Case No: HQ09X03540
Case No: HQ09X03541

Neutral Citation Number: [2010] EWHC 3144 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/12/2010

Before :

Mrs Justice Sharp DBE

- -

Between :

Richard Hayden **Rayden Engineering Limited**	**Claimants**
- and -	
Diane Charlton	**Defendant**
And:	
Richard Hayden **Rayden Engineering Limited**	**Claimants**
- and -	
Mike Carver	**Defendant**

- -

Mr Harvey Starte (instructed by **Berryman**) for the **Claimants**
Mrs Charlton and Mr Carver in person

Hearing date: 14 October 2010

- -

Judgment

Mrs Justice Sharp:

1. At the end of the hearing I told the parties that the Claimants' two actions for libel, one against Mrs Charlton and one against Mr Carver, would be struck out. To explain why I reached that conclusion, it is necessary for me to set out the background and history of the litigation in some detail.

2. The Claimant company ("the Company") is an engineering business which specialises in the manufacture and welding of pipes. The personal Claimant is a 90 per cent shareholder in the Claimant company and is its Managing Director. It was said by him in November 2008 that the Company had an annual turnover in the region of £10 million and employed over 100 people.

3. Mrs Diane Charlton is a part-time cook in a care home. Mr Carver is retired.

4. In August 2009 the Claimants began these two sets of proceedings for libel against Mrs Charlton and Mr Carver. The actions arose out of articles published by Mrs Charlton on various websites. Mr Carver runs a website which picked up and repeated the publications made by Mrs Charlton. Mrs Charlton accepts she is the primary publisher; she is supported in every respect by Mr Carver, whose action mirrors hers. Although both Mrs Charlton and Mr Carver appeared in person before me, Mrs Charlton has taken on the responsibility of managing both actions, and for defending Mr Carver's action, as well as hers.

5. The genesis of the dispute between the parties are events which took place in 2006. The Company's premises are in Wentworth Street, Ilkeston, Derbyshire. In September 2006 it put up an 8 foot steel palisade fence around a triangle of land it planned to use for storage. The triangle of land backed onto, and was adjacent to a row of terraced houses in Wentworth Street. Mrs Charlton lives in one of the terraced houses. Feelings obviously ran high as a result. Among the documents I have seen is a copy of the front page of the Ilkeston Advertiser for the 21 September 2006, with the headline: "LAND FURY" and the subheading: "She feels like she is in prison".

6. Amongst the complaints made by Mrs Charlton were that the land had been fenced off without planning permission, mature trees, including an apple tree, had been felled, a bat habitat was destroyed, uneven hardstanding had been laid, which caused neighbouring properties to flood after heavy rain in 2007 and that the residents of Wentworth Street have suffered harassment of various kinds at the hands of the Claimant company's employees.

7. The Claimants first pursued a complaint against Mrs Charlton through "Nominet", for the surrender of two websites registered and operated by Mrs Charlton. Their complaint to Nominet was made in November 2008 and was successful after an appeal to the Nominet Appeal Panel on the 29 April 2009. Mrs Charlton stopped operating those two websites, but then transferred the articles to another website where they remain accessible.

8. On 19 June 2009 three letters were written on behalf of the Claimants by their solicitors, Berryman, in accordance with the Pre-action protocol in defamation to Mrs Charlton, Mr Carver and a Mr Ian Johnson. The letters were sent by recorded delivery to each recipient (and also by email to Mrs Charlton). Complaint was made in strong

terms about the articles published by Mrs Charlton. The letter to Mrs Charlton complained of publications on websites operated by her which it was said alleged that the Claimants had "stolen" the land, had destroyed wildlife and a legally protected bat habitat of mature vegetation and a copse of trees, had dishonestly blamed McAlpine – the contractor constructing the Ilkeston bypass at the time – for damage they had caused to vegetation on the land, had knowingly created a flood risk and of flooding 15 homes in Wentworth Street, of "taunting" the victims of the flooding, of making dishonest denials and creating fraudulent evidence, and of subjecting the neighbours in Wentworth Street to harassment, bullying, intimidation and deception including by creating noise, dust, fumes and smoke, by keeping the neighbours in Wentworth Street under CCTV surveillance, and of concocting complaints to the police.

9. The letter concluded by requiring Mrs Charlton to stop publication immediately otherwise a claim for libel would be made.

10. After some further correspondence, proceedings were issued against Mrs Charlton and Mr Carver; and the Claim Form and Particulars of Claim were served on 6 August 2009. The publications complained of in the action against Mrs Charlton were set out over 33 pages of the Particulars of Claim. I set out below one published by Mrs Charlton on her "councilanddeveloper" website as an example:

> "MAGNA EST VERITAS ET PREVALEBIT
>
> TRUTH IS MIGHTY AND IT SHALL PREVAIL"
>
> THIS WEB SITE IS CURRENTLY BEING THREATENED WITH LIBEL PROCEEDINGS AND MR HAYDEN OF RAYDEN ENGINEERING HAS DEMANDED THAT TWO OF THE WEB SITE DOMAIN NAMES ARE HANDED OVER TO HIS SOLICITOR BY 16.00 HOURS ON MONDAY THE 15TH OF SEPTEMBER 2008, OTHERWISE HE WILL INITIATE PROCEEDINGS THROUGH THE DOMAIN NAME PROVIDER TO SEIZE THE DOMAIN NAMES BEFORE INSTIGATING A LEGAL ACTION FOR LIBEL.
>
> THESE LEGAL THREATS HAVE BEEN MOTIVATED SOLELY WITH THE INTENTION OF PREVENTING TRUTHFUL BUT UNWANTED CRITICISM OF MR HAYDEN'S CONDUCT WHICH CULMINATED IN THE WEB SITES BEING PUBLISHED. LIBEL LAW IS NOT DESIGNATED TO PROTECT AN INJURED REPUTATION FROM THE TRUTH, NOR IS IT DESIGNATED TO SILENCE THE TRUTH OR STIFLE THE FREEDOM TO IMPART THAT TRUTH.
>
> IN A NUTSHELL:
>
> MR HAYDEN TOOK FLOOD LAND THAT DID NOT BELONG TO HIM

