IN THE COURT OF APPEAL **Appeal No A2/2009/1602**

CIVIL DIVISION **Claim No. HQ06X03643**

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

MR JUSTICE TUGENDHAT

B E T W E E N:

JANE CLIFT

Respondent/ Claimant

-and-

(1) SLOUGH BOROUGH COUNCIL
(2) PATRICK KELLEHER

Appellants/ Defendants

RESPONDENT'S SKELETON ARGUMENT

References in this Skeleton Argument are to the 3 Appeal Bundles and to the Respondents' Bundle, Bundle 4, are in the format [Bundle/Page].

A. INTRODUCTION

1.1 This is an application for permission to appeal with the appeal to follow if permission is granted concerning the relationship between the "qualified privilege" defence to claims for libel and the public law duties of public authorities, in particular the duty imposed by section 6 of the Human Rights Act 1998 ("the HRA") to act compatibly with Convention Rights.

1.2 This Skeleton Argument follows the structure of the Appellants' Skeleton Argument ("As' Skeleton") and responds to the six grounds of appeal under the two heads of appeal which the Appellants classified as:

(1) issues of principle concerning Article 8 and qualified privilege.

(2) issues arising in this specific case.

There is some overlap with issues in this specific case and the issues of principle.

1.3 The Appeal Bundles contain a good deal of surplusage. The Appellants have been invited to agree a Core Bundle but have failed to do so. The Appeal Bundles do not contain the final versions of the Statements of Case or of the

Respondent's Witness Statement. These are included in a Respondent's Bundle (Bundle 4) which, for ease of reference contains the final versions of all the Statements of Case. It also contains a short extract from the Transcript.

2.1 In summary, it is submitted that:

(1) A public authority should only be entitled to rely on the defence "qualified privilege" in respect of a defamatory publication if it the publication was consistent with its public law duties.

(2) A public authority should only publish information disclose or the purpose of and to the extent necessary for performance of its public duty and in accordance with its obligations under the HRA.

(3) If the information published affects an individual's reputation, there is an interference with his or her rights under Article 8(1) of the Convention which must be justified under Article 8(2).

(4) In order to be justified under Article 8(2) the publication must be necessary for a legitimate aim and proportionate to that aim.

(5) This approach is consistent with the duties imposed on public authorities by the Data Protection Act 1998 ("the DPA").

(6) On the facts of this case, the Judge was correct to hold that publication was excessive and not proportionate.

2.2 As a result, the decision of the Judge was correct for the reasons that he gave and the application for permission to appeal should be dismissed.

B. BACKGROUND

3.1 This is a libel claim by the Respondent, Jane Clift, against the First Defendant Slough Borough Council ("the Council") and the Second Defendant, Patrick Kelleher ("Mr Kelleher"), the Council's Head of Public Protection arising out of the Council's decision to place Ms Clift's name on the Violent Person's Register with a risk rating of Medium.

3.2 The facts are summarised in the Judgment (§§1-2 and 9-37 [**1/34** and **35-42**]).

4.1 In brief, Ms Clift witnessed some anti-social behaviour in a public park. In the course of reporting this to the Council, she spoke on the telephone to Ms Fozia Rashid, the Council's Anti-Social Behaviour Officer. Ms Clift was dissatisfied with the way Ms Rashid responded to her report and subsequently complained

to the Council.

4.2 Ms Clift wrote a letter dated 12 August 2005 to the Council which stated:

> "I did not want to give Fozia Rashid the self satisfaction of terminating the call – I slammed my phone down so hard I broke it. I felt so affronted and so filled with anger that I am certain I would have physically attacked her if she had been anywhere near me. **I truly am not of that nature and so, surely, this should act as a wake up call to the borough as to the capacity she has for offending people"** (emphasis added) **[3/787]**

She repeated a similar sentiment when she met Mr Kelleher on 25 October 2005 although it remained in the past tense as recorded in his Notes of Interview "Stated that she would have hit Fozia if she could." **[3/808].**

4.3 As a result of this letter and her statement to Mr Kelleher it was decided to add Ms Clift's name to the "Violent Persons Register".[1] On 1 December 2005 Mr Kelleher sent an email to 54 individuals who were officers or employees of the Council ("the Email") – he also asked for hard copies to be sent to 12 Council Community Wardens (66 publishees in total). This began

> "I have requested that Jane Clift's name be added to the register of violent persons following repeated threats of violence towards a member of staff" [**3/833].**

4.4 A copy of the "Violent Persons Register itself was circulated with the Email. It contained an entry describing the "incident" as "Threatening behaviour on several occasions" ("the Register Entry")**[3/859]**. The Council was unable to identify all the publishees but Mr Satterthwaite estimated it would not have been over 150: Judgment §28 **[1/39]**. The recipients divided into (a) Council Employees and (b) what were described as "Partner Organisations of the Council".

5. The Partner Organisations of the Council to whom the Register Entry was sent were a wide variety of organisations many of which Ms Clift had no contact with: (see Letter 11.1.06 **[3/853]):**

(1) Slough Accord – environmental management (including refuse collection and road sweeping);

(2) Interserve FM – Building Maintenance on Council owned properties and

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[1] Note that although the Council's document on "Safe System of Work (Codes of Practice)" [**3/752-757]** refers to "Potentially Violent Persons" or "PVPs", the register which was maintained was headed the "Violent Persons Register" [**3/858-864]** and was routinely referred to as such.

estate maintenance;

(3) NHS Primary Care Trust – social services related activities including Community Mental Health Team, Supporting People and Community Nursing;

(4) Community Safety Partnership – Neighbourhood Wardens. This included which included about 50 businesses in the Town Centre Business Initiative: Judgment §81(vii) **[1/55].**

6.1 The defences to the claim included

(a) justification and

(b) a contention that the words complained of were published on an occasion of qualified privilege.

