Neutral Citation Number: [2012] EWCA Civ 1655

Case No: A2/2012/1251

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(QUEEN'S BENCH DIVISION)
CARDIFF DISTRICT REGISTRY
HH JUDGE CHAMBERS QC
(SITTING AS A JUSTICE OF THE HIGH COURT)
[2012] EWHC 976 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2012

Before :

LADY JUSTICE ARDEN
LORD JUSTICE LLOYD JONES
and
MR JUSTICE TUGENDHAT

- -

Between :

ROBIN CAMMISH	**Respondent**
- and -	
CLIVE HUGHES	**Appellant**

- -
- -

Mr Godwin Busuttil (instructed by **PSB Law LLP**) for the **Appellant**
Mr Timothy Atkinson (instructed by **Morgan LaRoche**) for the **Respondent**

Hearing date: 28 November 2012

- -

Approved Judgment

Lady Justice Arden:

1. These are defamation proceedings which the respondent has brought against the appellant for the purpose of vindicating his reputation as a result of a damaging statement issued by the appellant. Trial has yet to take place. The costs have been considerable. The appellant applied to HHJ Chambers QC sitting as a judge of the High Court of Justice in the Cardiff District Registry for an order dismissing the proceedings without a trial: he sought to show that there is no real and substantial tort in issue in the proceedings. HHJ Chambers QC dismissed that application by his order dated 4 May 2012. The appellant now appeals to this court. Accordingly, the central issue posed by this appeal is whether there is now any real and substantial tort to be tried in these proceedings. If not, it is established, under the law developed by this court in *Jameel v Dow Jones & Co Inc* [2005] QB 946, that the court should dismiss the proceedings to prevent the incurring of further legal costs and use of court resources. Some idea of the scale of the costs to date can be gained from the parties' schedules of costs for this appeal alone, which together amount to some £70,000.

2. This is the judgment of the court, to which each member of the court has contributed. We announced the result of this appeal at the end of the hearing with reasons to follow in our judgment. We said that we considered that the judge was right in the meaning that he gave for the words complained of and that those words attained the level of seriousness necessary for the maintenance of defamation proceedings. However, we went on to say that we considered that the proceedings had in fact now served their purpose and should be brought to an end on terms as to costs.

The words complained of

3. There is little dispute about the facts. We need only deal with them in outline.

4. The appellant owns and runs companies that at the material time were seeking planning permission for the construction of two biomass power plants in South Wales.

5. The respondent was the owner and a director of QP Group Ltd, which provided management consultancy services to "blue-chip" companies, until its dissolution in June 2009. It is clear from the material from Companies House that it was a company of some substance. The respondent is a resident of Kidwelly, near Swansea in South Wales. The respondent continues to be involved in business through another QP company.

6. The respondent was also the chairman and a director of a company called Coedbach Action Team Ltd. This was an action group of local residents who were opposing the grant of permission for the construction of the two biomass stations, one in Kidwelly and another in Swansea. The opposition included attending planning inquiries into whether the applications should be granted.

7. In April 2010, a twelve-page bundle of documents was sent anonymously to a number of recipients.

8. The first page was typewritten. It referred to the fact that the respondent was the leader of a residents' action group opposing the grant of planning permission for two power stations. It read:

> "Dear All
>
> Please see Companies House on your Mr Cammish Coed Bach Action Team Ltd – between him and [his] girlfriend they have dissolved over 20 companies not able to sell anyone of them and coming to Swansea to tell you how to do it
>
> Maritime Association,
> SA1 Residents,
> MP's
> AM's
> Press.
> etc etc
> Inspectors – Mr Emyr Jones
> Mr John Woodcock"

9. The remainder of the bundle consisted of some copy emails between the respondent and members of the committee of the Coedbach Action Team Ltd, and also the fruits of a search for directorships carried out at Companies House against the respondent's name. This search showed that the respondent was the director of 5 companies and a past director of some 15 dissolved companies. The respondent does not complain about the data obtained from Companies House, which is available for public inspection.

10. The respondent does, however, complain about the first page of the bundle and a handwritten message at the top of the second page of the bundle. This message reads:

> "Coedbach Action Team Ltd
>
> See statement that on 31 March public inquiry cancelled and to have the appeal dismissed, when Mr Hughes was asked – he knows nothing about it. See Mr Cammish dissolved 15 companies = not able to run them
>
> Supporter of the power plants @ for jobs in area"

11. The reference to cancellation of a public inquiry was derived from one of the emails included in the bundle. This was an email from the respondent and he stated in effect that a particular hearing of the inquiry had been cancelled following representations. The appellant claims to have been provoked by this inaccuracy of expression, but in our judgment nothing turns on it.

