

# **Media Disputes & Civil Litigation Costs**

**Early Resolution Procedure Group  
Report 2010**

14th December 2010

# **Early Resolution Procedure Group Report**

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## **1. Executive Summary**

- 1.1 The Early Resolution Procedure Group (ERPG) was formed in early 2010 and is made up of a dozen or so senior practitioners in the field of media law. They include two prominent QCs, an established junior barrister, several partners in specialist firms dealing with media cases and four in-house lawyers working for media organizations (newspapers and television). The Chairman is a retired High Court Judge.
- 1.2 As its title suggests, the ERPG was established in order to consider ways in which claims, principally against the media but also involving individuals and companies, whether for defamation or invasion of privacy or malicious falsehood, might be capable of earlier (and therefore cheaper) resolution than is currently possible through litigation.
- 1.3 The ERPG is not convinced that in relation to privacy cases, there is a serious problem. They are most commonly determined by pre-publication applications, where the outcome substantially rests on whether the threatened publication is restrained by interim injunction or not. Insofar as shortcuts are reasonably available, the Group believes the current CPR provides the Court in such cases with extensive management powers already. The ERPG also did not see any need for changes in relation to malicious falsehood. Both causes of action are triable by Judge alone and are not therefore bedevilled by the issue of meaning and by uncertainties over mode of trial in the same way as defamation actions are.
- 1.4 The ERPG is convinced that the principal obstacle to early resolution in defamation cases is the lack of a procedure for determining the *actual* meaning of the material complained of before service of a defence, rather than merely circumscribing the (often wide) range of arguable meanings as presently provided for by CPR Part 53 PD 2.3. The objective is easily stated; achieving that objective has proved to be far from straightforward. This report includes in section 4.3 a short summary of the principal solutions that were considered by the Group but either rejected or left to others to formulate. At Appendix 3 the Group has set out a summary of the minutes of the Group's meetings. Section 4.3 and Appendix 3 have been included in order vividly to illustrate the problems which need to be overcome if early resolution of claims against the media is to be achieved in a manner which is consistent with the current legislation (in particular section 69 of the Senior Courts Act 1981) and the Civil Procedure Rules (notably CPR 53, PD 2.3 and 4). Any solution has to be consistent with established principles and must strike a fair balance between claimants and defendants.

- 1.5 There was from the outset consensus within the ERPG that the key to achieving the objective of enabling an early resolution of disputes was to devise a system which enables the meaning or meanings of the words complained of to be established at the earliest possible time and in any event before service of a defence. An early determination of meaning will in many cases bring about an early settlement of the complaint, for example where the defendant recognises that it cannot defend (for example by a defence of justification) what has been determined to be the meaning of the words or images sued on. Even if the action proceeds, an early determination of meaning will effectively limit the ambit both of any defences sought to be relied on by defendants and of replies by claimants (e.g. alleging malice in fair comment and qualified privilege cases).
- 1.6 The potential costs benefits for both claimants and defendants of an early determination of meaning in defamation cases cannot be over-stated. In the first place, in the absence of such a determination, defendants often find it difficult to formulate an effective offer of amends under s.2 of the Defamation Act, 1996. Such an offer cannot be made after the defence is served (s. 2(5)). It is not uncommon for a defendant to wish to make such an offer, if the claimant's meaning is preferred, but to defend the action if a lower meaning prevails. The policy behind the s.2 procedure was to encourage early settlement. Likewise a claimant may not wish to proceed at all, if he fails in establishing the meaning for which he contends. Narrowing the issues before defence will therefore often achieve huge savings in legal costs and court and client time; and will often lead to much prompter vindication and enable the defendant to mitigate damages much earlier or allow a claimant to withdraw with a modest exposure in costs. If the action proceeds, interlocutory applications will be fewer (as will trips to the Court of Appeal); the scope of disclosure will be reduced and trials (if they occur) will be shorter. There will be a corresponding saving in court time.
- 1.7 As recognised by the Neill Committee in 1991, the early determination of meaning, prior to service of a defence, is not possible as long as the jury at trial remains the ultimate arbiter of what the single meaning is. Moreover, before service of a defence the Court is most unlikely to be in a position to determine mode of trial in accordance with the criteria set out in s.69 of the Senior Courts Act 1981. Indeed where a defence of justification or honest opinion is pleaded, that judgment often cannot be made until the Reply has been served, disclosure given and even witness statements exchanged so that the scope of the factual issues has been clearly identified.
- 1.8 The ERPG has no doubt it is neither practical nor desirable to empanel one jury to determine meaning at an early stage before defence and a different jury to determine other issues at trial.
- 1.9 Section 69(4) allows the Court to order that different issues of fact in a defamation action may be tried by different modes of trial. However the ERPG, even allowing for the construction of this sub-section by the Court of Appeal in *Armstrong v Times Newspapers* [2006] EWCA Civ 519; [2006] 1 WLR 2462, does not interpret the provision as being intended or designed to confer a general jurisdiction on Judges to determine meaning before service of a defence.