6.2 Qualified privilege was pleaded in the undated Amended Defence as follows (para 3):

> "The email was published on an occasion of qualified privilege in that the Second Defendant had a duty to send the Email, namely to protect the safety of the First Defendant's staff and the staff of its partnership organisations, which staff had a corresponding interest in receiving the same" (para 3, **[2/337])**.

There is a similar plea in relation to the Register Entry (para 5 **[2/339].**

6.3 The Re-Re-Amended Reply **[4/3/16-26]** denied that the Email and the Register Entry were published on an occasion of qualified privilege on the basis that:

(a) Their publication was not necessary or proportionate to the legitimate aim of protecting the rights of the Council's employees (§5.3, **[4/3/30].**

(b) They were published maliciously (§6 **[4/3/30-31**]

7.1 The Judge held (Judgment §38, **[1/43]**) that the only publications subject to qualified privilege were those to "customer facing staff" in 3 named departments of the Council. He held that the Appellants:

(1) Did have a qualified privilege defence in relation to publication to employees of the Council who were "customer facing staff" (and their managers) being employees in the following departments: Trading Standards, Neighbourhood Enforcement and Community Safety.

(2) Did **not** have a qualified privilege defence in relation to publication to employees of the Council who were 'customer facing staff' (nor their managers), being employees in the following departments: Licensing,

Food and Safety, Children and Education Services; and

(3) Did **not** have a qualified privilege defence in relation to Community Wardens, Trade Union Officials, anyone in the four partner organisations.

7.2 As regards a number of other publishees[2], it was conceded by the Appellants at trial that the case should proceed on the footing that publication to those people was not on an occasion of qualified privilege (Judgment §40 **[1/43]**).

7.3 The effect of these rulings was that the jury were directed that if they jury did not find that the words complained of were published maliciously damages were to be assessed on the basis that the Register Entry was circulated to 150 people and the Email to 30 people (the publication to the remainder of the 66 people being covered by qualified privilege)(Judgment: §42 **[1/44])**.

8.1 The jury rejected the defence of justification and also found that Ms Clift had not established malice against the Second Defendant. The Jury's verdict is recorded in the Judgment after Trial (**[1/26-28]**).

8.2 In relation to the publications which the Judge had ruled were not covered by qualified privilege the jury awarded Ms Clift damages of £12,000. She left court with her reputation vindicated.

C. SUMMARY OF RESPONDENT'S CASE ON THE ISSUES OF PRINCIPLE

9.1 It is submitted that the legal principles which apply in this case are clear and well established:

(1) An occasion of publication will be "privileged" if the publisher can establish a "legal, moral or social" duty to publish the communication to publishees who have a corresponding interest or duty to receive it. Reciprocity is essential (*Adam v Ward* [1917] AC 309, 334).

(2) Where the publication is by a public authority, the information must be disclosed in accordance with a public duty. As this court said in *Wood v Chief Constable of West Midlands* ([2005] EMLR 20):

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[2] See Judgment § 39 **[1/43]:** (1) Environment Health Officers [3 named] & the Head of Environmental Services and Policy; (2) Head of Customer Services Team; (3) Housing Neighbourhood Managers and supervisors; (4) Strategic Director for Social Services; (5) [a name is given but no job description]; (6) An unascertained number of additional publishes - Mr Satterthwaite's evidence was that he did not know how many but he thought not over 150 people.

> "a public body ought not generally to disclose information which comes into their possession relating to a member of the public, being information not generally available, except for the purpose of and to the extent necessary for the performance of their public duty. The principle rests on a fundamental rule of good public administration which the law must recognise" (para 58).

This principle applies whether the disclosure is pursuant to a "duty" or in service of an "interest": a public authority does not have an interest in disclosing information otherwise than in accordance with the "fundamental rule of good public administration" already mentioned.

(3) Where a public authority publishes information which is damaging to a person's reputation, that person's Article 8 rights are engaged and there will not be a "duty to publish" unless that publication can be justified under Article 8(2) (see *Re BBC* [2010] 1 AC 45, §§18-22).

(4) In order to be justified under Article 8(2), the publication must be necessary for a legitimate aim and must be proportionate to that aim. In other words:

(i) the legitimate aim in question must be sufficiently important to justify the interference;

(ii) the measures taken to achieve the legitimate aim must be rationally connected to it; and

(iii) the means used to impair the right must be no more than is necessary to accomplish the objective;

(iv) a fair balance must be struck between the rights of the individual and the interests of the community, which requires a careful assessment of the severity and consequences of the interference.

(see, eg, *Huang v Home Secretary* [2007] 2 AC 167, para 19).

9.2 The Court must apply these principles in deciding whether the words complained of in this case were published on an occasion of qualified privilege.

D. THE GROUNDS OF APPEAL ON ISSUES OF PRINCIPLE

Ground 1: "Respondent's Article 8 Rights not engaged": [As' Skeleton, §§16-25]

10.1 The Appellants contend that there is no Article 8 right to reputation and that the matter has not, to date, been considered by this court (Appellant's Skeleton, §24, [**1/15]**).