12. There can be no doubt that it was unreasonable to infer from the fact that the respondent was a former director of dissolved companies, even 15 of them, that he was unfit to run them. The fact that a company is dissolved does not mean that its demise was the result of the misconduct or mismanagement by the directors or any of them. Companies may be dissolved for many reasons, and they may be dissolved without any insolvency procedure.

13. In fact, the respondent has provided an explanation for the number of dissolved companies in a witness statement. He said:

> "6.1 To me these words are a direct, intentional and serious attack upon my professional and personal integrity and would have been understood as such by readers.
>
> 6.2 In making the written accusations about my business competence it seems to me that Clive Hughes does not understand the dynamics of running a successful management consultancy. Contrary to what he has written, the aims and objective of the 15 dissolved companies was never to grow them and sell them at a profit. Each one was originally set up as a means of protecting the Intellectual Property and the separate products and service offerings of QP Group to our customers, for example Outsourcing Ltd. QP Group is an international management consultancy working in the procurement and supply chain industry helping "blue chip" clients make substantial savings on their expenditure on goods and services with suppliers. By way of example, in excess of 25% of FTSE 100 companies have been or are QP Group clients. By paying £150-£200 pa to Companies House as a dormant company, the QP Group had name protection to the trading rights to outsourcings in the UK. Exactly the same approach applies to the other companies, for example, QP Engineering, QP Electronic commerce, etc. The only exception to this was QP Group (France) Ltd which was an active trading small company operation (which successfully achieved its start-up objectives of being at breakeven with turnover of €1 million).
>
> 6.3 So not only has Clive Hughes misunderstood the purpose of the company creation and dissolution, he is also inaccurate in the defamatory statements that he has made that I was *"not able to sell anyone of them and coming to Swansea to tell you how to do it"*. That is untrue and, in addition, defamatory in its implication that I am a thoroughly incompetent businessman. The business purpose was to protect the Intellectual Property, Products and Solutions of the QP Group."

14. The appellant has not challenged this explanation in the respondent's witness statement. The respondent had simply formed companies under names related to the name of his company in order to prevent anyone else from doing so and trying to pass off their services as those of his company. This is a normal reason for incorporating a company. The dissolution of such a company has nothing to do with the respondent's business abilities.

Circulation of the bundle

15. The precise number of recipients of the bundle is unclear. It is known to have been sent to some six recipients. They include the chair of a local residents' group and to two planning inspectors. Some of these recipients disclosed that they had passed the bundle to a limited number of other persons but happily it appears that the planning inspectors simply destroyed the bundle. The respondent believed that he had recently identified other recipients but he now accepts that this was not the case. No other recipient has therefore been identified since the circulation of the bundle of documents to which we have referred.

16. Needless to say, the statement caused distress and inconvenience to the respondent. He had to have several meetings with the recipients to satisfy them that there was no truth in the suggestion that he had acted in any way improperly. He has stated in a witness statement that others attending the planning inquiries also knew about the bundle, and this evidence has not been challenged.

Costly litigation inevitably ensues

17. Because the bundle was sent anonymously, the respondent had to identify the author in order to be able to prevent repetition. The appellant was identified via his handwriting on the bundle. However, he denied authorship in his response to the letter before action, a point to which we shall have to return later in this judgment. The respondent had to start litigation against the appellant to prove authorship. The appellant was forced to admit authorship in his defence. He did not, however, do so before the service of his defence.

18. In his defence, the appellant also denied that the publication was defamatory. He relied on a meaning of the words complained of that cast no doubt on the respondent's business competence in spheres outside that of the action group. He asserted that the words meant no more than the respondent was unsuitable to be a leader of the action group.

19. An application was issued to determine the meaning of the words complained of. The respondent contended for a wider meaning, namely that the words complained of asserted that he was a seriously incompetent business person. The appellant contended that the words only related to his fitness to chair the action group. The appellant also sought the dismissal of the proceedings without a trial in accordance with *Jameel*. These matters came before the judge.

