to me, but Ms Inglis denied being asked by Ms Iurillo for her card back, so she also denied using those words. She looked very uncomfortable in the witness box when denying the use of those words, and it does seem inherently likely to me that she was anxious not to lose face by having to return cards. I did not believe her denial that she used those words, and likewise I do not believe her denial of guarantees of benefits and of promises that cards would be returned. I believe that Ms Inglis and her aides were very persistent and badgered some people to sign, although I do not find that there was any intimidation by her or the union officer, Mr Amorim. Many of those who signed, including Ms Iurillo and Ms Wetli, were in fact older than Ms Inglis.

I believe and find that when he heard of the unionisation drive, Mr Ballantyne put pressure on crew who had signed or who might be thinking of signing to think again. Some of this pressure was proper. Some of it was dubious to say the least. I find that Mr Ballantyne did ask crew members to see him one by one for a talk, but I see nothing wrong with that. On the other hand I accept and find that he made statements to the effect that union representation would mean possible loss, subject to renegotiation, of benefits already held, including McDonald's Gold Cards which gave discounts at McDonald's and at partnering retail stores, and in my judgment no reasonable employer could honourably have used union representation as a ground for withdrawing those benefits unless, at least, they were replaced by some equivalent.

...

Both Ms Iurillo and Ms Wetli gave evidence to the effect that Chris Broom played a

large part in organising feeling against unionisation. Ms Iurillo said that Chris Broom approached lawyers for the intervening crew members, but I do not believe that the lawyers could have been instructed without Mr Ballantyne's active participation, if only because it does not appear that any of the intervening crew were called upon to contribute to the lawyers' fees. I do accept that some crew members' parents, including Chris Broom's father it seems to me, were strongly anti-union and it is impossible for me to estimate with any certainty how much of the motivation for the anti-union reaction came from crew themselves, parents and Mr Ballantyne. I do think that a lot of young crew probably had spontaneous cold feet about having signed union cards, without I believe really thinking, when they realised that Mr Ballantyne who had provided them with work for which they were grateful, was upset at the prospect of unionisation of his business. Such a reaction would only be human nature, especially if some parents were upset too, as they clearly were. I thought that Ms Iurillo's evidence to the effect that at the age of sixteen, seventeen or eighteen you just wanted some money from your part-time work, in order to go to the movies or out to dinner and that you were not too concerned about the benefits of union membership, was probably true for a lot of the crew at Orangeville, although clearly not for Ms Inglis. I believe that a lot of the young crew were content with what they were getting and had no wish to stir things.

I do not think that Mr Ballantyne was being two-faced, as the Defendants suggested, in at first telling crew at a meeting that it was up to them whether they joined the union, and then later taking the legal point before the board that many were under eighteen. No doubt he did what his lawyers advised, and it was clear from Miss Inglis' evidence that some of those who had signed were as young as fifteen.

...

I believe that Ms Inglis' evidence of undue pressure arises largely because she is unwilling to believe that many crew were genuinely unsympathetic to her union drive, or changed their minds about it, and I do not accept it. She was clearly inclined to see the worst in Mr Ballantyne. ...

...

In any event I do not consider that any criticism of Mr Ballantyne invalidated the overwhelming vote in favour of what he wanted, namely rejection of the union.

...

Most important of all, there was no evidence that anyone was sacked for union activity at the Orangeville store. Ms Inglis herself worked on for about four months after the

vote. ...

I do find that the First Plaintiff and its Canadian subsidiary were very concerned that the attempt at unionisation should fail. ...

I believe that Orangeville demonstrates the First Plaintiff's attitude to unionisation of franchisees' stores. It encouraged and helped Mr Ballantyne to do everything legal to avoid unionisation, but neither it nor the franchisee did anything to get rid of pro-union workers."

These extended excerpts show that the judge gave the most careful consideration to a large body of evidence from various witnesses. We discuss elsewhere in this judgment the appellants' submission, which in our judgment is quite untenable, that the judge was biased in his assessment of the evidence generally. These passages are just one example which in our view demonstrate that, on the contrary, he considered the evidence properly, fairly and comprehensively in performing one of a trial judge's primary duties of weighing the evidence, judging the credibility of each of the witnesses and deciding which evidence to accept and which evidence to reject. For Orangeville, the judge performed this task in relation to the evidence of Sarah Inglis, among others, and the appellants in our view made no headway at all in this appeal by pointing, as they did, for instance, in paragraph 38 of their written submission on this part of the evidence, to certain details of her evidence in support of any submission that this court should reach different conclusions of fact from those reached by the judge. This and similar submissions were quite unpersuasive both because we are sure that the judge took all the evidence which he heard into consideration, and also because the judgment itself makes it clear beyond any doubt that his findings of fact were balanced and properly available to him on the evidence taken as a whole. For immediate particular purposes, the finding of fact that the first respondents encouraged and helped Mr Ballantyne to do everything legal to avoid unionisation, but that neither they nor the franchisee did anything to get rid of pro-union workers is, in our judgment, unassailable.

The way in which the judge addressed the evidence about Orangeville is generally representative of other parts of his judgment which deal with the issue of unionisation. We discuss more briefly his findings relating to Dublin, Madrid and Lyon in France because they included high points of the appellants' factual case that McDonald's had a policy of preventing unionisation by getting rid of pro-union workers. It is not necessary to dwell on evidence relating to McDonald's general antipathy to unions since the judge found in the appellants' favour on this point.

Mcdonald's restaurants in Dublin were operated by Pantry Franchise Ireland Ltd under a franchise agreement with the first respondents. The principal of the franchisee was Mr Mehigan. The evidence concerned events in Dublin in 1979 and 1985. In 1979, there was industrial action. The dispute was referred to the Labour Court. The court eventually recommended that the company should agree to recognise the Irish Transport & General Workers Union for negotiating purposes both individually and collectively on behalf of its members. The franchisee accepted the courts' recommendation. The appellants' case was that Pantry Franchise discriminated against four employees who had been active

in the strike, James Macken, Ann Holmes later Casey, Sean Mrozek and Tom Caulfield. Moving on to 1985, the judge considered matters relating to the dismissal of Anthony Brien and Coner McCann. Having carefully considered the evidence, the judge said on page 686 of his judgment:

> "My finding on the allegation of sacking or victimisation for union activity in Dublin are that Mr Macken was dismissed because he had been violent and threatening in the course of union activity, not simply because of involvement in union activity.
>
> Ms Casey's lobby hostess post was abolished because it was not justified in the low period of the strike. But Mr Mehigan did nothing to encourage Mrs Casey back. He was content that she should not return in the light of her union activities, and I have no doubt that she lost her employment with Pantry Franchise because of her union activities. Happily the experience has not done Mrs Casey any harm. She has gone on to much better things.
>
> I consider that Mr Mrozek was an honest witness but ready to believe the worst of McDonald's. I believe that he was picked on over the crew room and drink before work incidents, and I believe that was because of his part in the strike. There must have been a "them " and "us" feeling between those who had been on strike and those who had worked on. That would only be human nature. Feelings had clearly run high during the strike. But I do not believe that Mr Mrozek was driven out for his union activities after his reinstatement. By then he was at college and working part-time, and I believe that he left of his own accord. He too went on to better things.
>
> However, I do not consider that it was Mr Mehigan's general policy, let alone that of the First Plaintiff, to sack or victimise strikers.
>
> There were other strikers who went back to work in September,1979, about whom no complaint of victimisation was made.
>
> I consider that Mr Brien and Mr McCann were dismissed, in part at least because of union activities. But I do not consider that Mr Mehigan played any part in their dismissal or knew of them until after the event. He told me that he would have reprimanded the manager if he had known. On the other hand he did not offer the men their jobs back when the union took up their cause, and I think that he preferred to pay them compensation."

The judge summarised the evidence relating to a McDonald's restaurant in Madrid quite shortly. The restaurant was one of eight run by a joint venture partnership between the first respondents and Señor Camillo Mira. He was responsible for the day to day running of the restaurant. In 1986, he sacked four employees who wanted to have a union election. He did not consult the first respondents before he did so but acted on advice from local lawyers. Mr Stein thought that the men should be reinstated

and a union vote taken. Mr Stein flew to Madrid. By the time he got there, the Labour Court had decided that the men should be reinstated and that there should be union elections. Mr Stein advised Señor Mira to reinstate the employees and change his lawyers. The men were reinstated and union committees were elected. They are still in existence there and at other McDonald's restaurants in Spain. Mr Stein, speaking for the first respondents, said that this was a satisfactory conclusion to the affair. The judge accepted that Mr Stein's expressed view was genuine.

Evidence relating to France mainly concerned M. Hassen Lamti, who went to work as a crew member at a franchised restaurant in Lyon in 1989. He was made Floor Manager in 1990 and he still held that post when he gave evidence. His evidence was that he was victimised for union activities by M. Antolinos, the franchisee. The judge said at page 692 of his judgment:

> "M. Lamti said that M. Antolinos then proposed that he be moved to another restaurant or be sacked but with generous financial rewards. M. Lamti refused and by his account his working conditions were changed for the worse in a number of respects. He was falsely accused of taking sick leave and working elsewhere, of making bomb threats and of being involved in a hold-up at the restaurant.

The judge assessed his evidence and that of Mlle. Chantal Villeneuve-Gallez, who had been a Zone Manager at another McDonald's restaurant in Lyon since 1991. M. Lamti was strongly cross-examined on behalf of the respondents but they called no evidence in support of the matters which were put. The judge then said on page 694:

> "M. Lamti made a reasonable impression as a witness and he had some very general support from limited documentation and Ms Villeneuve-Gallez, and I really must put the allegations in cross-examination to one side when they were denied by M. Lamti and there was no evidence to support them.

> ... I have to make a decision on the balance of probabilities on the evidence which I have heard. On that basis I find that at least one franchisee in France, anyway, discriminated against M. Lamti and M[lle]. Villeneuve-Gallez in the course of their employment, because of union activities, and that McDonald's France S.A. did not make any real effort to clear this up.
>
> Where that takes me, if anywhere, is another matter."

Thus there were instances over a number of years when a McDonald's franchisee in Europe sacked or discriminated against employees. It was for the judge to decide on this and all the other evidence taken as a whole whether to reject the explicit evidence called on behalf of the respondents that they had no policy of preventing unionisation by getting rid of pro-union workers. The instances referred to came from a very small number of McDonald's restaurants run by franchisees and, even taken by themselves, scarcely provide any basis from which to infer a policy. We are quite unpersuaded that they provide any proper basis for disturbing the judge's finding of fact on the evidence as a whole that there was no such policy.

We consider elsewhere in this judgment the appellants' submissions under their headings "Admissions against Interest" and "Bias" and those put forward in support of their case under section 5 of the Defamation Act 1952. These contain numerous extensive references to evidence relating to the Employment part of the case. In the light of the judge's findings and our decisions in this part of the appeal, the scope for the appellants to improve their case further on the judge's findings of fact is very limited. The number of instances where there was evidence that McDonald's had sacked workers for union activity was small and the judge's findings were, so far as they went, reasonably favourable to the appellants. For example, the judge accepted M. Lamti's evidence about discrimination, but he was not sacked. The judge found that the four Madrid workers were sacked, but they were reinstated and the union was recognised. The judge's findings about the six particular employees of Pantry Franchise in Dublin were largely in favour of the appellants' case, so far as it went. And so forth. We have considered all the many points raised by the appellants under these heads. We are not persuaded that the judge's findings of fact should be disturbed. This applies in particular to the very limited extent to which he might have made different findings about incidents where it was alleged that workers had been sacked for union activity.