10.2 The law is, in fact, clear and well established on this point. In *Re BBC* ([2010]

1 AC 145) the House of Lords proceeded on the basis that Article 8 protected the right to reputation (see, eg, §28 per Lord Hope). The point was argued in the case of *Re Guardian News and Media* ([2010] 2 WLR 325, §§37-42). The Supreme Court accepted that the right to protection of reputation is a right which, as an element of private life, falls within the scope of Article 8. The Supreme Court accepted that an attack *on* reputation must attain a certain level of gravity and must impact on a person's relationship with other people *(*§42). This is consistent with the approach taken in Strasbourg (see eg *A v Norway* Judgment of 9 April 2009, §§64).

10.3 As a result of this judgment of the Supreme Court it is unnecessary to address the substantial body of Strasbourg case law over the past five years which treats "reputation" as an aspect of the right to respect for private life protected by Article 8.[3]

10.4 In addition, the protection of a person's moral and psychological integrity also falls within the scope of Article 8 (see, eg, *Kyriakides v Cyprus*, Judgment of 16 October 2008 at § 41). Furthermore, respect for private life also comprises the right to establish and develop relationships with other human beings (*Ibid*, at §49).

11.1 There can be no doubt that the words complained of are seriously damaging to Ms Clift's reputation, her relationships with others and the conduct of her normal private life and that, as a result, her Article 8 rights are engaged.

11.2 The widespread publication of information that a person is violent and her inclusion on a register of "violent persons" is a serious interference with her Article 8 rights. Beyond affecting her reputation, it also interfered with her relationships with others (particularly how she was treated by the Council) and her moral and psychological integrity:

(1) on 12 May 2006, Mr Kelleher (having learnt that Ms Clift was hand delivering letters to the Council) sent an email stating:

> "Under no circumstances should she be allowed into the office and officers receiving her at the door should be accompanied at all times." **[3/867]**

(2) the Council's Potentially Violent Persons Policy required that (a) two people must be present at meetings where an active PVP marker is

[3] The pre-2009 cases can be found in Clayton and Tomlinson, *The Law of Human Rights* (2nd Edn, 2009), §§12.301 to 12.302.

registered and (b) staff must not let the registered person get between them and a safe egress route: **[3/756]**.

(3) Ms Clift gave oral evidence about the effect that her inclusion on the Register had upon her in similar terms to §13.31 of the Particulars of Claim **[1/79]** her namely: -

- she felt embarrassed and humiliated every time she went to the Council;
- on one occasion at Landmark House, a man on the front desk chuckled to himself and said I'll find someone to explain it to you if I can find someone brave enough.
- Although she had lived there for 10 years, she left Slough after 8 to 9 months of being on the Violent Persons Register because she felt that everywhere she went, people were whispering about her and talking about her.

11.3 At trial, the Appellants conceded that:

> "the placing of the Claimant on the Register engaged her Article 8 rights in the narrow context of her reputation and that publication had to be justified under Article 8(2)" (Judgment §64 **[1/52]).**

Although the Appellants' Counsel did reserve his position as to whether there was an Article 8 right to reputation, this stated concession was made.

12. This Ground of Appeal does not raise an arguable point and permission should be refused.

Ground 2: Judge erred following *Wood* rather than *Kearns* [As' Skeleton, §§26-29]

13.1 The occasions of qualified privilege have traditionally been divided into two categories:

(1) where the maker and the recipient have a common interest in receiving the information ("common interest") and

(2) where the maker has a duty/interest to make the statement and the recipient has a corresponding duty/interest to receive the information ("duty-interest"): see *Gatley on Libel & Slander* (11th edition) at §14.6.[4]

13.2 However, in *Kearns v Bar Council* ([2003] 1 WLR 1357, §30) this Court suggested that a more helpful categorisation was to be found by distinguishing

[4] *Duncan & Neill on Defamation* (3rd Edn, 2009) runs the two together suggesting that qualified privilege is established if, having regard to the subject matter, the publisher had a duty or interest to make it and the publishees a corresponding interest or duty to receiver it (§16.05).

between:

(1) cases where there was an existing and established relationship between maker and recipient and

(2) cases where no such relationship has been established or the communication is volunteered otherwise than in relation to that relationship.

13.3 In *Kearns* it was held that where there was an established relationship (there between the defendant and the Bar) which required the flow of free and frank communication, the occasion of the communication was protected by qualified privilege even though no steps had been taken to verify the communication. It was also said in *Kearns* that the question of whether a particular relationship gives rise to a common interest or a duty/interest situation will often produce sterile disputes: per Keene LJ at [45].

13.4 It should be noted that the *Kearns* classification has problems of its own (see *Gatley* at §14.8). The authors of *Gatley* and *Duncan and Neill on Defamation* (3rd Edn, 2009, §16.05) continue to use the "duty/interest" analysis. In *Howe v Burden* ([2004] EWHC 196 at §15) Eady J suggested that *Kearns* was a case of what might be called "off the peg" privilege, where the issue can resolved by looking at the relationships between the parties and the subject matter of the communication.

14.1 The case of *Wood v Chief Constable of West Midlands* concerned letters from a police officer to the Crime Fraud Prevention bureau, an independent insurance engineer and an insurance broker setting out details of allegations of handling stolen property against the claimant's company and business partner. Tugendhat J struck out the defence of qualified privilege ([2004] EMLR 17) and that decision was upheld by this Court ([2005] EMLR 20).