Before the judge

20. As this case would have been tried by judge alone, without a jury, both parties asked the judge to determine the meaning of the statement, not just the meaning that it was capable of bearing. The judge rejected the appellant's meaning. He held that the meaning included the assertion that the respondent was seriously incompetent in business:

> "34. For the reasonable reader of the communication the words can carry only one meaning and that is, "because he was unable to run them your Mr Cammish has had to dissolve 15

> companies which he wanted to sell. This shows that he is a seriously incompetent businessman who is far from being the man to come to Swansea to tell you how to run your protest"…."

21. The judge was not asked to decide whether the words complained of were fact or comment. A determination whether a matter is fact or comment is important since the law tends to allow a person to express views, however unreasonable. Accordingly the determination that words constitute comment will deprive the claimant of all remedies in respect of the words complained of unless the claimant was guilty of malice.

22. If malice is in issue, the burden of proof is on the claimant (the respondent), and the claimant would have to show that the defendant did not honestly believe that the facts on which he based his comment justified his comment: see *Joseph v Spiller* [2011] 1 AC 852 at [108]. The respondent informed this court that he intended to plead malice if it arose, but that it did not presently arise because the issue of fact or comment had not yet been determined and because the defence of honest comment currently pleaded relates only to the meaning advocated by the appellant before the judge and which the judge had rejected.

23. To afford a defence, a comment must indicate, at least in general terms, the facts on which it is based, and those facts must be true or protected by privilege: see *Joseph v Spiller* at [3] and [105]). However, in this case, the appellant clearly set out the facts which are admittedly true, and are protected by privilege, since he included in the bundle the whole of the relevant Companies House search on which he relied for his comment.

24. Since the judge did not determine the question whether the words complained of were fact or comment, the appellant contended that the judge should strike out the proceedings on the ground that the statements were not of their nature defamatory and that they did not meet the standard of seriousness set out in *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985.

25. The judge rejected those arguments and declined an order for striking out the claim. In so doing, he inevitably took no account of whether they were comment when he rejected the appellant's application to dismiss the proceedings without a trial.

Grounds of appeal: (1) Meaning and (2) Fact or comment

26. Mr Godwin Busuttil, for the appellant here and below, challenges the judge's approach to meaning on the footing that he did not consider the document as a whole. In his oral submissions, Mr Busuttil did not press the appellant's own meaning but rather argues that, whatever meaning the words had, they could only amount to comment. Indeed, he submits that we should approach the matter of meaning with the presumption that the words were comment. The judge should not have determined meaning without also dealing with the issue whether the words used were fact or comment.

27. As to the question whether the words complained of constituted fact or comment, Mr Bussutil submits that the comment was clearly based on accurate facts. The appellant was clearly simply expressing a view on the basis of the Companies House data that he supplied.

28. Mr Timothy Atkinson, for the respondent here and below, seeks to uphold the judge's determination of meaning. He urges us to be slow to interfere with the assessment of the trial judge, citing Sir Thomas Bingham MR in *Skuse v Granada Television* [1996] EMLR 278 at 286:

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

29. He submits that the judge was not in error: the only pleaded defence of honest comment was in relation to the appellant's meaning, which the judge held was wrong. On the other hand, Mr Atkinson realistically recognises that the question of fact or comment was a matter with which the court could deal on appeal.

30. Mr Atkinson also submits that the words spoken were clearly fact. Alternatively, he submits that fact and opinion were so bound up with each other that they should be treated as consisting entirely of fact: see *Hunt v The Star Newspaper Ltd* [1908] 2 KB 309.

Discussion and conclusions

Standard of appellate review on questions of meaning

31. As to the test that this court should apply, although this court has the same documents as were available to the judge, and the meaning depends on documents, we apply the dictum of Sir Thomas Bingham MR, which we have quoted. The determination of meaning does not depend solely on the documents, but on an evaluation of those words in their context. In those circumstances, we consider that we should not depart from the judge's meaning unless it is clear that some other meaning applies.

Meaning

32. The judge applied the guidance given by this court and recently summarised by Sir Anthony Clarke MR in *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 at [14]. We also follow that guidance. It was in these terms:

> "The governing principles relevant to meaning . . . may be summarised in this way:
>
> (1) The governing principle is reasonableness.

> (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.
>
> (3) Over-elaborate analysis is best avoided.
>
> (4) The intention of the publisher is irrelevant.
>
> (5) The article must be read as a whole, and any 'bane and antidote' taken together.
>
> (6) The hypothetical reader is taken to be representative of those who would read the publication in question.
>
> (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation . . .'.
>
> (8) It follows that 'it is not enough to say that by some person or another the words might be understood in a defamatory sense'."

