Neutral Citation Number: [2011] EWHC 737 (QB)

Case No: 9MA90484

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2011

Before :

THE HONOURABLE MRS JUSTICE SHARP

- -

Between :

(1) Gordon Bowker (Trading as Lagopus Services) **(2) Christine Bowker (Trading as Lagopus Services)**	**Claimants**
- and -	
The Royal Society for the Protection of Birds	**Defendant**

- -
- -

Richard Munden (instructed by **Public Access**) for the **Claimants**
Adam Wolanski (instructed by **Bird & Bird LLP**) for the **Defendant**

Hearing dates: 21st October 2010 & 5th November 2010

- -

Judgment

Mrs Justice Sharp:

Introduction

1. These applications are made in a libel action brought by the Claimants, Mr Gordon Bowker and his wife, Mrs Christine Bowker (trading as Lagopus Services) against the Defendant, the Royal Society for the Protection of Birds (the RSPB). The Defendant applies (a) for a ruling that the words are incapable of bearing the meanings complained of or any meanings defamatory of the Claimants; (b) a ruling that the action, if it reaches a trial, should be tried by judge alone; (c) a ruling that there be summary judgment for the Defendant, alternatively that the claim be struck out as an abuse of the process.

2. The Claimants specialise in grouse fieldwork, research and captive breeding of black grouse. The Defendant is a very well-known charity responsible for the conservation of birds and is the largest wildlife conservation organisation in Europe. Dr Murray Grant and Dr Ian Johnstone are both Principal Conservation Scientists at the Defendant, and Dr Timothy Stowe is the Director of the Defendant in Wales. In October 2007 Dr Grant was a Senior Research Biologist and Dr Johnstone was a Research Biologist both with the RSPB.

3. The claim arises out of the publication in October 2007 of three documents (written separately by Dr Grant, Dr Johnstone, and Dr Stowe) by the Defendant, all of which contained critiques of a peer-reviewed scientific paper about black grouse

conservation published in September 2007 in a scientific journal called *Wildlife Biology*, written by the Claimants together with Dr David Baines. The action was begun in 14 April 2009. There is no issue on limitation because extensions to the limitation period were agreed, while attempts were made to settle the dispute between the parties.

4. Mr Richard Munden who appears for the Claimants complained at the start of the hearing that in certain respects the Claimants did not have proper notice either of the grounds on which the applications were made, or of the matters relied on in support of them. Though some additional further evidence was served by the Defendant shortly before the hearing began, I consider that generally, the Claimants had sufficient notice of both the nature of the applications and the evidence relied on in support. In addition, Mr Adam Wolanski who appears for the Defendant said he was content for there to be an adjournment if the Claimants needed one, but Mr Munden declined that invitation. Be that as it may, the case before me has proceeded in fits and starts. The time estimate agreed by the parties of 1 day was insufficient. Mr Wolanski had not even concluded his opening submissions by then. It was then adjourned for a further day; but submissions were not completed on that day either. By agreement, the Claimants' submissions and the Defendant's reply to them were then completed in writing; and over the subsequent weeks both sides provided further written submissions, replies to them, and indeed further evidence. I should add I do not criticise the parties for the time taken: there was a great deal of ground to cover. But if therefore the Claimants were under any initial disadvantage, they subsequently had an opportunity to consider the Defendant's case, as it was made before me and to answer it.

Events leading to the publications complained of

5. Severn Trent Water (STW) is the owner of the land around and including Lake Vyrnwy in North Wales. The RSPB manages that land for STW and has at all material times had a contractual responsibility for the conservation of birds, including black grouse at Lake Vyrnwy. Black grouse are a UK red listed species; that is, a species with the highest conservation priority. Between 1997 and 1999 the Defendant retained the First Claimant, Mr Bowker by a series of short-term contracts to carry out grouse fieldwork in Central and North Wales as part of its Welsh Black Grouse Recovery Project (the Recovery Project). Between 2000 and 2003 the Defendant advised on a project run by the Claimants and funded by STW called the Severn Trent Water Lake Vyrnwy Black Grouse Project (the STW project).

6. The Defendant's written brief for the STW project was, amongst other things, to advise on the scientific validity of the work being carried out: see the project proposal by Dr Johnstone entitled: "Project title: population size, productivity and dispersal of black grouse at Lake Vyrnwy RSPB Reserve over three years." As part of that brief, the Defendant provided scientists to advise on the work being undertaken by the Claimants.

7. In 2004/5 as a result of their work on the STW project, the Claimants wrote a report for the STW (the STW report); and a paper based on the STW report co-authored by Dr David Baines of the Games and Wildlife Conservation Trust (GCT) formerly the Game & Conservancy Trust. It is common ground that in 2005 the Claimants submitted the paper for publication to the journal, *Bird Study*, but it was rejected after

being sent to Dr Gibbons of the Defendant and an independent reviewer unconnected with the Defendant for peer review. In September 2007 however the paper was published in the peer-reviewed journal, *Wildlife Biology* and I shall refer to it therefore as the *Wildlife Biology* paper.

8. The Claimants' conclusions in the *Wildlife Biology* paper were that there was a very low chick and juvenile survival rate of black grouse in the Lake Vyrnwy population, that these low survival rates were largely attributable to raptor and fox predation, and that in consequence, the black grouse population at Lake Vyrnwy had declined.

9. It is part of the Defendant's case that the matters raised by the Claimants in the *Wildlife Biology* paper were of direct concern and interest to the Defendant given their responsibility for the conservation of black grouse at Lake Vyrnwy; and it was anticipated by many within the Defendant that the *Wildlife Biology* paper would generate public debate and controversy about the conservation work carried out by the Defendant on the nature reserve managed by the RSPB at Lake Vyrnwy.

10. On 14 September 2007 the GCT issued a press release about the *Wildlife Biology* paper, the terms of which had been approved by STW. In the press release serious concerns were expressed about the Welsh black grouse population. It stated that the Claimants' research had "clearly identified" with "compelling evidence" the effect that predation by raptors and foxes was having on black grouse at Lake Vyrnwy.

11. The three publications complained of were published in the weeks following the issue of the press release. They are: (a) an email from Dr Grant, (the Grant email) sent on 5 October 2007 which had as its subject the *Wildlife Biology* paper (which is referred to in the email as the "The bowker et al paper"); (b) a critique of the *Wildlife Biology* paper written by Dr Johnstone which was sent as an attachment to the Grant email. It was entitled "A critique by RSPB Conservation Science of: Bowker, G. Bowker C, & Baines, D (2007) Survival rates and causes of mortality in black grouse *tetrao tetrix* at Lake Vyrnwy, North Wales, UK. *Wildlife Biology* (13(3))" which I shall refer to as the RSPB Critique; and (c) a letter from Dr Stowe of 16 October 2007 (the Stowe letter) to Andy Warren of STW and copied to Tim Wright of STW.

The words complained of

12. The Grant email was addressed to internal RSPB recipients (principally members of its Black Grouse email list): and 16 other named recipients within the RSPB. It is complained of in its entirety, and says as follows:

> "**Subject**: The Bowker et al paper
>
> Dear all – many of you by now will be aware of the Bowker et al paper that has recently been published (Bowker, G. Bowker, C. & Baines, D. (2007) Survival rates and causes of mortality in black grouse *tetrao tetrix* at Lake Vyrnwy, North Wales, UK. *Wildlife Biology* 13(3)). This paper stems from a 3 year study that Gordon Bowker undertook (funded by Severn Trent Water) on our Lake Vyrnwy reserve a few years ago. We were always uncomfortable with this work, and were very concerned about the field methods employed by Gordon. The work was

initially written up as an unpubl rept for Severn Trent Water (STW), but was then 'adopted' by David Baines of the GCT who pulled out some of the data and analysed them to produce a scientific paper. RSPB were sent this paper in draft to allow us to comment on it, which we did, expressing very grave concerns to GCT. However, these views did not dissuade GCT from proceeding to submit this paper for publication.

To help us address the issues and likely problems that we may face following its publication, Ian Johnstone has put together a very useful critique of the paper that will be very helpful to those of us who are likely to be faced with questions and comments arising from the paper's publication. This critique is attached. At least for the moment **this should NOT be circulated externally,** but please do use the information provided within it to deal with the issues that may arise. I do not have an electronic copy of the paper itself, but hard copies can be obtained by contacting Alix Middleton at SHQ (who has kindly agreed to do this until the journal issue arrives at our library).

A particular point of concern in this study is that it adopted very high disturbance methods, which could conceivably have led to the high rates of predation and chick mortality recorded (black grouse being a species that are known to be sensitive to activities such as catching and radio-tagging). Unfortunately, many of these more unorthodox methods were not documented in the paper itself, although they are detailed in the original but unpubl STW rept. This is worth bearing in mind when faced with comments regarding the fact that we are refuting findings based upon peer reviewed published science. The overall levels of disturbance to the study animals in this study appear to be much higher than in any other radio-tracking study of black grouse published in the scientific literature.

To my mind the methods that may have had greatest influence in biasing the results from this study are:

Breeding success. This was measured using standard method of locating broods with trained dogs. However, counts were made 'on or around 1st September' (according to the original STW rept) or in the 'last week of August' (according to the published paper). Either way, these counts are late compared to when they are done at other UK sites and in other UK studies (mid July to mid Aug being the norm). Therefore, the breeding success data are not directly comparable to those from other UK studies – more chicks may have died, and its also conceivable that some break-up of the broods may have started by the time counts were done (staff working on black grouse in Wales may be able to comment on the likelihood of the latter).

Radio-tagging of young chicks: A large number of chicks were radio-tagged at an early age (e.g. 40 chicks from 10 broods in 2000 and 14 chicks from seven broods in 2002: Bowker & Bowker 2003). Young black grouse chicks are vulnerable to many mortality sources, and it is conceivable that radio-tagging young chicks may increase their vulnerability in some ways. Even if any such effects are small they may have affected results in this study due to the large numbers tagged. No mention of the tagging of young chicks is made in the methods of the published paper.

Capture, handling and tagging of juvenile black grouse: A high proportion of all juvenile black grouse at Vyrnwy were radio-tagged during the study. Gordon Bowker, in his STW rept on this work (Bowker & Bowker 2003), advocates a method of handling chicks on multiple occasions, in order to reduce the chances of mortality when old chicks/juveniles are captured for the purposes of tagging. This meant that chicks were located (with dogs), captured and handled on multiple occasions and, overall, chicks surviving to 8 weeks each appear to have been handled more than three times. As far as I am aware, this is a completely untried and untested method, and to my mind seems more likely to increase mortality amongst chicks. Again, this information (fundamental to the methods of study) is not mentioned in the published paper.

Hopefully, Ian's critique, along with above information, will help in dealing with any fall-out that arises from the Bowker paper. Get back to me or Ian with any queries etc you might have on all of this.

Note, I have circulated this to those staff on our 'black grouse' e-mail list, plus a few others I could think of (and who didn't appear to be on that list), but please forward to others in your departments/regions/countries who might not be on this list but may need to deal with black grouse and these issues.

Cheers

Murray"

13. I have highlighted in bold those parts of the pleaded meanings for each publication, which Mr Wolanski draws particular attention to for the purposes of this application (and the numbering is taken from the Particulars of Claim).

14. The Grant email is said by the Claimants to bear the following natural and ordinary meanings which are defamatory of them, namely that they:

"4.1 **recklessly** used entirely untried and untested field methods, about which Dr Grant was most concerned and which

he would never condone, involving unprecedented and **dangerous** levels of disturbance to black grouse;

4.2 **dishonestly mislead** readers of their published paper by **deliberately** omitting details of such methods when they should have included them;

4.3 **incompetently** measured broods at a time of year that was too late to draw any meaningful comparisons with other sites and studies; and

4.4 **dishonestly (or at least incompetently)** presented the results of their study in a scientific paper as if the results were of value when they **knew (or at least should have known)** that the results were biased and misleading."

15. The Claimants' complaint about the publication of the RSPB Critique is confined to its publication as an attachment to those publishees to whom the email was sent. In addition to the words which are set out below, it consisted of 3 graphs (with the relevant keys) which are set out in their entirety in the Particulars of Claim. The RSPB Critique says as follows:

"A critique by RSPB Conservation Science of:

Bowker, G. Bowker, C. & Bains, D. (2007) Survival rates and causes of mortality in black grouse *tetrao tetrix* at Lake Vyrnwy, North Wales, UK. *Wildlife Biology* 13(3).

Summary

This study presents data on breeding success, survival rates and causes of death of black grouse over four years at Lake Vyrnwy, North Wales. Breeding success was estimated by searches for females with chicks using pointer dogs. Juvenile and adult survival was estimated by radio-tracking. They then used these demographic rates to determine whether the population should be increasing or declining. They also estimated population trends by censuses in spring. They conclude that breeding success and survival were too low during their study to maintain the population (low survival being due to high losses to birds of prey and foxes), and suggest that immigration from adjacent more productive sites may have supported numbers in the past. They support their conclusion for black grouse by using data on red grouse over the same period that also show low breeding success and decline in numbers.

Background

Science is the combining of quantitative observations (data) with logical arguments to make a case for or against specified

ideas (hypotheses). The conclusions that can be made by studies that use this scientific method are always limited by both the quality and quantity of the data they use. For example, inaccuracy or bias in data can lead to the wrong conclusions being drawn. Small sample sizes or length of study often do not reveal the full picture. Failure to consider all the important variables can also lead to the wrong conclusions. It is well worth looking at this paper by Bowker *et al* to see how they have dealt with these issues.

Inaccurate lek[1] counts?

First, we need to question whether a decline in black grouse has really taken place over the period of their study. The reason for this is that the lek count data in Bowker *et al* differ from those published by RSPB and Severn Trent Water (STW) (fig.1). The RSPB/STW data represent a long series of systematic surveys that always used the standard black grouse survey method and the same survey area each year. The largest discrepancy was in 2000, and this figure has the most influence on the trend reported by Bowker *et al*. Because the RSPB/STW and Bowker *et al* data for other years are much more similar, we can only conclude that their survey method was different in 2000, leading to a higher count. This weakens their case for a decline in male black grouse at Lake Vyrnwy.

Lack of long-term context

Second, even if the trends in males and females reported by Bowker *et al* are accurate (perhaps they counted birds within a different boundary to that represented by the RSPB/STW data), we should ask how this fits within the long-term trend on the reserve (fig.1). Clearly there is an upward trend in male black grouse at Lake Vyrnwy over the last decade. During this period, peregrine and goshawk numbers have remained stable, fluctuating between 2-4 prs and 0-4 prs respectively (RSPB unpublished data). The intensity of fox control (and presumably fox abundance) is also unchanged since 2000.

Therefore, Bowker *et al's* conclusions do seem at odds with the general increase over a period with stable predator abundance. This is even more puzzling in the light of their data that show males begin lekking on average just 1.5km from where they were born. Therefore, whilst immigration of some females from neighbouring populations is possible (although their suggested source population has since declined), the long-term increase in

[1] A lek is the name given to an area used for the performance of communal breeding displays and courtship during the mating season by black grouse. A lek count is of the number of males at the lek. Though it is not a word in common usage the argument before me proceeded on the basis that the readers of the publications complained of would be familiar with these words.

males at Lake Vyrnwy must be largely from locally reared birds.

Low breeding success and survival: real ecology or artefact?

Third, we need to be satisfied that the reported low breeding success and survival (the causes of population decline) are correct results, rather than the consequences of the methods used, or other variables not taken into account. Radio-tagging was the main method Bowker *et al* used to measure survival. Literature evidence for bad effects of radio-tagging on grouse is mixed. For example, Johnstone & Lindley (2003) report ambiguous results for black grouse chicks in Wales, and concluded that their study lacked the statistical power to detect more subtle effects. Studies that use radio-tracking should always consider whether their study animals are affected.

A high percentage of the black grouse population at Lake Vyrnwy were radio-tagged at some point in their lives (e.g. all 12 juveniles in 2000 and 14 out of 18 juveniles in 2001, these data being found in the full report of their project (Bowker & Bowker 2003)). Given this, and their lack of assessment of effects, the possibility that low survival was due to disturbance associated with radio-tagging and monitoring cannot be excluded. Furthermore, Bowker *et al* do not mention that young chicks were also radio-tagged as part of their study (e.g. 40 chicks from 10 broods in 2000 and 14 chicks from seven broods in 2002: Bowker & Bowker 2003). So if present, this effect could also cause the low breeding success reported.

Based on field signs, the authors report most deaths as due to predation by birds of prey (suggesting goshawk or peregrine) and foxes. That these are predators of black grouse is expected. However, based on the results in Bowker *et al*, we are unable to exclude the possibility that the high level of losses they found (85%) was an artefact of the intensive methods they used to estimate survival. This view is reinforced by the upward trend in lekking males since 1994, when peregrine and goshawk numbers were broadly stable.

Breeding success has been measured by systematic survey since Bowker *et al* and in the same areas as their study (counts took place in the third week of August). It was a mean of 3.3 chicks per hen in 2005 (n=3), 2.7 chicks per hen in 2006 (n=3), and in both years although few hens were found, all had broods. Even allowing for slightly earlier counts, these figures are much higher than those reported by Bowker *et al*. However, breeding success was zero in 2007. Breeding success is known to be poor in such wet summers, when chicks may be more vulnerable to predation in addition to lack of insect food

(Summers *et al* 2004). Bowker *et al* do not consider environmental effects such as this in their discussion of reasons for their reported low breeding success.

Red grouse breeding success at Lake Vyrnwy has also been estimated in six standard 1km square plots over the long-term (fig.2). Whilst during the period of Bowker *et al's* study success declined, data suggest that this was a fluctuation within longer-term stability. Indeed, after a period of decline, spring male red grouse abundance is now the same as when Bowker *et al* began their project (fig.3).

Conclusion

The inadequate survival and population decline at Lake Vyrnwy reported by Bowker *et al* seems to be an anomaly in a longer period of population increase and, at least in recent years, adequate breeding success.

There are a number of reasons why they wrongly conclude that the Vyrnwy population is doomed. First, their lek count data for 2000 seems to be inaccurate. Second, they have not demonstrated that their survival data are unbiased by their intensive methods. Third, they have failed to consider all relevant variables (such as June rain). Fourth, they have failed to interpret their results within a wider context. Their arguments for declines in breeding success and numbers for both black and red grouse are undermined when their data are viewed in the context provided by long-term monitoring data that used standard methods.

Because they have not formally addressed all of these issues, we must conclude that their science is unconvincing. Indeed, the authors themselves acknowledge some of these weaknesses.

References

Bowker,G, Bowker,C. (2003) Black Grouse (*Tetrao tetrix*) at the STW Lake Vyrwny Estate, North Wales. Unpublished report.

Farmer, R. (2005) Lake Vyrnwy: Farming and Conservation, a Case Study. RSPB, The Lodge, Sandy, Beds.

Johnstone, I & Lindley, P. (2003) The proximate causes of black grouse breeding failure in Wales. CCW contract science report No. 600.

Summers, R.W. Green, R. E. Proctor, R Dugan, D. Lambie D. Moncrieff, R. Moss, R & Bains D. (2004) An experimental

study of the effects of predation on the breeding productivity of capercaille and black grouse. *J.Appl.Ecol* **41** 513-525

Thorpe, R. Sheehan,J & Walker, M (2004) The birds of RSPB Lake Vyrnwy reserve. *Welsh Birds* **4** 20-30."

