



Neutral Citation Number: [2013] EWHC 1505 (QB)

Case No: HQ12D05245

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 12/06/2013

**Before :**

**THE HONOURABLE MR JUSTICE TUGENDHAT**

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**Between :**

<b>Euromoney Institutional Investor Plc</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>(1) Aviation News Ltd (2) Philip Tozer-Pennington</b>	<b><u>Defendants</u></b>

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**Manuel Barca QC** (instructed by **Mishcon De Reya**) for the **Claimant**  
**Godwin Busuttill** (instructed by **Taylor Hampton**) for the **Defendants**

Hearing date: 2 May 2013  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
**THE HONOURABLE MR JUSTICE TUGENDHAT**

**Mr Justice Tugendhat :**

1. This action is part of a dispute between organisers of business conferences. The conferences are for the benefit of people engaged in aviation, and those providing finance to them. Those who attend are representatives of the world's largest airlines, leasing companies, commercial banks and other financial institutions and others, such as lawyers, who provide services to them. It is common ground that there are a number of such conference organisers in the world.
2. The Second Defendant is a former employee of a company associated with the Claimant. He founded and manages the First Defendant, which is a relatively new entrant into this market.
3. This action was commenced by a claim form issued on 6 December 2012. The claim was (1) for damages, including special and aggravated damages, for libel in respect of words contained in email messages published by the defendants (2) for "damages for the intentional infliction of harm by unlawful means".
4. Particulars of Claim were served dated 6 December 2012 ("the Original Particulars of Claim"). They were drafted by the Claimant's solicitors before Mr Barca was instructed.
5. On 16 January 2013 the Defendants issued an application notice. They applied to strike out all the Claimant's claims on a number of grounds. In the alternative, they asked for rulings on the meaning of the words complained of in accordance with CPR 53 Practice Direction para 4.1. This provides:

"At any time the court may decide –

  - (1) whether a statement complained of is capable of having any meaning attributed to it in a statement of case;
  - (2) whether the statement is capable of being defamatory of the claimant;
  - (3) whether the statement is capable of bearing any other meaning defamatory of the claimant".
6. On 1 March 2013 the Claimant issued an Application Notice. It asked for permission to add a second claimant Euromoney Trading Limited ("ETL"). It also asked for permission to amend the claim form and the Original Particulars of Claim.
7. The proposed amendments are radical. The claims for special and aggravated damages for libel are abandoned. Also abandoned is the claim for damages for the intentional infliction of harm by unlawful means. But permission is sought to add a new claim not previously referred to, namely a claim in malicious falsehood.
8. There are two separate texts complained of. The first is an email ("the Email") addressed to a single publishee and dated 30 August 2012. The second is an email sent to an unknown number of publishees dated 16 November 2012 ("the Advertisement").

9. The Email has the subject heading: “Invitation to Speak – AE Dublin 2013”. It was written by the Second Defendant on behalf of the First Defendant to a Ms Carol Palmer. It reads as follows:

“Dear Carol,

We sent a message to Tom some months ago about speaking on our main banking panel and to date we have no reply. Please note that if he would like to join it then I need to know before the close of business this week.

The panel is at 11.00 hrs on Tuesday 22 January 2013.  
On it are:

..., Head of Transportation, Credit Agricole Corporate Investment Bank/ ..., Development Bank of Japan Inc/ Standard Chartered (BC name)/ ..., JP Morgan/ ..., DVB Bank/ ..., Deutsche Bank/ ..., Citi Group/ ..., Director at Credit Suisse Securities (USA)/ ... TBC/

We have more airline finance teams than have ever been assembled in Dublin before and as you guys will already know we have forced a total change in focus at AFJ’s Airfinance Europe conference over the past three months which has led their event to be a carbon copy of ours.

Let me know but every active bank other than yours is in the room. Details for the conference can be found at: [www.aedublincom](http://www.aedublincom)”.

10. The Advertisement was sent out with a subject line: “Airline Economics Growth Frontiers Dublin 2013”.

“Quality Guarantee?

Do you trust the innovators who came up with an original plan that the industry accepts as being a winner?

Do you trust the company with the most experience within the aviation finance and leasing sector?

If your answer to the above is yes then you need to be at Airline Economics Growth Frontiers Dublin 2013 [a website address is given].

Innovation that forced the competition to change their name, focus, offering and cost to attend.

More years of experience in the aviation finance and leasing sector than staff at the competition – after all what is a brand without the staff?

And of course – No blemished record of fleecing the industry. We believe in a fair margin and if you buy a delegate pass then you should expect to have a seat at all events without additional costs.

We believe that a finance and leasing conference should focus on those that drive the industry, not those that sell to it. We do not need to be shown the way to see this fact.

We believe that an event should be informative and fun. There will be no sardines to be found pressed to the foyer windows in the City Centre of Dublin in 2013 at our conference.

There are a few remaining places - join us and help us help you”.

11. At the hearing Mr Barca did not oppose the Defendants’ application to strike out insofar as it was based on the Original Particulars of Claim. He invited the court to consider only the draft amended claim form and the draft amended Particulars of Claim.
12. Mr Busuttil opposed the application for permission to amend. A number of the grounds on which he opposed the application closely resembled grounds upon which he had sought to strike out the Original Particulars of Claim. He objected to the joinder of ETL, and to the addition of a new cause of action, both on substantive grounds, and because no claim by ETL, and no claim for malicious falsehood, had been mentioned in the pre-action correspondence. In effect, he submitted, what the Claimant was doing amounted to the abandonment of the original claim and the commencement of a new claim. It should be required to discontinue and issue new proceedings.
13. The draft includes amendments to the meanings which the Claimant and ETL now seek to attribute to the words complained of, insofar as the complaint is in defamation. The meanings, as pleaded in the draft, are set out below.
14. The Claimant also pleads, in respect of each of the publications complained of, the facts upon which it and ETL rely in support of their case that the publishee(s) would understand the words to refer to or the Claimant and ETL, or one of them.
15. Since there is an issue as to whether the Claimant has title to sue it will be necessary to return later in this judgment to consider whether the words complained of are capable of referring to the Claimant.

#### SUBMISSIONS FOR THE DEFENDANT

16. In addition to the submission (referred to above) that the Claimant should be required to commence new proceedings, rather than be given permission to amend, Mr Busuttil makes the following substantive submissions in relation to the draft amendments:
  - i) *Defamation:*

- a) Reference: The Claimant has no claim for defamation because the words complained of could only reasonably have been taken by readers to refer to a company which was running the conference business, and, in accordance with the draft amendment that is ETL alone. The Claimant, as a non-trading corporation at the date of publication has no standing to sue in defamation at all.
  - b) Meaning: No meaning defamatory of either claimant has been identified which either the Email or the Advertisement are reasonably capable of bearing, alternatively, in relation to the passage in the Advertisement including the word “fleecing” any defamatory meaning can only be an opinion or value judgment.
- ii) *Malicious Falsehood:*
- a) The Claimant can have no claim in malicious falsehood for the same reason it can have no claim in libel: it was not the company operating the conference business, it is a non-trading corporation, and so there is no likelihood of it suffering pecuniary loss.
  - b) This is a case in which the Claimant and ETL ought to be required to explain in their Particulars of Claim how it is said that the alleged malicious falsehood was likely to cause each of them pecuniary damage such as is referred to in the Defamation Act 1952 s.3.
  - c) It is clear that it is inherently improbable that even ETL would be likely to suffer any such loss or damage, in particular because, if that had been likely, it would have manifested itself already, given that the rival conferences took place in January 2013.
  - d) Those statements complained of which are not factual in nature, but are opinion or value judgment, cannot be the subject of a claim for malicious falsehood.
  - e) There is no case of malice pleaded against the Defendants which has any prospect of success.
- iii) *Abuse of Process:* A defamation claim in respect of the Email, or any claim for malicious falsehood, would not be proportionate and “worth a candle” (*Jameel v Dow Jones* [2005] QB 946) and therefore would be an abuse of the process of the court.
17. In addition to these points Mr Busuttil submits that there is a further obstacle to any real prospect of the claimants succeeding in this action, albeit not one that is yet apparent on the evidence. He states on instructions that Ms Palmer, the addressee of the Email, is the corporate communications contact for Mr Tom Cahill, who is Managing Director of Morgan Stanley in New York. They are both based in New York. The Claimant has not so far advanced any case that the publications complained of are actionable in New York, as it would be required to do in order to succeed in these proceedings. There may be some similar difficulties in relation to

publishees of the Advertisement. However, he has not asked me to rule upon this point at this stage of the proceedings.

