Case No: A2/2000/2095
A2/2000/2095/A

Neutral Citation Number: [2001] EWCA Civ 1197
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(MR JUSTICE GRAY)

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday 20th July 2001

B e f o r e :

LORD JUSTICE PILL
LORD JUSTICE MANTELL
and
LORD JUSTICE BUXTON

- -

David Irving	Applicant
- and -	
(1) Penguin Books Ltd	Respondents
(2) Professor Deborah Lipstadt	

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 0171 421 4040, Fax No: 0171 831 8838
Official Shorthand Writers to the Court)

- -

Richard Rampton QC (instructed by Messrs Davenport Lyons and Messrs Mischon de Reya) for the Respondents
Heather Rogers (instructed by Messrs Davenport Lyons) for the first Respondent
Anthony Julius (instructed by Messrs Mischon de Reya) for the second Respondent
Adrian Davies (instructed by Amhurst Brown Colombotti) for the Applicant

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Judgment

LORD JUSTICE PILL:

This is the judgment of the Court.

Background

1. This is an application for permission to appeal against a judgment given by Gray J on 11 April 2000 whereby he dismissed a claim by Mr David Irving ("the applicant") that he had been libelled in a book entitled "*Denying the Holocaust – The Growing Assault on Truth and Memory*" written by Professor Deborah Lipstadt and published in the United Kingdom by Penguin Books Ltd in 1994. The applicant is the author of over 30 books and has specialised in the history of the Third Reich. Amongst his titles are *The Destruction of Dresden* (1963), *Hitler's War* (1977 and 1991 Editions) and *Goebbels – Mastermind of the Third Reich* (1996).

2. Because there is no significant dispute as to their effect, it is not necessary to set out extensively the passages from *Denying the Holocaust* of which the applicant complains. They include, at p 161, the statement that "scholars have described Irving as a "Hitler partisan wearing blinkers" and have accused him of "distorting evidence and manipulating documents to serve his own purpose". On the same page, it is stated that "he has been accused of skewing documents and misrepresenting data in order to reach historically untenable conclusions, particularly those that exonerate Hitler". At p 181 it is stated that "Irving is one of the most dangerous spokespersons for holocaust denial. Familiar with historical evidence, he bends it until it conforms with his ideological leanings and political agenda".

3. The trial lasted from 11 January to 15 March 2000 and judgment was given on 11 April 2000. The applicant appeared in person. He has been represented at the hearing of the present application by Mr Adrian Davies of Counsel. Mr Davies addressed the Court for 3 days and the hearing lasted for a total of 3½ days. Both at the trial and before this Court the respondents have been represented by Mr Richard Rampton QC.

Conclusion on Meaning

4. We refer immediately to the judge's "Conclusion on meaning". At 2.15 the judge stated:

> "Adopting the approach set out earlier, my conclusion is that the passages complained of in their context and read collectively bear the following meanings all of which are defamatory of him [the applicant]:
>
> i that Irving is an apologist for and partisan of Hitler, who has resorted to the distortion of evidence; the manipulation and skewing of documents; the misrepresentation of data and the application of double standards to the evidence, in order to serve his own purpose of exonerating Hitler and portraying him as sympathetic towards the Jews;
>
> ii that Irving is one of the most dangerous spokespersons for Holocaust denial, who has on numerous occasions denied that the Nazis embarked upon the deliberate planned extermination of Jews and has alleged that it is a Jewish

deception that gas chambers were used by the Nazis at Auschwitz as a means of carrying out such extermination;

iii that Irving, in denying that the Holocaust happened, has misstated evidence; misquoted sources; falsified statistics; misconstrued information and bent historical evidence so that it conforms to his neo-fascist political agenda and ideological beliefs;

iv that Irving has allied himself with representatives of a variety of extremist and anti-semitic groups and individuals and on one occasion agreed to participate in a conference at which representatives of terrorist organisations were due to speak;

v that Irving, in breach of an agreement which he had made and without permission, removed and transported abroad certain microfiches of Goebbels' diaries, thereby exposing them to a real risk of damage;

vi that Irving is discredited as an historian.

Subject to one point disputed by the applicant, those conclusions as to meaning are accepted by the parties. The point at issue is whether a statement at p 213 of *Denying the Holocaust* bears the meaning that the applicant approves of the internment and the killing of the Jews in concentration camps. It is stated that another author, "echoing David Irving, argues that the Nazi 'internment' of Jews was justified because of Chaim Weizmann's September 1939 declaration that the Jews of the world would fight Nazism". The judge did not accept (2.16) that the reference to the applicant "when read in the context of the other references to him, bears the meaning that he applauds the internment of Jews in Nazi concentration camps". The judge was entitled so to find. Moreover, the innuendo now alleged that "internment" meant killing was not pleaded and could not be relied on.

5. It should be said at once that the judge found that the respondents had failed to justify the second allegation in sub-paragraph (iv) and the allegations in (v). The judge relied on section 5 of the Defamation Act 1952 ("The 1952 Act") to give judgment in favour of the respondents, notwithstanding those findings against them.

The central issue

6. Both at the trial, and at the hearing of this application, stress has been placed on the importance of the applicant's integrity as a serious historian. The judge drew attention (3.2) to the applicant's statement that "for him his reputation as a truth-seeking historian is more important than anything else". Consideration of the applicant's reputation as an historian was central to the trial and is central to this application. Indeed, the judge's conclusion (13.1), that "the charges levelled at Irving's historiography appear to me to lie at the heart of what Lipstadt wrote about him in *Denying the Holocaust*" is expressly adopted on the applicant's behalf though it is strongly denied that the charges are true. The judge recorded (5.9) that the applicant testified "that he had never knowingly or wilfully misrepresented a document or misquoted or suppressed any document which would run counter to his case".

7. The judge acknowledged (4.7) that the burden of proving the defence of justification rested upon the respondents. To succeed in their defence of justification, in relation to the allegations at (i), (iii) and (vi) above, the respondents have to establish not only that the applicant is not a

reputable historian, to use the expression adopted at the hearing as a form of shorthand for the allegations about his work, but also that he had a motive of his own in distorting the evidence. The second limb has not however been the subject of dispute. On behalf of the applicant, Mr Davies accepts that if the applicant is shown not to be a reputable historian, which is the central issue, his motivation is not an important issue. Mr Davies says that it is "at the margin". It is dealt with briefly later in this judgment. Mr Davies of course rightly adds that, if the respondents have failed to demonstrate that the applicant is not a reputable historian, their case cannot be made by proving a motivation, however unattractive. The allegation of "holocaust denial" has also been put as a subsidiary issue.

Gray J's judgment

8. The judgment of Gray J can only be admired for its comprehensiveness and style. It has the unusual accolade for a judgment of being published, verbatim and without commentary, in book form, The publishers are the Penguin group and the book runs to 350 pages. It is not necessary, in order to determine this application, to attempt the comprehensiveness to which the judge aspired, and which he attained, following a very long trial. His conclusions on each issue are succinctly stated. Plainly reference to his summary of evidence and submissions is on some issues necessary to assess the validity of his conclusions but it is not necessary or appropriate to set out that evidence extensively. It is for the applicant to demonstrate that there is a real prospect of an appeal succeeding.

9. Having set out an overview of the applicant's claim and of the defence of justification, the judge set out in sections (v) to (xii) of his judgment the contentions of the parties on each of the issues in dispute. Section (v) considers specific criticisms made by the respondents of the applicant's historiography under 18 headings, each of them being concerned with a specific event or events in the history of the Third Reich. Auschwitz, not surprisingly, has a long section (section vii) to itself. The judge's findings on justification are set out in section xiii (including findings under section 5 of the 1952 Act) and is followed at section xiv by the judge's verdict in favour of the respondents.

The applicant's case

10. The notice of appeal took the form of a skeleton argument of 191 paragraphs, settled by Mr Davies. Mr Davies invites the Court to approach the application on the basis of the statement of Baggallay JA in *The Glannibanta* (1876) 1 PD 283 at 287:

> "Now we feel … the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are … material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect."

11. Mr Davies submits that the five expert witnesses called at the trial on behalf of the respondents were all motivated by ideological bias and, particularly in the case of the historian Professor Evans, by personal hatred. Professor Evans denied that allegation stating that he did not have personal feelings about the applicant and had tried to be as objective as possible. The attack on Professor Evans, whom Mr Davies described as the key witness for the respondents, has been continued at this hearing, his analysis of one aspect of his evidence being described as "ridiculous". It is also submitted that Professor Evans should not have been allowed to give evidence as to the meaning of the words "holocaust denier" and also that Professor van Pelt should not have been permitted to give evidence on architectural, as distinct from historical, matters and should not have been permitted to give evidence on the chemistry of fumigation and gas chambers. The fees paid to the experts were "so grotesquely large", it is submitted, that their evidence could not be "the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation" (Cresswell J in *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 at 81.

12. Mr Davies rightly stresses that all the individual points at issue should be considered against the background that the respondents have to establish not merely that the weight of historical evidence is against the views expressed about events by the applicant but that, on the evidence available at the time the view was expressed, the view was wholly unreasonable and not one which could honestly be held. Only if no rational historian with a general knowledge of the Third Reich could have come to the conclusions reached by the applicant at the material time were the allegations against him justified.

