Case No: A2/2009/1831/2

Neutral Citation Number: [2010] EWCA Civ 716
IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
MR JUSTICE EADY
HQ08X01338

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2010

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE CARNWATH
and
LORD JUSTICE MOORE-BICK

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Between :

KHADER	**Appellant**
- and -	
AZIZ & ANR	**First Respondents**
- and -	
DAVENPORT LYONS	**Respondents**

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Andrew Veen and Arfan Khan (instructed by **Simons Muirhead & Burton**) for the **Appellant**
Heather Rogers QC (instructed by **Davenport Lyons**) for the **First Respondents**
Aiden Eardley (instructed by **Davenport Lyons**) for the **Respondents**

Hearing dates : **19th May 2010**

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Judgment

President of the Queen's Bench Division:

Introduction:

1. These proceedings arise out of an article in the Daily Mail of 12th April 2007 under the heading "How Queen Mariam spent a penny and lost a fortune". The woman there referred to is the first respondent, Mariam Aziz, the former wife of the Sultan of Brunei. The article related how she had accidentally dropped a £1m. diamond bracelet in the ladies' lavatory of Les Ambassadeurs club in Mayfair. The bracelet was found in the lavatory by Leila Khader, the appellant, described in the article as a one-time friend of the late King Hussein of Jordan, who describes herself as an international society figure and business woman. The article related that the appellant returned the bracelet to Ms Aziz and it ended with the words "and the generous reward offered by a woman whose former husband's fortune reached £65 billion at its peak? "The queen gave her a hug and a kiss", I am told".

2. Ms Aziz was aggrieved by the article, feeling that it put her in a bad light for having behaved ungenerously towards the finder of a very valuable bracelet. The article gave the impression of having derived from information provided by the appellant, not least because it contained a quotation attributed to her.

3. The second respondent, Mr Dowd, was at the time an associate solicitor with Ms Aziz' solicitors, Davenport Lyons. The firm has a retainer from Ms Aziz to act for her, which the respondents say includes general instructions to monitor media coverage about her and to take such steps as may be appropriate to protect her interests. As a result, Mr Dowd, acting in his capacity as Ms Aziz' solicitor made contact with Associated Newspapers Limited, the publishers of the Daily Mail, and had a short conversation with Ms Minsky, the journalist who wrote the article.

The proceedings

4. In a first action brought by the appellant on 8th April 2008, the appellant alleged that three publications, for which Mr Dowd was primarily responsible, were defamatory of her. The first publication related to the conversation which Mr Dowd had with Ms Minsky on 12th April 2007. In this conversation, he is alleged to have said:

> "Leila Khader is a disreputable person and a liar. You should not rely on her words because they are false and she has acted in cahoots with some other persons to pretend that a diamond bracelet had been found and was being returned to Mariam Aziz in order to embezzle money from Mariam Aziz."

   Mr Dowd accepts that he had a conversation with Ms Minsky, but denies that he spoke these words.

5. The second publication alleges that exactly the same words were spoken by Mr Dowd (or possibly others said to be acting on behalf of Ms Aziz) during another telephone conversation on 12th April 2007 with Mr Barry Hayes (or possibly others) at Les Ambassadeurs club. Both Mr Dowd and Mr Hayes deny that any such conversation took place. A third defamatory publication was said to be contained in a letter sent by Mr Dowd to Ms Minsky on or shortly after 13th April 2007. Mr Dowd denies sending

any such letter and a disclosure order against Associated Newspapers Limited failed to reveal any evidence of such a letter being received.

6. The appellant brought a second action on 11th March 2009 against Davenport Lyons and Mark Bateman, a partner in that firm.

7. By application on 24th November 2008, both Ms Aziz and Mr Dowd applied for summary judgment dismissing the first action or for the first action to be struck out. They claimed that the appellant had no reasonable grounds for seeking relief, that the claims were bound to fail, and that the proceedings were an abuse of process. An equivalent application was made in respect of the second action. By his judgment of 31st July 2009, Eady J acceded to these applications and dismissed the claims. His judgment may be found at [2009] EWHC 2027 (QB) and it may be referred to for greater detail than this judgment need contain.

The judge's judgment

8. As to the first action and the first publication, the judge noted that Ms Aziz would be entitled to speak out in her own defence against defamatory attacks in the media or, even if the words used were not defamatory, to complain about alleged inaccuracies. Furthermore, a considerable degree of latitude would be given to her in assessing what is relevant and reasonably necessary for the purposes of such a response (see *Watts v Times Newspapers Limited* [1997] QB 650). The judge also considered the scope of the defence of qualified privilege with reference to *Baker v Carrick* [1897] QB 838 and *Regan v Taylor* [2000] EMLR 549. He found that there was a plain defence of qualified privilege in respect of Mr Dowd's conversation with Ms Minsky in his capacity as Ms Aziz' solicitor which was equivalent to the privilege which Ms Aziz herself would have had. The privilege applied both to Ms Aziz, as the person actually referred to in disparaging terms in the article, and to Mr Dowd as her duly authorised agent acting within the scope of his authority.