One of the appellants' main submissions was that, irrespective of the factual evidence to which we have referred, the terms of the McDonald's Crew Handbook alone were sufficient to establish that McDonald's do have a policy of preventing unionisation by getting rid of pro-union workers. The submission is that the rules forbid activities essential to union activity and that, since it was accepted on behalf of the respondents that breach of some of these rules was a sackable offence, that by itself exemplified a policy of preventing unionisation by getting rid of pro-union workers. In our judgment, these submissions fail for two main reasons. First, the submission requires a narrowing of the defamatory meaning which in our view is not warranted. We have already said that it is scarcely possible for an organisation as large as McDonald's to have a policy of getting rid of pro-union workers without actually doing so. In the context, the words complained of import the factual allegation that policy is put into practice. Theoretical possibilities arising from the terms of a Crew Handbook do not by themselves establish a policy. Secondly, the submission seriously overloads the actual terms of the Crew Handbook upon which the appellants rely. The judge considered these matters in this passage from page 655 of his judgment:

> "Mr Morris laid considerable stress on the contents of the Second Plaintiff's Crew Handbook which gave as an example of "gross misconduct resulting in dismissal":
>
> > "Making statements or disclosing to any person, including press, radio, television and media representatives, any information relating to the Company, its business or affairs, it customers or finances, or any of its trade secrets at any time during the continuance of your employment (except so far as may be necessary during the ordinary course of your employment)."
>
> Mr Nicholson said that the provision would include making statements to trade unions but it was not geared to trade unions. It would certainly cover speaking to newspapers about conditions at McDonald's.
>
> Some "Basic Guidelines and Responsibilities" in the Handbook provided, among other matters, that crew were not to post any notice on the Company section of the notice board, could not seek subscriptions or distribute literature in the restaurant, and could not use the restaurant for outside interests.
>
> Mr Nicholson agreed that all this meant that if a crew member was a member of a union, or wanted to be, he or she would not be allowed to collect subscriptions in the store, or put up notices on the notice board, or organise meetings in the store without management being present.

> Mr Morris argued that all this showed not just that the Second Plaintiff was resistant to union activity but that it would sack anyone who spoke to a union about conditions in a store.
>
> However, there was absolutely no evidence that the Second Plaintiff had ever used the provisions of the Handbook in that way. The provisions have a number of purposes, useful to the Second Plaintiff, which have nothing to do with unions and they do not mean to me that the Second Plaintiff has a policy of preventing unionisation by getting rid of pro-union workers."

We agree in particular with the last sentence of this passage from the judge's judgment. The parts of the Crew Handbook relied on by the appellants are of quite general application and, although they might in theory be relevant to those who might want to take part in union activity, they are in the present context no more than general provisions without specific relevance to the point in issue. They are quite insufficient to found a policy of the kind contended for. This conclusion is only reinforced by the fact that there was absolutely no evidence that they were ever used as a basis for getting rid of pro-union workers.

Part 14

Section 5 of the Defamation Act, 1952

Towards the end of his judgment on the respondents' claim the trial judge dealt explicitly with the application of section 5 of the Defamation Act, 1952. That section reads as follows:

> "In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."

The judge summarised his findings on the defamatory words in the leaflet and the extent to which the appellants had succeeded or failed in justifying those words. He then concluded as follows in respect of section 5:

> "... in my judgment it is quite clear that the Plaintiffs' reputations must be materially injured by the unjustified charges, despite the defamatory charges which have been shown to be true, to the Plaintiffs' detriment.
>
> In my view the unjustified allegation of blame for starvation in the Third World was and is particularly serious for a multinational corporation such as the Plaintiff, based in the USA., and for any large subsidiary company, like the second Plaintiff, based in a well-fed, even over-fed country like the U.K. The unjustified allegation of destruction of rainforest was and is particularly serious in environmentally conscious times. It is obvious that the unjustified allegations of knowingly selling food with a serious risk of damaging their customers' health, are particularly damaging to companies who run one of the best known catering businesses in this country where publication of the libel is complained of.
> In my judgment, those and the other charges, or parts of charges, which have not been justified, materially injure the Plaintiffs' trading reputations, even giving full weight to the matters which have been shown to be true, distinct charges or not. It follows that the Defendants are not saved by section 5 of the 1952 Act, and that the Plaintiffs must succeed on their claims for damages against both Defendants."

In their amended grounds of appeal, (paragraphs 20A and 63(d)) the appellants assert that the judge

> "erred in not finding in the defendants' favour under Section 5 of the Defamation Act 1952 ... when allegations relating to the core business practices of McDonald's had

been found proven."

They then give some six examples, taken from the judge's findings as to McDonald's publications pretending that their food had a positive nutritional benefit, as to the very real risk of heart disease for those who eat McDonald's food several times a week throughout their lives, as to the exploitation of children through advertising, as to the second respondent paying its workers low wages and helping to depress wages for workers in the catering trade in Britain, as to McDonald's being strongly antipathetic to any idea of unionisation of crew in their restaurants, and as to their responsibility for cruel practices in the rearing and slaughter of some animals.

Those were given expressly as examples, and not surprisingly in the period before the hearing of this appeal began the respondents sought details of any further findings in the court below on which the appellants intended to rely in respect of Section 5. That request produced a document consisting of 66 pages of A4 typescript, quoting 513 paragraphs from the judgment. It is not practicable to set those out in this judgment, nor is it necessary, since the application of section 5 depends upon the conclusions which we have reached as to those charges which have been proved to be true and those which have not, rather than on the conclusions reached by the trial judge.

In oral argument the appellants have submitted first that all matters found to be proven true should be treated as relevant to section 5, even if they form only part of a charge which has been held not to have been substantially justified. They say that anything proved that reflects on McDonald's reputation is relevant. That submission cannot succeed. It flies in the face of the wording of the statutory provision which is dealing with "distinct charges". If a distinct charge is proved to be true, it is to be taken into account when deciding whether the other charge or charges not proved to be true materially injure the plaintiff's reputation. But if a distinct charge is not proved to be true, or at least substantially true, then the mere fact that some part of that charge was proved true will not bring section 5 into operation. It may very well be relevant on damages, but not on section 5.

The main argument advanced by the appellants in this part of the appeal has been that the respondents' reputation depends on their core activities, that is to say matters which directly affect their business. Therefore the allegations about nutrition and the unhealthiness of the respondents' food products are of the greatest importance to their reputation, far more so than those made about destruction of rainforest or the use of non-recycled paper. Deceiving of the public, say the appellants, about the nutritional value of McDonald's food, together with the exploitation of children through advertising, are charges which go to the core of the respondents' business. In addition, the respondents' ban on union activity and their paying of low wages are highly damaging to their reputation, as is the finding about cruelty to animals. That is something, it is said, about which people feel strongly.

In response, Mr. Rampton submits that the accusation that the respondents are to blame for starvation in the Third World is as serious as any accusation that could be made against a large company. With the present level of environmental consciousness, the allegation about the destruction of rainforest is almost as serious, as is the charge that the respondents are forcing tribal people off their ancestral

territories. It is acknowledged that the nutrition charges must be given great weight, because the sale of food is the business in which McDonald's are engaged, but amongst those charges the allegation that eating McDonald's food will bring a very real risk of suffering cancer of the breast or bowel or heart disease is of basic importance, as serious as anything in the leaflet. Even if only one of those three medical conditions were to remain unproven, it would still be a very serious charge. The respondents argue that the allegation, found to be true, that McDonald's exploit children by using them as more susceptible subjects of advertising should not be regarded as seriously damaging to McDonald's reputation: such exploitation is inevitable with advertising aimed at children, and it is an accepted part of modern western culture.

Mr. Rampton argues that, though the charge of cruel practices concerning animals was found to be true, it was not alleged that McDonald's themselves were involved in such practices, only that they were responsible for them happening. As for the allegations about working conditions and pay, these should be treated as serious allegations. That is also true of the charge that McDonald's have a policy of preventing unionisation by getting rid of pro-union workers, which is especially serious for a large employer. Were the allegations about pay and conditions found to be comment, rather than statements of fact, then they would not be relevant under section 5, which only applies to charges justified or not justified.

These contentions advanced by the parties to this appeal were necessarily put forward without knowing what conclusions this court would reach on those charges subject to appeal. Some of the allegations were, of course, not subject to appeal: those were the charges found by the trial judge to be true. But section 5 has now to be applied in the light of our findings on the various charges.

We agree with the judge that certain charges have not been shown to be justified. These are: that the respondents (or either of them) have been to blame for starvation in the Third World; that they have bought vast tracts of land in poor countries and caused the eviction of small farmers from their land; that they have been guilty of the destruction of rainforest, directly or indirectly, thereby causing wanton damage to the environment; that they have used lethal poisons to destroy vast areas of rainforest and forced tribal people there off their ancestral territories; that either of them has lied when it has claimed to have used recycled paper; that they sell food which, as they must know, exposes their customers to a serious risk of food poisoning; and that they have a policy of preventing unionisation by getting rid of pro-union workers. We have not arrived at the same conclusion as the judge on some other matters, under the general headings of nutrition and employment pay and conditions.

On the topic of nutrition, the allegation that eating McDonald's food would lead to a very real risk of cancer of the breast and of the bowel was not proved. On pay and conditions we have found that the defamatory allegations in the leaflet were comment. The submission on behalf of the respondents that comment has no part to play under section 5 is, in our view, soundly based: that statutory provision is dealing with the defence of justification and the injury to the plaintiff's reputation, "having regard to the truth of the remaining charges." Comment does not enter in to any aspect of the exercise to be conducted under section 5.

In addition to the charges found to be true by the judge - the exploiting of children by advertising, the pretence by the respondents that their food had a positive nutritional benefit, and McDonald's responsibility for cruel practices in the rearing and slaughter of some of the animals used for their products - the further allegation that, if one eats enough McDonald's food, one's diet may well become high in fat, etc., with the very real risk of heart disease, was justified. That, as the respondents acknowledge, must have a serious effect on their trading reputation, since it goes to the very business in which they are engaged. In our judgment, it must have a greater impact on the respondents' reputation than any of the other charges which the trial judge had found to be true, though they too must of course be taken into account when applying section 5.

Having allowed for the effect on McDonald's reputation of those charges found to be true, the question to be answered is whether the words not proved to be true do or do not "materially injure" that reputation. We do not accept the appellants' argument about the relative unimportance of the allegations about starvation in the Third World and destruction of rainforest. These days there is a widespread public awareness of such problems, and charges of such conduct are not to be belittled. The accusation about food-poisoning goes to the trading reputation and success of the respondents, what the appellants called their "core activities." So does the allegation about the very real risk of cancer. Other allegations may be of a lesser significance.

We conclude that those unjustified charges do materially injure the respondents' reputations, even when proper allowance has been made for those charges which were justified and for the effect of those charges on those reputations. It follows that section 5 of the 1952 Act cannot provide the appellants with a defence.

Part 15

Counterclaim

Grounds of Appeal

The appellants' grounds of appeal relating to the counterclaim are as follows:

"52. The trial Judge erred in finding that the third document put out by the Second Plaintiff did not allege that the Defendants had falsely claimed that they had not been involved in a campaign against McDonald's when this was clearly stated in the words complained of (J. p.721).

53. Further the trial judge erred in failing to find the natural and ordinary meaning of the words complained of in the third document, namely that the Defendants

(a) have deliberately ignored several letters sent by McDonald's solicitors since 1984 advising them that the leaflet was defamatory and have despite these letters, persistently continued to distribute the said leaflet and thereby spread lies.

(b) have falsely claimed that they are not actively involved, when they have, for many years, taken leading roles in a consistent campaign against McDonald's including responsibility for organising demonstrations and anti-McDonald's fayres.

54. The trial judge erred in finding that although it was inaccurate to allege that the Defendants had ignored several letters sent to them since 1984 by McDonald's solicitors, the Second Plaintiff's charge, in early 1994, that the Defendants had tried to avoid responsibility for the leaflet complained of has been justified.

55. The trial judge erred in finding that there was justification for the allegation that the Defendants had falsely claimed that they had not been involved in a London Greenpeace campaign against McDonald's (J. p.734) when there was no, or no sufficient evidence to support this.

56. There was no or no sufficient evidence to support the trial judge's findings that the Defendants put out material as part of the McLibel Support Campaign, which contained strongly worded criticisms of the Plaintiffs, involving repetition of the allegations in the leaflet complained of, assertions that those

allegations were true, criticism of the Plaintiffs for having instituted and continued libel proceedings against the Defendants to intimidate the Defendants and to suppress freedom of speech, and an allegation that the Second Plaintiff had suppressed material documents to cover up the truth contained in the leaflet complained of.

57. The trial judge erred in finding that the Defendants and each of them would have ignored letters sent by the Plaintiffs concerning the leaflet complained of in the main action when there was no or no sufficient evidence to support this, and/or erred in taking this into account in a decision about whether the Plaintiffs had in fact written to the Defendants about the said leaflet. (J. p.734).