13. It is submitted that while the applicant may have at times shown rather poor judgment, the position he took on issues was one of several, or a range of, positions which could honestly be taken on the existing evidence. It was important to keep in mind the information available at the time the relevant books were written, which was before much of the present evidence had become available. We acknowledge that it is of the essence of the investigation of historical events, particularly comparatively recent events, that fresh material becomes available from time to time. It may throw doubt on previously held views or may tend to confirm them. The reputable historian who continues to express views will have regard to the fresh material when doing so.

14. Counsel submits that provided there was evidence which entitled the applicant to reach the conclusion which he expressed on an issue, he could not be condemned in the manner the respondents have condemned him. An historian who writes books for publication must inevitably be selective in the material included, it is submitted. Where the applicant retained his doubts about events in the Third Reich, the evidence was not so overwhelming that he could not honestly persist in his doubts. The question is whether the applicant could honestly come to the conclusions he did. Mere negligence on his part was insufficient to justify the allegations made against him, Counsel submits.

15. Mr Davies relies on admissions made by the applicant as to events which occurred in the Third Reich to demonstrate the applicant's objectivity. He has never denied that the Nazis and their collaborators murdered millions of Jews. It is submitted that he has never tried to justify that conduct of theirs. He accepts that at some time after June 1941 a policy of murdering all Jews in occupied Europe had become State policy "at Himmler's level". By 1943, and quite possibly earlier, that was a systematic policy.

16. Counsel also mentioned a concession made by the applicant when cross-examining Dr Longerich upon the possibility of Himmler conducting operations behind Hitler's back. The applicant volunteered the information that Himmler's brother had told him "that Heinreich was such a coward that he would never have done this without Hitler's orders".

17. Reference is also made to the applicant modifying his views when fresh evidence has become available, for example in relation to the Leuchter Report, and in relation to casualties resulting from the bombing of Dresden. The applicant has also habitually disclosed to other historians documents which he had discovered (5.12). In some respects, those who had taken views different from the applicant's had had to revise them. For example, it was until 1990 recorded on a plaque at Auschwitz that 4 million people had died there whereas the current estimate is very much lower, a change in the direction of the views held by the applicant.

18. Mr Davies urges the Court to bear in mind that the applicant appeared in person at a long and complex trial and allowance should be made for any failure in his understanding of procedure and in his presentation. The further general point is made that the weight to be placed on statements made by the applicant in speeches and interviews, and relied on by the respondents to justify their allegations, should be very limited. He had spoken without notes and in stressful situations. He should be judged as an historian and not as a platform speaker.

19. Counsel relies on the favourable comments of the judge (13.7) under the heading "Irving the Historian". The paragraph begins with the sentences:

> "My assessment is that as a *military* historian, Irving has much to commend him. For his works of military history Irving has undertaken thorough and painstaking research into the archives. He has discovered and disclosed to historians and others many documents which, but for his efforts, might have remained unnoticed for years".

That assessment is now unchallenged. We also agree with the judge that the applicant's knowledge of World War II, his mastery of detail, along with his ability and intelligence are not in doubt.

<u>The test to be applied</u>

20. In stating his conclusions on the defence of justification, the judge first set out the claims made by the respondents, their extent and the test to be applied. We set out the relevant paragraphs in full. Mr Davies accepts that in paragraphs 13.3 and 13.4 the judge has correctly stated the test to be applied.

> "13.1 The charges levelled at Irving's historiography appear to me to lie at the heart of what Lipstadt wrote about him in *Denying the Holocaust*. I propose therefore to consider first whether the Defendants have made good their claim that, in what he has written and said about the Third Reich, Irving has falsified and misrepresented the historical evidence.
>
> 13.2 There are several aspects to this. The falsification and misrepresentation alleged by the Defendants relate to (a) the specific individual criticisms of Irving's historiography which are addressed in

section v. above; (b) his portrayal of Hitler, which is dealt with at section vi.; (c) his claims in relation to Auschwitz covered in section vii. And, finally, (d) the bombing of Dresden which is dealt with in section xi.

13.3 The question which I shall have to decide is whether the Defendants have discharged the burden of establishing the substantial truth of their claim that Irving has falsified the historical record. In this connection I should repeat the caveat expressed at the beginning of this judgment: the issue with which I am concerned is Irving's treatment of the available evidence. It is no part of my function to attempt to make findings as to what actually happened during the Nazi regime. The distinction may be a fine one but it is important to bear it in mind.

13.4 If the charge of misrepresentation and falsification of the historical evidence is substantially made out, there remains the question whether it was deliberate. Irving rightly stresses that the Defendants have accused him of deliberately perverting the evidence. For their part the Defendants recognize that it is incumbent on them to establish, according to the appropriate standard of proof, that the misrepresentation and falsification were motivated by Irving's ideological beliefs or prejudices. In this context, I shall consider the submission made by Irving that he had been guilty, at worst, of making errors in his handling of the historical record. As I will explain in assessing Irving's motivation, I will also take into account the evidence of the public statements by Irving in which he allegedly denied the Holocaust; the evidence upon the basis of which the Defendants accuse him of anti-semitism and racism and the evidence of his alleged association with right-wing extremists."

The approach of this Court

21. We consider the approach which this Court should take to the judge's consideration of the evidence, his conclusions and verdict. By reference to the statement of Baggallay JA in *The Glannibanta*, already cited, Mr Davies invites the Court to weigh the conflicting evidence for itself and draw its own inferences and conclusions. We accept that there are some issues which turn upon the construction of documents where this Court is in as good, or almost as good, a position to assess the evidence as was the trial judge. We say almost as good because the comments of witnesses upon the documents and witnesses' assessment of the context in which the documents came into existence deserve weight. On the issues as a whole, the judge's assessment of the credibility and reliability of the historians was in our judgment a significant factor in the case. In the end, the judge had to consider whether the applicant was a reputable historian. In reaching his conclusion, he would inevitably have to assess the approach of the applicant to the source material he had considered and the approach of Professor Evans, the main protagonist for the respondents. The fact that each of the parties subjected the historian on the other side to detailed and lengthy cross-examination illustrates the importance of this aspect of the trial. It may have been more a question of reliability in terms of historiography than of credibility but, in deciding whether the respondents' allegations are justified, the judge who heard the oral evidence and the manner in which it was given was in a good position to assess it. Having said that, this Court can be expected to scrutinise carefully the reasoning of the judge and submissions made as to the source material on which it is based.

Procedural issues

22. An issue also arose as to the scope of the evidence which the respondents' expert witnesses, and in particular Professor van Pelt, were entitled to give. Professor van Pelt was introduced as a Professor of the History of Architecture at a Canadian university. It emerged that he was not a qualified architect and it is submitted on behalf of the applicant that Professor van Pelt should not have been allowed to give evidence on architectural questions, such as the design of the buildings at Auschwitz. He described himself as a cultural historian. It is further submitted that, even if qualified to give evidence about the design of buildings, he should not have been permitted, when questions arose as to the chemistry involved in gassing, to give evidence about that.

23. We see no merit whatever in the first of these submissions. Professor van Pelt plainly had considerable knowledge and expertise in the design of buildings and the uses to which they can be put. The absence of a professional qualification in architecture did not preclude him from giving evidence on architectural matters when the issues were those in this case. One does not have to be a qualified lawyer to express views on legal history. There must of course be a limit to the extent to which someone whose profession is that of historian can express views of his own on highly technical matters. The witness is however entitled to consult, refer to and rely on source material in support of an opinion. Military historians frequently express opinions about the effectiveness of weapons and the effect of their use in battle and can do so without their being experts, for example, in ballistics or metallurgy.

24. That being so, such force as Mr Davies's second submission may have had was destroyed by his refusal to entertain discussion of Professor van Pelt's source material. Mr Davies stated that he had not come to the hearing prepared to argue the merits of van Pelt's report. He declined to examine, for example, the documents, mentioned by the judge at 7.124, on which Professor van Pelt had relied in expressing the opinion that the quantity of coke required per corpse at Auschwitz would have been no more than 3.5 kg. Nor was he prepared to analyse the information on the basis of which the applicant had expressed the opinion that the appropriate figure was 35 kgs. This was not a subject for evidence from either party, Mr Davies submits. We reject that submission.

25. We also mention at this point that there were before the Court two applications to call fresh evidence in support of the application. The first, made well before the hearing, was to call evidence from Mr Germar Scheerer (born Rudolf), who holds a diploma in chemistry, and Mrs Zoe Polanska-Palmer, who was detained in Birkenau Camp. The respondents had prepared voluminous evidence in reply. In the event, that application to call fresh evidence was not pursued. We express our dismay at this combination of events; the preparation of very detailed evidence (exposing the respondents to great expense in preparing a reply and the members of the Court to considerable pre-hearing reading) and the withdrawal of the application.

26. We were not prepared to entertain an application made by Mr Davies in the course of the hearing that a series of photographs, said to be self-explanatory, dealing with the issues as to the Prussian blue staining of fabric exposed to hydrogen cyanide should be admitted. That was a subject considered in the proposed additional evidence it was decided not to seek permission to adduce. To permit admission of photographs alone would have been unfair and could have been very misleading.

27. The second application was made in the course of the hearing. It was wished to call evidence of the contents of a book written by Professor Evans, published early this year and known to the applicant in March. The application was not reduced to writing and we did not see the book but the allegation is that the work demonstrates Professor Evans's ill-will towards the applicant. We refused the application first on the ground of its extreme lateness, which was an important factor having regard to the allegation to be made; second on the ground that the alleged attitude of Professor Evans had already been raised at the trial and the judge had been in a position to assess, with that in mind, the lengthy evidence he had given; third on the ground that the proposed additional evidence was not, and could not be contended to be, crucial on the central issue having regard to all the material available.