9. As to the second alleged publication the judge found the pleading to be vague. He held that it would be inherently unlikely that Mr Dowd or anyone would speak exactly the same words to other persons as he was alleged to have spoken to Ms Minsky. Moreover, both Mr Dowd and Mr Hayes had denied making this alleged defamatory publication and the appellant had served no evidence in response. The appellant's claim in this respect was based on bare assertion. As to the third alleged publication, the judge found the pleading to be in breach of the requirement that the words complained of in a libel action need to be set out expressly. He held that the claim should be struck out for non-compliance with this rule. The sending of the letter remained a bare assertion in the teeth of the evidence.

10. The judge then considered the question of malice, both in respect of the application to strike out the claim based on injurious falsehood and for the purpose of considering whether it could defeat the defence of qualified privilege. He said this at paragraph 31 of his judgment:

> "The modern leading authority as to the meaning of malice is *Horrocks v Lowe* [1975] AC 135, 149-151. As to its pleading, there are stringent requirements imposed because malice is recognised as being tantamount to an accusation of fraud or

> dishonesty and must not be made on a merely formulaic basis. It is necessary to plead and to prove the facts from which malice is to be inferred, and it will not suffice to plead only facts which are equally consistent with the absence of malice as with its presence. This was established in the middle of the 19th century in *Somerville v Hawkins* (1851) 10 CB 583 and has been confirmed in modern times by the Court of Appeal in *Telnikoff v Matusevich* [1991] 1 QB 102 and in *Alexander v Arts Council of Wales* [2001] 1 WLR 1840. It is recognised that mere assertion will not do (see generally *Gatley on Libel and Slander* (11th ed) at para 30.5). A claimant may not proceed simply in the hope that something will turn up if the defendant chooses to go into the witness box, or that he or she will make an admission in cross-examination."

11. The judge held that the particulars pleaded by the appellant were insufficient to satisfy the requirements of establishing malice. He found that there was no basis for pleading malice against either Ms Aziz or Mr Dowd and no reason to suppose, in the light of the evidence, that it would be possible to prove malice. In any event, it was independently appropriate to strike out a claim not based on a publication amounting to a real or substantial tort, since there was no reason to suppose that the appellant was in any way adversely affected in Ms Minsky's estimation following the phone call with Mr Dowd, nor that a shifting and inconsistent case of potentially serious financial consequences had any proper basis. The judge referred to and applied *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946.

12. The judge refused the appellant's application to amend her Particulars of Claim. He held that the Amended Particulars of Claim were prolix and confusing. A new version of the words alleged to have been published by Mr Dowd to Ms Minsky was not supported by the content of new material having become available in the form of a disclosed note by Ms Minsky and a redacted email from Mr Dowd to Mr Bateman. A proposed amendment in respect of the second publication was unsupported by evidence and did nothing to overcome the fundamental problem that the evidence adduced on behalf of the defendants had not been contradicted. No evidence had been served to explain why there had been a change or to suggest that any evidence would be forthcoming at trial to support the original or new versions of the publication relied upon.

13. Waller LJ gave permission to appeal in relation to the striking out of the first two alleged publications, but not the third publication.

14. As to the second action, the judge held that the claim against Davenport Lyons and Mr Bateman was flawed for the same reasons as the claims brought against Ms Aziz and Mr Dowd. He held in addition that a defence of limitation was unanswerable. Waller LJ refused permission to appeal against the judge's order on the second action and that action remains struck out.

Grounds of appeal and submissions:

15. The prolix grounds of appeal as advanced in the appellant's skeleton argument may be summarised as follows. It is arguable that there was no defence of qualified

privilege because it is arguable that Mr Dowd was acting outside the scope of his or his firm's retainer. The written retainer which was produced dated 13th September 2004 does not extent to communications with the press. There was no sufficient attack in the Daily Mail article on Ms Aziz giving rise to a need to defend herself against attack. It is submitted (quite wrongly) that the defence of qualified privilege only extends to statements made in connection with judicial or quasi-judicial proceedings. It is submitted that Mr Dowd arguably exposed himself and his client to proceedings by not communicating a more measured response. It is submitted that the case that Ms Aziz and Mr Dowd acted with malice is arguable. Mr Dowd's language was grossly exaggerated and as such was an inferential indication of malice. Express malice should be found because Mr Dowd was alleged to have had an historic intimate relationship with Ms Aziz. In any event, Mr Dowd had no reasonable basis for alleging dishonesty or making the other defamatory allegations against the appellant and he was therefore at least arguably reckless or wilfully blind as to the truth or falsity of what he said.