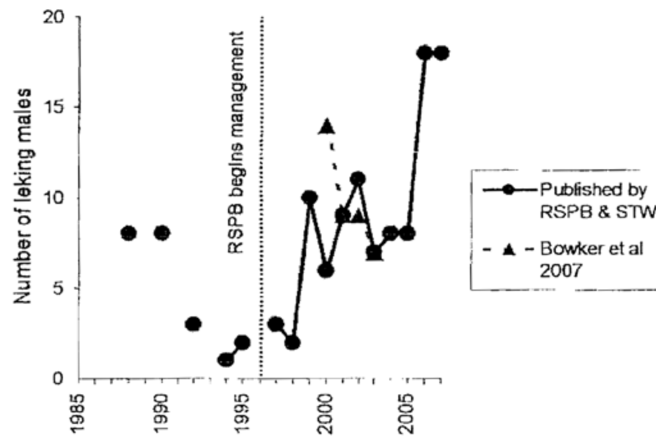

Fig.1. Changes in the number of lekking black grouse at Lake Vyrnwy. RSPB & STW data are for the RSPB reserve only, on which RSPB began habitat management in 1996 (updated data from Thorpe *et al* (2004)) and Farmer (2005).

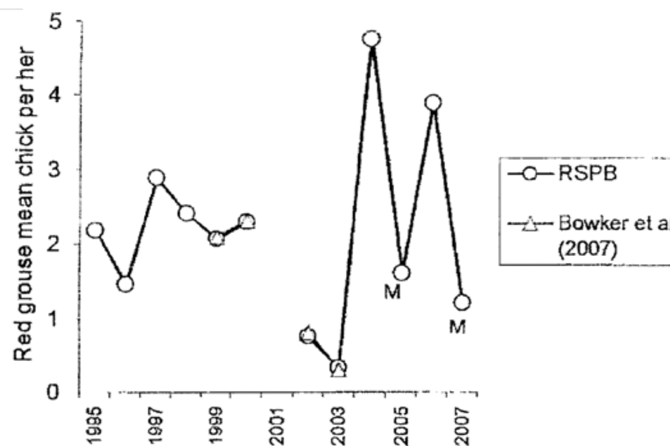

Fig.2. Red grouse breeding success (chicks per hen) in six 1km square monitoring plots has fluctuated at Lake Vyrnwy, but has not declined overall (M=minimum, when additional very young chicks were present but were not counted). Counts were carried out by Gordon Bowker in 95/96, and then by David Ogilvy.

Fig.3. Index of spring red grouse abundance in monitoring plots at Lake Vyrnwy. The dotted line shows no change. Abundance has increased in recent years and equals that when Bowker *et al* began their project (1999).

16. It is said by the Claimants that the RSPB Critique bore the following natural and ordinary meanings which were defamatory of them, namely that they:

> "6.1 **recklessly** used intensive field methods involving **dangerous** levels of disturbance to black grouse chicks and juveniles, such methods being the most likely cause of the low rate of survival of black grouse reported in the study;
>
> 6.2 **improperly** failed to declare such methods in their published paper;
>
> 6.3 **incompetently** used an inaccurate lek count for the year 2000;
>
> 6.4 **incompetently neglected** to consider environmental effects as a reason for the reported low breeding success; and
>
> 6.5 **cynically (or at least incompetently**) attributed the low grouse survival rate (that they had most likely caused themselves) to predators."

17. Dr Stowe's letter was written to Andy Warren of STW on 16 October 2007 and copied to Tim Wright, STW Shrewsbury. It included the graph attached as Fig. 1 to the RSPB Critique with its title, and the text of the letter says this:

> "I am writing about the recently published paper on black grouse at Lake Vyrnwy – Bowker G, Bowker C and Baines D (2007) Survival rates and causes of mortality in black grouse Tetrao tetrix at Lake Vyrnwy, North Wales, UK Wildlife Biology 13 – and about the Game Conservancy Trust's press release of 26 September carrying your name as STW contact.
>
> Given our joint interests and responsibilities for the Lake Vyrnwy estate, I am sure that this paper is of great interest to

you, as is the overall situation and future for black grouse at Lake Vyrnwy, and elsewhere in Wales. As a conservation organisation that attempts to base its policies and land management on the best available evidence, the RSPB welcomes and encourages scientific research on wild bird populations and their habitats, indeed it often funds and conducts such research itself. Unfortunately, I feel unable to take such a view of the Bowker et al paper.

As you know this paper comes from a study that we have long been concerned by, given the way in which it appeared to be undertaken, and we have serious concerns over the resulting paper. These concerns have been raised with you and your predecessor over a number of years. Some of these concerns are of such a fundamental nature that I think we need to make you aware of them again (as the representative with responsibility conservation issues of the company which sponsored this work).

On the face of it, the paper seems quite compelling; predation levels at Lake Vyrnwy appear very high on black grouse adults and juveniles, and the authors use a simple model to show that productivity was not high enough to compensate for these high levels of predation mortality, so the population declined. A nice case of where a predator seems to be limiting its prey population.

However, the RSPB’s monitoring of male black grouse at Lake Vyrnwy tells a completely different story. I have attached a graph that compares Bowker et al’s short-term (2000-2003) run of data with our own much longer set. As you will see, our data suggest that the male black grouse population has risen dramatically over the period of our management. It also shows that there is a marked discrepancy in Bowker et al’s and our estimate for 2000. The decline of males reported by Bowker et al hangs almost entirely on the one data point for this year. Bowker et al also report an even more marked decline among female black grouse; unfortunately, we do not have any data on females for comparison.

Given the apparent rate of decline, the paper leaves the reader feeling that in the absence of some form of predation management, the Vyrnwy black grouse population must surely be doomed to extinction. But nothing could be further from the truth. Numbers of male black grouse are now higher than they have been for the last twenty years.

So, how can the story told by the paper and RSPB’s information appear so different? I can think of several reasons; there are probably others.

First, the RSPB's data are wrong for 2000, the male black grouse population at Vyrnwy declined between 2000 and 2003, and the period of Bowker et al's study just happened to coincide with this short-term decline (due to high predation mortality and low breeding success) in an otherwise rising trend. If this were the case, it is unclear why mortality was so high during this particular period, as our evidence suggests that predator numbers at Vyrnwy have remained more or less stable over the last decade.

Second, the fieldworkers may have contributed to the decline they observed. The methods used to catch, handle, mark and track birds – particularly chicks – seem to have been particularly intensive, which is a cause for serious concern, given that black grouse are a species known to be particularly sensitive to such activities. The authors advocated – at least in the STW report that preceded the paper (although mention of this is omitted from the paper itself) – handling of chicks on multiple occasions, with each chick in a brood being located by a dog on each occasion. As far as I am aware, this is a completely untried and untested approach to this type of work, and is undocumented in the scientific literature.

Overall, chicks that survived to 8 weeks were each handled more than three times, with a high proportion of all the juveniles at Vyrnwy being radio-tagged in each year of study. Once tagged, they were then located and flushed every two weeks. Additionally, large numbers of young chicks were radio-tagged as part of the study (e.g. 40 chicks from 10 broods in 2000 and 14 chicks from seven broods in 2002), and again this could inflate mortality. Again, mention of this activity is omitted from the published paper. To my mind, this seems a high level of disturbance, and is much greater than in any other radio-tracking studies of black grouse that we, at RSPB, are aware of. One interpretation of the attached graph could be that male black grouse numbers were rising before the arrival of Bowker, declined while he worked on the site, and rose again when he left. While there may well be no causation here, there surely remains – at least to my mind – a whiff of suspicion.

Finally, the RSPB data are correct, male black grouse numbers simply fluctuated between 2000 and 2003 and did not decline at all. If so, the entire thrust of the paper seems flawed.

I do not know – and probably may never know – which of these reasons, if any, is closest to the truth. However you look at it, though, such short-term studies do little to aid our understanding of these complex problems. I agree that predators can sometimes reduce black grouse numbers. Our own work at Abernethy suggests this, but has also shown that

rainfall can be equally important for productivity; the Bowker et al study took no account of this at all.

For all of these reasons above, I see little merit in the Bowker et al paper, and fail to see how this work will do anything positive to further effective conservation action for black grouse. I am not clear either what benefit STW can derive from helping to publicise the paper. I hope that you can understand our frustration with this paper. As far as we are concerned, the black grouse population has risen dramatically at Lake Vyrnwy since we took over the management of its moorlands, hardly a message that shouts out from the Bowker et al paper, or from the recent press release put out by the Game and Wildlife Conservation Trust with your name attached to it.

Some years ago, the RSPB and STW agreed a communications protocol at meetings that you or your line manager attended in Shrewsbury, to ensure that press releases of mutual interest were agreed before issuing. We agreed that both organisations would operate at Lake Vyrnwy in a spirit of partnership and cooperation. The black grouse press release seems to breach that protocol. Further, how would STW react if RSPB issued a press release with incorrect implied criticism of your operation?

Given our serious concerns over the paper, the apparent failure of the communications protocol and in the interests of the Lake Vyrnwy operation, I think it would be valuable to have further discussion on this matter to see whether we might be able to reach some agreement on a way forward.

I look forward to hearing from you.

Yours sincerely,

Dr Tim Stowe

Director, Wales

Copy to Tim Wright, STW Shrewsbury"

18. It is said by the Claimants that the Stowe letter bore the following natural and ordinary meanings which were defamatory of them, namely that they:

"8.1 **recklessly** used particularly intensive yet completely untried and untested field methods, about which Dr Stowe was most concerned and which he would never condone, involving unprecedented and dangerous levels of disturbance to black grouse chicks and juveniles, such methods being the most likely cause of a decline in the numbers of black grouse at Lake Vyrnwy;

> 8.2 **dishonestly misled** readers of their published paper by deliberately omitting important information about these methods that had been included in the preceding STW report;
>
> 8.3 **incompetently** used an inaccurate lek count for the year 2000, which renders their entire study worthless; and
>
> 8.4 **incompetently** neglected to consider rainfall as a reason for the reported low breeding success."

19. The Particulars of Claim contain a plea of malice, the particulars of which are relied on in support of a claim for aggravated damages, and then repeated in the Claimants' Reply in response to the substantive defence of qualified privilege relied on by the Defendant. Mr Wolanski for the Defendant says that if the action proceeds, it will be the Defendant's intention to amend to include a defence of fair comment. Both in the claim for aggravated damages and the Reply to the Defence, the Claimants assert that the authors of the words complained of were actuated by express malice for which the RSPB must be held responsible. Very serious allegations are made of dishonesty (including fabrication of data) and bad faith which it will be necessary for me to address.

20. However, a theme which has permeated the submissions made of behalf of the Defendant is that this is a debate about science; indeed it is said that at the centre of this case and its lengthy pleadings (which refer in terms to scientific extracts and papers) lie several scientific issues which the court would be required to explore: particularly relating to the question whether intensive radio tagging and chick handling may contribute to falling grouse numbers, which is an area of controversy within the bird conservation arena.

21. This it is said has two implications. First, it is a case which plainly could not be conveniently tried by a jury (see the Senior Courts Act 1981 section 69(1)); and I am asked to rule accordingly. This it is submitted would give me a greater latitude in the exercise of summary jurisdiction because the burden on a party seeking Part 24 summary judgment in a defamation action is higher than in other types of action only when there are issues of fact deemed fit to go before a jury. Second, Mr Wolanski submits the court's approach should be informed by the important principle that courts should be slow to permit parties to seek to settle scientific disputes through litigation; and reliance is placed on the decision of the Court of Appeal in *British Chiropractic Association v Singh* [2010] EWCA Civ 250.

22. Mr Munden accepts that if the court determined this was not a case that could conveniently be tried by a jury, then the court has a discretion to order trial by judge alone, but otherwise says he is not sure where the cry of "Science" takes matters: and it is not clear in which respects the Defendant wishes the court to treat this case differently because it has a scientific background.

23. It will be necessary for me to consider these submissions in relation to the issues raised by the Defendant's applications, the first of which is meaning.

Issue one: meaning

24. I am asked to make a ruling pursuant to CPR Part 53.4.1 that the words complained of are not capable of bearing the meanings pleaded in the Particulars of Claim, or any meaning defamatory of the Claimants.

25. The legal principles relevant to the exercise of this jurisdiction are well settled. See for example, *Gillick v Brook Advisory Centres* [2002] EWHC 829 (cited in paragraph 32.5 of Gatley on Libel and Slander 11th Edn) and *Armstrong v Times Newspapers Limited* [2005] EWCA Civ 1007, *Jameel v The Wall Street Journal Europe Sprl* [2003] EWCA Civ 1694, [2004] EMLR 6 at paragraph 14. The judge's role is to pre-empt perversity, and the test is therefore a high one. When the Court is invited to exclude one or more meanings at the pre-trial stage, as Sedley LJ said in *Berezovsky v Forbes* [2001] EWCA Civ 1251, [2001] EMLR 1030 at [16]:

> "The real question in the present case is how the courts ought to go about ascertaining the range of legitimate meanings. Eady J regarded it as a matter of impression. That is all right, it seems to us, provided that the impression is not of what the words mean but of what a jury could sensibly think they meant. Such an exercise is an exercise in generosity, not in parsimony."

26. The relevant principles were summarised in *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 where Sir Anthony Clarke MR said at [14]:

> "The governing principles relevant to meaning … may be summarised in this way:
>
> (1) The governing principle is reasonableness.
>
> (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.
>
> (3) Over-elaborate analysis is best avoided.
>
> (4) The intention of the publisher is irrelevant.-
>
> (5) The article must be read as a whole, and any "bane and antidote" taken together.
>
> (6) The hypothetical reader is taken to be representative of those who would read the publication in question.
>
> (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation…" ….

> (8) It follows that it is not enough to say that by some person or another the words might be understood in a defamatory sense."

27. In the context of the dispute between the parties about meaning, and whether the words were capable of bearing any meaning defamatory of the Claimants at all, Mr Wolanski submits that none of the publications are an attack on the Claimants. They are to a greater or lesser extent, merely a critique of the science they deploy, describing it variously as unconvincing, or open to question. It is not defamatory of a scientist he says (nor, as in this case, a researcher) to describe the work he did in that way. He says excellent scientists may on occasion produce unconvincing work based on flawed data, and none of the words complained of suggest that the Claimants acted 'dishonestly', 'incompetently', 'recklessly' or 'dangerously'.

28. Mr Wolanski submits that in each case, the pleader has attempted to manufacture a libel case from what is plainly no more than a critique of the scientific methods used, and conclusions reached, by the Claimants in one paper. This is, in particular, when one considers the RSPB Critique, *par excellence*, an attempt to settle a scientific controversy by litigation rather than by the methods of science. He says moreover that many, especially within the scientific world, would find troubling the notion that scientists can find themselves subject to libel proceedings as a result of scientific critiques of this nature, however robust. What is under scrutiny is scientific method. As stated in *Gatley* at paragraph 2.26:

> "To be actionable [in defamation] words must impute to the claimant some quality which would be detrimental, or the absence of some quality which is essential, to the successful carrying on of his office, profession or trade. The mere fact that words tend to injure the claimant in the way of his office, profession or trade is insufficient. If they do not involve any reflection upon the personal character, *or* the official, professional or trading reputation of the claimant, they are not defamatory."

29. As I have indicated above, he says the approach of the court should be informed by the important principle that courts should be slow to permit parties to seek to settle scientific disputes through litigation. And he draws attention in this context to what the Lord Chief Justice said in giving the judgment of the Court in *Singh* at [34]:

> "We would respectfully adopt what Judge Easterbrook, now Chief Judge of the US Seventh Circuit Court of Appeals, said in a libel action over a scientific controversy. *Underwager v Salter* 22 Fed. 3d 730 (1994):
>
> > "[Plaintiffs] cannot simply by filing suit and crying 'character assassination!' silence those who hold divergent views, no matter how adverse those views may be to a plaintiffs' interests. Scientific controversies must be settled by the methods of science rather than by the methods of litigation….More papers, more discussion, better data, and more satisfactory models – not larger awards of

> damages – mark the path towards superior understanding of the world around us.""

30. Mr Munden disputes that the words here were published as part of a scientific debate at all. But in any event, he points to the fact that the Court of Appeal in *Singh* did not declare that libel claims could not be brought that related to science, or that claims involving science were an abuse of the process. Instead, they simply considered the case in the scientific context: in particular holding that the words complained of must be construed in that context, both when considering meaning and determining whether the words were fact or comment. It could not be suggested that there is a blanket defence for statements made in the scientific context (where none is available for example, for statements on political matters, as the House of Lords determined in *Reynolds v Times Newspapers* Ltd [2001] 2 A.C. 127). He accepts that some of the words may be construed as comment (though that defence is yet to be pleaded); but a significant feature distinguishing this case from *Singh* is that here malice is alleged.

Discussion

31. Similar arguments to those advanced before me by Mr Wolanski, were considered by the Court of Appeal in *Drummond-Jackson v British Medical Journal* [1970] 1 W.L.R. 688, where an action for libel was brought in respect of the publication of a learned and technical article in the British Medical Journal. The article concerned the results of research into a method for anesthetising patients which had been advocated and practiced by a dentist (the plaintiff). It concluded the method was dangerous for patients and may impede good dentistry. The majority of the Court of Appeal (Pearson LJ and Sir Gordon Wilmer) considered the article was capable of giving rise to a meaning which was defamatory of the plaintiff. The court did not have the benefit of considering a pleaded meaning since the action pre-dated the requirement that a claimant should identify the meaning he or she relied on in the Particulars of Claim, but in a well known passage from his judgment Pearson LJ said this at p.698-699:

> "Words may be defamatory of a trader or business man or a professional man, although they do not impute any moral fault or defect of personal character. They [can] be defamatory of him if they impute lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade or business or professional activity…."

32. This passage was cited with approval by Neill LJ in *Berkoff v Burchill* [1996] 4 All ER 1008 at 1011. In the course of an extensive review of the definitions of the word "defamatory" from previous cases, Neill LJ included the definition given by Pearson LJ, only noting: "*that it is necessary in some circumstances to consider the occupation of the plaintiff*". See more recently the discussion of business defamations in *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB), [2010] EMLR 25 at [37] to [50] citing what was said by Neill LJ in *Berkoff*; and also *Dee v Telegraph Media Group Ltd* [2010] EWHC 924 (QB) at [42] to [48].

33. Lord Denning MR in his dissenting judgment in *Drummond* considered that the words were no more than lawful criticism of the plaintiff, and said this at p.694:

> "The law draws a distinction between libel and lawful criticism. *Libel* is personal and subjective. It is a lowering of the man himself in the eyes of right-thinking people generally. It is actionable without more ado. *Lawful criticism* is impersonal and objective. It is criticism of goods, of a design, a system, or a technique. It points out defects and deficiencies in them without attacking them and himself. It is not actionable unless proved to be both false and malicious.
>
> Applying this test, I hold that this scientific paper is no libel. Here are a group of scientists who have done a valuable piece of research. They have discovered that the technique practised by the plaintiff is dangerous. It is surely in the public interest that they should make known their findings to the profession: and that the scientific journals should be entitled to publish them: without fear of a libel action. So far from everything being presumed against them, I think everything should be presumed in their favour: for they are doing a public service. It may be that, in criticising the plaintiff's technique, they are casting some reflection on him. That cannot be helped. Every criticism of a technique tends to cast some reflection on those who practise it. But that does not give cause for a libel action. These scientists have nowhere descended to an attack on the plaintiff personally. They should not be plagued with a libel action. The case is, to my mind, covered by Griffiths v. Benn, 27 T.L.R. 346 and John Leng & Co. Ltd. v. Langlands, 114 L.T. 665. The comments on a system in those cases were far more violent and severe than these here, but it was held that there was nothing which went beyond the bounds of lawful criticism.
>
> So here I hold that the defendants have not gone beyond the bounds. They have only exercised the right of lawful criticism. It would be a sorry day if scientists were to be deterred from publishing their findings for fear of libel actions. So long as they refrain from personal attacks, they should be free to criticise the systems and techniques of others. It is in the interests of truth itself. Were it otherwise, no scientific journal would be safe. I would allow the appeal and strike out this statement of claim."

