Neutral Citation Number: [2017] EWHC 543 (QB)

Case No: HQ15D02711

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/03/2017

Before :

HIS HONOUR JUDGE PARKES QC
(Sitting as a Deputy Judge of the High Court)

- -

Between :

ZIPPORAH LISLE-MAINWARING **Claimant**

- and -

ASSOCIATED NEWSPAPERS LIMITED

First Defendant

KATHRYN KNIGHT

Second Defendant

- -
- -

Mr Hugh Tomlinson QC and Ms Sara Mansoori (instructed by **DLA Piper LLP**) for the **Claimant**
Mr Andrew Caldecott QC and Ms Christina Michalos (instructed by **Wiggin LLP**) for the **Defendants**

Hearing date: 11 November 2016

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Approved Judgment

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

This judgment was handed down in public on 17.03.17. It consists of 48 pages.

The judge does not give leave for paragraphs [182]-[201] "CONFIDENTIAL ANNEX" to be reported and this section has been removed from the published judgment.

It is a contempt of court for any person to publish the contents of the above paragraphs without first obtaining a direction for permission to report from the judge.

HIS HONOUR JUDGE PARKES

HHJ Parkes QC :

INTRODUCTION

1. The claimant owns a building in South End, a mews near Kensington Square, London W8. In March 2015 she decided to paint the building in loud red and white vertical stripes, as an act of apparent retaliation against those who objected to her planning application for development of the site and change of use. As she herself put it, "*the Council and [a] difficult neighbour had insisted that they wished the building to stay in commercial use … accordingly, I painted the building appropriately*". Her behaviour attracted the attention of the first defendant (ANL), and prompted a number of news and comment stories in the Daily Mail and the ANL website, Mail Online. Two of those articles defamed the claimant, and she issued proceedings for libel.

2. The current application is for assessment of compensation pursuant to s3(5), Defamation Act 1996, following acceptance of a qualified offer to make amends.

3. The first article was published by ANL on 15 April 2015 on Mail Online. It was headlined *"Revealed: the war hero's daughter who infuriated neighbours with her £15 million 'eyesore seaside hut' - and how she fell out with own family after feud"*. The words complained of were part of a longer article which referred to the Kensington planning dispute, to her father's wartime RAF record, and to litigation with a Mr Cobbe arising from a dispute about a property in Yeoman's Row. The offending words read as follows:

> *"Today Mail Online can reveal Mrs Lisle-Mainwaring has also fallen out with the family of her late husband Robert, who have accused her of failing to pass on cash and property worth millions after his death in 2007.*
>
> *Robert Lisle, her stepson, said her behaviour does not surprise him, having last had contact with her in 2012 when they continued to row over the inheritance he believes is due to him and the wider family.*
>
> *He said: 'She has made commitments and reneged on them. She's an extremely unpleasant character.'*
>
> *His wife Sally claims Mrs Lisle-Mainwaring's life revolves around money, which has left her estranged from much of her family.*
>
> *She said: 'She's fallen out with the family. It's sad, she's missing out on them growing up and getting married. But she's not involved because of her decisions.'*
>
> *'Her husband promised money and property to his children and grandchildren but after he died it never materialised. They were promises my husband's father made, but she has never kept one.'"*

4. The second article was written by Kathryn Knight, the second defendant, and published by ANL both on Mail Online (on 17 April 2015) and in the print edition of the Daily Mail on the following day. Headlined in part '*Toxic neighbour with a past as colourful as her £15m house*', both variants of the second article contained two quite distinct components, both of which are complained of. For damages purposes, I am not invited to make any distinction between Ms Knight and ANL, which no doubt stands behind her. As before, the words complained of represent small parts of a longer article that revisited the Kensington planning dispute and the litigation over Yeoman's Row.

5. The first component of the second article raised a further defamatory matter which the claimant prefers to regard as private ('the closed matter'). By order of Master Yoxall dated 9 June 2015, the pleadings available for public inspection were redacted so as to exclude references to the closed matter, and although I shall deal with it as far as I can in this judgment, full elaboration has to be relegated to the confidential annex. What I can say is that the closed matter involves a serious allegation of wrongdoing which ANL has not sought to justify, and the publication of which I accept has caused the claimant particular anger and distress.

6. The closed matter aside, the second article elaborated on the allegations made by the claimant's stepson. The words complained of are as follows:

> *"Not long before he died, Robert says, his father told him he'd be well provided for once he had passed away. 'He told me that Yeoman's Row was being sold for around £40 million, and that I would be all right.'*
>
> *'I'd seen a copy of his will sometime previously in which he left 15 per cent of the joint estate to me and 15 per cent to Patricia's cousin with provision made for the grandchildren and various charities.'*
>
> *But after his father's death, Robert was surprised to find his father had made a new will in the year before his death, leaving everything to Zipporah. 'Obviously, I was taken aback, but I felt my father had entrusted her to look after the family financially and I had no reason to believe she would not.'*
>
> *…*
>
> *It was the next conversation about money that soured the relationship. 'By 2012, I'd become rather overweight and Zipporah told me she'd helped me pay off my £240,000 mortgage if I lost 2 st in the next few months,' Robert recalls.*
>
> *It was a bizarre proposal, but he thought it was her way of finally passing on some of the money he'd expected. He took the offer seriously and lost the weight.*

> *'She came for dinner in August 2012, then said she wasn't going to pay - the words she used were that she realised she was "reneging on a commitment"'."*

7. The claimant instructed solicitors. The letter before action was sent on 21 May 2015, following an initial letter dated 17 April. Proceedings were issued on 9 June seeking damages, including aggravated and special damages, for libel. The meanings pleaded (other than in respect of the closed matter) were as follows:

First article -15 April 2015

8. That the claimant had

   i) made commitments to the family of her deceased husband, Robert, and then reneged on them in an extremely unpleasant fashion;

   ii) after her husband's death, consistently failed to keep promises of money and property worth millions made by him to his children and grandchildren, thereby betraying his expectation and the trust placed in her.

Second article – 17/18 April 2015

9. That the claimant had

   i) influenced her husband to write a new will excluding his family, then betrayed the trust placed in her by her late husband to look after his family financially and provide for them after his death from an anticipated £40 million proceeds of the sale of Yeoman's Row;

   ii) deliberately and without good reason reneged on a commitment made to Robert Lisle to pay off his £240,000 mortgage if he lost weight.

10. The special damage claim, to which I shall return below, seeks to recover the claimant's costs incurred in removing from the internet alleged repetitions and republications of the words complained of by third parties.

11. After two extensions of time for service of the Defence, a qualified Offer of Amends was made on 27 August 2015. It closely, although not entirely, endorsed the defamatory meanings pleaded by the claimant in the Particulars of Claim, including the meaning pleaded in respect of the closed matter. That matter aside, the defendants accepted that the articles bore the following untrue defamatory meanings:

First article -15 April 2015

   i) The claimant had made commitments to the family of her deceased husband Robert and then reneged on them in an extremely unpleasant fashion;

   ii) After her husband's death, the claimant consistently failed to keep promises of money and property worth millions made by him to his children and grandchildren, thereby betraying his expectation and the trust placed in her.

Second article – 17/18 April 2015

iii) The claimant betrayed the trust placed in her by her late husband to look after his family financially and provide for them after his death from an anticipated £40 million proceeds of the sale of Yeoman's Row;

iv) The claimant deliberately and without good reason reneged on a commitment made to Robert Lisle to pay off his £240,000 mortgage if he lost weight.

12. The defendants stated in the qualified Offer of Amends that they relied on a number of matters in mitigation of damages, in reliance on the principles set out in *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579.

13. The qualified Offer of Amends was accepted by the claimant on 4 November 2015.

14. Thereafter, there were difficulties in agreeing a form of wording for an apology and statement in open court, but an agreed statement was read by the parties in front of Nicol J on 14 March 2016. A report of the statement was published in the issue of the Daily Mail dated 15 March 2016 and on Mail Online.

15. On 17 March 2016, the claimant started proceedings ('the Lisle litigation') in defamation and breach of privacy against her stepson, Robert Lisle, and his wife Sally, and in harassment against Robert Lisle alone. As far as the defamation claim was concerned, it was primarily expressed to relate to defamatory statements made to 'third parties including to journalists working for Associated Newspapers and The Telegraph (some of which were subsequently published in articles in the Daily Mail, The Telegraph and elsewhere online via a variety of other media outlets and websites)' on unknown dates in April and May 2015. The Lisle litigation was compromised by payment to the claimant of £25,000 in damages and her costs, and by the reading of a joint statement in open court on 18 July 2016. Its relevance to the current application is that ANL relies on the damages received by the claimant from the Lisles for the purposes of s12, Defamation Act 1952.

16. On 18 March 2016 the claimant issued an application notice seeking an order pursuant to s3(3), Defamation Act 1996, that the defendants should fulfil the offer of amends by taking agreed steps in relation to the reporting of the statement in open court.

17. The present application was issued by the claimant on 8 July 2016.

MATTERS IN ISSUE

18. The following matters are in issue.

i) General damages

a) The sum or sums to be awarded to the claimant by way of compensation under s3(5) Defamation Act 1996;

b) The impact, if any, which the defendants' *Burstein* particulars have on that sum;

c) The impact, if any, which the settlement of the Lisle litigation has on that sum, pursuant to s12, Defamation Act 1952;

d) Whether there should be a single award or separate awards of compensation;

ii) The discount to be applied to the award of general damages to take account of the qualified Offer of Amends;

iii) Whether the defendants are entitled to their costs of the application made by the claimant dated 18 March 2016 pursuant to s3(3), Defamation Act 1996; and

iv) Whether the claimant should be awarded special damages, and if so in what sum.

GENERAL DAMAGES

19. By s3(5), Defamation Act 1996,

> *"If the parties do not agree on the amount to be paid by way of compensation, it shall be determined by the court on the same principles as damages in defamation proceedings.*
>
> *The court shall take account of any steps taken in fulfilment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances, and may reduce or increase the amount of compensation accordingly."*

20. The issue of compensation under s3(5) is governed by the same principles as an award of libel damages: *Turner v NGN* [2006] EWCA Civ 540; [2006] 1 WLR 3469 at [16].

21. An award of general damages for libel serves three functions: first, to act as a consolation to the claimant for the distress and embarrassment which she has suffered from the publication of defamatory words, secondly, to compensate for the injury to her reputation; and thirdly, to act as vindication for her reputation. I bear in mind the overriding principle that, in order to comply with Article 10 of the European Convention on Human Rights, an award of damages must be proportionate to the legitimate aim of compensating the claimant for the injury and distress which she has suffered and of providing her with vindication.

22. The gravity of the allegation complained of is particularly important in assessment of damages for injury to reputation, especially where (as in the present case) it touches the claimant's personal integrity, loyalty and the core attributes of personality. By contrast, vindication will be a less significant factor in an offer of amends case, where the defendant has never contended that the allegations are true.

23. The principles of assessment in defamation proceedings were described in the following terms by Sir Thomas Bingham M.R. in *John v MGN Ltd* [1997] QB 586 at p.607:

> *"The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also relevant; a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation; but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross examines the plaintiff in a wounding or insulting way."*

24. In offer of amends cases the court will follow a two-stage process, by which it first assesses compensation on the basis of a suitable award following a trial in which there had been no significant aggravation or mitigation, and only then makes a reduction to take account of any apology and of the willingness of the defendant to go down the offer of amends route. Delay in making an offer of amends may reduce the discount. I shall return to this aspect of the matter below. For the moment I focus on the award of general damages before any discount for offer of amends.

The claimant's evidence

25. The claimant deals at some length in her evidence with the impact of the libels upon her. That is entirely proper, for the impact of a libel on the claimant, in terms of distress, hurt and humiliation, is highly material to the award of damages. I should say that the parties were content that the witness statements should stand as evidence without cross-examination, as if this had been an interim application. So while the experience of coming to court will have been much less stressful for the claimant than it might otherwise have been, I did not have the advantage of observing her giving live evidence.