- 1.10 Accordingly, if there is to be a procedure for the early determination of meaning in defamation actions, there needs to be an amendment to s.69 to confer the necessary jurisdiction.
- 1.11 The EPRG considered wider policy issues about the desirability of jury trial in defamation actions to be outside its remit. Its proposed amendment to s.69 (see Appendix 1) is therefore largely confined to allowing early determination by judge alone of the issue of meaning. However, the Group also decided that there would be occasions when a Judge might have to rule on the issue of 'comment or fact'. Without having the power to rule on 'comment or fact' as well as meaning, a situation could arise where a judge decided meaning but the issue of 'comment or fact' was left to a jury and they decide they fundamentally disagreed with what the judge had ruled on meaning. This could create a serious anomaly. The Group therefore concluded that judges must also have the power to rule on 'comment or fact' as well as meaning, leaving aside whether the action is ultimately to be tried by jury or by judge alone and whether or not meaning has already been determined by a judge alone. The requisite amendments to the CPR have been drafted on this basis.
- 1.12 The EPRG considered the argument that, if the action does not settle and if the mode of trial is to be by jury, it is undesirable to direct a jury to try the other issues of fact in the case on the basis of a meaning found by the Judge, whether they agree with it or not. The EPRG concluded that a jury, firmly but tactfully directed, should be able and willing to judge outstanding issues arising from pleas of justification or honest opinion by reference to a meaning provided to them by the Judge subject to the proviso in 1.13 below. Such a course is likely to reduce the risk of hung juries, which is a highly unsatisfactory outcome for all concerned.
- 1.13 The issue of the judge deciding whether the words complained of are 'fact or comment' gave rise to some concern. If the judge has already determined meaning (see paragraph 1.11 above), it seemed to the Group to be difficult to ask a jury to determine the question of whether the words complained of are matters of comment or statements of fact, when they may not agree with the meaning found by the Judge. As stated above, the obvious solution is for the Judge to determine 'fact or comment' as well in such a case. The Group therefore believed that any new s.69 (5) should empower a judge to decide not only meaning but also the issue of 'fact or comment' irrespective of the ultimate mode of trial (see paragraph 5.1 below).
- 1.14 It may be, of course, that these proposed amendments are unnecessary, if a wider reform of the role of jury trial in defamation cases were introduced.
- 1.15 The Group considered various ways of streamlining the new procedure as explained below. It was decided that in the great majority of cases, the application for the determination of meaning could be resolved on paper on the application of either party at any time after service of the Claim Form and once it was clear that meaning would be a key, if not determinative, issue. The Court could also act of its own motion in an appropriate case. While it is hoped that most applications could be resolved quickly and simply on paper, the court

should retain the right to hear oral argument where an application for the determination of meaning required the submission of any factual evidence (innuendo or reference cases) or complex points of law.

## **2. Preamble: costs concerns and the need for reform**

- 2.1 Over the last ten years the cost of defamation actions has become prohibitively expensive. In February 2010 the Culture Media and Sport Committee (“CMSC”) published its report on “Press Standards, Privacy and Libel”. Amongst the many topics addressed by the CMSC was: “The impact of conditional fee agreements on press freedom, and whether self-regulation needs to be toughened to make it more attractive to those seeking redress”. The CMSC noted that “defamation has traditionally been labelled a ‘rich-man’s tort’, as libel cases are notoriously expensive and public funding, through legal aid, is not available.
- 2.2 Parliament had sought to address these problems by means of the Access to Justice Act 1999, which extended to defamation proceedings the so-called ‘no win, no fee’ agreements, or conditional fee agreements (“CFAs”), which were intended to enable those who would otherwise have been unable to fund the substantial costs involved in defamation (and other) claims to bring or defend proceedings. But while CFAs have undoubtedly brought greater access to justice for those of limited means, notably in personal injury actions, they have also massively increased costs burdens on unsuccessful defendants. Losing defendants in defamation claims have been penalised in a manner never fully appreciated or foreseen. As the CMSC observed, the measures taken by successive governments to curb litigation costs (including the introduction of CFAs) “whatever their virtues, have not slowed the rise in litigation costs and may have accelerated it, raising at the same time new problems in relation to press freedom”.
- 2.3 While the CMSC’s recommendations extended well beyond the cost of libel proceedings and the impact of the CFA regime, it stated in terms that: “Establishing whether the meaning of a word or phrase is defamatory is frequently at the heart of the libel process . . . . When bringing a case the claimant is required to set out the words complained of and the defamatory meaning he or she believes they convey. If the defendant disputes this, the task of determining whether the words bore the meaning alleged by the claimant falls to a jury at trial, unless the parties have agreed to its determination by a judge”.
- 2.4 Juries invariably return general verdicts, so that in most cases neither the parties nor the court are any wiser at the end of sometimes convoluted and expensive litigation as to what view the jury took as to the actual meaning of the words complained of. The CMSC stated in its report that it had received limited evidence about hearings to determine meanings and the extent to which they are used. The report continued: “We agree, however, that any measures to provide more certainty at an earlier stage of libel cases in the UK,

should be pursued more vigorously. We urge the Government, therefore, to look closely at this aspect of procedure in its present review of the costs and operation of UK libel laws”.

- 2.5 At the same time as the CMSC was conducting its inquiry, both the government and the judiciary were looking into the same issues. Late in 2008 Sir Anthony Clarke, then Master of the Rolls, asked Lord Justice Rupert Jackson to review the rules and principles governing the cost of civil litigation and to make recommendations in order to promote access to justice at a proportionate cost. In January 2010 Jackson LJ made a number of recommendations. He suggested that success fees and after-the-event (“ATE”) premiums should be irrecoverable from the losing party in actions funded by CFAs.
- 2.6 In relations to defamation and kindred litigation, Jackson LJ made two further recommendations designed to protect access to justice for claimants. First, that damages should be increased by 10%, so as to take account of potential additional costs faced by CFA-funded claimants. Secondly, he recommended the introduction of “one-way qualified costs shifting”. This would allow the courts, when making an order for costs, to take into account the seriousness of the subject matter of the libel or breach of privacy, as well as the financial resources and conduct during proceedings of all the parties. Jackson LJ further recommended “pro-active case management”.
- 2.7 In its report the CMSC welcomed the recommendation to limit the recoverability of success fees and agreed that ATE premiums should for the future become wholly irrecoverable.
- 2.8 In March 2010 the Ministry of Justice published the report of the Libel Working Group, which had also been examining possible ways of achieving an early resolution of the issue of meaning in defamation cases as well as the role of juries in defamation proceedings. This report made clear that there was “no consensus on whether the right to trial with a jury should continue to be available in defamation proceedings”. The Working Group did, however, agree that “one area in which a change to the role of juries would be appropriate would be in relation to the early resolution of meaning”.