Anti-semitism and racism as motivation and association with right wing extremists

28. The judge recorded (9.1) that no allegation of anti-semitism or of racism had been levelled against the applicant in *Denying the Holocaust*. The respondents claim that the applicant's alleged racism and anti-semitism "provide a motive for his falsification of the historical record" (9.1). No objection is made to the body of evidence on these subjects incorporated into the judgment (9.4 – 9.7). It is not necessary for present purposes to set out this evidence or even to summarise it. The judge was justified in saying (13.101) of the statements of the applicant recorded at 9.5 that: "His words are directed against Jews, either individually or collectively, in the sense that they are by turns hostile, critical, offensive and derisory in their references to semitic people, their characteristics and appearances." It is common ground that the material goes "to allege motive only" (paragraph 191 of notice of appeal). The judge concluded that the "inference which … is clearly to be drawn from what Irving has said and written is that he is anti-semitic." (13.105) The judge accepted that the applicant "is not obsessed with race" (13.108) but added that "he has on many occasions spoken in terms which are plainly racist". In this application, the applicant does not seek to challenge those findings which go to motive only. The respondents contend that they help to explain why a military historian with much to commend him has allegedly "falsified and misrepresented the historical evidence".

29. The judge also found (13.115) that the applicant had associated "to a significant extent" with named individuals who are "all right-wing extremists". The judge concluded that the applicant's "association with such individuals indicates in [his] judgment that Irving shares many of their political beliefs". That finding is not challenged in this application. The main point put in issue is, I repeat, the applicant's reputation as an historian.

Events in the history of the Third Reich

30. The appellant's historiography has been assessed by reference to a number of events in the history of the Third Reich. The Auschwitz issue featured prominently at the trial and in the submissions at this hearing. Mr Davies went so far as to say that if he failed on Auschwitz, in failing, that is, to show an arguable case that the applicant's views were those a reputable historian could hold, the application failed. We do not hold Mr Davies to that concession though it reflects the evidence of the applicant, as recorded by the judge (7.94), that if "anyone detected holes in the roof [morgue 1 of crematorium 2], he would abandon his libel action".

31. It is not to diminish the importance of the scale and scope of the Auschwitz issue in human terms when we say that we prefer to take a more general view of the applicant's historiography. An overall view must be taken and that requires consideration of his published

views in relation to the events in issue as a whole before a conclusion is reached. The allegation that the applicant was an "apologist for Hitler" and had the purpose of "exonerating Hitler" in any event requires consideration of issues other than the extent of gassing at Auschwitz. We concentrate on those events which have been specifically advanced by Mr Davies at this hearing and the conclusions the judge had reached upon them.

Auschwitz

32. A striking feature of this aspect of the case was that evidence and submissions as to what happened at Auschwitz included a consideration of views currently held, that is held at the time of the trial. It is striking because of the emphasis otherwise placed on behalf of the applicant on the contents of his books being assessed on the basis of evidence available at the time of publication. Having made that submission strongly, Mr Davies accepts that, in relation to Auschwitz, the respondents can succeed if they establish that, at any point in time, including the time of the trial, the applicant has adopted a position so contrary to the evidence as to be perverse. On this issue, evidence was given by both sides on the basis of evidence currently available. It is accepted that the applicant modified his position in the course of the trial.

33. The judge's conclusion (13.91) was:

> "Having considered the various arguments advanced by Irving to assail the effect of the convergent evidence relied on by the Defendants, it is my conclusion that no objective, fair-minded historian would have serious cause to doubt that there were gas chambers at Auschwitz and that they were operated on a substantial scale to kill hundreds of thousands of Jews."

34. Mr Davies submits that, having set out the correct test at paragraphs 13.3 and 13.4, the judge set out the wrong test at paragraph 13.70 when considering this issue:

> "In these circumstances the central question which, as it appears to me, falls to be determined is whether or not the evidence supports the Defendants' contention that the number of deaths ran into hundreds of thousands or whether Irving is right when he claims that the killing by gas was on a modest scale."

By using the expression "whether Irving is right", the judge has wrongly stated the issue and wrongly reversed the burden of proof, it is submitted. The conclusion reached flows from that misdirection. Secondly, submits Mr Davies, the conclusion at 13.91 is not justified by the findings at 13.71 to 13.90.

35. Until the publication of the Leuchter report, the applicant had expressed no view, submits Mr Davies, on Auschwitz. He was a specialist on the military campaigns of the Third Reich and not on extermination. Mr Fred Leuchter was expert in execution procedures including the administration of gas and it was what the applicant read in his report in 1988 that convinced him that there was no truth in the claim that Jews met their death in large numbers in gas chambers at Auschwitz. The judge set out Leuchter's findings in detail (7.79 to 7.89). Professor van Pelt dismissed the Leuchter report as flawed and unreliable. As the judge noted in his conclusions on Leuchter (13.79 and 13.80), the applicant agreed that the Leuchter report was fundamentally flawed. He accepted that a false assumption by Leuchter vitiated

Leuchter's conclusion and the applicant conceded the existence of many other factual errors in the report.

36. The applicant's case is not that the Leuchter report can now be considered reliable but that it had appeared reliable when brought to the applicant's attention in 1988 and that the applicant was acting honestly in relying on it at that time. Moreover, on the evidence available at the time of trial, it was still an issue for legitimate historical debate whether Jews had been systematically gassed at Auschwitz. The evidence for the proposition that there was mass gassing is nowhere near so strong, it is submitted, that it is perverse for the applicant to entertain doubts about it. The applicant's position is that there were no gassings at Auschwitz 1 and only random gassings at Auschwitz 2. There remain good grounds for scepticism as to what had happened at Auschwitz, it is submitted.

37. On the applicant's behalf, Mr Davies made a sustained attack upon the reliability of the evidence which led the judge to his conclusion (13.91) already quoted. There were serious doubts about the reliability of Olēre's drawings which showed, for example, the impossible event of flames 90 ft long emerging from a chimney. They could not be treated as corroborating Tauber's account. The subsequent statements of Höss, the camp commandant, could not be relied on because of obvious exaggeration. Broad was a man of flexible allegiances in that he had served first the Gestapo, and after the war the British and was unreliable. Professor van Pelt had accepted that the building at Auschwitz 1 now visited by tourists had not been used as a gas chamber during the war.

38. The judge had treated as corroboration (13.77) what could not properly so be treated and the applicant was entitled to his doubts about the eye-witness evidence. Mr Davies refers to the applicant's challenge at the trial to the evidence of Professor van Pelt that the single air photograph he had selected for use at the trial "very clearly showed that there are four introduction deliveries in morgue No 1". (Day 10, p 26, line 12). (There was an issue as to whether gas could have been introduced into the building.) It was but a single photograph, of unknown date and Professor van Pelt accepted that it was impossible to say what kind of shadow the objects cast. On the issue of the existence of chimneys protruding through the roof, the judge himself found the photographic evidence hard to interpret (13.73). He acknowledged (13.83) that the argument that there was no evidence of the presence of chimneys or ducts in the roof of morgue 1 at crematorium 2 "deserves to be taken seriously".

39. Mr Davies also relies, as did the applicant at the trial, on the absence of references to gassing in the captured records of deaths at Auschwitz. Moreover, reports from the camp to Berlin, in cypher, did not mention gassing. The cypher had, unknown to the German authorities, been broken by the British and reports were decoded at Bletchley Park. Secrecy was not maintained with respect to other methods of mass murder and there was even gloating over some atrocities, for example, by the Einsatzgruppen. A British document prepared by a senior Foreign Office official demonstrated that as late as August 1943 the Office had no evidence of mass executions in gas chambers. Had gassing occurred at Auschwitz it was surprising that there were no better records of it. The applicant was entitled to his genuine doubt as to events at Auschwitz. The applicant accepted that a very large number of people had died at Auschwitz, by other methods of killing and as a result of disease. His refusal to accept the systematic use of gas chambers to kill large numbers of Jews could not be described on the evidence as perverse.

40. That the judge considered carefully the evidence and the submissions of the applicant at the trial is clear:

> "13.73 I recognise the force of many of Irving's comments upon some of those categories. He is right to point out that contemporaneous documents, such as drawings, plans, correspondence with contractors and the like, yield little clear evidence of the existence of gas chambers designed to kill humans. Such isolated references to the use of gas are to be found amongst these documents can be explained by the need to fumigate clothes so as to reduce the incidence of diseases such as typhus. The quantities of Zyklon-B delivered to the camp may arguably be explained by the need to fumigate clothes and other objects. It is also correct that one of the most compromising documents namely Bischoff's letter of 28 June 1943 setting out the number of cadavers capable of being burnt in the incinerators, has a number of curious features which raise the possibility that it is not authentic. In addition, the photographic evidence for the existence of chimneys protruding through the roof of morgue 1 at crematorium 2 is, I accept, hard to interpret.
>
> 13.74 Similarly Irving had some valid comments to make about the various accounts given by survivors of the camp and by camp officials. Some of those accounts were given in evidence at the post-war trials. The possibility exists that some of these witnesses invented some or even all of the experiences which they describe. Irving suggested the possibility of cross-pollination, by which he meant the possibility that witnesses may have repeated and even embellished the (invented) accounts of other witnesses with the consequence that a corpus of false testimony is built up. Irving pointed out that parts of some of the accounts of some of the witnesses are obviously wrong or (like some of Olere's drawings) clearly exaggerated. He suggested various motives why witnesses might have given false accounts, such as greed and resentment (in the case of survivors) and fear and the wish to ingratiate themselves with their captors (in the case of camp officials). Van Pelt accepted that these possibilities exist. I agree".