58. The trial judge erred in law in holding that the second Plaintiff was protected in making defamatory statements of the Defendants, which had not been justified, by the defence or qualified privilege. Without prejudice to the generality of this ground of appeal, it is submitted that:

(a) the trial judge erred in holding that a defence of qualified privilege was available to a corporation such as the Second Plaintiff, which was incapable of human emotions and reactions and/or

(b) the publication of the leaflet and press releases complained of were not an immediate reaction to an attack upon it and/or

(c) the trial judge erred in finding that the second Plaintiff's publication of the documents complained about in the counterclaim were a reaction to a public attack upon it and/or

(d) the trial judge erred in finding that refutation by the Defendants of the claim brought against them by the Plaintiffs was capable of amounting to a public attack on the Plaintiff.

(e) the trial judge erred in finding that the Second Plaintiff had a duty to publish the defamatory statements to the public and the media generally and/or in finding that the media and the public had a corresponding duty to receive that information (J. p.746)

(f) the trial judge erred in holding that the defence of qualified privilege could apply to documents produced and/or prepared in anticipation of attack.

59. The trial judge erred in ruling that there was insufficient evidence to show that the statements made in the three documents of which the Defendants complained were made in bad faith or with an improper motive.

60. The trial judge erred in ruling that even if the Second Plaintiff acted with malice or bad faith or an improper motive in publishing the leaflets complained about in the counterclaim did not defeat the defence of qualified privilege because it was not the dominant motive for the publication. (J. p.757)."

On page 713 of his judgment, the judge introduced the issues on the appellants' counterclaim as follows:

"As I have already said, both Ms Steel and Mr Morris have counterclaimed damages for libel from the Second Plaintiff, McDonald's Restaurants Limited, on the basis that the company has accused them of telling lies in the leaflet complained of.

Their claims are based on three documents which were first put out by the Second Plaintiff in March, April and May,1994, as the beginning of the trial of this action drew near.

The first document was a press release published on the 14th March,1994, in the form of a "Note to News Editors" with a briefing attached.

The Note to News Editors read as follows:

"McDonald's Restaurants and "London Greenpeace".

The attached briefing gives the background to the reasons why McDonald's Restaurants is bringing a libel action against two individuals representing the self-styled anarchist group "London Greenpeace".

Tomorrow (15th March) an Appeal relating to the case is being heard at the High Court.

Please note that "London Greenpeace" is nothing to do with the respected Greenpeace organisation. Attached is a copy of a letter to that effect from Greenpeace".

The attached briefing read as follows:

" McDONALD'S vs "LONDON GREENPEACE"
LIBEL CASE - UPDATE 14/3/94

The High Court will tomorrow (15th March) consider an Appeal by two members of the self-styled anarchist group "London Greenpeace" against a judge's ruling on two procedural issues in the libel action being brought against them by McDonald's.

Many of the issues are complex, being of a scientific or technical nature and Mr Justice Bell determined that the case should not be heard in front of a jury. This is not an unusual decision in such circumstances. The forthcoming libel case is a matter of great public importance and it is in the public interest that the judge will be able to give a detailed explanation of his final decision, as opposed to cases heard by a judge and jury which result in a simple "proven" or "not proven".

Background

* On Monday, 18th April,1994 McDonald's (McDonald's Corporation and McDonald's Restaurants Ltd) goes to the High Court in order to establish that a leaflet entitled "What's Wrong With McDonald's", produced by London Greenpeace, is libellous.

* London Greenpeace is an independent group of activists NOT connected in any way with Greenpeace Limited the internationally renowned organisation (see attached).

* In December 1984 McDonald's solicitors wrote to the group expressing concern about the leaflet, stating that it was defamatory and requesting that the organisation disassociated themselves from the leaflet and its contents. Despite several subsequent letters, no acknowledgement or reply was ever received and persistent distribution of the leaflet continued.

* In September 1990 McDonald's wrote to the five core members of the group. They were advised that the leaflet was defamatory and that proceedings had been issued. They were invited to apologise and undertake to stop repeating/publishing the allegations. As a result, three of the group did admit in Court that the leaflet was libellous, they apologised and undertook not to repeat the lies.

* However, two of the group said they stood by the contents of the leaflet and chose to defend it on the grounds that they maintained it to be true.

* The leaflet has been distributed extensively in and around McDonald's restaurants since 1984 not just in the UK but worldwide, to the extent that its contents have been reported in the media, in schools and even a church magazine. If McDonald's does not take action to correct these lies they will be assumed to be true.

* These lies are affecting McDonald's staff, customers, suppliers and thousands of independent franchisees.

* McDonald's has no choice, therefore, but to take steps to stop these lies otherwise the group will continue to deceive the public. The group is not incorporated therefore it was only possible for McDonald's action to be against those individuals who were responsible for distributing the leaflet and who chose to defend it.

* This action is not about freedom of speech - it is about freedom to tell the truth and the defendants are not telling the truth".

Both the Note to News Editors and the attached briefing were on sheets of paper with a McDonald's logo and the word "information" printed boldly at the top, and the name of the Second Plaintiff and its address printed at the bottom. They gave the telephone number of the Second Plaintiff's Communications Department for further information.

The Second Plaintiff admitted publication of the Note and briefing to over forty representatives of about twenty prominent arms of the media."

The second document which the appellants relied on was a leaflet which the second respondents issued to all McDonald's restaurants in the United Kingdom in April and May 1994. This leaflet was headed "To our Customers - Why McDonald's is going to Court". Its text was shorter than that of the first document, but to broadly similar effect. It stated that London Greenpeace had ignored several requests from McDonald's to stop publishing their leaflet. It said that the action was not about freedom of speech, but about the right to stop people telling lies. 300,000 of these leaflets were produced. They were distributed, and therefore published, to the management and franchisees of restaurants with a view to them giving them to any customer who asked about the legal action. The judge thought it probable that a significant number of them were handed out to McDonald's customers because the litigation had attracted a lot of attention. The appellants submitted that "a significant number" understated the extent of the publication to customers, but any difference is, in our view, immaterial.

The third document was headed "Libel Action Background Briefing". The second respondents sent it to various people in anticipation of the beginning of the trial. It was produced from about March 1994 and thereafter published in April, May and June 1994. It was a long document in broadly similar terms to those of the first leaflet. It referred to five core members of London Greenpeace. It stated that the leaflet complained of in these proceedings contained lies affecting McDonald's staff, customers, suppliers and thousands of independent franchisees. McDonald's had no choice but to take steps to stop these lies otherwise the group would continue to deceive the public. It gave headline details of the contents of the leaflet complained of. It summarised what McDonald's would seek to demonstrate in court. It summarised a number of additional issues which, it said, would be raised.

The judge said that it appeared that this third background briefing had been produced in order that it might be given to anyone, particularly journalists, who asked for information about the trial. The second respondents accepted that up to the filing of the counterclaim on 3rd June 1994, the background briefing was sent to 9 representatives of the media, whom the judge took to be potential routes to further, wide publication. In June and July 1994, it was sent to 11 more representatives of the media. Thereafter, it must have been sent to others who enquired because it was sent to Mr Ken Livingstone M.P. on 7th March 1996 and a German journalist in May 1996.

The judge summarised the appellants' counterclaim in relation to these documents as follows:

> "Ms Steel and Mr Morris each claimed that the wording of each of the documents, the press release, the leaflet to customers and the background briefing, bore meanings which were defamatory of each of them. They pleaded a number of detailed defamatory meanings which can be boiled down to two main charges: firstly, that by distributing the leaflet with which this case is concerned, knowing that its contents are untrue, both Ms Steel and Mr Morris have persistently spread lies and intentionally made numerous false statements about McDonald's, thereby deliberately deceiving the public and thereby harming McDonald's staff, customers, suppliers and franchisees; and that they have tried to avoid responsibility for what they have done by falsely claiming that they have not been involved in a London Greenpeace campaign against McDonald's and by ignoring several letters sent to them since 1984 by McDonald's solicitors complaining about the leaflet in question".

The judge's conclusion as to meaning was:

> "In my judgment the third document put out by the Second Plaintiff from March,1994, onwards clearly bore those meanings and the first and second documents bore those meanings, save that they did not allege that the Defendants had falsely claimed that they had not been involved in a campaign against McDonald's.
>
> The sting was that the Defendants had published a leaflet which they knew to be untrue and that they had tried to avoid responsibility for it".

The judge observed that lies are false statements of fact which you know to be untrue. He did not accept Mr Rampton's suggestion that the use of the word "lies" was just an emphatic way of saying that the allegations in the leaflet were untrue. He said that the charges of lying in the leaflet, but trying to avoid responsibility for it, were clearly defamatory.

The second respondents defended the counterclaim, first, on the basis that the words complained of were true in substance and in fact and therefore justified; and, secondly, by contending that they were published on occasions of qualified privilege. The judge described the basis of the plea of qualified privilege in these terms:

> "... the words were published in necessary, reasonable and legitimate response to, or anticipation of public attack upon both Plaintiffs, made or prompted by the Defendants, and that the words complained of were therefore published "pursuant to a moral or social duty and/or legitimate interest to protect the Plaintiffs' respective reputations from public attack and in each case the publishers were under a moral or social duty and/or had a legitimate interest to receive the same by way of response to or reasonable

anticipation of the public attack"."

The appellants contended that the contents of the leaflet complained of were true, so that there could be no question of lying. Alternatively, they contended that, if parts of the leaflet were untrue, they did not know them to be untrue. They believed everything in the leaflet to be true. They also contended that neither of them had ever received a letter from the second respondents or their solicitors until they got a letter with a copy of the writ in September 1990, and that they had not falsely denied being involved in a campaign against McDonald's. The appellants denied that the publications were protected by qualified privilege. They contended alternatively that, if they were, the privilege was vitiated by express malice on the part of the second respondents.

The question whether the contents of the leaflet complained of by the respondents were true raised the same issues as those of justification determined by the judge upon the respondents' claims. The respondents did not contend on the counterclaim that other parts of the leaflet complained of than those which were the subject of their own claims were untrue. The judge said that, if his findings on the respondents' claims were sound, much of the leaflet complained of was in fact untrue, although parts of it had been justified. Some of the statements in the leaflet, inoffensive in themselves if taken out of context, were true or partially true. The judge then said:

> "I do not find it necessary to go through every statement or allegation in the leaflet (let alone some which are not, like alleged responsibility for damage to the ozone layer) making findings as to what is true and what is untrue, where I have not already done so. The fact is that the majority of the defamatory charges are untrue, although some are true, and some of the inoffensive or less consequential statements of alleged fact are true, but some are untrue or misleading in their context.
>
> In my view the important thing so far as the counterclaim is concerned is to see whether there is anything untrue in the leaflet, which Ms Steel or Mr Morris knew to be untrue, it being for the Second Plaintiff to prove not only that it was untrue but also that Ms Steel or Mr Morris knew full well that it was untrue, that is a lie".

We have in the present judgment reached a number of conclusions on the respondents' claims and the appellants' defences of justification which are different from those reached by the judge and more favourable to the appellants. As will be seen, these are not central to a consideration of the counterclaim, since the issue upon which the counterclaim failed was that of qualified privilege.

The judge considered the state of mind of each of the appellants separately. He started from the firm view that Ms Steel is by nature an honest woman, although he had been unable to accept some of what she told him in relation to the issue of publication.

Ms Steel gave evidence that she believed that the contents of the leaflet complained of were true. She would never distribute something which she did not believe to be true. She found it offensive to be

accused publicly of deliberately deceiving the public on matters of great public importance. She would not have spent 5 years defending something which she did not believe to be true. Mr Rampton concentrated his cross-examination of her on her belief in what the leaflet said about starvation in the Third World and destruction of rainforest. Ms Steel said that there was material which she had read which supported the allegations and she gave details. The judge considered that Ms Steel looked uncomfortable during this part of her evidence. In his view she was pretending to have seen support for statements on this topic which she did not have. The question, however, remained whether it had been proved that she knew the statements in the leaflet complained of to be untrue. The judge referred to and cited the well known passage in the opinion of Lord Diplock in *Horrocks v. Lowe* [1975] A.C. 135 at 150 on the subject of honest belief in the context of malice which we cite later in this part of our judgment. The passage concludes with the words:

> "... but despite the imperfection of the mental process by which the belief is arrived at it may still be "honest", that is, a positive belief that the conclusions they have reached are true. The law demands no more."