### **3. The establishment of the Early Resolution Procedure Group**

- 3.1 It was apparent that there was a good deal of activity at judicial, parliamentary and ministerial levels, into the problems which were widely perceived to be hampering the ability of the media and non-governmental bodies to perform their important functions. In particular there was concern that the ability of the media and professional critics to report and comment on matters of some public importance was being unjustifiably curtailed. There was at the same time a perception that press self-regulation was failing and that standards were falling.

- 3.2 In the summer of 2009, Jackson LJ asked a group of practitioners in the media field to consider a Civil Legal Aid Fund for defamation actions. This working group (the CLAF Group) then considered ways in which these perceived problems might be tackled in particular balancing the right to access to justice with the curtailment of the recoverability of success fees and ATE premiums. At paragraph 5.2 of his report Jackson LJ observed:

*Early Resolution Procedure*

*The libel CLAF Working Group has put forward an interesting proposal for an early resolution procedure. In my view the Working Group's proposal and the issue of early resolution generally merit consideration by specialist practitioners and judges. I commend these matters to them for further analysis. One particular question for consideration is how any early resolution procedure before a judge could be linked to the final trial before a jury, if there is a jury, for example would the jury be directed to impute a particular meaning to the relevant words, even if the jury interpreted them differently?"*

- 3.3 Prompted in part at least by that judicial encouragement, the ERPG was formed. The membership of the ERPG was made up as follows: Sir Charles Gray, a retired High Court judge, was invited to chair the group; Andrew Caldecott QC, head of chambers at 1 Brick Court and Adrienne Page QC, joint head of chambers at 5 Raymond Buildings, as two leading libel silks, were asked to join the Group. The other key members of the ERPG are all experienced practitioners in the field of media law. They include Alasdair Pepper, a senior partner at Carter-Ruck and one of the originators of the early resolution procedure proposal put forward by the CLAF Group; Jacob Dean of 5 Raymond Buildings who also worked on the original early resolution procedure proposal; Razi Mireskandari, a senior partner at Simons Muirhead & Burton; Gill Phillips, Director of Editorial Legal Services at Guardian News & Media; and Alastair Brett, formerly Legal Manager at Times Newspapers Limited and Chairman of the CLAF Group, who has acted as the Honorary Secretary to this Group.
- 3.4 At the first meeting of the ERPG, it was agreed that it was desirable to expand the group to include a practitioner working in the field of television and another practitioner doing mainly claimant work and an in-house lawyer working for one of the popular newspaper titles. As a result, John Battle of ITN; Jeremy Clarke-Williams of Russell Jones & Walker and Charles Collier Wright of Mirror Group Newspapers Limited accepted invitations to join the group.

#### **4. Solutions explored by the ERPG**

- 4.1 Members of the ERPG have met on four occasions since the formation of the Group in February 2010. A summary of these meetings is contained in Appendix 3 with the key points to emerge from the discussions set out in 4.2 and 4.3 below.
- 4.2. After much debate, the Group decided to confine its recommendations to methods of resolving, at an early stage, disputes about the meaning of the words complained of. The principal issues upon which there has been a consensus within the Group and which have led to the recommendation in this Report, are the following:
  - 4.2.1 There has been broad agreement that the statutory right to jury trial has sometimes led to “a game being played down to trial” with both parties speculating on the meaning a jury would place on the words complained of. This meant that many cases have proceeded far longer than necessary for an early and fair resolution. The reservation to the jury of the right to decide the meaning of the publication complained of has often been used by a party as a means of putting pressure on the other side. It was felt that this problem was exacerbated by the fact that juries are not required to make an express finding as to the notional ‘single meaning’ borne by the words complained of or to articulate, when giving their verdict, what the publication would have conveyed to the notional ordinary, reasonable reader or viewer. It is “anybody’s guess” what meaning the jury will put on the publication sued on. This has resulted in an undesirable uncertainty in cases where meaning is in issue. It was also agreed that in the absence of a determination of meaning, defendants often find it difficult to formulate an effective offer of amends under s.2 of the Defamation Act, 1996.
  - 4.2.2 Aspects of law and practice in defamation cases that have led to expensive and protracted interim hearings include the so-called "single meaning rule", which requires the jury (at least in theory) to determine a single defamatory meaning even in circumstances where different readers might attribute to the words differing meanings all of them equally plausible. Problems are created by the vexed question of ascribing to words various different “levels” of meaning. In such cases the claimant may assert that the publication complained of imputes “guilt” of dishonest conduct on his part, whereas the defendant may maintain that the publication merely imputes the existence of “reasonable grounds for suspecting guilt” on the part of the claimant or an even lower level of meaning i.e. that the claimant might warrant being investigated in relation to something.
  - 4.2.3 It is accepted that claimants will invariably plead the most damaging meaning which can be attributed to the words complained of, frequently known as “the high water mark meaning”. CPR 53 PD 4 entitles either the claimant or the defendant to apply to a judge for a ruling that the words complained of are *incapable* of bearing the meaning pleaded on behalf of the claimant or sought to be justified by the defendant.