(We were told that the author of the letter of 28 June 1943 was Bischoff and not Muller as stated in the judgment handed down. We were also told that a correction was made at the time of handing-down.)

41. The contentions of the parties, and the evidence relied on, are fully set out both in section (v) of the judgment and in section (xiii). The judge summarised the respondents' case (13.73) as being "that there exists what van Pelt described as a "convergence" of evidence which is to the ordinary, dispassionate mind overwhelming that hundreds of thousands of Jews were systematically gassed to death at Auschwitz."

42. The judge stated (13.72) that it appeared to him to "be important to keep well in mind the diversity of the categories [of evidence] and the extent to which those categories are mutually corroborative". The judge set out a summary of the documentary evidence and the eye-witness evidence. He stated (13.75) that "it appears to me that the cumulative effect of the documentary evidence for the genocidal operation of gas chambers at Auschwitz is

considerable". As to the eye-witness evidence, he stated that while he acknowledged "that reliability of the eye-witness evidence is variable, what is to me striking about that category of evidence is the similarity of the accounts and the extent to which they are consistent with the documentary evidence". The judge concluded:

> "13.78 My conclusion is that the various categories of evidence do 'converge' in the manner suggested by the Defendants. I accept their contention which I have summarised in paragraph 7.75 above. My overall assessment of the totality of the evidence that Jews were killed in large numbers in the gas chambers at Auschwitz is that it would require exceedingly powerful reasons to reject it. Irving has argued that such reasons do exist."

43. Following that provisional conclusion, the judge set out the reasons relied on by the applicant, the Leuchter report, the alleged absence of holes in the roof of morgue 1 of crematorium 2, the case that gas chambers were required for fumigation purposes or (on re-design) to serve as air-raid shelters and the arguments relating to "death books", decrypts and coke consumption. In relation to the holes in the roof, the judge concluded (13.83) that "an objective historian, taking account of all the evidence, would conclude that the apparent absence of evidence of holes in the roof of morgue at crematorium 2 falls far short of being a good reason for rejecting the cumulative effect of the evidence on which the Defendants rely". In relation to the use of gas chambers for other purposes, he concluded (13.86) that he cannot accept "that this argument would come anywhere near displacing the conclusion to be drawn from the convergent evidence relied on by the Defendants for their contentions as to the object of the redesign work". The other points did not impress the judge and he added that he did not "consider that they would have impressed a dispassionate historian either". In relation to "death books", the judge referred to the unchallenged evidence of a large number of witnesses that "the books record only the deaths of those who were formally registered as inmates of the camp. The Jews who were selected on arrival to die were taken straight to the gas chambers without being registered. One would not therefore expect to find mention of the cause of death of those Jews in the death books". (13.88).

44. In relation to camp reports, the judge concluded:

> "13.89 Reports were sent regularly from the camp to Berlin in cypher. They were intercepted and decoded at Bletchley Park. Although these reports often gave the cause of death, they did not mention gassing. In my judgment there are two reasons why little significance is to be attached to this: the first is that there was a strict rule of secrecy about the gassing and the second is that, like the death books, these reports related to registered inmates only".

Conclusion on Auschwitz

45. Having reached those conclusions, the judge set out his general conclusion at 13.91 already cited. We acknowledge that important parts of the evidence relied on by the judge were not first-hand evidence. For example, he did not and could not hear the "eye-witness evidence" of

Tauber, Olēre, Höss and Broad, on whom he relied. He had to assess the value of their evidence on the basis of statements made by them many years ago together with the comments upon them and upon their context by expert historians. This has two consequences. The first is that the value of the evidence of any individual "witness" must be less than if he or she had given evidence orally to the Court and been subject to cross-examination. The second is that, as compared with the trial judge, this Court is at less of a disadvantage in assessing the evidence than is often the case. We bear those considerations in mind along with the earlier statement of the approach we proposed to adopt. (para 21) Having considered the evidence summarised by the judge, and the submissions of the parties we have come to the conclusion that the conclusion of the judge at 13.91 was a conclusion he was fully entitled to reach.

46. We are also satisfied that the judge directed himself correctly. At 13.70, already cited, the judge was doing no more than identifying the factual issue at Auschwitz, what he described as "the central question". He needed to do so because the applicant's position at trial on Auschwitz had changed significantly from those he had previously adopted. At the trial, he put in issue, as Mr Davies had rightly acknowledged, his up-to-date position. It was necessary for the judge to identify the applicant's current position on the factual issue, as he did at 13.70, by referring to the applicant's claim "that the killing by gas was on a modest scale". That the applicant's position had been different at an earlier time is confirmed by the record of his public statements set out in the judgment (8.17). We cite three examples:

> Dresden, 13 February 1990: "… the holocaust of Germans in Dresden really happened. That of the Jews in the gas chambers at Auschwitz is an invention. I am ashamed to be an Englishman."
>
> Toronto, 8 November 1990: "… more people died on the back seat of Senator Edward Kennedy's motor car at Chappaquiddick than died in the gas chamber at Auschwitz."
>
> Calgary, 29 September 1991: "… and so are the other eye-witnesses at Auschwitz [liars] who claim they saw gassings going on because there were no gas chambers in Auschwitz as the forensic tests show."

47. The judge's self-direction as to the test to be applied to the applicant's historiography, the factual issue having been determined, is set out at 13.3 and 13.4, which Mr Davies accepts as an appropriate direction, and we have no doubt that the judge applied it when reaching the conclusion at 13.91.

The applicant's historiography

48. Under the heading "The specific criticisms made by the defendants of Irving's historiography", the judge set out (5.16 to 5.245) the submissions of the parties as to views expressed by the applicant on 18 events in the history of the Third Reich. The judge's conclusions upon the submissions are set out at 13.9 to 13.50 of the judgment. At 13.51, as well as 13.9, the judge expressed general conclusions. Mr Davies has challenged those conclusions by making submissions upon the judge's consideration of the applicant's views upon some of the events of greater significance.

Hitler's trial in 1924 and crime statistics for Berlin in 1932

49. Neither party was disposed to attach much importance to the applicant's views on these events or to the judge's conclusions. Mr Davies refers to the judge's statement (13.12) that "Irving

ought to have appreciated that Hofmann's allegiance to Hitler rendered his testimony untrustworthy". The manner in which the applicant had sought to explain his approach to Hofmann's testimony, summarised by the judge at 5.27, certainly justifies that finding, in our view. However, submits Mr Davies, that was far from a finding of perversity. The same can be said, submits Mr Davies, of the judge's conclusion in relation to 1932 (13.13): "Whilst I am sympathetic to Irving's handicap in being unable to obtain access to documents in the German archives, I am not persuaded that there exist documents which justify Irving in quoting without any reservation the claim made by Daluege [that in 1930 a strikingly large proportion of offences of fraud in Germany were committed by Jews]". That conclusion reverses the burden of proof, it is submitted, and in any event certainly cannot be regarded as a finding of perversity.

The events of Kristallnacht (November 1938)

50. The importance of the events on 9 and 10 November 1938 in the history of the Third Reich and hence the importance of the manner in which the applicant dealt with them was not disputed by Mr Davies. As the judge put it:

> "13.14 It was, I believe, common ground between the parties that *Kristallnacht* marked a vital stage in the evolution of the Nazis' attitude towards and treatment of the Jews. It was the first occasion on which there was mass destruction of Jewish property and wholesale violence directed at Jews across the whole of Germany. As an historian of the Nazi regime, it was therefore important for Irving to analyse with care the evidence how that violence came about and what role was played by Hitler."

51. In *Goebbels*, (p 276-277), the applicant described the events in these terms:

> "What of Himmler and Hitler? Both were totally unaware of what Goebbels had done until the synagogue next to Munich's Four Season Hotel was set on fire around one A.M. Heydrich, Himmler's national chief of police, was relaxing down in the hotel bar; he hurried up to Himmler's room, then telexed instructions to all police authorities to restore law and order, protect Jews and Jewish property, and halt any ongoing incidents. The hotel management telephoned Hitler's apartment at Prinz-Regenten Platz, and thus he too learned that something was going on. He sent for the local police chief, Friedrich von Eberstein. Eberstein found him livid with rage.
>
> According to Luftwaffe adjutant Nicolaus von Below, Hitler phoned Goebbels, 'What's going on?' he snapped, and: 'Find out!'
>
> According to Julius Schaub, the most intimate of his aides, Hitler 'made a terrible scene with Goebbels' and left no doubt about the damage done abroad to Germany's name. He sent Schaub and his colleagues out into the streets to stop the looting (thus Schaub's postwar version). Philipp Bouhler, head of the Fuhrer's private chancellery, told one of Goebbels' senior officials that Hitler utterly condemned the progrom and intended to dismiss Goebbels. Fritz Wiedemann, another of Hitler's adjutants, saw Goebbels spending

> much of the night of November 9-10 'telephoning … to halt the most violent excesses.' At 2.56 A.M. Rudolf Hess's staff also began cabling, telephoning, and radioing instructions to gauleiters and police authorities around the nation to halt the madness. But twenty thousand Jews were already being loaded onto trucks and transported to the concentration camps at Dachau, Buchenwald, and Oranienburg. Hitler made no attempt to halt this inhumanity. He stood by, and thus deserved the odium that now fell on all Germany.
>
> Goebbels had anticipated neither Hitler's fury nor, probably such an uncontrollable, chaotic orgy of destruction. Not surprisingly he made no reference to this unwelcome turn of events in his diary. But perhaps this, rather than Lida Baarova, was the reason why he would write this *mea culpa* to Hitler six years later: 'In the twenty years that I have been with you, particularly in 1938 and 1939, I have occasioned you much private grief.' Ribbentrop relates that when he tackled Hitler about the damage Goebbels had done, Hitler rejoined that this was true, but he could not let the propaganda minister go – not when he was just about to need him again."