## WHAT IS DEFAMATORY

18. There is no dispute between the parties as to what is defamatory according to the law. As the Court of Appeal said in *Modi v Clarke* [2011] EWCA Civ 937 citing Greer LJ in *Tolley v Fry* [1930] 1 KB 467 at 479:

"Words are not defamatory, however much they may damage a man in the eyes of a section of the community unless they also amount to disparagement of his reputation in the eyes of right thinking men generally. To write or say of a man something that would disparage him in the eyes of a particular section of the community but will not affect his reputation in the eyes of the average right thinking man is not actionable within the law of defamation."

19. The Court of Appeal has not considered whether (as held in *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985) words are only defamatory at common law if they satisfy a test of seriousness, and in the light of the Defamation Act 2013 s.1 (which introduces a statutory test) it may now never have occasion to do so. But that court has proceeded on the assumption that the claimant's complaint must surmount a threshold of seriousness. See *Cammish v Hughes* [2012] EWCA Civ 1655; [2013] EMLR 13 para [38]:

"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".

20. Particular considerations apply to corporate claimants. A corporate claimant does not have feelings, and cannot therefore suffer the injury to feelings which account for a significant element of awards of damages made in favour of personal claimants. Further, in the context of a defamation claim, a corporate claimant does not have relevant rights under ECHR Art 8. On the other hand, defendants in defamation proceedings do have rights to freedom of expression at common law and under Art 10.

21. In *Derbyshire County Council v Times Newspapers* [1993] A.C. 534 at 547 Lord Keith identified the kinds of damage which defamatory words might be likely to cause to a trading corporation. He said:

"The authorities cited above clearly establish that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business. Examples are those that go to credit such as might deter banks from lending to it, or to the conditions

experienced by its employees, which might impede the recruitment of the best qualified workers, or make people reluctant to deal with it."

22. This is not an exhaustive list, but few other kinds of damage have been suggested in the authorities to which I have been referred. In *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; [2008] 1 WLR 585 the Court of Appeal gave weight to a submission from counsel that there might be damage to a holding company's activity in seeking licenses in the interest of its group.
23. In *Multigroup Bulgaria v Oxford Analytica* [2001] EWHC 582 (QB); [2001] EMLR 28 at paras [34]-[42] Eady J withdrew from a jury the case brought by a holding company, citing *Prudential Assurance Co v Newman Industries* [1982] 1 All ER 345 at 366-368 and *Shevill v Presse Alliance* [1992] 1 All ER 409 (CA).
24. It follows that the likely effect upon a corporate claimant of any words complained of by it may not be sufficiently serious to provide the necessary justification for an interference with freedom of expression, even if they would have provided a sufficient justification for interference with the defendant's rights if the claimant were an individual. See *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44; [2007] 1 AC 359 paras [156]-[158] (in the dissenting speech of Lady Hale), *Boehringer Ingelheim Ltd v Vetplus Ltd* [2007] EWCA Civ 583; [2007] FSR 29 paras [48], [55] and [58] and *Ajinomoto Sweetener SAS v Asda Stores Ltd* [2010] EWCA Civ 609; [2011] QB 497 at para [29]. In *Lait v Evening Standard* [2011] EWCA Civ 859; [2011] 1 WLR 2973 at paras [42]-[45] and *Waterson v Lloyd* [2013] EWCA Civ 136 at para [67] Laws LJ has twice noted

"the common law's increasing focus in this area on the balance to be struck between public interest and individual right: between free speech and private claims, rather than on reputation as akin to a right of property."

#### PRINCIPLES APPLICABLE TO AMENDMENT OF THE DEFAMATION CLAIM

25. The Defendants' application made on 16 January 2013 was that the original claim should be struck out, whether under CPR r3.4(2)(a) (as disclosing no real reasonable ground for bringing the claim), or following a ruling on meaning under PD 53 para 4.1.
26. An application for permission to amend Particulars of Claim must be refused in a case where, if the proposed amendment had been in the original pleading, it would have been struck out under CPR r.3.4(2)(a). An application may also be refused where the proposed new claim has no real prospect of success (the test in CPR r.24). In *Tesla Motors Ltd v British Broadcasting Corporation* [2013] EWCA Civ 152 at para [28] the Court expressed the test as follows:

"...in general the court should lean in favour of allowing amendments in order to ensure that the real dispute between the parties can be determined, but that principle is subject to certain limits. It has become increasingly a matter of concern that substantial amendments, ..., can have a very disruptive effect

on the proceedings and add significantly to the costs. ...[The court] must also have regard to the intrinsic merits of the case which the applicant seeks to raise, because it would clearly be contrary to the overriding objective to give permission to pursue a case which has no real prospect of success at trial.”

27. It follows, in a defamation action, that the court should refuse permission to amend, if the court hearing the application for permission decides that the words complained of in a proposed draft are incapable of bearing any meaning attributed to them in the proposed draft, or are incapable of being defamatory of the claimant (PD 53 para 4.1). The parties therefore addressed submissions to me in relation to the proposed amendment as if this were an application for a ruling on meaning under PD 53 para 4.1 in relation to the draft amended Particulars of Claim.
28. There are the following matters requiring particular consideration in this case.
29. First, on an application under PD 53 para 4.1 the court should apply the guidance given by Sir Anthony Clarke MR in *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 at [14]. It was in these terms:
  - "(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'...."
30. Second, the court may decide whether the words complained of are capable of being only a statement of fact or only an expression of opinion.

31. In *British Chiropractic Association v Singh* [2011] 1 WLR 133 the Court of Appeal held that in some cases the court considering a meaning application may decide first what meaning the words are capable of bearing, and then go on to consider whether that is a statement of fact or of opinion. That is what Eady J did in that case, at the invitation of the parties. But the Court of Appeal made clear that that is not always the best approach. In fact, in *Singh* the Court of Appeal unusually did not make any decision on what the words complained of actually meant (*Singh* was the trial of a preliminary issue on meaning, not an application under PD 53 para 4.1). The Court said this:

“2. By agreement between the parties, Eady J was asked to determine two preliminary issues. The first was what defamatory meaning the words bore. The second was whether they constituted assertions of fact or comment...

16. What a passage of prose means when read in context is, however, not the critical question in a case such as this. The critical question, at least for present purposes, is whether its meaning includes one or more allegations of fact which are defamatory of the claimant, or whether the entirety of what it says about the claimant is comment (or, to adopt the term used by the European Court of Human Rights in its Article 10 jurisprudence, value-judgment).

17. ... the judge ... postulate[d] the resultant issue as "whether those responsible for the claims put out by the BCA were well aware at the time that there was simply no evidence to support them". This, he held, was "a matter of verifiable fact"....

19. In our judgment Eady J, notwithstanding his very great experience, has erred both in conflating these two elements of the claim and, more particularly, in treating the first of them as an issue of verifiable fact....

23. ... the material words, however one represents or paraphrases their meaning, are in our judgment expressions of opinion....

31. ... Our decision does not seek to collapse or erode the general distinction between fact and comment: it seeks to relate the distinction to the subject-matter and context of the particular article and the dispute to which it relates...

32. It may be said that the agreed pair of questions which the judge was asked to answer (see para 4 above [sic: this must be an error for para 2]) was based on a premise, inherent in our libel law, that a comment is as capable as an assertion of fact of being defamatory, and that what differ are the available defences; so that the first question has to be whether the words are defamatory even if they amount to no more than comment. This case suggests that this may not always be the best

approach, because the answer to the first question may stifle the answer to the second.

33. However this may be, we consider that the judge erred in his approach to the need for justification by treating the statement that there was not a jot of evidence to support the BCA's claims as an assertion of fact. It was in our judgment a statement of opinion, and one backed by reasons”.