16. It is submitted that it is sufficiently arguable that the appellant's claim is not an abuse of process. The words complained of impute an imprisonable criminal offence and thus do not require proof of damage. The judge should not have held that the appellant had not been adversely affected by the defamatory words spoken. Her reputation had been damaged and she had suffered stress and inconvenience. It was to be supposed that Ms Minsky would have passed on what she had been told. The appellant had a significant reputation to protect. She had been excluded from her social circle and had humiliatingly lost her membership of Les Ambassadeurs club. This is not a case where there is no real damage. In any event, the *Jameel* jurisdiction to strike out a case on the basis of abuse of process is too narrow to encompass the present case.

17. It is submitted additionally as to the second alleged publication that the evidence of Mr Rahr supports the fact of such publication to the Club, despite the denial by Mr Hayes.

18. Ms Rogers QC and Mr Eardley on behalf of the respondents support the judge's reasoning and conclusions. They point out that the two alleged publications in respect of which the appellant has permission to appeal allege slander for which a claimant must prove actual loss or damage unless, relevantly, the words impute that the claimant has committed an offence punishable by imprisonment. The cause of action requires the claimant to allege and prove the speaking of particular words. The appellant has failed to grasp this principle and its consequences.

19. As to qualified privilege, the respondents submit that the Daily Mail article plainly had a derogatory sting to it which entitled Ms Aziz to respond. The answer to an attack will be privileged provided it is, in a broad and reasonable sense, germane to the subject matter of the attack – see *Regan v Taylor* at page 565. The defendant has considerable latitude. The defendant must not include entirely irrelevant and extraneous material (see *Watts v Times Newspapers* [1997] QB 650 at 671). But the law does not concern itself with niceties in such matters (see *Turner v MGM Pictures Limited* [1950] 1 All ER 449 at 471.) It may be relevant, and sometimes necessary, for a defendant to state that the claimant should not be believed. Mr Eardley submits that the evidence of Ms Aziz and Mr Dowd makes it clear that Mr Dowd was acting within the scope of his authority when he spoke on the telephone to Ms Minsky and

the appellant advances no evidence to the contrary. There is no proper basis for saying that the scope of the retainer was strictly circumscribed by the terms of the original letter of 13th September 2004, since things had obviously moved on since then. A person may chose to respond to an attack through an agent, such as a solicitor. The solicitor is protected by qualified privilege in respect of a publication on behalf of a client, provided that privilege would have attached to the same publication if made by the client and providing that the solicitor was acting within the scope of his authority. The only question is whether the communication by the solicitor fell within the scope of the client's authority. If the terms of his retainer are sufficiently wide, the solicitor does not have to show that the client specifically instructed him to make that communication or authorised the precise words used (*Regan v Taylor* at 563-4).

20. As to malice, Ms Rogers refers at (great) length to the well known opinion of Lord Diplock in *Horrocks v Lowe* [1975] AC 135 at 149-151. To destroy privilege, the desire to injure must be the dominant motive for the defamatory publication. If it is proved that the person publishing defamatory matter did not believe that it was true, that is generally conclusive evidence of express malice. If a person publishes untrue defamatory matter recklessly, without considering or caring whether it is true or not, he is treated as if he knew it to be false. But indifference to the truth of the publication is not to be equated with carelessness, impulsiveness or irrationality. Judges and juries should be very slow to draw the inference that a defendant was so far actuated by improper motive as to deprive him of the protection of privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. Where the only evidence of improper motive is the content of the defamatory material itself or the steps taken by the defendant to verify its accuracy, the plaintiff must show affirmatively that the defendant did not believe it to be true or was indifferent to its truth or falsity. This burden is not lightly satisfied. The only exception to this is where what is published incorporates defamatory matter which is not really necessary to fulfil the duty or the protection of the interest upon which the privilege is founded. It was accepted in *Turner v MGM Pictures* at page 455 that grossly exaggerated language may be evidence of malice. However, it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence.

21. Ms Rogers submits that there is no proper basis for asserting that Ms Aziz authorised the very words which Mr Dowd is alleged to have used nor any proper basis to allege that she had no honest belief in, or was recklessly indifferent to, the truth of what was said. As to malice on the part of Mr Dowd, Mr Eardley submits that it was no part of the case before Eady J that Mr Dowd used grossly exaggerated language. The words alleged to have been used would have been germane to the defence against attack privilege. Eady J was right to regard the question of malice as subjective, and the appellant is unable to show that there was information available to Mr Dowd to cause him to doubt the truth of what was said. There is no proper evidence of improper motive. Further, the judge was right on the issue of abuse of process. There was no evidence that the appellant had suffered damage sufficient to support an action for slander, nor that she had sustained a real or substantial tort.

22. As to the second publication, the respondents submit that there was no proper basis for Waller LJ to consider that there was material to support the possibility that the

credibility of Mr Hayes and Mr Dowd might be challenged as to the making of this alleged publication.