52. It is not disputed that the judge was entitled to have regard to the contents of *Goebbels* when considering whether the defence of justification was established notwithstanding the fact that its publication (1996) post-dated that of Professor Lipstadt (1994). In *Cohen v Daily Telegraph Ltd* [1968] 1 WLR 916, Lord Denning, at p 919, cited *Maisel v Financial Times Ltd* [1915] 3 KB 336 and *Godman v Times Publishing Co Ltd* [1926] 2 KB 273 and stated:

> "Those cases show that, in order to prove that the words are true, particulars can be given of subsequent facts which go to support the charge. Thus, if a libel accuses a man of being a 'scoundrel,' the particulars of justification can include facts which show him to be a scoundrel, whether they occurred before or after the publication."

53. Mr Davies makes the point, when dealing with this and other events, that the relevant passage in the applicant's publication is a very small part of the whole. In this case, it is less than a page in a book of over 500 pages plus over 150 pages of "notes to sources". Notwithstanding the brevity of the passage, the judge was entitled to hold that the light it throws upon the approach of the applicant to important historical events is important.

54. In our judgment, the judge's summary of the effect of that passage in *Goebbels* is apt:

> "13.15 Readers of the account in *Goebbels* of the events of 9 and 10 November 1938 were given by Irving to understand that Hitler bore no responsibility for the starting of the pogrom and that, once he learned of it, he reacted angrily and thereafter intervened to call a halt to the violence."

55. The judge considered the evidence on which the applicant relied and stated that in his view (13.17) the applicant ought to have approached the accounts he was given by Hitler's adjutants many years after the event "with considerable scepticism and rejected them where they

conflict with the evidence of the contemporaneous documents both before and after 1am on 10 November". Having made other findings adverse to the applicant, the judge concluded (13.18) that:

> "The claim that during that night Hitler did everything he could to prevent violence against the Jews and their property is in my judgment based upon misrepresentation, misconstruction and omission of the documentary evidence."

56. Mr Davies submits that it is not perverse to prefer oral to documentary evidence. An historian is entitled to a very broad measure of judgment. The point at which Mr Davies attacks the judge's analysis of *Kristallnacht* is in an alleged failure by the judge to appreciate in his conclusions the significance of a telegram emanating from Gestapo Headquarters at 3.45am (the Bartz telegram). It is referred to at footnote 49, one of eight footnotes to the relevant account in *Goebbels*, though not in the text. However, it emerged, that the applicant himself had not mentioned it in the course of his evidence, when it could have been the subject of analysis and cross-examination, but only in his closing submissions. Even had it been subject to debate in the course of the trial, and having regard to its timing, it is difficult to see what doubt it could have cast upon the judge's conclusions on this issue.

57. The judge analysed the evidence carefully. His reference to documentary as against oral evidence was not a generalisation but a view upon the particular facts of the case. The documents were contemporaneous; the oral account of Hitler's adjutants were given "many years after the event". The judge concluded (13.16) that "an objective historian would in my view dismiss the notion that Hitler was kept in ignorance until a relatively late stage." He added (13.17) that "to write, as Irving did, that Hitler was 'totally unaware of what Goebbels had done' is in my view to pervert the evidence."

58. Mr Davies, on this and other factual issues, has been unable to cast significant doubt upon the judge's conclusions on the evidence. The judge accepted, and was entitled to accept, Professor Evans' construction of the telex sent by Hess at 2.56am. He said that the order read (5.60):

> "On express orders from the very highest level, acts of arson against Jewish shops and the like are under no circumstances and under no conditions whatsoever to take place."

That, the judge concluded (13.18), "was not a general instruction to 'halt the madness' [as described in *Goebbels* p 277] but rather to stop acts of arson against Jewish shops and the like, so permitting other acts of destruction to continue and Jewish homes and synagogues to be set on fire."

<u>The shooting of the Jews in Riga</u>

59. The judge concluded that a total of about 5,000 Jews were shot in Riga on 30 November 1941. General Bruns had then been a colonel stationed in Riga. In captivity in 1945, he was surreptitiously recorded as saying that a junior officer named Altemeyer had told him that the Jews were to be shot in accordance with the Fuhrer's orders but that Altemeyer showed Bruns another order "prohibiting mass shootings on that scale from taking place in future. They are to be carried out more discreetly". In *Hitler's War*, (American edition), the applicant referred

to the order as Hitler's "renewed orders that such mass murders were to stop forthwith". No reference was made to the words "on that scale" or to the words "they are to be carried out more discreetly".

60. The judge concluded (13.24) that the applicant had "perverted the sense of Bruns's account". Mr Davies submits that the reason the applicant treated the evidence in the way he did was that there was contemporary corroborative evidence, for example a signal from Himmler and the fact that the shootings did stop for many months. There was corroboration for the first part of Bruns's statement but there was not a shred of corroboration for the suggestion that "the shootings are to be carried out [that is to continue] more discreetly". We are entirely unpersuaded by that argument. The judge held (13.24) that "an objective historian is obliged to be even handed in his approach to historical evidence: he cannot pick and choose without adequate reason". The alleged absence of corroboration for one part of an account which clearly bears upon and is related to the other part does not justify the selectivity involved in failing to mention the uncorroborated part at all. Had the applicant cited the whole of the passage, he may fairly have been able to add the comment now relied on in expressing his overall view. To fail to refer at all to one part is, as the judge found, a perversion of the sense of Bruns's account.

The Schlegelberger note

61. The judge introduced the issue in this way:

> "5.151 One central document cited by Irving in support of his case that Hitler consistently intervened to mitigate the harm sought to be done to the Jews is a note said to have been dictated by an official in the Reich Ministry of Justice, namely, Schlegelberger, which is undated but which is claimed to have come into existence in the spring of 1942, which records what he has been told by Lammers, a senior civil servant at the *Reichskanzlerei*:
>
> > '*Reichsminister* informed me that the *Fuhrer* has repeatedly declared to him that he wants to hear that the solution to the Jewish question has been postponed until after the war is over'.
>
> That note, says Irving, is incompatible with the notion that Hitler authorised or condoned the wholesale extermination of Jewry during the war."

Mr Davies submits that the note is central to the appeal on the facts. It is an authentic record of Hitler's thinking on the Jewish question and so of seminal importance. At the trial, the applicant referred to it as a "high-level diamond document" (13.33).

62. The respondents' case, also made by Mr Rampton at this hearing, was that the Schlegelberger note made no sense against the background of the events of 1942 which included the mass transportation of Jews from Western and Central Europe. The respondents sought to cast doubt upon the date of the document and the circumstances in which it came into existence so as to question whether any weight could be given to its contents. Even if it did accurately record a statement of Hitler's views in March 1942, it was likely to be his view not on the Jewish question generally but on the narrower issue of mixed marriages between Jews and Gentiles and the children of such marriages (Mischlinge) (5.155). That question had been

discussed at the Wannsee Conference in January 1942 and again discussed at a further conference on 6 March 1942. The allegation against the applicant is that no reputable and objective historian would in the circumstances admit only one possible interpretation of the note.

63. The judge was prepared to assume that the note was a 1942 document but concluded (13.35) that:

> "it is (to put it no higher) very doubtful if the Schlegelberger note is evidence of a wish on the part of Hitler to postpone the Jewish question until after the war, that is, to take no offensive action against them of any kind until after the cessation of hostilities. I do not believe that Irving was able to provide a satisfactory answer to the Defendants' question: why should Hitler have decided suddenly in March 1942 to call a halt to a process which had been going on with his authority on a massive scale for at least six months. I am persuaded that, for the reasons advanced by Evans, it is at least equally likely that the note is concerned with the complex problems thrown up by the question how to treat half-Jews (*Mischlinge*)".

64. The judge went on to state that if the respondents' explanation of the note is correct "the note does not possess the significance which Irving attaches to it".

65. The judge's conclusion was:

> "13.36 I do not regard the arguments advanced by Irving, which I have set out at paragraphs 5.165-7, as being without merit: they are worthy of consideration. But I do consider the Defendants' criticism to be well-founded that Irving presents the Schlegelberger note as decisive and incontrovertible evidence (see *Hitler's War* at p 464) when, as he should have appreciated, there are powerful reasons for doubting that it has the significance which he attaches to it. Irving's perception of the importance of the note appears to take no account of the mass murder of the Jews which took place soon afterwards."