MR HAYDEN DEVELOPED THAT FLOOD LAND AGAINST OFFICIAL ADVICE

MR HAYDEN HAD PRIOR KNOWLEDGE THE DEVELOPMENT WOULD INCREASE FLOOD RISK

MR HAYDEN WAS DIRECTLY RESPONSIBLE FOR THE FLOODING OF 15 NEIGHBOURING HOMES

MR HAYDEN HAS DONE NOTHING TO ALLEVIATE THIS INCREASED FLOOD RISK TO OUR HOMES

MR HAYDEN HAS SUBJECT HIS NEIGHBOURS TO A SUSTAINED CAMPAIGN OF HARASSMENT

MR HAYDEN CANNOT KEEP TAKING THINGS THAT DOES NOT BELONG TO HIM AND RESORTING TO BULLYING, HARASSMENT AND DECEPTION IN WHICH TO ACHIEVE THEM. AGAIN THESE WORDS ARE NOT LIBELLOUS BUT FULLY PROVABLE.

MR HAYDEN HAS ALREADY ERODED THE RIGHT TO PRIVACY, THE RIGHT TO PEACEFUL ENJOYMENT OF POSSESSIONS, THE RIGHT TO RESPECT FOR FAMILY LIFE AND THE RIGHT TO FREEDOM FROM FALSE IMPRISONMENT.

IN DEFENCE OF THE LAST HUMAN RIGHT NOT ALREADY ERODED BY MR HAYDEN – THE FREEDOM OF SPEECH AND EXPRESSION AND UPON CAREFUL CONSIDERATION OF THE EVIDENCE – THE ABSOLUTE DEFENCE OF JUSTIFICATION WILL BE USED TO DEFEND THE RIGHT TO SPEAK AND IMPART THE TRUTH FREE FROM FEAR OF LEGAL INTIMIDATION."

11. Again, as an example, I set out the meanings attributed to the words set out above:

"The First and Second Claimant:

misappropriated land that did not belong to them that was prone to flooding;

developed the land although officially advised not to do so;

did so knowing the development would increase the flood risk to neighbouring residential properties;

thereby caused 15 neighbouring homes to be flooded;

despite which they have since done nothing to alleviate the increased flood risk they caused, but rather

> they have subjected their residential neighbours to a sustained campaign of harassment, bullying and deception."

12. The Particulars of Claim included a claim for an injunction, a claim by the First Claimant for aggravated damages, and a claim for special damages by the Company for the cost of pursuing its Nominet application, particulars of which it was said would be served separately.

13. In Mr Carver's case, as I have said, complaint was made about an article (also complained of in Mrs Charlton's action) and its various versions, published on his website, "name-n-shame".

14. On 2 September 2009, lengthy Defences were served by both Defendants, acting in person, as they have done throughout, relying on the defence of justification or truth. Mrs Charlton also said this at paragraph 3 of her Defence:

> "(c)Prior to this the claimants has [sic] been aware of initial allegations central to this complaint since the 21 September 2006. …
>
> (d) I respectfully draw the courts attention to: Oysten v Blaker (1996) 2 All ER 106; Steadman v BBC (2001) EWCA Civ 1534 and Waller Steiner v Moir 919740 1 WLR 991 where it is recognised that the essence of a genuine complaint in libel is prompt action. Inexcusable and inordinate delay is both prejudicial to the administration of justice and an abuse of the process. The main purpose of this action is to prevent truthful and justifiable criticism of the Claimants' conduct which led to the websites inception."

15. On 25 September 2009 within 28 days of service of the Defence the Defendants served their Allocation Questionnaires indicating a willingness to mediate and requesting trial of the actions by jury. This was made clear in the space provided for any other information, where there was handwritten the following in block capitals:

> "THE DEFENDANT WISHES TO EXERCISE HER RIGHT UNDER SECTION 69 OF THE SUPREME COURT ACT 1981 TO A TRIAL BY JURY IN WHICH TO DECIDE THE ISSUES OF FRAUD, DEFAMATION, LIBEL AND THE EXTENT OF THE CONFLICT OF EVIDENCE BETWEEN THE PARTIES."

16. On 29 September 2009 Master Kay made an 'unless' order against the Claimants in Mrs Charlton's action. He ordered that unless their Allocation Questionnaire was filed within 7 days the claim would be struck out. On the same day, the Claimants filed their Allocation Questionnaire. To the question "Do you want to attempt to settle at this stage" they answered "No" on the ground that "proper attempts to settle the matters in dispute were made prior to the issue of proceedings. Given the Claimant's allegations and the Defendant's denial of liability, the Claimant does not consider it is possible to settle the proceedings at this stage."

17. On 7 October 2009 Master Kay considered the Allocation Questionnaires in the Charlton action. He ordered the Charlton action should be stayed until 4 December 2009 so the parties may attempt to settle the claim; but if it did not settle, standard disclosure was to be given by close of business on 18 December 2009 with inspection by 15 January 2010 and he directed there should be a case management conference on 25 January 2010.

18. On 9 October 2009 the Claimants' solicitors wrote to Mr Carver pointing out what they said were deficiencies in his defence, and inviting him to serve a revised defence or otherwise the Claimants would have to apply to strike his defence out and enter judgment.

19. On 28 October 2009 Master Leslie made an order for directions including that Mrs Charlton's action was re-assigned to him so it could run in tandem with Mr Carver's action. Master Leslie then gave identical directions in both actions, repeating Master Kay's orders as to the stay, the timetable for disclosure, and the CMC.

20. On 14 December 2009, the Claimants served a Part 18 Request for Further Information of the Defences on the Defendants. It contained 47 requests, and asked for a response by 28 December 2009. At the same time, the Claimants issued an application notice.