14.2 The defence was struck out on the basis that the police, as a public authority, should not generally disclosed damaging information other than for the purpose and to the extent necessary for the performance of their public duties (*ibid*, §63). Reliance was placed on the "fundamental rule of good public administration" that

> "When, in the course of performing its public duties, a public body (such as a police force) comes into possession of information relating to a member of the public, being information not generally available and potentially damaging to

> that member of the public if disclosed, the body ought not to disclose such information save for the purpose of and to the extent necessary for performance of its public duty or enabling some other public body to perform its public duty" (*R v Chief Constable of North Wales Police ex parte Thorpe* [1999] QB 396 at 409H).

This passage was cited with approval in *Wood* (§58, cited in the Judgment, at §54 **[1/47-48]**). The decision in *Kearns* was mentioned by May LJ in *Wood* (see §54) but as there was no "existing relationship" its application to disclosure by public authorities was not considered further.

15.1 There is no conflict between *Wood* and *Kearns.* This is because the defendant in *Kearns* (the Bar Council) was not a public authority and, as a result, no question arose to the application of the "fundamental rule of good public administration" mentioned above. The issues that arise in this case and in *Wood* arise because the Defendant is a public authority.

16.2 In any event, the position is put beyond doubt by the application of the HRA. As the Appellants point out this was not considered in *Wood* as the relevant publications took place before the HRA came into force (see *Wood,* §65). Although the HRA was in force when *Kearns* was decided it was not relied on. As the Judge correctly points out the case did not relate to "sensitive" (or personal) information and, at that stage, reputation had not been recognised as an Article 8 right (see Judgment, §67, **[1/52].** As a result of section 6 of the HRA, the Council is bound to act in a way which is compatible with Ms Clift's Article 8 rights. This reinforces the "fundamental rule of good public administration": if a public authority publishes information which is damaging to a person's reputation Article 8 rights are engaged and there will not be a "duty to publish" unless that publication can be justified under Article 8(2).

16.3 Furthermore, as a public authority under section 6(3)(a) of the HRA the Court itself is obliged to act compatibly with Ms Clift's Article 8 rights and ensure that any interference with those rights by the Council is justified and proportionate.

16.1 In any event, even if the Judge had followed *Kearns*, Ms Clift would still have succeeded in her claim in relation to publication to the Partner Organisation and non-employees of the Council because qualified privilege would still not have

applied. As the Judge said (Judgment §99 **[1/59]):**

> "The ruling I made would have been different if I had followed *Kearns*. So far as publication to fellow Council employees is concerned, there was an existing relationship, and so no occasion to enquire into the circumstances. Publication to all employees of the Council would have been on an occasion of qualified privilege, including to those employees who did not need to know, such as those in the Licensing Department. In the case of publication to partner organisations, or non-employees, these were not within an existing relationship, and the ruling would have been the same. These were not on an occasion of qualified privilege".

16.2 The Appellants assert (As' Skeleton, §29 **[1/16**]) that these publications were situations of an "existing or established relationship" without giving reasons. It is submitted that the judge was right on this point as well.

17. This Ground of Appeal does not raise an arguable point and permission should be refused.

Ground 3: Departure from *Horrocks v Lowe* [As' Skeleton §§30-25]

18.1 This Ground is closely related to the previous one. At its heart is the question as to whether the ambit of qualified privilege should be the same in relation to private bodies or individuals and in relation to public authorities which are obliged to act in accordance with fundamental rules of good public administration and compatibly with Convention Rights. The Judge correctly held that public authorities should be subject to stricter standards than those traditionally imposed by the common law on private bodies and individuals.

18.2 Contrary to the Appellants' contentions, this does **not** involve "the removal of the defence of qualified privilege to libel" (As' Skeleton, §35a. **[1/17]**). This defence remains potentially available if a public authority is disclosing information in a way which is consistent with its public law duties (including its duties under the HRA). However, the Judge's approach does involve denying public authorities the defence if they are not acting consistently with their public law duties. This is an entirely proper approach. A public authority should not have a defence to libel in relation to a publication which is unlawful in public law.

18.3 The contention that the protection of qualified privilege is rendered illusory (As' Skeleton,§33) is simply unfounded. All that is required is that disclosure

requires a public interest justification and there needs to be consideration of the relevance of the material published on a case by case basis. As May LJ said in *Wood v Chief Constable of the West Midlands Police* ([2005] EMLR 20)

> "Disclosure of damaging information about individuals requires specific public interest justification. Ill-considered and indiscriminate disclosure is scarcely likely to measure up to this standard. That said, each case depends on a careful consideration of its own facts." (§63)

19.1 The Judge said that the effect of his decision was to depart from the common law approach to "excessive publication" – which is that irrelevant matter retains the protection of qualified privilege unless it is published maliciously. The Judge accepted that the effect of his decision was that the Court would apply "an objective test of relevance to every part of the defamatory matter published" (Judgment, §103, **[1/60]**). The classical exposition of the common law is, of course, to be found in the speech of Lord Diplock in *Horrocks v Lowe* ([1975] AC 135, 151E-F). The Judge dealt with the fact that he was departing from the approach in this case in the section of the Judgment headed "The Implications of this Judgment" (§§99-125, **[1/59-65]**). In particular, he gave a compelling explanation of historical background and why, when the HRA applies, the common law standards are no longer applicable.