26. The claimant explains in her evidence how throughout her relationship with her late husband Robert Lisle, she produced most of the income and capital. The capital seems to have come largely from a fortunate London property acquisition, Yeomans Row. The claimant insisted on being described in the statement in open court as a successful businesswoman, but beyond her good fortune in the property market she says nothing

of any profession which she may have followed or of her business activities or of how she earned any income. Evidence about those matters might have been material to the assessment of damages. Her husband died in 2007, after a long and happy relationship of over 30 years. The claimant got on well with her husband's son, also Robert Lisle. She now has homes in the UK and Switzerland and 'property interests', including 19 South End, in the UK. Media interest in the claimant seems to have been ignited by her planning dispute with her local planning authority. She had intended a very substantial redevelopment of 19 South End as a final home for herself, and appears to have sought change of use from commercial to residential. Both the planning authority and what she calls a 'particularly difficult' neighbour insisted that the house had to remain in commercial use, so she painted the building 'appropriately' in vertical red and white stripes. 'As is usual', she says, 'I did not discuss this with my neighbours. Painting was not their decision to make, it was mine'.

27. She was contacted through her planning and property solicitor on 13 April 2015 by an ANL journalist who was writing an article about 19 South End, but the claimant was not interested in talking to her. The article was published on Mail Online on 14 April under the headline "The £15m 'eyesore seaside hut'". On 15 April, she was visited by ANL journalists at her Geneva address, and declined to speak to them.

28. The first article now complained of was published on 15 April 2015. It contained the passage set out at [3] above. The claimant could not credit the contents of the article, which she hated. What upset and angered her most was what she felt to be 'the gross intrusion into (her) private life, the inaccuracy and the spite with which the article was filled'. She felt that she had been stripped for the public gaze. With some justice, she observes that her generation (she was born in 1943) did not share its personal affairs with outsiders, and was much more reticent and private than its successors. Against that background, she was particularly upset to read such hurtful and untrue allegations about personal matters, and all the more so since not only was it untrue to suggest that she had made and reneged on commitments to her late husband's children and failed to keep financial promises supposedly made by him to his children and grandchildren, but in reality all the money that she had was her own, and not her late husband's, and she had chosen to use it to make some extremely generous and entirely voluntary gifts to her late husband's family. That is accepted not just by ANL but also, as is clear from the terms of the statement in open court in which they participated at the conclusion of the Lisle proceedings, by her stepson and his wife.

29. On 17 April the claimant was informed by her solicitor that the second defendant had called to say that in the next day's Daily Mail they would be running a further story about her. It was to make further allegations about the claimant's supposed failures to abide by promises to her late husband and her stepson Robert, and to raise for the first time the closed matter which is dealt with in the confidential annex to this judgment. At that point the claimant instructed her current solicitors, DLA Piper, to deal with ANL. On her instructions they wrote to ANL at 21.22 on the evening of 17 April, enclosing a response for publication. The letter was addressed to the editor of the Daily Mail, Paul Dacre, and was emailed to news@dailymail.co.uk and to the second defendant. It made clear that she had not failed to support her stepson: on the contrary, she had given him very generous support from her own (and not her late husband's) funds.

30. The claimant read the second article on Mail Online on the morning of 18 April 2015. She was acutely distressed by it and the untruths that it contained. Understandably, her distress was magnified by the fact that her stepson and his wife were plainly the sources of much of what was published, despite the generosity that she had shown them in the past.

31. The claimant was further distressed by the cruel, ignorant and vindictive comments made by a number of readers of the second article on Mail Online, some of whom expressed the hope that she would soon die. It is not difficult to understand the claimant's feeling at the time that it might be simpler to end a life that seemed to have so little to recommend it and that complete strangers apparently wanted to bring to a close. It is true that the majority of reader comments were about the painting of the house rather than the words complained of, and that some were supportive of her, but the impact on her of such extreme manifestations of hostility from strangers must have been very upsetting indeed, and can hardly have been mitigated by an element of sympathy from others. On the claimant's evidence, after reading the second article she seriously contemplated suicide; her blood pressure rose to a high level; and she suffered an attack of urticaria, a pre-existing condition which is exacerbated by stress. I am not comfortable with the introduction of medical evidence by a lay litigant, without any expert support, particularly as to causation, and without disclosure of medical records, and I am not prepared to make a finding that these symptoms were caused by publication of the words complained of. But I am entitled to regard this evidence as serving to emphasise and underline the distress that the claimant plainly suffered.

32. Matters were not improved by the time taken to respond to her complaint, which seems to have been caused partly by the illness of the ANL lawyer responsible for the matter, coupled with a failure to pass the file to someone else. A formal letter before action was sent on 21 May 2015 setting a deadline of 4 June, to which ANL suggested that the claimant should wait until 11 June, after the lawyer returned from sick leave. The claimant felt, not without reason, that there was a lack of urgency in dealing with what from her perspective was a matter of huge importance. The claim form was issued on 9 June. Meanwhile, the articles remained available to the world on Mail Online. I should make clear, however, that any aggravation caused by delay in responding to the complaint, and in making an offer of amends, is a factor to be taken into account not at this stage but when considering the discount to be made for the offer of amends and the process of giving effect to that offer.

33. With effect from 21 April 2015, ANL added to the second online article the statement which the claimant had provided in her solicitors' letter of 17 April. The added words read: 'In a later statement, Zipporah said: "The dealings between my stepson and myself are private family matters. It is untrue that I have failed to support my stepson and this allegation is extremely hurtful. He and his son have been personally financed by me to the tune of approximately £1 million. This was not in any way from my husband's money"'. The wording was not added to the first article until 24 July 2015. The impact of this addition, even on readers of the second online article, will probably not have been great, given that most publication takes place soon after an article appears, but, as Mr Caldecott QC pointed out, it would have been worse had nothing been done.

34. The articles were taken down on 27 August 2015, when ANL made their qualified offer of amends, over 4 months after publication. The offer of amends was accepted by the claimant on 4 November 2015. Thereafter, as is more fully explained below, a joint statement in open court was read on 14 March 2016. The statement was reported by ANL, but in terms which are said to have caused further distress to the claimant.

Burstein particulars

35. The offer of amends was made expressly subject to what have become known as Burstein particulars, after the decision in *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579.

36. It seems to me that the impact of the Burstein particulars falls to be considered at the stage of assessment of general damages (or statutory compensation), rather than at the second stage, when the appropriate offer of amends discount is determined. That was the approach adopted by Eady J in the case of *Turner v News Group Newspapers Ltd* [2005] EWHC 892 (QB).

37. Burstein particulars should be limited to directly relevant background context which is relevant to the claimant's reputation in the relevant sector of his or her life. In Burstein's case, the claimant, a traditionally minded composer, complained of the allegation that he used to organise bands of hecklers to go about wrecking performances of atonal music. The particulars sanctioned by the Court of Appeal related to the claimant's behaviour in co-founding a group of campaigners against modernist music who had urged the public to join them in booing a revival of Birtwistle's opera Gawain at Covent Garden, and in associating himself with their tactics of booing and hissing at the conclusion of the performance. Those particulars could not have amounted to justification, but they were directly relevant context of the defamatory words, and, as May LJ observed in *Burstein* at [41], to keep that context from the jury when assessing damages was to put them in blinkers. In *Turner v News Group Newspapers* [2006] EWCA Civ 540; [2006] 1 WLR 3469, the Burstein principle was first considered in the context of s3(5) compensation following offer of amends. In that case, the particulars concerned a similar area of the claimant's life to that raised by the libel, and were relevant in particular to assessment of the injury to the claimant's feelings. The Court of Appeal stated that to be admissible, such evidence had to be so clearly relevant to the subject matter of the libel or to the claimant's reputation or sensitivity in that part of his life that there would be a real risk of the jury assessing damages on a false basis if they were kept in ignorance of the facts to which the evidence related: see per Keene LJ at [56]. The Court of Appeal considered the question again in *Warren v Random House Group Ltd* [2008] EWCA Civ 834; [2009] QB 600, holding that there was no substitute for examination in each case of whether the material qualified as background context directly relevant to the assessment of the damage sustained by the claimant, in particular the damage to his reputation in the sector of his life to which it related and the injury to his feelings.

38. ANL's Burstein particulars were set out in an annex to the qualified offer of amends. The annex also includes other matters relevant to mitigation, but the Burstein particulars proper, so far as still relied on at the assessment hearing, are as follows:

> *"(1) ANL relies on findings of unconscionable conduct on the part of the claimant in a final judgment given by Etherton J*

> *in the case of James Cobbe v (1) Yeomans Row Management Ltd and (2) Robert Lisle-Mainwaring (the Cobbe proceedings), and endorsed on appeal to the Court of Appeal and House of Lords. ANL relies on findings of fact that the claimant had a settled intention not to abide by the terms of an agreement she had entered into with Mr Cobbe but deliberately refrained from telling him that she did not intend to honour the agreement, in order to ensure that he continued his efforts to obtain planning permission in respect of the Yeoman's Row property, and that she thereby took unconscionable advantage of him.*
>
> *(2) ANL relies also on the claimant's behaviour in painting her property at 19 South End in lurid red and white stripes, without consultation or warning to her neighbours, after the grant of planning permission for change of use was quashed by this court. The repainting is said to have been visually intrusive, gaudy and out of keeping with the surrounding properties and area, and the claimant is said to have acted in a provocative way that would inevitably attract public attention, criticism and inquiry."*

39. For the claimant, Mr Tomlinson QC submitted that the Cobbe case (which was referred to in both articles complained of) was a business matter, quite different from the issues of family loyalty raised by the articles complained of, and did not mean that the claimant was hardened against the effect of completely different allegations about her family life. As for the repainting of the house, the public attention of which the claimant complained did not stem from her behaviour in repainting the house but from ANL's publication of the words complained of. Mr Caldecott QC, for ANL, did not place much reliance on the repainting, although he suggested that the claimant was inviting scrutiny by acting as she did. That puts it mildly. He regarded the Cobbe affair as 'not immaterial', on the footing that the claimant had been guilty of conduct of which a number of courts had disapproved.

40. Plainly, neither the Cobbe matter nor the repainting has any real connection with the allegations complained of, which relate to betrayal of trust and breach of promises and commitments made to family members. They do not concern a similar area of the claimant's life to that attacked by the libel, and they do not damage her reputation in the relevant sector of her life. At the most, they suggest (with her words quoted at [26] above) that the claimant is a less delicate and sensitive individual than her evidence might otherwise suggest. But that may not be of great help in assessing the injury to her feelings, because the most thick-skinned of public figures may be highly sensitive to attacks on their behaviour in a private or personal sphere. In short, I do not regard the Burstein material as warranting a discount on the award which is otherwise appropriate.

The Lisle proceedings

41. Defamation Act 1952 s12 provides as follows:

> *"Evidence of other damages recovered by plaintiff*

> *In any action for libel or slander the defendant may give evidence in mitigation of damages that the plaintiff has recovered damages, or has brought actions for damages, for libel or slander in respect of the publication of words to the same effect as the words on which the action is founded, or has received or agreed to receive compensation in respect of any such publication."*

42. On 19 February 2016 the claimant caused letters before action to be sent to Robert and Sally Lisle. Their allegations formed the core of the words complained of in this action. The letter to Robert Lisle, which was sixteen pages long, complained that he had caused the publication of the words presently complained of in this action, and other words, on Mail Online and in the Daily Mail, and of defamatory words published in the Daily Telegraph and Express. It also complained of the publication by him of a defamatory email sent by him on 8 July 2015 to six members of DLA Piper, it complained of breach of privacy, and it made a claim in harassment, a cause of action which was said to arise from all the other matters complained of in the letter. The letter to Sally Lisle complained only of defamation in respect of the newspaper articles, including the words complained of in this action.

43. On 17 March 2016 the claimant issued proceedings against Robert and Sally Lisle. The claim form sought (inter alia) damages, including aggravated and/or special damages, for

    i) libel and/or slander in respect of defamatory statements of and referring to the claimant published by (the Lisles) to third parties, including journalists working for Associated Newspapers and The Telegraph (some of which were subsequently published in articles in the Daily Mail, The Telegraph and elsewhere online via a variety of other media outlets and websites) on unknown dates in or about April and May 2015;

    ii) libel in respect of words contained in an email published or caused to be published by (Robert Lisle) on 8 July 2015 to at least six individuals from DLA Piper LLP;

    iii) breach of privacy and/or breach of Article 8 of the European Convention on Human Rights and/or misuse of private information as a result of information of and relating to the claimant published or caused to be published by (Robert Lisle) on a website operated by him;

    iv) (as against Robert Lisle) pursuing a course of conduct against the claimant that amounts to harassment under Protection from Harassment Act 1997.