Discussion:

23. In my judgment, there is such a formidable range of problems with the appellant's claims that the judge was cumulatively correct to strike them out. It is of course axiomatic that, in defamation proceedings, questions of law are for the judge, but questions of fact for the jury; so that neither the judge nor this court should presume to make decisions dependant on issues of fact which ought properly to be left to the jury. But that does not mean that a claimant can secure a full jury trial simply be asserting that there are issues of fact. As this court decided in *Alexander v Arts Council of Wales* [2001] EWCA Civ 514; [2001] 1 WLR 1840, section 69 of the Senior Courts Act 1981 entitles a party to have a material issue of fact decided by a jury. But it is for the judge to decide whether there really is such an issue. If the judge decides that the evidence, taken at its highest, is such that a properly directed jury could not properly reach a necessary factual conclusion, he is entitled to withdraw the issue from the jury. If a party's case depends on a finding of fact by the jury which, if it were made, would be bound to be set aside on appeal as perverse, the judge can grant the other party summary judgment. In *Alexander*, in a claim for liable and slander attracting a defence of qualified privilege, there was no evidence upon which a reasonable jury properly directed could hold that the defendants had acted maliciously. The claim could not succeed and the judge had been right to grant the defendants summary judgement. The test to be applied is equivalent to that in criminal jury trials – see *R v Galbraith* [1981] 1 WLR 1039 at 1042C.

24. This principle, in my view, clearly applies in the present case to the second alleged publication. Here it is alleged that, on 12th April 2007, Mr Dowd (or someone on Ms Aziz' behalf) spoke the same defamatory words as are alleged for the first publication to Mr Hayes (or someone) at Les Ambassadeurs club. There is no positive evidence whatever to support the making of a publication in these terms on this date. Both Mr Dowd and Mr Hayes deny that there was such a publication. The only matters relied on are that for some reason the appellant's membership of the club was suspended – which goes nowhere to prove the necessary terms of a publication by or on behalf of Ms Aziz – and paragraph 43 of the witness statement of Peter Rahr, who was at the time a director of Les Ambassadeurs in a separate claim by the appellant against the club. Mr Rahr there states that Ms Aziz was not in the country when Ms Khader was suspended from the club. He recalls a discussion with Ms Aziz some time following the suspension in which Mr Rahr made an oblique reference to the dispute with Ms Khader, to which Ms Aziz said that she was surprised that the Daily Mail article had been published. She had said that she had understood that someone else had found the bracelet, but that Ms Khader had taken it from that person in order to return it to her. Ms Aziz was understandably unhappy about the publicity that the article attracted to her. This evidence again goes nowhere to support the terms of the necessary second publication. It refers to a time after Ms Khader's suspension and after 12th April 2007. Its content does not begin to accord with the terms of the alleged second defamatory publication. The appellant is accordingly left, more than three years after the event, with no evidence at all to support the fact or the terms of this alleged second publication.

25. In my view, Waller LJ was over-persuaded that there was now some evidence that what was said in the defamatory statement reached other people within the club. For my part, I have seen no such evidence. Waller LJ also thought it of some significance that Mr Dowd denied making the first publication, but that there was now evidence that he did, putting his credibility in doubt. But Mr Dowd denied (and still denies) making the first publication in the terms in which it was alleged – a necessary ingredient of a defamation pleading. The material now available does not go to establish that he made the first publication in the terms alleged – only that he had a conversation with Ms Minsky. Any residual doubts as to his credibility cannot alone go to establish the facts necessary for the second publication. In my judgment, therefore, the appellant has no evidence, and will obtain no evidence, from which a jury properly directed could find as a fact in the face of denials by Mr Dowd and Mr Hayes that the second alleged defamatory publication was made. A finding by a jury to that effect would be reversed by this court on appeal as perverse. The judge was right to strike out the claim based on that publication. This means that the appellant has now failed to bring forward a sufficient case for each of the second and third alleged publications – for it will be recalled that the claim in respect of the third publication also failed because there was no evidence that the necessary letter had been sent or received. This is a general merits point of some relevance to consideration of the first alleged publication, where Mr Dowd denies making the defamatory statement alleged, and there is, as yet, no direct evidence before the court that he did.