34. The majority however, did not take that view. Sir Gordon Wilmer said this at p.702:

> "The case which the plaintiff seeks to set up, as I understand it, is that he is attacked in the way of his profession, in that, without any proper prior investigation, he is alleged to have been preaching and practising a dangerous technique, found in a number of instances to produce deleterious effects, and possibly resulting in death in several cases. It should in my judgment be for a jury to say whether all this is defamatory of the plaintiff, as an attack on his professional reputation. What I

> find it impossible to say, at any rate at the present stage, is that the words of the article are plainly and obviously incapable of bearing any defamatory meaning.
>
> It has been urged on behalf of the defendants that so to hold would be most detrimental to the advancement of scientific knowledge, since no scientific journal will in future feel safe in publishing an article which is critical of the views of an opposing school of thought. I do not accept that there is any such danger. For one thing, it is perfectly possible for scientific gentlemen to criticise each other's views and theories without saying anything capable of being construed as defamatory, even though they may be, in Gilbert's words,
>
> "Maintaining with no little heat
>
> Their various opinions."
>
> But quite apart from that, it is, I think, to be emphasised that the present case is not concerned merely with the presentation of opposing views on some theoretical scientific subject. The essential feature of the case is that the plaintiff is a practising dental surgeon, and the gist of his case is that the article complained of is unjustifiably critical of the way in which he carries on his practice, thereby damaging his professional reputation."

35. In his judgment, Pearson LJ (immediately before the passage cited at paragraph 31 above) doubted that the analogy drawn by Lord Denning between a trader's goods, and a professional man's technique in this case was sound. At p.698 he said this:

> "How can it be argued that this article could not reasonably be given any meaning defamatory of the plaintiff in his profession as a dentist? I think it can only be so argued on the basis of a narrow view being taken as to the scope of defamation of a person in his trade, business or profession.
>
> Many reported cases are concerned with the question whether defamation of goods involves defamation of the trader who sells the goods…
>
> I doubt whether the analogy sought to be drawn in the present case between a trader's goods and a professional man's technique is sound. Goods are impersonal and transient. A professional man's technique is at least relatively permanent, and it belongs to him: it may be considered to be an essential part of his professional activity and of him as a professional man. In the case of a dentist it may be said: if he uses a bad technique, he is a bad dentist and a person needing dental treatment should not go to him."

36. In *Singh* the parties had invited the judge below to consider two questions: the first, was what defamatory meaning the words bore; the second, was whether they constituted fact or comment. The Court of Appeal held the words were opinion, and that the judge had erred in ascribing to words which were expressions of opinion, meanings which required them to be defended as verifiable fact. The Lord Chief Justice went on to say at [32]:

> "[I]t may be that the agreed pair of questions which the judge was asked to answer was based on a premise, inherent in our libel law, that a comment is as capable as an assertion of fact of being defamatory and that what differ are the available defences; so that the first question has to be whether the words are defamatory even if they amount to no more than comment. This case suggests that this may not always be the best approach, because the answer to the first question may stifle the answer to the second."

37. In this case there is at present no defence of comment pleaded; and both sides have invited me to consider the issue of meaning first (an approach which accords with that considered to be the right one by the Court of Appeal in *Burstein v Associated Newspapers Ltd* [2007] EWCA Civ 600, [2007] EMLR 21). Although Mr Wolanski raised in general terms the problems which may arise when suing over matters of scientific controversy, he did not contend that merely because something is said/written during the course of a scientific debate it is immune from suit or incapable of bearing a defamatory meaning. These were not the contentions of the parties in *Singh*, nor did the court in *Singh* so hold. Such an argument risks conflating the issues of the meaning of what is said, whether what is said is defamatory, and the defences which are or ought to be available for saying it. I note also that in the *Underwager* case itself it was assumed for the purposes of the judgment that at least some of the statements complained of were untrue and defamatory (see paragraph 5 of that decision). The issue in that case was whether the plaintiffs needed to establish actual malice; and if they did, whether the lower court was right to hold the publications were privileged, and right to give summary judgment on the issue of malice on the deposition evidence before it.

38. Mr Wolanski did not therefore argue that if the words did accuse the Claimants of incompetence, negligence, recklessness or dishonesty in the carrying out of their professional work, then scientists/fieldworkers for this purpose are in a special category for the purpose of determining whether words are defamatory or not. Such an argument would be contrary to the principles to which I have referred above. His simple argument was that the publications made no such accusation, and no reasonable reader could conclude that they did.

39. Nonetheless disagreements about scientific matters (even strong ones) as Sir Gordon Wilmer pointed out in *Drummond*, are capable of being expressed without being defamatory of the other party; and in my view the fact that statements are made in a 'scientific critique' whether formal or informal, may have an important bearing on how the relevant words would be understood by the ordinary reasonable reader. As Neill LJ said in *Berkoff* at p1018:

> "It is trite law that the meaning of words in a libel action is determined by the reaction of the ordinary reader and not by the intention of the publisher, but the perceived intention of the publisher may well colour the meaning."

40. If for example, it is obvious that what is said is part of a measured analysis of the issues in a scientific context, then the perceived intention of the publisher that it should be, may well colour the meaning attributed to it by the ordinary reasonable reader (quite apart from the question whether what is said may be regarded in the circumstances as a value judgment: and defensible as such, in the absence of dishonesty). Moreover, the scientific method itself requires scrutiny and criticism for the advancement of knowledge and as the relevant hypothetical reader might well understand, even the most eminent scientist may be wrong without being incompetent. With those considerations in mind, I turn to the arguments on the publications complained of.

The Grant email: the parties' submissions

41. The Defendant submits that as Dr Grant sent the email with the RSPB Critique as an attachment, readers of the email therefore must be taken to have read the RSPB Critique as well: see ***Dee*** at [27] to [32]. Such readers it is said would understand Dr Grant to be discussing Dr Johnstone's conclusions, and to be commenting upon what Dr Johnstone has identified as the problems with the Claimants' work. Mr Munden was also content for the two publications to be looked at together. In my view Mr Wolanski is correct in suggesting both that Dr Grant was discussing Dr Johnstone's conclusions, and that the readers of the email should be taken to have read the attachment, to which their attention was directed. That does not mean however that the two publications, which are dealt with separately in the Particulars of Claim, should be treated as one publication for the purpose of meaning. In circumstances where each presents, self-evidently, the author's own analysis of the *Wildlife Biology* paper, it seems to me the correct approach for present purposes is that each publication provides the context in which the other should be read.

42. Mr Wolanski submits that in the email, Dr Grant sets out the background to the publication of the *Wildlife Biology* paper, and then summarises what he identifies as the main "points of concern" about the Claimants' work arising from the RSPB Critique. Dr Grant's main theme is that the Claimants used certain 'unorthodox methods' in their grouse field work which, as he puts it, "*may have had* greatest influence in biasing the results from this study". I have already referred to the Defendant's general argument above. Mr Wolanski says that the pleaded meanings bear little resemblance to the email, and that stripped of their "pleader's spin" in particular, the highlighted words, what is left is merely a critique of the Claimants' science which is not defamatory of them. The words he highlights are Mr Wolanski submits deployed in an attempt to turn what is a critique of the Claimants' science into a "character assassination". Were the emboldened words to be excised, as they should be, the meanings would not defame the Claimants at all.

43. With regard to meanings 4.1 and 4.3 he says the email does not accuse the Claimants of recklessness or incompetence. To say of a scientist that he has deployed "*a completely untried and untested method*" is not to allege recklessness or incompetence: indeed, scientific progress often depends upon the deliberate use of

completely untried and untested methods. That is the essence of experimentation. Even the most respected scientist may use methods which turn out to produce unreliable results. Uncertainty is inherent in scientific enquiry. He draws attention to the fact that Dr Grant says that the methods used by the Claimants "**could conceivably** have led to the high rates of predation and chick mortality recorded" (page 1 third paragraph); that the Claimants' methods **"may** have had greatest influence in biasing the results from this study" (page 1 third paragraph); and that handling of chicks on multiple occasions "to my mind **seems more likely** to increase mortality amongst chicks". This is very far from accusing the Claimants of acting recklessly or incompetently. Instead it calls into question the methods by raising the possibility that they may have rendered the results unreliable. Dr Grant is not attacking the Claimants: he is highlighting the uncertainty surrounding radio tagging and intensive chick handling.

44. However, Mr Wolanski says that even if the words did allege that the Claimants had used methods they knew may endanger the lives of grouse, this would not be defamatory of them. Scientific experiments sometimes involve knowingly endangering the lives of animals (and sometimes, in the field of medical science, of humans). If scientists never took risks then new treatments could never emerge. A reasonable person (not an animal rights activist perhaps) would not necessarily think the worse of such a scientist. Regard should be had to the audience of the publications, all professionals working in this area: see *Thornton*. In any event, the pleader correctly does not contend in meaning 4.1 that the words allege that the Claimants *knew* their methods were dangerous.

45. As for meanings 4.2 and 4.4, Mr Wolanski submits the words do not accuse the Claimants of dishonesty. The words could only impute dishonesty if they alleged that (a) the Claimants used methods which they knew would, and did, produce unreliable results, and (b) the Claimants deliberately sought to keep these methods secret. The Claimants cannot have been dishonest if they merely *ought to have known* that the methods were flawed. Meaning 4.2 does not (and could not) contain any averment that the Claimants *knew* they should have included details of the methods used. Meaning 4.4 contains the insufficient 'ought to have known' formulation. The words do not allege that the Claimants used methods which they knew would, and did, produce unreliable results. Indeed, Dr Grant makes it clear that even he was unsure whether the methods had this effect – it was merely *conceivable*, or *likely*.

46. The words do not allege either, that the Claimants deliberately sought to keep their methods secret. Indeed, they make it clear that the contrary was true: Dr Grant says that many of the 'unorthodox' methods were "unfortunately... not documented in the paper itself" (page 1 third paragraph) but then goes on to say "although they are detailed in the original but unpublished STW report". He says that far from being embarrassed about their methods, or seeking to cover them up, the Claimants themselves drew attention to their methods in an earlier paper.

47. Mr Munden makes a compendious submission in relation to the three publications complained of. In respect of each, the Claimants' case is that the words are capable of bearing and do bear the meanings complained of as the relevant reasonable reader reading them (someone with knowledge of conservation science) would understand each of the documents complained of to be plainly critical of Claimants' methods, and therefore of them as researchers.

48. Mr Munden submits the Claimants are professional researchers: and anything which imputes lack of qualification or skill in the conduct of that profession is defamatory of them. The email he says makes it clear the Claimants were "doing something wrong" and is highly critical of them. He accepts that it is not necessarily a criticism to say that someone's methods are "completely untried and untested", but he submits that one has to read on to see that the Claimants were using such methods which were likely to lead to an increase in mortality. Any reasonable reader would he submits think that the Claimants were therefore reckless, and were using methods that were dangerous. As to the specific meanings, assuming that the "facts" were not disputed (i.e. those words not emboldened) any reader would think this was a criticism of the Claimants' judgment. The reader would see that there were matters which the Defendant was alleging Claimants must have (or should have) been aware of. But they nonetheless presented their results in a scientific study as if the paper was of value, and were therefore dishonest or incompetent in doing so, and cynical or incompetent in attributing the likely results of their own actions (the low survival rate) to predators. Any reasonable reader would understand that the Claimants should have mentioned the methods which have an effect on the data and would conclude the omission of fundamental data was deliberate and dishonest.

49. In my judgment it is clear that the central focus of the Grant email is on the field methods used by the Claimants. ("We were very concerned about the field methods employed by Gordon." "To my mind the methods that may have had greatest influence…").

50. It is also clear, that the Grant email questions the methods used and whether their use may have biased i.e. influenced the results. (Although the use of the word "bias" in the meanings complained of might have suggested otherwise, during the course of argument, Mr Munden rightly accepted that the word "bias" in the context in which it was used in the Grant email, connoted bias in the sense used by scientists when commenting on results, that is, a systematic error in the design, conduct or analysis of a study which results in estimates which depart from true values. An unbiased study is free from systematic error).

51. The real question is whether the Grant email, read in the context of the RSPB Critique, goes further and (for the purposes of this application) is capable of suggesting to the reasonable reader not only that there is a question mark over the Claimants' methods, but that their use of them is culpable in the way alleged i.e. incompetent, negligent, reckless or dishonest, as is their failure to mention them in the published paper. Such a conclusion would have to be an inferential one, capable of being drawn by a reader "reading between the lines", because, as Mr Wolanski points out, none of those words which he highlights appear in the Grant email itself. Even reading between the lines and adopting a generous rather than a parsimonious approach to the meaning in accordance with the principles identified above, I do not think the Grant email is capable of bearing the meanings complained of. In particular, I do not consider it is arguable that a reasonable reader of the email could conclude the Grant email meant the Claimants were dishonest, or reckless or incompetent in the manner suggested by the pleaded meanings. I have reached my conclusions on this and the other publications complained of, both as a matter of general impression, and having regard to a more detailed consideration of the language of the email itself.

52. The first question which arises is what the reasonable reader could conclude the email was saying about the consequences of the high disturbance methods used. The meanings pleaded suggest the reader could conclude it was being suggested that the methods used in fact led to the high rates of mortality recorded. Such a conclusion would in my judgment be wholly unreasonable having regard to the cautious and contingent way in which Dr Grant expresses himself on that topic, as a result of which it is not arguable that he does any more than call into question the methods by raising the possibility that they may have rendered the results unreliable.

53. Thus, for example, it is not said that high disturbance methods did lead to the high rates of predation and chick mortality recorded. It is said the high disturbance methods "could conceivably have led" to this result. Moreover, in the introduction to the more detailed discussion of the methods in the bullet points, Dr Grant not only uses the word "may" (when suggesting that the methods may have had an influence in biasing the results from the study) but underlines it to give it emphasis. In my view, this is highly material to the meaning the reasonable reader could attribute to what follows, and indeed to the email as a whole. When the tagging of young chicks is discussed after the second bullet point, it said that "it is conceivable" that radio tagging of young chicks "may" increase their vulnerability in some way. The cautious nature of what is being said is reinforced by the discussion of the "possibility that the effects may be small". As for the handling of chicks on multiple occasions, in my view, in the context, Dr Grant's views of this method ("seems more likely to increase mortality amongst chicks") is simply a contrast with the First Claimant's advocacy of it on the ground it reduces mortality, advocacy which cannot be accepted at face value because the method advocated is "untried and untested".

54. In the result, if the reader is merely told that there is a possibility the methods used may have influenced the results, and rendered them unreliable, it would be wholly unreasonable in my view to infer that the Claimants' use of them, was in fact dishonest, reckless or incompetent; or that the Claimants knew or ought to have known that the results they were presenting in the *Wildlife Biology* paper were biased and misleading, still less could it reasonably be inferred that the Claimants had dishonestly or cynically misled their readers by deliberately omitting details of "such" methods i.e. methods which they knew resulted in flawed or misleading results. As to the latter point (concealment of method, meaning 4.4), it is also material to my conclusion on capability, that the reader is told both that the Claimants themselves drew attention to their methods in an earlier paper/report to a third party (the STW), conduct inconsistent with dishonest concealment, and that the person who pulled out the data from the Claimants' original work and analysed them to produce a scientific paper, was David Baines of the GCT i.e. not the Claimants, albeit the Claimants' names are on the *Wildlife Biology* paper as well. Shorn of this pejorative context, I do not consider either, the suggestion that the brood count was taken at a time not directly comparable to those used in other studies is capable of bearing the meaning that the Claimants were incompetent in taking the count at that time, as opposed to merely being wrong.

55. I turn next to the question whether the Grant email is arguably defamatory of the Claimants, albeit not in the pleaded meanings. It is arguable in my view that it is, having regard to the approach of Pearson LJ in *Drummond-Jackson,* and Neill LJ in *Berkoff* cited above, albeit at a lower level of seriousness than that contended for at

present. In particular, while the relevant words are arguably capable of reflecting adversely on the Claimants' capabilities and judgment, I do not consider even when read in the context of the RSPB Critique, as I have said, that they are capable of "imputing any moral default or defect of personal character" on their part. The precise wording of any meaning must be a matter for the Claimants to formulate, if so advised, subject to my conclusions overall. But in my view, the Grant email arguably raises questions as to the Claimants' judgment and abilities as field workers (but not their bona fides) in using high disturbance methods which may have affected the mortality of chicks which their fieldwork was supposed to measure. In addition, it is arguable in my view that a reasonable reader (bearing in mind the nature of the readership in question) could also conclude the words reflected on their abilities by suggesting they had co-authored a paper for publication in a peer-reviewed journal which fell below the generally accepted standard for such work, by failing to detail the methods which were fundamental to the results.

The RSPB Critique

56. The arguments advanced by the parties in respect of the RSPB Critique mirror to a great extent those already advanced in respect of the Grant email. Mr Wolanski submits this was a detailed and serious critique of the Claimants' *Wildlife Biology* paper but not of the Claimants, and does not suggest they were dishonest, reckless, cynical or incompetent. Dr Johnstone draws attention to the fact that the Claimants' data about grouse numbers differ from the RSPB's data. He questions whether the Claimants' conclusions about grouse numbers are correct. He also raises the question as to whether the methods used by the Claimants (handling and radio tagging) may have contributed to the low numbers recorded. He concludes by pointing to four reasons why the Claimants wrongly conclude that the Vyrnwy grouse population is doomed; and he ends by describing the Claimants' science as "*unconvincing*".

57. Mr Munden accepts that (in comparison to the email) the RSPB Critique is in more measured tones. But he submits that it would be read alongside the email; and the underlying message it conveys is similar in nature. To try and compare any sets of data when using different methods would be of no use, and would be incompetent; it is suggested (at least) that there are reasonable grounds to suspect the effects recorded were due to the methods used; the suggestion is that the Claimants should have declared the methods that they used, and their failure to do so was improper. The overall tone of what is said is negative and critical; with regard to the intensive methods used, the failure to consider relevant data which they should have done, and their failure to consider the data in a wider context. He nonetheless accepts that the Critique's conclusion (that the science was "unconvincing") is less objectionable than that of the email ("undermined").

58. The RSPB Critique both as matter of impression, and when considered more carefully, even when read in the context of the Grant email, seems to me to be no more than a careful and measured scientific appraisal of the *Wildlife Biology* paper, its science, its methods, its suggestions (that immigration from adjacent and more productive sites may have supported black grouse numbers in the past) and its conclusions (low breeding success and survival of black grouse due to high losses to birds of prey and foxes). Various possibilities relating to three topics are carefully analysed and discussed in a moderate and balanced way by reference to the scientific method set out and explained in the second paragraph under the heading

"Background". These are; first, lek counts (the possibility that the lek count data in the *Wildlife Biology* paper is inaccurate); second, how the *Wildlife Biology* paper data fits in with long term trends if it is accurate; and third, whether it is possible to exclude the possibility that the low breeding success and survival is an artefact of the methods used, or other variables such an environmental factors.

59. As is said in terms, this is a critique of the science of the *Wildlife Biology* paper, the express purpose of which is to see how it measures up against the scientific criteria it describes. The conclusions reached must obviously be seen in that overall context, as well as in the context of the discussion which precedes them. To say in the context of the sort of discussion engaged in here, that someone has drawn a wrong conclusion (that the black grouse population is doomed) for example, is not in my judgment, defamatory of them. It is said the lek count data seems to be inaccurate, but it has earlier been acknowledged that it is possible that the lek count data is accurate, and the differences in numbers could have arisen from a different approach ("perhaps they counted birds within a different boundary to that represented by the RSPB/STW data").