44. The claim against the Lisles appears to have been fairly quickly compromised. A joint statement in open court was read on 18 July 2016. The Lisles appeared in person. The statement recites that the defendants spoke by telephone to the second defendant in this action, Kathryn Knight, between 14 and 17 April 2015, and made untrue and defamatory allegations about the claimant which were subsequently published in national newspapers including Mail Online, the Daily Mail and The Telegraph, and picked up and repeated by other news organisations. The allegations specifically identified in the statement in open court were that Robert Lisle said that the claimant

had failed to provide for him and his family as his father had wanted, implying that the claimant had unreasonably denied the Lisles money that had been promised to them and was properly due to them; that the claimant had broken promises to buy him a property in France, to 'deal with his mortgage' if he lost weight and to pay him a pension; and that she had treated his father's sister badly over financial matters. In addition, the statement referred to the email which Robert Lisle had sent on 8 July 2015 to six individuals, all members of DLA Piper, suggesting that he might become the victim of an 'accident' at the hands of his stepmother, a woman who had the means and inclination to take revenge against him. The statement also relied on Robert Lisle's disclosure of a private matter on a website operated by him. As far as Sally Lisle was concerned, it was said only that she had alleged that the claimant had unreasonably denied her and her family money that had been promised to them and was properly due to them. No mention was made of the claim in harassment, which seems not to have added anything of substance to the causes of action already pleaded in the claim form. The Lisles agreed to pay the claimant £25,000 by way of damages. The claimant's evidence is that the sum agreed was kept low in part because of the Lisles' modest means.

45. In those circumstances, ANL contends that the claimant has recovered damages in respect of the publication of words to the same effect as those now complained of. For the claimant, it is submitted that the overlap is limited to a small part of the claim against the Lisles, and moreover that the type of damage caused to the claimant by the Lisles' behaviour was very different to that caused by ANL, because in their case publication was primarily to one journalist (although in fact republication was relied on) and caused the claimant a sense of betrayal, whereas the publication by ANL entailed vast public damage and enormous distress. Moreover, it is said, the Lisle settlement was not reported by ANL, so ANL cannot rely on the settlement as having diminished the harm caused to her.

46. Although the claim form against the Lisles alleged libel and/or slander to 'third parties including journalists working for Associated Newspapers and The Telegraph', the statement in open court refers only to slander published to the second defendant. Both the claim form and the statement in open court make clear that the claimant relied on republication of those words in Mail Online, the Daily Mail and The Telegraph. In fact, as Mr Caldecott rightly submits, the republication in the Telegraph (19 April 2015) was considerably less strong than those in the ANL outlets. It is true that there was also a claim in respect of Robert Lisle's 8 July 2015 email, although publication of that was very limited, and also in respect of a privacy matter. And I must take into account that the claimant relied on republication which went beyond ANL outlets. Moreover, the claimant understandably felt betrayed and upset by the Lisles' behaviour, even though her relations with them had already broken down. All that said, the claimant's recovery against the Lisles was substantially in respect of the publication of words to the same effect as the words on which the action is founded, and in my judgment it is a matter which ANL can properly rely on in mitigation of damages, although (given that the statement in open court in the Lisle matter seems to have received little publicity, and certainly none in ANL outlets) its impact on the claimant's reputation (as opposed to her feelings) will have been slight. Mr Tomlinson QC described the process in argument as essentially 'a jury exercise', and if he meant that the impact of s12 is not susceptible to precise analysis and calculation, I agree with him. I take it into account in setting the starting point for

general damages, but do not propose to quantify this aspect of mitigation any more than I would any other aggravating or mitigating factor, the offer of amends excepted.

Aggravation of damages: republication

47. Foreseeable republication of the articles complained of by third parties is a facet of the pleaded claim for aggravated damages: see paragraph 12.1 of the Particulars of Claim, repeating paragraph 10. Mr Tomlinson accepted that the impact of any republication was likely to be negligible as far as general damages was concerned, and asked that republication should be considered only in the context of special damages. I therefore say no more about it in this context.

Extent of publication

48. The extent of publication is highly material to the assessment of damages. Publication of the first article was on Mail Online; the second article was published online and in the hard copy edition of the Daily Mail. Usually in such cases, the defendant will inform the claimant of its circulation and readership figures, which are generally agreed. Not so in this case, although by the date of the hearing there seemed little real dispute as to the relevant figures.

49. ANL's evidence (De Silva 2nd witness statement) was that between 15 April 2015 and 27 August 2015, when both articles were taken down, the first article had 32,783 unique user views, and that between 17 April 2015 and 27 August 2015, the second article had 80,855 unique user views. Ruth Hoy of DLA Piper queried the meaning of 'unique user' in her 4th witness statement dated 31 October 2016, observing presciently that it was unclear whether the term included users accessing the articles by, for example, iPhone, Android or iPad mobile applications (apps). Ms de Silva (3rd witness statement, 11 November 2016) responded that it meant unique electronic devices, so that if someone viewed the article on a computer and later on an iPad, that would register as two unique users. That may be right as far as it goes, although it is hardly a full definition. But Ms de Silva missed the question implicitly raised, namely whether the figures for online readership included app users. In the draft judgment sent to the parties in the usual manner on confidential terms, I concluded, because the evidence did not suggest otherwise, that Ms de Silva's figures represented the total of online readership in England and Wales.

50. However, it turns out that Ms de Silva's figures did not give the full picture. It now appears that access to the online articles via ANL's apps, ie through special software enabling access from smartphones and tablets, involves an entirely separate platform from the main www.dailymail.co.uk website, and the figures for page views through apps were not included in the figures given by Ms De Silva in her witness statement. I am now told that the total unique user view figures for England and Wales, including the ANL website and its Apple and Android apps, are 106,691 for the first article (as against 32,783 originally stated) and 183,877 (as against 80,855 originally stated) for the second. Given that the first article was only published online, that is a very substantial increase in readership. The second article was published both online and in hard copy, but the revised online figures represent almost 5% of total readership (taking that figure as 4.015m: see [51] below), as opposed to 2% for the original figure. Nor should it be forgotten that users of smartphones and iPads are capable of showing friends a story that they are reading, just as the reader of a

conventional newspaper may do. In other words, the unique user figures are, I take it, the equivalent of hard copy circulation, but the readership figure is likely to be higher.

51. The print run of the edition of the Daily Mail for Saturday 18 April (in which the second article was published) was 2,285,100 in England and Wales, and it appears that the National Readership Survey gives the average readership of the Saturday issue of the Daily Mail between April and June 2015 as 4.015 million.

52. In his written submissions, Mr Caldecott QC accepted that readership was a multiple of circulation, and suggested 2.5 as the multiple, that being the figure adopted by Warby J for the mass media publications in *Lachaux v Independent Print Ltd* [2016] QB 402 at [148] – [150]. In fact, Warby J referred to a figure of 2 or 3 times circulation, and it seems to me that the best evidence that I have is that of the National Readership Survey.

53. The claimant exhibits the ABC activity certificate for Mail Online between 1 and 30 April 2016, which gives a figure of 14,039,907 as the daily average of unique browsers. That seems to me to be unhelpful, because the articles were published in 2015, not 2016, and because, as Ms De Silva explains, those figures are not broken down by article, and they relate not just to the dailymail.co.uk URL, where the two articles appeared, but to the total traffic for the whole of the Mail Online website, which include such parts of the Mail Online site as *This is Money* and *Fantasy Football*. It seems to me that notwithstanding the failure of ANL to include app users until February 2017, I should nonetheless proceed on the basis of the figures stated by Ms De Silva, as now amended in correspondence.

Comparable awards

54. The court is entitled to have regard to previous awards, and the parties each suggested examples. It is true, of course, that the facts of each case vary to such a degree that unless another decision is almost on all fours with the facts of the case being considered, such comparators are not often helpful. But they can set the parameters.

55. For the claimant, Mr Tomlinson QC relied on *Cruddas v Calvert* [2013] EWHC 2298 (£165,000, plus £15,000 aggravated damages, for the publication in the Sunday Times of allegations of political corruption and breach of UK electoral law, going to the claimant's personal honour and integrity); *ZAM v CFW* [2013] EMLR 27 (£100,000 plus £20,000 for special aggravating factors, in respect of allegations published to hundreds and at most the low thousands, that the claimant was dishonest in financial matters, which went to the heart of his professional career in finance, and was a paedophile); and *Cairns v Modi* [2012] EWHC 756 (QB), where an award of £75,000 was upheld by the Court of Appeal, for a 'tweet' sent to 65 publishees alleging that the claimant, a well-known cricketer, had been guilty of match-fixing, with a further £15,000 to reflect the manner in which the defendant had conducted the trial. As Mr Caldecott QC pointed out, the original publication may have been limited, but the defence of justification was reported around the world, and affected the need for vindication.

56. Mr Tomlinson referred in argument to two further awards. One was *KG v NGN* [2012] EWCA Civ 1382; [2013] 1 WLR 1015, a case in which *The People* alleged that the father of Baby P had been convicted in the 1970s of the rape of a 14 year old

girl. KG was not named in the article, but he was identifiable to a limited number of readers, including friends and relatives who knew that he was the father of Baby P. Some would have known that the allegation was false, but a number of them would have been troubled at the possibility that there might be some truth in the allegation, and others would not have known that the allegation was false. The judge's starting point of £150,000 was reduced to £100,000 on appeal before discount for offer of amends. The other was *Angel v Stainton* [2006] EWHC 637 (QB), in which the claimant, a supplier of defence equipment, was libelled in a letter sent to five influential recipients, suggesting that he had received a prison sentence for illegal arms dealing. The correct starting point was held by Eady J to be £40,000, the value of which would now be closer to £50,000. Publication was very much narrower in those cases, although in each case it reached at least some of those who knew the claimant, and will have done substantial damage. In the present case, the allegation was less serious, but will have reached a huge readership.

57. For ANL, Mr Caldecott referred to the old case of *Rantzen v Mirror Group Newspapers* [1993] 3 WLR 53, where the plaintiff was said to have protected a child sex abuser who was teaching at a school, thus allowing him to continue his abuse, and was awarded £250,000, reduced on appeal to £110,000, following a failed plea of justification. That award would be very substantially higher today, given the effect of inflation. Mr Caldecott also referred in particular to *Nail v News Group Newspapers* [2005] EMLR 20, where the claimant would, but for an offer of amends, have been awarded £45,000 in respect of allegations published in the News of the World (which had a circulation of almost four million) about the claimant's sexual behaviour and to the effect that since he achieved success he had become arrogant, rude and mean.

58. These authorities provide the beginnings of a framework, even if none is on all fours with the libels in the present case.

Two awards or one?

59. Where there are two or more libels, the court has a discretion to compensate the claimant by a single award of damages: see eg *Hayward v Thompson* [2982] 1 QB 47 and *Pedley v Cambridge Newspapers Ltd* [1964] 1 WLR 988. In the present case the articles were published only days apart and they substantially overlap. In my judgment, a single award is appropriate in this case.

60. However, this case is complicated by the closed matter, with which I deal in the confidential annex to this judgment. Rather than split the award of general damages between the 'open' libels and the closed matter, it seems to me preferable to make one award which embraces not only both articles, but also the 'open' and private aspects of the case. I should make clear that although the second defendant, Ms Knight, was only responsible for the second article, at Mr Caldecott's invitation, not resisted by Mr Tomlinson, I treat the matter as if ANL were the only effective defendant.