66. That conclusion was stated in the context of the judge's earlier opinion (13.32) that "Irving's treatment of the Schlegelberger note and the importance which he attaches to it shed important light on the quality of his historiography". It is clear that the judge has not fully accepted the respondents' attempt to diminish the value of the note. The judge regarded the issues surrounding the note as "worthy of consideration". The criticism of the applicant's historiography is based on the applicant having presented the note as "decisive and incontrovertible evidence". We have been referred, as was the judge, to the applicant's references to the note in his books and speeches. In *Hitler's War* (1991, p 18) the applicant stated: "Whatever way one looks at this document it is incompatible with the notion that Hitler had ordered an urgent liquidation program". In *Hitler's War* (1991), p 464, Lammers' statement in the note is said to be "highly significant". In *Goebbels* (1996), p 388:

> "Hitler wearily told Hans Lammers that he wanted the solution of the Jewish problem postponed until after the war was over – a ruling that remarkably few historians now seem disposed to quote".

67. In a speech to the Institute for Historical Review in 1983, the applicant referred to the note as "the most cardinal piece of proof in this entire story of what Hitler knew about what was going on". At Toronto on 13 August 1988 the applicant referred to the note as the "most compelling document" that Hitler did not know about the extermination of the Jews. He added that "there is no clearer proof than that one document".

68. The judge's use of the expression "decisive and incontrovertible evidence" was a paraphrase of what he considered to be the applicant's views. As such, it was somewhat too strong, in our view. The judge was however correct, in our judgment, both in his view that the applicant's treatment of the note sheds light on the quality of the applicant's historiography and in the substance of his eventual conclusion. A reputable historian would have let his readers and listeners know of the problems involved in assessing the value and effect of the Schlegelberger note and would not have used the language he did. The particular relevance of the issue is that it bears upon the role in events of Hitler himself, an important issue between the parties.

69. Mr Davies urges us not to judge the applicant as a "platform speaker". The fact that some of the strong statements just cited were made in public speeches rather than in written publications does not, in our judgment, greatly lessen their significance in present circumstances. Where, as in some of the instances we have had to consider, the charge is one of incomplete treatment of a range of evidence, it would not be right to demand too stringent a standard of comprehensiveness in formal lectures. Where, however, as with the Schlegelberger note, the charge is the promotion of historical claims on the basis of evidence that the applicant should have known was questionable to the extent that it could not be used in support of those claims without qualification, it seems to us that the conduct is equally open to criticism whether it takes place in a public speech or within the confines of a work of scholarship. In the speeches to which we have been referred, the applicant was presenting himself as a professional historian, entitled to speak as such and entitled to be given credence as such.

<u>Goebbels diary entry for 27 March 1942</u>

70. Under this heading in the judgment, two overlapping but distinct issues arise. The first, and it is the one which the judge identified at 5.172, is "the manner in which Irving deals with the question of when Hitler was aware of the policy of exterminating Jews". The judge's conclusion (13.38) dealt with that issue but also a second issue, whether the applicant's treatment in *Hitler's War* (both editions) of Goebbels diary entry for 27 March 1942 is misleading. The diary entry has to be considered against the "common ground" identified by the judge (5.172). As the judge put it (5.171): the "*Einsatzgruppen* set about the systematic killing of Soviet Jews [in 1941]. In about the autumn of 1941 the extermination policy was extended to Jews in the area of the General Government. The gassing of Jews commenced in December 1941 at an extermination centre called Chelmno in the Warthegau; the latter being an area containing territory incorporated into the *Reich* after the conquest of Poland …"

71. The respondents' case at the trial was that the applicant's claim that Goebbels deceived Hitler, by concealing from him the reality of what was happening in the death camps, was wrong. The judge concluded first (13.37) that the manner in which the applicant dealt with the diary entry in *Hitler's War* (both editions) was "misleading and unsupported by the circumstantial evidence" (13.37). Secondly, he did not "accept that the evidence of the circumstances as they existed in March 1942 lends support to Irving's claim that Goebbels concealed from Hitler the reality of what was happening in the death camps" (13.38).

72. The diary entry was (5.174):

> "The Jews are now being pushed out of the General Government, beginning near Lublin, to the East. A pretty barbaric procedure is being applied here, and it is not to be described in any more detail, and not much is left of the Jews themselves. In general one may conclude that 60% of them must be liquidated, while only 40% can be put to work. The former *Gauleiter* of Vienna [Globocnik], who is carrying out this action, is doing it pretty prudently and with a procedure that doesn't work too conspicuously. The Jews are being punished barbarically, to be sure, but they have fully deserved it. The prophesy that the *Fuhrer* issued to them on the way, for the eventuality that they started a new world war, is beginning to realise itself in the most terrible manner. One must not allow any sentimentalities to rule in these matters. If we did not defend ourselves against them, the Jews would annihilate us. It is a struggle for life and death between the Aryan race and the Jewish bacillus. No other government and no other regime could muster the strength for a general solution of the question. Here too the *Fuhrer* is the persistent pioneer and spokesman of a radical solution, which is demanded by the way things are and thus appears to be unavoidable. Thank God during the war we have a whole lot of possibilities which were barred to us in peacetime. We must exploit them. The ghettos which are becoming available in the General Government are now being filled with the Jews who are being pushed out of the *Reich*, and after a certain time the process is then to renew itself here. Jewry has nothing to laugh about …".

73. On this issue, the judge expressed his two conclusions in summary form. In our judgment they are both justified. In Hitler's *War* (1991 p 464-5), the applicant wrote:

> "Dr Goebbels, agitating from Berlin, clearly hoped for a more speedy and ruthless solution, although he held his tongue when meeting his Fuhrer. On March 19 he quoted in his diary only this remark by Hitler: 'The Jews must get out of Europe. If needs by, we must resort to the most brutal methods.' That Goebbels privately knew more is plain from his diary entry of the twenty-seventh. 'Beginning with Lublin,' he recorded, 'the Jews are being pushed out eastward from the Generalgouvernement. A barbaric and indescribable method is being employed here and there's not much left of the Jews themselves. By and large you can probably conclude that sixty percent of them have to be liquidated, while only forty percent can be put to work.' Dr Goebbels recorded further that the Trieste-born SS Brigadier Odilo

> Globocnik, the former Gauleiter of Vienna, was performing this task carefully and unobtrusively. As fast as the ghettos of the Generalgouvernement were being emptied, they were being refilled with the Jews, deported from the Reich, and the cycle started over again. 'The Jews have nothing to laugh about now,' commented Goebbels. But he evidently never discussed these realities with Hitler. Thus this two-faced minister dictated, after a further visit to Hitler on April 26, 'I have once again talked over the Jewish question with the Fuhrer. His position on this problem is merciless. He wants to force the Jews right out of Europe … At this moment Himmler is handling the major transfer of Jews from the German cities into the eastern ghettos'."

The diary entry is quoted in the context of a passage in which the applicant stated that Goebbels "held his tongue when meeting his Fuhrer", that Goebbels " evidently never discussed these realities with Hitler" and that Goebbels was "a two-faced minister". Hitler and Goebbels had met, the judge found, on the day before the diary entry. (It is agreed that the date of 29 March stated at 5.174 should be 26 March.) The failure of the applicant, in a passage the theme of which was that Goebbels was keeping Hitler in ignorance of the realities, to refer to the second part of the diary entry of 27 March justified the judge's conclusion (13.38) "that the way in which Irving deals with this diary is tendentious and unjustified". In the course of that passage it had been stated that "here too the Fuhrer is the persistent pioneer and spokesman of a radical solution".

74. The judge also considered (13.38) whether "evidence of the circumstances as they existed in March 1942" lent support to the claim that "Goebbels concealed from Hitler the reality of what was happening in the death camps". The judge recognised that the applicant was justified in his claim that Goebbels was often mendacious in his diary entries and that the entries have to be scrutinised in the light of surrounding circumstances. It was in that context that the judge stated that he did not consider that "Irving was able to point to evidence which controverted the contention of the defendants that by March 1942 the 'radical solution' favoured by Hitler was extermination and not deportation". Mr Davies submits that in that sentence the judge reversed the burden of proof. It was for the respondents to establish that it could not rationally be suggested that Goebbels concealed the reality from Hitler and not for the applicant to establish that Hitler did not know. If that statement in the judgment were to be taken in isolation, the submission would be correct. The point arose however in the context of whether the applicant's treatment of the diary entry was a fair and rational one. In putting the criticised point in the way he did, the judge was, in the applicant's favour, expressing his willingness to consider whether what he had found was "misleading" treatment of the diary entry might be rendered fair treatment by evidence of surrounding circumstances.

75. The issues of Hitler's knowledge and of treatment of a diary entry became intertwined in this part of the judgment in a somewhat complex way. We do however agree with the conclusion of the judge, already stated, on each of them.

76. The point is fairly made that historians, especially those as assiduous in their research as the applicant, are constrained by space in their citation of source documents. On an issue as important as Hitler's knowledge of realities of the Third Reich, however, an historian who claims that Hitler was kept in ignorance by one of his chief ministers whom he met regularly,

was required to place before his readers a fuller account of an important and relevant diary entry made a day after one of the meetings.

Hitler's meeting with Antonescu and Horthy in April 1943

77. The judge regarded this issue as important in assessing the applicant's historiography. In 1943 there were in Hungary some 750,000 Jews. The Nazis brought pressure on the Hungarian government to deport them and the Hungarians were reluctant to comply. Meetings between Hitler and Admiral Horthy, leader of the Hungarian government took place on 16 and 17 April 1943. The Hungarians refused to hand over the Jews and Hungary was subsequently invaded and occupied by the Germans.