- 4.2.4 Against the above background, there is a consensus within the Group that a mechanism to enable the precise defamatory meaning of words to be determined at an early stage would be of great benefit to claimants and to defendants alike. It would enable the defendant to make an informed offer of amends, which must be made before defence and would assist the parties to reach an early settlement.
- 4.2.5 The view was taken that where both the claimant and the defendant agree that the meaning of the words should be decided by Judge alone, the Court can so direct pursuant to s.69(4) of the Supreme Court Act 1981. Absent such agreement, the parties would continue with expensive litigation in ignorance of the "true" meaning of the publication up to and including trial.
- 4.2.6 In recent years there has been an increasing trend away from jury trial. Only four such trials took place in defamation cases in London in 2009 and so far in 2010 the Group does not believe that there have been any this year in London. Although the Faulks Committee recommended in its Report on Defamation in 1972 that jury trials should become the exception rather than the rule, no action has been taken on that recommendation. It is noted that Jackson LJ suggested that the role of juries in defamation cases is a topic which requires further consideration.
- 4.2.7 Within the Group there was no consensus on the general issue of retaining trial by jury in defamation cases, some members opposing any change to the current presumption in favour of jury trial and others favouring a change in the law whereby jury trial would be reserved only for exceptional cases.
- 4.2.8 It was agreed that the latter course would require primary legislation as would any change limited to empowering a judge to rule on either the meaning of the publication complained of or whether the words complained of were statements of fact or comment. The Group decided to recommend a new two part sub-section (5) to section 69 of the 1981 as drafted by Andrew Caldecott QC to facilitate such rulings by a judge on meaning and, where appropriate, whether the words were fact or opinion/comment.
- 4.2.9 Apart from 'comment or fact' cases (see paragraphs 1.11 to 1.13 above), no one within the Group considered that there would be a problem in principle if a jury were to be directed at trial that a judge had previously made a ruling as to the meaning of the words complained of which would be binding on the jury when deciding the remaining issues in the case. Consideration was given to what would happen if a jury at a subsequent trial disagreed with the meaning earlier attributed to the words complained of by the judge in the exercise of his power to decide meaning under the proposed new section 69(5). In relation to meaning disputes, it was doubted whether juries do in practice agree upon a single meaning in all cases. It was nevertheless felt that a jury might welcome being provided with a single meaning, as determined by the judge beforehand, on the basis of which they would then have to determine other issues of fact. The majority of the group felt that the principal argument in favour of an early resolution of meaning by a Judge was that it would in

many cases lead to an early settlement, cut down on hugely expensive interlocutory hearings and thereby ultimately avoid the need for an expensive trial.

4.2.10 The result of the Group's discussions and therefore its recommendation, as set out in section 5.1 below, is that either party should be able to issue an application for meaning to be determined as a preliminary issue of fact as soon as it is clear that meaning is likely to be a critical issue, if not a determinative one. For the reasons set out in paragraph 1.11 to 1.13 above, it was also felt that disputes as to 'comment or fact' should also be susceptible to a similar early resolution procedure in appropriate cases. This is compatible with the recommendations in the Jackson Report for more active case management in defamation actions. It is dependent on the amendment to section 69, set out in paragraph 5.1 below, and the CPR, set out in Appendix 2.

4.3 Set out below is a brief summary of some of the other solutions that were canvassed at the Group's meetings with the reasons for their rejection.

4.3.1 **Short form pleadings:** The Group's starting point was the procedural change canvassed in detail by the CLAF Group in Appendix 1 to its report to Jackson LJ, referred to in his report at paragraph 5.2 (see 3.2 above). In summary, this envisaged the service of short form Particulars of Claim which excluded issues relating to damages and aggravated damages, followed by a short form, proposed Outline Defence which would highlight any controversy suitable for early determination by the Court, in particular, on meaning. It would preserve the ability of the defendant to make an offer of amends after such determination. Full and final versions of the pleadings would be exchanged only after such determination, assuming the action did not thereupon settle. In the end, this revision was rejected on the ground of the increased work and costs involved in having a two-layered approach to the statements of case in all defamation claims.

4.3.2 **Pre-action application under CPR Part 8 on meaning:** Consideration was given to mechanisms whereby there could be a fast-track adjudication of meaning in cases where it could result in a settlement *before* Claim Form. The possibility of an amendment to CPR Part 8 was explored but ultimately the idea was rejected. In particular, it was felt that it might well encourage resort to the Courts in those cases which otherwise would never be commenced or defended if proceeding under CPR Part 7 was the only available route open to the parties. There would also be many cases in which final resolution could not be achieved through Part 8 and thus would result in a duplication of proceedings. Examples are where the Part 8 adjudication would have to be premised upon proof by the claimant of disputed facts, such as where a legal innuendo was relied upon or identification of the claimant was in issue.

4.3.3 **Meaning to be pleaded in the Claim Form:** The possibility was explored of requiring a claimant as a matter of routine practice to plead his defamatory meaning(s) in the Claim Form. This would be with a view to the earliest possible identification of a real controversy as to meaning. The Court could

then be asked by the defendant to resolve that issue before the claimant incurred the costs of preparing Particulars of Claim which, in some cases, can be quite lengthy and costly documents, especially where there are detailed claims for aggravated damages. This option was ultimately rejected, principally for two reasons. In the first place, there would be cases in which the Claim Form had to be issued at very short notice when it would be undesirable for the claimant to be forced to arrive at a definitive formulation of his meaning without proper consideration and/or advice. Secondly, it would be likely to increase the number of cases in which specialist counsel was involved before the issue of the Claim Form, with the consequential increase in costs that might otherwise have been avoided.

- 4.3.4 **Court Case Questionnaires on meaning:** Another option explored was a requirement on the part of the Court in any defamation case to send out an early Case Questionnaire, immediately after issue of the Claim form. This would require the parties to state if meaning was likely to be a contentious issue and, if so, each party would be asked to specify the meaning(s) for which it contended. This too was thought to be unduly costly and unnecessarily elaborate, particularly as there would be some cases in which it would not reveal the existence of any relevant dispute.
- 4.3.5 **Pre-Action Protocol and spelling out meaning:** Amending the Defamation Pre-Action Protocol (“the Defamation PAP”) to require both parties to specify their case on meaning was, on the whole, favourably viewed. Under the existing Protocol, it is listed in 3.5 as "desirable for the defendant to include in the Response to the Letter of Claim the meaning(s) he/she attributes to the words complained of". There is no such provision for claimants, although Jackson LJ recommended this change. Although the parties cannot, in subsequent litigation, be held to the meanings they put forward in pre-action correspondence, there could nonetheless be costs sanctions if a later shift on meaning resulted in costs being wasted. While this reform would appear both desirable and consistent with the overall approach of the CPR, it was generally felt that this should be left up to the Pre-Action Protocol Group and its deliberations and negotiations. It was noted, however, that failures to adhere to the PAP were rarely, if ever, visited with adverse costs consequences. A tougher approach to breaches of the PAP would need to be made to make such a reform effective.