Conclusion on general damages

61. In *Nail v News Group Newspapers Ltd* [2004] EWHC 647 (QB); [2004] E.M.L.R. 20, Eady J described the process of assessing damages where there has been an offer of amends:

> *"I think it more helpful to focus on what I would have been inclined to award for these libels following a trial (i.e. sitting as a judge alone) in which there had been no significant aggravation (such as a plea of justification) and no significant mitigation (such as an apology). This is not a wholly artificial scenario. It might arise in various ways; for example, if there were a trial confined to meaning or qualified privilege (neither of which, at least in theory, adds further injury to the claimant's reputation). I would tend to ask, having regard to the current conventional overall ceiling for damages …. what the particular libel is worth on that scale of gravity. The main factors to be taken into account are the gravity of the allegations, the extent of publication and the degree of distress caused to the claimant. Damages must be no more than the sum necessary and proportionate to compensate the claimant, that is, to provide her with vindication, and to compensate her for the damage to her reputation and for the distress which she has been caused."*

62. It has now become conventional to recognise a 'ceiling' for general damages in defamation, which broadly corresponds to the maximum level of damages for pain, suffering and loss of amenity in personal injury cases. That figure now appears to be of the order of £300,000 (see *Cairns v Modi* at [25] and *Simmons v Castle (No.2)* [2012] EWCA Civ 1288, [2013] EMLR 4).

63. Against that background, Counsel made brief submissions on the appropriate level of award. For the claimant, Mr Tomlinson QC argued for an award no less than £150,000. Mr Caldecott QC, for ANL, suggested a figure of around £50,000.

64. The two articles were widely published, the second very much more widely than the first, because it was not only online but also printed in a hard copy edition of the Daily Mail. It will have been seen by millions of readers.

65. The 'open' allegations are hurtful and unpleasant. They suggest, wholly falsely, that the claimant behaved most unpleasantly to the family of her late husband and that she has betrayed his trust. They go directly to the claimant's personal honour and integrity, and impugn the central characteristics of her personality – the kind of person that at heart she is. As for the closed matter, it involves a serious allegation which I accept has been particularly distressing to the claimant. I accept that she has suffered substantial personal distress as a result of the publication of these libels. That said, they are not the gravest of allegations. They do not, for example, impute corruption to a public figure (*Cruddas*); nor do they impute to a famous sportsman (*Cairns*) impropriety that goes to the core of his sporting career. By contrast with those cases, the claimant is a private person, and not widely known; and there has never been any suggestion that the allegations were true.

66. I take account of the fact that, as I conclude, the claimant has already recovered damages from her stepson and his wife, Robert and Sally Lisle, in respect of words which are substantially (but not wholly) to the same effect as those now complained of. ANL are entitled to expect, in accordance with s12 Defamation Act 1952, that this factor should have a mitigating effect. I do not take account at this stage of the offer

of amends, although plainly it is relevant to note that ANL has never sought to justify any of these allegations.

67. It hardly needs to be said how unfortunate it is that the correct figures for online publication were not supplied by ANL until after the judgment was sent out to the parties in draft. It is true that the pleaded claim related to online publication on the www.dailymail.co.uk website, and not to publication via mobile apps, and the qualified offer of amends related to the claim as pleaded. I do not doubt, nonetheless, that had the issue of the separate platform occurred to ANL or their advisers, they would have disclosed the relevant figures so that the claim could have been amended and the full extent of publication embraced by the qualified offer of amends. They would hardly have wanted to proceed to trial in reliance on a technical pleading point, knowing that the claimant was labouring under a misapprehension about the true extent of publication. It appears unlikely, therefore, that there was any bad faith on the part of ANL, although there must have been a failure to apply minds properly to the true extent of publication, even though the issue was not specifically pleaded. Conversely, had the claimant's advisers realised that there was a wider online readership than that represented by www.dailymail.co.uk, they would have sought permission to amend to plead it, and permission would have been given. I shall proceed as if that permission had indeed been sought and granted.

68. I allowed the parties to make further very brief written submissions on the significance of these developments. It appears that the statement in open court was not available to app users, because they were unable to view the news page on which the report of the statement was published. It follows, the claimant argues, that ANL did not publish a suitable correction or sufficient apology within s2(4) of the 1996 Act as far as the mobile app users (some 176,930 in total) are concerned. That is true, but the offer of amends did not relate to publication via mobile apps, that (for very good reasons) not having been pleaded. The claimant argues for an increase in the quantum of general damages over the figure determined by the court in the original draft judgment, and for a reduction in the discount for offer of amends (dealt with below). ANL accept that damages should be reviewed in the light of the new information, but contend that the discount for offer of amends should not be reduced because the omission was plainly inadvertent, and apps were not raised as an issue until a very late stage. Moreover, it is said, the additional app figures, seen in the context of overall publication, should not lead the court to the conclusion that damages should be increased.

69. It seems to me that an upward adjustment to general damages is inevitable in the light of evidence of further publication to 176,930 users who could never have seen the statement in open court unless they had also accessed the Daily Mail website from a computer or read a hard copy of the newspaper. The fact that these readers will never have had that apology and retraction brought at least to their potential attention is in my judgment a matter of real significance as far as damages are concerned, notwithstanding that they represent (as far as the second article is concerned) only a fraction of the total likely readership. I have attempted to look afresh at the correct level of general damages in the light of the new evidence.

70. In my judgment it is not appropriate to adjust the level of discount for offer of amends, given the fact that the failure to appreciate that app users represented a further significant group of publishees is likely, as I accept, to have been inadvertent.

Had the point been appreciated at any earlier stage I do not doubt that the further publication would have been factored in to the arrangements for a report of the statement in open court, so as to ensure that the further publishees were reached. I note that ANL proposes to arrange for re-publication of the report of the statement in open court on www.dailymail.co.uk, this time on the home page, and on the Apple and Andoid apps if the claimant wishes. As ANL accept, the reasonable costs of this discrete issue of the extent of online publication will have to be borne by them.

71. In all those circumstances, looking at the matter afresh in the light of the new evidence of online publication, my conclusion is that the least sum necessary to compensate the claimant for the injury to her reputation and for the distress that she has suffered is £90,000.

DISCOUNT TO BE APPLIED TO GENERAL DAMAGES TO TAKE ACCOUNT OF THE QUALIFIED OFFER OF AMENDS

72. The articles complained of were published between 15 and 18 April 2015. The letter before action was sent on 21 May 2015, following an initial letter dated 17 April. Proceedings were issued on 9 June seeking damages, including aggravated and special damages, for libel. The qualified offer of amends was made on 27 August and accepted on 4 November. Thereafter, there were substantial delays in carrying the offer of amends into effect, with the result that a joint statement in open court was not made until 14 March 2016. Even then, there were arguments about the sufficiency of ANL's published report of the statement.

73. By s3(5) of the 1996 Act, in determining the amount to be paid to the claimant by way of compensation, the court shall take account of any steps taken in fulfilment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances, and may reduce or increase the amount of compensation accordingly.

74. In the passage set out at [59] above, Eady J explained how he went about assessing damages against the background of an offer of amends. He went on to describe in these terms how he approached the reduction for the offer of amends (*Nail v News Group Newspapers Ltd* [2004] EWHC 647 (QB); [2004] E.M.L.R. 20):

> *"I would then aim to make a significant reduction to take account not only of any actual apology but also of the very willingness of the defendant to use the offer of amends route. A defendant is in those circumstances effectively laying down his arms, and inviting meaningful negotiation over compensation and restoration of reputation."*

75. Eady J spoke of the need for a 'healthy discount', and his approach was broadly endorsed by the Court of Appeal [2004] EWCA [2005] E.M.L.R. 12 at [41]:

> *"One principle on which damages are awarded in defamation proceedings is that they are assessed as at the point of assessment. Of necessity, they are not in fact assessed at the date of publication, nor are they notionally assessed then. A*

> *further consequent principle is that conduct of the defendant after the publication may aggravate or mitigate the damage and therefore the award. Each case depends on its own facts and this will apply to the determination of compensation under s3(5). That said, if an early unqualified offer to make amends is made and accepted and an agreed apology is published, as in the present cases, there is bound to be substantial mitigation. The defendant has capitulated at an early stage without pleading any defence, has offered to make and publish a suitable correction and apology (and has in fact done so in agreed terms in the present cases) and has offered to pay proper compensation and costs, these to be determined by the court if they are not agreed—see ss2(4), 3(5) and 3(6). The claimant knows that his reputation has been repaired to the full extent that that is possible. He is vindicated. He is relieved from the anxiety and costs risk of contested proceedings. His feelings must of necessity be assuaged, although they may still remain bruised (and he is still entitled to say so, if that is so). He can point to the agreed apology to show the world that the defamation is accepted to have been untrue and unjustified. There may be cases in which some of these features are absent, or in which their impact may be slight. An example could be if the defendant had offered and published a correction and apology, which the claimant had not agreed and which the court found to be unsuitable and insufficient—see s3(5), second sentence. There may also be aggravating features, although the use of the procedure would generally suggest that there is unlikely to be significant aggravation after the making of the offer to make amends. "A healthy discount" may be a more colourful phrase than "substantial mitigation", but they mean the same thing."*

Complaint and response

76. It is necessary in this case to consider not only the delay before the offer of amends was made, but also, and in some laborious detail, the problems which delayed the making of the joint statement in open court. In addition, even the report of the statement in the Daily Mail and on Mail Online proved contentious.

77. The claimant's original letter of complaint, which was sent on 17 April 2015 by DLA Piper in anticipation of publication of the second article, was met with a short and somewhat dismissive response dated 21 April 2015 from Kirsty Howarth, described as the ANL Group Legal Adviser.

78. On 21 April ANL added to the second online article the statement which the claimant had provided in her solicitors' letter of 17 April 2015 (see [31] above). The wording was not added to the first article until 24 July 2015.

79. A very much fuller letter of complaint about the second article was sent by DLA Piper on 23 April. It was followed by a chaser on 27 April, and an exchange of emails in which Ms Howarth explained that she was looking into the complaint. Unfortunately,

Ms Howarth had to undergo a medical procedure on 5 May, and ANL informed DLA Piper by email dated 6 May that she would not be back until 19 May. It was said that in all the circumstances it would be inappropriate for the claimant to issue proceedings without waiting for Ms Howarth's response, and that there was no urgency that could justify that course. Yet of course in the meantime the articles remained available on the internet. ANL's email showed a clumsy lack of understanding of the claimant's concerns. As DLA Piper observed by email dated 7 May, and as ANL's Head of Editorial Legal, Elizabeth Hartley, accepted with hindsight, another ANL lawyer should have dealt with the matter in Ms Howarth's absence.

80. In the event, a formal letter before action, dealing with both articles, was sent on 21 May 2015 setting a deadline of 4 June, to which ANL suggested that the claimant should wait until 11 June, after the lawyer returned from sick leave. This seemed to the claimant to betray a lack of any sense of urgency, and the claim form was issued and served, with Particulars of Claim, on 9 June. An extension of time for service of a defence was agreed to 6 August, but it should be noted that on 30 July Ms Hartley rang the claimant's solicitor to apologise for the delay, to make it clear that ANL wished to resolve the complaint and that she would be writing with proposals on settlement (as in fact she did the following day, albeit that they were without prejudice). Thereafter, ANL obtained by consent an order for a further extension to 3 September.

Offer of amends and consequent negotiations

81. The qualified offer of amends was made by letter dated 27 August 2015. On that day, the two articles were taken down. The offer of amends contained offers in accordance with s2, Defamation Act 1996, to make a suitable correction and apology, and to publish them in a manner reasonable and practicable in the circumstances. The letter stated ANL's assumption that the claimant would not want the apology to refer to the closed matter.

82. It is a feature of this litigation that it has been very hard fought, with little quarter given. That is not in accordance with the intended spirit of the offer of amends scheme, which is meant to be quick, economical, and conciliatory. One example is the exchange of correspondence over what might have been thought to be the simple and not unreasonable request by Wiggin, for ANL, for an extension of time for service of the Defence until 28 September, with the object of giving the claimant time to consider the offer of amends and of minimising costs in the meantime. Co-operative solicitors could normally have dealt with such a simple matter over a telephone call. In this case it required a total of six letters, arguing over whether the order should be expressed to be final, and as to whether or not costs should be in the case, before the extension of time was eventually agreed. In the event, a further extension of 14 days, to 12 October, was offered by DLA Piper, apparently because the claimant was still considering her position.