32. The questions which the parties in *Singh* asked the judge to answer reflect the CPR. By PD 53 paras 2.5 and 2.6, where a defendant alleges that the words complained of are true, or fair comment, he must specify the defamatory meaning which he seeks to defend as true, or fair comment, as the case may be. A claimant is not required by PD 53 to specify whether the words complained of are a statement of fact or opinion. That issue only arises if and when a defendant serves a defence in which the defendant seeks to defend the words complained of as being one or other of a true statement of fact, or statement of opinion (whether the opinion is honest is an issue that arises only if the claimant pleads malice in a reply).
33. In *Cammish* the judge had been asked to determine meaning as a preliminary issue (it was not an application under PD 53 para 4.1) and there was an application to strike the claim out as an abuse (on the principles set out in *Jameel v Dow Jones & Co Inc* [2005] QB 946 paras [54]-[55]). But the following may apply equally in an application under PD 53 para 4.1, if the position is sufficiently clear. Arden LJ said in *Cammish* that:
- “43. If the judge is going to make a definitive determination of meaning, he should normally deal with comment at the same time....
44. The words written by the appellant were clearly comment...
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*)...”
34. PD 53 para 4.1 does not refer to a decision to be made by the court as to whether the words complained of are capable of being only a statement of fact, or only comment, as the case may be. But this omission in the PD does not limit the court's powers. The court's case management powers under CPR r.3 are wide enough to permit the court to proceed in the manner in which the Court of Appeal proceeded in *Singh* and *Cammish*. And the court's duty to have regard to the overriding objective in CPR r.1, may require it to proceed in this way, as the court held in *Cammish*.
35. Third, a claim in defamation in respect of words complained of should be struck out (and so a proposed amendment disallowed) if the court decides that there is no real or substantial tort to be tried in relation to those words. That is to say that the claim should be struck out unless there is a realistic prospect of a trial yielding a 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: see *Jameel* paras [54]-[55] and *Cammish* paras [52]-[55].

#### THE E-MAIL – DEFAMATORY MEANING

36. The draft amended pleading reads:

“11.2 In their natural and ordinary or inferential meaning the said words mean and would be understood to mean that the first and/or second claimants were forced, as the result of competition from the first and/or second defendant to resort to the disreputably improper and/or underhand expedient of deliberately making the 2013 conference into a carbon copy of the First Defendant’s Conference.

11.2 The said words were accordingly defamatory of the claimants and each of them in the way of their business as aforesaid”.

37. Mr Busuttil submits that a statement that a company has copied the product or services of another company is, without more, incapable of being defamatory. What might make it defamatory would be if there were an allegation of a breach of a law or code which is binding on the alleged copier, for example an allegation of an infringement of copyright. Subject to an allegation of unlawful acts of that kind, even if originality is to be applauded (as it sometimes is), copying is widely recognised as something that takes place in every business activity.
38. Further, the allegation that there had been copying is not an allegation which could affect a corporate claimant adversely, or have a tendency to do so. Any reasonable reader would understand that the E-mail was written by a competitor, and would recognise that it was a form of advertising or boasting that the writer was the first to have had the idea. There is nothing in the E-mail to support the case that what was suggested was something underhand or disreputable in the copying.
39. Mr Barca submits that a reasonable customer of a claimant referred in the E-mail would surely think the less of that Claimant for having been forced, as the result of competition from the Defendants, into the disreputably improper and/or underhand expedient of deliberately making its conference a carbon copy of the Defendants (first ever) event.
40. In my judgment the submissions of Mr Busuttil are clearly correct. The words complained of in the E-mail are incapable of bearing any meaning defamatory of any claimant company to which they may refer. Not everyone can be first with an idea. There is nothing inherently defamatory in saying that a claimant had an idea after a defendant and copied the defendant, even if the claimant may (understandably) not like that criticism. Lawful copying promotes competition, and that is beneficial to the public at large.
41. Moreover, even if a customer might think the worse of a claimant alleged to have had an idea only after someone else, the test in defamation is not what a claimant’s

customers (or any other section of the community) might think, but what the right thinking member of society could reasonably think. There is nothing which could lead a reasonable member of society to understand that the E-mail imputed a breach of the law, or of any code by which a claimant might have been bound. No such law or code has been suggested to me in argument.

42. It follows from this decision on meaning that the amendment must be refused in so far as it includes a claim for defamation based on the Email.

#### THE ADVERTISEMENT – DEFAMATORY MEANING

43. The draft amended Particulars of Claim include the following in relation to the Advertisement:

“13. In their natural and ordinary or inferential meaning the words complained of ... meant and were understood to mean that the First and/or Second Claimants:

13.1 had, as a result of competition from the First Defendant, been forced to resort to the disreputably improper and/or underhand expedient of deliberately copying the First Defendant’s original and innovative conference plan (which the Claimant was [sic] accepted by the aviation – finance industry as a ‘winner’).

13.2 have a blemished record for dishonestly and/or fraudulently overcharging for tickets for the Conference.

14 The said words identified in paragraph 13 above were accordingly defamatory of the Claimants and each of them in the way of their business as aforesaid”.

44. The first meaning complained of (in para 13.1 of the draft) is the same as the meaning attributed to the E-mail, which I have held is incapable of being defamatory. The same applies to this meaning attributed to the Advertisement.
45. As to both meanings, the first point that Mr Busuttil advances is that they are not capable of referring to the Claimant. Unlike the E-mail, the Advertisement does not expressly refer to any other specific competitor, but only to “the competition”. At this stage of this judgment I shall assume that the Advertisement is capable of referring to whichever Claimant may be the proper one (as discussed below).
46. The submission that Mr Busuttil makes on meaning is that the word “fleece” in the context of the Advertisement can only mean making an unfair or excessive charge, and cannot mean charging dishonestly or fraudulently. He accepts that in some contexts the word “fleece” can mean to obtain dishonestly, but not in this context. He points to the other words in the next sentence of the Advertisement which he submits are explanatory:

“We believe in a fair margin and that if you buy a delegate pass you should expect to have a seat at all events without additional

cost... There will be no sardines to be found pressed to the foyer windows... at our conference”.

47. Further, Mr Busuttil submits that in any event what is conveyed by the word “fleece” is only capable of being an expression of opinion or value judgment, not a statement of fact.
48. Mr Barca submits that the word “fleece” is plainly disparaging, and capable of imputing dishonesty. Both counsel cited dictionary definitions. There is no doubt, as Mr Barca submits, that dictionary definitions do include “rob” (ie dishonesty) as a meaning for “fleece”, as well as “charge an excessive amount”. The Claimant and ETL do not ask the court to investigate their charges. In the draft amended Particulars of Claim it is pleaded:
- “17.4 The Claimants admit (and for the avoidance of doubt, are not concerned to litigate in this claim) the existence of market sentiment to the effect that the Conference is expensive and could or should be cheaper. However, it is untrue that the Claimants have any ‘blemished record’ for dishonestly or fraudulently overcharging those who freely choose to attend the Conference”.
49. In my judgment dictionaries are of assistance in the exercise the court has to carry out in determining issues of meaning in a defamation action, but that assistance may be limited. What the court has to consider in the present application for permission to amend is what meaning the words complained of (taken together) are capable of having attributed to them: not what an individual word means. For example, the literal meaning of the word “kill” is commonly understood to be to put to death. But if a reader reads a report that a claimant has said “If you do that again I’ll kill you”, a dictionary definition of “kill” is of little help. Depending upon the context, the claimant may be conveying any of a range of possible meanings: eg a criminal threat to murder, an expression of frustration and disappointment, or an expression of excitement at losing a difficult point in a game with a friend. In the sentence “If you do that again I’ll kill you” the literal meaning of “kill” is (in most circumstances) the meaning least likely to be the one that a reasonable reader could understand the speaker to mean.
50. In my judgment this is a case where the court should consider the questions in the order set in *Singh*. The first question to ask is whether the Advertisement is, by the sentence including the word “fleece”, capable of being understood as being a statement of fact, or only capable of being understood as an expression of opinion or value judgment.
51. In my judgment the Advertisement is plainly only capable of being an expression of opinion or a value judgment. In the context of the words complained of in this action there is no objective or verifiable standard by which the court could decide whether, as a matter of fact, the charge for a business conference of the kind referred to is dishonest. There is, for example, no allegation related to some specific fact or complaint which might be suggestive of dishonesty. The facts or complaints identified in the Advertisement are an additional charge for a seat at some events, and overcrowding (“sardines”). Nothing is referred to in the Advertisement which could

possibly be understood as conveying a statement of fact that “the competition” have been dishonest.