The judge observed that one should be slow to find that the person publishing defamatory material has done so without honest belief in its truth. The judge then said:

> "Ms Steel's attitude to the facts may not be a very reassuring one in someone who says that her reputation as a reliable campaigner is important, and it would have been better if she had told me at the start that she just took the leaflet to be true in these two specific respects. She clearly found the whole idea of making any concession to the Plaintiffs intolerable, as I have said before.
>
> For all that, however, at the end of the day I am not persuaded that at the time of relevant publication of the leaflet, or at the time when the Second Plaintiff published its allegation of "lies", she knew that the allegation of sale to McDonald's of vast tracts of farming land in poor countries and the allegation of the use by McDonald's of lethal poisons to destroy vast tracts of rainforest were untrue. I believe that she knows now that both allegations are untrue, whatever she may say, but I am not satisfied that she knew then.
>
> The statements about the sale to McDonald's of vast tracts of farming land in poor countries and the use by McDonald's of lethal poisons to destroy vast tracts of rainforest were the high water marks of the Second Plaintiff's case that Ms Steel had known that what was in the leaflet was untrue and that she had, therefore, lied. In the other parts of the leaflet, even where I have held its defamatory messages to be untrue, there was material upon which Ms Steel could base a belief that the allegations were true, if she chose to.
>
> In all these circumstances I hold that the defamatory message of the press release, the

> leaflet to customers and the background briefing to the effect that by distributing the leaflet with which this case is concerned, knowing that its contents were untrue, Ms Steel had persistently spread lies and intentionally made numerous false statements about McDonald's, thereby deliberately deceiving the public and thereby harming McDonald's staff, customers, suppliers and franchisees, has not been justified".

Mr Morris did not give evidence. The judge said, however, that he saw a lot of him in court and that, although his feelings carried him away in the froth of his own turbulence from time to time, the judge started from the firm view that he is by nature an honest man of strongly held beliefs, well founded or not. The judge dealt quite shortly with the respondents' contentions against him. It was for the second respondents to satisfy the judge that Mr Morris knew that some statements, at least, in the leaflet which he continued to defend up to the time of the allegations of "lies" were untrue. The judge concluded:

> "Although I am satisfied that Mr Morris was involved in the original production of the leaflet, I am not satisfied that he played any part in writing it. Although there was no direct evidence of it, I believe that there is room for Mr Morris like Ms Steel, believing what the author or authors of the leaflet, whom I believe he knew well, had written so long as it was not contradicted by something else which he knew.
>
> In my judgment the Plaintiffs have not discharged the burden of justifying the defamatory message of the press release, the leaflet to customers and the background briefing to the effect that by distributing the leaflet with which this case is concerned, knowing that its contents are untrue, Mr Morris had persistently spread lies and intentionally made numerous false statements about McDonald's, thereby deliberately deceiving the public and thereby harming McDonald's staff, customers, suppliers and franchisees".

The respondents do not seek to appeal against these findings.

The judge then turned to the charge that the appellants had tried to avoid responsibility for what they had done by falsely claiming that they had not been involved in a London Greenpeace campaign against McDonald's and by ignoring several letters sent to them since 1984 by McDonald's solicitors. Those solicitors only ever wrote two letters at most to London Greenpeace until they sent letters on 20th September 1990 with the writs. The judge considered that the allegation of several unanswered letters was made in order to paint the appellants as unresponsive to attempts by the second respondents to deal with publication of the leaflet without recourse to litigation, and it was inaccurate. Nevertheless there was justification for the allegation that the appellants claimed that they had not been involved in a London Greenpeace campaign against McDonald's. This latter conclusion essentially followed from the judge's finding about publication in the proceedings. The judge concluded:

> "In my judgment the Defendants did try to avoid responsibility for what they had done by seeking to limit their involvement, and by denying participation in the publication of the leaflet complained of. In my view the allegation of ignoring several letters sent to them since 1984 by McDonald's solicitors, complaining about the leaflet was an inconsequential detail in those circumstances. The main thrust of the defamatory parts of the three documents was that the Defendants had told lies in the leaflet, spreading its untruths knowing them to be untrue, and moreover that they had denied responsibility for the leaflet.
>
> The second part of this was justified in substance and in fact, but the first part was not, and it follows that the Second Plaintiff must sustain its defence of qualified privilege if it is to avoid an award of damages to Ms Steel and Mr Morris for the accusation of lying".

The basis of the defence of qualified privilege claimed by the second respondents was described by the judge as "the right to reply to attack". The judge described the legal principle as:

> "Where a person (including a company) is the subject of an attack upon his character or conduct the law permits him (whether out of duty or interest) to answer that attack to anyone who has an interest in receiving, or a duty to receive his reply, and any defamatory statements about the attacker contained in his reply to the attack are privileged and immune from a successful claim for privilege subject to certain qualifications".

The judge noted that the reply to an attack must be published to those who have a common or corresponding duty or interest to receive it. The reply must be broadly speaking relevant to the defence to the attack. The privilege is lost if the reply is made with actual or express malice, "... that is with a sole or dominant motive which is improper so that the privileged occasion is abused, and where a statement is excessive having reference to the privileged occasion, albeit relevant to it the excess is material as evidence of malice". Another possible indicator of express malice is lack of honest belief of what is said by the person claiming privilege. The judge cited extensively from *Adam v. Ward* [1917] A.C.309 and *Horrocks v. Lowe* [1975] A.C.135. He also referred to *Murray v. Batey* (unreported, Court of Appeal, 6th August 1992).

The appellants contended that the second respondents were fixed with actual malice on the part of Mr Preston or Mr Nicholson or Mr Mike Love, its Head of Communications or Ms Eddie Bensilum, an Assistant Public Relations Manager.

The second respondents did not contend, for their case of qualified privilege, that the reply was to the original attack made by the publication of the leaflet complained of between September 1987 and September 1990 upon which their own claim in the proceedings relied. They contended that the public attack comprised a variety of material put out or prompted by the appellants as part of the "McLibel

Support Campaign" after the start of the respondents' libel action, and involving a repetition of the allegations in the leaflet complained of, assertions that those allegations were true, and criticisms of the respondents for having instituted and continued libel proceedings against the appellants to intimidate them and to suppress freedom of speech. The judge expressed the second respondents' case on privilege in the words of Mr Rampton in his final submission to the judge as follows:

> "You have publicly accused us on a number of occasions of bringing this action in order to suppress the truth and to silence our critics. In aid of that, you have alleged that we have suppressed large numbers of documents which would have shown the truth of the libel, you have re-asserted its truth and you have repeated a number of its allegations. We say those accusations are false, as you must know they are, and we are entitled to tell the public so".

The judge examined the facts relevant to the question of qualified privilege. Within a month of service of the writ, the "McLibel Support Campaign", which gave its address as that of London Greenpeace, started putting out leaflets reasserting the truth of the leaflet complained of and attacking the plaintiffs for taking legal action. The judge gave examples of these leaflets produced during 1991 and continuing in 1992 and 1993. He described the effect of the leaflets in these terms:

> "The thrust of the campaign's message was that the allegations in the leaflet complained of were true and that the trial would prove it; that nevertheless the Plaintiffs were trying to suppress free speech and pressure should be put on them to drop the case; but that funds were required for the legal battle which looked like going ahead; and that the Plaintiffs had withheld vital documents from disclosure.
>
> The case and the campaign against it received wide publicity in national and local newspapers and magazines and on radio and television".

The case was originally expected to be tried in 1993, but it was put off to 28th February 1994, then to 18th April 1994 and finally to 28th June 1994 when it started in open court. In this context, the judge considered six documents put out by the McLibel Support Campaign in the first three months of 1994. The last of these was dated 5th March 1994, which was 9 days before the first apparent publication of the first of the second respondents' documents of which the defendants complain in their counterclaim. Having considered the terms of the press release dated 5th March 1994, the judge said:

> "The Defendants contended that there was no satisfactory evidence of their involvement in any of the particular items put out by the campaign, but on the strength of what I see as the Defendants' clear and express involvement in the first McLibel Support Campaign leaflet to which I have referred, their part in the May,1991, protest at the Second Plaintiff's head office, their part in the November,1991, march, their express involvement in the January,1994, "we just have each other" leaflet and in the 5th March,1994, Press Release in which they were quoted, as well as their obvious wish to drum up public antipathy to the Plaintiffs' legal claim, I have no doubt that both Ms Steel and Mr Morris played a full part in the activities of the McLibel Support Campaign from beginning to end including the January to early March,1994, documents.
>
> Those activities amounted to an attack which involved a repetition of the allegations in the leaflet complained of, by summaries of the points at issue and averments that the contents of the leaflet were true. It involved criticism of the Plaintiff for having taken and pressed on with an intimidatory libel action, and for allegedly trying to silence its critics and trying to defeat the right to freedom of speech. It involved accusing the Plaintiff of keeping vital documents hidden away.
>
> I have no doubt that the Second Plaintiff had an interest in replying publicly to that attack in order to seek to protect its reputation and that it had a duty to do so in the light of the large number of people to whom its continued trading success, reliant as it must be on its reputation and brand image, was important; not just to the First Plaintiff and to stock holders in the First Plaintiff which owns it, but employees, franchisees and suppliers with an interest in the McDonald's system. In my judgment the media generally, having been made aware of the attack, had an interest and duty to hear the Second Plaintiff's reply so that it might have the accounts of both sides in what had became a very public dispute on matters of important public interest. The Second Plaintiff had a similar interest and duty to bring its reply to the attention of its customers, by publication of its reply in its restaurants if it chose to use that method, and the customers had an interest and duty to hear its reply so that they heard the accounts of both sides.

> Mr Preston said that in January,1994, it became clear that the Defendants, through the McLibel Support Campaign, were intensifying their publicity efforts with a view to manipulating public opinion in the run-up to the trial. I accept that Mr Preston believed that that was happening and in my judgment he was right. Mr Preston said that it was clear that as the trial approached and media interest increased there was a real danger that McDonald's customers, franchisees, employees and their families might be misled into accepting what the Defendants, through the McLibel Support Campaign, were saying if it was allowed to pass without challenge. "We wanted to put the record straight".

The judge rejected the contention of the appellants that the three documents which they relied on were not a response to any attack by the McLibel Support Campaign, let alone by the appellants, but were simply a carefully timed attempt to discredit them on the eve of the trial. He held that the parts of the three documents which were expressed to be defamatory were clearly relevant to the defence to the attack. In conclusion he held:

> "So in my judgment the three documents and their contents, defamatory of the Defendants, were published on occasions of qualified privileged and they are protected by qualified privilege unless they are shown to have been published with express malice, that is with a sole or predominant motive which was improper, most readily demonstrated by lack of honest belief in their truth".

As to malice, the appellants contended that the four people to whom we have referred could not honestly have believed that the appellants had lied in the leaflet or that they had failed to answer several letters. They submitted that the motive or dominant motive for making the defamatory statements was to damage the credibility of the appellants on the eve of the trial, to deter people from making contributions to their costs and generally to vent the second respondents' spite on the appellants. The judge said that the appellants did not spend much time on the question of express malice of the four individuals or the second respondents when they addressed him on the counterclaim. But they did refer to various evidence for their contentions as to malice. The judge gathered together what he understood to be their particular points in this passage from page 750 of his judgment:

> "Mr Preston, Mr Nicholson, Mr Love and Ms Bensilum must have known that the Defendants believed in the truth of the leaflet complained of and that it was not therefore "lies" in their hands, because by the beginning of 1994 they had produced a large number of witness statements which, it was said, demonstrated the truth of many allegations in the leaflet. Mr Preston accepted in evidence that he could have made his point without referring to "lies".
>
> Both he and Mr Nicholson must have known that the 1984 letter to London Greenpeace was written about another leaflet and that there was at best only one further

letter in 1987 or 1988 to anyone associated with London Greenpeace before the September,1990, letters covering the writs. Since Mr Nicholson attended meetings to help those who produced the three documents, about the background to the litigation, he must have passed this information on to Mr Love and Ms Bensilum.