21. On 17 December 2009, the Defendants complied with the order for disclosure. Mrs Charlton served on the Claimants a list of 239 documents, individually identified and described in chronological order. On the same day, the Claimants issued an application notice dated 14 December 2010 asking for an order that the further information be provided and "for consequent directions for service of a Reply, disclosure and inspection."

22. On 18 December 2009, Mrs Charlton produced and then served her Objections to the Part 18 Request for Further Information. She also wrote to the Claimants requiring disclosure by 29 December 2009.

23. On 22 December 2009, the Claimants declined to give disclosure on the ground it was inappropriate to do so because of their forthcoming application for further information.

24. Mrs Charlton says in her skeleton argument that in accordance with the PD 18 para 1.1 and the Queen's Bench Guide 7.7.1, she should have been given an opportunity to answer the request before the application was issued. She also says the request should have been confined to matters reasonably necessary and proportionate to enable the party requesting the information to understand the case it has to meet (CPR 1.1(2)(b)); this request however she says, dealt, repetitively, with satellite issues and asked for information that had already been adequately disclosed to the Claimants. She therefore objected to providing the information asked for.

25. The hearing of the CMC duly took place on 25 January 2010. By then, because the Claimants did not issue their application until 17 December 2010, that is, a matter of days before the orders were due to be complied with, as Mrs Charlton's skeleton argument pointed out, the Claimants were in breach of the timetable for the progress of the action laid down by the directions already given. In particular, they had not

served their Replies; or given disclosure or inspection which on 7 October 2009 had been ordered to take place by 18 December 2009 and 15 January 2010 respectively. .

26. The Claimants were represented at the CMC by Mr Harvey Starte. In his skeleton argument it was said that the Claimants needed the Part 18 information to meet the Defendants' case, and frame their reply. Candidly, it was said, they also needed it to judge whether and what contentions in the Defence should be struck out. In the Carver action, complaint was made about Mr Carver's Defence. After receiving the Claimants' Pre-action protocol letter, Mr Carver had revised the webpage complained of. It was said amongst other matters, that his Defence was defective because he had refused to plead a defence to the "original webpage."

27. Master Leslie ordered Mrs Charlton to answer requests 1 to 4 by 12 February 2010 identifying the defamatory meanings she would justify and identifying (by reference to the paragraphs of the Defence or otherwise) the facts and matters said to substantiate those meanings. Mrs Charlton says the order was that she should do so either as a Part 18 Response or as an amended Defence. In "lieu" of ruling on Requests 5-47, Master Leslie ordered Mrs Charlton should, when serving her witness statements, identify the documents disclosed by her and the paragraphs in those witness statements that gave the further information sought. Mr Carver was ordered to provide further information or to amend his defence identifying what meanings were justified in respect of both the original and revised version of the webpage, and the facts and matters justifying those meanings.

28. Master Leslie also revised the timetable for the progress of the action. The Claimants were ordered to serve their Replies by 5 March 2010, to provide disclosure by list by 26 March 2010 and inspection by 9 April 2010. Witness statements were to be exchanged by 30 April 2010. The parties were to apply by 19 February 2010 to fix the date for the pre-trial review.

29. On 12 February 2010, Amended Defences were served by both Mrs Charlton and Mr Carver. On the same day, the Claimants fixed the pre-trial review for 10 June 2010.

30. On 4 March 2010, that is, the day before the Replies were due to be served, the Claimants issued an application notice without notice to the Defendants seeking more time for service of their Replies and for a revision of the trial timetable ordered by Master Leslie, with service of amended Replies by 19 March 2010, the Claimants to provide disclosure by list on 9 April 2010, inspection by 23 April 2010 and for exchange of witness statements by 21 May 2010.

31. On 5 March 2010, Mrs Charlton emailed the Claimants' solicitors to ask why the Replies due on the 5 March 2010 had not been served. She received no reply. On 8 March 2010, Mrs Charlton emailed a letter to the Claimants' solicitors, reminding them of the order that had been made by Master Leslie that they serve their Replies by 5 March 2010, that the order was based on their own application to the court for extensions of time, and sending them a copy of the order. She said that if no Reply was served by 15 March 2010 she would make an application to the court "to compel performance and also [to] inform the Court of your continued non-compliance with Court Orders and invite additional Orders as the Court sees fit to grant."

32. On 9 March 2010, Mr Frith of Berryman replied to Mrs Charlton's emails in a one line email enclosing a copy of the application made to the court for an extension of time for service of the Replies.

33. On 10 March 2010 Master Leslie considered the Claimants' application without a hearing. He granted the Claimants the extension for service of the Replies to 19 March 2010. In addition, he ordered that the timetable for the other directions relating to disclosure, inspection, and exchange of witness statements he had made on 25 January 2010 should be varied. The new timetable was now as follows. The Claimants were to provide disclosure by list on 9 April 2010; inspection was to take place by 23 April 2010; witness statements were to be exchanged by 21 May 2010. The Master also ordered the Claimants to give notice of the order he had made pursuant to CPR rule 23.9 and 10.

34. The Claimants did not comply with any of these orders. They did not serve their Replies by 19 March, they did not provide disclosure by list or provide inspection (indeed they still have not done so); they did not exchange witness statements. They did not give the Defendants notice of the order.

35. The Defendants therefore were in the dark as to what, if anything had been done as a result of the Claimants' application. On 16 March 2010 Mrs Charlton emailed the Claimant's solicitors objecting to their failure to ask the Defendants to agree the variation asked for. This was rebuffed by the Claimants' solicitors by an email sent on 17 March 2010 which said if she had any complaint to make about the matter, she could take it elsewhere. If the solicitors knew at that stage about the orders made, they did not tell Mrs Charlton about them.