60. In the end, it is the science that is described as unconvincing, and then only because some issues have not been formally addressed. In all these circumstances, and in particular where it is said that the "authors themselves acknowledge some of these weaknesses" it would be wholly unreasonable in my view to infer from what is said that the Claimants had acted recklessly, improperly or cynically, or that they were incompetent as the pleaded meanings suggest; the pleaded meanings seem to me to be both strained and unreasonable. Thus the words "the possibility that low survival was due to disturbance associated with radio-tagging and monitoring cannot be excluded" and "they have not demonstrated that their survival data are unbiased by their intensive methods" is converted into the meaning that the Claimants "**recklessly** used intensive field methods involving **dangerous** levels of disturbance to black grouse chicks and juveniles, such methods being the most likely cause of the low rate of survival of black grouse reported in the study". In my judgment no reasonable or sensible reader could attribute such meaning, or indeed the other meanings complained of to the material words read as a whole. Indeed, the overall message it seems to me is not one which is arguably defamatory of the Claimants at all in particular having regard to the subject matter under discussion, and the context in which it is discussed.

The Stowe letter

61. Mr Wolanski submits there is nothing in the Stowe letter which is arguably defamatory of the Claimants and the pleader's meanings depart radically from the text complained of; the meanings complained of are nearly identical to those of the Grant email, even though the text of the two publications is very different. In the letter Dr Stowe says the conclusions of the Claimants in the *Wildlife Biology* paper about grouse numbers differ significantly from the conclusions drawn by the RSPB. He then suggests three possible reasons (adding "*there may be others*") for this discrepancy. First, the RSPB data may be wrong for 2000; second, the Claimants may have contributed to the decline they observed by using particularly intensive field methods; and third, the RSPB data are correct, and black grouse numbers simply fluctuated between 2000 and 2003. He then says:

> "I do not know – and probably may never know – which of these reasons, if any, is closest to the truth".

62. Once again, Mr Wolanski submits the emboldened words are impermissible spin, the necessary excision of which would render the pleaded meanings not defamatory of the Claimants. There is no suggestion of recklessness, incompetence or dishonesty on the part of the Claimants. Dr Stowe acknowledges he *does not know* whether his suggested reasons for the discrepancies in data are 'close to the truth'; indeed he agrees that predators *can* reduce black grouse numbers – thus lending possible support to the Claimants' thesis of a decline of grouse because of predation. Dr Stowe's main point in the letter is that "short term studies" like that behind the *Wildlife Biology* paper may not aid an overall understanding of the "complex problems" concerning grouse numbers, given the doubts over the methodology employed; and given the possible importance of factors such as rainfall not mentioned in the Claimants' paper. Mr Munden submits, shortly, that the Stowe letter is plainly defamatory of the Claimants and bears the meanings complained of.

63. My conclusions in respect of the Stowe letter are the same as for the Grant email and essentially for the same reasons. I do not consider the words complained of are capable of bearing the pleaded meanings, at least in their current formulation. There is no doubt that overall, Dr Stowe makes it clear he has serious concerns about the *Wildlife Biology* paper and whether its results are reliable. But nonetheless it seems to me that those fundamental concerns attach to the methodology, rather than the bona fides of the persons conducting the research; and I repeat the points made in paragraphs 52 to 54 above. The first meaning pleaded is an impossible one to maintain in my view. The letter makes clear there is a only a possibility (amongst other possibilities discussed, and there are "probably others") of a link between the high disturbance methods used by the Claimants and the decline in numbers ["While there may be no causation here, there surely remains – at least to my mind – a whiff of suspicion" and "I do not know - and probably may never know – which of these reasons, if any, is closest to the truth."]; if indeed a decline in numbers actually occurred, which itself is canvassed as a possibility at best. Similarly, Dr Stowe does not say, positively that the Claimants used an inaccurate lek count for the year 2000; that is merely one of the possibilities canvassed of the three. Nor do I consider the words are capable of bearing the meaning that the Claimants "dishonestly misled" readers of their paper by omitting important information as is pleaded. Even if Dr Stowe was suggesting, at least implicitly that such information should have been included, a reasonable reader and not one "avid for scandal" could not conclude in my view, that its authors had omitted the information dishonestly. I take a similar view of the suggestion that the Claimants were "incompetent" in failing to take account of the rainfall. Nonetheless, as for the Grant email, the relevant words are in my view arguably capable of reflecting adversely on the Claimants' judgment, but at a lower level of seriousness than currently pleaded. Again, the precise formulation would be a matter for the Claimants, but I consider it arguable that the Stowe letter raises questions about their judgment in particular in using methods which may have contributed to a possible decline in black grouse numbers, the bird population their study was supposed to observe.

64. Although I have concluded that the RSPB Critique is not defamatory of the Claimants, in case I am wrong about that, I shall consider the Defendant's further

applications on the footing that the case proceeds in respect of all three publications complained of.

Judge or jury

65. Section 69(1) of the Senior Courts Act 1981 provides as follows:

> "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 an issue-
>
> (b) a claim in respect of libel,
>
> the action shall be tried with a jury, unless the court is of the opinion that the trial requires any ... scientific ...investigation which cannot conveniently be made with a jury...
>
> (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."

66. The questions I must determine are therefore first, whether the trial will involve a scientific investigation; second, whether the investigation can conveniently be done with a jury; and third, whether nonetheless there should be trial by jury, even though the proviso to section 69(1) is satisfied.

67. In *Aitken v Preston* [1997] EMLR 415, Lord Bingham of Cornhill LCJ said this at p.421to p.422:

> "(i) The basic criterion, *viz.* that the trial requires a prolonged examination of documents, must be strictly satisfied, and it is not enough merely to show that the trial will be long and complicated (Rothermere v. Times Newspapers Ltd [1973] 1 W.L.R. 448). However, the word "examination" has a wide connotation, is not limited to the documents which contain the actual evidence in the case and includes, for example, documents which are likely to be introduced in cross-examination (Goldsmith v. Pressdram Ltd [1988] 1 W.L.R. 64).
>
> (ii) "Conveniently" means without substantial difficulty in comparison with carrying out the same process with a judge alone. This may involve consideration of several factors, for example:
>
> (a) the additional length of a jury trial as compared with a trial by judge alone;
>
> (b) the additional cost of a jury trial taking into account not only the length of the trial but also the cost of, for example, additional copies of documents;

(c) any practical difficulties which a trial by jury would entail, such as the handling of particularly bulky or inconvenient files, the need to examine documents alongside each other, and the degree of minute scrutiny of individual documents which will be required;

(d) any special difficulties or complexities in the documents themselves (Beta Construction Ltd v. Channel Four Television Co. Ltd [1990] 1 W.L.R. 1042 especially per Stuart Smith L.J. at page 1047C-D and per Neill L.J. at page 1055H, referred to and applied in the recent case of Taylor v. Anderton [1995] 1 W.L.R. 447).

(iii) The ultimate exercise of discretion will in each case depend substantially on the circumstances of each individual case, and it would be idle to attempt to enumerate all the factors which might arise.

There are, however, four factors which have been identified in the earlier cases, which have some general application and which are presently relevant, as the judge recognised:

(1) The emphasis now is against trial by juries, and this should be taken into account by the court when exercising its discretion (Goldsmith v. Pressdram (*supra*) at page 68 *per* Lawton L.J. with whom Slade L.J. expressly agreed). This conclusion is based on section 69 (3), which was a new section appearing for the first time in the 1981 Act to replace section 6 (1) of the Administration of Justice (Miscellaneous Provisions) Act 1933, the provision in force at the date when Rothermere v. Times Newspapers was decided.

(2) An important consideration in favour of a jury arises where, as here, the case involves prominent figures in public life and questions of great national interest (Rothermere v. Times (*supra*)).

(3) The fact that the case involves issues of credibility, and that a party's honour and integrity are under attack is a factor which should properly be taken into account but is not an overriding factor in favour of trial by jury (Goldsmith v. Pressdram (*supra*) at page 71H *per* Lawton L.J).

(4) The advantage of a reasoned judgment is a factor properly to be taken into account (Beta Construction v. Channel Four Television (*supra*))."

68. In *Fiddes v Channel Four Television Corporation* [2010] EWCA Civ 730 Lord Neuberger MR said this at [16] to [22]:

"16. It was suggested on behalf of Mr Fiddes that these principles were not entirely consistent with earlier authorities, but we do not accept that. Inevitably, there are some dicta in other judgments which put some of these points slightly differently, but there is no inconsistency between Lord Bingham's illuminating summary of the applicable principles when approaching the section 69 questions and other authoritative observations from this court. Lord Bingham went on to point out the value of a reasoned judgment (which would not be available in a jury trial), particularly to the successful party.

17. Having said that, there are six points we think it right to make about Lord Bingham's analysis of the applicable principles, in the light of the arguments advanced to us.

18. First, we would like to emphasise the need for caution when invoking the additional length, and (even more) the additional cost, of a jury trial as factors to be taken into account on the second, convenience, section 69 question. Jury trial will almost always take longer, and cost more, than trial by judge alone. The extra time taken, and the extra costs involved, in a jury trial may often be a useful sort of quantitative cross-check of what might otherwise be a purely qualitative assessment of the extra inconvenience of a jury trial (as was done in *Beta Construction* [1991] 1 WLR 1042). However, it would be dangerous if those two factors were given much independent weight, as it would risk undermining the important right to a jury trial which section 69(2) gives – to defendants as well as to claimants – in libel actions.

19. Secondly, the number of documents is not the issue when it comes to the first and second section 69 questions. As Slade LJ said in a passage cited by the Judge, "[t]here may be many cases where numerous documents will be required to be looked at, but no substantial practical difficulties are likely to arise in their examination being made with a jury", and, by contrast, there can be cases where "relatively few documents will require examination, but nevertheless long and minute examination of them is likely to be required".

20. Thirdly, it is important to appreciate that the inconvenience to be considered in the second section 69 question is that arising from "the prolonged examination of documents": the court should not, at that stage, look at any other inconvenience which may arise as a result of a jury trial, although it could well be relevant when considering the third question. Fourthly, the fact that one party is a public figure may often be a reason for favouring a jury trial, but that does not mean that the fact that neither party is a public figure is a reason against a jury trial.

> 21. Fifthly, it is fair to say that the constitutional importance of the right to trial by jury was not mentioned in *Aitken* [1997] EMLR 415, but that aspect was clearly in the Judge's mind in this case, as he cited Nourse LJ's observation in *Goldsmith* [1988] 1 WLR 65, 74, referred to above. That is undoubtedly a factor which has to be borne in mind on the issue of convenience as well as of discretion.
>
> 22. Sixthly, as the Judge pointed out in this case, the fact that juries in criminal trials (especially those trials involving allegations of complex financial fraud and the like) sometimes have to consider complex documentation does not really bear on the three section 69 questions. It may well be that, in some such criminal trials, the section 69 questions would result in the conclusion that the trial should be by judge alone, but the questions do not arise in the criminal field even in relation to such cases: there is an absolute right to a jury trial, save in circumstances which are very different from those covered by section 69."

69. The same principles apply mutatis mutandis to cases involving scientific investigation. The question therefore is, would the scientific investigation be such that it could be carried out without substantial difficulty in comparison with carrying out the same process with a judge alone, having regard to the criteria which are relevant to the issue of convenience identified above.

70. Mr Wolanski submits this is a case which bristles with scientific issues on the pleadings as they currently stand and the court can therefore say now, that it is a case which falls within section 69 of the Senior Courts Act 1981 as one which will require a prolonged scientific examination which cannot conveniently be made with a jury. He says in addition, that it will probably be a case which requires a prolonged examination of documents, though he accepts that it is premature to determine that issue now, in advance of disclosure. The Defence refers to 8 different scientific papers. The Reply refers to 12 scientific papers. There are disputes as to what those papers convey and as to how they were understood by Drs Grant, Johnstone and Stowe.

71. Mr Munden submits this application is premature, and should be re-visited if necessary once the scope of the evidence has been ascertained after disclosure and witness statements. But in any event, he says this is not a case that will require "prolonged examination of documents" or any "local or scientific investigation". The case is not particularly document heavy, nor do any of the documents require particularly careful reading, and while the case relates to scientific research the court will not need to decide any complex scientific issues or engage in any "scientific investigation". Rather, honesty and credibility will be the central issues, which are quintessentially jury questions. He submits that on a proper analysis of the points raised in the pleadings on malice (to which Mr Wolanski has referred in detail) some are only "background" or are simple issues for a jury to understand; or the issues do not require determination as such because what matters is not the scientific resolution of the issues themselves, about which it will not be necessary for the court to make

findings of fact, but the Defendant's honest belief, or lack of it, in relation to those facts.

72. It is plain in my judgment, that the trial will involve a scientific investigation; and that the investigation cannot conveniently be made with a jury.

73. There may be cases where the court may take the view that a decision on this issue is premature if made at such an early stage because the issues raised are capable of agreement to a considerable extent before trial, or are not as formidable as they might appear at first sight (see for example, *Mcardle & Ors v Newcastle Chronicle & Journal Limited* [2004] EWHC 1093 (QB)). But I do not consider this is such a case as can be seen from a scrutiny of the pleadings themselves; and because (to adopt the words of Lord Bingham of Cornhill LCJ in *Aitken*) from what I have seen and heard I have formed the impression that the trial will be a very dogged infantry battle with every foot of territory contested to the utmost.

74. I do not think Mr Wolanski has exaggerated the position when he says this case bristles with scientific issues and a jury would be simply bewildered by the numerous scientific issues and sub-issues which the pleadings raise on the case as it is currently formulated. I consider generally, they would be very difficult indeed for a jury to comprehend or cope with. It is correct, as Mr Munden submits, that the central issue for the jury to consider is the honesty of the three employees of the RSBP whose bona fides and motives are under attack; and it may well be that this can be done without resolving the issues which the pleadings raise. But the route of the attack will involve a consideration of those issues nonetheless, including for example, a detailed and close comparative analysis of a number of different research/scientific studies. There will be special difficulties and complexities in my view in the examination of such documents and the scientific terms they employ; and it will at least be necessary for the jury to consider and conduct an investigation into the science behind the relevant assertions made, and to understand some of the scientific concepts concerned, in order to determine whether the views impugned were honestly expressed.

75. Using the issue of extra cost and length as a cross-check (see *Fiddes* at [18] cited above) there would obviously be a very significant increase in the length of the trial and its cost if these matters had to be dealt with before a jury.

76. To take two examples of many, I set out below the pleaded case on two issues: i) various references to the correct interpretation of Dr Johnstone's 2003 scientific paper; and ii) how the Claimants' 2000-3 study which formed the basis for the *Wildlife Biology* paper, differed from the Defendant's own 1998-9 study:

i)

> "**Particulars of Claim 13.1.5** The work done by the First Claimant in 1998 and 1999 produced much of the data on which Dr Johnstone wrote a scientific paper, *The proximate causes of black grouse breeding failure in Wales*, with Patrick Lindley. An appendix to this paper extracted data from the First Claimant's database of the 161 chick handlings that took place in 1998. Part of this paper focused on the results of the investigation into the effect of radio-tagging, concluding that

"There was no strong evidence that disturbance associated with radio tracking, or being radio tagged, reduced chick survival". Dr Grant, Dr Johnstone and Dr Stowe were all fully aware of this study and its conclusions yet did not refer to it in the words complained of (except for Dr Johnstone, who referred to it in the most general terms) and instead suggested that radio-tagging in fact increased mortality.

Defence paragraph 16.2.5 Dr Johnstone considered the issue of the effects of radio tagging and handling of chicks to be of such importance it was given prominence in the 2003 report that he wrote with Patrick Lindley ("the Johnstone and Lindley study") for that project's funder, Countryside Council for Wales. The study included an analysis of data from 1998-2001, with a summary of the numbers of chicks radio-tagged by site and year, including the 1998 and 1999 data collected by the Claimants under contract to the Defendant.

Defence 16.2.6 The Johnstone and Lindley study concluded that the evidence that radio-tagging had an effect was not strong either way. Importantly, the study did not conclude that radio-tagging never affects black grouse survival. Rather, the study highlighted that effects may have existed but could not be detected with that study design (e.g. sample sizes were small and so statistical tests had limited power to detect effects). In relation to radio-tagging effects, the study concludes by stating, "Given the range of covariates that might influence breeding success on each site, these analyses may lack the statistical power to detect more subtle effects". Such covariates would include rainfall, habitat quality and levels of predation.

Reply 9.8(a) Paragraph 16.2.5 is admitted, save that the issue of radio-tagging and handling of chicks was not given any great prominence in Dr Johnstone's 2003 paper. The summary on page 2 dedicates only one of 14 sentences to the issue: "There was no strong evidence that the disturbance associated with radio tracking, or being radio-tagged, reduced chick survival". This paper was based on data including that from the 1998 work, which involved, at the direction of Dr Grant and Dr Johnstone, intensive handling of chicks. The words quoted in the penultimate sentence of paragraph 16.2.5 are a standard caveat included in many science papers and are not a 'conclusion' in respect of radio-tagging.

Reply 9.8(b) Paragraph 16.2.6 is denied. The study was looking at whether the evidence showed radio-tagging having any effect on chick survival; the authors were not trying to 'prove a negative' and show that it had no effect. Their findings were that there was no evidence of any statistical significance that radio-tagging did reduce chick survival. This is not somehow a neutral result, as the Defendant seeks to portray it,

but rather one that supports the view that radio-tagging does not have an effect on chick survival."

ii)

"**Particulars of Claim 13.1.7** From 1st April 2000 to 31st August 2003 the Claimants carried out work of a very similar nature as the First Claimant had for the Defendant for Severn Trent Water at Lake Vyrnwy. This work was known as the STW Lake Vyrnwy Black Grouse Project. The Defendant was involved in this work, its role being "to providing the project brief…ensure the scientific validity of the work, assist with its analysis and publication (if required), to oversee the day to day management via the Reserve warden, and to ensure that the project complements the Welsh Black Grouse Recovery Project" (project brief written by Dr Johnstone). Dr Johnstone wrote a paper on the claimants 2000-2003 Lake Vyrnwy work:- *Population size, productivity and dispersal of black grouse at Lake Vyrnwy RSPB Reserve over three years.*

Defence 16.8 As to paragraph 13.1.7, it is denied that the work carried out by the Claimants from 1 April 2000 to 31 August 2003 for Severn Trent – the STW project – was of a very similar nature to the work carried out for the Defendant during the Recovery Project. In so far as it is suggested that Dr Grant believed that the work carried out was similar, this is denied. Specifically:

16.8.1 Unlike the 1997 – 1999 work, the 2000 – 2003 work involved the radio-tracking of adult black grouse for prolonged periods to measure their movements.

16.8.2 Different protocols were in place for monitoring the survival of radio-tagged black grouse chicks. The Defendant's protocols for 1998 and 1999 required fewer chicks to be tagged and for there to be no subsequent revisiting, recapturing and handling of those chicks.

16.8.3 The Defendant's work in 1998 and 1999 did not involve searches of sites from mid-April to late-May with trained dogs to count numbers of black grouse hens.

16.8.4 The Defendant's work in 1998 and 1999 did not involve monitoring radio-tagged adult and juvenile black grouse, including the locating and flushing of these birds every two weeks on average.

16.8.5 In 2000 – 2003 estimates of black grouse productivity at Lake Vyrnwy were made later in the season than the average for sites covered by the Defendant's work in 1998 and 1999.