19.2 This part of the Judgment is, in fact, *obiter*. The decision did not concern the publication of "irrelevant matter" but rather the extent of the qualified privilege available to the Council. The Judge's finding was that the publication by the Appellants of the Email and the Register Entry to two categories of publishees was not covered by qualified privilege. This was not because of the inclusion of "irrelevant matter" but because there was no justification for such publication under Article 8(2) and hence no duty to publish.

20.1 The Appellants seek to argue that the Judge's decision would mean that public authorities would find it difficult to decide where the line is to be drawn and would draw it restrictively, thus destroying the social utility of the privilege (As' Skeleton, §33 **[1/16-17]**).

20.2 This argument misses the essential point that public authorities are **already** under an obligation to apply an objective test of relevance to information which they publish – as a matter of "good public administration" and under the HRA

and the DPA. The standards which the Judge applied are no stricter than those that the Council already seeks to comply with. In fact, as the Judge noted the Information Commissioner's "Data Protection Act 1998 Compliance Advice Violent Warning Markers", takes a more restrictive view of the proper disclosure of information of the type in issue in this case (see Judgment, §95, **[1/58]**).

21.1 The Appellants advance two further arguments under this head (As' Skeleton, §35 **[1/17]).** These both appear to be based on the (incorrect) premise that the Judge has ruled that the defence of qualified privilege has no application to the Council.

21.2 First, it is said that Article 8 does not impact on the Council's defence of qualified privilege because Ms Clift could bring a free standing HRA claim for damages. This argument was not advanced below and is a non sequitur. The fact that a "victim" of a violation of a Convention Right can bring a claim under section 8 of the HRA for damages does not mean that an otherwise unlawful act becomes lawful.

21.3 Second, it is said that the Article 8(2) balancing exercise can properly take into account the public policy reasons for the existence of qualified privilege. This is exactly what the Judge did. He said

> "The court should not set such a complicated or high bar to work against the public interest that the policy is intended to protect" (Judgment §82 **[1/56]**).

22. Once again, this Ground of Appeal does not raise an arguable point and permission should be refused.

E. THE GROUNDS OF APPEAL ON WEIGHING THE ISSUES IN THIS CASE

Ground 4: Finding that Only the Respondent's Convention Rights Were Engaged [As' Skeleton, §§16-25]

23.1 The Judge found that no Convention rights of Mr Kelleher, the Second Appellant were engaged and that as a public authority, the Council had no convention rights: Judgment §76 **[1/54]**. He held that the only Convention Right engaged is that of Ms Clift to her reputation.

23.2 The Appellants now contend that the Article 2 (right to life) and Article 8 (right

to respect for a private & family life) of the Council employees were engaged. This was not argued below as the Judge noted (Judgment §75 **[1/54]**):

> "Mr Beggs submitted that the Council owed a duty to ensure the safety of their staff. . . He did not submit that these duties were owed equally by the Council to the staff of its partner organisations, such as the NHS, nor could he have done so. **Nor did he submit that the risk to the Council's own employees on the facts of the present case was such as to engage their Article 8 right to their physical and psychological integrity. Nor could he sensibly have done so"**. (emphasis added)

24.1 It is well established that before any Convention Rights are engaged a certain level of seriousness of interference has to be attained.

24.2 In relation to Article 8, the point has been emphasised on a number of occasions. For example, in *Gillan v Commissioner of Police for the Metropolis* **(**[2006] 2 AC 307) - which concerned alleged breach of Article 8 rights by the use of police stop and search powers - it was held that any interference involved was not sufficiently serious to engage Article 8(1), Lord Bingham doubted

> "whether an ordinary superficial search of the person can be said to show a lack of respect for private life .... it is clear Convention jurisprudence that intrusions must reach a certain level of seriousness to engage the operation of the Convention, which is, after all, concerned with human rights and fundamental freedoms...". **(**§28)

24.3 In relation to Article 2, is even higher. The positive obligation to protect life is only triggered if there is a "real and immediate risk to life" (see, *Re Officer L* [2007] 1 WLR 2135, §20).

25.1 On the facts the Judge was correct to hold that the Appellants could not sensibly suggest that the Article 8 rights of its staff were engaged (Judgment §75 **[1/54]**).

25.2 Ms Clift's letter dated 12 August 2005 on which the Council based its decision to place her on the Violent Persons Register read as follows:

> "I did not want to give Fozia Rashid the self satisfaction of terminating the call – I slammed my phone down so hard I broke it. I felt so affronted and so filled with anger that I am certain I would have physically attacked her if she had been anywhere near me. **I truly am not of that nature and so, surely, this should act as a wake up call to the borough as to the capacity she had for offending people"**. **[3/787]**

Even when this was repeated at the meeting with Mr Kelleher on 25th October

2005, it remained in the past tense "Stated that she would have hit Fozia if she could." **[3/808].** It is clear that this is nothing more than a figure of speech used to convey her frustration.

26.1 At its highest this might be taken as a indicating a past intention to use violence towards one individual – Ms Rashid. Statements of this type directed at one particular person cannot sensibly be said to engage the Article 2 or Article 8 rights of any other Council employees because the requisite level of seriousness is not attained. There is no evidence of any credible threat to any employee of the Council. The Appellants' contention that employees' Article 2 and Article 8 rights were generally engaged is misconceived.