36. On 22 March 2010, Mrs Charlton sent a further reminder to the Claimants' solicitors that a Reply had to be served. She received no reply. On the same day, Mr Carver emailed Mr Frith stating that it would appear the 19 March had now passed without a further attempt to meet the revised deadline they had asked for in their application. His email said: "Please advise latest position". Mr Carver received no reply either. Indeed the Defendants heard nothing more from the Claimants until 10 June 2010.

37. On 25 March 2010, Mrs Charlton, having had no response from the Claimants, emailed Mr Carver, asking him to contact the court to find out whether the Claimants had been granted an extension of time for service of their Replies; and to enquire why they had not heard from the court regarding the Claimants' application as the time limit sought had passed without service of the Replies.

38. On 26 March 2010, Mr Carver therefore contacted the court. He was told that the Claimants had been granted an extension for service of the Replies to 19 March 2010, that Master Leslie had ordered Berryman to draw up the order he had made and to serve copies on the Defendants in compliance with CPR 23.9 and PR 23.10, as the matter was decided without a hearing.

39. On 26 May 2010 in view of the Claimants' continued failure to comply with the court's orders, and to respond to correspondence, Mrs Charlton issued an application to be heard on 10 June 2010 at the hearing of the pre-trial review, for an 'unless' order to compel compliance with the orders made by Master Leslie on 10 March 2010 about which she knew (from the telephone contact with the court rather than from the

Claimants) that is, the Claimants' failure to serve their Replies by 19 March 2010, and to serve on the Defendants copies of the order Master Leslie had made.

40. On 9 June 2010 Mrs Charlton set off from Derbyshire to attend the pre-trial review hearing. She travelled on a pre-booked saver ticket the day before the hearing to be sure of arriving on time and so she could travel off peak, which even taking account of the modest cost of her overnight stay, very significantly reduced her costs of coming to London. Mr Carver travelled from Bexley on the day of the hearing.

41. While Mrs Charlton was on the train, the Claimants' solicitors (who had taken no steps in the action since 4 March 2010 and had made no contact with the Defendants since 17 March 2010) endeavoured to send Mrs Charlton by email, a large number of documents on which they intended to rely at the hearing the next day. Mrs Charlton, who as I have said was travelling, did not receive the email or the enclosures.

42. She and Mr Carver saw them for the first time at the hearing itself on 10 June 2010 which was heard by HH Judge Mackie QC. The Claimants were again represented by Mr Starte. The documents handed to Mrs Charlton and Mr Carver and which the Claimants relied on at the hearing included an Application Notice, in draft issued by the Claimants, a 72 page draft Reply; a witness statement from Mr Frith, a draft order prepared by the Claimants' solicitors, which included a direction that trial be by judge alone, Mr Starte's skeleton argument and a chronology.

43. In paragraphs 5 to 9 of his witness statement dated 9 June 2010, Mr Frith said this:

> "Subsequent to the Order of Master Leslie, the Claimants made an Application to the Court for further time in which to serve its Replies and any Defence to the Counterclaim brought by the Defendants. The matter was heard by Master Leslie on 10th March 2010 and the Claimants' Application duly approved. A copy is attached hereto marked JRGF2. I undertake that I will engross the form of Order, have it sealed by the Court and serve [sic] upon the Defendants. "
>
> Unfortunately, by administrative oversight on my part, for which I apologise both to the Court and the Defendants the Replies were duly settled and approved by the Claimants, but I neglected to serve them on the Defendants. Copies of the Replies to be served immediately are attached hereto marked JRGF. I confirm to the Court that the Statement of Truth will be signed by or on behalf of the Claimant in the form of the Reply attached hereto. I confirm to the Court that the Replies will be served upon each of the Defendants by return.
>
> I confirm to the Court that the Claimants have not made disclosure by List, nor has it served its Witness Statements. I apologise to the Court for the slippage in the directions timetable, as Ordered and amended by Master Leslie. I proffer my apology to the Court for the delay in these proceedings. I confirm, however, to the Court that the Claimant fully intends to proceed with this action, and to do so in a proper and

> timeous fashion. To that end, I further confirm to the Court that the Claimants are ready and able to serve their List of Documents, provide Inspection and exchange Witness Statements in accordance with the draft Order prepared by the First Defendant, Diane Charlton, in her application [of the 26 May 2010] along with the Draft Order which she has prepared, or as directed by the Court.
>
> In conclusion, I can only reiterate to the Court my apologies for the delay in the progression of this matter, but reiterate that the Claimants will now push forward with the action as Ordered [sic] by the Court."

44. Mr Starte's skeleton was similarly apologetic, describing the failures to which Mr Frith referred as "very regrettable". Mr Starte submitted that no proportionate purpose would be served by making service of the Replies the subject of an 'unless' order (as Mrs Charlton had asked for). He went on to say this:

> "The Claimants acknowledge that since Master Leslie's Order of 10 March, they have not progressed these actions as they should. They acknowledge that the court will be concerned that there should be no further unnecessary delay: that a tight schedule should be set and adhered to.
>
> The Claimants respectfully submit:
>
> (a) that their proposed Order will achieve a suitably tight schedule;
>
> (b) that if that Order is now made, disposal of these actions will not, in the event, have been substantially delayed, nor will the Defendants have been caused any significant disadvantage or detriment by that delay."

45. There were a number of omissions so it seems to me in the information given to the court. For example, Mr Frith did not say why it was that his administrative error, as he described it, in not serving the Replies, prevented him from progressing the actions in other ways. He did not say how it came about that disclosure and inspection had not been given, or why it was Mrs Charlton had received no reply to her application notice for an 'unless' order.

46. But the Claimants' legal advisers obviously recognised that Claimants were in serious and inexcusable breach of the orders the court had made, that they were at risk of some sort of sanction being imposed (not least because Mrs Charlton had applied for an 'unless' order), and that the only way to remedy the wrong that had already occurred, was for the court to set a tight schedule and for the Claimants to adhere to it. In this context, Mr Starte's skeleton referred to a consideration of obvious importance: that is, whether disposal of the actions had been substantially delayed, and whether the delay that had already occurred had caused the Defendants any significant disadvantage or detriment. It was implicit in what was said in my view that

the Claimants recognised that a "tight timetable" was necessary if such prejudice to the Defendants was to be avoided.