## **5. Recommendations of the ERPG for Early Resolution Procedure**

- 5.1 The principal and unanimous recommendation of the ERPG is that at the earliest opportunity s.69 of the Senior Courts Act 1981 be amended to include a new subsection in the following terms:

- (5) Further in any action for libel or slander a judge may at any stage of the action decide:
- (a) the issue of what the words or images or other material complained of mean; and
- (b) the issue of whether or to what extent the words or images or other material complained of comprise statements of fact or statements of opinion;
- and any such decision by a judge shall (subject to any appeal) be binding irrespective of whether other issues in the action are tried with or without a jury.
- In relation to (a), meaning may include an innuendo meaning and may include any issue as to whether the material complained of refers to the claimant.

- 5.2 In order for applications, pursuant to the above amendment to be brought before the court, amendments will need to be made to the Practice Direction to CPR Part 53, which currently only provides for rulings to be made on whether statements complained of are “capable” of bearing certain meanings or of being defamatory of the claimant. Whilst recognising that detailed rule changes are for the Rules Committee, the ERPG has formulated suggested revisions to CPR Part 53 PD 4 to show how such changes *might* be effected. The suggestions include determination of the issue of meaning on paper by the judge alone and/or the determination of the issue of whether the words complained of are comment or statements of fact. They also permit the Judge to direct that there be an early determination of meaning or comment or fact at the Allocation Questionnaire stage, even though neither of the parties has hitherto requested it. The suggested revision to s.69 is attached at Appendix 1. The suggestions for CPR revisions are attached at Appendix 2.

## **6. Postscript on ADR**

- 6.1 Although much discussion took place at the meetings of the ERPG about the desirability of there being some form of voluntary ADR in media disputes, particularly those involving meaning in libel actions, it was ultimately resolved that no formal recommendation to that effect should be included in this report.
- 6.2 It should nevertheless be recorded that most, if not all, members of the ERPG saw great advantage in having such a voluntary system available alongside and as an alternative to early judicial determination of meaning in accordance with Recommendation (1) at paragraph 5 above. It was felt that, since the meaning to be determined is the meaning which the hypothetical ordinary reasonable reader would have put on the publication complained of, the presence of two lay assessors (one male and one female) would in many cases be of great assistance to the expert chairing any arbitral panel. Even comment or fact disputes can be settled through voluntary binding arbitration. Other important perceived advantages relate to the speed with which a voluntary arbitration on meaning or comment or fact can be achieved and the significantly lower cost

of such a voluntary system, which would invariably be less formal, quicker and cheaper than determination by a judge alone after issue of a High Court claim form.

- 6.3 The overriding advantage for claimants of a system such as the one run by The Times under its Fast Track Arbitration scheme for meaning or quantum disputes is that the cost of voluntary arbitration on meaning i.e. the cost of the expert chairing the Panel and the two lay assessors is paid for by the newspaper, with the newspaper forfeiting any right to recover its own costs or the costs of the arbitral panel from the Claimant who might be on a CFA. It is clear that The Times scheme worked well in the relatively small number of cases dealt with. The Guardian is intending to offer a similar system in appropriate cases. The Group felt that it was desirable that any voluntary ADR scheme should be more broadly based and that it should not be tied to a single newspaper. The Claimant should have the right to choose the Panel Chair from a list of accredited libel silks and former High Court judges with both sides having the right to veto the two lay assessors chosen by the Panel Chair.
- 6.4 The ERPG was firmly in favour of exploring the possibility that a scheme embracing as many publishers and broadcasters as are willing to participate in such a scheme might be set up at the earliest opportunity. It is hoped that research can be carried out to determine how many potential participants there might be in a voluntary arbitration scheme and to ask them whether such participants would be willing to meet not only their own costs of the arbitration but also the costs of the Panel Chair and two lay assessors. The media participants would also have to agree to one way costs shifting i.e. not seeking to recover their own costs or the costs of the Panel if the media defendant was successful in establishing its meaning as the natural and ordinary meaning of the article complained of. The ERPG intends to investigate in the near future which organisation might be suitable to manage or oversee such a system. Possible candidates include the Civil Mediation Council and/or the Institute of Arbitrators. Both organisations could usefully be approached.
- 6.5 The ERPG applauds the statement made in the Spending Review 2010 at paragraphs 2.68 and 2.70 to the effect that Her Majesty's Government intends to reform the court system to provide a more efficient service using mediation and alternatives to court where possible.

## APPENDIX ONE

### Draft amendment to section 69 of the Senior Courts Act 1981

(1) Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue-

- (a) a charge of fraud against that party; or
- (b) a claim in respect of libel, slander, malicious prosecution or false imprisonment; or
- (c) any question or issue of a kind prescribed for the purposes of this paragraph,

the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.

(2) An application under subsection (1) must be made not later than such time before the trial as may be prescribed.

(3) An action to be tried in the Queen's Bench Division which does not by virtue of subsection (1) fall to be tried with a jury shall be tried without a jury unless the court in its discretion orders it to be tried with a jury.

(4) Nothing in subsections (1) to (3) shall affect the power of the court to order, in accordance with rules of court, that different questions of fact arising in any action be tried by different modes of trial; and where any such order is made, subsection (1) shall have effect only as respects questions relating to any such charge, claim, question or issue as is mentioned in that subsection.