26.2 In relation to Ms Rashid, it cannot sensibly be argued that her Article 2 rights were engaged – there was plainly no "real or immediate risk" to her life.[5] Her Article 8 rights were not engaged because there was no credible threat to her physical or psychological integrity. Even if there was such a threat, the balancing of her rights with Ms Clift's rights could have been met by proportionate measures focussed on restricting contact between Ms Rashid and Ms Clift. Any balancing exercise would not require circulation of the Violent Persons Register as widely as it was in fact circulated.

Ground 5: "Wrong to Consider Publications Disproportionate" [As' Skeleton §§40-52]

Introduction

27.1 Under this ground the Appellants seek to disturb the "balance" struck by the Judge. This Court will not, of course, interfere with such an assessment unless it is shown to be plainly wrong. In this case, far from being plainly wrong, it is submitted that the Judge was plainly correct in holding that the circulation was disproportionate to those categories of people he identified as not covered by qualified privilege.

27.2 The Judge held (Judgment §38 and §§82-83, **[1/43 and 56]** that it was not proportionate or fair to publish the Email or the Register Entry to:

(1) 'customer facing staff' and their managers who were employees in the following departments: Licensing, Food and Safety, Children and

[5] As implicitly acknowledged by the Council in failing to take any action until 1 December 2005, nearly 4 months later, see para 29.1 of this Skeleton.

Education Services; and to

(2) Community Wardens, Trade Union Officials and anyone in the four partner organisations.

28.1 It appears that there is no dispute as to the proper test for "justification" under Article 8(2) (see Judgment §70 **[1/53]**). It must be shown that the publication was necessary for a legitimate aim and was be proportionate to that aim. In other words:

(i) the legitimate aim in question must be sufficiently important to justify the interference;

(ii) the measures taken to achieve the legitimate aim must be rationally connected to it; and

(iii) the means used to impair the right must be no more than is necessary to accomplish the objective;

(iv) a fair balance must be struck between the rights of the individual and the interests of the community, which requires a careful assessment of the severity and consequences of the interference.

28.2 It is accepted by Ms Clift (as it was before the Judge) that the protection of the safety of the Council employees and the employees of its partner organisations is a "legitimate aim". It is also accept that this is, in principle, sufficiently important to justify an interference with Ms Clift's Article 8 rights and that the inclusion of a person's name on the Violent Persons Register is rationally connected to the legitimate aim.

28.3 However, in all the circumstances, the publication of the words complained of was not "proportionate" and was therefore not justified under Article 8(2) for the following reasons:

(1) The placing of Ms Clift on the PVP Register for a period of 18 months with a "Medium Risk" rating was a substantial interference with her Article 8 rights. It not only damaged her reputation it also affected the way in which she interacted with others and had an adverse effect on her "psychological integrity".

(2) There was no evidence of any the risk to the safety of the generality of Council employees. Ms Clift had been in direct and telephone contact with large numbers of Council employees and had (on the Appellants' own account) only threatened violence to one of them, Ms Rashid. There

was no evidence to suggest that the safety of any other employee was at risk.

(3) There was no evidence that the Ms Clift had contacted or attempted to contact Ms Rashid at any time between 11 August and 30 November 2005 or had in any way sought to give effect to her alleged "threats".

(4) The evidence showed that, in substance, the only matter relied on was what is alleged to have been said to Mr Kelleher on 25 October 2005: "Stated that she would have hit Fozia if she could" **[3/808].** Even taking the Appellants' evidence at its highest this did not constitute (and was not taken to constitute) a threat which was sufficiently serious or immediate to justify a Violent Incident Report or any kind of immediate "protective measures".

(5) The protection of Ms Rashid from Ms Clift (if that was necessary) could have been achieved by measures focussed on that employee – for example, by ensuring that Ms Rashid did not come into contact with Ms Clift and circulating appropriate warnings concerning Ms Clift to relevant employees.

(6) No employee had complained about Ms Clift's conduct and no contemporaneous "Violent Incident Report" relating to her had been completed by any person.

29.1 It is noteworthy that, on the Appellants' own evidence there was no urgency either to put Ms Clift on to the Register or to circulate the information. It was accepted by Mr Satterthwaite in cross-examination that there was no urgency: (Transcript p. 16, line 34 **[4/5/78]**). The incidents the Council relied on were the Letter and the Meeting (25.10.05). Yet it was not until 1 December 2005 that a Violent Incident Report Form **[3/834]** was completed – almost 4 months later.

29.2 These delays were contrary to the Council's own "Violence At Work Policy" which stated:

(1) incidents are to be reported 'as soon as is practical (same day if possible"' **[3/754]** and

(2) "A copy of the form must be sent to the Corporate Health & Safety Unit immediately for entry on to the central data base. This is to be done even if the investigation has not been fully completed as any delay means that other staff members may be put at risk" **[3/754]**.

29.3 The obvious lack of urgency strongly suggests that, even on the Council's own assessment, there was no immediate risk from Ms Clift to Council employees.

29.4 In all the circumstances, there were no reasonable grounds for believing that in the light of the three matters relied on by the Second Appellant in his decision to place Ms Clift on the Violent Persons Register was that it was necessary to publish the Email or the Register Entry in order to protect employees of the Council and others from violence threatened or perpetrated by Ms Clift.

30.1 As the Judge noted, the "Compliance Advice" provides a "useful check" (Judgment §92, **[1/58]**).

30.2 Under this advice, the Council was under a duty to ensure that only those employees who were likely to come into physical contact with Ms Clift, or who could otherwise demonstrate a need to know, had access to "violent marker information". The Council had no duty to circulate the information to any other employees.