52. For this reason, in so far as the Advertisement includes the word “fleece”, I conclude that it is capable only of being understood as an expression of opinion, or a value judgment.
53. This conclusion has consequences for the action, since a claimant can only succeed in suing for defamation on a defamatory expression of opinion if (in accordance with *Spiller v Joseph* [2010] UKSC 53; [2011] 1 AC 852) the claimant can prove malice in the sense that the defendant did not in fact hold the opinion he expressed.
54. There is, of course, a further condition which a claimant must satisfy before the defendant need rely on a defence of honest comment. The claimant must persuade the court that the words complained of are (or at this stage of the proceedings are capable of being) defamatory.
55. There can be little doubt that the inclusion of the word “fleece” would be disparaging of a person or company referred to by the Advertisement in the minds of prospective customers. But, as already noted, that would not suffice to make the Advertisement defamatory. A claimant has to satisfy the court that the disparagement would be in the minds of right thinking members of society generally.
56. It is to be noted that the prospective customers at whom the Advertisement is plainly directed, and who are alleged to have been overcharged, are international banks, airlines, law firms and the like. In other words, they are a class of customer whom members of society generally might see as well able to look after themselves. So the Claimant’s task in satisfying the test at trial may well be a difficult one.
57. However, I accept that the Advertisement is capable of meaning that whatever company is referred to has unfairly overcharged its customers, and that in that meaning it would be capable of lowering either the Claimant or ETL in the minds of right thinking members of society generally. But, as stated in para 48 above, there is not complaint of that meaning.

#### REFERENCE IN DEFAMATION

58. Neither the Email nor the Advertisement refers to the Claimant or to ETL by name.
59. In support of the case that the Advertisement refers to the Claimant and ETL, or one of them, the Claimant relies on the words “the competition”. It pleads that the only other aviation finance conference being held in Dublin in January 2013 was the Euromoney Conference. In fact, so it is said, the Euromoney Conference has since its inception hitherto been the only aviation conference which is held (a) in Dublin, and (b) in mid-to-late January each year.
60. In para 16.4 of the draft the Claimant pleads that:

“The aviation industry audience to whom the Defendant published the Email and the Advertisement would have been aware of sufficient of the aforesaid facts and/or those facts

additionally pleaded [elsewhere in the Particulars of Claim] to have thereby understood the words complained of to refer to the First and/or Second Claimants.”

61. If the words complained of are alleged to disparage unnamed corporations in the way of their business, and the business is identified, then the test is as set out by the editors of Duncan & Neill on Defamation 3<sup>rd</sup> ed para 10.02:

“Where the publication relates to a business with a complex corporate structure care should be taken to bring the claim in the name of a company which (1) would be identified by reasonable readers as the subject of the allegations and (2) apt to suffer damage to its own trading reputation as a result of the publication.”

62. It is not necessary that a corporate claimant should prove that a publishee of words complained of knows its formal legal name. See Gatley on Libel and Slander 11<sup>th</sup> ed paras 7.1-7.2.

63. In support of the application by the Claimant for permission to add ETL as a second claimant there is a witness statement by Mr Luke Gibson, the Managing Director of ETL. He states that ETL is a wholly and subsidiary of the Claimant. He accepts that the description of the Claimant in the Original Particulars of Claim was not accurate. That description was that the Claimant:

“provided leading publishing events, and electronic information services to the finance, law, and energy and transport sectors for more than five years”.

64. Mr Gibson states that the true position is as set out in the draft Amended Particulars of Claim as follows:

“A. The Parties

1. ... The First Claimant is the parent company of the Euromoney Group (“Euromoney”). [ETL] is a subsidiary of the First Claimant trading within Euromoney. As further elaborated under heading B below, Euromoney has been in the business of providing leading publishing, events, and electronic information services to the finance, law and energy and transport sectors for more than 35 years...

B. Background: Aviation Finance Conferences

3A. Euromoney’s business activities as aforesaid include the publication of Airfinance Journal (“AFJ”) a specialist journal which appears in printed magazine and internet versions... Originally established some 30 years ago, the AFJ is the leading financial intelligence source for the aviation industry, and provides its specialist readers with news and analysis

relating to the financing of airlines, aircraft leasing, manufacturers and airports.

3B. [There are then set out the trademark information].

4. For 15 years (since 1999) every January Euromoney has been hosting the Annual European Airfinance Conference in Dublin (“the Conference”).

4A. Until 2010, the Conference was directly run as a joint venture by two operational divisions of the First Claimant: ‘Euromoney Seminars’ and ‘Airfinance Journal’. The Conference was marketed using the name of both the divisions and was branded using the “Airfinance” trademark. Following a corporate re-organisation within Euromoney in September 2010, both the said divisions were transferred to the Second Claimant. Since 2011 both divisions have continued to run the Conference and had moved to re-brand their joint venture using the name ‘Airfinance Events’. The Second Claimant now pays the First Claimant a licence fee for the use of the ‘Airfinance’ trademarks in its branding.

4B. In 2013, and to reflect the increasingly international character of delegates and speakers at the event the Conference was re-named the “Annual Global Finance Conference” ... [there then follows a description of the Conference much of which has been given in the pre-action correspondence].

65. The draft amended Particulars of Claim set out the case on reference in para 16, which in turn relates back to paragraphs 1-10, which contain the two sections headed “The Parties” and “Background: Aviation Finance Conferences”.
66. Mr Gibson goes on to explain that when proceedings were issued against the Defendants on 6 December 2012, he understood that the Claimant, as the parent company and ultimate owner of the relevant trademarks and Euromoney group of business, was the correct party to bring proceedings. After advice from lawyers on 29 January he made enquiries about the corporate structure and came to understand that the Claimant had direct control of the Conference before the creation of ETL, and that the conference part of the business had been transferred to ETL with effect from 30 September 2010.

#### *The Email*

67. Since I have held that the E-mail is not capable of being defamatory, the issue of reference does not arise. But I consider it in case it should become relevant at a later stage.
68. The Email includes the words “AFJ’s Air Finance Europe Conference”. The case on reference is that (1) the Claimant is the parent company of a group of companies which includes ETL (para 1), (2) the business of the group includes the publication of Airfinance Journal (para 3A); (3) until 2010 the Euromoney Conference was run as a

joint venture by two operational divisions of the Claimant (neither of those entities being the Claimant or ETL) and marketed with the use of the “Airfinance” mark and by the words “Euromoney Seminars and Airfinance Journal are divisions of [the Claimant]” (paras 4A, 16.1 and 16.2); (4) since 2011 those divisions became part of ETL, and the Euromoney Conference marketed with the words “Airfinance Events is a division of [the Claimant] (paras 4A and 16.2).

69. There is also pleaded at para 4A that ETL “now pays the ... Claimant a licence fee for the use of the “Airfinance” trade mark. However, the word “now” is not defined as the date of the Email. And Mr Busuttil submits that there is no plea or evidence that the Claimant granted a license to any licensee other than ETL. He submits that there is nothing in the draft amended pleading to support the case that at the dates of the publications complained of (30 August 2012 for the Email) the words complained were likely to cause any pecuniary damage to the Claimant.
70. On this basis Mr Busuttil submits that there is no factual basis for the draft pleading that the Claimant is apt to suffer damage to its own trading reputation as a result of the publication.
71. Mr Barca submits that the draft pleading alleges that the Claimant did in the past run the Euromoney Conference, and that in any event, as I stated in *Adelson v Associated Newspapers Ltd* [2007] EWHC 997 (QB) at [70] “the issue in relation to claims in libel by corporations that do not trade may be in a state of development”. The draft pleading does not state that the Claimant is a mere holding company, and the application before the court must be decided on the draft pleading.
72. On this issue I accept Mr Barca’s submission. In my judgment it cannot be said simply on the basis of the draft amended Particulars of Claim that the E-mail is incapable of being understood to refer to the Claimant. The claim does not appear to be very strong, but whether any damage which the Claimant might suffer as a result of the E-mail suffices for this to be a real and substantial tort is a different question, considered below.

#### *The Advertisement*

73. As to the Advertisement, in support of their case that this would be understood to refer to the Claimant and ETL, they rely on the same facts as relied on in relation to the Email, and on the fact that the only other aviation finance conference being held in Dublin in January 2013 was the Euromoney Conference.
74. Mr Busuttil accepts for the purposes of this hearing that “the competition” is capable of being understood as referring to ETL, although he does not accept it is capable of referring to the Claimant. But he submits that the Advertisement, in so far as it refers to “fleecing”, can only be understood as making a positive statement about the First Defendant, and is not capable of being understood as making a derogatory statement about the competition.
75. I cannot accept that submission. The Advertisement is capable of being understood as comparing the First Defendant and the competition in a manner which refers to the competition and does so by way of disparagement. In my judgment, the same

conclusion must follow in relation to the Advertisement as I reached in relation to the Email (see para 72 above). Mr Barca succeeds on this point also.