47. HH Judge Mackie QC made a revised order for directions, as the Claimants asked him to do, in accordance with the Claimants' draft order. The Replies were to be served by 18 June 2010; the Claimants were to give standard disclosure by 2 July 2010; the parties were to give inspection by 23 July 2010; exchange of witness statement was to take place by 13 August 2010; a trial window of 1 November to 31 January 2010 was set; (in paragraph 9) the action was to be tried by judge alone, and the trial estimate was 10 days; the Claimants were to apply no later than 10 July 2010 for the proceedings to be listed for trial as a fixture in the trial window and were to give notice to the Defendants of the appointment; a further pre-trial review was then to be arranged.

48. Mrs Charlton and Mr Carver were also awarded their modest costs of £729.05 and £290, respectively, in full. Mr Carver's costs included £50 HH Judge Mackie QC had expressly allowed for taxis, as Mr Carver suffers from chronic emphysema. The Claimants were ordered to pay the costs by 24 June 2010.

49. The Claimants were very fortunate indeed it seems to me, not to have been made the subject of some fairly draconian 'unless' orders; certainly, it is likely in my view that the court would have considered making such orders, had it not been for the apologies proffered and the express assurances given that the Claimants would now comply with the court's orders, adhere to the yet further revisions to the trial timetable made at their request; in short that they would now get on with action.

50. But the Claimants did not do so. They complied with none of these orders either, apart from serving on the Defendants the replies and the order made on 10 March 2010 – which they did shortly after the 10 June hearing. They did not provide disclosure by list by 2 July 2010, they did not provide inspection by 23 July 2010, they did not exchange witness statements by 13 August 2010; and they did not apply by 10 July 2010 for the case to be fixed for trial. This was not all. The Claimants did not make any attempt to contact the Defendants, and they did not reply to or acknowledge the Defendants' letters or emails to them. Indeed, to use a colloquialism, there was, yet again, complete "radio silence".

51. Both Defendants are impecunious.

52. On 29 June 2010 Mr Carver emailed Mr Frith about the order for costs. He reminded Mr Frith that the costs of both Defendants should have been paid by 24 June 2010. He received no reply. His costs have never been paid.

53. Mrs Charlton had to resort to enforcement action (by issuing a writ of fieri facias) to recover her costs. She received them about 3 weeks before the hearing before me, that is, nearly 4 months after they should have been paid.

54. Shortly after the hearing of 10 June 2010, Mrs Charlton noticed the provision in the order for trial by judge alone. On 20 June 2010 she therefore issued an application notice asking for a variation to that order. She attached a detailed skeleton argument to her application notice.

55. She said the Defendants, as litigants in person, had filed a request for trial by jury on 24 September 2009, within 28 days of filing the Defence, as required by the rules, but in the wrong document, that is, in their Allocation Questionnaires. She said she had had no notice of the applications made by the Claimants on 10 June 2010, and had not seen the draft order prepared by the Claimants before then. She had been given a large number of documents at the hearing which she had also never seen before (including Mr Frith's witness statement and the 72 page draft reply as well as counsel's skeleton and chronology) and failed to notice or object to paragraph 9 dealing with mode of trial. She also had her own 'unless order' to deal with.

56. In her skeleton argument accompanying the application notice, she drew attention to section 69(1) of the Supreme Court Act 1981 and amongst other matters to the fact that the claim was for libel and contained allegations of fraud. She said the trial documents and evidence were not of a technical nature and no prolonged examination of the documents was necessary. A jury would be able to understand and comprehend the evidence. She said if the words were capable of being defamatory it was an important and substantive right to have a jury decide questions of fact in respect of liability and quantum. She said meaning and damages are inseparable in a defamation action, and the Defendants consider it to be an important fundamental right intertwined with freedom of speech to have the facts determined by a jury. Particularly given the extent of the conflict of evidence and issues between the Claimant and the Defendants. She said the Defendants consider they have a reasonable prospect of success in their defence of justification and are on trial and under threat of huge legal costs for (saying) what they consider to be true. She said the Defendants unreservedly apologised for filing the incorrect form asking for jury trial within 28 days of the Defence (i.e. the Allocation Questionnaire) but in all the circumstances asked the court to vary the order.

57. Mrs Charlton then received a letter from the Queen's Bench Listing Office, dated 29 June 2010 referring to her application to vary issued on 20 June 2010. It said her application had been referred to HH Judge Mackie QC who had made the following directions:

> "If the claimant consents to your application and you produce written evidence of this, the Judge will be prepared to make the order as asked.
>
> If the claimant does not consent to your application, then the application will need to be listed in court with both parties in attendance."

58. On 30 June 2010, Mrs Charlton therefore sent an email to Mr Frith headed 'Amendment to 10 June 2010 order', drawing his attention to the directions made by HH Judge Mackie QC and inviting his agreement to the order. In the email she said: "I seek your cooperation in this matter without the need for a separate hearing and additional costs." She received no reply.

59. On 22 August 2010, Mrs Charlton issued a second application in which she asked for further 'unless' orders; that unless the Claimants comply with the orders made by HH Judge Mackie QC on 10 June 2010, the Claimants' claim should be struck out and for indemnity costs. The issue of the application notice, as with any other, required her to

pay a fee, which she did. She attached to the application notice a skeleton argument, a detailed Chronology and Issues document, as well as a List of relevant persons. Methodically, she identified the relevant procedural rules that the Claimants had failed to comply with at all stages of the litigation, cross referencing each point to the documents she relied on in support.

60. She asked that both her applications be listed on the same date to save costs.

61. In good time before the hearing before me on 14 October 2010, Mrs Charlton lodged paginated bundles, separate skeleton arguments for each of her applications, a chronology, a pre-reading list for the judge, a List of Persons Present, and her Bill of Costs, which was itemised with supporting receipts attached.