26. The state of the evidence to support the pleaded first publication is as follows. It is accepted that Mr Dowd and Ms Minsky had a short telephone conversation on 12th April 2007. On 19th April 2007 solicitors acting for the appellant wrote to Davenport Lyons asserting that Mr Dowd had made allegations to the Daily Mail that the appellant was a liar who gave false information to the Daily Mail; that she was a disreputable person; and that she was attempting to "embezzle" money from Ms Aziz with the assistance of an unnamed associate. I leave to one side for the moment the obvious fact that "embezzle" is a very strange term to have applied to any version of the facts relating to the bracelet. There is no witness statement from Ms Minsky. The appellant says in paragraph 43 of her second witness statement of 14th May 2009 that Ms Minsky had told her that her employers had instructed her not to provide a witness statement for trial, but that she would attend trial to give evidence on subpoena. The appellant's second witness statement technically attests to the fact that Ms Minsky related to the appellant the conversation with Mr Dowd as pleaded. However,

    a) The appellant wrote a letter of complaint to the Law Society on 28th July 2007 in which she set out the allegations which Mr Dowd was said to have made, which do not there contain the word "embezzle". The relevant part, as set out in this letter, is "that I was in cahoots with another person to get a reward or financial profit."

    b) Ms Minsky's contemporaneous note of the conversation with Mr Dowd goes nowhere to establish that Mr Dowd spoke the defamatory words alleged. The only note of relevance is "Leila Khader didn't find bracelet, said it [was] another individual".

    c) Mr Dowd's email of 12th April 2007 to Mr Bateman concerning his conversation with Ms Minsky goes no further than to state that there

> were "inaccuracies in print" and that Mr Dowd "told her the source was not to be relied on".

Thus, although, as the respondents accept, the court may be constrained (without enthusiasm) to accept for present purposes, subject to the abuse argument considered below, that the fact of the alleged first publication on the general lines pleaded is capable of being established at trial, I do not consider that there is any real prospect of a jury finding (other than perversely) that the word "embezzle" was used or that Mr Dowd accused Ms Khader of making up a story that the bracelet had been lost; and the court is further entitled to have general regard to the fact that the evidential support for a modified version of the alleged publication is suspect.

27. The appellant challenges the judge's decision that the occasion of Mr Dowd's conversation with Ms Minsky was one of qualified privilege. Two narrow points are taken; first, that there was no sufficient attack on Ms Aziz in the Daily Mail article to sustain a privileged response; and, second, that it is reasonably arguable that Mr Dowd's authority did not extend to defending Ms Aziz against critical media comment. As to the first point, in my judgment the judge was correct to regard the sting of the article, if not itself defamatory, as a disparaging criticism of Ms Aziz in the matter of the return of the bracelet. As to the second point, in my view the appellant has no prospect of displacing the evidence of the respondents that Mr Dowd had a general authority to act on behalf of Ms Aziz which extended to defending her against disparagement in the media. Her denial that she authorised Mr Dowd to publish the words alleged is not a denial of his authority, but an averment which complements Mr Dowd's denial that he published the particular words alleged. *Regan v Taylor* is authority for the proposition that an authorised publication by an agent attracts the same qualified privilege as would the same publication by the principal. It is also authority for the proposition that a modern solicitor with general authority is not a mere channel of communication, but may be engaged to represent his client in the matter in which he is engaged and may often be called on to make communications whose content might in part be derived from his own experience, rather than from direct instructions of his client. Chadwick LJ who dissented in the result in *Regan v Taylor*, nevertheless said at page 569:

> "I have already expressed the view that there is no reason in principle why a client should not give to his solicitor a general retainer authorising him to make such response to defamatory attacks upon the client as the solicitor may from time to time think appropriate. Such a retainer may authorise the solicitor to express his own views or opinions without further reference to the clients; and may authorise the solicitor to mount a counter attack in the media in response to an attack which has been made upon the client by an identified person or publication or, perhaps, in response to any future attacks. Whether or not such a retainer has been given – and if so, its terms – must, in my view, be a question of fact, to be decided on the facts of the particular case."

28. The short point in the present appeal is that there is nothing whatever to indicate that Mr Dowd's retainer did not extend to enable him to represent Ms Aziz by communicating with Ms Minsky as he did. In my judgment, the appellant has no

prospect of displacing the respondents' evidence on this point, which in any event accords with probability. Mr Dowd had no business to make whatever communication he did without authority, which he plainly had.

29. As to malice, the appellant would have to establish positively that Ms Aziz was actuated by a dominant improper motive to injure the appellant, rather than by her wish to mount an effective defence to the disparagement she saw in the newspaper article. Here the only substantial matter relied on to establish improper motive is the outspoken terms of the alleged publication itself. Granted that occasionally malice may perhaps be inferred from grossly exaggerated language (see *Turner v MGM* at page 455), as Lord Diplock said in *Horrocks v Lowe*, where conduct extraneous to the privileged occasion itself is not relied on, and the only evidence of improper motive is the content of the defamatory material itself or the steps taken by the defendant to verify its accuracy, with one exception which does not arise here, the appellant has to show affirmatively that the defendant did not believe the publication to be true or was indifferent to its truth or falsity. An allegation mutedly advanced that Ms Aziz and Mr Dowd may historically have had some intimate relationship would be a fanciful support for a dominant improper motive for Mr Dowd. There is no persuasive conduct extraneous to the privileged occasion. The language alleged (shorn, as in my view it should be, of the word "embezzle") is not, I think, grossly exaggerated, and does not by itself positively and affirmatively sustain a dominant motive to injure such that the respondents did not believe the publication to be true or were indifferent as to its truth or falsity. In my judgment, this ground of appeal should fail.