83. On 30 September, DLA Piper wrote to warn Wiggin that the claimant was considering amending her Particulars of Claim to add claims based on privacy and harassment. In the light of that threat, Wiggin suggested a further extension of time for service of defence, to 27 October. In response, DLA Piper suggested an extension to 17

November, so that ANL would have time to take into account in their Defence the proposed amendments to the Particulars of Claim.

84. By a letter dated 15 October 2015, ANL offered to publish an apology in terms of the drafts attached, in the Daily Mail and Mail Online Clarifications and Corrections column (page 2 of the hard copy edition, and on the news home page of Mail Online for 24 hours, thereafter searchable indefinitely); to provide (if so wished) a private apology in respect of the closed matter, in the terms of a draft attached, to be signed by the Assistant Editor; to make a joint statement in open court in terms to be agreed, to include an apology; and to pay substantial compensation. However, there was no offer to publish a separate report of the statement in open court in addition to the published apology, for that 'would be duplication and liable to confuse'.

85. ANL's offer was rejected on 21 October in strident terms. The proposed apology was 'wholly inadequate', as, it was suggested, must have been plain to ANL; a correction on page 2 would not be sufficiently prominent, but would have to be published with a prominence equal to that of the articles, in the same size font and accompanied by a picture of the South End property; the suggestion that a private apology should be signed by the Assistant Editor was 'quite frankly offensive': an apology would only be accepted if signed by Mr Paul Dacre of ANL, and it would have to apologise in general terms for 'grossly libellous and unnecessary allegations', without clarifying the detail of the libel. The letter suggested that the claimant would regard £1 million as representing substantial compensation, and stated the claimant's belief that ANL was 'determined to continue its course of printing unpleasant, inaccurate and malicious articles about her'.

86. The offer of amends was accepted by the claimant on 4 November 2015. Acceptance was said to be without prejudice to the claimant's intention to bring separate proceedings in harassment and breach of copyright. The claimant's proposals for remedies were to be the subject of a separate letter.

87. Further proposals were made by DLA Piper by letter of 18 November 2015, with a view to agreeing an apology first. The claimant wished an apology to be published at the top of page 3 of the Daily Mail, and the top half of the home page of Mail Online, to include the largest font used in the original articles for the heading, and to be accompanied by a colour picture of the South End property. The proposed apology read as follows:

> *"We have published numerous articles about the striped house and its owner Mrs Lisle-Mainwaring. Those articles have contained many errors and included defamatory statements. Further and specifically we published allegations from a Robert and Sally Lisle, which allegations we have been unable to substantiate. We apologise unreservedly and have paid Mrs Lisle-Mainwaring her legal costs and a sum in lieu of damages to charity on her behalf."*

88. That was not acceptable to ANL, on the basis that it had to be clear to its readers what they were apologising for. By letter of 26 November Wiggin proposed a revised wording, with a view to its wording being agreed before the issue of prominence was

discussed. The counter-proposal on wording of an apology for online publication was as follows (that proposed for the Daily Mail was not different in substance):

> *"A Mail Online article on 15 April and a Daily Mail article of 18 April reporting on the painting of a house in Kensington with red and white stripes wrongly alleged that Zipporah Lisle-Mainwaring had mistreated her stepson's family in relation to their inheritance in various ways. We accept that these defamatory allegations were untrue and apologise for the distress and upset caused and have [agreed to pay] [paid] Mrs Lisle-Mainwaring her costs and a sum to charity on her behalf in lieu of compensation."*

89. That was unacceptable, and the correspondence continued. Meanwhile, however, on 5 December 2015 the claimant issued proceedings against ANL in harassment and breach of copyright, as threatened earlier. The harassment alleged a course of conduct which embraced the publication of many allegedly inaccurate articles by ANL about the claimant, including the articles complained of in this action, but not complaining of the defamatory elements of those articles. The copyright claim was founded on the publication by ANL of reproductions of one watercolour and three photographs. The claimant was said to be the copyright owner of one of the photographs: copyright in the other images was assigned to the claimant by the copyright owners by deeds dated 4, 5 and 13 November 2015.

90. On 11 December 2015, Wiggin wrote to suggest an apology by joint statement in open court, in terms attached. They also offered a contemporaneous report of the statement. It was to be published on the news page of Mail Online, with an appropriate heading and accompanied by a photograph of the claimant, for 24 hours, after which it would be permanently searchable; and on a news page of the Daily Mail on or before the page number on which the original article appeared, above the fold, in a typeface of the same size as that of surrounding articles, with an appropriate heading and a photograph of the claimant. Wiggin warned that if a joint statement could not be agreed quickly, ANL proposed to seek permission to make a unilateral statement. Since the claimant wanted Robert and Sally Lisle referred to, they would have to be given an opportunity to make submissions on any application for leave to make an agreed joint statement. The object of the draft was to state matters in general terms since that was what the claimant wanted, but to give an indication of the subject matter sufficient for the apology to serve its purpose. The central wording of the part of the draft to be read by the claimant's counsel read as follows:

> *"The articles wrongly alleged that Zipporah Lisle-Mainwaring had mistreated her late husband's son, Robert Lisle, and his family in relation to inheritance claims in various ways. The defendants have been unable to substantiate these allegations which were untrue and defamatory of the claimant and caused her considerable distress. Robert Lisle and his wife contributed to their publication which increased the hurt to her feelings. The claimant felt she had no alternative but to instruct her solicitors to issue a defamation claim. The defendants have accepted that the allegations are untrue and made an offer of amends which the claimant has accepted. The defendants are*

> *here today by their counsel to apologise unreservedly for the publication of these allegations. The first defendant has [agreed to pay] [paid] the claimant's legal costs together with a sum to charity on her behalf in lieu of compensation."*

91. On 17 December 2015, DLA Piper replied with counter-proposals. In respect of the closed matter, the point was made that ANL could not apologise explicitly because that would only compound the damage caused, so some general wording was required to acknowledge that. In particular, it was argued that Wiggin's draft was insufficiently broad to cover that wrong implicitly, and was therefore misleading, by giving the impression that the allegations referred to in the statement were the only ones which were defamatory, when that was not the case. That was sought to be achieved in the DLA Piper draft by use of a reference to the articles having included many inaccuracies, some of which were defamatory, including specifically the allegations made by Robert and Sally Lisle about mistreatment of his family in relation to inheritance claims and in relation to reneging on promises. The letter added that the claimant did not accept that a contemporaneous report of the statement should replace the publication of a separate apology.

92. Wiggin replied on 30 December 2015 with a number of amendments which might have been thought insubstantial, except that their draft proposed omitting the device ('many inaccuracies, … including specifically the allegations made by Robert and Sally Lisle') by which DLA Piper had intended to refer obliquely to the closed matter. Wiggin also stated that ANL no longer felt it was proportionate to publish a separate apology as well as a report of the statement.

93. This was not satisfactory for the claimant (DLA Piper letter 5 January 2016), because no amends were being offered for publication of the closed matter. Since the closed matter could not be repeated in the joint statement, it was necessary to refer to it in a general way in terms of 'inaccuracies', as the 17 December draft had done, and Wiggin's suggestions as to an alternative device were invited. The claimant insisted on publication of an apology, which was 'a fundamental part of your original offer of amends', and had to be honoured. That was not entirely correct, for the offer of amends had offered to make a suitable correction and apology, and to publish the correction and apology in a manner reasonable and practicable in the circumstances. ANL were still offering a correction and apology (by statement in open court) and appropriate publication of a report, but were simply jibbing at the publication of an apology separate from publication of the statement in open court. There were other points of less importance.

94. A further draft was enclosed by DLA Piper. Most unfortunately, the new draft did not seek to narrow the divide between the two previous competing drafts or to focus on the small but surely bridgeable gap between the parties, but instead added new material, some of which was more rhetoric than substance (eg reference to a 'disregard for accuracy', and to ANL having failed to attempt to establish the truth) and much of which (eg a reference to the claimant's funds having been produced by her own efforts and not the fruits of inheritance) bore the hallmark of intervention in the actual drafting process by the claimant herself. The draft also stated, quite wrongly, that the defendants had attempted to justify the articles and had denied that they were defamatory.

95. On 19 January 2016, Wiggin replied. Most importantly, they explained that a reference to unspecified 'inaccuracies' was unacceptable and would not make clear to readers what they were apologising for. ANL's offer of a private letter of apology stood. Alternatively, the closed matter could be referred to as 'a private matter'. A further draft was proposed. It referred to the Lisle allegations, and stated that the second article had included another matter which was private: the publication of the allegations, and of the private matter, had a detrimental effect on the claimant's reputation and caused her acute distress and embarrassment. On the face of it, the proposed draft was very close indeed to DLA Piper's draft of 17 December 2015. The only difference of real substance remained the use of the reference to the 'private matter', in place of DLA Piper's 'many inaccuracies, … including specifically'. But that difference was a sticking point.

96. On 26 January, DLA Piper explained that they could not understand why a reference to 'many inaccuracies' was unacceptable, given that ANL had published so many inaccuracies about their client. Wiggin had in fact explained the reason: it was that apologising for unspecified inaccuracies would not tell readers what was being apologised for. DLA Piper did not at that stage say why it was inappropriate to refer to the 'private matter'. The 5 January draft statement was again enclosed, unaltered.

97. By letter of 2 February 2016, Wiggin explained the problems with the 5 January draft. For the first time, Wiggin expressed the fear that the matter was not going to be resolved in correspondence, and stated that rather than delaying further, ANL was going to apply to the court for permission to make a unilateral statement in terms of a draft enclosed, which would be published contemporaneously online and in hard copy with a prominence in accordance with their 11 December letter. An application notice and supporting witness statement were sent the same day. The Lisles were to be notified. The issue of an application to make a unilateral statement was a very remarkable step for a defendant to take. Ms Hartley, ANL Head of Editorial Legal, is aware of no other case where it has been done.

98. On 3 February, DLA Piper said that the claimant would consider her response, but that it might depend on the response of the Lisles. They asked for the hearing date of 15 February to be adjourned, because the claimant would then be out of the country. An alternative date of 10 March was requested. They made clear that use of a reference to a 'private matter' would not be acceptable, because it was likely only to exacerbate the problem, by drawing public attention to it. Yet, they said, the claimant took the view that a unilateral statement without that reference (sc: to the private matter) would amount to a failure to honour the offer of amends. The claimant reserved her right to make a unilateral statement in the form of the draft supplied to Wiggin on 26 January.

99. ANL did not agree to an adjournment. By letter of 8 February Wiggin insisted that the differences between the parties were modest and that the only potentially contentious matter was the mention of the Lisles, on which the claimant had insisted, but the Lisles had now confirmed that they would not contest the application. Moreover, Wiggin did not see how the claimant could simultaneously request the removal of the reference and reserve the right to argue that without it, ANL was not honouring their offer.

100. DLA Piper responded on 10 February that they were disappointed by ANL's refusal to re-fix the application to make a unilateral statement: it was clear that there was 'no urgency which required (ANL's) application to be heard' on 15 February. That was a very surprising proposition, given what one would expect would be the importance to the claimant of prompt public vindication. The letter contended that ANL had not sought to agree a sufficient or appropriate correction or apology with any degree of urgency, and again referred to the claimant's right to make a unilateral statement of her own.

101. On 11 February, Wiggin agreed to adjourn ANL's application on condition that the claimant agreed by a mutually agreed date to state whether or not she wished to make a unilateral statement of her own, and if so, to issue her application within the same time period and fix a hearing date for both applications, with a view to saving costs and efficient use of court time. That suggestion was refused: DLA Piper saw no reason to agree to the conditions, and insisted that the hearing should be adjourned in any event. Their client was considering 'in her own time' whether she wished to make a unilateral statement. In the event, Wiggin bowed to the claimant's wishes and agreed to adjourn the hearing on 15 February.

102. On 17 February, DLA Piper announced that the claimant was considering proceedings against Robert and Sally Lisle, and requested notes of interviews with them.

103. Wiggin wrote on 19 February, arguing that there was no point in two unilateral statements, and urging agreement to the draft submitted on ANL's behalf on 19 January. They expressed concern at the potential for yet more delay, which was liable to increase costs further. In the light of the claimant's rejection of ANL's proposals for reference to the closed matter, Wiggin enclosed a private letter of apology in respect of that matter, signed by the assistant editor of the Daily Mail, Charles Garside.