(5) Further in any action for libel or slander a judge may at any stage of the action decide:

(a) the issue of what the words or images or other material complained of mean;

and

(b) the issue of whether or to what extent the words or images or other material complained of comprise statements of fact or statements of opinion;

and any such decision by a judge shall (subject to any appeal) be binding irrespective of whether other issues in the action are tried with or without a jury.

In relation to (a), meaning may include an innuendo meaning and may include any issue as to whether the material complained of refers to the claimant.

## APPENDIX TWO

### Suggested Amendment to CPR Part 16 and the Practice Direction to CPR Part 53

#### PART 16

#### Contents of the particulars of claim

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(The Practice Direction to Part 53 contains additional rules concerning the content of particulars of claim in defamation claims)

#### PRACTICE DIRECTION TO PART 53

2.10(1) A claimant must give full details of the facts and matters on which he relies in support of his claim for damages, but only in so far as it is proportionate to do so.

(2) Where a claimant seeks aggravated or exemplary damages he must provide the information specified in rule 16.4(1)(c), but only in so far as it is proportionate to do so.

(3) If either the claimant or the defendant has indicated in pre-action correspondence that if proceedings are issued he intends to make an early application for a ruling on meaning the claimant need not in the particulars of claim give full details of the facts and matters on which he relies in support of his claim for damages, including aggravated or exemplary damages, unless invited to do so by the defendant, or until such an application has been determined.

#### **Ruling on meaning or comment**

**4.1** At any time the court may decide –

- (1) whether a statement complained of is capable of having any meaning attributed to it in a statement of case;
- (2) whether the statement is capable of being defamatory of the claimant;
- (3) whether the statement is capable of bearing any other meaning defamatory of the claimant;
- (4) whether the statement is capable of comprising statements of fact or comments;
- (5) whether the statement has any meaning attributed to it in a statement of case;
- (6) whether the statement is defamatory of the claimant and if so what the defamatory meaning of the statement is;
- (7) whether the statement bears any other meaning defamatory of the claimant;
- (8) whether the statement comprises statements of fact or comments.

4.2 An application for a ruling on meaning or comment may be made at any time after service of particulars of claim the Claim Form. Such an application should be made promptly. If the application is made before the service of the particulars of claim the time for serving the particulars of claim is extended to 14 days after the hearing of the application for a ruling on meaning or comment, or such other time as the Court may direct.

(This provision disapplies for these applications the usual time restriction on making applications in rule 24.4.1)

4.3 The court may with or without a hearing make a ruling on meaning or comment at any time or may give directions to the parties to assist the court in making a ruling on meaning or comment. If the court has not been asked to make a ruling on meaning or comment pursuant to this practice direction by the time Allocation Questionnaires are to be filed then the claim will be referred to a Judge of the jury list for a decision as to whether it is appropriate to make a ruling on meaning or comment, or to give directions to the parties to assist the court in making a ruling on meaning or comment, before the case proceeds further.

4.4 Where an application is made for a ruling on meaning or comment, the application notice must state that it is an application for a ruling on meaning or comment made in accordance with this practice direction and must specify the ruling sought by reference to the relevant sub-section(s) of 4.1 above.

4.5 The application notice or the evidence contained or referred to in it, or served with it, must identify precisely the statement that the court is being asked to consider, and the meaning attributed to it or fact or comment which it is said to comprise, and contain a concise account of the arguments relied on in support of the application.

4.6 Any respondent to an application for a ruling on meaning or comment must, within 14 days of the application notice being served on him, file and serve a concise account of the arguments relied on in opposition to the application and any evidence on which he relies.

4.7 On receipt of the respondent's concise account and evidence (if any) the application notice will be referred to a Judge of the jury list, who may either deal with the application without a hearing or make directions for an oral hearing, including directions as to the length of that hearing and any further skeleton arguments or other documents to be filed and served by either party, if any.

4.8 When considering an application for a ruling on meaning under paragraphs 4.1(4), (5) or (6) of Practice Direction 53 or a ruling on comment under paragraph 4.1(7) of that Practice Direction the court may decline to decide the issue and/or direct that it be decided at trial.

4.9 Any decision on meaning pursuant to paragraphs 4.1(4), (5) or (6) of Practice Direction 53 and any decision on comment pursuant to paragraph 4.1(7) of that Practice Direction shall (subject to any appeal) be binding irrespective of whether other issues in the action are tried with or without a jury.



**4.10** For the purposes of this practice direction meaning may include an innuendo meaning and may include any issue as to whether the claimant was sufficiently identified.

(Rule 3.3 applies where the court exercises its powers of its own initiative)

(Following a ruling on meaning or comment the court may exercise its power under rule 3.4)

(Section 7 of the Defamation Act 1996 applies to rulings on meaning)

## **APPENDIX THREE**

### **Meetings of the ERPG**

Members of the ERPG met on four occasions since the formation of the Group in February 2010. Set out below is a brief account of the views expressed and decisions arrived at in the course of the various meetings. This should provide some insight into the issues and problems which the ERPG has sought to address, as well as providing some of the reasoning behind the recommendations made by the Group.

### **Meeting of the ERPG on 17 February 2010**

1. At the first meeting of the ERPG, the discussion centered on section 69 of the Senior Courts Act, 1981 which provides that, subject to defined exceptions, defamation actions should be tried with a jury. The material parts of section are as follows:-
    - s. 69 (1) Where, on the application of any party to an action to be tried in Queen's Bench Division, the court is satisfied that there is an issue
      - ...
        - (B) A claim in respect of libel, slander, malicious prosecution or false imprisonment,
        - ...
        - the action shall be tried with a jury unless the court is of the opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.
        - ...
        - (4) Nothing in subsections (1) to (3) shall affect the power of the court to order, in accordance with rules of court, that different questions of fact arising in any action be tried by different modes of trial; and where any such order is made, subsection (1) shall have effect only as respects questions relating to any such charge, claim, question ... .
2. There was broad agreement that the statutory right to jury trial led to many cases proceeding far longer than they would otherwise need to for a fair resolution. The reservation to the jury of the right to decide the meaning, and the often wide range of possible meanings, of the publication complained of was often used by each party as a means of putting pressure on the other side. It was felt that this problem is exacerbated by the fact that juries are not required to make an express finding as to the notional 'single meaning' borne by the words complained of or to articulate, when giving their verdict, what the publication would have conveyed to the notional ordinary, reasonable reader or viewer. It was "anybody's guess" what meaning the jury would put on the publication sued on. This meant that there tended to be undesirable uncertainty in cases where meaning was in issue. The majority of the Group agreed that this often made it difficult for a defendant to make an effective offer of amends under s.2 of the Defamation Act, 1996.