30. Independently of the case of malice, and irrespective of whether there might be more than one view as to the validity for present purposes of the appellant's case on malice, she still has to establish that the tort which she alleges is real and substantial. If she cannot make a sufficient case here, the claim should be struck out, both because a claim for slander generally requires proof of actual loss and damage, and because an insubstantial claim which is not worth the candle should be struck out. There is no positive evidence that the alleged first publication went beyond Ms Minsky (other perhaps than for investigation purposes for the purposes of these proceedings) and no evidence whatever that any internal republication within Associated Newspapers caused the appellant any loss. The suspension of her membership of Les Ambassadeurs club did not arise out of the alleged publication to the Daily Mail.

31. In *Jameel v Dow Jones*, an internet article implied that the claimant had been or was suspected of having been involved in funding a terrorist organisation. Only five subscribers within the jurisdiction had accessed the internet article, and the defendants said that the claimant had suffered no or minimal damage to his reputation. The claim was struck out as an abuse of process. This court held that, adopting the proactive approach required by the overriding objective under the Civil Procedure Rules of dealing with cases justly, and keeping a proper balance between the Convention right to freedom of expression and the protection of individual rights, the court was required to stop as an abuse of process defamation proceedings that were not serving the legitimate purpose of protecting the claimant's reputation. The test to be applied was whether there was a real and substantial tort. The publication within the jurisdiction was minimal and did not amount to a real and substantial tort when the damage to the claimant's reputation was insignificant. It was disproportionate and an abuse of process for the claimant to proceed with his claim. If the claimant succeeded

in the action and was awarded a small amount of damage, it could perhaps be said that he had achieved vindication for the damage done. But both the damage and the vindication would be minimal. This court endorsed at paragraph 57 in *Jameel* the approach of Eady J in *Schellenberg v British Broadcasting Corporation* [2000] EMLR 296 with regard to proportionality. Eady J said that he was bound to ask whether the game was worth the candle. He could not accept in that case that there was any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantage to the parties in terms of expense, and to the wider public in terms of court resources. This court had earlier endorsed that approach in *Wallis v Valentine* [2003] EMLR 175.

32. In my judgment, the principle in *Jameel* applies in the present appeal. The appellant's claim on the first publication is at best fraught with difficulties. But even if it were to succeed at trial, it would not be worth the candle. She would at best recover minimal damages at huge expense to the parties and of court time. This would be so, even if she and those representing her were to adopt for the future a hitherto elusive economical approach to the amount of paper and time which the case might need. As things are, the parties' expenditure must vastly exceed the minimal amount of damages which the appellant might recover even if she were to succeed in overcoming all the obstacles in the path of such success. The judge was correct to conclude that this claim is disproportionate and that it should be struck out as an abuse.

33. Waller LJ also gave the appellant permission to appeal against an order by Eady J prohibiting publication of matters shortly listed in a confidential annex to his orders. Those matters concern details of one or more alleged historic intimate relationships which Ms Aziz may have had with Mr Dowd or any third party. It is said that this material was already in the public domain, and attention is drawn to the small print of footnote 18 of a judgment of Underhill J (sitting in private) in [2007] EWHC 91 QB. The terms of the footnote strongly suggest that Underhill J accepted Ms Aziz' denial of the allegation. However that may be, that footnote no more puts private details into the public domain than does this paragraph of my judgment. I would dismiss this ground of appeal, not least because the judge's order was justified and proportionate, because the appellant's claim will not now proceed, and because publication under the shield of absolute privilege of any such private details given in proceedings from which this is an unsuccessful appeal would be wholly unwarranted intrusion.

34. For these reasons I would dismiss this appeal.

Excessive skeleton arguments and documents:

35. When Waller LJ gave Ms Khader, the appellant, limited permission to appeal in this case, he ordered the appellant to file and serve revised and less prolix skeleton arguments, and revised and less prolix Amended Particulars of Claim confined to the relevant claims and issues for determination of the appeals. The appellant nominally complied with that order, but in substance failed to do so. The appellant's skeleton argument for this appeal runs to 86 paragraphs occupying 22 closely typed pages. There was little of real use to the court before paragraph 70, although it is fair to say that the preceding section on the law, although again of excessive length for a skeleton, was structurally reasonably sound. The respondents' skeleton was of similar over-fleshed proportions, although it is not fair to be over-critical when this skeleton

was responding to one which was itself grossly excessive. The appellant then thought fit to serve a further skeleton in reply which ran to a further 74 paragraphs occupying a further 27 closely typed pages. Not content with this, the parties, though I suspect mainly the appellant, produced for the court 5 well filled lever arch files of documents, very few of which were referred to; and 6 files of largely unread authorities – all this in an appeal whose hearing time Waller LJ fixed as 3 hours (later enlarged to one day) and where one of the first instance judge's reasons for striking out the claim was that it was not worth the candle.