Ms Bensilum must have known that she was not telling the truth when she wrote to an enquirer on the 18th May,1994:

> "First of all I would like to reassure you that the only reason for not resorting to legal action any sooner was because we truly hoped that the matter could be resolved satisfactorily out of court. It is certainly not true to say that we were taking the time to `sort things out'.
>
> As you have seen, the allegations in their leaflet are of an extremely serious nature and potentially very damaging. Our initial contact with the group was a letter written in December 1984 and since that time we have made repeated attempts to present our position to the group and demonstrate to them the fact that their allegations were untrue, however they have ignored our correspondence and refused to stop further publication of the leaflet".

The Background Briefing was calculated to give the impression that a City Law firm and two specialist libel barristers had been appointed to act for the Defendants generally in the proceedings, when they had only acted on a pro bono basis on an interlocutory appeal, as Mr Nicholson who followed all the proceedings carefully must have known and as he must have told Mr Love and Ms Bensilum.

Mr Love wrote to Mr George Galloway MP on 3rd July,1995, saying: "It has never been our intention to seek damages or to recover costs from the defendants", and that became a recurring theme of the Second Plaintiff's public pronouncements. Yet the Plaintiffs were still claiming costs and the letter came long after the three documents in March, April and May,1994, but it showed that the Second Plaintiff and Mr Love in particular had no regard for the truth.

On 8th March,1996, Mr Preston signed a further witness statement which must have been prepared some time before, accepting that it was wrong to say that several letters had been written to London Greenpeace and remained unanswered. Yet the Second Plaintiff continued to send out the Background Briefing uncorrected on this point. This demonstrated that the Second Plaintiff had no honest belief in that part of the Briefing which dealt with unanswered letters. Mr Love, in particular, must have known that it was untrue when he sent a copy of the Background Briefing to Mr Ken Livingstone on 7th March,1996. A month before that, on 6th February,1996, he had written to Mr Livingstone saying: "It has never been our intention to seek damages or recover costs

> from the defendants". In fact he must have known that damages and costs were still being claimed. The same applied to the Briefing which he sent to Stern in May,1996.
>
> Neither Mr Love nor Ms Bensilum was called to refute an inference of express malice.
>
> The allegation of lies, the allegation of unanswered letters, and the other allegedly dishonest statements were not necessary to reply to any attack from the Plaintiffs and they could only have been an improper attempt to discredit the Defendants and to lessen their prospects of obtaining donations towards their legal costs on the eve of trial and to vent spite on the Defendants.
>
> All that amounted to express malice."

The judge had seen Mr Preston in the witness box for the best part of seven days. He had the strong impression that Mr Preston is a decent man who reveres McDonald's and all it stands for. The judge had no hesitation in accepting that Mr Preston believed that the leaflet complained of consisted of lie after lie. The judge considered the evidence of Mr Robert Beavers, whom he also described as a decent man, and, like Mr Preston, one who reveres McDonald's and all it stands for. Having considered his evidence, the judge said:

> "It is a short step from believing that a leaflet covering a number of topics going to the heart of the operations of the business which one reveres, is completely untrue to believing that it is all "lies", however defined. Some of Mr Preston's rationalisation of why the Defendants must have known it to be true may not on analysis hold water, but I have no hesitation in accepting that from his particular point of view the whole substance of the leaflet was untrue and that he genuinely believed that Ms Steel and Mr Morris knew it. I have no reason to doubt that Mr Nicholson, Mr Love and Ms Bensilum shared their Chief Executive Officer's view".

It was suggested to Mr Preston that what was said in the publications complained of about several unanswered letters was dishonest. The judge considered this and concluded:

> "I have already said that in my judgment the reference to failure to respond to several letters was a mere detail in the light of the Defendants' attempts to avoid responsibility for the leaflet. There had been one or two letters, and in the context of a no doubt irritated reply to attack, and taking Lord Diplock's guidance into full account, as I have done in judging the question of the Defendants' honesty in relation to untrue allegations in the leaflet, I am not persuaded that the statement about unanswered letters was made in bad faith".

The judge then considered the respondents' offer in a letter of 20th September 1990 to waive their "undoubted right to damages" if the allegations were retracted; and the reappearance later of the

respondents' active claim for damages. The judge did not believe that the respondents' vacillation over damages and costs gave him any indication that they were acting in bad faith or for some improper motive. The judge then concluded:

> "So, applying Lord Diplock's approach to the question of honest belief, I am not satisfied that those identified as the embodiment of the Second Plaintiff for the purposes of publication of the three documents with their defamatory contents, did not believe in their essential truth and I am not satisfied that they were indifferent to their essential truth of falsity.
>
> Although the allegation of "lies" went beyond the averment of lack of truth which was all that was strictly necessary and the allegation of failing to respond to several letters went beyond the averment of avoidance of responsibility for the leaflet, which was all that was strictly necessary, I do not consider that this excess, such as it was, demonstrated a dominant improper motive.
>
> I consider that part of the motive for the three documents and the parts of them which were defamatory of the Defendants was to discredit the Defendants, although Mr Preston did not accept that, and I am satisfied that there was considerable ill will towards the Defendants by the time that the three documents were published. But all that was understandable in the light of the terms used in the material put out by the McLibel Support Campaign of which the Defendants were part, and I am not satisfied that there was an improper motive in all the circumstances. Even if there was an element of improper motive, I am satisfied that the predominant motive of the three documents, expressed as they were, was to refute the out-of-court public attack which the Defendants, with others, had made. That attack had been expressed in the strongest terms and the Defendants cannot complain that like was to some extent met with like".

The judge accordingly upheld the second respondents' claim for qualified privilege and held that it was not vitiated by express malice. On this basis, the counterclaim failed.

Justification

The appellants submit that the judge should not have found that the respondents' plea of justification succeeded to the limited extent that he did so find. They say that the respondents produced no evidence that the appellants had publicly denied being actively involved in the publication of the leaflet complained of and that the respondents' case at that stage depended only on the appellants' pre-trial conduct of their case. It was, however, true, as the judge found in the publication issue, that the appellants had falsely denied being actively involved in the publication of the leaflet. Whether that denial had strictly speaking been made in public at that stage was immaterial to this part of the respondents' justification.

The appellants submit that the judge should not have found that the defamatory publications were even partly justified. The appellants did not, they say, falsely claim that they had not been involved in the campaign against McDonald's. They say that as a matter of fact they had not been involved. For the original publication of the leaflet, this is a repetition of their case on publication. The judge decided this issue against them and we have upheld his finding. For the McLibel Support Campaign, the submission is a challenge to the judge's finding that the appellants played a full part in the activities of the Campaign including the distribution of the January to March 1994 documents. There was, in our view, an ample evidential basis for this finding, both for the reasons given by the judge and not least from the answers given in cross-examination by Ms Steel on Day 278 from page 17 ff., which she had initially overlooked in her submissions to us. The appellants also submit that their pre-trial conduct of the case was not a proper basis for a public response by McDonald's. This last point is a confusion of thought, because McDonald's did not claim that their publications were in response to any attack other than that of the McLibel Support Campaign.

Qualified privilege

Paragraphs 58 to 60 contend that the judge was wrong to find that the second respondents' publications were protected by qualified privilege; that he was wrong to reject the contentions of bad faith and improper motive; and that he was wrong to conclude that, if there was malice, bad faith or improper motive, it was not the dominant motive for the publication.

With two exceptions, the appellants do not contend that the judge stated the relevant law incorrectly. In brief summary, a person (including a corporation) whose character or conduct has been attacked is entitled to answer the attack, and the answer will be protected by qualified privilege provided that it is proportional and fairly relevant to the attack and the extent of its publication. "... [H]e is entitled, if he can, to defend himself effectively, and he only loses the protection of the law if he goes beyond defence and proceeds to offence" -Lord Oaksey in *Turner v. MGM Pictures* [1950] 1 All E.R. at 470/1. The passage continues with a discussion by analogy with the criminal law of self-defence. The privilege is vitiated if the answer is not made in good faith and if it is actuated by express malice. The questions whether the answer is proportional and fairly relevant to the attack and whether it is not made in good faith but actuated by express malice are related, but not identical. The question whether the answer is proportional and fairly relevant is essentially objective. The question whether there was malice or lack of good faith is one of subjective intention. But facts relevant to the objective question may be among those from which inferences of subjective intention may be drawn.

The appellants submitted to the judge and to this court that privilege does not arise if there is another appropriate way of dealing with the attack - in this case by the respondents proceeding to establish their case, so far as they were able, in court. In our judgment, this is not the law. The entitlement to make a proportional response to an attack on your character or conduct is not one of last resort, although it may well be appropriate to consider other possible ways of dealing with the attack in determining whether the answer was proportional.

The appellants contended in paragraph 58 of the Notice of Appeal that the judge was wrong to hold that a defence of qualified privilege is available to a corporation which is incapable of human emotions and reactions. In our view, this contention, unsupported by authority, is misconceived. The appellants have advanced in this appeal a submission that corporations such as the respondents should not in law be entitled to bring defamation proceedings against those who criticise them. That may be seen as an argument of some substance, although we have rejected it. The submission that corporations should not have available to them in appropriate circumstances a full range of defences to libel proceedings brought against them is quite insubstantial. The particular defence of qualified privilege which the judge held applied in this case does not have to depend on human emotions and reactions.

In their written and oral submissions to this court, the appellants submitted:

(a) that the defence of qualified privilege should fail because the second respondents' motivation for making the defamatory statements was not a response to attack;

(b) alternatively, that the defence of qualified privilege should fail because the response to attack was excessive;

(c) that the defence of qualified privilege was defeated by malice.

The appellants submitted that the second respondents' publications were not a response to an attack but a studied public relations exercise in anticipation of the start of the trial. They submitted that the leaflet complained of had not been distributed since 1990, and so there was no attack. But the respondents did not claim to be responding to the publication of the leaflet, but to those of the McLibel Support Campaign. Mr Morris submitted that the McLibel Support Campaign documents were themselves defensive in that they were continuing to protect the public from the perceived evils of organisations such as McDonald's and also seeking financial support for unrepresented defendants who did not have legal aid to defend themselves from McDonald's attack on them. In our view, the first part of this submission is as misconceived as that which we considered in the General Law section of this judgment under the heading "Reasonable and legitimate response to attack". The second part is correct so far as it goes, but largely ignores the terms of the McLibel Support Campaign documents exhibited to Mr Preston's second supplementary statement. The judge was, we think, entirely correct to regard these documents taken as a whole as a strong attack on McDonald's.

The appellants referred us extensively to the terms of the minutes of public relations meetings and other documents relating to the counterclaim disclosed by the respondents. They submitted that blanked out parts of these documents showed that the respondents were withholding material which would have established malice or other matters favourable to the appellants. We consider this submission to be groundless. The respondents were not obliged to disclose irrelevant or privileged

material and there is no proper basis for supposing either that the material in question should have been disclosed or that any of it falsified the case which the respondents were making. More persuasive were Ms Steel's references to the terms of these documents in support of the submission that the exercise was not one of defence to attack, but a general public relations exercise unrelated to the activities of the McLibel Support Campaign. We consider, however, that Mr Rampton was correct in submitting that Ms Steel's references were selective. There are other references in these documents, for instance, to demonstrations and out of court activities. The documents were part of the evidence as a whole which it was for the judge to consider as a whole. He did so on this topic on pages 747-8 of his judgment. In addition, we consider that Mr Rampton is correct in submitting that the critical question was whether the *publication* was a response to an attack. The genesis of the document published is, of course, relevant but not necessarily decisive on the question of whether its publication is such a response.

The appellants submit that, in determining whether a defence to an attack is reasonably appropriate, it is relevant to consider the respective times of the attack and the reply. They submit that the judge failed to give proper weight to this and failed to draw what, it is suggested, was an overwhelming inference that the second respondents were motivated by a desire to achieve a tactical advantage on the eve of the trial. The publications of the McLibel Support Campaign and the interest of the media dated back to late 1990. The second respondents appointed public relations advisers in January 1994 and the publications were carefully crafted by them over a number of weeks in consultation with lawyers. The publications were made shortly before the varying dates set for the start of the trial. The publications were intended, among other things, to deter people from making donations in support of the appellants' defence and to inhibit press reporting of the impending trial.