## MALICE AND DEFAMATION

76. The effect of the decisions that I have made so far is that, subject to two outstanding points, I would grant the application for permission to amend to advance that part of the new case in defamation which is based on the Advertisement. But I would do so only in so far as that refers to “fleecing”, and only if (which is not the case) the Claimant or ETL were relying on the meaning I have found in para 57 above. One of the outstanding points is the *Jameel* abuse point considered below. But there is another.
77. Since I have concluded that the Advertisement is only capable of being defamatory in a meaning which expresses an opinion, it would follow that such a claim could only have a prospect of success if the Claimant and ETL can plead malice in the required sense, namely that the Defendants did not in fact hold the defamatory opinion in question.
78. But the time for making that allegation in a statement of case has not yet arisen: a plea of malice in answer to a defence of honest comment need not be made before the Reply. There is a plea of malice in respect of the new case in malicious falsehood, but that does not address the defamatory meaning which I have held the Advertisement to be capable of bearing.

## MALICIOUS FALSEHOOD

79. The four essential constituents of the tort of malicious falsehood, and further information about it, were set out by Glidewell J in *Kaye v Robertson* [1991] FSR 62 at 67 as follows (the numbering is added):

"The essentials of this tort are that the defendant has [1] published about the plaintiff [2] words which are false, [3] that they were published maliciously, and [4] that special damage has followed as the direct and natural result of their publication. As to special damage, the effect of Section 3(1) of the Defamation Act 1952 is that it is sufficient if the words published in writing are calculated to cause pecuniary damage to the plaintiff. "

80. The 1952 Act s.3 reads:

"3(1) In an action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or any other permanent form...."

81. In the present case no actual damage is pleaded. The Claimants rely on s.3. For the purposes of this application it is common ground that the words "calculated to cause

pecuniary damage" mean "more likely than not to cause pecuniary damage". See *IBM v Websphere Limited* [2004] EWHC 529 (Ch) at para 74.

82. Malice can be proved in any of the following ways, as stated in *Duncan & Neill* at para 18.17: (a) by proof that the defendant knew that the relevant statements were false; (b) by proof that the defendant was reckless and published the relevant statements not caring whether they were true or false; or (c) by proof that, even though the defendant believed the relevant statements to be true, he published them in order to injure the claimant.
83. The claim in malicious falsehood is pleaded in para 17 of the draft amended Particulars of Claim. It is not easy to follow the pleaded case. As to the falsehood, this is because the statements alleged to be false are not set out one by one with the particulars of the respects in which each statement is alleged to be false. In some instances the Claimant has alleged that statements are false, when those are not statements which are made explicitly in the words complained of. These are identified by asterisks below.
84. Mr Busuttil's submissions are under the following headings:
  - i) the words complained of are not capable of bearing the meanings which are not explicitly set out;
  - ii) the statements alleged to be false are not statements of fact, but statements of opinion, and a statement of opinion cannot be complained of as a falsehood for the purpose of a claim in malicious falsehood, subject to one exception mentioned in *Gatley* at para 21.5;
  - iii) the Claimant has failed to plead a case of malice which is more consistent with dishonesty on the part of the Defendants than with absence of dishonesty (citing *Telnikoff v Matusevitch* [1991] 1 QB 102 and other cases considered at *Gatley* para 30.5).
  - iv) the Claimant has failed to identify the nature of the damage which it alleges that it was likely to suffer, or the chain of causation by which it was likely to suffer it, this being one of those cases where such a plea is required, as in the *Tesla Motors* case.
85. It appears that the following statements are alleged to be false in the draft amended Particulars of Claim:
  - i) In the Email: that the Claimant's Conference is a copy of the First Defendant's: paras 17.1, 17.3, 17.4
  - ii) In the Advertisement
    - a) that the First Defendant forced the Claimant to change the name, focus and offering of its Conference: para 17.3
    - b) that the Claimant has a blemished record \*for dishonestly or fraudulently overcharging\*: para 17.5

- c) that the First Defendant has more years of experience in the aviation finance and leasing sector than the staff at the Claimant, and \*is therefore more trustworthy\*: para 17.6
86. In para 17.4 the Claimant sets out respects in which its Conference in 2013 differed from the First Defendant's conference, and states that, given these differences, "the 2013 Conference could manifestly not have been a 'carbon copy' of the First Defendant's conference".
87. In para 17.3 the Claimant sets out examples of changes made to its Conference in each of the years 2001, 2003, 2011, 2012 and 2013 which it states were made to improve customer satisfaction and which were not "either copied from or 'forced' by the Defendant". Para 17.11 refers back to para 17.3.
88. In para 17.6 the Claimant sets out facts about ten members of its staff (their names, and years and fields of experience) which it states demonstrate the falsity of the Defendant's claim that its staff, said to consist only of the Second Defendant and his wife, had more experience than the Claimant's. It is said that the Claimant's staff had a cumulative total of 92 years' experience of aviation finance industry conferences, whereas the Second Defendant and his wife had a cumulative total of 16 years in the aviation industry. In para 17.11 it is pleaded that the Defendants knew the numbers and years and fields of experience of the Claimant's staff.
89. The particulars under the heading "Particulars of Malice" are also difficult to follow. The gist of paras 17.9 and 17.10 is that the Defendants deliberately sought to generate confusion in the minds of prospective customers between the conferences organised by the Claimant and by the Defendants. I take this to be a plea of intention to injure the Claimant, in effect by causing confused prospective customers not to attend the Claimant's Conference.
90. 17.11 reads:
- "Not least by reason of the matters set out in paragraphs 17.1 to 17.6 above, the Second Defendant knew that there was no basis for his insinuations that the First Claimant was guilty of improperly copying the First Defendant's Conference, dishonest/fraudulent overcharging, or being less experienced than the First Defendant to run an aviation-finance conference. Accordingly, and having regard to the fact that the Second Defendant sent the Advertisement only a few weeks after his ill-tempered capitulation in response to the First Claimant's [complaint of infringement of its trade mark] the Claimant will contend that the Second Defendant published the words complained of: (1) knowing them to be untrue, or else with reckless indifference as to whether they were true or false; and/or (2) with the intention of promoting the First Defendant's Conference by deliberately disparaging the Conference; (3) in the case of the Advertisement, fuelled by his anger and hostility after having been forced to accede to the First Claimant's legal demands the previous month".

91. In summary, the case on malice is both knowledge of falsity and intention to injure.

#### REFERENCE AND MALICIOUS FALSEHOOD

92. I reject Mr Busuttill's submission that the words complained of are not capable of referring to the Claimant for the same reasons that I rejected the corresponding submissions he made in relation to defamation. The case on reference for each of the Claimant and ETL has, on the basis of the draft pleading, a sufficient prospect of success to justify the grant of permission to join ETL.

93. This point is closely linked to his submission on the case on likely damage under the 1952 Act s.3. Mr Barca made clear in argument that the likely damage relied on was the loss of customers, who would be deterred or confused by the Defendants' statements from attending the Euromoney Conference in 2013. It is possible that could affect the licence fee which is pleaded. In my judgment the case in damage is sufficiently pleaded.

94. I also reject the submission that permission should be refused on the ground that it is inherently improbable that ETL would be likely to suffer any such loss or damage, in particular because if that had been likely, it would have manifested itself already, given that the rival conferences took place in January 2013. That is a submission that may or may not succeed at trial, but is not a basis for refusing permission to amend.

95. But that again leaves open the question whether there is a real or substantial tort, and whether the court should permit a claim in malicious falsehood to be advanced when it had not been mentioned in the pre-action protocol. Both of these points are considered below.

#### MEANING IN A MALICIOUS FALSEHOOD CLAIM

96. I turn to Mr Busuttill's submission that those statements complained of which are not factual in nature, but are opinion or value judgment, cannot be the subject of a claim for malicious falsehood. This submission applies principally to the meanings which (in relation to defamation) I held to be capable of being only opinion or value judgment, and to the claims that the Defendants had more years of experience in the aviation finance and leasing sector than staff at the competition.

97. Mr Barca submitted that the conclusion that I reached in relation to defamation cannot be taken without more as applying to malicious falsehood. The reason for this is that in defamation the court must apply the single meaning rule, whereas in malicious falsehood that rule does not apply: *Ajinomoto* at paras [33]-[35]. So, Mr Barca submits, "the defamation short cut of a preliminary ruling on meaning is thus not available to the Defendants" in a malicious falsehood claim.