33. Neither counsel has suggested that this guidance was inapplicable in this case.

34. Applying that guidance, we have come to the same conclusion as the judge. As the judge held, the fact that the bundle was sent anonymously indicates that the sender wished the reader to draw from the fact that the companies had been dissolved an adverse inference about the leadership role of the respondent in the action group from his business experience. To accept that the criticism of the respondent's ability was limited to the companies that had been dissolved would, as the judge held, deprive the words of all meaning in the context of their use. The words cannot be so limited. We accordingly agree with the judge's meaning of the words complained of.

Was the meaning defamatory?

35. It is common ground that the issue in this case, where the words complained of relate to the respondent's business behaviour, the relevant test is whether the words have an adverse effect on the opinion of right thinking persons or would have a tendency so to do.

36. The judge held that the words were defamatory since they cast doubt on the claimant's creditworthiness.

37. We agree with the judge's conclusion that the words were defamatory, but not for the reasons that he gave. The imputation was that the respondent was a seriously incompetent businessperson, not that he would not meet his financial obligations. The meaning inevitably leads to the conclusion that the words denigrate or tend to denigrate a person in the way of his business.

Threshold of seriousness

38. Both parties agreed that the threshold test of seriousness had to be satisfied. The law does not provide remedies for inconsequential statements, that is, of trivial content or import. It is necessary that there should be some threshold test of seriousness to avoid normal social banter or discourtesy ending up in litigation and to avoid interfering with the right to freedom of expression conferred by article 10 of the European Convention on Human Rights. The judge considered that the words complained of reached the requisite threshold of seriousness.

39. Mr Busuttil submits that the judge was wrong in his assessment of the level of seriousness. He submits that an analogy can be drawn with sportspeople who are not necessarily incompetent merely because they fail. Losing is an occupational hazard of competitive sport. He submits that there is no fixed standard of conduct in business. Mr Atkinson seeks to uphold the judge's conclusion on this issue.

40. Even though seriousness is a multi-factorial question, to which this court would apply a low level of appellate review, that does not prevent us from agreeing fully with the judge's conclusion that the threshold test was met. The sporting analogy is out of place. It is appropriate in the right context: in *Thornton*, Tugendhat J applied that type of reasoning to a writer whose field covered writing to different levels for different readership or markets.

41. However, it does not apply here. First, a businessperson who is a director, as the respondent was, must clearly comply with certain fixed, non-optional duties imposed in the Companies Act 2006 and elsewhere. A seriously incompetent businessperson would probably fall foul of one or more of these fixed duties. Second, for businesspeople, a charge of serious incompetence is not comparable with the judgments made on sports players in competitive sports who may be skilled players whether they win or lose. Third, the inference that the respondent drew from the words was not simply an over-reaction to them. They were capable of affecting his livelihood. Reputation is important to a businessperson as he needs to persuade others to trust that he will competently perform commitments entered into in the course of business.

Were the words complained of fact or comment?

42. As Lord Judge LCJ pointed out in *British Chiropractic Association v Singh* [2011] 1 WLR 133 at [16] defamatory statements of fact and comment can appear in the same document.

43. If the judge is going to make a definitive determination of meaning, he should normally deal with comment at the same time. It is unfortunate that he was not asked to take that course in this case. The pleading point on the defence has been suggested as the explanation, but little weight is to be attached to the limited form of the current defence of honest comment. The appellant could have amended his defence to make a further plea of comment prior to trial. In the circumstances, this matter having been raised by the appellant on this appeal and fully argued, this court should clearly proceed to determine the issue of fact or comment.

44. We reject the argument that the issues of fact and comment are intimately tied up with each other so that the comment could no longer be relied on as such (see *Hunt* at 319 per Fletcher Moulton LJ). The insertion of the "equals" sign creates a clear bright line between the author's facts and his opinion.

45. The words written by the appellant were also, in our judgment, clearly comment. The fact that he used an "equals" sign immediately after his statement of fact as to 15 dissolutions demonstrates that what followed was his view as to what could be deduced from the Companies House search. Moreover, it is clear from the judge's meaning that the words complained of, involving as they do a conclusion as to serious incompetence, entail not facts, but a value judgment.

46. It is no answer that the deduction which the appellant sought to draw from the Companies House material was unsustainable, as we have explained above. It is well established that, if the words complained of are comment, a defence of honest comment may be available whether the comment was right or wrong.