The judge considered these matters in detail on pages 747 to 749 of his judgment. He accepted the evidence of Mr Preston that he believed that the appellants, through the McLibel Support Campaign, were, in January 1994, intensifying their publicity efforts with a view to manipulating public opinion in the run up to the trial. The "goal" of "McDonald's London Greenpeace Trial Communication Strategy" was:

> "For McDonald's to be perceived as a truthful and ethical company whose policies and actions are in the best interests of the public and the environment."

Mr Preston's evidence was that the aim was not to discredit the appellants publicly nor to undermine their attempts to raise donations from the public. Having considered evidence relating to the McDonald's public relations efforts in the Spring of 1994, the judge recorded the appellants' contention that the three documents complained of were not a response to any attack by the McLibel Support Campaign, but simply a carefully timed attempt to discredit the appellants on the eve of the trial. The judge's conclusion was that those arguments failed to take sufficient account of the strong terms of the McLibel Support Campaign's attack on the respondents, particularly at the beginning of 1994, and of the actual terms of the three documents. Essentially the judge accepted the respondents' evidence that the publication did not have the purpose contended for by the appellants. This was a finding of fact

available to the judge on the evidence. It was for him to judge the credibility of the witnesses, whom he saw and heard, in particular Mr Preston and Mr Nicholson. We see no proper basis for interfering with this finding, which on the contrary we consider was intrinsically persuasive on the evidence. The appellants submit that the claim for qualified privilege should have failed because the respondents did not call Mr Love or Ms Bensilum to give evidence and that they were the creators of the documents complained of. The judge's concern, however, was to consider the *respondents'* motivation and it was, in our view, open to him to reach his conclusions on the evidence of those whom he considered for these purposes were the relevant principals. We deal with another aspect of this submission later when we consider submissions about malice.

The appellants submit that the words used in the publications complained of were excessive. They used the expressions "vicious" and "unwarranted" in their submissions to the judge, saying that the publications were character assassination without any back up. In written submissions to this court, the appellants stress that Mr Preston accepted that the respondents could have made their points without accusing the appellants of lying. It is submitted that the second respondents failed to show by evidence that they believed the appellants to be telling "lies" and that the judge wrongly equated "untruth" with "lies". In our view this is a misreading of the judgment. The judge gave a plain and correct explanation of what constitutes a lie. He held on the facts that the relevant principals of the respondents, committed as they were to McDonald's, believed the leaflet to contain unvarnished lies. The appellants submit that the accusation that the appellants were telling lies was excessive and went beyond any proper boundary of qualified privilege. In support of this, however, the written submission reverts to contentions that there was no proper basis for the judge to conclude that the representatives of the second respondents believed that the leaflet complained of contained lies. In our judgment, the judge's conclusion to this effect had a firm evidential basis which is not amenable to appeal. Further, it is not, in our view, intrinsically excessive to defend yourself against what you believe to be lies by saying that they are lies. In a wider context, we do not consider that in the context of a defence of qualified privilege the judge's finding in substance that the defence to the perceived attack was proportional is one that we should disturb.

The appellants submit that the extent of the second respondents' publications was excessive and evidence of malice. Some of the McLibel Support Campaign publications were to supporters only, not to the public generally. These did not justify publication to the media generally. This, in our view, is quite unpersuasive, when some of the McLibel Support Campaign publications were themselves Press Releases and when the Campaign was operating a Press Office. One publication to supporters referred to "a countrywide network of hundreds of supporters" and was advertising "Mass Leafletting" and a Day of Action on 26th February 1994 at McDonald's stores throughout London. "In preparation, 25,000 leaflets have been initially printed and are just itching to be shoved into the willing hands of the eager public". There was a list of nearly 100 London Restaurants with a manuscript note saying "Let's Do Them All!" We see nothing excessive in the circumstances in McDonald's deciding to circulate all 30,000 or so of their own staff, nor in sending 500 leaflets to each of their restaurants.

The appellants further submitted that the respondents' publications were excessive because it was not

established that the appellants had ever made a public claim not to have been actively involved in the publication of the leaflet complained of. Accordingly they submit that a public defence was unnecessary and excessive. In our view, this submission is confused. The balance of proportionality to be judged is that between the appellants' attack on the respondents, which was public, and the respondents' response; not that between the manner of the respondents' response and the conduct of the appellants' which the response described. In any event, this part of the respondents' publication was found to be true.

On qualified privilege generally, the appellants make a strong complaint that they were unevenly treated since their own defence of qualified privilege to the respondents' claim failed, but the respondents' defence of qualified privilege to their counterclaim succeeded. The submission takes no account of the different nature of the respective defences. Although they were both defences of qualified privilege, for the counterclaim the defence arises because the respondents were responding to an attack. For the claim, there was no attack, only an original publication, and the submission which we have rejected arose from the circumstances and nature of the publication. There is no intrinsic reason why the one defence should fail because the other does.

Malice

The classic exposition of the law of express malice in this context is in Lord Diplock's opinion in *Horrocks v. Lowe* [1975] A.C. 135 at 149 as follows:

> "[Privilege] is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit - the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege.
>
> So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. "Express malice" is the term of art descriptive of such a motive. Broadly speaking it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication: knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide

protection of his own legitimate interests.

The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it is proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief". If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest," that is, a positive belief that the conclusions they have reached are true. The law demands no more".

The appellants submit that the defence of qualified privilege should have been defeated by malice. They submit that the second respondents' dominant motive was improper. They advanced before us essentially the same submissions as they had made to the judge which he gathered together in the passage starting on page 750 of his judgment and which we have quoted. These include those about the defence to the attack being excessive, which we have already considered.

The appellants highlighted the following evidential points and submissions in support of their contention that the judge should have found that the second respondents' publications were actuated by malice:

(a) submissions about their allegedly not having responded to solicitors' letters.

(b) other allegedly false statements in the publications, e.g. to the effect that the appellants were going to have legal representation or advice during the trial, when their representation had been solely for an appeal hearing, not for the trial itself; and that the second respondents were not seeking damages and costs, when eventually they did.

(c) the fact that the respondents did not call Mr Love or Ms Bensilum to give evidence.

(d) the unnecessary extent of the second respondents' publications.

(e) the use of a letter from Greenpeace UK, which had no relevance to any matter in dispute. We regard this as quite insubstantial. It was plainly prudent to make clear that the respondents' publications were not about another organisation with a similar name.

The appellants submit that the judge wrongly played down the significance of the allegation in the second respondents' publications that the appellants had ignored several letters sent to them since 1984 by McDonald's solicitors. They say that there were no such letters. A 1984 letter, whoever it was sent to and whatever the significance of a reference in the "Aims and Ideals" leaflet, cannot have been received by the appellants, since neither of them was shown to have been concerned with London Greenpeace in 1984. Ms Steel contended that the respondents had no evidence until after she herself gave evidence that she was involved at all before 1989. There was no other letter before September 1990, when the writ was served. The appellants did respond to this with their defence. They submit that the respondents had ample opportunity in the first three months of 1994 to check the true facts, and that they must have taken the opportunity because a draft with a 1988 date was later changed to 1984. Further, there came a time when the respondents unquestionably knew that the reference to several letters was wrong. They acknowledged this in Further and Better Particulars of July 1994, or at least September 1994, and in Mr Preston's witness statement which was dated 8th March 1996. Yet there were publications of the Briefing Document after these dates with the words unaltered. This, submit the appellants, was all evidence of malice.

The judge dealt with the letters in this way on page 735:

> "In my view the allegation of ignoring several letters sent to them since 1984 by McDonald's solicitors, complaining about the leaflet, was an inconsequential detail in those circumstances. The main thrust of the defamatory parts of the three documents was that the defendants had told lies in the leaflet, spreading its untruths knowing them to be untrue, and moreover that they had denied responsibility for the leaflet".

The judge concluded on page 755 that he was "not persuaded that the statement about unanswered letters was made in bad faith". The judge accepted on page 28 of his judgment that Mr Nicholson thought that he had asked solicitors to write a letter in 1987 or 1988 though noting that no copy of such a letter (or reply to it) had been discovered.

While it may be difficult, even for a large organisation, to trace its correspondence over a long period, we recognise the force of the appellants' complaint that they were wrongly accused of failing to acknowledge or reply to several letters from McDonald's. Assuming that McDonald's checked their records, they should not have made this allegation unless they were sure that they had written several relevant letters. Moreover, when considering malice, there is force in the further submission that the second respondents continued to use the Briefing Document after they knew that it was inaccurate in its reference to letters written.

Before expressing our conclusion, we consider the appellants' further submission that the respondents' failure to call Mr Love or Ms Bensilum to give evidence, when they were available to do so, should have resulted in a finding of malice. Mr Love and Ms Bensilum were the authors of the Briefing Document. A meeting had been held at which it was agreed to "issue background briefing to all national media before start of trial". The judge found on page 748:

> "Mr Nicholson was present at that meeting, although he said that his presence at that and other meetings was to give factual background. Mr Preston was not present at that or other meetings, although he said that he was kept informed of what was going on. He said that he was not involved in drafting the three documents which were produced but he was sure that he was shown them for approval before they were released".

The judge accepted the good faith of Mr Nicholson and Mr Preston but the submission is made that, when considering the respondents' good faith, it was also the good faith of Mr Love and Ms Bensilum which was in question. As to the unanswered letters, the judge held at page 754 that it was "fair to assume Mr Preston, Mr Love and Ms Bensilum relied on Mr Nicholson's recollection". The judge thereby relied on an assumption in favour of the authors of the Briefing Document who could have been called to give evidence, but were not. It is submitted that the false allegation of unanswered letters, the absence of an explanation for the falsity from the authors of the document and the persistence in publishing the document when some of its contents were known by the second respondents to be untrue should have led to an inference of malice.

Mr Rampton makes the point that it was for the appellants to establish malice before the judge and that there was no obligation upon the respondents to call evidence. They could, and did, invite the judge to conclude that on such evidence as was called malice was not established.

While the judge was in our view wrong to dismiss the issue about the letters as an "inconsequential detail", we accept his conclusion that the "main thrust" of the defamatory parts of the relevant documents was elsewhere. Moreover, the good faith of Mr Preston and Mr Nicholson was, as the judge held, a relevant consideration. The judge heard relevant evidence over many days and neither rhetoric nor repetition nor fine intellectual analysis of the transcribed evidence are in the context proper substitutes for judicial assessment of evidence as it is given orally. We are unpersuaded that the judge's assessment of the evidence on this issue should be disturbed. His comprehensive judgment

makes it clear that he carefully considered and took account of all the substantial points of evidence and submission.

We find unpersuasive the appellants' submission that the respondents' inconsistencies about their claims for damages and costs were evidence of malice. The respondents are not to be criticised for looking initially for vindication only or in subsequently being persuaded that procedurally a claim for damages was necessary and appropriate.

Other particular points relied on in paragraph 58 of the Notice of Appeal are:

(a) that the documents complained of in the counterclaim were not an *immediate* reaction to a *public* attack upon the second respondents.

In our view, these submissions are insubstantial. On the judge's findings of fact, which in this respect are scarcely capable of being challenged, the publications by the McLibel Support Campaign relied on by the respondents as attacks were clearly (and notwithstanding the appellants' submission to the contrary) made to the public. They continued in the first three months of 1994 to the 5th March 1994, which was very shortly before the first of the respondents' publications complained of. This in itself was very close to the then anticipated start of the oral hearing. In these circumstances, it is unnecessary to consider whether in law it is necessary that a reaction to an attack must always be immediate.

(b) that the judge was wrong to find that the second respondents had a duty to publish the defamatory statements to the public and the media, and in finding that the media and the public had a corresponding duty to receive that information.

We have discussed duty and interest earlier in this judgment in the context of the appellants' own claim for qualified privilege for the leaflet complained of. The essence of the defence of qualified privilege to the counterclaim, expressed as it may be in terms of interest and duty, is an entitlement to protection where you are mounting a proportional defence to an attack upon yourself. If the attack is public, a proportional defence will normally entitle you to defend yourself publicly. This was, as we have said, a public attack.