98. Mr Busuttill disputes that this is the consequence of there being no single meaning rule in malicious falsehood.

99. To resolve this issue it is necessary to look more closely at what was decided in *Ajinomoto*. Since hearing this case I have heard and handed down judgment in *Cruddas v Calvert & Ors* [2013] EWHC 1427. In that case a similar point was argued, and I referred in my judgment to this case. Paras [57]ff in *Cruddas* set out the

reasons why I have reached the conclusion I have reached in this case, namely that my decisions in paras 38 and 52 above apply to the claim in malicious falsehood. In so far as the Advertisement includes the word “fleece”, it is incapable of imputing dishonesty or fraud, and is capable of being understood only as an expression of opinion or a value judgment.

100. I turn to the claim about the experience of the Defendants, compared to the competition, and in particular the words “is therefore more trustworthy” in para 17.6. If the word “trustworthy” imputes a doubt about their integrity, then I would hold that the Advertisement is not capable of bearing that meaning. If it imputes a doubt about their professional skills, I would hold that the comparison is capable only of being an expression of an opinion or value judgment. The word “therefore” makes clear that the added words are an inference.
101. But the comparison itself can only be a matter of opinion. The Advertisement refers to the competition. The fact that it refers to the Claimant or ETL (if it does) does not preclude that it also refers to other competing companies. The term is imprecise. So too are the criteria: they are not specified at all in the Advertisement. Nor are “the staff” specified against whom the Defendants compare themselves. It is impossible to see how a court could carry out an objective verification of such a claim.
102. I also accept Mr Busuttil’s submission that the law is correctly stated in *Gatley* at para 21.5: a statement of opinion cannot be complained of as a falsehood for the purpose of a claim in malicious falsehood.
103. The exception mentioned by the editors of *Gatley* is where a defendant claims to hold an opinion which he does not in fact hold. In my judgment that is not a true exception. The statement that a person holds an opinion is for the purposes of the law of misrepresentation and fraud treated as a statement of fact about that person’s state of mind. There is no reason why it should be treated differently for the purposes of the law of malicious falsehood.
104. There remains to be considered the allegations of copying (paras 17.1 to 17.4). Mr Busuttil submits that these are not capable of supporting a claim in malicious falsehood because they are comparative advertising of a kind which the courts have repeatedly recognised as lawful. He cites *Vodafone Group plc v Orange Personal Communications Services Ltd* [1997] FSR 34, 39 and more recent cases in which that case has been cited. In *Vodafone* Jacob J said:

“The public are used to the ways of advertisers and expect a certain amount of hyperbole. ... The test is whether a reasonable man would take the claim being made as one made seriously ... the more precise the claim the more likely it is to be so taken - the more general or fuzzy the less so”.
105. In my judgment the claim about copying is not one that a reasonable man could take seriously in this case. The claim to be first is one that advertisers constantly make. And in a complex product or service there are likely to be numerous different features, so that the claim may be truthfully made by a number of rival relying on different features.

## MALICE

106. On the foregoing findings (that the statements are not ones of fact, but of opinion) the question of malice does not arise. But I shall consider it briefly.
107. A plea of malice is a plea of dishonesty. In cases such as this, where the parties are competitors in business, a plea of malice in the form of intention to injure is difficult to sustain. Rival businesses intend to promote their own interests. The fact that to some extent business is a zero sum game means that promoting one business may result in harming another. But it is fanciful to suggest that the Defendants in this case were intent on injuring the Claimant or ETL. I reject that basis of the plea of malice.
108. The alternative basis is that the Defendants knew that the allegations of copying, and of the respective experience of themselves and their competitors' staff were false.
109. The complaint about the Defendants' claim to be more experienced was first raised by the Claimant on 21 November as a claim in defamation. The Defendants responded the same day. The response included the following:
- “We feel it is true that we have more experience in the finance and leasing sector than Ascend/Flight Global and Euromoney at this time because key staff have been lost at both /all those companies (and others),... Your statement of amalgamated experience is a very silly one given that you are talking about far more people in large organisations, it does not remove the fact that aviation finance and leasing knowledge/experience of frontline staff is not as great as that possessed by staff at these offices on an individual basis. If you have frontline editorial/Conference staff writing magazine content and working on/in conference moderation roles full time that have more front line experience of writing about and moderating on aviation finance and leasing then we will retract our statement in full and at once without hesitation and sate a correction...”
110. This response illustrates the difficulty that the court would have in attempting to verify the claim (assuming that the claim were an allegation of fact). But the claim in malice was formulated after this correspondence. The dispute about the relative experience of the parties was not followed up in correspondence. It was not until recently, when they pleaded para 17.6.1 in the draft amended Particulars of Claim, that the Claimant and ETL rose to the challenge set by the Defendant in his e-mail of 21 November. They set out the names and experience of the staff whom they state they “can presently count on”. If that is a reference to the date of the Advertisement in November 2012, it provides a starting point for a relevant comparison. But in the light of the correspondence I see no real prospect of the Claimant and ETL proving that the Defendants were dishonest in the claim they made in the Advertisement.
111. Accordingly, I would refuse permission to amend to add the plea in malicious falsehood.

**IS THERE A REAL AND SUBSTANTIAL CLAIM IN DEFAMATION OR MALICIOUS FALSEHOOD?**

112. In the light of the decisions I have made I do not need to consider whether there would be a real and substantial claim in defamation or in malicious falsehood, save in respect of the defamatory meaning (overcharging) which I held that Advertisement was capable of bearing (para 57 above). However I do so, in case the point should become relevant.
113. It is at this point that the pre-action correspondence purportedly conducted in accordance with the Protocol becomes relevant.
114. Mr Barca accepts that in the case of the E-mail there is only one addressee, and only one, or perhaps two, publishees (Ms Palmer and the Tom referred to in the E-mail). In the case of the Advertisement, there is as yet no averment as to how many publishees there might be. I cannot at this stage find any facts, but I am prepared to assume that there might well have been quite a number. And I ignore the point (albeit that it seems likely to me) that the publishees may well all be outside the jurisdiction of this court and the publications governed by a foreign law.
115. Mr Barca submits that this is a case where proceedings are made necessary by the risk of the Defendants repeating the words complained of on occasions in the future, and that for this reason there is a good claim for an injunction. Further he submits that there is a reasonable prospect of an award of substantial damages.
116. Mr Busuttil submits that the words complained of related to conferences which took place last January, and that if any damage were likely to have been suffered, then that would have become apparent by now and that there is no substance in the claims for relief whether by way of damages or an injunction.
117. In my judgment, assuming (contrary to what I have decided) that the words complained of are defamatory, or that there is a claim in malicious falsehood, there is no real prospect of a corporate claimant recovering either substantial damages or an injunction. I refer to the correspondence

*The Pre-Action Correspondence*

118. The pre action correspondence, so far as material, includes the following.
119. On 19 October 2012 at 11:57 solicitors for the Claimant sent a letter of claim addressed to the First Defendant. The complaint related, not to either of the matters the subject of this action, but to material on the First Defendant's website. The claim was for infringement of trademark and passing off. The words in respect of which the complaint was made were headed

“Latest News

Airline Economics Dublin 2013

Schedule Launch

September 7<sup>th</sup> 2012...

We have been talked about and we have been copied. Now it is time for us to release our schedule. You will find the full schedule, a list of attending

companies, speaker and sponsor information, floor plans and rates at [www.aedublin.com](http://www.aedublin.com)

Put simply Airline Economics Dublin 2013 is the first global air finance and leasing event to be staged. We were asked to run this event by a large segment of the finance and leasing community who thought it was time that airlines, and not OEMs were the centre of attention. Moreover the thinking is the event should be both better than what has gone before but also far less expensive for attendees and airlines alike. Also the thinking is that attendance at the event should be capped so that every delegate space comes with a seat in the main hall and access to all events (something that should surely be a given in this day and age). ...”.

120. In a letter of 19 October solicitors for the Claimant stated that the Claimant was the proprietor of the trademark for the words Air Finance. They claimed that, by using the words Air Finance on the website, the First Defendant was infringing the Claimant’s intellectual property rights and committing the tort of passing off. They required the First Defendant to cease and desist.
121. On the same day, at 14:43, the Defendants replied by e-mail. The reply was written by the Second Defendant. It included the following:

“We have at no stage ever tried to pass ourselves off as being from or involved with your company. Indeed I remind you that it is your offices which changed the name and offering of your conference to match ours which led to confusion...

Now that we are aware that you have a copyright of the word Airfinance we will cease using the same and we will also go back to the persons you mention within their next 24 hours to ensure that they realise that we are not anything to do with your company. We do not want to be associated with you in any way at all. ...