104. On 22 February, DLA Piper made a fresh proposal, which was that a joint statement should deal with the closed matter by referring to a 'breach of our client's article 8 rights'. The enclosed draft was in all other respects identical, or substantially so, to the draft put forward by Wiggin on 19 January, which itself had been very close indeed to DLA Piper's draft of 17 December 2015. That proposal, clumsy as it was, was accepted (Wiggin 24 February), subject to the resolution of minor drafting points.

105. A joint statement was agreed on 1 March 2016, and was read on 14 March. By the statement, ANL accepted the falsity of the allegations and apologised. The core of the statement, after the usual introductory material, described the claimant as a successful businesswoman and read as follows (omitting the rejoinder by Counsel for the claimant):

> *"The articles wrongly repeated allegations made by Robert Lisle, her late husband's son, and his second wife, Sally Lisle, that Zipporah Lisle-Mainwaring had mistreated her late husband's son and his family in relation to inheritance claims in various ways, including allegations that she unreasonably denied them moneys that they claimed had been promised to them and were properly due to them.*

The Defendants have been unable to substantiate these allegations as they were untrue, and defamatory of the Claimant. The second article also breached the Claimant's rights under Article 8 of the European Convention on Human Rights. The publication of the allegations and the breach of the Claimant's rights under Article 8 of the European Convention on Human Rights had a detrimental effect on her reputation amongst friends, family and business associates and caused her acute distress and embarrassment.

Both prior to (in respect of one of the articles) and following publication (in respect of both articles) the Claimant, via her solicitors, wrote to the Defendants requesting that the online content be removed and suitable remedies be made including an apology and the payment of money by way of damages, which she intends to donate to charity. The Defendants did not remove the articles and, by June 2015, the Claimant felt she had no alternative but to instruct her solicitors to issue a defamation claim in respect of the articles.

The Defendants have now accepted that the allegations are untrue. The Defendants removed the online articles at the end of August 2015, over four months after publication, and at the same time as making an offer of amends, which the Claimant has accepted. The Defendants are here today by their counsel to apologise unreservedly for the publication of these allegations and the breach of the Claimant's Article 8 rights. The Defendants have agreed to pay the Claimant's legal costs together with a sum as damages which she in turn will donate to charity. In addition the Defendants have undertaken not to repeat allegations bearing the same or similar meanings to those referred to above.

[Counsel for the Defendants]

My Lord, on behalf of the Defendants, I confirm all that has been said on the Claimant's behalf. The Defendants apologise to the Claimant for the distress and hurt caused to her. A few days after publication, the First Defendant added a footnote to the online version of the second article referred to above explaining the Claimant's generosity to her late husband's son and his family. It subsequently removed both articles that are the subject of this defamation in their entirety and has undertaken not to publish allegations which bear the same or similar meanings to those referred to above in future. I confirm that the Defendants have agreed to pay the Claimant's legal costs together with a sum as damages which she in turn will donate to charity."

Report of the statement in open court

106. The statement was reported above the fold on page 10 of the issue of the Daily Mail dated 15 March 2016 under the headline 'Damages for striped house millionaire', with a photograph of the red and white striped building captioned 'Dispute: the London mews house'. The report read as follows:

> *"Millionaire property developer Zipporah Lisle-Mainwaring received an apology and damages at the High Court yesterday over articles in which we reported on a dispute involving her London mews house being painted with red and white stripes.*
>
> *The articles, on April 15 and 17 last year, wrongly reported untrue allegations made by her late husband's son, Robert Lisle, and his wife that she had mistreated him and his family in relation to inheritance claims, including by unreasonably denying them money they claimed they had been promised.*
>
> *The Daily Mail, Mail Online and journalist Kathryn Knight apologised for the distress and embarrassment caused by the allegations and a further defamatory matter mentioned in one article which she considered similarly infringed her rights.*
>
> *We agreed not to repeat that allegations and to pay her costs. Mrs Lisle-Mainwaring said she was donating the damages to a charity for Second World War pilots."*

107. The statement was also reported in identical terms on Mail Online, where it seems to have been carried for over 24 hours on the home news page. (As it now appears, the statement was not reported in a form accessible to online users of mobile apps).

108. The claimant was very upset by what she regarded as the misreporting of the statement in open court, and caused a lengthy letter of complaint to be sent on her behalf 15 March 2016.

109. In particular, she was upset that the closed matter had not been reported as a breach of her Article 8 rights, that having been the agreed solution to the difficulties in negotiating a joint statement. She considered that the wording used, 'a further defamatory matter which she considered similarly infringed her rights', suffered from the same problems as the wording which she had refused to agree, because it served to provide intrigue and would cause readers to look for details of the matter. Moreover, the report did not state ANL's acceptance that the 'further defamatory matter' had in fact breached the claimant's rights, but only that she considered it had.

110. There were other problems with the report which upset the claimant. She maintained that no report had appeared on the Mail Online, but that it had instead been immediately archived. That seems to have been a misunderstanding, possibly stemming from the erroneous belief of the claimant and/or her solicitors that the report should have been on the home page of Mail Online (as opposed to the news page), for the evidence of ANL (de Silva 2nd witness statement [54]) was that the

report had indeed been carried on the Mail Online news page for over 24 hours. That seems no longer to be in dispute.

111. In addition, the claimant was concerned that she had been described in the headline as a 'millionaire property developer' rather than as a 'successful business woman'; and that the property at 19 South End had been wrongly described as a 'mews house', which was said to suggest that it was more valuable than in fact it was.

112. She also complained that font size of the hard copy report was 'dwarfed' by the font size of the other article on the same page, and bore no resemblance to the font size used in the original hard copy publication. Similarly, she complained that the online report was not of the same size as that of surrounding articles and did not use an 'appropriate heading'.

113. The claimant therefore demanded the immediate removal of the website report, to 'curb the serious damage and distress which it is causing in its current form', and to allow her to approve and agree a form of apology which properly reported the statement. She proposed a form of words which she contended was more appropriate. The amended article was then to be published on the top half of the home page of Mail Online for a further 2 days. Failure to comply with her requirements would be met with an application to the court for an order pursuant to s3(3), Defamation Act 1996, that ANL should fulfil their offer of amends by taking the steps which had been agreed, including to publish a correction and apology in a manner reasonable and practicable in the circumstances.

114. ANL rejected her complaints. They argued (17 March 2016) that the description of the closed matter in the report as a 'further defamatory matter' was a fair one, given that Art.8 embraces injury to reputation, and that it was wholly unrealistic to suppose that anyone would be prompted to investigate what lay behind that brief reference.

115. The complaints about prominence were, in my judgment, rightly rejected, for there was nothing in the prominence of either report which failed to comply with ANL's offer dated 11 December 2015. Similarly, the damaging connotations put on the use of the term 'millionaire property developer' were rejected, and the complaint about the use of the term 'mews house' was simply ignored. I do not think ANL are to be criticised for that.

116. It is important to note that there had been no agreement for the detailed wording of the report. ANL had offered in their offer of amends to publish a correction and apology in a manner reasonable and practicable in the circumstances, and on 11 December 2015 to publish a contemporaneous report of the statement in open court both on Mail Online and in the Daily Mail, with conditions as to the use of a photograph and as to prominence which were met. On 19 January 2016, Wiggin said that the clear apology for and withdrawal of the allegations contained in their then draft statement in open court would be 'reflected' in any report of the statement. In my judgment the published reports represented a fair index of the statement in open court, and satisfied ANL's obligations under the offer of amends. In particular, I regard the claimant's concerns about ANL's decision to refer to the closed matter as 'a further defamatory matter … which she considered similarly infringed her rights' as exaggerated. It is unrealistic to suppose that ANL's formulation would have been more likely to lead a reader on a course of inquiry as to what lay behind it than a reference to a breach of

her art.8 rights, which was an unusual and inelegant form of words, at least as well calculated to cause the ears of readers to prick up.

117. The claimant's response to the reports of the statement in open court does perhaps serve to illustrate her distrust of ANL and her acute sensitivity to any action on ANL's part which could be construed as an attempt to escape from their obligations to her. Those feelings are to a considerable degree understandable in the light of the impact of the articles complained of on the claimant, and in the light of ANL's failure to engage properly with her complaint in the early stages, but they undoubtedly infused her solicitors' correspondence and cannot have made for an easy process of negotiation.

Factors affecting discount

118. There is no standard discount to be applied where an offer of amends has been made. The range of discounts has run from 10% (*Barron v Collins* [2017] EWHC 162 (QB)) to 50% (*KC v MGN Ltd* [2012] EWHC 483 (QB), that discount being upheld on appeal in *Cairns v Modi* [2013] 1 WLR 1015). Mr Tomlinson argued for a discount of 30%; Mr Caldecott accepted that 50% would be unduly generous.

119. Mr Tomlinson helpfully set out in his skeleton argument the factors that have been held to bear on the level of discount:

i) Whether the offer of amends is made suitably early, bearing in mind that the latest date is the last date for service of the defence;

ii) Whether the defendant's apology is published late or is off-hand;

iii) Whether the defendant has advanced in correspondence an ill-founded defence;

iv) Whether the defendant has made clear the way in which it will present its defence in court and whether there is a possibility that the claimant's character will be attacked; and

v) Whether a defendant's overall attitude aggravated the overall hurt to the claimant's feelings through the contents of solicitors' letters, including by treating the claimant dismissively, or behaving in a way which was grudging or not sufficiently conciliatory. Aggravating conduct could be relevant to reducing the size of the discount or even, in an extreme case, might at least theoretically make it appropriate to offer no discount at all.

120. Delay is a factor of great importance. So in *Veliu v Masrekaj* [2007] 1 WLR 495, where the grave allegation of involvement in terrorism posed real risks to the claimant's safety, there was significant delay in making an offer of amends, and there were many aggravating factors, the discount was one third. A similar discount (35%) was made in *Campbell-James v Guardian Media* Group [2005] EMLR 24, where the claimant, a senior officer in the Intelligence Corps, was accused in the Guardian of being linked to the abuses of prisoners at Abu Ghraib in Iraq. That was another case which posed personal risks to the claimant and called for a speedy apology, but his complaint was met with a three month delay before anything was done, and even then

the only response was an off-hand apology in the 'Corrections and Clarifications' column. The complaint in *Turner v News Group Newspapers* [2006] 1 WLR 3469 was met with an offer of amends which was made after four months, on the very day when a defence had to be served: the discount was 40%. The same discount was applied in *Angel v Stainton* [2006] EWHC 637 (QB), where the offer of amends was made the day before the defence was due, despite the fact that the defendant knew perfectly well that there was no evidence to make good the serious allegation complained of.

121. In this case there is no doubt that ANL were slow to engage with the claimant's concerns. It was nobody's fault that the lawyer dealing with the matter became unwell and required an operation; nor that she appears to have returned to work later than had been hoped. But ANL's failure to bring someone else in to take over the case, and the apparent belief of its legal department that it was reasonable to expect the claimant to wait for a response until 11 June, approaching 2 months from publication of the articles, suggest a very dismissive attitude, notwithstanding Ms Hartley's apology for the delay. It is true that ANL needed to interview Robert and Sally Lisle before they were going to be able to form a view of the merit of the complaint: this was not a case like *Angel v Stainton*, where the defendant knew there was no evidence to make the allegation good. I do not know how long that process took. However, in the event it was over four months before the qualified offer of amends was made. It was coupled with a statement of intention to refer to *Burstein* particulars, but I do not regard that as a factor which can have significantly detracted from the effective surrender which the offer entailed. There was no real prospect of the claimant's character being attacked except to the extent that she had already been criticised for unconscionable conduct in the Cobbe proceedings.