3. There was discussion about the so-called “single meaning rule”, which requires the jury (at least in theory) to determine a single defamatory meaning even in circumstances where different readers might attribute to the words differing meanings all of them equally plausible. There was also discussion about the problems created by the vexed question of ascribing to words various different “levels” of meaning. In such cases the claimant may assert that the publication complained of imputes guilt of dishonest conduct on his part, whereas the defendant may maintain that the publication merely imputes the existence of reasonable grounds for suspecting guilt on the part of the claimant or an even lower level of meaning i.e. that the claimant might warrant being investigated in relation to something.
4. There was general agreement that these issues often led to expensive and protracted interlocutory hearings. It was accepted that claimants would invariably plead the most damaging meaning which could be attributed to the words complained of, frequently known as “the high water mark meaning”. CPR 53 PD 4 entitles either the claimant or the defendant to apply to a judge for a ruling that the words complained of are incapable of bearing the meaning pleaded on behalf of the claimant or sought to be justified by the defendant.
5. There was consensus that a mechanism to enable the precise defamatory meaning of words complained of to be determined at an early stage would be beneficial to claimants and to defendants alike. It would enable the defendant to make an informed offer of amends. There was agreement that, if such a mechanism were to be available, both claimants and defendants would benefit greatly.
6. It was agreed that where both the claimant and the defendant agreed that the meaning of the words complained of should be decided by judge alone, the court could so direct pursuant to s.69 (4) of the 1981 Act. Absent such agreement, the parties would continue with expensive litigation in ignorance of the “true” meaning of the publication up to and even including trial.
7. It was accepted that there had in recent years been an increasing trend away from jury trial. Only four jury trials in defamation cases took place in 2009. Although the Faulks Committee had suggested in its Report on Defamation in 1972 that jury trials should become the exception rather than the rule, no action had been taken on that recommendation. It was noted that Jackson LJ had suggested that the role of juries in defamation case was a topic which required further consideration.
8. There was some disagreement within the Group as to the right way forward. Some members were opposed to changing the current presumption of jury trial in defamation actions. Others favoured changing the law to enable jury trial in defamation actions to become the exception rather than the rule with the right to jury trial being reserved for exceptional cases. It was accepted that the latter course would entail either repealing s.69 of the 1981 Act or, alternatively, adding a sub-section empowering a judge to rule on the

meaning of the publication complained of, save only in cases where the issue of meaning was a matter of such importance that it should be left to a jury to determine it.

9. Finally at this first meeting there was discussion as to the possibility of having two lay assessors to assist the judge in determining the meaning of the words sued upon. Most felt that this would be difficult to implement and was therefore inappropriate. It was, however, agreed that it would be beneficial to have a voluntary ERP system running alongside the High Court procedure as an alternative to determination by a Judge alone pursuant to s.69. The overriding advantage was felt to be that it would be much quicker and a far cheaper way of resolving disputes about meaning (and possibly also about questions of whether the publication consisted of statements of fact or comment).

#### **Meeting of ERPG on 16 March 2010**

10. At the outset of the second meeting it was tentatively agreed that any recommendations by the ERPG should principally concern disputes about the meaning of words complained of. It was agreed that any recommendations of the ERPG should not extend to disputes as to whether words complained of constituted statements of fact or comment. (Subsequently it was appreciated that situations could arise where a judge had decided meaning and the question of fact or opinion might be left to the jury. If the jury disagreed with the judge over meaning this could create a serious anomaly. It was therefore important to build into any new early resolution system flexibility so that a judge could not only decide meaning but also the issue of fact or opinion where appropriate.)
11. There was general agreement that primary legislation would be required to amend s.69 if it was considered to be desirable that a judge should be empowered to decide the issue of meaning at an early stage in every case where meaning was in issue. In the absence of such an amendment there was a risk of infringing section 69(1) of the 1981 Act.
12. Some within the group were opposed to replacing the traditional right to a jury trial in defamation actions with trial by judge alone. No one considered that there would be a problem if the jury were to be directed at trial that a judge had previously made a finding as to the meaning of the words complained of which would be binding on the jury when deciding the remaining issues arising in the case.

#### **Meeting of the ERPG on 14 May 2010**

13. In advance of the third meeting of the Group a short additional sub-section to s.69 of the Senior Courts Act, 1981, drafted by Andrew Caldecott, was circulated:

*(5) Further in any action for libel or slander a judge may at any stage of the action decide the issue of what the words or images or other material complained of mean; and any such decision by a judge shall (subject to any appeal) be binding irrespective of whether other issues in the action are tried with or without a jury. For this purpose meaning may include an innuendo meaning and may include any issue as to whether the material complained of refers to the claimant.*