78. While the judge found that the applicant's account of Hitler's meeting with Antonescu, military dictator of Romania on 12/13 April 1943 was misleading we regard the judge's only relevant finding on this issue to be that the applicant "materially perverts the evidence of what passed between the Nazis and Horthy on 17 April" (13.44). There was evidence that at the meeting on 16 April Hitler sought to persuade Horthy to agree to the expulsion of the Hungarian Jews but reassured him that there would be no need to kill them. On 17 April, Hitler and Ribbentrop expressed themselves more explicitly. The judge accepted that the minutes taken by officials at both meetings were reliable. The judge found that, on 17 April, both Hitler and Ribbentrop "spoke in uncompromising and unequivocal terms about their genocidal intentions in regard to the Hungarian Jews". Hitler is recorded as having said (5.204):

> "If the Jews [in Poland] didn't want to work, they were shot. If they couldn't work, they had to perish. They had to be treated like tuberculosis bacilli, from which a healthy body can be infected. That was not cruel; if one remembered that even innocent natural creatures like hares and deer had to be killed so that no harm was caused. Why should one spare the beasts who wanted to bring us bolshevism? Nations who did not rid themselves of Jews perished".

79. That statement is quoted in *Hitler's War* but is followed by the statement:

> "But they can hardly be murdered or otherwise eliminated". [Horthy] protested. Hitler reassured him: "There is no need for that."

80. The judge stated (13.44) that he was not persuaded "that Irving had any satisfactory explanation for this transposition from 16 to 17 April of Hitler's comforting remark, made on 16 April, that there was no need for the murder or elimination of the Hungarian Jews".

81. Mr Davies asks the Court to consider afresh whether the transposition was innocent and whether, taken in isolation, the transposition can bear upon the applicant's historiography. The judge concluded (13.44) that in his judgment "Irving materially perverts the evidence of what passed between the Nazis and Horthy on 17 April". We see no reason to doubt that conclusion. It has a significant bearing upon the attitude of Hitler to Jewish questions and upon the applicant's approach to Hitler's involvement.

Deportation and murder of the Roman Jews in October 1943

82. The issue on this point is a narrow one. The SS Chief in Rome received an order to transfer 12,000 Roman Jews to Northern Italy where they would be liquidated. The matter was referred to Hitler's headquarters and the order came back that these Jews were to be taken to a concentration camp in upper Italy named Mauthausen to be held there as hostages rather than be liquidated as had been ordered by Himmler. In *Hitler's War* (1977, p 575) the applicant said of this that "again Hitler took a marginally 'moderate' line". The judge held (13.45) that since the Roman Jews were to be at the mercy of the SS, it was "specious for Irving to argue, as he did, that Hitler's intervention was for the benefit of the Roman Jews". The judge added that it was "a culpable omission on Irving's part not to inform his readers that these Jews were ultimately murdered". The Court was told that a statement that they had been "liquidated" was included in the 1977 edition but omitted in the 1991 edition.

83. In isolation, we do not consider this finding to be of the greatest significance but it does assist in establishing the pattern alleged by the respondents of the applicant portraying Hitler as sympathetic towards the Jews. The word "moderate" is a curious one in circumstances in which Jews were to be held by the SS, especially in the context of the 1991 edition in which the reference to the liquidation of the Jews is omitted.

Himmler's speeches of 6 October 1943 and 5 and 24 May 1944

84. It was common ground that in these speeches Himmler was speaking with remarkable frankness about the murder of the Jews and that, with effect from October 1943, it had to be conceded that Hitler cannot have been ignorant of the extermination programme. In the second speech, referring to the Jewish question, Himmler referred to carrying out "the soldierly order" and in the third speech to "orders" and to his "sense of duty". The respondents' case was that the speeches provided powerful evidence that Hitler ordered that the extermination of the Jews should take place. In *Hitler's War* (1977), the applicant commented on the reference to a "Fuhrer Order" in the speech of 5 May and stated that "there is reason to doubt that he [Himmler] showed this passage to his Fuhrer". The judge described this suggestion as "fanciful" and regarded the absence of any mention of the speech in *Hitler's War* (1991) as "another culpable omission". We agree with the judge's conclusions on this issue.

Ribbentrop's testimony

85. In an endnote to *Hitler's War* (1977) the applicant stated:

> "Writing on Hitler in his Nuremberg prison cell, Ribbentrop also exonerated him wholly. 'How things came to the destruction of the Jews, I just don't know as to whether Hitler began it, or Hitler put up with it, I don't know. But that he ordered it I refuse to believe, because such an act would be wholly incompatible with the picture I always had of him'."

The following words in that record was omitted. They were:

> "On the other hand, judging from his Last Will, one must suppose that he at least knew about it, if, in his fanaticism against the Jews, he didn't also order [it]".

86. The applicant argued that the omitted passage cried out to be cut out (5.239). It was mere supposition on Ribbentrop's part or, as Mr Davies puts it, "merely speculation".

87. Ribbentrop was of course Foreign Minister in the Third Reich and his views were important to any assessment of Hitler's knowledge of events in the Third Reich. The applicant's submissions are not to the point which is of misleading selectivity in the context of the account in *Hitler's War*. We agree with the judge (13.48) that "there is an obligation on them [historians] not to give the reader a distorted impression by selective quotation" and that the applicant had failed "to observe this duty". The suggestion that Ribbentrop "wholly exonerated" Hitler is entirely inconsistent with the record read as a whole.

The Bombing of Dresden

88. The respondents contended at the trial that in his book *The Destruction of Dresden* (1963) the applicant has, amongst other things, distorted and twisted historical facts and "misrepresented the facts as they appear from the available evidence" (11.5). A revised edition of the book appeared in 1996. The principal issue is in relation to the number of those killed in Allied air raids on 13 and 14 February 1945. Since 1963 different figures have been given by the applicant in his books and speeches.

89. Mr Davies describes this issue as a "peripheral issue" and a "side issue". It is common ground that the evidence has nothing to do with Hitler's policy towards the Jews. We do not propose to set out the careful and comprehensive summary of the evidence by the judge or his analysis. The analysis amounts to a serious criticism of the applicant's historiography by way of his treatment of documents, his reliance on estimates by unidentified individuals, his disregard for apparently credible evidence and in continuing to make "grossly inflated claims as to the number of casualties" in a subsequent edition of the book and in speeches. The judge referred (13.124) to the accumulation of evidence that the true death doll was within the bracket of 25-30,000 and that the "estimates of 100,000 and more deaths which Irving continued to put about in the 1990's lacked any evidential basis and were such as no responsible historian would have made" (13.126).

90. Mr Davies refers to a letter from the applicant published in the Times on 7 July 1966. It purported to set the record straight by reference to reports prepared by the East German authorities. The existence of the letter makes all the more surprising the subsequent assertions to which the judge referred. The applicant has failed to cast doubt upon the judge's conclusion on this part of the case which we regard as a significant and warranted attack upon the applicant's historiography.

Holocaust denial

91. This issue has taken a very subsidiary place at the hearing and in our judgment rightly so. It can be dealt with briefly. The expression "Holocaust denial" has achieved currency because of claims that the Holocaust did not occur and books written in reaction to those claims. Professor Lipstadt's book is entitled "*Denying the Holocaust*" and bears the sub-title "*The Growing Assault on Truth and Memory*". The first words in the preface to the original edition are: "When I first began studying holocaust denial …". In his conclusion on meaning the judge by inference defined the Holocaust as the "deliberate planned extermination of Jews" "embarked upon" by the Nazis.

92. The judge was entitled to hear Professor Evans's view upon the meaning of the expression. We are not persuaded that the expression can be given any precise technical meaning or that "Holocaust denier" defines a class of persons precisely. Having regard to the views expressed by the applicant about a range of events in the history of the Third Reich, we agree with the judge that the applicant may be described as a Holocaust denier. We acknowledge that he has over the years modified, and in some respects significantly modified, his views upon some of the relevant events. However, the respondents were justified in describing him as "one of the most dangerous spokespersons for Holocaust denial" having regard to the views he has expressed and in some respects persisted in, and the manner and force with which he has expressed them. The use of the word "dangerous" was justified by reason of his historiographical methods considered by the judge and in this judgment.

Hitler as a friend

93. Mr Davies submits that the judge has misunderstood the applicant's position when attributing to the applicant the opinion that "Hitler was a friend of the Jews" (13.11). Mr Davies submits that the applicant has never expressed that opinion and goes as far as to say that no reputable historian could possibly say such a thing. What the applicant has claimed is that Hitler was the best friend the Jews had in the Third Reich and that, submits Mr Davies, was to damn Hitler with faint praise. What the applicant was concerned to do was to distinguish, in Hitler's favour, Hitler's position from that of Himmler and other ministers and agencies of the state.

94. We have not found or been referred to a statement in the terms recorded by the judge, and proceed on the basis advocated by Mr Davies. Indeed it was on that basis that the trial was conducted and the application made. What the applicant has sought to do in submissions on many of the events considered by the judge and in this judgment is in different ways to minimise Hitler's role in events involving the Jews. What the respondents have sought, successfully, to do is to attack the applicant's historiography in the way he has attempted to do it. Any distinction between whether Hitler was claimed to be "the Jews' friend" or the "best friend the Jews had in the Third Reich" is not material to the debate on the specific issues as it has occurred. Any misunderstanding by the judge on this point does not affect his reasoning or the conclusions he reached.