62. In relation to her application for trial by jury, her skeleton argument made the points I have referred to above. She drew attention to the letter from the Queen's Bench Listing Office, dated 29 June 2010 and to her email sent to Mr Frith on 30 June 2010. She also pointed out that when she had received the order of 10 June 2010, sealed on 16 June 2010 and noticed the paragraph dealing with mode of trial, she had taken immediate steps to vary the order in accordance with CPR 23.10(1).

63. In relation to her application for 'unless' orders she pointed to the extensive catalogue of failures by the Claimants to obey the orders of the court and to comply with the civil procedure rules, some of which she then listed:

> **"11 March** Court granted Claimants Application for variation of the 25 Jan 2010 variation of the original 7 Oct 2009 Court directions orders for the Claimants to serve a reply by the 19 March 2010.
>
> The Court instructed the Claimants to serve copies of the made without a hearing variation order on the Defendants in compliance with **CPR 23.9** and **CPR 23.10** [DC36]. The Claimants failed to do so. Both Defendants had no knowledge a third set of Directions Orders had been issued with a revised timetable for the Claimants disclosure by list, discovery or exchange of Witness Statements which in any event the Claimants also failed to comply with.
>
> **16 March** DC emails Claimants over unacceptable behaviour and to query Claimants discourteous failure to notify or to seek variation by mutual consent before making application to the Court [DC37].
>
> **17 March** Claimants email DC stating that there had been no opportunity to invite consent which would not have been forthcoming in any event and there were no Court rules which prevented the Claimants from doing as they had done so and if DC had any further point to make then she should take it elsewhere [DC38].

19 March Claimants failed to serve replies as ordered on 25 Jan 2010.

22 March Claimants received reminder over failure to serve replies. The Claimant did not respond [DC39].

26 March Claimants fail to give standard disclosure by list. DC submits an Application to the Court for an order to compel Claimants compliance with directions orders and Court timetables.

30 April Claimants fail to serve witness statements and Notices relating to evidence.

9 June The Claimant served a Court Application which included mode of trial, chronology, witness statement and an unverified 72 page reply to DC via email [DC40] when DC was travelling to London for the 10 June 2010 PTR [DC41].

DC did not receive these documents prior to the PTR and had no prior knowledge of the Claimants Court Application which without notice included mode of trial by Judge alone.

The Claimants Application should have been made under proper notice in accordance with **CPR 23.7 (b)** giving both Defendants correct notice to study the Application. This being the fifth time the Claimants has failed to give the correct notice to the Defendants.

10 June The Claimants had delayed in preparing for the PTR and it was unable to take place. An Application by DC for an Unless Order and an Application by the Claimant was dealt with instead. A new date for a PTR has yet to be confirmed.

The Claimants Draft Order was approved with a fourth timetable for compliance with the fourth set of Directions Orders [DC42].

16 June Claimants serve a verified reply to the Defendant.

24 June Claimants failed to comply with paragraph 13 of the 10 June 2010 Court Order necessitating additional time and expenditure in issuing a writ of execution for enforcement [DC43]. MC in parallel action has not received his Court awarded costs.

29 June MC in parallel action reminds Claimant over Court Order [DC44]. Claimant fails to respond.

29 June Claimants serve DC with sealed copy of the order made by Master Leslie on 11 March 2010 following the

Claimants without notice and without a hearing application. The Claimant had failed to comply with the 11 March 2010 third set of Directions Orders [DC45].

2 July Claimants failed to give standard disclosure of documents by list in compliance with paragraph 3 of the 10 June 2010 Court Order.

10 July Claimants failed to list proceedings for trial as a fixture and give notice of the said appointment to the Defendants in compliance with paragraph 8 of the 10 June 2010 Court Order.

23 July Claimants failed to give inspection of documents in compliance with paragraph 4 of the 10 June 2010 Court Order.

13 Aug Claimants failed to serve Witness Statements and any Notices in compliance with paragraph 5 of the 19 June 2010 Court Order."

64. She went on to say this:

"The Claimants inexcusable disregard of civil procedure rules and practice directions and non compliance with four sets of directions orders is detrimental to the Defendants right to a fair trial of the issues under Article 6 (1) of the ECHR.

The Claimants inordinate and inexcusable delay in instigating this action and the reluctance to pursue this action in a timely fashion despite the witness statement pledges submitted to the Court to the contrary [DC9] is prejudicial to the administration of justice.

The Claimants has deployed a number of dilatory litigation tactics through unnecessary and burdensome expenditure on time consuming, needlessly repetitive and distracting Court applications and hearings.

Immediately prior to this action the Claimants had spent 10 months pursuing DC through Nominet formal process. Despite DC being forced into litigation for two years this dispute is no where nearer a conclusion than when it began on 11 September 2006. In over a year since instigating this action and despite four sets of Directions Orders the Claimants has thus far failed to make even basic pre trial preparations. The trial window will once again have to be postponed due to the Claimants repeated failures.

DC has already had to pursue non payment of nominal costs through High Court enforcement. MC in parallel action has not received his very nominal Court Ordered costs of £290 at all.

A primary purpose of the Court is to expeditiously and justly determine a case on its merits without prolonged and unnecessary delay. **CPR 1.3** makes clear that both parties are required to assist the Court in furthering the overriding objective.

The Defendants in both actions have a reasonable expectation to have the issues determined expeditiously and justly without prolonged and unnecessary delay.

PD 44 18.2 states the Court can sanction conduct which gave rise to unreasonable and improper conduct, including steps calculated to prevent or inhibit the Court from furthering the overriding objective. When deciding whether or not to impose a sanction at all or the scale of the sanction, the Court will ordinarily have regard to the seriousness of the non-compliance by the party in default, in all the circumstances in light of the overriding objective.

To summarise

The Claimants thus far has:

Instigated action after inordinate and inexcusable delay

Failed to follow pre action Protocol for defamation despite stating to the contrary in Claimants Allocation Questionnaire.