122. However, having considered the correspondence after the offer of amends with care, I do consider that ANL engaged reasonably with the claimant's requirements, which were often expressed in aggressive terms which will have made a conciliatory response difficult. Indeed, it seems to me that the delay in the making of the statement in open court cannot to any substantial extent fairly be blamed on ANL. The claimant herself was inexplicably slow to respond to the offer of amends, accepting it only on 4 November, and thereafter significant delay was caused by her insistence on 5 January 2016, at a point when agreement had almost been reached on a draft statement in open court, on the inclusion of further material, including the untrue assertion that ANL had attempted to justify the articles. The draft of the statement in open court which was finally agreed on 24 February was very similar to a draft put forward on her behalf on 17 December, at a point when there was only one area of dispute, which should, with goodwill on both sides, have been capable of prompt resolution. It is remarkable also that on 10 February her solicitors asserted that there was no urgency which required ANL's application for leave to make a unilateral statement to be heard on the return date obtained. In all the circumstances I am not prepared to say that ANL should lose credit for their offer of amends on account of the difficulties of negotiation; nor, as explained above, for the reports which they published of the statement in open court. I have explained at [70] above that the apparently inadvertent understatement of true online publication should sound in damages rather than in a reduction of the discount.

123. In my judgment the proper discount allowable in this case is 40%.

124. In consequence, the discounted award of general damages will be £54,000.

COSTS OF APPLICATION UNDER DEFAMATION ACT 1996 S3(3)

125. In the light of the claimant's concerns about misreporting of the statement in open court, she issued an application on 18 March 2016 under Defamation Act 1996 s3(3) for an order that ANL should take the agreed steps in fulfilment of that offer, by taking down the online report of the statement in open court and replacing it with a version, to be published for 24 hours on the Mail Online home page, which satisfied the claimant's concerns. She also sought leave to serve short. The application was served shortly before 4.30pm on Friday 18 March and listed for hearing on Wednesday 23 March 2016.

126. ANL did not consent to short service and asked the claimant to agree to an adjournment so that they could file evidence. Initially the claimant would only agree if the report of the statement in open court was taken down, because it was said that ANL's refusal to do so was causing her to suffer distress. ANL refused, because the application was disputed and founded on misunderstanding. ANL had to instruct counsel, who settled a skeleton argument.

127. In the event, at 1356 on 22 March the claimant consented to the application (and the issue of costs) being adjourned. On 29 March, DLA Piper suggested that the application be amended and listed instead for a full assessment of damages. That was a sensible suggestion, and it was accepted by ANL, although it meant that the report would necessarily remain in archived form on the Mail Online website until the hearing of the assessment of damages. That did not sit easily with the claimed urgency of the original application.

128. Eventually, the claimant confirmed by letter dated 6 October 2016 that she was not seeking an order under s3(3) but that she intended to rely on the evidence served in support of the application, in respect of what was said to be ANL's failure to fulfil its offer of amends.

129. ANL seek their costs incurred solely as a result of what they consider an unreasonable refusal to agree to an adjournment so that they could put in evidence. In the course of the hearing, Mr Tomlinson stated that the claimant did not oppose an order for the costs of the adjournment. In my view ANL are entitled to those costs. The application was rushed, overly aggressive and ultimately misconceived, and an adjournment was inevitable.

130. There is a statement of costs showing a total amount of £10,076, which I am told relates only to the application to adjourn for directions and opposition to the application for short service. I heard no oral argument on quantum. The claimant asserts in her subsequent written submissions that there are also issues about Cheltenham solicitors charging London rates, which is said to be a matter for a costs judge, and that the sum claimed is excessive, given that the defendants' costs on a contested disclosure hearing had been £3,926 (the claimant's own costs of that hearing had been £16,347.40). The figure of £2,000 is suggested. The former point is unpersuasive when litigation appears from the correspondence to have been conducted from a substantial London office, and the suggested figure is implausible in the context of this closely fought litigation. But given that quantum is contested and

that I have heard no proper argument on it, and given the very substantial amount claimed in respect of a narrow and discrete issue, I will hear argument on quantum with a view to a summary assessment on the handing down of this judgment, if either party wishes it. The costs will be the defendants' in any event. In the absence of further argument I shall have to say that those costs will be subject to detailed assessment if not agreed.

SPECIAL DAMAGES

131. There is a claim for special damages, founded on what the claimant says was the need to take down from the internet repetitions and republications of the words complained of. In effect, the claim is for the costs incurred in mitigating her loss. It has turned out to be an issue of very considerable difficulty.

132. By CPR 16PD 8.2(8), a claimant must specifically set out in the Particulars of Claim 'any facts relating to mitigation of loss or damage'. CPR 53 PD, which relates to defamation claims, has the following material paragraphs:

> *"2.1 Statements of case should be confined to the information necessary to inform the other party of the nature of the case he has to meet. Such information should be set out concisely and in a manner proportionate to the subject matter of the claim.*
>
> *2.10 (1) A claimant must give full details of the facts and matters on which he relies in support of his claim for damages."*

133. It has always been necessary to plead and prove special damage with proper particularity: so in *Perestrello v United Paint Co* [1969] 1 WLR 570, a contract case, Lord Donovan stated at p579 that

> *"… if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court.*
>
> *The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case. "The question to be decided does not depend on words, but is one of substance" (per Bowen L.J. in Ratcliffe v Evans [1892] 2 QB 524, 529.*
>
> *The same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of*

> *damage which is "special" in the sense that fairness to the defendant requires that it be pleaded.*
>
> *The obligation to particularise in this latter case arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible."*

134. What is the claimant's pleaded case? In the context of serious harm (s1, Defamation Act 2013), the following is pleaded at paragraph 10 of the Particulars of Claim:

> *"10.3 The Internet's ubiquity and the permanent and accessible nature of the words complained of …. mean not only that the claimant's reputation is already irreparably harmed but also that further serious harm to it is in the future likely.*
>
> *10.4 The words complained of have entirely foreseeably been repeated and republished extensively by other websites worldwide with open accessibility in this jurisdiction, so increasing the scope of publications here and the serious harm to the claimant's reputation for which the Defendants and each of them are responsible. For example, at…. [the pleader goes on to identify three locations, one on the website wn.com, and two on source30.com]."*

135. At paragraph 13, the special damage claim proper is stated as follows:

> *"Further, in support of her claim for special damages the Claimant will rely upon her costs incurred in having removed from the Internet the various repetitions and republications by third parties of the words complained of and links to the same, which repetitions, republications and links are the foreseeable consequence of the publications of the said words by the Defendants and each of them and have been caused by the said publications. The Claimant is presently unable to quantify or particularise her loss in these respects but will serve particulars of special damage separately when the same are available."*

136. No particulars of special damage were ever served in pleading form. Indeed, no particulars at all were served until 8 July 2016, when the second witness statement of Ruth Hoy was served on behalf of the claimant. The reason that the particulars had not been served earlier was said to be that the clean-up operation was never-ending, making it cost-effective and proportionate to serve the information in July 2016: to have done it earlier, Ms Hoy says, would have required regular updating.

137. The whole task is said by the claimant to have been the reasonably foreseeable consequence of the publication by ANL of the words complained of. The claimant's case is that material published on Mail Online attracts an immense global readership, and is bound to be re-published and shared many times over. It appears that some

websites will simply 'lift' and republish entire articles without amendment or permission; others will republish particular information. ANL's evidence is that neither article was syndicated, and any repetition of them was unauthorised. Some of the sites were 'scrapers', which illegally search the internet for other people's work and reproduce it without permission; some are content farm websites which automatically republish material taken from the MailOnline website, using the RSS feed. Nonetheless, Mr Tomlinson maintains, publication by news scrapers and content farm websites was entirely foreseeable.

138. ANL removed the online copies of the articles complained of when the qualified offer of amends was made on 27 August 2015. However, that had no immediate effect on republication of the articles, and even after the content had been removed, references to the articles continued to appear in Google search results.

139. DLA Piper asked for ANL's help in removing this defamatory content. By letter dated 2 September 2015, DLA Piper informed ANL's solicitors, Wiggin, of material which continued to be available, including Google search results which themselves (that is to say, without following the links thrown up) contained repetitions of the defamatory material. They complained of a 'Mail Online' branded YouTube video which repeated some defamatory information from the first article; a PressReader.com search result that quoted the headline of the second article and repeated words from the article that gave the claimant's maiden name in the context of the closed matter; and a newstral.com search result that republished the headline of the second article and provided a link to it. They asked for ANL's help in removing such references to the articles and related content over which they had control or where they had a relationship with the publisher.

140. Wiggin replied on 23 September. They explained that ANL did not have a YouTube channel and had no knowledge of the video: the link in the search result did not work, and no results were returned for a search of the claimant's maiden name; the PressReader articles could not be found; and the newstral.com website contained only the headline of the second article, with a link to a page on MailOnline which stated that the article could no longer be found. There were therefore no defamatory republications. Wiggin also explained that when ANL removed the articles from their website they asked Google to carry out a 'flush' to remove all iterations, including cached versions of either article. ANL had also notified all those to whom its material was syndicated, so that they should remove the articles also. In the circumstances, ANL felt that no further action could reasonably be expected of them.

141. However, the claimant continued to face the difficulty that although the underlying content might not be available when a link was clicked on, defamatory material continued to appear on the face of the search results. That was the difficulty with the PressReader material: the search result itself repeated the libel about the closed matter. (On the face of it, however, it did not identify the claimant by her current names). In the case of Newstral, the claimant's former name, the article title and the link to MailOnline were shown, and apparently other articles (not complained of) linking or referring to her former name remained on MailOnline. The complaint is not entirely clear, but seems to be that the link was made between her current names and her former name (and thus the closed matter). There was also a search result from Source30.com, which repeated details of the closed matter on the website but also in the search result itself.

142. Wiggin observed (letter 23 October 2015) that the primary complaint now appeared to concern Google search results summarising publications that were no longer available, rather than publications on third party websites themselves, and suggested that the claimant should request Google to remove the search results, with ANL's support in the form of a letter confirming that it had taken down the articles referred to in the search results. The letter also explained ANL's efforts to deal with the Source30 material, which was an unauthorised edited copy of the second article. ANL managed to have it taken down, but it was then reactivated and further efforts were being made to remove it. In fact, Wiggin reported on 10 November that it had been successfully taken down.

143. On 30 October Wiggin provided a draft of a letter which ANL proposed to send to Google to support the claimant's efforts to remove all Google search results referring to the articles complained of or their content, and in particular search results relating to Newstral, Source30 and PressReader. PressReader continued to be a matter of concern to the claimant, but as at 9 November 2015 Wiggin were insisting that the search result only came up with the claimant's old name and contained no reference to her current ones: there was no offending content on the PressReader site.

144. Yet whatever the content of the site, there were still difficulties with PressReader search results linking the claimant to her old name and the closed matter (DLA Piper, 17 November 2015). What appeared was a result headed with 'Toxic neighbour', a reference to the Daily Mail of 18 April 2015, and a reference to the closed matter and the claimant's former name. ANL's retort (26 November 2015) was that the closed matter was not linked to the claimant's current names, but only to a search against her old one.

145. The letter to Google was eventually provided on 7 December 2015. There is no point in setting out in detail the correspondence between the parties on this issue. Suffice it to say that Wiggin required DLA Piper's contact at Google so that ANL's letter could be sent to that contact, not apparently understanding DLA Piper's point that they were not liaising with a particular person, because that was not how Google worked. It is enough to say that the claimant remained concerned about iterations of the defamatory material continuing to be available on the internet, and ANL responded to each matter raised.

146. But the difficulties with alleged republications, and with problematic search results, do not seem to have morphed into a claim for continuing special damage until well into 2016. There had been rumbles in the correspondence about consequences: for instance, on 11 December 2015 DLA Piper threatened to hold ANL liable for the costs of following up a particular point with Google; on 1 February 2016 DLA Piper warned that they would 'share details of this website (Source30.com) and correspondence in respect of any damages assessment'; and in a letter dated 11 February 2016 DLA Piper maintained that it was ANL's responsibility to address the harm which, it was contended, continued to be caused to the claimant as a direct result of ANL's actions, and warned that it would be addressing the issue when damages were assessed. But it does not appear that a formulated continuing special damage claim was announced until Ms Hoy's 8 July 2016 witness statement.