Refusal of leave by Sedley LJ

95. Sedley LJ refused leave on paper on 18 December 2000 for the following reasons:

> "1. I much regret the length of time that it has taken me to come to this decision, not least in view of the pressure that I put on the parties to submit their representations expeditiously. Reaching a conclusion on the application has been the work of days, not of hours.
>
> 2. I am prepared to enlarge time on the basis of Mr Adams' affidavit of 16 May 2000, and to permit amendment of the notice of appeal as asked.
>
> 3. What follow are my essential reasons for refusing permission to appeal. They do not cover every element advanced and contested,

although I have read and re-read both the submissions and the judgment. They address what I consider to be the key issues.

4. I bear in mind, as Gray J very clearly did, that when a professional historian claims, correctly, that he has been defamed as a falsifier and a bigot, a defence of justification places a heavy burden on the defendant who advances it. There is much about which two people can legitimately differ, and differ angrily, without either of them meriting such a description. But by bringing this action on the pleaded meanings the applicant offered a challenge, and in Gray J's judgment the defendants met it.

5. I accept that this court is probably as well placed as Gray J to evaluate the documents and the expert evidence. What it cannot do, and is not asked to do, is to ignore or modify the judge's appraisal of the applicant himself. This is not, as the grounds suggest, peripheral. As Gray J in Chapter XIII shows with clarity, the applicant's disposition is the cement between the bricks. What might in another historian have been casual misreadings of evidence emerge in the applicant's case as sedulous misinterpretations all going in the direction of his racial and ideological leanings. Hence the verdict for the defendants.

6. "Holocaust denial" may be a comprehensible phrase, but it has a particular register about which the judge was entitled to hear expert evidence. With or without such evidence the meaning he assigned to the phrase at J 8.3-4 was plainly right. Holocaust denial means not necessarily a blank refusal to acknowledge a Nazi policy of mass murder of Jews and other minorities but a systematic endeavour, by marginalising and excusing what happened, to accuse those who insist upon it of being Zionist propagandists. This is not the law's concern so long as it stops short of incitement to racial hatred: in the UK there is no law against Holocaust denial, and it is a fundamental liberty not only to be contentious but to be wrong. I bear in mind too that anti-Zionism and anti-semitism are not necessarily the same thing.

7. Here, however, the applicant has invoked the law by suing his antagonists. In justifying their libel, the defendants have focused upon two particular forms of Holocaust denial in his work: what I will call the aberration theory, predicated on Hitler's ignorance of and/or opposition to mass extermination of Jews, and the exaggeration theory, predicated on deliberate inflation of the numbers killed at Auschwitz. The first, they say, seeks to excuse what happened; the second to marginalise it.

8. The Schlegelberger memorandum is the applicant's preferred evidence for the aberration theory. The memorandum by itself (see J 5.151-169) might have stood simply as an example of a controversial document about which honest historians could differ – indeed the judge said so (J 13.36). But the applicant's adherence to it as a "diamond document" came in the context of a damning and justifiable finding (J 13.26-31) that he had repeatedly misrepresented documentary evidence in order to absolve Hitler of anti-semitism; and it is against the

backdrop of this ubiquitous handling of Third Reich material that the applicant's use of the document emerges as part of a predetermined misreading of evidence which could not, as the judge found, be objectively justified.

9. The Auschwitz materials are central to the exaggeration theory. Here too the historical record is inevitably incomplete and in places unreliable. But here too the applicant has been betrayed by his own method, notably his reliance on the discredited Leuchter report. The judgment (J 8.17) sets out the solidity of the applicant's denial of mass homicide at Auschwitz, and sets in that context his recent focus on the "holes in the roof" issue (J 13.81-3). I accept readily that the latter argument may be none the worse for coming late in the day; but the evidence that there were no holes for the admission of cyanide pellets is at best inconclusive against the potent evidence that people were gassed there in tens of thousands. The controversy about methods and numbers may legitimately remain; but what the applicant has done is demonstrate once again his willingness to sacrifice objectivity in favour of anything which will support his chosen form of Holocaust denial.

10. Van Pelt's evidence enters into this aspect of the judgment. Van Pelt was heard as a cultural historian with special knowledge of Auschwitz and its architecture (J 4.17(ii); G 30). What he said (J 7.123-4) about the use of Zyklon-B was in part arithmetic and in part comment; probably it was not necessary to have an expert of any kind to put this forward, but its acceptance by Gray J was a matter of logic and did not depend on any expertise professed by Van Pelt.

11. In these circumstances the applicability of s.5 of the Defamation Act 1952 was in essence a jury question: were the false allegations that the applicant had agreed to share a platform with terrorists, had a self-portrait of Hitler above his desk and had misappropriated archive material sufficient to damage the reputation which was not his? The negative answer given by Gray J was entirely open to him, and that, I apprehend, is enough. If, however, this court were to take the decision for itself, I see no realistic prospect of its arriving at a different answer. The claimant had played for high stakes on the central issue of his entitlement to be regarded as a genuine historian and had lost on grounds so damaging that they left no real room for discrete damage by the unfounded allegations.

12. The experts' fees may be thought high – depending on how much work they did – but the suggestion that they were paid to testify as they did is without visible foundation.

13. If a newspaper comments impermissibly on a current trial the Attorney General has power to bring contempt proceedings against it. But where the trial is by judge alone it takes cogent evidence to establish a sufficient risk that he has been influenced – especially when the suggestion is that he has been driven by a fear of adverse press

comment. I know of nothing in the present case which comes near this threshold.

14. (Deals with stay on enforcement of the costs order.)"

We agree with those reasons save only in our acknowledgement that the judge was in our view in a better position to evaluate the oral expert evidence. On some issues, for example experts' fees (paragraph 12 of Sedley LJ), we have not found it necessary to revisit the question.

Conclusion

96. We have expressed our views on the issues raised by Mr Davies. Limitations of time inevitably are such that Mr Davies did not address us on every single piece of evidence on which the judge relied. In rightly being selective, Mr Davies has no doubt taken the points which he and the applicant consider to be the best ones. He has not persuaded us that it is arguable that the judge's general conclusions were unjustified. Where we have been invited to consider evidence in detail, it does not in our judgment diminish the soundness of the judge's conclusions. The judge expressed his conclusion at 13.165:

> "My overall finding in relation to the plea of justification is that the Defendants have proved the substantial truth of the imputations, most of which relate to Irving's conduct as an historian, with which I have dealt in paragraphs 13.7 to 13.127 above. My finding is that the defamatory meanings set out in paragraph 2.15 above at (i), (ii), (iii) and the first part of (iv) are substantially justified."

We agree.

Section 5 of the 1952 Act

97. The judge acknowledged (13.166) that "there are certain defamatory imputations which I have found to be defamatory of Irving but which have not been proved to be true". With respect to those, the respondents seek to rely on section 5 of the 1952 Act. That provides:

> "In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges".

98. With respect to one charge, Mr Davies strongly submits that the respondents are not entitled to rely on that defence. It is the unproved allegation that "on one occasion [the applicant] agreed to participate in a conference at which representatives of terrorist organisations were due to speak". The conference was (13.166) "an anti-Zionist conference in Sweden in 1992 which was also to be attended by various representatives of terrorist organisations such as Hezbollah and Hamas". Mr Davies submits that not only is this a very grave allegation but it is of quite a different category from the charges against the applicant's historiography which have been the

main issue in the case. Whatever the conclusion upon the applicant's historiography, Mr Davies submits, the applicant's reputation is materially injured by the allegation that he agreed to speak at a conference attended by terrorist organisations.

99. The judge concluded:

> "The charges which I have found to be substantially true include the charges that Irving has for his own ideological reasons persistently and deliberately misrepresented and manipulated historical evidence; that for the same reasons he has portrayed Hitler in an unwarrantedly favourable light, principally in relation to his attitude towards and responsibility for the treatment of the Jews; that he is an active Holocaust denier; that he is anti-semitic and racist and that he associated with right wing extremists who promote neo-Nazism. In my judgment the charges against Irving which have been proved to be true are of sufficient gravity for it to be clear that the failure to prove the truth of the matters set out in paragraph 13.165 above does not have any material effect on Irving's reputation."

100. We agree with the judge. While the attack on the applicant's historiography was central and fundamental to the case, it was proved in the context described by the judge which involved anti-semitism and racism and association with right-wing extremists. In that context, the allegation that on one occasion he agreed to participate in a conference at which representatives of terrorist organisations were due to speak did not materially injure his reputation having regard to the truth of the charges proved.

Result

101. The judge was fully entitled to hold (13.168) that the defence of justification succeeded. In our judgment, and for the reasons we have given, it is not arguable that an appeal against the judge's verdict would succeed. The application for permission to appeal is refused.

Citation

Pursuant to paragraph 6.1 of Practice Direction (Citation of Authorities) [2001] 1 WLR 1001, we indicate that the judgment may be cited on the question of the approach of the Courts to expert evidence.

ORDER: Application for permission to appeal refused; applications for permission to call fresh evidence are dealt with in the judgment; respondents to have their costs of the applications, those costs to include the costs incurred in relation to the applicant's applications to call fresh evidence; by consent, and at the application of the respondents, there will be an extension of time for the commencement of detailed assessment procedures of six months, making the time within which the application must be made one of nine months; the stay imposed by this court upon the order for costs made by Gray J is removed; permission to appeal against the removal of the stay (even of power to grant) is refused; the court leave open to the applicant to raise as a preliminary point at the detailed assessment procedures (only in relation to the costs of

the application for permission to appeal and to call fresh evidence) the question whether maintenance of either respondent should deprive them of an order for costs.

(Order not part of approved judgment)