(c) that the judge was wrong to hold that the defence of qualified privilege could apply to documents produced or prepared in anticipation of attack.

The judge did not so hold. On the facts, the documents complained of were not published in anticipation of an attack, but in a response to attacks.

The judge's finding that the predominant motive of the publication of the three documents was to refute the out-of-court public attack which the appellants, with others, had made was, in our view,

equally a finding of fact which the judge was on the evidence entitled to make.

In summary, the judge's rulings on malice, bad faith and dominant motive were essentially findings of fact. He correctly stated the relevant law in particular by reference to the opinion of Lord Diplock in *Horrocks v. Lowe* [1975] A.C.135 at 149-151. We are not persuaded that these findings of fact should be disturbed.

Paragraph 52 of the Notice of Appeal complains that the judge was wrong to find that the third document put out by the second respondents did not allege that the appellants had falsely claimed that they had not been involved in a campaign against McDonald's when this was clearly stated in the words complained of. This is a misreading of page 721 of the judgment, which speaks of the first and second documents not making the allegation referred to, not the third document. It is also immaterial, since the sting of the libel as found by the judge comprehended the substance of this allegation.

Paragraph 53 of the Notice of Appeal complains that the judge was wrong in failing to find certain natural and ordinary meanings of the words complained of in the third document. This again is a misreading of page 721 of the judgment, where, subject to the qualification inaccurately referred to in paragraph 52 of the Notice of Appeal, the judge found that the third document bore the meanings for which the appellants contended and which in substance were those referred to in paragraph 53 of the Notice of Appeal. In written and oral submissions to this court, the appellants submit that the judge inaccurately recorded their contentions as to the defamatory meanings of the publications of which they complained. They say in particular that it had never been their case that the sting was that they had "tried to avoid responsibility" for publishing a leaflet which they knew to be untrue and that this was not the natural and ordinary meaning of the words complained of. There is, however, little substantial difference between this part of the meaning found by the judge and that pleaded in paragraph 17(f) of the appellants' Defence and Counterclaim. The appellants submit that the judge should have found the meaning for which they contended, although they accept that this would not necessarily result in the appeal here succeeding. In our view, the judge's more extended account of the meanings for which the appellants contended, which he accepted, was both substantially accurate and a proper finding as to meaning. His summary of the sting of the libel was a proper distillation from that.

Paragraph 57 of the Notice of Appeal complains that the judge was wrong to find that each of the appellants would have ignored letters sent by the respondents. This is an inaccurate reference to what the judge said on page 734 of the judgment. He there said that Ms Steel gave evidence to the effect that, if she had received letters asking for an apology for the allegations in the leaflet, she would not have given it, and the judge would not have expected Mr Morris to have given one either. The judge then said that the second respondents had not tried to resolve matters by correspondence "but the fact is that the defendants would have been intransigent anyway". That is not to say that the appellants would have ignored letters. The finding that they would have been intransigent if the respondents had tried to resolve matters by correspondence is, in our view, fully justified by the evidence, including that to which the judge had just referred. This whole point is in any event peripheral to the main sting

of the counterclaim.

In conclusion, we reject each of the appellants' submissions in relation to their counterclaim.

Part 16

Damages

The principles applicable to an assessment of the damages to be awarded in defamation cases were set out by the judge at pages 758 to 760 of his judgment. Reflecting both those and his findings on the individual defamatory charges, he awarded each plaintiff £30,000, in respect of which Mr Morris was severally liable for the whole amount. He and Ms Steel were held jointly and severally liable to each plaintiff in respect of £27,500 of that amount. That took account of the judge's finding that Ms Steel's responsibility for publication only began in early 1988, as compared to September 1987, the starting point of the period for which Mr Morris was responsible.

The appellants' grounds of appeal relating to damages were:

> "61. The trial judge erred in finding that the Defendants lack of means were irrelevant to the question of level of damages.
>
> 62. The trial judge erred in law in awarding substantial damages, or any damages, to the Plaintiffs, when there was no evidence as to the extent of publication of the leaflet complained of and/or the extent, if any, of the Defendants' specific involvement in any such publication. (J. p.32).
>
> 63. The trial judge erred in law in awarding substantial damages, or any damages, to both the First and Second Plaintiffs, when:
>
> (a) the Plaintiffs are indistinguishable and do not have separate reputations and/or
>
> (b) the First Plaintiff has no reputation in the jurisdiction and/or
>
> (c) some of the allegedly defamatory allegations found by the trial judge did not refer to the Second Plaintiff."

We have already dealt with the position of the first respondent and its reputation. As for the argument that some of the defamatory allegations did not refer to the second respondent, this relates principally to the charges concerning starvation and rainforest destruction. While this contention may seem superficially attractive since there is no explicit reference to the United Kingdom company in that part of the leaflet, it is in fact unsustainable. The defamatory statements about McDonald's undoubtedly referred to the second respondent as well as the first, as one would expect with a leaflet distributed principally in the United Kingdom. The section ends with the comment that "When you bite into a Big Mac, you're helping the McDonald's empire to wreck this planet." It is clear from that passage and from the introductory words to the leaflet that the object of this section is to discourage the reader of the leaflet from eating McDonald's burgers, and the reader would see the allegations as referring not only to the parent corporation but to the United Kingdom vendor of McDonald's burgers. In addition, the reputation of the second respondent would suffer from the allegations.

The remaining grounds of appeal are limited in their scope. In fact, in their written and oral submissions, the appellants have gone substantially beyond those grounds, without objection being raised by the respondents. We propose to consider those wider arguments, as well as the original remaining grounds.

The appellants challenge a number of the features of the judge's approach to damages. It is argued that he was wrong to hold that the means of a defendant in a defamation case are irrelevant. A defendant's lack of means should be taken into account in assessing damages. We regard this point as fundamentally wrong. As with awards of damages in most torts, the purpose of compensatory damages is to compensate the plaintiff, and that is to be measured by the damage suffered by the plaintiff, not by the ability of a defendant to pay. The appellants also contend that a corporate body should not be able to sue for libel unless it can show special damages: this is an argument with which we have already dealt when considering the issues of general law early in this judgment. It is not a sound one. Nor is the contention that damages should be reduced where the published statement concerned a matter of public interest. The latter aspect may, where appropriate, give rise to a defence of qualified privilege or of fair comment, but where the conditions for such a defence are not met, there is no scope for a reduction in damages. That would be wrong in principle, since the injury to the reputation of the plaintiff is the fundamental consideration in the assessment of damages and that injury would be the same, whether or not the defamatory statement concerned a matter of public interest.

Earlier in this judgment, we considered the argument that the respondents had consented to the publication by the appellants as a result of the correspondence with Veggies Ltd and their solicitors. In May 1988 the respondents' solicitors agreed the terms of an apology by Veggies Ltd for the allegations about destruction of rainforest and the torture or murder of animals, and agreed also that McDonald's would make no further claim so long as the apology was published in the magazine produced by Veggies Ltd. As we have said, we do not regard that as providing a defence of a consent to the publication by others, such as the appellants, of the remaining allegations in the leaflet.

However, the appellants submit that the agreement with Veggies Ltd should reduce the damages now recoverable by the respondents. It is argued that McDonald's reputation must already have been damaged by the circulation of the Veggies leaflet in modified form a circulation to which McDonald's did consent. This, therefore, should be seen as a mitigating factor. The decision of the House of Lords in *Associated Newspapers Ltd v. Dingle* [1964] A.C. 371 is no bar to this, since that dealt with a situation where the plaintiff's reputation had been tarnished by the publication of the same libel by others and where the plaintiff either could not (as in that case) or did not take action against those others. But in the present case, it is said, there was evidence of positive consent to the continued publication by Veggies Ltd of the majority of the allegations in the leaflet complained of. That puts this case into a different category, not covered by the speeches in *Dingle*, with the result that McDonald's reputation should be treated as one already damaged by the publications of the Veggies Ltd leaflets.

This is coupled with an argument about the true extent of the publication by the appellants of the leaflet complained of. We accept that there was substantial publication by Veggies Ltd of a leaflet bearing their name but otherwise containing the same material as the leaflet complained of, save as modified to accord with the agreement between them and McDonald's. The evidence is considered in the section of this judgment headed "Consent" and "Veggies Agreement". The appellants argue that it is difficult to distinguish between the damage caused to McDonald's reputation by the publication for which the appellants are responsible and the damage caused to that reputation by the Veggies Ltd leaflet and its extensive publication.

Factually, there is evidential material common to both these arguments. But the two arguments are quite distinct. Even in *Dingle* it was accepted by the House of Lords that evidence was admissible to establish the extent of the damage for which the defendant was liable. The distinction between the two points was clearly brought out by Lord Denning:

> "Now comes the difficult point which I may state in this way; The "Daily Mail" are only responsible for the damage done to the plaintiff's reputation by the circulation of the libel in their newspaper. They are not responsible for the damage done to the plaintiff's reputation by the report of the select committee or by the publication of extracts from it in other newspapers. If the judge isolated the damage for which the "Daily Mail" were responsible, he would have been quite right, see *Harrison v. Pearce.* But it is said that he did not isolate the damage. He reduced the damages because the plaintiff's reputation had already been tarnished by reason of the publication of the report of the select committee of the privileged extracts from it in the "Daily Mail" and other newspapers. I think he did do this and I think he was wrong in so doing." (page 410)

We shall turn shortly to the issues raised about the true extent of the publication for which the appellants are liable. On the issue of the mitigation of damage because of McDonald's tarnished

reputation resulting from their consent to the Veggies Ltd leaflet in modified form, it is submitted by Mr Rampton that this contention is not open to the appellant, because it was never raised on the pleadings. He cites RSC Order 18, rule 12(1)

> "every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing ...
>
> (c) where a claim for damages is made against a party pleading, particulars of any facts on which the party relies in mitigation of ... the amount of damages."

It is argued that the omission from the appellants' pleadings of any such particulars had practical and prejudicial consequences at trial, because the extent of any overlap between the circulation of the Veggies leaflet and that of the leaflet complained of was never explored in evidence. Therefore it is now impossible to establish the extent to which any tarnishing of the respondents' reputation had already taken place in the minds of the recipients of the appellants' leaflet. It was for the appellants to establish the extent of any such tarnishing, since the burden of proof is on them to establish any matter relied on in mitigation. In addition, the agreement with Veggies Ltd was only arrived at in May 1988, and it can therefore provide no mitigation in respect of the appellants' liability prior to that date. Nor can it provide, it is said, any mitigation in respect of those allegations omitted from the Veggies leaflet after May 1988 but contained in the leaflet complained of.

The last point is undoubtedly sound though of limited effect. The only allegation omitted by agreement from the Veggies leaflet and in respect of which the trial judge found the appellants liable was the one that McDonald's had been responsible for the destruction of rainforest. Furthermore, the argument that the effect of publication by the appellants before May 1988 cannot be mitigated by the Veggies agreement is not of great significance, since Mr Morris' liability was for publication over a three year period beginning in September 1987 and Ms Steel's liability only began in early 1988. In both cases the bulk of the period of publication could be affected by the Veggies agreement if the appellants' arguments are soundly based.

We have already observed that there was some departure in this case from the normal rules of court applicable to pleadings. Understandable though that might be in a case involving unrepresented defendants, it has produced some uncertainty as to exactly what the case for the appellants was at trial. They undoubtedly made during the trial a number of references to the Veggies agreement, and did so in the context of various submissions, including malice, abuse of process, and a general argument about McDonald's assenting to the publication of the words complained of. On the final day of trial, Ms Steel said:

> "Since they consented to publication by the agents effectively they are consenting to their reputation being damaged as they consider it, or either that they did not consider it would damage their reputation or they were content to have their reputation damaged. And that in that case the damage to their reputation cannot be separated out from any

> alleged damage caused by publication of the fact sheet by others. It is a similar point to the argument about Plaintiffs' consent to the distribution of the Veggies fact sheets."