30.3 In fact the Email was published to 54 people and the Register Entry was published to large numbers of individuals (and outside organisations) without any demonstration that these individuals or organisations were likely to come into physical contact with the Claimant. The proportionality assessment adopted by the Judge was considerably more favourable to the Council than that envisaged by the Information Commissioner.

Council's Employees

31.1 The distinction between the categories of employees not covered by qualified privilege and those who were that was drawn by the Judge was based on the likelihood of Ms Clift having contact with those departments:

> "But I do not accept that it was reasonable to conclude that any risk existed to those of the Council's staff who worked in departments which the Claimant was not likely to approach, such as Licensing. Trade union officials did not need to see the names of those on the Register in order to verify that the Council was taking appropriate measures to protect union members. Anonymising the version of the Register sent to them would be a simple and proportionate measure (Judgment §85 **[1/57]**).

31.2 The Appellants wrongly assert that the distinctions drawn between different departments are irrational and illogical (As' Skeleton §13, **[1/13]).** The issue is not whether different departments fall within the same area of the Council (eg.

Commercial Services) but whether Ms Clift was likely to have contact with them. The Judge was correct to distinguish in principle between those Ms Clift was likely to have contact with and those she was not as having a direct bearing upon whether circulation to them was proportionate, given the gravity of the interference. If the Court accepts that principled distinction, the detail of which organisations are covered is essentially a finding of fact which the Judge is best placed to make having heard the evidence.

31.3 It is submitted that circulation to employees that Ms Clift was not likely to have contact with was disproportionate and contrary to Article 8 for the reasons set out above. In each case, the Appellants did not adduce any evidence as to the identity of these individuals nor why the Council had a duty to publish to these individuals, or their interest in receiving the publications.

Partner Organisation Employees

32.1 The Partner Organisations are third party organisations outside of the Council. It was accepted by the Appellants at trial that many of these were organisations with which Ms Clift had no contact (see Judgment §§47 – 48, **[1/45 -46])**, in particular, Ms Clift had no contact with Interserve FM which engages in maintenance of council properties – she does not live in and never has lived in a Council owned property. Ms Clift also had no contact with Community Wardens: Community Mental Health; a National Probation Service; Child Protection Service; Youth Offenders Team; Drugs Action Team; Slough Race Equality Council; People First or Connections Berkshire.

32.2 In those circumstances, the Appellant had no duty to circulate to these organisations and to do so was disproportionate. As with the employees in the non-qualified privilege classes, as regards the Partner Organisations, the Appellants did not adduce any evidence as to the nature of the duty to publish nor their interest in receiving the publications.

32.3 In concluding that there was no duty owed to the Partner Organisations and that circulation was disproportionate, the Judge said at §86 **[3/57]**:

> "In my judgment the Council owed no duty to the staff of partner organisations which it did not owe to the staff of any other body, public or private, from which the Claimant might seek services or supplies. And in the case of two of those organisations, Mr Satterthwaite correctly conceded that there was no evidence of risk. Administrative convenience of the kind he advanced could not be a sufficient reason for sending the register to such

> organisations. Notably weak was the explanation given by Mr Satterthwaite to Ms Clift in his letter of 11 January 2006[6] of how staff of the partner organisations might come face to face with Ms Clift: "A good example of this is one of the many satisfaction surveys carried out".

The Respondent adopts and relies on that reasoning in support of the argument that the breadth of circulation was disproportionate, particularly as regards the weakness of the explanation and the claim to administrative convenience.

33.1 Further, the Council had been prepared to remove Ms Clift's name from the Register as circulated to Partner Organisations which strongly suggests publication to them was disproportionate.

33.2 During the course of Ms Clift's complaints about being included on the Violent Persons Register, the Council (Mr Satterthwaite) prepared a draft letter which stated that her name would be removed from the partner organisations. It contained the following paragraph

> "... I have requested that our partner organisations (as listed above) remove with immediate effect any PVP markers that they hold against your name, therefore your PVP marker will only now remain within the confines of the council." Draft letter to Ms Clift 11.1.06 **[3/853]**

This was removed from the letter as actually sent (see **[3/856]**) because of concerns that "she may say we are admitting we made a mistake" (Email from Finbar McSweeney to Peter Satterthwaite 11.106 **[3/852]).**

34.1 The Appellants contend that the finding that publication to Slough Accord was not protected is another example of the Judge's illogical reasoning apparently because "everyone . . . has their refuse collected" (As' Skeleton, §13(c) **[1/13]**). This is completely at odds with the evidence of the Appellants' own witness, Mr Satterthwaite (the Data Protection Officer) who made it clear that Slough Accord had no interest in receiving this information. He gave evidence as follows during examination in chief:

> Q Why did you initially think that you would invite those four partners to remove her name from any databases they had?
>
> A. At the time I actually considered that in hindsight maybe those organisations don't really need to know about ----
>
> Q Why not?

[6] This letter is at **3/856.**

> A. Certainly Interserve mainly repairs Council properties, and Miss Clift does not live in a Council property. Therefore, for example, Interserve would not probably come in contact with Miss Clift.
>
> Q Right. What about the other three?
>
> A. **Slough Accord mainly deal with refuse and street cleaning. I considered that maybe they would not need to know about Miss Clift's entry.** (Transcript, p. 7, lines 10 -21, **4/5/69**). (emphasis added)

34.2 Mr Satterthwaite further went on to say the reasons he did circulate the Register to Partner Organisation was for administrative convenience. Essentially, this was because he might not have remembered that he had removed the name in two months time when he updated and re-distributed it: Judgment § 81(vii) **[1/56];** Transcript, p. 8 (line 18) to p.9 (line 10) **[4/5/70]**).