36. In *Midgulf International Limited v Groupe Chimique Tunisian* [2010] EWCA Civ 66, Toulson LJ, with whom Mummery and Patten LJJ agreed, expressed strong disapproval of the volume of papers presented to the court by the appellant. It does not diminish my equivalent disapproval of the excess of documents in the present appeal, that the scale of the excess in *Midgulf* appears to have been somewhat greater than in the present appeal. At paragraph 72, Toulson LJ expressed his disapproval in these terms:

> "I am afraid that the case is a grotesque example of a tendency to burden the court with documents of grossly disproportionate quantity and length. It is a practice which must stop. Far from assisting the court, it makes the work of the court infinitely harder. Hours had to be spent reading through Midgulf's voluminous skeleton arguments and they were largely wasted hours. It will no doubt also have added greatly and unnecessarily to the costs of the appeal."

At paragraph 74, Toulson LJ quoted from the judgment of Mummery LJ in *Tombstone Limited v Raja* [2008] EWCA Civ 1444; [2009] 1 WLR 1143, where Mummery LJ explained that skeleton arguments were aids to oral advocacy, not written briefs; and that too many practitioners, at increased costs to their clients and diminishing assistance to the court, burden their opponents and the court with written briefs.

37. There are, in my judgment, two warnings to be sounded in relation to the still increasing tendency to overburden the court and other parties with skeleton arguments which are not skeleton, and with volumes of unnecessary documents and authorities. First, judges should be more prepared than they perhaps have been in the past to use the powers available to them to disallow the cost of the preparation and use of excessive written material, whatever the outcome of the case. Second, practitioners should be well aware that the court will not for ever tolerate the time and cost of *both* excessive written submission *and* oral argument of commensurate length. The court should not habitually tolerate both and clients should not be expected to pay for both. Speaking for myself, I greatly value properly constructed and concise oral submissions. But the time might soon arrive when I should regard it as my public duty to curtail oral submissions severely, if I have already been served up with written submissions which contain in detail everything which is reasonably capable of being said in support of the parties' contentions. If practitioners want to kill oral advocacy, the preparation and presentation to the court of excessively long written submissions (under the guise of skeleton arguments) is the way to go about it. They should not set about killing oral advocacy unintentionally.

Lord Justice Carnwath:

38. I agree that the judge was entirely right to refuse to allow the action to continue. Publications 2 and 3 were wholly without foundation and were rightly rejected for that reason. I add a few words of my own in relation to publication 1, to express concern both about the nature of the case, and the artificial basis on which we have been required to consider it.

39. The story started with what might have been thought (to use Ms Khader's words) a "happy story with a happy ending". An apparently inconsequential piece in the Daily Mail revealed to its readers that the former wife of the Sultan of Brunei, Ms Aziz, had mislaid a diamond bracelet in the ladies' lavatory of the Les Ambassadeurs club and that it had been found and returned to her by another member, Mrs Khader. The article ended with this statement:-

> "And the generous reward offered by a women whose former husband's fortune reached £65 billion at its peak?
>
> "The Queen gave her a hug and a kiss, I am told".

It is astonishing and highly regrettable that those few, trivial words have led to three years of hostile, and no doubt very expensive, litigation.

40. The story might have been thought a simple illustration of the unsurprising point that fellow members of a club do not normally expect a financial reward for returning lost property to each other. However, that was not how it was seen by Ms Aziz and her legal adviser Mr Dowd, or indeed those representing her in these proceedings. In the skeleton argument of Miss Rogers QC and Mr Eardley in this appeal it is said:-

> "on any reasonable reading of the article, it portrayed the first respondent as having acting in a mean and ungenerous way to the appellant who had found a very valuable bracelet to her at Les Ambassadeurs Club."

41. Having so reacted, Mr Dowd spoke to the Daily Mail to complain. He spoke to the journalist, Ms Minsky. She as it turned out was a friend of Miss Khader, who later learned from her about the conversation. According to Mr Dowd's own note to his supervising partner, he "put her straight on the errors in the article", and was told she was "happy to quote the inaccuracies in print". He noted also that he had told Ms Minsky that "the source was not to be relied on and if there is further contact she should inform us immediately". Mr Dowd himself has not disclosed what were the "errors" as he saw them, and no correction was in fact published in the Daily Mail.

42. We have no witness statement from Miss Minsky herself (apparently because her employers declined to allow her to do so voluntarily), but we do have a manuscript note apparently taken by her at the time of the conversation. The only material points from the note are:

> "Leila Khader didn't find bracelet, said it was another individual" "worth nowhere near £1million…"

The only other shred of contemporary evidence is from a Mr Rahr, a member of the staff at the club. He recalls a conversation with Ms Aziz at the club a few days later, when he mentioned the incident and she said that "she understood that someone else had found the bracelet".