> **Reply 9.15** As to paragraph 16.8, even if, which is denied, all of the pleaded differences between the 1997 – 1999 work for the Defendant and the Lake Vyrnwy work for STW pleaded in fact existed, they are not sufficient to distinguish the two projects as dissimilar. As to the specifics pleaded:
>
> (a) As to paragraph 16.8.1, the First Claimant's work for the Defendant in 1999 included radio-tagging adult grouse (two birds at each of Clocaenog, Vyrnwy and Cwm-hesgyn).
>
> (b) As to paragraph 16.8.2, as Dr Grant well knew (and has admitted in the Defence), the 1998 work involved a far greater degree of capturing, handling and tagging chicks than took place at Lake Vyrnwy; and in 1999 chicks were revisited and re-handled to re-glue tags.
>
> (c) Paragraph 16.8.3 is denied. The work in 1998 started in March and involved searching for hens.
>
> (d) Paragraph 16.8.4 is admitted in respect of the 1998 work, but the 1999 work did involve monitoring radio-tagged adult and juvenile black grouse. It is denied that the Lake Vyrnwy work involved flushing birds every two weeks; paragraph 9.18 below is repeated.
>
> (e) Paragraph 16.8.5 is denied. The 2000 – 2003 estimates of black grouse productivity at Lake Vyrnwy were undertaken in August. As confirmed by an email from Dr Johnstone to the First Claimant dated 22 June 2001, the counts in 1997 took place between 16 July and 20 August, in 1998 between mid-July and September, and in 1999 between 22 July and 31 August."

77. The question then is whether I should nonetheless exercise my discretion to order trial by jury bearing in mind that the emphasis is now against trial by jury: see *Goldsmith v Pressdram* [1988] 1 WLR 64 at [68]. I bear in mind the Claimants' desire for a trial by jury, and the importance of the right to trial by jury (which latter point is relevant on convenience and discretion). In addition, issues of credibility and integrity are involved. This however is not an overriding factor: see *Goldsmith* at p. 71, and I note also that the Defendant asks for trial by judge alone in circumstances where very serious allegations are made against three of its employees. Looking at the matter in the round, there are no factors here which I find sufficiently persuasive to order a mode of trial which I have firmly concluded would be inconvenient. On the contrary, it seems to me, the interests of justice will best be served by a trial by judge alone which culminates in a reasoned judgment on the controversial issues: and that this is a case in which "a general verdict of a jury could well leave room for doubt and continuing debate whether, on important and hotly contested issues, the plaintiff or the defendant had been vindicated" (per Lord Bingham of Cornhill LCJ in *Aitken* at p.427).

Issue three: Summary Judgment

78. CPR r.24.2 provides that:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

79. The test for summary judgment under CPR 24.2(a) in a claim to be tried by judge alone is whether the court considers that the party whose case is challenged in whole or in part has a real prospect of success on the relevant issue. A higher threshold has to be satisfied if the action (or issue) is one to be determined by a jury because the judge must not trespass on the jury's role as sole judge of the facts; the judge in such a case may only withdraw an issue of fact where the evidence, taken at its highest, is such that no properly directed jury could reach a verdict contended for by one of the parties (see *Bray v Deutsche Bank* [2008] EMLR 215 per Tugendhat J at [28] to [31] and *Alexander v Arts Council of Wales* [2001] EWCA Civ 514, [2001] 1 WLR 1840).

80. This case therefore raises a potential conundrum (described by Tugendhat J in *Bray* at [30]) in that the Defendant asks first for trial by judge alone, and then that there should be no trial at all, applying the threshold for such an application where the trial is by judge alone. In *Bray* there was a concession by the claimant that for the purposes of the defendant's application for summary judgment, the court should adopt the test most favourable to the defendant – that is the ordinary test under CPR 24.2(a). No such concession is made in this case. However in my view, if the court determines that the case (on the pleadings as they stand) is one that should be tried by judge alone, I can see no rational objection to the court then determining any subsequent applications for summary judgment on that footing. It might seem odd as a matter of presentation, but it would hardly make sense (and would be disproportionate) to require a defendant to mount each application separately to arrive at the same result.

81. On an application for summary judgment, as Mr Munden emphasises, the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond* (No 5) [2001] EWCA Civ 550.

82. In *Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical 100 Ltd* [2007] FSR 3, Mummery LJ said:

> "It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before a judgment can be given (see Civil Procedure Vol 1 24.2.5). A mini-trial on the facts conducted under CPR Part 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice."

83. The relevant principles were summarised by Tugendhat J in _Bray_ at [32] to [39] citing *Three Rivers DC v Bank of England (No 3)* [2003] 2 A.C. 1:

> "32. There is no dispute between the parties on the legal principles potentially applicable. There is an issue as to which of the potentially applicable principles prevails. There are two separate principles, both to be taken from *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1. There is the general principle as to the court's approach to summary judgment. And there is the particular principle applicable to allegations of dishonesty. Allegations of malice in libel actions fall into the category of dishonesty.
>
> 33. The general principle to be applied in considering CPR 24 is set out by Lord Hope of Craighead:
>
> "94 the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is-what is to be the scope of that inquiry?
>
> 95 I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well−recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini−trial on the documents without discovery and without oral evidence. As Lord Woolf

said in Swain v Hillman [[2001] 1 All ER 91], at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

34. Lord Hobhouse of Woodborough put it succinctly at para 158:

"The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality."

35. The particular principle applicable to an allegation of malice in libel (which is equivalent to dishonesty) requires the claimant to pass a much higher threshold. A pleaded case in malice must be more consistent with the existence of malice than with its non−existence. In libel the principle is now generally taken from Telnikoff v Matusevitch [1991] QB 102. The principle is of general application and was set out by Lord Hobhouse in Three Rivers, when he said:

"160 Where an allegation of dishonesty is being made the [claimant] must have a proper basis for making an allegation of dishonesty in his pleading. The hope that something may turn up during the cross−examination of a witness at the trial does not suffice.

161 The law quite rightly requires that questions of dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden - the balance of probabilities - but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence. At the pleading stage the party making the allegation of dishonesty has to be prepared to particularise it and, if he is unable to do so, his allegation will be struck out. The allegation must be made upon the basis of evidence which will be admissible at the trial."

36. The burden of proving malice is not easily satisfied: Horrocks v Lowe [1975] 135.

37. […]

38. In applying these principles it is necessary for the court to assume that the allegations of fact made by the Claimant in the APOC and the Reply, as to publication and malice (if sufficiently particularised), will all be established as true. Similarly, it is necessary for the court to assume that the allegations of fact made by the Defendant in support of his plea of qualified privilege will all be established as true. These

> assumptions are not findings of fact, or expressions of opinion as to the likely outcome. It is simply that if the assumptions are not made, the points will not arise. For example, if the Claimant's case that the Press Release [complained of] refers to him is not upheld at trial, he will have failed on his whole case at that stage, and the other parts of his case will not require to be determined. At a hearing such as this one the later thresholds or tests in a party's case have to be examined on the assumption that he has passed the earlier ones.
>
> 39. The denials by the other party, whether made in a pleading, or in a witness statement or affidavit, are of little assistance, unless they fall into one of the exceptions identified by Lord Hope at para 95: cases where it is possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, that is, where it is clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. It must follow that a bare denial, even on oath, from the most eminent source cannot be expected to bring a case within that exception."

84. See also what was said by Eady J in *Henderson v London Borough of Hackne*y [2010] EWHC 1651 (QB):

> "33. It has been confirmed by the Court of Appeal in *Telnikoff v Matusevitch* [1991] 1 QB 102 and in *Alexander v Arts Council of Wales* [2001] 1 WLR 1840 that, in order for a claimant to succeed in proving malice, it is necessary both to plead and prove facts which are more consistent with the presence of malice than with its absence. This is one of the reasons why, in practice, findings of malice are extremely rare.
>
> 34. It is thus reasonably clear, as a matter of pleading practice, that allegations of malice must go beyond that which is equivocal or merely neutral. There must be something from which a jury, ultimately, could rationally infer malice; in the sense that the relevant person was either dishonest in making the defamatory communication or had a dominant motive to injure the claimant. Mere assertion will not do. A claimant may not proceed simply in the hope that something will turn up if the defendant chooses to go into the witness box, or that he will make an admission in cross examination: see *Duncan and Neill on Defamation* at para 18.21.
>
> 35. It is not appropriate merely to plead (say) absence of honest belief, recklessness or a dominant motive on the defendant's part to injure the claimant. Unsupported by relevant factual averments, those are merely formulaic assertions. It is certainly not right that a judge should presume such assertions to be provable at trial. Otherwise, every plea of malice, however

> vague or optimistic, would survive to trial. It would be plainly inappropriate to move towards such an unbalanced regime, since it would tend to undermine the rights of defendants protected under Article 10 of the European Convention on Human Rights.
>
> 36. It is necessary also to remember, in a case where malice is alleged against a corporate entity, that in order to fix it with the necessary state of mind, the individual person or persons acting on its behalf, and who are said to have been malicious as individuals, must be clearly identified."

85. The Defendant submits that the publications complained of were plainly covered by qualified privilege, that the pleaded case of malice is misconceived and bound to fail and that I can conclude now that the Claimants have no real prospect of succeeding on the claim. Mr Munden submits both qualified privilege and malice raise complex issues and conflicts of fact which make the case unsuitable for summary disposal.

Qualified Privilege

86. The Defendant's case at its simplest is that the publications for which the Defendant is responsible in law are plainly protected by qualified privilege, because the relevant publishees had a common and corresponding interest in the subject matter of the publications they received. The relevant publishees for this purpose are the 59 people within the RSPB who received the Grant email (and who were members of what is called the Black Grouse group, or had some other particular interest in the subject matter); one person who was sent the RSPB Critique on its own, and the two employees of STW (Mr Warren and Mr Wright) who received the Stowe letter. It is common ground that the Claimants were forwarded a copy of the Grant email and the attachment by Dr Baines – the co-author of the *Wildlife Biology* paper. The Defendant says it does not know how he obtained a copy; but however he did, the Claimants do not have a viable case that the Defendant is responsible for the republication of it to him, in circumstances where Dr Grant's email specifically restricted publication to within the RSPB. To that extent therefore this case differs from the position which Tugendhat described in ***Bray*** at [38] because the Defendant's application for summary judgment on the issue of qualified privilege involves, at least in part, a submission that the Claimants have no viable case on republication either.

87. The Claimants have pleaded a case on republication of the Grant email in which it is said "Pending full disclosure and/or the provision of further information, the Claimants are aware of republications to the Forestry Commission and to the Game & Wildlife Conservation Trust… but cannot be more specific." The Defendant says it has therefore conducted extensive investigations beyond that which would be required by standard disclosure; and that as a result it can say now as a matter of evidence (i) what the position is on the relevant extent of publication, its responsibility for publication and the relevant interest of the individual publishees, and that this will not change at trial; and (ii) that the Claimants have no realistic prospect of establishing that the publications complained of were not published on an occasion of qualified privilege.

88. The Defendant's evidence in respect of the Grant email dealt with two principal issues. First, the extent of the publication of the Grant email. And second, the relevant interests of the publishees for the publications it accepted it was responsible for. The Claimants served evidence in response, and there was some further "to-ing and fro-ing" in witness statements and written submissions thereafter, including after the oral part of the hearing had concluded. It could be said (and indeed Mr Munden did say) that this on its own was illustrative of the unsuitability of this issue for summary disposal. However, it is important in my view, to examine whether what is said really does give rise to a genuine issue of fact which requires resolution at trial, bearing in mind the principles set out above.

89. With those matters in mind, it is convenient to refer at this stage to the parties' evidence in more detail.

The evidence re the Grant email

90. On the face of the Grant email, it can be seen that it was sent by Dr Grant to 16 individuals named in the header and to "the Black Grouse" email group.

91. Mr Sherrell, the Defendant's solicitor, says in his witness statement (served in May 2010) that the Defendant has carried out very extensive searches which have taken 127 hours so far, to ascertain the extent of publication of the Grant email; and he describes these searches in detail. A search was carried out in August 2009 for the Grant email on the RSPB's Outlook Exchange Servers (live emails) and Vault (archived email storage). This showed that the Grant email had been sent to 59 individuals named in a list exhibited to Mr Sherrell's witness statement (either directly, or in a small number of cases, by it being forwarded to them by one of the original recipients). Dr Mark Avery is the Director of Conservation at the Defendant. In summary, it is said by Dr Avery that the 59 individuals were all RSPB staff, each of whom had a professional interest in issues of grouse conservation. The list explains the interest of each in receiving the Grant email, and its attachment. Most were members of the RSPB's Black Grouse Group. This is an email distribution group within the RSPB which shares information as part of the RSPB's role in promoting the conservation of black grouse, and whose members have jobs which require them to be informed about the conservation of black grouse. Others were either involved in black grouse management projects, managed reserves where there were black grouse so had an interest in grouse conservation, were responsible for overseeing land agency issues on reserves where there were black grouse, dealt with media issues or had senior positions within the RSPB.

92. Mr Sherrell says a thorough search was then carried out on the PC hard drives of the 59 RSPB staff identified as publishees to ascertain whether they had forwarded the email to others; Mr Sherrell describes both the technical details and search terms used in this search. This search was conducted for the period 5 October 2007 (when the Grant email was sent) to 3 December 2007 (when the Defendant first received a complaint from the Claimants). Given the last date on which the Grant email was forwarded internally was 19 October 2007 it is said any dissemination beyond 3 December 2007 is extremely unlikely; and that a search beyond that date would consume considerable additional RSPB resources. Some of the PCs used by the 59 RSPB staff could no longer be searched for various reasons which Mr Sherrell sets

out with the relevant technical details. For example, the computer concerned has been disposed of, or redistributed, wiped of data and re-imaged.

93. It is said by Mr Sherrell that if a further search were to be carried out, this would involve removing all PCs from the RSPB staff concerned which still exist and paying an external consultancy to run a hardware search to look for deleted files on the hard disc. This would cost at a conservative estimate £125,000 and use a considerable amount of further RSPB staff time. In his first witness statement dated 13 October 2010, Mr Bowker said he did not accept this. He said he believes that the Defendant uses a firm in the Netherlands to back up its emails on an external server. Ms Dawson is the head of information services at the RSPB; and conducted the electronic searches referred to. In her witness statement dated 19 October 2010 she confirms what Mr Sherrell says in his witness statement about the electronic searches undertaken by the RSPB; and says Mr Bowker's belief is incorrect. The Defendant does not use a firm in the Netherlands. She says the Defendant's data is backed up onto tape which is not searchable in the way data on a server would be. This is why there are no further searches which the RSPB is able to conduct itself and anything else would have to be handled by an external IT company. She provided Mr Sherrell with the estimate of costs if that were to be done.

94. Mr Sherrell says that the searches conducted to date go beyond what the Defendant would be required to do under standard disclosure. Given the very high cost of conducting further searches, and the wholly speculative nature of that exercise, it would be unreasonable and disproportionate for the Defendant to be required to go further than it already has in the context of this case. It is said if the Claimants were to issue an application for specific disclosure in order to compel the Defendant to conduct further searches, they would not succeed. Thus, it is said the court can say now the evidence as to the extent of the publication of the Grant email will not change.

95. Mr Sherrell says that the Defendant's searches have discovered only one instance of the RSPB Critique being sent outside the RSPB (and it was not, on that occasion sent as an attachment to the Grant email). On this one occasion, it was sent on 24 November 2007 as an attachment to an email by Dr Jeremy Wilson (Head of Research, Scotland, and Dr Grant's line manager) to Dr Colin Galbraith of Scottish National Heritage (SNH). Dr Wilson's email is exhibited to Mr Sherrell's witness statement. Dr Galbraith was at the relevant time the Director of Science and Advisory Services for SNH and was about to chair a meeting of the UK Biodiversity Action Plan Group on Black Grouse. The subject of the email from Dr Wilson to Dr Galbraith was the "Black Grouse UK BAP meeting." It attached both the *Wildlife Biology* paper and the RSPB Critique. The Defendant's position is that publication to Dr Galbraith is also privileged on precisely the same grounds as those relied on in respect of publications to those named recipients of the email.

96. Dr Grant says it is plain from the content of the email that he did not intend the RSPB Critique to be circulated externally. As for his request to the recipients to "please forward to others in your departments/regions/countries", he says "Departments, regions and countries are all recognised sub-divisions within the RSPB structure. "Countries" for example, refers to England, Wales, Scotland and Northern Ireland which all have their own separate RSPB Headquarters."

97. Mr Bowker says in his first witness statement dated 13 October 2010 that the Grant email was widely circulated outside the Defendant. He relies on the fact that Dr Baines received the email, as did the Claimants, and says he is "sure that other third parties did too. We have been told by many colleagues in the UK and Europe that these were widely disseminated – unfortunately they refuse to witness the fact for fear of professional recriminations from the Defendant and within the conservation world." He says the fact that there has been no search for deleted emails "leads to the conclusion that data/information is being suppressed." Mr Bowker also says that he has no idea who the people on the Black Grouse list are, or what their interest in the information is for which he only has Mr Sherrell's word. He says: "more information on the extent of publication will be forthcoming – we are confident that at least one and hopefully more of the recipients from the third party organisations that received the email and critique can be persuaded to come forward with their evidence."

98. In Mr Bowker's second witness statement dated 3rd November 2010 served after the first day of the hearing, Mr Bowker raises further matters. Mr Bowker says he cannot be expected to accept Mr Sherrell's evidence that the RSPB's back-up on tape is not searchable, or that only an external IT company could search the storage system at a cost of £125,000. He says it is his understanding that it can restore data back to the computer which can then be searched using the RSPB's own software. He also says he has applied under the Freedom of Information Act to various organisations to "expose the full extent of dissemination" and further evidence of the paths of the emails and Critique, and they still have some time to respond. As for the list of 59 publishees, Mr Bowker says many were not working on black grouse, and names five individuals as "just some of them."

99. This latter point produced two more witness statements, one from Mr Sherrell dated 4 November 2010, served after the first day of the hearing, and one in response from Mr Bowker served some days after the hearing had finished, as well as a flurry of written submissions and counter submissions.

100. Mr Sherrell says it is not the Defendant's case that the individuals who received the email needed to have been working on black grouse for publication to be privileged, but in any event he gives more detail about the roles and responsibilities of the individuals named in his original list, including the 5 individuals named by Mr Bowker. Mr Bowker says in response that he has met the five individuals concerned, and they were not directly involved with black grouse.

101. I will set out what Mr Sherrell says with Mr Bowker's further evidence in response, in square brackets underneath:

> "**Dr Graham Hirons.** In October 2007, Dr Hirons was Head of Reserves Ecology for the RSPB. His team were responsible for ensuring that staff working on reserves were provided with the eco logical knowledge required to manage each reserve. In addition, they undertake audits of reserves – which includes, for example, knowledge of the trends of birds (such as black grouse) on RSPB land – to ensure that reserves are as productive for wildlife as possible. Dr Hirons' team are also responsible for deciding whether predator control (i.e. killing of predators) should be undertaken on a reserve, to safeguard

threatened species (like black grouse). [Graham Hirons, is head ecologist based in Sandy HQ and is not involved with black grouse.]

Tim Melling. In October 2007, Dr Melling was Conservation Officer in RSPB's Northern England Office. Mr Melling was a member of the steering group of STW's project to reintroduce black grouse into the Upper Derwent Valley of the Peak District National Park. Gordon Bowker was the contractor undertaking the reintroduction work, funded by STW. [Tim Melling is a conservation officer. He was involved in the UDV [Upper Derwent Valley] project, but he arrived at one meeting and introduced himself as merely standing in for a colleague who couldn't come. He said "I am a Twite expert, and know nothing about black grouse". He was there just to report back to RSPB on the progress of the UDV.]

Julian Hughes. In October 2007, Julian Hughes was Head of Species Policy. His job was to ensure that the RSPB does all it can to improve the fortunes of species of conservation concern (like the black grouse), by ensuring that RSPB's action plans for each of these species is fully implemented across the organisation. Each action plan had a plan manager within Mr Hughes's team; Mr Hughes himself took responsibility for black grouse. [Julian Hughes was species and policy officer but was not working on black grouse].