The industry is well aware that we are a separate conference and indeed we would like to see the full Hogan e-mail to check the context of the comments as he has staff at our event already who know full well who we are”.

122. The “Hogan e-mail” is an e-mail referred to in the letter of 19 October from the Claimants. It was dated 24 September and sent by the Defendants to Mr Hogan, President and Chief Executive of Etihad Airways in which the Defendants wrote: “ours is the first global Air Finance and Leasing Conference”. Mr Hogan forwarded it to the Claimant asking:

“What is this all about? Please can you send me the new draft programme along with a list of confirmed speakers. I suspect it might be easier if we just deal with the one person otherwise it creates mayhem and confusion”.

123. On 23 October 2012 the Defendants sent a further e-mail to the solicitors for the Claimant headed “Open Letter”. It included the following:

“I am able to confirm that all terms to ‘AirFinance’ have been stripped from the website and e-mails and materials. We have contacted Etihad and Mr Hogan and we have contacted all at the conference both attending and speaking. Other than a great many amusing e-mails we have no one who booked ‘by mistake’ as yet”.

124. On 26 October 2012 solicitors for the Claimant wrote referring to the Defendants’ e-mails of 19 and 23 October 2012. They noted the Defendants’ agreement to discontinue use of the Claimant’s trade mark. Whilst they reserved their client’s rights, there is no indication that they expected the matter to proceed further. However, in relation to the Defendants’ e-mail of 19 October, first paragraph, they wrote:

“Furthermore we are surprised by your assertions that our client has changed the name and offering of its conference to match yours. Please explain”.

125. This letter was sent at 11:58 by e-mail. The Defendants replied on the same day at 13:57. The reply included the following:

“We make money on our event by virtue of the fact we are very different from your client’s event as your client has a poor reputation for value and conference offerings on stage with a poor reputation for cramming too many people into a single space shall we say – so given that fact which you should be aware of by now, why would we pass off as being the same? There is no logic to your argument and we have not done so in any event. ...

Your client changed their focus following consultation with a firm that was hired to look into our offering, as we know as we caught them, now why would your client do that if not to seek information on innovations they were not equipped to come up with themselves after 15 years? Moreover we are able to show clearly that on the main we booked speakers that have not been on the stage at your client’s event before, and then your client booked the same people some weeks and months later – causing confusion...”.

126. That appears to have been the end of the matter as far as fears of infringement of trademark and passing off are concerned. But it was not the end of the Claimant’s complaints.

127. By an e-mail dated 21 November 2012 at 11:37 solicitors for the Claimant made their new claim in defamation. This is a pre-action protocol letter in relation to the Email (dated 30 August) and the Advertisement (dated 16 November 2012). The letter includes the following:

“The Defamatory Allegations would mean and would be understood to mean that our client has intentionally copied the content, focus and cost of your conference; is not innovative; has a blemished record or is dishonest in its ticket sales for its conference; and that our client’s staff are less experienced than yours. These allegations are categorically untrue, extremely serious and defamatory of our client.

It is clear that the Defamatory Allegations refer to our client because it is your only competition in Dublin: your conference is in direct competition with Euromoney’s and no other. The industry audience to which you published the Defamatory Allegations would be more than aware of this fact, and that you are comparing yourself directly with our clients. ...

Our client’s conference is now marketed as a ‘Global Conference’ but this is due to the increasing international character of the conference due to the speakers and delegates, and not due to your start-up conference. Our client is constantly seeking feedback from the aviation finance market on how to improve its Conference. It has, for example, reduced the price of the tickets... these changes were contemplated much before our client knew of your conference.

Your allegation of ‘fleecing the industry’ is an extremely serious allegation because it is a reference to fraud. The allegation is untrue. Our client does not defraud its delegates and has always been transparent about its pricing of the tickets for delegates. Our client’s Conference is divided into two parts. The first part is one day for a specific sector of the market such as investors. The second part of the Conference is the main part which lasts two days. Delegates can buy a ticket for the first day only, for the second and third days combined, or for all three days. Your allegation that delegates have to pay ‘additional costs’ implies that the delegates at our Conference do not get what they pay for when the reverse is the truth - ...

It is categorically untrue to say that your staff are more experienced than our client’s. Our client has a cumulative total of 92 years experience. As far as we are aware, your staff has a cumulative total of around 16 years’ experience.

You are clearly attempting to market your conference and attract delegates by discrediting our client’s Conference. We also note your further references to our Conference in your publication ‘Airline Economics’ [that is a complaint that is not pursued]. It is clear that you are conducting a campaign against our client and its Conference, in the hope that it will increase the popularity of your own. Not only is this bad business, but it also amounts to improper motive, and therefore indicates that your publications are being made maliciously. ...

The Defamatory Allegations have already caused irreparable damage to the good reputation of our client... The commercial damage you have caused is as yet unquantifiable. You must confirm by 5.30 pm on Thursday 22 November 2012, ... that you will not further use, refer to, or make the Defamatory Allegations, or any other allegation relating to our client whether by yourself or through any third party for any reason.

You have until 5pm on Wednesday 28 November 2012 to:

1. Provide us with a list of all those (whether individuals or companies) to whom you published the Defamatory Allegations;
  2. Provide us with undertakings not to repeat the Defamatory Allegations or those similar to them;
  3. Publish the enclosed retraction and apology to all those to whom you made the Defamatory Allegations (and provide this firm of evidence as such;
  4. Pay our client damages;
  5. Pay our client's legal costs. ...”
128. The letter ends with a threat to issue proceedings if the Claimant's requirements are not met. There is attached the following draft:
- “Apology and Retraction
- To whom it may concern
- I and my company Aviation News Limited (“ANL”) made a series of inaccurate and defamatory allegations about Euromoney Institutional Investor Plc (“Euromoney”). These allegations included that: Euromoney is copying ANL's conference, is less experienced in the aviation industry than ANL is and implying that Euromoney has a blemished record or is dishonest in its ticket sales for its conference.
- These allegations are entirely incorrect and on behalf of myself and ANL I retract them in their entirety. I apologise wholeheartedly for having made these allegations and have also apologised directly to Euromoney... ”.
129. On the conclusions I have reached above, the Defendants were entitled to refuse to publish a retraction and apology in these terms. They had made no allegation of dishonesty, the allegation of copying was not defamatory, and in so far as they expressed honest opinions they were not obliged to retract them at all.
130. The Defendants replied to this e-mail, again doing so on the same day, at 23:28. The e-mail covers four closely typed pages and includes the following:

“We are a small family company with little or no support coming under a sustained and malicious attack by your clients. The company that at this time does not have the margin to support any of the directors in a full time and paid capacity and therefore does not have the funds and assets with which to seek retained legal representation. We are being bullied, and all evidence supports us in this view that we have formed today following your letter.

Your claim of malice and statements made by us that we know to be untrue is totally incorrect and unjustified. In fact, as we have mentioned before to your offices, we believe wholeheartedly that you and your clients are conducting a sustained and malicious campaign against us in an attempt to stifle and delete legitimate competition.

We never shy away from admitting our mistakes and would do so via formal retraction if we have made incorrect and/or malicious comments even if they had not caused loss or damage, but in this instance we do not find cause for a retraction as you suggest, we have not caused damage or loss, we have not made a malicious statement and we have not made any statement that we knew to be untrue.

We have a record of admission from your staff verbally from September 2012 in conversation that, and I quote: ‘Ah I see you have got some competition’ The Euromoney senior staff member replied: ‘Yes, they have forced us to drop our price and change a few things’. We are confident that if forced to go openly to the market that we will be able to find many instances in addition to this which bag our belief that you and your client are knowingly not telling the truth in this letter...