47. Our conclusion that the critical words were comment, not fact, has an important effect on the future conduct of this case. It means that, if the appellant amends his defence to plead honest comment with respect to the objective meaning found by the judge, the respondent, in order to succeed at trial, will have to show that he did not believe the opinions that he expressed (*Joseph v Spiller*). The appellant would be given an opportunity to amend his defence.

Would a defence of honest comment lie in the present case?

48. *Joseph v Spiller* does not deal with the question whether a defendant can rely on a defence of honest comment if he did not intend to convey the objective meaning found by the court. Neither counsel was in a position to help us on the answer to this point.

49. However, it is enough for the purpose of this application for us to say that it is at least arguable that the defence of honest comment is available if (a) the author of a statement did not intend or believe his words to convey the meaning given to them by the court, and (b) on the meaning which he intended and believed the words to convey he believed the statement to be true (see *Gatley on Libel and Slander* 11th ed 35-28, last sentence).

Could malice be shown on the facts of this case?

50. We have not been shown any direct evidence. The respondent would therefore have to rely on the court drawing inferences from circumstantial evidence.

51. It is self-evident that it is difficult to prove malice where there is no direct evidence to support that case and inferences have to be made.

Should these proceedings continue?

(a) the Jameel test

52. This Court established in *Jameel v Dow Jones* that it could be disproportionate to continue proceedings to vindicate a libel, which was initially serious, if the circumstances had changed from those initially thought to apply. The test that this court laid down was whether there was a "real and substantial" tort within the jurisdiction.

53. In *Jameel*, there was a serious accusation made that two persons were funding terrorists. This appeared in a website publication which was immediately removed and made virtually inaccessible. It was later discovered that only three persons had ever accessed the information while it was on the website. Lord Phillips MR, giving the judgment of this Court, held:

> **"**54 Mr Price's submissions amount, so it seems to us, to asserting that Dow Jones's failure to challenge English jurisdiction estop them from relying at this stage on arguments that could have been advanced in support of such a challenge. We do not accept this. An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice. If Dow Jones have caused potential prejudice to the claimant by failing to raise the points now pursued at the proper time, it does not follow that the court must permit this action to continue. The court has other means of dealing with such prejudice. For instance, appropriate costs orders can compensate for legal costs unnecessarily incurred and relief can be made conditional on Dow Jones undertaking not to raise a limitation defence if proceedings are now commenced in another jurisdiction.
>
> 55 There have been two recent developments which have rendered the court more ready to entertain a submission that pursuit of a libel action is an abuse of process. The first is the introduction of the new Civil Procedure Rules. Pursuit of the overriding objective requires an approach by the court to litigation that is both more flexible and more proactive. The second is the coming into effect of the Human Rights Act 1998. Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, in so far as it is possible to do so. Keeping a proper balance between the article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged."

54. This court went on in *Jameel* in effect to apply the same test in relation to the statements within the jurisdiction as it would have required to be satisfied before giving permission to serve out of the jurisdiction, namely: was there a real and substantial tort within the jurisdiction?

55. In the earlier case of *Schellenberg v BBC* [2000] EMLR 296, Eady J held that, in deciding whether defamation proceedings should be struck out as an abuse of the

process of the court, the relevant question was whether "the game was worth the candle". This approach had been approved by this court in *Wallis v Valentine* [2003] EMLR 175. Eady J could not accept:

> "that there is any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources."

56. Eady J accordingly put the test, which was later developed in *Jameel,* in an accessible way. He captured the point that, while the court must provide a remedy in a case that requires one, the process of the court should not be used in a case where the need has gone away. The expression of Eady J is illuminating and convenient. We, therefore, follow counsel in adopting the words he used to denote the *Jameel* test.

(b) is the game worth the candle in this case?

57. Mr Busuttil relies on a large number of factors. Publication of the words complained of had been extremely limited. The respondent had applied to show a further republication but the judge rejected that application as wrongly based and there had been no appeal from his ruling on that point. Mr Busuttil submits that there would be no further percolation of the words complained of. He submits that weight should be attached to the fact that the respondent had failed to show any further publication.

58. Mr Atkinson resists a strike out of the proceedings unless the respondent's reputation is vindicated. He submits that, as this was a serious libel, the respondent had to proceed to judgment to obtain vindication. He accepts that, if the words complained of were in law comment and the defence so alleged, the respondent would have to plead malice and that would become the only issue on liability at trial.