Richard Farmer. In October 2007, Mr Farmer was RSPB's Senior Reserves Manager for Wales, and Manager of our North Wales Office in Bangor. In this role, he took overall responsibility for RSPB's reserves in Wales, ensuring that they met the objectives required of them, one of which was to ensure healthy populations of species of conservation concern, such as black grouse.

Dick Squires. In October 2007, Mr Squires was RSPB's Area Manager for Mid and S Wales, overseeing all reserves in Mid and West Wales, including Lake Vyrnwy. Mr Squires was consequently the line manager of Mike Walker, the site manager of Lake Vyrnwy. Apart from line manager responsibilities, Mr Squires was actively involved in and had responsibility for reserve and species management, including for black grouse. [Dick Squires and Richard Farmer were reserves managers, and like the others were not working on black grouse or were people who would be asked about them by any third party]."

The evidence re the Stowe letter

102. There is no dispute that the Stowe letter was published to Mr Warren on an occasion of qualified privilege. And it is not suggested that it was published to anyone other

than Mr Warren and Mr Wright. The issue between the parties is whether Mr Wright had a relevant legitimate interest in receiving a copy; and for the purpose of this hearing, whether the court can say now, that publication of it to him was plainly privileged.

103. Mr Sherrell says he has been told by Dr Avery that Tim Wright was responsible for the operation of the Lake Vyrnwy site at the relevant time; and he exhibits to his second witness statement dated 14 July 2010 a letter from Mr Wright to the Defendant (dealing with various commercial negotiations at Lake Vyrnwy) in which he describes himself as "Principal Valuer"; and an internal RSPB document regarding a meeting that was had with Mr Wright about Lake Vyrnwy. He also exhibits the communications protocol STW had with the Defendant, and to which the Stowe letter refers. This provided that Lake Vyrnwy was run as "a partnership between RSPB Cyrmru and Severn Trent Water" and that the protocol was part of a communications plan between RSPB and STW. It said: "all draft news releases to be sent to both partner organisations [the RSPB and STW] for comment before release."

104. Mr Bowker says there was no legitimate reason to send the Stowe letter to Mr Wright at all. As far as he was aware, Mr Wright was only responsible for properties and maintenance; all STW conservation matters on company land, including in relation to Vyrnwy were dealt with by Mr Warren as their Conservation and Heritage Manager.

The parties' submissions

105. Mr Wolanski submits the Defendant has conducted very extensive research in order to ascertain the extent of publication of the Grant email. The text of the email makes clear that the RSPB Critique "*should NOT be circulated externally*" by its recipients, who are all said in the email to be "*staff on [the RSPB's] 'black grouse email list, plus a few others [Dr Grant] could think of*'. Dr Grant also tells the recipients of the email: "*please forward to others in your departments/regions/countries who might not be on this list but may need to deal with black grouse and these issues*".

106. He submits Dr Grant was thereby attempting to confine publication of his email and the RSPB Critique to those within the RSPB who "may need to deal with black grouse and these issues". 'Regions' refers to the RSPB administrative regions within England and 'Countries' is a reference to the various constituent parts of the United Kingdom (see Dr Grant's witness statement). It is accepted by the Defendant on the evidence, that Dr Baines of the GCT received a copy, as the Claimants allege, but not that there was publication to 'the Forestry Commission'. He says the Claimants have not said to whom at the Forestry Commission the email and critique was sent, by whom it was sent, or when it was sent.

107. Although Mr Bowker asserts in his witness statement that the Claimants "have been told by many colleagues in the UK and Europe that [the words complained of] were widely disseminated" he also says "unfortunately they refuse to witness this fact for fear of professional recriminations from the Defendant and within the conservation world." Despite the Claimants' stated confidence that "at least one and hopefully more of the recipients from the third party organisations that received the email and critique can be persuaded to come forward with their evidence" Mr Wolanski submits there is obviously no realistic prospect of the Claimants proving publication to third

parties beyond those two already pleaded. They have already had three years since the publications complained of to do so.

108. He says the Claimants' stated optimism – unsupported by any evidence – that they will be able to prove publication beyond the publishees already identified is not a sufficient reason for the matter to be allowed to proceed to trial, and refers to what I said in *Dee* at [64]:

> "the court must "grasp the nettle" and reject an unreasonable conclusion contended for by the respondent. If not, as Tugendhat J said in *John v Guardian News Media Ltd* [2008] EWHC 3066 (QB) at [16] the applicant will be "*wrongly burdened with defending libel proceedings [which] can be a very onerous burden and one which interfered with the right of freedom of expression.*"

109. There must at the very least be pleaded facts upon which publication to further publishees may be inferred: see *Bataille v Newland* [2002] EWHC 1692 (QB). Here there are none.

110. The evidence on publication is therefore highly unlikely to change between now and trial. It is in summary that:

   i) The publication of the Grant email and RSPB Critique took place to the 59 RSPB staff identified in the list attached to Mr Sherrell's witness statement.

   ii) The publication of the Grant email and RSPB Critique took place to Dr Baines at the GCT, although it is not known who published it to him, and, if they are not at RSPB, whether RSPB would be liable for such publication. The Claimants also assert publication to the Forestry Commission, but have provided no particulars of this, nor any evidence to back it up.

   iii) In addition, the RSPB Critique was sent (without the Grant email) to one individual outside the RSPB, namely Dr Galbraith, the Director of Science and Advisory Services for SNH who was about to chair a meeting of the UK Biodiversity Action Plan group on Black Grouse.

111. As for the RSPB publishees, the list referred to above sets out the role of each of the publishees within the RSPB. Mr Bowker says in his latest statement that he does not accept what is said about the role of these various individuals, but has not produced any evidence or none which realistically calls into question what Mr Sherrell has said about them since Mr Sherrell's statement was served at the end of May 2010. In summary, each RSPB publishee on the list was a member of RSPB staff and had a professional interest in issues of grouse conservation. Most were members of the RSPB's Black Grouse Group which is a group within the RSPB which shares information as part of the RSPB's role in promoting the conservation of black grouse. Others were either involved in black grouse management projects, managed reserves where there were black grouse so had an interest in grouse conservation, were responsible for overseeing land agency issues on reserves where there were black grouse, dealt with media issues or had senior positions within the RSPB. They were all therefore individuals who may need to deal with enquiries arising from the *Wildlife*

Biology paper, or who had an ongoing professional interest in black grouse conservation matters.

112. As to Mr Bowker's further evidence, Mr Wolanski points out in further written submissions that Mr Bowker did not serve any evidence to contradict the evidence in Mr Sherrell's first statement served in May 2010 about the position of these individuals until after the hearing had begun. He says no doubt if the Defendant was to serve further evidence dealing with the new allegations, Mr Bowker would serve a further witness statement and so on. Instead, the Defendant stands by Mr Sherrell's statement which makes clear the position of the named recipients and the reason for their inclusion on the black grouse list, or other reasons why they had an interest in receiving the words complained of.

113. In the result, Mr Wolanski submits the case that the publication to individuals within the RSPB is protected by qualified privilege is unanswerable. There was a pre-existing relationship between publisher and publishee – see *Kearns v General Council of the Bar* [2003] EWCA Civ 331, [2003] 1 WLR 1357. There was certainly a common and reciprocal interest between publisher and publishee in the issue of black grouse conservation discussed in the communications – *Gatley* paragraph 14.42 – 14.45. The publication of the RSPB Critique alone to Dr Galbraith, is also he submits plainly privileged. Dr Galbraith was about to chair a meeting of the UK Biodiversity Action Plan group on Black Grouse. He obviously had a legitimate interest in knowing of the debate concerning this recently published research on issues of grouse conservation.

114. As for the other external publishees, the RSPB does not know how publication to Dr Baines and (if it occurred) to the Forestry Commission arose. The Claimants plead publication to Dr Baines and the Forestry Commission was "intended by" Dr Grant; or that Dr Grant "knew or should have known that there was a significant risk they would occur". The case that the Defendant is liable for these republications is unviable. No pleaded basis is made for the assertion that Dr Grant intended or knew of or should have known of these republications. In his witness statement, Dr Grant denies knowing this. Dr Grant expressly forbids such republications in his email. The Claimants have failed to explain how Dr Baines came to receive the email. In the case of the Forestry Commission, the Claimant has not even informed the Defendant who supposedly received the email – the case that Dr Grant should be held liable for republication is therefore even thinner.

115. *"The reality is that the court has to decide whether, on the facts before it, it is just to hold [the Defendant] responsible for the loss in question*" – see Gatley paragraph 6.36. Mr Wolanski submits it is for the Claimants to show an adequate causative link between Dr Grant's publication and the publication to Dr Baines and the Forestry Commission, and this they have failed to do.

116. In any event, he submits in the alternative, that publication to Dr Baines and the Forestry Commission is highly likely to be protected by qualified privilege: Dr Baines was a co-author of the *Wildlife Biology* paper. He had a legitimate interest in what the RSPB's response to that paper was. The Forestry Commission (like RSPB) manages land upon which black grouse live. It had a legitimate interest in what the RSPB's response to the *Wildlife Biology* paper was.

117. As for the Stowe letter, this was published to two individuals within STW, the Defendant's landlord at Lake Vyrnwy in Wales where the black grouse study had been carried out. On 14 September 2007, the GCT had sent out the press release concerning the *Wildlife Biology* paper which had apparently been endorsed by STW. Dr Stowe's letter concerned the research carried out at Lake Vyrnwy and the apparent breach by STW, by the endorsement of the GCT press release, of a communications protocol which had been established between the RSPB and STW. It was addressed to Andy Warren, who was Conservation, Access and Recreation Advisor (West). It was copied to Tim Wright, who was at the time responsible for the operation of the Lake Vyrnwy estate. In their respective roles, both Mr Warren and Mr Wright had legitimate interests in the issues raised in the letter and its publication to both is also plainly privileged.

118. Mr Munden submits the occasion of the publications here was not of a classic "off the peg" type such as an employment reference or a complaint to the police or a regulatory body. Rather the court will have to examine all of the circumstances to consider whether the occasion was privileged as the Defendant contends. He refers to the following in particular.

119. The court he says will have to consider whether Dr Grant's alleged belief that the Defendant's staff "would face questions from a range of people and other organisations on the findings of the *Wildlife Biology* paper, and in particular would be challenged about the findings concerning the decline in the black grouse population at Lake Vyrnwy" was, in the circumstances, sufficient to create a duty or interest of the type protected by qualified privilege - particularly as the findings of Claimants' work at Lake Vyrnwy had been made public and commented upon in a 2005 report by other scientists and in the media quite some time before the email. In that context he refers to other articles appearing in the media. The existence of an occasion of privilege is of course a matter to be assessed objectively (see e.g. *Adam v Ward* [1917] AC 309 per Lord Atkinson at 334) and to that extent Dr Grant's belief is irrelevant.

120. Even if that did create a sufficient duty or interest, the court will have to examine whether each recipient of the email and/or Critique was indeed a member of the Defendant's staff who "would face questions from a range of people and other organisations on the findings of the *Wildlife Biology* paper, and in particular would be challenged about the findings concerning the decline in the black grouse population at Lake Vyrnwy". Mr Munden says the Defendant has simply provided a (lengthy) list of internal recipients with very brief details of their (alleged) roles in the Exhibits to Mr Sherrell's witness statement, which is not accepted and is not sufficient for a court to make a finding on a summary judgment application. Where privilege is pleaded in respect of publication to various individuals with different potential interests in the information, the court will examine the circumstances of each individual, the burden being on the defendant: see e.g. *Brady v Norman* [2008] EWHC 2841 (QB). As for the further evidence served on this issue, the burden is on the Defendant in this application and the court is in no position to prefer the evidence of Mr Bowker or Mr Sherrell over the other. In any event, the external recipients of the email (as to the extent of which there is a conflict of fact) cannot possibly fall within the pleaded criterion.

121. The court would also have to consider whether the GCT release concerning the *Wildlife Biology* paper can be considered an "attack" on the Defendant sufficient to

give rise to any occasion of privilege for Dr Stowe to reply to; and if it did, whether that privilege extended to writing to Mr Warren and Mr Wright at STW, i.e. whether they each had any or any sufficient interest in receiving D's answers to the "criticism" of it in the paper.

122. Mr Munden submits these are proper matters for disclosure, witness statements and trial. They should not be disposed of on a summary judgment application. He says the evidence doesn't explain how the Grant email got to Dr Baines, as it plainly did. He submits that unexplained publication, plus the external publication is sufficient for an inference of further publications, for which the Defendant may be liable if the person who sent it, was an employee.

Discussion

123. Standing back from the submissions and the evidence for a moment, it seems to me it is important to recollect the principles which give rise to the defence of qualified privilege.

124. In *Toogood v Spyring* (1834) 1 C.M. & R. 181 Parke B. said this at 193:

> "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorised communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society."

125. As Lord Macnaughten said in *Macintosh v Dun* [1908] AC 390 at 399, this passage:

> "not only defines the occasion that protects a communication otherwise actionable, but enunciates the principle on which the protection is founded. The underlying principle is 'the common convenience and welfare of society' – not the convenience of individuals or the convenience of a class, but, to use the words of Erle C.J. in *Whiteley v Adams* (1863) 15 C.B. (N.S.) 392 at 418, 'the general interest of society'."

126. The question is whether:

> "the communication was of such a nature that it could fairly be said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them." Per Lord Esher MR in *Hunt v Great Northern Rly Co*, [1891] 2 QB 189 at 191."

127. See also *Kearns* at [30] and [39] where Simon Brown LJ said this:

> "30. The argument, as it seems to me, has been much bedevilled by the use of the terms "common interest" and "duty-interest" for all the world as if these are clear-cut categories and any particular case is instantly recognisable as falling within one or other of them. It also seems to me surprising and unsatisfactory that privilege should be thought to attach more readily to communications made in the service of one's own interests than in the discharge of a duty - as at first blush this distinction would suggest. To my mind an altogether more helpful categorisation is to be found by distinguishing between on the one hand cases where the communicator and the communicatee are in an existing and established relationship (irrespective of whether within that relationship the communications between them relate to reciprocal interests or reciprocal duties or a mixture of both) and on the other hand cases where no such relationship has been established and the communication is between strangers (or at any rate is volunteered otherwise than by reference to their relationship). This distinction I can readily understand and it seems to me no less supportable on the authorities than that for which Mr Caldecott contends. Once the distinction is made in this way, moreover, it becomes to my mind understandable that the law should attach privilege more readily to communications within an existing relationship than to those between strangers. The latter present particular problems. I find it unsurprising that many of the cases where the court has been divided or where the defence has been held to fail have been cases of communications by strangers. *Coxhead -v- Richards* was just such a case. As Coltman J, one of those who held that privilege did not attach, observed:
>
> > "The duty of not slandering your neighbour on insufficient grounds, is so clear, that a violation of that duty ought not to be sanctioned *in the case of voluntary communications*, except under circumstances of great urgency and gravity." (Emphasis added).
>
> 39. Subject only to the point I have already made about preferring for my part a distinction between cases depending on whether they do or do not involve an existing relationship rather than a distinction between common interest cases and those involving duty-interest, I agree with the approach taken in that paragraph. It matters not at all whether Mr Stobbs and the Bar Council are properly to be regarded as owing a duty to the Bar to rule on questions of professional conduct such as arose here, or as sharing with the Bar a common interest in maintaining professional standards. What matters is that the relationship between them is an established one which plainly

> requires the flow of free and frank communications in both directions on all questions relevant to the discharge of the Bar Council's functions."

128. Taking the Grant email first, it is an internal RSPB email, which discussed the contents of the Claimants' *Wildlife Biology* paper and which had attached to it a scientific critique on that paper prepared by Dr Johnstone. In my judgment the publication of both to the 59 members of staff was plainly made on an occasion of qualified privilege, as was the publication of the RSPB Critique to Dr Galbraith.

129. I have set out at paragraphs 5 and following above some of the relevant facts. It is not in dispute that on 14 September 2007, shortly before the Grant email was sent, the GCT issued a press release about the *Wildlife Biology* paper, approved by STW. It expressed serious concerns about the Welsh black grouse population, and stated that the Claimants' research had "clearly identified" with "compelling evidence" the effect that predation by raptors was having on black grouse at Vyrnwy. It cannot sensibly be disputed in my view that the matters raised by the Claimants in the *Wildlife Biology* paper, were of direct concern and interest to the Defendant given its responsibility for conservation of black grouse at Lake Vyrnwy; or that the Defendant's critique of it (by both Dr Grant and Dr Johnstone) were matters of legitimate interest to those individuals within the RSPB who had an interest in black grouse, or who were involved in black grouse issues at the RSPB. This is sufficient in my view to give rise to a defence of privilege (assuming as one must for this purpose that the content of the email and the Critique was accurate and fair). I consider Mr Wolanski was right when he said in submissions that the nub of the privilege here arose from the position of the parties, their pre-existing relationship and the subject matter of the communication concerned.

130. In my view the relationship of the parties and the subject matter of the matters under discussion are of particular importance in this case. I consider it is plainly for "the common convenience and welfare of society" (subject of course to the issue of motive or honesty) that persons within the Defendant's organisation should be free to communicate their concerns internally about the merits or otherwise of a study which had been published in a peer-reviewed scientific journal relevant to the work of the organisation itself; and that they should be able to discuss such matters outside their organisation with people such as Dr Galbraith, who had a legitimate interest in the subject matter of the communication as well (see further paragraph 135 below). It is in this context that I consider the observations made by Lord Denning MR in *Drummond-Jackson* and of Easterbrook J in *Underwager* cited above to be particularly apposite. Mr Munden suggested that such considerations were irrelevant because none of the publications here were part of a scientific debate made, for example, in a learned scientific journal. In my view that is too narrow an approach.

131. Be that as it may, I also consider the internal publications are plainly privileged even if one takes the rather narrower approach to the privilege relied on in the Defence (though as I have said, the matter was put rather more broadly on the Defendant's behalf before me). It is not in dispute, that there had been previous public criticism of the RSPB and their conservation of species such as black grouse at Lake Vyrnwy. I consider it to be obvious that the appearance of the *Wildlife Biology* paper in a peer reviewed journal was likely to generate public debate and controversy about the conservation work carried out by the Defendant on the nature reserve, and that those

within the RSPB who had a particular interest in black grouse might therefore be called upon to answer questions about the *Wildlife Biology* paper and its conclusions that the black grouse population was declining at Lake Vyrnwy. Contrary to Mr Munden's submissions, the fact that there had been previous controversy about the matter, as is pleaded in paragraph 2.6 of the Reply, does nothing in my judgment to detract from the case on privilege: if anything it emphatically supports it. I do not think it necessary however for the purposes of privilege, for the Defendant to establish either that all those within the RSPB who received the email *worked* with black grouse or that they would by reason of their position within the RSPB *in fact* be called upon to answer questions about the *Wildlife Biology* paper by others; it would be sufficient that they might be.

132. Having regard to the evidence of the Defendant about the roles of the recipients, and about the nature of the Black Grouse email group, it is said by the Defendant, correctly in my judgment, that it is to be inferred that all members of that group at the relevant time had a legitimate interest in black grouse issues as part of their RSPB work. It is not realistic in my view to suggest that people within the RSPB who join a group called the Black Grouse group do not have a legitimate and protectable interest in reading about matters which are relevant to the work done by the RSPB with black grouse, namely a study which suggests that black grouse numbers at a site managed by the RSPB are in serious decline, and what the RSPB's own scientists have to say about it. Nor, having regard to the matters I have referred to is it realistic to suggest that the other publishees did not have a relevant interest either.