34.3 Given the nature of the seriousness of the allegation, this cannot amount to proportionate publication. The Appellant obviously had the capacity to remove her name from publication to the Partner Organisations (as indicated by the draft letter) but elected not to do so for administrative convenience. This is not proportionate given the gravity of the interference with the Respondent's Article 8 rights.

35.1 The Appellants contend that the fact that a person "might" come into contact with Ms Clift was a sufficient threshold to justify circulation: (As' Skeleton, §52 **[1/19]).** The imposition of such a threshold is too low where the allegations are serious and engage her Article 8 rights.

35.2 A proportionate response would only involve circulation to (a) those who were identified as being at direct risk and (b) reasonably likely to come into contact with Ms Clift. "Might" is a far too hypothetical standard; theoretically, anyone "might" have contact with a listed individual, for example in at recreational facility or in a public street.

35.3 The contention that any standard other than "might" makes the use of the Violent Persons Register "operationally impossible or irrelevant" is not supported by any evidence led by the Appellants' at trial and is inconsistent with the Compliance Advice.

36. Accordingly, the contention that the Judge erred in conducting the

proportionality exercise under Article 8(2) is unarguable and permission should be refused on this point.

Ground 6: The Partner Organisations & Existing Relationships [As' Skeleton §§53-56]

37.1 The Judge was correct to hold that the Partner Organisations were not "within an existing relationship" in the *Kearns* sense. The Appellants have failed to establish as a matter of evidence that the Partner Organisations were in a relationship with the Council of the sort contemplated by *Kearns*. There was no evidence led as to the precise nature of the relationship between the Council and the Partner Organisations. It appears that their relationship is an arm's length commercial one.

37.2 Ms Clift will also rely on the following points in relation to the Partner Organisations:

(1) These were organisations wholly independent of the Council. The contention the Council could be said to be in a relationship with (say) 50 businesses in the Town Centre Business Initiative (which fell within the Community Safety Partnership) of such closeness to require frank and free flow of information as contemplated by *Kearns* is not sustainable**.**

(2) The relationship in play is very different from that between the Bar Council and the Bar – while the latter relationship obviously requires frank and free flow of information the former does not.

(3) The Council could not be said to owe a duty to employees of third party organisations of this sort to disclose information concerning Ms Clift.

37.3 In any event, even with "an existing relationship" it is still necessary to identify a duty and interest giving rise an occasion of qualified privilege. The Appellants have failed to identify such a duty or interest as regards the Partner Organisations.

F. ABUSE OF THE PROCESS

38.1 As a fallback position, the Appellants contend that if, following the appeal the number of recipients found to have unjustifiably received the Email and the Register Entry are very small then they will contend that the claim should have been dismissed as an abuse of the process on the basis that the "game was not worth the candle". (see Grounds of Appeal §5 [**1/6**]. This is a new point which

was not argued below and is not dealt with in the Appellants' Skeleton.

38.2 This argument depends on a finding by this Court increasing the number of recipients covered by qualified privilege to most but not all of those to whom the Email and the Register Entry were published. It is difficult to see on what basis such a finding could be made.

39.1 Even if there were a relatively small number of actionable publications in this case it would not be an abuse of the process under the doctrine set out in *Jameel (Yousef) v Dow Jones & Co Inc* ([2005] QB 946). In that case Lord Philips MR

> "It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake. Normally where a small claim is brought, it will be dealt with by a proportionate small claims procedure. Such a course is not available in an action for defamation where, although the claim is small, the issues are complex and subject to special procedure under the CPR." (§70).

39.2 This is not a case that could be described as an abuse of process on *Jameel* grounds because the allegation was a serious one and Ms Clift's Article 8 rights are engaged. As a result, Ms Clift is entitled to see to vindicate her reputation and a failure to provide a remedy would be contrary to Article 8 (see *Kyriakides v Cyprus* Judgment of 16 October 2008).

39.3 Publication to a small number of people is not in and of itself sufficient to render proceeding with a libel action disproportionate. What matters but who those recipients are and how their knowledge of the libel impacts on the claimant. The fact that there are a small number of recipients is not, of itself, sufficient to render a case an abuse where the allegations are serious see for example:

(1) *Haji-Ioannou v Dixon* ([2009] EWHC 178 (QB)) refusing to strike out allegations of lying against a businessman made to one journalist (this Court subsequently refused permission to appeal).

(2) *Underhill v Corser* ([2010] EWHC 1195 at §143) rejecting a *Jameel* abuse of process argument in relation to publication to 13 people of an allegation that the Claimant had dishonestly misappropriated funds.

(3) *Sanders v Percy* ([2009] EWHC 1870 (QB)) refusing to strike out on *Jameel* grounds slander published to one person alleging benefit fraud.

G. CONCLUSION

40.1 In conclusion, the Judge was right for the reasons that he gave. The only publications covered protected by qualified privilege were those to "customer facing staff" in Departments which were likely to have contact with Ms Clift.

40.2 The Grounds of Appeal do not raise arguable points and permission should be refused alternatively, if permission is given, the appeal should be dismissed.

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8 June 2010