Failed to comply with four sets of Directions Orders made by the Court.

Made unnecessary applications to the Court

Served onerous and oppressive Part 18 Request for repetitive discovery of satellite issues readily available through standard disclosure and discovery procedures

Failed to serve Court ordered directions made after a without a hearing application

Forced DC to keep making time consuming and expensive Applications to the Court to compel Claimants compliance

Failed to give correct service of documents prior to Court hearings…

Ignored numerous reasonable requests for information or compliance

> Delayed in proceeding with both actions to the detriment of both Defendants
>
> Accordingly, it is respectfully suggested that the Court may be minded to make an order pursuant to CPR 3.4(2) (c), or any other such sanction as the court deems just."

65. The Claimants were on notice of the Defendants' applications and the arguments in support, including the suggestion that the court should strike the actions out pursuant to CPR 3.4(2) (c) which had been served on them many weeks before the hearing before me. The applications elicited no response, either to the Defendants or to the court. The Claimants lodged no bundles and served no evidence.

66. Mr Starte however appeared at the hearing. No skeleton argument had been prepared or lodged by Mr Starte, who told me he had been instructed at short notice. He said however that the Claimants' solicitors had sent an email to Mrs Charlton on 13 October 2010 i.e. the day before the hearing. Just as before, Mrs Charlton had left Ilkeston early to be sure of being on time for the hearing and so she could take advantage of the costs saving of a pre-booked ticket. She did not therefore receive the email before the hearing began, and refused to accept a copy Mr Starte offered her at court.

67. In relation to Mrs Charlton's application pursuant to CPR 3.4(2)(c) Mr Starte said he could offer no excuses, only an explanation. This was that his clients were very preoccupied with their business, and had not directed their attention to these proceedings. In answers to questions from me, he could offer no explanation as to why correspondence to the solicitors had not been answered or why the Defendants' costs had been unpaid. He said he could only belatedly indicate that it was accepted that the 'unless' orders Mrs Charlton was seeking were appropriate. He accepted that the trial window had been lost and there would now have to be a new trial window for some time in 2011. He said his clients now recognised they were in "the last chance saloon", but he submitted their claim was a serious one, and it would be contrary to the interests of justice if the claims were to be struck out.

68. As for Mrs Charlton's application in relation to mode of trial, Mr Starte accepted that the issue of mode of trial had not been flagged up in his skeleton argument before HH Judge Mackie QC, nor had he referred to it in his oral submissions at the hearing on 10 June. He said he would not seek to shut the Defendants out from making the application at a later stage, but he submitted that this application was "premature". He said the court was not in a position to assess the volume of documentation that would be required because the Claimants had not yet given disclosure; and the matter should be considered by the Court at a later stage.

69. In her oral submissions Mrs Charlton said the strain of the litigation and of the Claimants conduct of the litigation, on both her and Mr Carver, as litigants in person, had been terrible. Her house was knee deep in files. She said for years now, she had had no family life and had not been able to spend any quality time with her husband, who was recovering from a severe illness. She said she needed to see an end to this and some light at the end of the tunnel, but the Claimants had ignored the orders of the court and ignored her. She said they could not keep lurching from one hearing to the next. She had done her utmost to comply with the rules and the court timetable.

The Claimants were experienced litigators and had solicitors and had no excuse for their behaviour. They had made no attempt to comply with the orders of the court. On 10 June 2010, they had given their applications to her in court when she had had no time to study them, or respond to or correct the submissions they made. They were taking advantage of litigants in person, and in a way that affected their freedom of expression.

70. In my view, Mrs Charlton's submissions are well founded. The Claimants' conduct of this litigation, as Mr Starte was bound to accept, was completely unacceptable. They were in serious default of the orders made by the court for the progress of the action. Had the trial timetable laid down by the court been complied with the actions would have been tried by now. As a result of the Claimants' inexcusable defaults the trial window has been lost. By the time of the hearing before me, 14 months after proceedings were started, the Claimants had not even produced a list of documents.

71. There has been no proper explanation for the delay because the Claimants have consciously put none before the court in a case where their conduct called for a proper explanation to be given both to the court and to the Defendants. In circumstances such as these, submissions from counsel are not a proper substitute for evidence. The court requires evidence, not merely for the sake of form, but so it can assess what should be done on a rational basis. In the event, what was said by Mr Starte did not even provide a proper explanation for what had occurred (let alone an excuse, as Mr Starte was bound to accept). Even if it was the case that the Claimants were preoccupied with their business, that does not explain why it was that solicitors instructed on their behalf did not respond to any of the communications from the Defendants from March 2010 onwards, including most recently, the applications made by Mrs Charlton in which she suggests amongst other matters, that the Claimants have deliberately conducted the litigation in the way that they have to put pressure on the Defendants who are at a great disadvantage as litigants in person; nor does it begin to explain why the order for costs was not complied with given the Claimants must have appreciated the potential hardship this would cause persons in the position of the Defendants.

72. When the civil procedure rules were first introduced, those involved in civil litigation had to accustom themselves to a new legal landscape provided by a new procedural code. The overriding objective was a phrase with which lawyers were unfamiliar: that is not the position now. By CPR rule 1.2 the rules of procedure must be interpreted so as to give effect to the overriding objective of enabling the courts to deal with cases justly. CPR rule 1.1(2) provides dealing with cases justly includes, so far as practicable, ensuring that the parties are on an equal footing, saving expense, dealing with cases in ways that are proportionate to a number of matters, including the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party and ensuring that cases are dealt with expeditiously and fairly.

73. The rules must be given a purposive construction as Lord Woolf made clear in the *Final Report* where he said at paragraphs 10-11 of chapter 20:

> "Every word in the rules should have a purpose, but every word cannot sensibly be given a minutely exact meaning. Civil procedure involves more judgment and knowledge than the rules can directly express. In this respect, rules of court are not

> like an instruction manual for operating a piece of machinery. Ultimately their purpose is to guide the court and the litigants towards a just resolution of the case. Although the rules can offer detailed directions for the technical steps to be taken, the effectiveness of those steps depends upon the spirit in which they are carried out. That in turn depends on an understanding of the fundamental purpose of the rules and of the underlying system of procedure."