133. It is not disputed by the Claimants that publication to those who might be called upon to answer questions about the Claimants' *Wildlife Biology* paper would be privileged: the argument in the end, appears to be that at least some of those on the list (of whom only five have been identified) did not fall into that category because their role within the RSPB was such that they did not *work* with black grouse. As to that, the Defendant's case on qualified privilege is not so narrowly put as I have already indicated; and as Mr Wolanski points out, it is not the Defendant's case that the individuals needed to have been working on black grouse for privilege to arise. Having regard to the evidence which has not been disputed, including that which is not in dispute about the five named individuals, I do not consider what is said specifically about them or in vague and general terms about the others by Mr Bowker is sufficient to raise a material factual issue for determination in respect of any of them. (I note also that Mr Bowker mentioned both Mr Mellings and Julian Hughes himself in a letter of 3 December 2007 exhibited to his first witness statement, apparently in the context of issues concerning black grouse; and see paragraph 186 below).

134. As May LJ pointed out in *Khader v Aziz* [2010] EWCA Civ 716:

> "It is of course axiomatic that, in defamation proceedings, questions of law are for the judge, but questions of fact for the jury; so that neither the judge nor this court should presume to make decisions dependant on issues of fact which ought properly to be left to the jury. But that does not mean that a claimant can secure a full jury trial simply be asserting that there are issues of fact. As this court decided in Alexander v Arts Council of Wales [2001] EWCA Civ 514; [2001] 1 WLR

> 1840, section 69 of the Senior Courts Act 1981 entitles a party to have a material issue of fact decided by a jury. But it is for the judge to decide whether there really is such an issue."

135. So far as Dr Galbraith is concerned, Dr Wilson's email to him said amongst other things, that the attachments were to brief Dr Galbraith ahead of the meeting, that the RSPB had severe reservations about the *Wildlife Biology* paper, which were explained in the attachment, it was conceivable that the Vyrnwy study may be raised at the meeting "and the fundamental differences of opinion on its quality and interpretation might then lead to heated and probably fruitless debate…". In the circumstances including those to which I have referred above, and having regard to the respective positions of Dr Wilson and Dr Galbraith (see paragraph 95 above) in my judgment the publication of the RSPB Critique to Dr Galbraith was plainly made on an occasion of qualified privilege.

136. I turn next to the Stowe letter. It is common ground that the Defendant managed Lake Vyrnwy for STW and was responsible for the conservation of black grouse there. Dr Stowe is the Director of the Defendant in Wales, with responsibility at the material time for the relationship between the Defendant and STW. There can be no doubt in my view that the *Wildlife Biology* paper, based on work done for STW at Lake Vyrnwy (and which unlike the STW report, had appeared in a peer-reviewed journal) raised issues which directly bore on those matters i.e. the Defendant's management of Lake Vyrnwy and its relationship with STW. It is moreover not in dispute that the GCT press release was issued under the aegis of both the GCT and STW, or that the protocol said what it did. In my judgment the press release clearly did raise issues about the Defendant's management of black grouse at Lake Vyrnwy, and about whether the protocol had been breached, both of which were expressly dealt with in the Stowe letter, as is apparent from its contents. Mr Wright was responsible for the operation of Lake Vyrnwy for STW at the material time, and in my judgment, he, like Mr Warren, plainly had a legitimate interest in receiving the Stowe letter. It is of course conceded that the publication of the Stowe letter to Mr Warren was made on an occasion of qualified privilege; and in my judgment, it is plainly the case that publication of it to Mr Wright was as well.

Other publications

137. If the publications I have referred to above are protected by qualified privilege, the question then arises as to whether the Defendant is entitled to summary judgment on the issue of qualified privilege on the evidence as it is now. The answer in my judgment is that it is.

138. The evidence from the Defendant before disclosure and witness statements, is that the Defendant's detailed internal electronic search insofar as it is physically possible for this now to be done, has revealed no other publications of the Grant email and its attachment apart from those made internally to the RSPB staff identified (and in the case of the RSPB Critique to Dr Galbraith). Having regard to the nature of the case, and the searches already conducted by the Defendant, the steps already taken in my view would satisfy the criterion for standard disclosure. The duty to disclose under an order for standard disclosure is qualified by reasonableness: the rule does not demand that no stone be left unturned: see *Abela v Hammond Suddards* [2008] LTL 9/12/2008 (with regard to electronic disclosure, see the factors relevant to reasonableness

identified in PD 31. para 2A.4). The Defendant would not be required in the circumstances of this case in my judgment, to conduct further searches than it has already in particular because of the substantial costs involved. If the matter had come before me on an application for specific disclosure, I would have refused it in the exercise of my discretion. I do not consider what Mr Bowker has to say about these matters, in particular, about the cost and difficulty of further searches, constitutes evidence, as opposed to unsupported assertion, or that it raises any material issue which requires resolution at trial.

139. I also consider Mr Wolanski is right when he submits that the Claimants have no realistic prospect of proving publication to third parties beyond the two publications already pleaded. As he points out, the Claimants have had three years since the publications complained of to do so, and their optimism, unsupported by any evidence, that they will be able to prove publication beyond the publishees already identified is not a sufficient reason for the matter to be allowed to proceed to trial. The Claimants' case that they will be able to establish further publications directly or by inference, seems to me to be one which in all the circumstance, lacks reality.

140. In my judgment therefore, the evidence on publication is therefore highly unlikely to change between now and trial; and the court can assess the case on the evidence as it now stands. On that evidence, there was only publication to the extent set out at paragraph 110 above. As for the publication to the other external publishees (Dr Baines and the Forestry Commission) the case that Dr Grant intended or knew or should have known there was a significant risk they would occur, is, as Mr Wolanski says unsupported by any facts. I agree that the Claimants case on his (and therefore the Defendant's) responsibility for these publications (assuming for this purpose that one to the Forestry Commission took place) is unviable: there are no pleaded facts to support such a case, and in my view it would be wholly unreasonable to draw an inference that Dr Grant was responsible for them having regard to what the Grant email said in terms, in bold, underlined and using capitals: viz "At least for the moment **this should NOT be circulated externally**". This was on any view, an emphatic prohibition against external republication. In the case of the Forestry Commission, there is not even an identifiable recipient of the email.

141. In consequence, the Defendant is in my judgment entitled to summary judgment on the issue of qualified privilege on the grounds that the Claimants have no real prospect of establishing that the relevant publications as identified above were not made on an occasion of qualified privilege.

Malice

142. The case on malice is contained in the plea in aggravation of damages, apart from one additional matter raised in the Reply. Fourteen particulars of malice are set out at the end of which it is said: "In the circumstances, Dr Grant, Dr Johnstone and Dr Stowe knew in respect of the words complained of which they respectively published, that insofar as those words were factual they were false (or they were at least reckless as to their truth or falsity), and if and in so far as those words consisted of comment on a matter of public interest, they were not their honest opinion, and they published them maliciously, motivated by an improper desire to harm the Claimants and protect themselves and the Defendant from fair criticism of its management of Lake Vyrnwy." The particulars themselves make serious allegations of dishonesty and

fabrication. These allegations are strongly denied by the Defendant in the Defence and in witness statements from Dr Grant, Dr Johnstone and Dr Stowe, but as Tugendhat J points out in *Bray*, such denials are not material for this purpose, no matter how eminent the person making them. It is necessary therefore to scrutinise the particular allegations relied on carefully to see whether they "pass muster". If they do not, then there is no relevant platform of facts from which the improper motive for publication in each case can be inferred, and the Defendant is entitled to summary judgment on this issue. It is necessary to bear in mind even on an application for summary judgment, the high threshold that is required before an improper dominant motive can be inferred in relation to a statement which would otherwise be protected by qualified privilege.

143. Before I consider the allegations themselves however, it seems to me a number of difficulties arise from the way the case on malice has been pleaded. The Claimants' pleaded case does not in my view sufficiently separate out the case on malice made against the three publishers, Dr Grant, Dr Johnstone and Dr Stowe to make a coherent case against each of them separately. Instead it appears to make a compendious case of malice in which separate allegations are added together to make one case against the Defendant. This matters because a Defendant's state of mind cannot be assessed on the totality of knowledge of its employees: See *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 1 WLR 805 at 813 and *Bray* at [16]. It also matters because each person accused of malice, particularly where there are allegations of the gravity made here, is entitled to know with precision the case that is being made against him. In my view the pleaded case lacks the particularity required when dishonesty is alleged; and on occasion it is also difficult to understand precisely what is being alleged.

144. There may be cases where it is appropriate for the court to allow a party time to amend their pleading in such circumstances, and consider any summary judgment application after that has been done (see *Howe* at [21] where it was said by Eady J that the plea of malice was prolix and badly set out, but there was no point in giving summary judgment on the case of malice until it had been properly pleaded and then found wanting). But the principal objection to the plea of malice in this case is that the central allegations upon which it is based (a number of which are common to the case against each doctor) are totally misconceived. There would be no point in requiring an amendment to put in proper form a case which was fundamentally flawed regardless of how it was presented. Since the parties have been able to identify the central allegations made in the pleadings for the purposes of the argument before me, I propose to consider the principal constituents of the plea of malice as it stands.

145. I note also, that the Claimants had the opportunity to consider whether the case should be recast after the Defence was served, and for many months after this application was made. Though Mr Munden complained at the outset of the hearing as I have already said, that in some respects he did not have sufficient notice of some of the complaints being made about the pleading, Mr Wolanski was right in my view in submitting that there was nothing which could be said to have taken the Claimants by surprise since the principal points argued before me were clearly flagged up and summarised in the Defence, and I refer to what I said at paragraph 4 above.

Approval/involvement in/knowledge of the same or similar methods

146. The central allegation (which I must assume to be true for this purpose) is in summary, that Dr Grant and Dr Johnstone and Dr Stowe knew of or had some involvement with and approved earlier work done by the Claimants for the RSPB in 1998 and 1999 which used the same or similar high displacement techniques to those which they raised concerns about in the publications complained of. In relation to Dr Grant and Dr Johnstone for example, it is alleged they endorsed and instructed the Claimants to use intrusive catching, handling and radio- tagging methods; and Dr Johnstone is alleged to have assisted the Claimants in the work concerned (it is said to have provided much of the data used by Dr Johnstone in the paper he wrote with Patrick Lindley, and which is referred to in the RSPB Critique). In relation to Dr Stowe it is merely said he was fully aware of this work (though no particulars are given). Thus, the case on malice is that because they had variously endorsed and encouraged or known of the use of some of the methods used by the Claimants in 1998 and 1999 (or in the case of Dr Stowe, had been kept informed of it) each of them must have been dishonest when they expressed concerns about these methods in 2007 or in the case of Dr Grant, described the methods as “untried and untested”. For example it is said of Dr Johnstone that he “dishonestly sought to castigate the First Claimant, as inter alia, recklessly using intensive field methods involving dangerous levels of disturbance”.

147. In the same vein it is alleged against Dr Johnstone that he did not raise any objection to the use of these or similar methods in 2000 to 2003. A subsidiary but associated allegation is that Dr Grant, Dr Stowe and Dr Johnstone did not refer to the paper written by Johnstone and Lindley and its conclusions (“except for Dr Johnstone who referred to it in most general terms”).

148. Even on the basis that the Claimants make good this part of their pleaded case, which is strongly contested in the Defence, Mr Wolanski submits scientists can perfectly legitimately change their minds about the validity of methods used. A method generally accepted as correct one year may be exposed as utterly useless, or damaging, the next year. Scientific progress requires the continual questioning and testing of methodologies. Even assuming for example that Dr Grant did perform a total *volte face* between 1998/9 and 2007 as to the validity of intensive radio tagging methods, this does not mean he was, or even may have been, malicious. It means he changed his mind. Equally, if Dr Johnstone approved methods in 2000 to 2003, but four years later suggested that those same methods may have produced unreliable results, this cannot be probative of malice. Dr Stowe is not said to have had close involvement with the Claimants in their 1998-1999 project. Neither is he said to have been closely involved with the Claimants during their work in 2000 to 2003. The case is instead advanced on the footing that he was ‘fully aware’ of what happened in this period – but no basis for this knowledge is pleaded. For this reason, the case of malice is even weaker than it is with respect to Dr Grant and Dr Johnstone.

149. Mr Munden stands by what is pleaded. He submits that what is alleged is strongly supportive of the case on malice; and if true, is more consistent with the presence of malice than its absence. He says malice is always a matter of inference, and points to the fact there is no actual evidence that the doctors actually did change their mind.

150. In my view none of these allegations, even if correct, is more consistent with dishonesty than not. It seems to me that what Dr Grant is alleged to have done (instructing the radio tagging of as many chicks as possible to assist in a study on wing and weight measurement) is not inconsistent with the use of the description "untried and untested method" in the Grant email since this reference in the email was obviously to the method advocated by the Claimants of handling chicks on multiple occasions to reduce mortality when older chicks/juveniles are captured and handled for the purposes of tagging. As Mr Wolanski says, it is not suggested in the plea of malice that Dr Grant ever advocated radio tagging for this purpose. I also do not accept that the conclusions of Dr Johnstone's paper are inconsistent with what he said in the RSPB Critique.

151. But whether there is an inconsistency or not, there is my view a more fundamental problem with this part of the Claimants' case. Accepting as true for this purpose the Claimants' case that in 1997-1999, Dr Grant and or Dr Johnstone endorsed or encouraged the Claimants' high disturbance methods, or that Dr Johnstone did not raise any objection to them in 2000-2003, or that Dr Stowe knew of them (or as is alleged specifically against him, wrote a skeleton brief for further work to be done by the Claimants in 2000), this cannot in my view lead to a rational conclusion that they were dishonest in expressing a different, or contradictory view about those techniques many years later. The allegation is even weaker in relation to Dr Stowe, whose pleaded connection with the earlier work (knowing of it, and approving of it – though no particulars are given of why it is said he knew of it, or when or how he approved it) is more remote than that of Dr Grant and Dr Johnstone.

152. Nor do I consider the allegation concerning what each doctor did or did not say about the Johnstone and Lindley study is rationally supportive of the case on malice either. It is difficult to understand the case being made here at all against Dr Grant and Dr Johnstone. Dr Johnstone *did* refer to the paper, and its results, and it was of course included in the list of references at the end of the paper. The suggestion that dishonesty could be inferred from how it was dealt with by Dr Johnstone is, in the circumstances, completely untenable. Dr Grant in turn, referred those who read his email in the RSPB Critique, and thus to what Dr Johnstone said about it. The Defendant says in its Defence that it was reasonable for Dr Grant not to refer to the paper for reasons which are given: the Claimants take issue with this in their Reply. Similarly, it is alleged by the Claimants in their Reply that Dr Grant, Dr Johnstone and Dr Stowe deliberately did not mention a different study (the 1989 Cayford study) which it is said involved more intensive handling than the Claimants' work for the Defendant in "a deliberate attempt to mislead readers into believing that the STW project involved more intensive methods than had been used before".

153. In my view the problem with this part of the case is analogous to the problem which arose in *Singh*. In the scientific context generally (or in an academic context for that matter) and in this case in particular, what references to include, and which papers merit discussion, is a matter of critical judgment. It is not possible therefore to rely on the omission to mention this or that paper, or the failure to give this or that paper sufficient emphasis as a fact or matter from which dishonesty could reasonably be inferred, save in some wholly exceptional case; and in my judgment there is nothing to suggest this is one of them.

154. However, even if I am wrong about that, it seems to me that on its own, the matters relied on in this case and to which I have referred above, are not allegations from which dishonesty could reasonably be inferred. I have already dealt with the Johnstone and Lindley study above. As for the Cayford paper, even if Dr Grant did know of the study, and had cited it before, as is alleged, his failure to cite it on this occasion (particularly in the light of the evaluative nature to which such an allegation gives rise as I have said) cannot rationally lead to a conclusion of dishonesty in my view; Dr Johnstone did not suggest that the STW project involved more intensive methods than had been used before and it is not pleaded that Dr Stowe knew of the Cayford study, still less that he knew that its methods employed were (allegedly) more intensive than those used by the Claimants.

The 15 February 2001 memorandum

155. A discrete factual issue is also raised by the Defendant as an additional and alternative point to the one dealt with above. Dr Johnstone says he regularly raised concerns about the Claimants' methods, at the material time, and the proposition that he did not is demonstrably false. An example of where concerns about tagging were discussed within the steering group and raised with the Claimants is at meetings of the STW steering group held on 14 February 2001, a minute of which (dated 15 February 2001) is explicitly referred to in the Defence and which is in evidence for the purpose of this application. It is a lengthy and detailed memorandum of two meetings which took place in the STW building at Lake Vyrnwy, and is addressed to Dr Stowe. At the morning meeting, not attended by the Claimants, it records that Dr Johnstone:

> "expressed concerns over higher levels of handling and radio-tagging of small chicks than was specified in the RSPB proposal. GN [Geoff Nicholls] understood these concerns and the potential for disturbance to impact on numbers of black grouse fledglings. The difference in chicks per hen counted at Vyrnwy compared to the recovery project sites was discussed along with the possible reasons for it (disturbance effects and timing of counts). It was agreed that this would be discussed with GB [Gordon Bowker] in detail. Making best use of the data collected was discussed. IJ stated he was happy to help with/carryout key analyses for the RSPB proposal, subject to the data being collected in an appropriate way."

156. The memorandum also records that the Claimants attended the afternoon meeting. It records that:

> "IJ [Dr Johnstone] studied data presented [by Mr Bowker] and asked questions about methodology... The concerns of the RSPB over levels of handling/tagging small chicks were discussed. GB [Gordon Bowker] had misinterpreted the report to CCW [Countryside Council for Wales] on effects of handling in 1999. However GB appears to have researched tagging effects in detail, and feels he has some evidence from Vyrnwy that this level of tagging had no effect, although this was not formally presented. Rather than appear inflexible IJ agreed to review levels of tagging this year in light of this.

> Nevertheless GB did agree to only tag two chicks per brood in future if the RSPB require it. Another option mentioned by GB was to catch and tag hens when they have small broods and use them to relocate large chicks for tagging. GB said it is important to handle chicks early to reduce shock-related deaths of older chicks, citing work on red grouse and game birds in general. GB stated that Murray Grant had said he could handle chicks 2-3 times over the course of the season. These issues will be covered by the review. …IJ suggested GB visit the North Wales Office in April to review tagging methodologies and talk about making best use of data. GB was happy to do this."

157. Mr Wolanski suggested during the course of argument that the Claimants would say (because they would have to, since the document was destructive of this part of their case) that the memorandum was fabricated. Indeed, although the word "fabrication" is not used, in my view, that is what Mr Bowker then did suggest, in his 2nd witness statement dated 3 November 2010. The memorandum refers to a CCW report ("report to the CCW on the effect of handling in 1999"). Mr Bowker says the only CCW report he is aware of is the paper which was written by Johnstone and Lindley in 2003, referred to in the RSPB Critique. Thus, the Claimants' argument goes, since the February 2001 memorandum refers to a document which did not come into existence until 2003, the memorandum must have been *reconstructed* after the event.

158. Dr Johnstone however says that the reference in the memorandum to "the report to the CCW on the effects of handling in 1999" is to a different document written by him in 1999, a copy of which the Defendant has also disclosed. It is a detailed scientific analysis headed: "**RADIO TAGGING OF BLACK GROUSE (TETRAO-TETRIX) CHICKS AS PART OF THE RSPB WELSH BLACK GROUSE RECOVERY PROJECT: REPORT TO CCW.**" ("the 1999 CCW report"). A snapshot taken from his computer of this document's "properties" is also in evidence, and reveals it was first printed on 20 January 2000.