43. So we move from what appeared to be no more than a happy story with a happy ending, to a possible dispute about who in fact found the bracelet; how much it was worth, and whether or not Mrs Khader had been hoping for some form of financial reward for returning it to its rightful owner. Even at this stage one would have not have thought it something which anyone would think it necessary to get very excited about.

44. However, as the President has explained, by the time the proceedings were begun, the case had taken on a new and much more serious slant. In the Particulars of Claim the words alleged to have been spoken by Mr Dowd included the following:

> "Leila Khader… has acted in cahoots with some other persons to *pretend* that a diamond bracelet had been found and was being returned to Mariam Aziz in order to *embezzle* money from Mariam Aziz" (emphasis added).

Thus in effect criminal conduct was being alleged.

45. It can be seen at once that this makes no sense. The allegation implies that the whole story of the loss of a bracelet was a fabrication formed for the dishonest purpose of extracting money from Ms Aziz. Yet there is no dispute that the bracelet was indeed lost, and was indeed returned by Ms Khader. Furthermore, no one before us was able to explain how anyone (particularly a lawyer, like Mr Dowd) could have thought the word "embezzle" an appropriate description for what happened.

46. We were asked, by both parties, to assume that it could be proved at trial that these apparently nonsensical words were indeed spoken by Mr Dowd. This was said to be the correct approach to an application for summary judgment under CPR Part 24 since the appellant had said that she would call Ms Minsky at trial by witness summons to prove her pleaded case.. Eady J proceeded on the same basis. For my part, I am unable to see why the court should be so constrained. This was not an application under the "striking-out" provisions, which direct attention to whether the statement of case itself discloses reasonable grounds for bringing the claim (rule 3.4(2)(a)) The issue under rule 24.2 is simply whether the claimant has a "real prospect of succeeding on the claim" (rule 24.2(a)(i)). Under that rule there seems no reason why the court should be required to assume proof of allegations, merely because they are pleaded.

47. The artificiality of such an assumption is underlined when one comes to consider the potential defence of qualified privilege and the related issue of malice. It was common ground that one of the criteria for a defence of qualified privilege is that the words used should have been reasonably necessary for their purpose. Even accepting that Mr Dowd was entitled to take steps to protect his client against adverse media comment, it is hard to see how this could extend to allegations of deceit and embezzlement, for which there was no conceivable foundation. Alternatively, such words might well be

thought to amount to the kind of "grossly exaggerated language" from which malice could possibly be inferred. I cannot believe that it is the correct approach.

48. As we heard no argument on these issues, I do no more than express my reservations. I am in any event satisfied that we are subject to no such constraints when considering the broader picture under the *Jameel* principle. On that I agree entirely with the President, and that is sufficient to dispose of the appeal. I also agree with his comments on the presentation of the case.

Lord Justice Moore-Bick:

49. I agree that the appeal should be dismissed for the reasons given by the President and wish to add a few words of my own only on the question of skeleton arguments.

50. I wish to associate myself expressly with the comments the President has made in paragraphs 35 to 37 of his judgment about the length and complexity of skeleton arguments generally. When the requirement to serve skeleton arguments was introduced many years ago it was made clear that their purpose was to inform the court of the essential elements of the parties' submissions to enable it to understand the issues and arguments arising on the appeal. Whatever counsel may think, that remains their primary function; they are not intended to serve as vehicles for extended advocacy, which is the function of oral argument. Nonetheless, over time skeleton arguments have steadily become longer and more complex and it is not uncommon for them to contain extensive citation from the documents in the case and the authorities. They have, in effect become written briefs which deal with all the minutiae of the case and are bulked up by a considerable amount of advocacy. If judgment is reserved they may serve a useful purpose once the hearing has been concluded, but their usefulness as an introduction to the appeal is diminished.

51. In order to achieve its purpose of enabling the court to make best use of the often limited reading time available a skeleton argument should set out as simply and concisely as possible a summary of the facts giving rise to the dispute, refer to the important parts of the judgment below, contain a succinct statement of the essence of each submission that counsel intends to make and set out briefly the grounds on which it is said to be well-founded, including a reference to the principal authorities on which counsel intends to rely in support of it.

52. I greatly value our tradition of oral advocacy, which in my view enables the court to gain a fuller and deeper understanding of the principles of law involved in the case and the merits of the competing arguments than is possible simply by reading written submissions. For my own part, therefore, I would not support any steps towards curtailing oral argument. I agree, however, that the court should not have to bear the burden of wading through lengthy, and correspondingly unhelpful, skeleton arguments in order to gain a sufficient understanding of the issues prior to the hearing. The remedy in my view is for the court to be far more willing in future to disallow part or all of the costs of any skeleton argument that fails to serve its essential purpose.