74. CPR 3.4(2) provides that "the court may strike out a statement of case if it appears to the court – (c) that there has been a failure to comply with a rule, practice direction or court order."

75. In my view, the following factors are of particular importance in this case. First, (as I find) there has been a deliberate and wholesale non compliance with the rules and orders of the court by the Claimants, amounting to a total disregard of the court's orders. Second, the Claimant's conduct of the litigation and their breaches of the case management directions of the court are contrary to the overriding objective, and have resulted in a serious delay to the progress of the actions. They are barely further forward than they were in December last year. As a result, the trial window has been lost, and there will be a substantial delay to any trial (as for the importance of this matter, see for example, PD 29, paragraph 7.4). Third, there has been no proper explanation for these failures, which in my view, as a matter of reality, remain unexplained. Fourth, the history of this litigation: the most recent failures follow a pre-existing pattern for the Claimants' conduct of the litigation of delay, defaults and disobedience to court orders. Fifth, the Claimants made no attempt to respond to these applications, save for the last minute appearance by Mr Starte, despite being on notice of them for many weeks. Sixth, the significant prejudicial and oppressive effect that the Claimants' conduct of the litigation has had on the Defendants, who as litigants in person have been placed in the position where it is they who have had to struggle to progress the actions brought against them.

76. As to the last point, I refer to Mrs Charlton's submissions which I have set out at paragraph 69 above and which I accept. The burden and strain that had been placed on both Defendants by the Claimants' conduct was apparent to me at the hearing. Mrs Charlton in particular, was extremely distressed by the behaviour of the Claimants. It is illustrative of the position in which the Defendants have been placed, that when I asked Mr Carver whether he wished to apply for his costs of the hearing before me, he said there wasn't much point as he "hadn't received the last lot" and was unlikely to get the costs whatever I ordered..

77. Had it not been for the fact that the Defendants were litigants in person, I suspect these actions would have been subject to sanctions long ago; and it seems to me that the Claimants have by their conduct, taken advantage of the fact that the Defendants were unrepresented and of limited means. As it is, the Claimants have been able to ignore this litigation and the orders of the court at significant personal cost to the Defendants, with relative impunity in the knowledge that even if they were ordered to pay the costs arising from their defaults (and obeyed the orders to pay them) those costs would be extremely modest.

78. In considering whether it would be appropriate to strike these actions out, I have borne in mind that doing so will deprive the Claimants of access to the court, a matter which it might be argued by the Claimants, has implications for their rights pursuant to article 6(1) of the ECHR "to a fair and public hearing within a reasonable time and by an independent and impartial tribunal established by law." However as Hale LJ (as she then was) said in *Khilili v Bennett and ors* EWCA [2000] EMLR 996 at [50] when considering whether a decision to strike out a claim for delay deprived a party of his article 6(1) rights:

> "National laws are entitled to regulate their domestic procedures, and this includes prescribing timetables and steps which have to be taken within a limited period. If a claimant has not complied with those rules, then normally he will not be able to complain under Article 6"

79. I accept that there may be relatively few occasions when the court would make a straight 'striking-out' order, rather than imposing some lesser sanction; and that the burden is on an applicant seeking such an order. Albeit that the Claimants were not in breach of an 'unless' order, and there was no application by them before me for an extension of time for compliance with the orders made or for relief from sanction, I have also considered the factors which are material to an application for relief from sanctions set out in CPR rule 9(1). In my judgment however, those factors weigh heavily against the Claimants.

80. The matters I have referred to above on their own persuade me that the point has come in these actions where it is right to impose the ultimate sanction, and these actions should now be struck out, having regard to the intrinsic justice of the case in the light of the overriding objective (see *Purdy v Cambran* [2000] CP Rep 67 at [51]).

81. But there are also additional factors which are relevant to the exercise of my discretion. The limitation period for libel actions is 1 year. Parties who start libel actions are expected to get on with them, not least because a claimant with a serious claim which he genuinely wishes to pursue will want prompt vindication. If he does not do so, and can give no proper explanation for his delay, the court may infer his motive for the delay is not a proper one and the action constitutes an abuse of the process. Whether that inference can be drawn, depends on the facts of the individual case. In this case, the only rational conclusion to be drawn from the Claimants' conduct of this litigation in my judgment is that they have lost interest in the litigation, and have no genuine desire to pursue it or to vindicate their reputation, and in that respect the continuation of these actions is an abuse.

82. Even if I am wrong about that however and these actions are not an abuse in that sense, it is still important that libel actions should be properly pursued. Whether a defendant is a journalist, or a person such as Mrs Charlton, who wishes to speak her mind about an issue which arises almost literally on her doorstep, there are important article 10 considerations so it seems to me, which arise when actions for libel are brought and not progressed, in particular when the power and resources of the parties are so different, and where the fact of being sued at all is a serious interference with freedom of expression (see for example what was said by Tugendhat J in *Lonzim v Sprague* [2009] EWHC 2838 (QB) at [33]).

83. Finally, I should deal with the issue of mode of trial. It was made clear by the Defendants from the outset that they wanted trial by jury. Were it necessary for me to do so I would vary the order made by HH Judge Mackie QC on 10 June 2010 as to mode of trial, to provide for a jury trial in this case. In my view there is nothing to suggest the trial cannot conveniently be tried by a jury (see section 69(1) Supreme Court Act 1981); and were the matter one of my residual discretion, the factors which Mrs Charlton has identified (see paragraph 56 above) would persuade me to exercise it in favour of trial by jury, notwithstanding the emphasis is now against trial by jury.

84. As it is however, these two actions will be struck out, and judgment will be entered for the Defendants.