159. Mr Munden submits even taken at face value, the memorandum amounts to Dr Johnstone's own account of one occasion over the three and a half years that the Vyrnwy project was ongoing on which he indicated to the First Claimant some concerns over the levels of handling/tagging of small chicks. It only relates to one of the issues discussed in the words complained of and is not a condemnation of the type a reader of the words complained of might have expected the Defendant to have made: rather it is said that the Defendant agreed "to review levels of tagging". There is no evidence that such a review ever took place, or that if it did it led to any communication with the Claimants as to what the Defendant viewed as an appropriate level. This one occasion must be considered in the context of the three and a half year Vyrnwy project, and in particular contrasted with the Claimants' other communications with Dr Johnstone which it is said show him to take a different view. Further there are several reasons to doubt the accuracy of the memorandum. In particular, although dated 2001 it appears to refer to a document (that is a "report to CCW on the effects of handling in 1999") not written until 2003, which Mr Munden says on instructions, the First Claimant has never seen.

160. He says this one document clearly does not take the issue into the realm of the cases considered by Lord Hope to be appropriate for summary judgment: where it is "clear beyond question that the statement of facts is contradicted by all the documents or other material on which is based" (*Three Rivers DC* at 95; cited by Tugendhat J in *Bray* at [33] and [39] in the context of malice; and see further for the significance of "*all* the documents" *Mentmore International Ltd v Abbey Healthcare (Festival) Ltd* [2010] EWCA Civ 761 per Carnwath LJ at [23]).

161. In *Mentmore* Carnworth LJ said this at [23]:

> "Lord Hope had spoken of a statement contradicted by "*all* the documents or other material on which it is based" (emphasis added). It was only in such a clear case that he was envisaging the possibility of rejecting factual assertions in the witness statements. It is in my view important not to equate what may be very powerful cross-examination ammunition, with the kind of "knock-out blow" which Lord Hope seems to have had in mind. "

162. The memorandum and the material parts of its contents are set out and relied on in the Defence (16.2.4.4-5). On the face of it, as Mr Wolanski submits, it records that the only scientist who was directly involved with Mr Bowker between 2000 to 2003, held and communicated reservations identical to those described in all three sets of words complained of. The allegation made by the Claimants in the plea of malice is that Dr Johnstone *never* communicated any such reservations about what he was doing at any material time as he could and would have done if he genuinely held such concerns. In those circumstances, if the memorandum is a genuine document, it is difficult to see it as anything other than the "knock-out blow" to which Lord Hope referred, at least on this one allegation. The point is not undermined by reference to other documents (for example, minutes of other meetings referred to by Mr Bowker) which show he says that no one raised any supposed concerns about handling and tagging; nor by Mr Bowker's other disagreements with the memorandum.

163. This presumably, is why the parties were concerned as to the document's authenticity. In my view, it is implausible to suppose that either of these two documents (that is the memorandum and the 1999 CCW report) are not genuine. The memorandum refers to a report to the CCW "on the effects of handling in 1999", and that is exactly what the 1999 CCW report disclosed by the Defendant is, as can be seen from its title, and indeed its contents. Mr Bowker might not have been able to recall a CCW paper other than the one written in 2003, or having been shown the one now produced by Dr Johnstone. But that on its own is not in my judgment a proper basis for inferring that another one *did not* exist, and *therefore* the February 2001 memorandum had been fabricated, or *reconstructed* post 2003. Mr Bowker denies that Dr Johnstone said to him what the memorandum records him as saying. But if the document is genuine, I do not consider it to be a realistic possibility that the Claimants will succeed in establishing that Dr Johnstone made no such statement as that set out in paragraph 155 above.

164. Be that as it may, and even if I am wrong to form such a view, this part of the case on malice fails in any event given my conclusions in paragraphs 153 and 154 above.

A further allegation of fabrication by Dr Stowe

165. In paragraph 13.1.10 of the Particulars of Claim a further allegation of fabrication is made, against Dr Stowe. The matter is put this way:

> "Further, it is simply not the case, nor is it suggested in either the Claimants [sic] 2003 report or their 2007 scientific [*Wildlife Biology*] paper that "once tagged, [black grouse] were then located and flushed every two weeks", as Dr Stowe wrote in the words complained of. <u>This is a complete fabrication</u> on Dr Stowe's part, plainly designed to make the Claimants look reckless and incompetent and their work appear unorthodox and dangerous to black grouse." (Emphasis added)

166. The response in the Defence was as follows:

> "In the *Wildlife Biology* paper the Claimants specifically state that "on average, tagged birds were located and flushed every two weeks."

167. The *Wildlife Biology* paper is of course in evidence before me, and there can be no doubt at all, that the Defendant is right about what it says.

168. What is said by the Claimants in the Reply however is not coherent as an acknowledgement that the allegation of "complete fabrication" was itself false and was being withdrawn; nor is it a coherent maintenance of the case on "complete fabrication" either. It says this:

> "As to paragraph 16.11, the data the Claimants recorded, from a distance, at Lake Vyrnwy showed that the birds flushed, on average, every two weeks when they were being tracking (sic), as they were very wild and active. This was not as is stated or implied in the words complained of, because of any action on the part of the Claimants. That the Claimants recorded from a distance whether the birds "fixed" or "flushed" is a fact well known to the Defendant and to Dr Grant and Dr Stowe and deliberately not relayed to the readers of the words complained of."

169. Thus (if I understand it correctly) what is now being said is that the use of the quote was misleading, because it suggested in some way that the Claimants actively flushed the birds, whereas the birds flushed because they were wild and active, and the Claimants simply recorded this from a distance, as the Defendant, Dr Grant and Dr Stowe knew, and which they deliberately decided not to pass on to the readers of the words complained of. Implicitly, it is not being disputed – any longer – that the quote was substantially accurate, but the case on "complete fabrication" is nonetheless not withdrawn as unsustainable.

170. However, Mr Munden's skeleton argument for this hearing, then put matter is put this way:

> "Dr Stowe falsely suggested in the Letter that the Cs caused the birds they were studying to flush every two weeks."

171. In his further written submissions made after the hearings, Mr Munden then said this (and I paraphrase): in the context, the suggestion in the Stowe letter is that the Claimants caused the birds to flush every two weeks. This was not the case, as is set out in the STW Report Methods. Though the *Wildlife Biology* paper does include the sentence quoted, the impression given in the words complained of is misleading, as would be evident to anyone who had read the STW Report (such as Dr Stowe).

172. In his written response Mr Wolanski says that the point now being made by the Claimants is not understood. The Claimants' words from the *Wildlife Biology* paper are quoted verbatim by Dr Stowe. The allegation that Dr Stowe must have been malicious when quoting the Claimants' own words is bizarre. The pleaded assertion is that Dr Stowe had "completely fabricated" the quote: this case must have been pleaded in error, yet is persisted in even now.

173. Mr Munden's final word is as follows:

> "Cs' case on this particular allegation against Dr Stowe should be clear from para 28(v) of the Cs' skeleton argument and/or para 25-26 of Cs' written submissions but for the avoidance of doubt it is made clear now: Dr Stowe's reference to flushing was, in context, deliberately misleading, but insofar as there is a reference to birds flushing in the Cs and Dr Baines' paper [the Wildlife Biology paper] ("on average…every two weeks") it was an error to refer to it as a "complete fabrication." (Emphasis added)

174. It is a serious matter to make an allegation of complete fabrication against anyone in litigation, let alone one of this nature against a professional person. It is difficult to understand how this allegation could have been pleaded in the first place since the words which were alleged to be a complete fabrication, were ones actually used in the paper to which the Claimants' names were attached. After the Defence was served it should have been obvious that the allegation of fabrication was completely unsustainable, and it should then have been expressly withdrawn. It was not. Instead, the Claimants appeared to be unwilling to let the point go, and attempted to advance the different contention that Dr Stowe's use of the Claimants' own words was deliberately misleading. In my view, the Defendant should not have had to attempt to piece together the case made against it from different (inconsistent) parts of the pleadings and submissions. Moreover, the fact that matters have been dealt with in this way gives serious cause for concern about whether proper consideration has been given to similarly bold allegations made in the malice plea, which Mr Munden submits must be taken at face value. Be that as it may, I do not accept the Claimants' new case that an inference of dishonesty can rationally be drawn from Dr Stowe's use in his letter, of the very description the Claimants themselves had used about their own methods in *Wildlife Biology*.

The allegation of fabrication of data relating to lek counts

175. This is the second principal allegation in the plea of malice. It relates to the difference in figures for "lek counts" in particular for the year 2000, which is discussed in the words complained of. In the RSPB Critique, at figure 1 as the key to the graph explains, a line graph compares two sets of published data: that is, data from the *Wildlife Biology* paper with data published by the RSPB in a peer reviewed journal *Welsh Birds* in 2004, listed in the references to the RSPB Critique (Thorpe R., Sheehan, J. & Walker, M. (2004) The birds of RSPB Lake Vyrnwy reserve. *Welsh Birds* 4 20-30).

176. What is said, in summary, is that Dr Grant, Dr Johnstone and Dr Stowe were each involved in a conspiracy to fabricate data in order to discredit the Claimants. The basis for the allegation is as follows. It is said by the Claimants that there was only one set of lek count data for the relevant period (2000) viz. that collected by the Claimants and local RSPB staff, as Dr Johnstone, Dr Grant and Dr Stowe "well knew"; and the RSPB did not take its own separate count. Thus it is said that the "lower figures put forward by Dr Johnstone and Dr Stowe are, it is to be inferred, a fabrication designed to discredit the Claimants." It is also said that Dr Stowe and Dr Johnstone made false claims as to the numbers of grouse at Lake Vyrnwy after the Claimants had finished their work there (i.e. they falsely claimed that the numbers had increased between 2003 and 2007), to paint a better picture of the Defendant's management of Lake Vyrnwy.

177. The Defendant says in its Defence that in 2003 it revised data for a range of species, including black grouse, after a full review of all reserve data going back to 1958 in some cases, that its decision to do so was unrelated to the Claimants' work, and that it did not even become aware of the Claimants' draft STW report until well after this review.

178. In their Reply, the Claimants simply repeat there was only one set of data approved at the STW steering committees. It is said the Defendant therefore had no alternative data upon which to base any 'revised' figures; and there were no reasons to revise the figures. Thus, it is to be inferred, that the data was fabricated. The only further matter relied on by the Claimants is an email from a former RSPB employee and warden at Lake Vyrnwy, a Ms Sheehan, which is put forward to support the Claimants' case that one set of data was collected in 2000 to 2002 (Ms Sheehan was not there in 2003). In it, she offers her opinion that there was no need to touch the data after the season had ended; and that if the Defendant was putting forward data that did not match that collected by the Claimants and the Defendant then "someone has been fiddling".

179. In my judgment there are simply no facts pleaded or further evidence advanced from which the court could reasonably infer that Dr Grant, or Dr Johnstone or Dr Stowe had fabricated grouse figures or engaged in a conspiracy to do so in order to discredit the Claimants as is alleged (regardless of whether there were justifiable grounds to revise the figures, which gives rise to an issue of fact which I cannot resolve). No particulars are given of their involvement in such a conspiracy and in my judgment, there is nothing put forward as evidence which could begin to substantiate this extremely serious allegation.

180. It is disputed by the Claimants that the Defendant had any independent data, but the Defendant's case is not that they had independent data per se, but that they revised the data that had been collected. It is not disputed by the Claimants in the Reply, that the RSPB revised the data, or that they did so in 2003, before they became aware of the Claimant's STW paper, or that the RSPB published their revised data in *Welsh Birds* in 2004, three years before the Claimants made their conclusions publicly available by means of the *Wildlife Biology* paper. As Mr Wolanski points out, even on the Claimants' case, the Claimants' conclusions did not come to public attention through the press until 2006. The notion that RSPB scientists would put their reputations at risk through involvement in fabrication of data in a scientific journal (*Welsh Birds*) when there wasn't even anything public to refute is, on the face of it, an improbable one.

181. But in any event, I do not consider the mere fact that the figures were different comes close to giving rise to a permissible allegation of complete fabrication. Ms Sheehan's email, which is to the same effect as the Claimants' case on the pleadings, in my view, takes the Claimants' case no further. Moreover, if there was 'fabrication' of the data in *Welsh Birds,* the Claimants plead no matters to support an inference that Dr Johnstone was himself involved in the fabrication, beyond the assertion that he was present at lek counts in 2000. This cannot be a basis for inferring fabrication. Even if (which Dr Johnstone denies) he discussed lek counts with the Claimants in 2000, this does not rationally support an inference that he subsequently fabricated revised data.

182. The allegation that Dr Johnstone and Dr Stowe had made false claims for the increase in grouse numbers after the Claimants had left Lake Vyrnwy is not supported by any particulars in the pleading: it is simply alleged. It is said however in Mr Munden's submissions, but not in evidence, that the Claimants' case in this respect is based on alternative figures for black grouse at Lake Vyrnwy in 2007, arrived at, so it is said, as a result of the Claimants' "*direct observations in the field*". These observations, if they were made, were made at a time, as Mr Wolanski also points out, when the Claimants had not worked on the site for some 4 years. But even if correct, this would not in my judgment provide a rational basis for inferring that the Defendant, let alone Dr Stowe or Dr Johnstone, had actually falsified the figures. A difference in data does not, without more, give rise to an inference of deliberate falsification by one side or the other; still less if it is said to arise in circumstances such as these.

The allegation that Dr Grant made false and misleading statements about the timing of brood counts to injure the Claimants

183. The nub of the complaint made here is that Dr Grant knew that brood break ups did not begin until September, and that the counts conducted by the Claimants were not "late" compared to when they were done by other studies. Therefore it is said it was "disingenuous" of him to have stated "it is conceivable that some break up of broods may have started by the time counts were done"; or to imply that that the data was of less value because it was not comparable with data from other sites.

184. There also is an issue between the parties as to whether the Claimants were referring to brood counts, or productivity counts in the STW report. (As I understand it, a brood count is a count of hens and chicks. A productivity count is what you do with the data: i.e. how you work out how productive hens were: so you need to do a brood count to do a productivity count). Whether or not the reference in the STW report was to a

brood count or a productivity count (and whether the difference is material for this purpose, which is a matter in dispute) seems to me to be neither here nor there in this context, since on the face of the email, Dr Grant refers to what is said in the *Wildlife Biology* paper in terms which are not criticised as inaccurate, namely that counts were made 'in last week of August'. Mr Wolanski also takes the point that what is said is that the data is not directly comparable to those from other "studies" rather than "sites". It doesn't seem to me that the latter point takes the Defendant's case any further (given the reference to both "sites" and "studies" earlier on).

185. On one view, it could be said that the issue joined between the parties in the pleadings on this part of the case suggests a simple disagreement about the facts. Be that as it may, the particular difficulty about this part of the Claimants' case on malice seems to me to arise from the suggestion that what Dr Grant said was false and disingenuous, when one considers the language he actually used, and the relevant context. The context here was a discussion of the method and results of the *Wildlife Biology* paper, in circumstances where it must be assumed that the Defendant has successfully established that these words were published on an occasion of qualified privilege. In that context, even if as is suggested, Dr Grant "knew" that brood break ups started in September, I do not consider it could be rationally inferred that Dr Grant was malicious on the grounds suggested here: for example in raising the mere possibility (it is "*conceivable*") that brood counts may have started earlier, in particular when he went on to say "(staff working on black grouse may be able to comment on the likelihood of the latter)". In my view, this cannot be a sustainable basis on which to advance a case of malice in the context of a scientific debate and, in particular, when the central parts of the Claimants' case on malice are not viable, for the reasons I have already given.

The allegation that Dr Grant, Dr Johnstone and Dr Stowe instructed Mr Melling to make a false accusation against the First Claimant

186. In the Reply it is alleged that at a meeting in 2004 of the Upper Derwent Valley Black Grouse project, the Defendant's Tim Melling made the very serious false allegation that the First Claimant had stolen birds from a project site in North England. It is said: "As Mr Melling subsequently admitted to Mr Warren [of STW] he had been instructed to make this false allegation by others at the Defendant, which it is to be inferred were or included Dr Grant, Dr Johnstone and Dr Stowe."

187. The suggestion (strenuously denied in their witness statements) that Dr Grant, Dr Johnstone and Dr Stowe were behind an attempt to propagate such lies about the First Claimant in 2004 is obviously a very serious one. There is no pleaded basis for this inference; the allegation amounts to mere assertion, and in my view it is a manifestly unsustainable one.

The allegation pleaded in paragraph 13.1.13 of the Particulars of Claim

188. It is said by the Claimants that the *Wildlife Biology* paper did not involve "unorthodox methods"; rain or other weather does not affect grouse of this age, which is why it was not discussed in the paper, and in any event there was no problem with weather during the hatching and rearing periods from 2000 to 2003. It is then pleaded that "Dr Grant, Dr Johnstone and Dr Stowe all knew this (or were at least reckless as to whether or not this was the case)". In his submissions, Mr Munden described this as

an allegation that Dr Johnstone (for example) was malicious in suggesting "it was improper" for the Claimants not to have discussed the weather in their *Wildlife Biology* paper when he knew the weather was fine for the relevant period, and it was common not to discuss it in scientific papers. As I have already said, I do not consider the RSPB Critique made any allegation of impropriety; Dr Johnstone simply pointed out that the *Wildlife Biology* paper did not consider such environmental effects in their discussion of reasons for their reported low breeding success and I consider this aspect of the Claimants' case runs into the problems set out in paragraph 185 above. Moreover, there is no pleaded basis for the assertion that Dr Grant or Dr Johnstone or Dr Stowe "knew" that there was "no problem with inclement weather" between 2000-2003 which (as Mr Wolanski says) is a curious submission given that Lake Vyrnwy is not in a part of the UK known for its fine weather.

189. For the reasons set out above, in my view, when the allegations made are subject to careful scrutiny, they simply do not pass muster, so as to give rise to a viable case on malice against Dr Grant, Dr Johnstone or Dr Stowe. In my judgment therefore the Claimants' case on malice has no realistic prospect of success, and the cautionary words of Lord Diplock in *Horrocks v Lowe* [1975] AC 135 at 149 to 152 as to the circumstances in which malice can be inferred in respect of words published on a privileged occasion apply to their fullest extent.

190. Finally, I should mention that neither side addressed any argument as to the effect, if any, that my ruling on meaning might have on this aspect of the application (see for example, the discussion in *Bray* at [41] to [43]). I have therefore for the most part, simply addressed the arguments on the basis on which they were made, which to a certain extent, assumed the case on meaning in the Claimants' favour. Obviously, the Claimants' case on malice is correspondingly weakened by my actual decision on meaning as set out above.

Conclusion

191. I do not consider there are any other compelling reasons why this claim should be tried. Publication took place more than three years ago now, on an occasion which was plainly privileged, in an internal email with very limited external publication, and in a letter sent to two people. The Claimants have no realistic prospect of establishing that the Defendant was malicious. There is no claim for special damages, and the cost of trying the claim (and not just in financial terms) would in my judgment, be enormous.

192. Mr Wolanski addressed a final argument, albeit extremely briefly on abuse of the process. In short, he submitted that some of the considerations to which I have referred in paragraph 191 above should persuade me to determine this was a case in which as was said by Lord Phillips MR in *Jameel v Dow Jones* [2005] at [69]:

> "the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick."

193. In view of the conclusions I have reached, it is unnecessary for me to address those arguments.

194. Following the circulation of the draft judgment in this case, Mr Munden on instructions, submitted further submissions in writing and further documents, but as I reminded the parties, the general position is that the circulation of a draft judgment is not intended to provide an opportunity to any party to reopen or reargue the case, or to repeat submissions made at the hearing, or to deploy fresh ones (see *R. (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 158 at [5]). Nothing in the submissions or documents submitted remotely justifies reopening the matters I have decided. As it is, in all the circumstances, and for the reasons given above, the Defendant is entitled to summary judgment on the claim.