I feel we must deal with point 6, as you lay the charge against us that we have stated that your client is defrauding the industry. This is totally untrue. **IN ACTUAL FACT WE WERE TALKING ABOUT US IN THE STATEMENT NOT ANY OTHER COMPANY...** However, if we have to answer your points then we will here and now: It is the case that everyone in the aviation sector feels that they are being ‘fleeced’ (to mean overcharging and not providing good value) by conference publishing and date companies at the moment. We are fully aware of the huge margins being made at AFAC, Flight Global/Ascend, Euromoney, UBM and others. Our Dublin offering exists because we were asked to cut the cost to the customer. We have many references of people saying that they are being ‘fleeced’ (and using that term) and cannot afford the high prices of Ascend, Flight Global, Euromoney and the others. I note (upon dictionary inspection a moment ago) that you have taken the literal term for the word and applied it to be levelled against your client alone – This is not true on both

counts, we believe strongly that the entire conference sector is overpriced and we believe strongly that everyone, including us in this instance uses the word you have flagged 'fleeced' in its slang term to mean that one is paying over the odds. ... I am sure that no one reading the message we sent out on 16<sup>th</sup> believes that for one moment we are accusing anyone of defrauding the industry. We did not for one second mean that and did not apportion that meaning to your client... If you can show unsolicited statements to the contrary from people saying that you are defrauding the industry following our message then we will absolutely without hesitation send a confirmation to those persons in full stating what I mention here and/or as required, as is only right and proper. As to your mention of additional cost to all events – your client knows full well that every conference across the globe in this sector charges for additional events such as awards. We are different, we can and do make note of this at all times as it is a legitimate selling point against all other offerings. Why did feel that this is aimed solely at your client when this is a unique selling point from all other conferences everywhere that we know of in this industry that we are competing against? This does not make sense and you are totally wrong to make the conclusion(s) that you have against the same and you misunderstand us completely.

It must also be stated (again) that your client and another now offers products that are similar, or as in the case of your client, exact to ours...

On your point 5. [the Defendants' response in relation to the relative experience of staff is set out above]

The line that you take from this message was formed from statements from within your client's offices based upon all facts to hand at that time... It is the actions and words of your client to many different sources within the industry that led to this line being included in the message to Tom Cahill's staff. It is also now clear that you were in possession of this message when you accused us of passing off a number of weeks ago, even though you had this message in your possession that clearly indicates we are trying to differentiate from the changing offering of your client. It seems to us, that you and your client are trying everything you can to delete competition through unfounded allegations that consume our time and therefore funds. You are also well aware beyond doubt that we no longer mention your client across any format...

We obviously wish to avoid any further action but cannot agree to make statements which are knowingly untrue. Such as that which you put forward...

I wonder - does your client need to take this action also in reference to people booked to their offering to ensure that they have not been misled? Indeed we have looked to see who opened the message of the 16<sup>th</sup> we can see that 51 people clicked on the message of the 16<sup>th</sup>. Of that number 29 are separate companies and 14 private e-mails. Of this total not one single one has booked to attend our event since the message was sent. We cannot send you details of these people as that action is against the procedure set out in the Data Protection Act, as you are aware. We will ask these people if our message lead them to believe that your client is defrauding the market (your belief stated in your letter of today which we disagree with). We can then decide with confidence if we need to issue a retraction to the statements made to those people in the message of 16<sup>th</sup>. We will allow your offices to follow our findings as they happen if you wish...

It is however, our undertaking on a without prejudice basis that: no person from the Aviation News Limited or any person associated with staff and or directors of the same, such as family or the like which can at a push be said to be under our control will make any defamatory allegations (not that we have) or make any other allegations or indeed make any mention of your client directly, indirectly or otherwise in any manner shape or form across all/any formats with regard to any conference product associated with the aviation sector. This is on the strict basis that your client agrees to the same and return in the interest of fair competition.”

131. By an e-mail of 23 November 2012 at 17:48 solicitors for the Claimant replied to the Defendants’ e-mail of 21 November. They urged him to take legal advice, as they had before. They summarised what they understood to be the position set out in his long email of 21 November 2012. They then wrote this:

“Your threatened further communication with the recipients of the Advertisement

... it is unclear from your email the nature of the communication you intend to make to the recipients of the Advertisement. Indeed, it is possible that by communicating further with the recipients you will only confuse matters further and exacerbate the damage you have already caused. Please confirm, as a matter of urgency and by return, that you will not communicate with the recipients of the Advertisement about this matter without first agreeing the wording of any such communication with this firm...”

132. The letter then went on to address a number of the matters set out in the e-mail of 21 November 2012. The solicitors maintained that the Claimant has not copied the Defendants’ conference nor changed its conference as a result of anything done by the Defendants. The letter sets forth the Claimant’s explanation of why it says it made the

changes to its conference, which the Defendants say were prompted by their own conference. The letter goes on:

“The truth is that you have purposely planned your conference in the same week in the same city as our client’s in an attempt to copy and feed off the Conference. You have also marketed your conference by reference to our client’s and have sought to defame our client and its conference as a means to advertise your own. It is our client’s 15th Annual Conference this year and their Conference has the highest attendance in the world.

Our client is not anti-competitive: it has had many competitors for many years across numerous lines of business in various sectors and has never had any problems of this kind with any of them. It does, however, object to being defamed, whether by its competitors or otherwise. ...

... You have defamed our client and now must remedy the damage you have caused. For the reasons outlined above, your attempts to defend what you have said will not be successful.

...

[they then reiterate the requirements numbered one to five set out in a letter of 21 November]...”

133. The Defendants replied, again effectively on the same day, that is 16 minutes after midnight. The e-mail explains the personal difficulties of the Second Defendant. The e-mail states that the Claimant will have a formal reply by way of letter by the deadline of 28 November and confirms that the Defendants will not contact anyone on this matter of the e-mail of 16 November, as requested.
134. The next day the Defendants sent a three page letter. In it they set out why they contended that the publications complained of were not defamatory, or were true, or were fair comment (a stance that I have largely upheld as correct). The letter ends:

“We will agree to send out your message that you suggest to the section of our database that received the original message, but only because we do not wish to waste our tears and time on your malicious intent and because we are so sure beyond question that we are in the right. We would only do this on the following terms on what is a without prejudice basis to get you off of our back:

1. The message is sent as you set out to the same section of our database as you request.
2. The message uses the text you suggest.
3. That is a complete end to your harassment of our offices in this matter.

4. The action is in no way an admission to your totally ridiculous claims and is set out as such clearly.”
135. On 26 November 2012 solicitors for the Claimant responded to the e-mail of 24 November. They stated that they awaited a substantive response, and if the undertakings, retraction and apology were not forthcoming by the deadline of 5 pm on 28 November 2012 proceedings would be issued.
136. On 28 November 2012 solicitors wrote for the first time on behalf of the Defendants. They complained of a number of incidents which they said had taken place in the summer of 2012, and were a sustained campaign by the Claimant to undermine the Defendants marketing and events, and indeed the company itself. They denied that the Advertisement referred to the Claimant, explaining that there were at least seven major players in the market. They stated that the words complained of were not defamatory, but were clearly a reference to the widespread practice of companies within the industry charging for award ceremonies, dinners and other events surrounding conferences which the Defendants provide for free.
137. On 6 December 2012 solicitors for the Claimant served the claim form and the Original Particulars of Claim. On 17 December 2012 solicitors for the Defendants complained that they should not have done this, because a substantive response had been sent before the deadline of 28 November. That included their open letter of 28 November referred to above and another letter which I take to be without prejudice.
138. By letter dated 19 December 2012 the Claimant’s solicitors claimed not to have received the two letters which the Defendants’ solicitors stated they had sent by email on 28 November before the deadline.
139. After further correspondence by the parties, and an agreed extension of time for the service of the Defence, on 16 January 2013 solicitors for the Defendants issued and served the Application Notice referred to above.
140. On 12 February 2013 the Claimant’s solicitors sent the draft amended Particulars of Claim which they invited the Defendants to agree that they should have permission to serve.
141. On 28 February 2013 solicitors for the Defendants replied. They raised substantially the points advanced before me in argument in opposition for the application for permission to amend.

### *Discussion*

142. In my judgment this is a case where the Claimant and ETL demanded in correspondence more than their entitlement, and in so far as they had any entitlement, they achieved it substantially in correspondence. The Defendants have not threatened to persist with the publications which the Claimant and ETL can properly complain of, or (to the extent that they have) it is plain an injunction will not be necessary. There is no real prospect of an injunction being required or granted.
143. While a claimant clearly does not have to prove actual damage for malicious falsehood for the purposes of the 1952 Act s.3, the measure of any likely recoverable

damages in the present case (whether in malicious falsehood or defamation) cannot be worth the expenditure of costs and other resources that would be involved if the action were to proceed. This is not a case where the recovery of damages could form the real issue between the parties. There is in this case no real or substantial tort. The application for permission to amend is refused for that reason, in addition to the other reasons given above.

144. I would not refuse permission to amend simply on the ground that the claim by ETL and the claim in malicious falsehood had not been advanced in the pre-action correspondence. That correspondence did raise the main points which are now sought to be pleaded, albeit that the complaint was confined to defamation.

#### CONCLUSION

145. Since the Claimant does not seek to pursue the claim on the basis of the Original Particulars of Claim, and since I refuse permission to amend, the action will be struck out.