14. The ERPG agreed that the short additional sub-section 69(5) was less radical and therefore less politically contentious and therefore probably preferable to the more elaborate amendment put forward by Lord Lester's Defamation Reform Group. This would simply have removed "libel, slander" from section 69(1)(b) of the Act but introduced a new test that would allow trial by jury in a defamation action but only where it was "in the interests of justice to do so, having regard to all the circumstances of the case".
15. It was suggested at this meeting that claimants should be required to set out in the claim form (rather than in the Particulars of Claim) not only the words complained of but also the meaning contended for by the claimant. This would enable both sides to know at the outset whether the meaning of the words complained of was likely to be a major bone of contention between the parties. If so, the majority of the Group felt that it might need to be resolved before any offer of amends could sensibly be made. In the event that the defendant disputed the meaning put upon the words complained of by the claimant, an application could be made under CPR Part 8 seeking resolution of the issue of meaning as a preliminary issue under CPR Part 53 PD 4. The adoption of this procedure would not oblige the judge to uphold the meaning put forward either by the claimant or by the defendant; rather the judge could adopt such other meaning as appeared to him or her to be the interpretation of the words which the ordinary reasonable reader (or viewer) would put upon the words.
16. There was discussion as to what would happen if a jury at a subsequent trial disagreed with the meaning previously attributed to the words by the judge in the exercise of his power to decide meaning under the proposed section 69(5). It was doubted whether juries do in practice agree upon a single meaning in all cases. It was nevertheless felt that a jury might welcome being provided with a single meaning, as determined by the Judge beforehand, upon the basis of which they would be able to determine any other defences which arose for decision by them. The majority of the group felt that the principal argument in favour of an early resolution of meaning by a Judge was that it would in many cases be likely to lead to a settlement, thereby avoiding the need for an expensive trial.
17. The Group discussed what, if any, voluntary Alternative Dispute Resolution ("ADR") system might be offered by media organisations. It was accepted that ADR would be a substantially cheaper way of determining meaning than having meaning determined by judge alone. Reference was made to the Fast Track Arbitration procedure used by The Times for dealing with meaning and

quantum complaints and used by the newspaper to determine one fair comment dispute. It was felt that this scheme could be used across the industry but it would need to be depersonalized and not associated with any one company.

### **Final meeting of the ERPG on 5 November 2010**

18. Prior to this meeting, a draft report was circulated for discussion and a junior barrister who had done some research for the Group on jury trial and early resolution procedures in other Commonwealth jurisdictions asked to attend.
19. According to this research, New South Wales in Australia had introduced in 1995 an early resolution procedure for meaning disputes under s.7A of the Defamation Act 1974 (NSW). This allowed a jury to determine meaning at an early stage. However it led to protracted argument by the parties on meaning prior to a s.7A hearing before a jury and a large number of cases being submitted to appellate review. In 2005, Australia repealed s.7A with many practitioners believing it had illogically reversed the roles of judge and jury; it being preferable for a judge to decide meaning and the jury to decide other contested issues. The Group was told that Canada still largely retained jury trial but each Province retained its own particular procedures and system although nothing much could be found on Pre-Action protocols or early resolution procedures revolving around meaning.
20. The Group discussed the earlier suggestion at the May meeting that meaning might be pleaded in the Claim form rather than the particulars of claim. On reflection it was decided that this would place a real burden on claimant solicitors who were reluctant to plead meaning at too early a date or have to do it in a hurry when issuing a “holding” claim form at the end of a limitation period. It was generally agreed that setting out a defamatory meaning should be left to the Pre-Action Protocol Group currently discussing changes to the Defamation Pre-Action protocol. While setting out the meaning contended for should clearly be done as early as possible, so the parties knew where they stood, it should not be mandatory to do it in the Claim Form.
21. The Group also agreed that it would not be sensible to give either party a right to issue Part 8 proceedings where one side or the other believed that meaning could be a critical issue. It was generally felt that the issue of meaning should crystallize under the provisions of the Pre-Action Protocol i.e. in pre-action or early correspondence. Once it was clear that meaning was a key issue then it was agreed that either the Claimant or the Defendant should issue an application for meaning to be determined as a preliminary issue under a new s.69 sub-clause 5. It was also felt that any application to determine meaning should normally be done on paper with a short reasoned ruling by the judge so that the matter could be taken on appeal if necessary.
22. The Group decided that it would be useful for the final report to set out the different options that the ERPG had considered and why they were being adopted or rejected. This included the following possible options:-

- a) Amending CPR Part 8 to allow a defendant to raise the issue of meaning prior to proceedings being formally commenced. This was rejected as potentially cumbersome and as possibly inviting unnecessary intervention by the Court when the issue of meaning could be dealt with under the Pre-Action protocol.
- b) Pleading meaning in the Claim form. This was rejected as forcing claimants to plead meaning when time may be of the essence and possibly requiring a specialist barrister to be instructed too early.
- c) Pleading a “short form” particulars of claim specifically setting out all levels of meaning being pursued by the Claimant (but without any aggravating particulars) and then the Defendant pleading a short form defence addressing the issue of meaning and simply outlining the likely defence(s). This was also thought to be too cumbersome and unnecessarily costly.
- d) Requiring the court to send out an early Case Questionnaire in every defamation case immediately after issue of the Claim form asking the parties if meaning was likely to be a significant bone of contention and, if so, requiring each party to specify the meanings for which it contended. This too was thought to be unduly costly and unnecessarily elaborate.
- e) Amending the Defamation Pre-Action Protocol (“the Defamation PAP”) to require both parties to specify their case on meaning. Although such meanings would not necessarily be binding, any material change of position at the pleading stage might have costs consequences. Moreover this reform would appear both desirable and consistent with the overall approach of the CPR. Indeed meaning is a surprising omission from the matters listed in paragraph 3.2 of the present Defamation PAP. This was dependent on the outcome of the negotiations currently being undertaken by the Pre-Action Protocol Group.
- f) Enabling either party to issue an application for meaning to be determined as a preliminary issue, as soon as it is clear that meaning is to be a critical issue, if not a determinative one. This is compatible with the recommendations in the Jackson report about more active case management in defamation actions. It is dependent on the amendments to section 69 and the CPR respectively set out in Appendix 3.