59. We consider that this court is in a better position than the judge to determine whether the game is still worth the candle since we have now determined that the words complained of were comment, and not fact. As we have explained, that narrows the remaining issues.

60. Having considered the submissions, we consider that following the delivery of this judgment the respondent would be no better off if the case continued and he incurred the costs of trial for the following reasons:

> (1) The number of recipients of the bundle is small. In reality the number of recipients is now known by default. It is possible that on disclosure further publication will come to light but it is unlikely that any significant further publication will now come to light.
>
> (2) The wrong done to the respondent's reputation has been vindicated by paragraphs 12 and 13 of this judgment as to the unreasonableness of the appellant's view.
>
> (3) No better vindication could be obtained at trial. If the appellant were to amend his defence to plead honest comment in relation to the meaning found

by the judge, the focus at trial would be solely on the question whether malice could be shown, and not on whether the comment was in fact fallacious. For the reasons already given, malice would be difficult to prove in the circumstances of this case.

(4) But if the appellant were not to amend, the respondent would still not achieve at trial any vindication of more value to him than that given to him in this judgment. Any damages awarded for so limited a publication would be small in relation to the costs, and any pursuit of the claim for damages only would be uneconomic. The wide publicity that would be given at trial to the documents from Companies House could also lead to further misunderstanding amongst some members of the public to the detriment of the respondent.

(5) The loss of the opportunity to obtain a permanent injunction at trial would not prejudice the respondent to any material extent. A permanent injunction would not be available in any event unless he proves malice and (as just stated) it would be difficult for him to prove this. Furthermore, there is no great need for an injunction. It is true that the appellant has neither offered an apology nor an undertaking not to repeat the statement made in the bundle. He has, however, said that he will not repeat it. If he were to do so, anonymity is unlikely to help him and it would be difficult for him to resist a claim of malice in light of what we have said about the unsoundness of the view he has expressed.

(6) The respondent has been able to soothe the apprehension of those who received the bundle, and time has passed since the events in issue. The wounds are in our judgment likely to heal more quickly and more completely if sleeping dogs continue to lie than if they are stirred up by the publicity that may result from a trial.

(7) The dismissal would be on certain minimum terms as to costs explained in paragraph 64 below.

61. Our view is that these factors effectively eliminate the need now to have a trial of these proceedings. In all the circumstances, there is, now, no real and substantial tort to be tried.

62. However an order for dismissal on its own would not reflect the seriousness of what happened. On the evidence the respondent had to spend considerable time and effort in soothing the fears of the recipients, and the circulation of the bundle also caused him anxiety and grief. The impact is not diminished, as the appellant suggests, by the fact that the principal recipients were fellow members of the action group. The evidence shows that they took the allegation seriously and applied their independent minds to it.

63. We also take into account that both parties come from a closely-knit community in South Wales. Wrong conclusions may be drawn in any community as to why an action was not allowed to proceed to trial. Paragraphs 12 and 13 above provide a measure of protection and vindication for the respondent but we consider more is needed in this case.

64. We propose to make an order for the payment of costs as a condition of the summary dismissal of these proceedings as a further protection and vindication to the respondent. It is clear that the respondent was fully justified in bringing these proceedings. He did not know who had sent the bundle of documents and so long as that was unknown he could not be satisfied that there was no risk of repetition. He remained in the dark about the appellant's authorship of the words complained of until the defence was received. We, therefore, order as a term of the summary dismissal that the appellant is to pay the respondent's costs of and incidental to those proceedings down to and including the date on which the defence was served, such costs to be the subject of detailed assessment, if not agreed. That order is without prejudice to any further application for costs that may hereafter be made.

65. Two final points need to be made.

66. First, counsels' extensive skeleton arguments contain submissions on which they did not address us orally. They were right to concentrate on the points made above. It would serve no purpose for this court to address their other points.

67. Second, the judge's principal reason for refusing to order summary dismissal of these proceedings was that the appellant had never explained why he lied in his response to the letter before action or apologised for it. The judge set out the circumstances in detail. We agree with the judge that this was an extremely serious error on the part of the appellant, and very ill-advised. The lie would inevitably be exposed and referred to in open court, and might lead to other orders being made against him, but in our judgment the question of summary dismissal has to be dealt with as a separate matter.

68. On the terms as to costs set out in paragraph 64, we direct the summary dismissal of these proceedings, and, to that extent, we allow this appeal.