Insofar as that passage refers to the Veggies agreement, it covers a number of different arguments, not always clearly distinguished. In his closing speech, Mr Morris made a number of "fundamental points", one of which was as follows:

> "Point 6. The effects of an agreement of the Plaintiff to the circulation of the words complained of or similar words, or, we could say, virtually identical words after a slight amendment, and the words complained of have been circulated by their own agents, hired to infiltrate London Greenpeace and by the main publishers of the fact sheet, Veggies Limited, in a very slightly amended form. In fact, the only difference would be, apart from the inclusion of CFCs, the slight amendment to the section about tropical forest destruction by the hamburger industry.
> And Veggies remain the main distributors of the words complained of, or the vast bulk of them. I mean, the changes in the heading of the animal section is irrelevant, we would say, in its effect."

In the circumstances of this case we would not be prepared to prevent this point on damages being taken by the appellants. The factual material about the distribution of the Veggies leaflet was sufficiently covered in evidence, even if the purpose of such evidence was not always manifest.

There is, however, a more basic problem about the appellants' reliance on the agreement with Veggies as a means of reducing the damages payable. As we have emphasised, the argument is to the effect that McDonald's reputation was damaged by the publication of the Veggies leaflet, so that the publication of the leaflet complained of had a less injurious effect. That proposition needs to be considered in the light of the principles outlined in *Dingle*. In the leading judgment, Lord Radcliffe said this at page 396:

> "There is, however, another and more general ground upon which all this material (and in that I include both the report itself and whatever may have been published or said about the respondent arising out of the incident dealt with in the report) should have been excluded from consideration as matter of mitigation tending to show that the respondent suffered from a "tarnished" reputation. Whatever may be the qualifications or requirements as to evidence led on the issue of reputation by way of mitigation of damages for libel, I do not believe that it has ever yet been regarded as permissible to base such evidence on statements made by other persons about the same incident or subject as is embraced by the libel itself. In my opinion it would be directly contrary to principle to allow such an introduction. A libel action is fundamentally an action to vindicate a man's reputation on some point as to which he has been falsely defamed, and the damages awarded have to be regarded as the demonstrative mark of that vindication. If they could be whittled away by a defendant calling attention to the fact

> that other people had already been saying the same thing as he had said, and pleading that for this reason alone the plaintiff had the less reputation to lose, the libelled man would never get his full vindication. It is, I think, a well understood rule of law that a defendant who has not justified his defamatory statements cannot mitigate the damages for which he is liable by producing evidence of other publications to the same effect as his; and it seems to me that it would involve an impossible conflict between this rule and the suggested proof of tarnished reputation to admit into consideration other contemporary publications about the same incident. A defamed man would only qualify for his full damages if he managed to sue the first defamer who set the ball rolling: and that, I think, is not and ought not to be the law."

That case was not one where there had been any consent by the plaintiff to the publication of the libel by someone other than the defendant. But that cannot affect the quantum of damage. It may, in appropriate circumstances, amount to consent to the publication complained of and so provide a complete defence. If it does not, as we have held in the present case it does not, the level of damages depends on the plaintiff's reputation and the amount of injury caused to it, taking account of all relevant circumstances. If there was consent to publication by another person, the circumstances will include the nature of the consent and the circumstances in which it was given. In the present case, the agreement reached with Veggies Ltd could not properly be construed as an admission by the respondents that they had a reputation of the kind alleged in those parts of the leaflet to which they had not objected, nor as evidence of such a reputation. In consequence, we reject the appellants' arguments that the agreement with Veggies Ltd should reduce the level of damages in this case.

They also submit that it was an abuse of process by McDonald's to claim damages when they had made public statements that they were not seeking damages. They note that in opening his case, Mr Rampton had said that "the plaintiffs are not concerned with damages" but rather with obtaining a vindication of their position in a reasoned judgment. It is said that this position was modified by the end of the trial. We very much doubt whether such a shift in position could in any event amount to an abuse of process, for which the appropriate remedy would be a stay rather than a refusal to award damages. But in the circumstances of this case there are no proper grounds for alleging that the plaintiffs were abusing the process of the court. Even in his closing submissions at the end of the trial, Mr Rampton was still raising the possibility that his client's reputations might be adequately or partially vindicated by the terms of the judgment, rather than by damages, at least to the extent that it would not be as necessary to mark the vindication by such an award as it would be in a jury trial where no reasoned judgment would exist. That proposition did not find favour with the judge, and in our view rightly so. On Day 311, he emphasised the difficulties if the court were to take the view that a plaintiff's reputation could be vindicated, wholly or partly, by the judgment rather than by an award of damages. The public might well not read the judgment itself whereas it might pay attention to the amount of damages awarded. The proposition to which we have referred was rejected by the House of Lords in *Dingle*, where Lord Morton of Henryton said at page 404 that such method of assessing damages

> "... would do less than justice to the plaintiff ... and it is based upon suppositions which may be unfounded. A judge cannot tell how widely his judgment will be reported and read, nor can he tell how far the plaintiff's general reputation will be improved by his complimentary remarks".

In the present case, it would in practice have given rise to a number of difficulties, not least in relation to any award made in favour of the appellants on the counterclaim. In all the circumstances we can see no abuse of process nor any reason for reducing damages by reason of the respondents' conduct on this aspect of the case.

Associated with this point is a submission by the appellants that McDonald's did not come to court with clean hands and that the court should show its displeasure at their conduct by reducing the award of damages. The appellants refer to the documents published about them by McDonald's, those documents forming the subject matter of the counterclaim, and also to the fact that the inquiry agents stayed undercover at London Greenpeace for a time after the writ was issued.

Even if this was a proper basis in principle for a reduction in damage, which we doubt, neither of the matters relied on in support amounted to misconduct on McDonald's part. Both have already been covered in this judgment: we have found that the publication by the respondents of those defamatory statements about the appellants was protected by qualified privilege. Since the law regards such protection as proper in the circumstances arising in this case, the respondents' behaviour cannot be characterised as misconduct. As for the inquiry agents, this aspect has already been dealt with when abuse of process was being considered. There is no basis in any event for concluding that these activities amounted to misconduct on McDonald's part.

We return to the point about the extent of publication and of damage to McDonald's reputation for which the appellants are responsible, as opposed to that for which others, such as Veggies Ltd, may have been responsible. The respondents are not entitled to recover from the appellants in respect of any damage to their reputation caused by Veggies Ltd's publication of similar libels. Indeed Mr Rampton has accepted that, in the light of the agreement reached with Veggies Ltd, the respondents had no cause of action against Veggies Ltd in respect of their publications.

The judge did not in this part of his judgment expressly distinguish between the damage caused by Veggies Ltd's publications and that for which the appellants were responsible. Nonetheless, we are satisfied that his award of damages reflected only the injury caused to the respondents' reputation by the publication for which the appellants are responsible. The judge's award was based on his finding that the appellants were both responsible for the publication of "several thousand copies" of the leaflet between the appropriate dates for each appellant. That finding was derived from the evidence of Mr Gravett, another member of London Greenpeace, that 2,000 or 3,000 copies of the leaflet had been printed in 1987, and from the judge's inference that there must have been consequential publication as a result of the direct publication. Mr Gravett was referring to leaflets which had been printed for London Greenpeace and which were delivered to their offices in a box. It is clear that these were copies of the leaflet complained of. They were not copies of any leaflet produced by or for Veggies Ltd. Therefore the figures of 2,000 or 3,000 copies were related specifically to copies of the leaflet complained of. As for the judge's reference to "consequential publication", he gave what was in effect a definition of what he understood by that earlier in his judgment at page 78, namely "by those to whom it (the leaflet) was originally handed or sent handing or copying it on." That is the established concept of consequential publication. It would not include distributing copies of the Veggies Ltd leaflet, which though similar in many respects to the appellants' leaflet was not identical and which could not be created merely by copying the leaflet complained of. It follows that the judge was not including publication of the Veggies' leaflet within his allowance for consequential publication. His award covered only the injury to the respondents' reputation caused by the publication for which the appellants were and are responsible. It can reasonably be assumed that those who read the 2,000 to 3,000 copies mentioned by the judge were different people from those who read the Veggies publication.

The appellants submit that no further onward publication was proved and that, for the publication of at most a total of 2,000 or 3,000 leaflets, the judge's starting point of £50,000, had none of the defamatory statements been justified, was too high. It seems to us that the judge's inference of consequential publication was a proper one. There was evidence from Mr Gravett that copies of the leaflet went out with a press release in August 1989 to newspapers, radio stations and television companies. The leaflet itself, under the heading "What Can Be Done" states: "Stop using McDonald's, Wimpy, etc., and tell your friends exactly why." As for the judge's figure for damages as a starting point, in our judgment that figure was a relatively modest one, given the seriousness of the allegations in the leaflets about the risks of heart disease and cancer and of food poisoning from eating McDonald's food and about the destruction of rainforest and the keeping of people in the Third World poor and hungry. We see no force in the appellants' submissions on that topic.

That leaves the precise amount of damages to be determined, since we have differed from the judge on a number of aspects of the case. In particular we have arrived at a different conclusion from his on important parts of the case concerning nutrition and health risks and on the allegations about pay and conditions for McDonald's employees. The appellants, however, failed to justify the defamatory statements in the leaflet about destruction of rainforest and starvation in the Third World, about packaging, food-poisoning, the dismissal by McDonald's of pro-union workers, and to some extent about cancer.

Nutrition and health risks always was and was bound to be an important element in the case, given McDonald's business. When opening their case at trial, leading counsel for McDonald's said of nutrition that "it lies at the heart of the case ... [McDonald's] business depends upon it." It is therefore highly significant that the allegation about the risk of heart disease has been justified. Moreover, even though the appellants failed to justify fully all the defamatory statements about the risks of cancer, it is well-established that such facts as they did establish when seeking to prove justification of those statements may be relied upon in mitigation of damages: see *Pamplin v. Express Newspapers Ltd* [1988] 1 WLR 116, where it was said by Neill L.J.:

> "The defendant may be able to rely on such facts as he has proved to reduce the damages, perhaps almost to vanishing point. Thus a defence of partial justification, though it may not prevent the plaintiff from succeeding on the issue of liability, may be of great importance on the issue of damages." (p.120).

As we have said, the findings reached by the judge on cancer risks went some way along the road of justifying for cancer of the breast and bowel the defamatory meaning upheld in the previous Court of Appeal decision. In essence the judge found that there was a possibly increased risk of breast cancer and a "strongly possible" increase in the risk of cancer of the bowel. Those findings must be reflected in the assessment of damages. However, the judge in making his own assessment expressly cited the Pamplin case and referred to the principle to be derived from it. His figures for damages must be taken to have reflected the findings he had made about the risks of cancer, findings from which we have not departed.

In contrast, his award of damages took account not only of the defamatory allegation about the risk of heart disease, which we have found to be a justified charge, but also the allegations about the pay and conditions of McDonald's employees. Those latter allegations, in the light of our finding that they were covered by the defence of fair comment, no longer fall to be reflected in the award. The judge had taken account of the fact that the evidence "did disclose unsatisfactory aspects of their working conditions", so the reduction in his award to allow for our conclusions on fair comment will be smaller than would otherwise have been the case. Nonetheless, some adjustment is needed to take account of that aspect. More significantly, we have concluded that the allegation in the leaflet about a "very real risk" of heart disease from a diet affected by eating McDonald's food was justified.

There remain highly damaging allegations which have not been justified. The charge about food poisoning is especially serious for companies engaged in the restaurant business, as are those about cancer risks, to the extent that those were not justified. As we said earlier when dealing with section 5 of the Defamation Act 1952, the allegations about starvation in the Third World and the destruction of rainforest are very harmful to a company's reputation. Taking all these matters into consideration, we conclude that the judge's awards of damages need to be reduced to a certain extent. Each respondent is entitled to damages of £20,000 for the publications between September, 1987 and September, 1990 for which Mr. Morris is responsible. The liabilities of Ms. Steel will be reduced to £18,000, which takes account of the somewhat shorter period for which she is responsible.

The order made by the judge as to the appellants' joint and several liabilities will stand but with the sums of £18,000 in place of £27,500, and the order as to Mr. Morris' several liabilities will stand but with the sums of £20,000 in place of £30,000. To that extent these appeals are allowed.

Order: Appeal allowed; no order as to costs; application for leave to appeal to the House of Lords refused. (This order does not form part of the approved judgment)