147. In that witness statement Ms Hoy set out instances of republication of one or other or both articles on Newstral.com, which is primarily a German language website but has

an English arm as well; journalisted.com; londonmercury.com; pressreader.com; and source30.com. In addition, she referred to other UK national newspapers having 'lifted' content from the articles and published articles of a similar nature, and to the difficulty of references to the articles complained of appearing in Google search results. Further difficulties arose from the publication of the claimant's former name in the context of the closed matter, because that enabled searches to be made against that name. It was therefore necessary, according to Ms Hoy, to ensure that details of her former name which provided a link to her current names and to the closed matter were taken down. She gave a number of examples in a confidential exhibit RPH12. Some seem to have republished one or other of the articles; others provided snippets which on their face did not publish defamatory material. Articles appeared and disappeared: for example, a Nigerian site, Nigeria Daily News, appears to have republished the second article in February 2016, ten months after the articles complained of and six months after ANL had taken them down.

148. As at 8 July 2016, the accrued value of the special damage claim was put by Ms Hoy, in her witness statement of that date, at £32,798. That turned out to be an arithmetical error: the sum was actually £35,455. That was said to represent the costs incurred by the claimant up to 30 June 2016 of 'engaging in a "cleaning up" operation of the republication of defamatory material about her on the internet'. The sum was broken down by Ms Hoy by reference to DLA Piper's monthly invoices. For example, the total invoiced for February 2016 was £6,357, in respect of 'Tackling on line republications and search results including source30.com, Press Reader, Nigeria Daily News, Vanuatu, correspondence with Nigeria Daily News, the primary service provider for Nigeria news'. That was the extent of the particulars supplied for any given month.

149. By letter dated 2 September 2016 Wiggin asked for a breakdown of the costs, seeking details of invoiced costs, including hourly rates, number of hours and disbursements, in relation to each of the websites referred to in Ms Hoy's 8 July 2016 witness statement, and in relation to Google.

150. DLA Piper responded on 7 September that the information was not readily available in the format requested: they did not understand why it had been requested or what relevance it had to the claim for damages.

151. Wiggin responded the same day: they maintained that the evidence should have been included in Ms Hoy's witness statement, and ANL were plainly entitled to see it. The information supplied did not allow ANL to make any informed assessment of the merits or reasonableness of the costs claimed.

152. DLA came back on 15 September. The time spent was not easily divisible, because what they had generally done was to search to see if defamatory material about their client had appeared in Google searches against her current and former names, taking evidence of what was found, contacting Google with a request to remove the result, and contacting website owners, hosts and registrars. To produce the kind of information that ANL sought, and to calculate an approximate split of the total spent on each third party, would require detailed analysis and a significant amount of work. In any event, they did not consider the information relevant. In DLA Piper's view, the information provided in Ruth Hoy's witness statement was 'more than sufficient for

the court to be able to assess the damages payable' to the claimant. I am afraid that I disagree, as I explain below.

153. Beyond the accrued figure as at 8 July 2016 (£35,455), Ms Hoy added a further £15,000, said to be an estimate of the claimant's future costs of continuing with the operation, at £2,500 per month for the next six months. However, her witness statement of 31 October 2016 (which corrected her earlier arithmetic) showed that the costs incurred DLA Piper between July and October 2016 had in fact exceeded that estimate and reached a figure of £12,682.50. There had been republications on eveyo.com, nigeriadailynews, twimoview.news, blogpvan.com and townhousesnewjersey.us, with which DLA Piper had had to deal. That therefore took the accrued figure to £48,137.50, but in the light of the recent discovery of further full republications of both articles, Ms Hoy regarded her earlier estimate of the time needed to complete the work as being unrealistic, and took the view that as much as another six months or more of work might be needed, at £2,500 per month. The claim for future loss was therefore a further £15,000, which brought the total special damage claim to £63,137.50.

154. Some argument was advanced by reference to a document headed 'Table of Internet Pages complained of', which is a kind of Scott Schedule that lists and numbers 21 material internet pages. The various points made by the parties on this schedule are by no means all agreed, and it is not clear if (and if so, how) the parties can have expected the court, on the basis of very brief oral argument, to make findings about the reasonableness or otherwise of pursuing each of these, or the cost of doing so, or the recoverability of that cost, or whether any particular republication would satisfy the serious harm requirement of s1, Defamation Act 2013. It was not entirely unwelcome, in the circumstances, that the defendants, followed by the claimant, put in further written submissions on the issue following the oral hearing. The claimant went further, supporting its submissions with a fifth witness statement by Ruth Hoy dated 21 November 2016. None of this should have been necessary had the parties acknowledged in advance of the hearing that the sort of analysis which was bound to be required could not possibly have been achieved in the course of a day's hearing, much of which was devoted to other aspects of the assessment of damages.

155. The 'Table of Internet Pages Complained of' starts by listing the three republications which were pleaded.

i) Item (1) (wn.com): according to the claimant's comments on the table, this gave a link to the first article (which presumably will not have been available after it was taken down on 27 August 2015), and a summary with the claimant's current name and some other details. According to ANL, the page did not repeat the words complained of and in any event was not accessible online when they tried to access it. However, it appears from Ms Hoy's fifth witness statement that the words complained of in the first article were repeated, although not visible in the exhibited screenshot, because they were accessed via a scroll down tool bar. That is shown on two pages of screen shot which are now (but had not previously been) exhibited. (The claimant also refers in the table to her complaint (not pleaded in the Particulars of Claim, nor apparently raised in correspondence) about a Google search result from new.wn.com, apparently a different site to wn.com, which links her current names to her birth names).

ii) Item (2) is a page from source30.com, a website based in Baghdad. This page is said by the claimant to have republished the first article, although it is said on behalf of ANL not to have been accessible. There was no copy of it in evidence, until Ms Hoy exhibited it to her fifth witness statement after the hearing. What has been belatedly exhibited appears to be a variety of pidgin English translation of the first article, suggestive of a computer-generated translation into another language and then back into English. This seems to have been a feature of Source 30, which under its banner at the top of the page has the words 'Quote for you the news fully and high credibility'. At the top of the page allegedly repeating the first article is the headline 'Lady behind striped Kensington house made as a lot as £60m out of property offers' (sic). It goes on to state that she 'has fallen out together with her household over inheritance'. There is room for argument as to exactly what it all means, although the allegation that the claimant made commitments and reneged on them is clearly made.

iii) Item (3) (also source30.com) reproduced a full copy of the second article, but with some similarly curious changes, which the defendant's written submissions stigmatise, not unfairly, as gibberish. However, the claimant contends that the meaning still 'comes through'. There may be some room for argument about that.

156. ANL says that it sought to have both the Source 30 articles taken down through the Newspaper Licensing Agency but the articles were not accessible. Later they were reactivated, after which, by early November 2015, the entire source30.com website was suspended. It then became active again on about 25 January 2016. It is accepted that the site was inactive by the date of Ms Hoy's second witness statement (8 July 2016). Between December 2015 and March 2016 it is said to have had some 5000 visits, which would have been to the site as a whole rather than any individual page. The defendants point out that it is not known whether any readers in this jurisdiction saw these articles. It is submitted that this was a rogue website, publishing material which was wholly unauthorised and unlawful, thereby breaking the chain of causation in respect of publications for which the defendants could properly be held liable. Moreover, the articles said to have been republished were barely comprehensible and would be seen by any English reader as unreliable nonsense. In ANL's submission, such results as remained on Source 30 during its periodic reappearances were not realistically likely to have caused the claimant any damage, and for DLA Piper to have persisted in attempting to persuade Google to remove links to the site was excessive and went beyond reasonable mitigation. The claimant, by contrast, argues that the articles were not gibberish and that the sting of the libel was repeated (that does seem to be true in respect of the closed matter at least); that their republication was a reasonably foreseeable consequence of the defendants' original unlawful acts; and that the website continued to appear in the results for Google searches under her former names, which had not only been revealed in the articles complained of but had also been included in other articles about the claimant which were not complained of as containing material defamatory of her.

157. That may serve to illustrate the kinds of issues which arise about the three articles of which complaint was made in the Particulars of Claim. The claimant seeks to recover the cost of removal of many more in addition, which are set out in the Table of

Internet Pages. I do not propose to set them out. Four pages were raised in correspondence in September or October 2015; one in February 2016; and the remainder in Ms Hoy's witness statements of 8 July or 31 October 2016, prepared for this application.

158. The claimant's position is that the special damage claim was included in the claim form and in the Particulars of Claim, and ANL were on notice of it when making their offer of amends. When they were served with Ms Hoy's witness statement of 8 July 2016 they had the particulars that they needed, and those particulars were updated on 31 October 2016. Had ANL wanted particulars earlier they could have asked for them, but did not. The steps taken by the claimant were, it is argued, reasonable ones to take in mitigation of the damage caused. Moreover, Mr Tomlinson argues, the case on serious harm made it clear that the damage caused by the articles complained of was likely to continue. The claim for special damage at paragraph 13 (set out above) picked up that plea, and on Mr Tomlinson's case made it plain beyond doubt that the loss was continuing.

159. Mr Caldecott, for ANL, does not suggest that a claimant cannot in principle plead a continuing special damage claim with proper particulars, for example a case where a company is suffering a continuing loss. But the basis of such a claim must be fully and properly pleaded. He submits that there are a number of shortcomings in the way in which the claimant's case is pleaded.

160. In particular, he objects to the reference to three websites 'by way of example': the claimant should have identified all known websites when the Particulars of Claim were served; he argues that paragraph 13 of the Particulars of Claim refers only to costs incurred, not costs to be incurred, and insists that there is no indication of any element of continuing loss; in any event, the claim is limited to 'repetitions and republications by third parties of the words complained of and links to the same': that cannot include taking lengthy and expensive steps to closing down Google results showing the claimant under her maiden name, because no part of her claim extends to mere mention of that name.

161. Mr Caldecott relies on the claimant's undertaking at paragraph 13 to serve particulars of special damage when they are available: that was her obligation. It was not ANL's obligation to seek further information. No particulars had been supplied by the date of the qualified offer of amends (27 August 2015), nor by the date of its acceptance (4 November 2015). Moreover, it is for the claimant to show that the republications repeat the words complained of, and that the work done by DLA Piper flows from work to take down such republications.

162. In any event, he submits, proper particulars of special damage would have gone beyond the details provided by Ms Hoy in her witness statements dated 8 July and 31 October 2016, and would have included the hours spent by DLA Piper staff, the rate per hour charged, and a summary of the actions taken, so that ANL could have judged whether the steps taken were reasonable and proportionate, whether the publications in question were ANL's responsibility and whether they would have caused the claimant serious harm. He emphasises the need to show serious harm, because of course there can be no liability for republication of material related to the articles complained of unless the serious harm test under s1 Defamation Act 2013 is satisfied.

The claimant cannot discharge her evidential burden in respect of each purported republication by asserting that it would be disproportionate to do so.

163. There are also issues as to remoteness. How far can it be said that ANL continue to be liable for republications of republications, or defamatory Google search results, many months after the articles were taken down? How far is any liability affected by the long delays in agreeing the statement in open court, which in my judgment cannot fairly be laid at ANL's door?

164. It will be apparent that this aspect of the claim raised very difficult questions which were hardly apt to be determined as one part of a single day's application, even with the aid of further written submissions. However, there are a number of principles which are uncontroversial.

165. A claimant may take steps to mitigate her loss, and to recover the cost of doing so from the defendant as special damage. The authorities show that the standard of reasonableness to which the victim of loss will be held, in seeking to mitigate, is not a high one. I have in mind the remarks of Lord Macmillan in *Banco de Portugal v Waterlow* [1932] AC 452 at 506, spoken in the context of contract, but equally applicable to tort:

> *"Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment, the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of the duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."*

166. In principle, I can see no possible reason why a claimant should not take steps to take down reasonably foreseeable internet repetitions and republications of a defamatory article, and recover the reasonable cost of doing so from the defendant. I did not understand Mr Caldecott to suggest otherwise.

167. Nor is there any dispute that special damages are in principle recoverable in cases where an offer of amends has been made. Indeed, Mr Caldecott accepts that if a specific item of special damage, expressly pleaded with full particulars, has an element of continuing loss, the basis of which is itself clearly pleaded, the claimant should not be precluded from seeking to recover that loss.

168. However, he points out that there are constraints inherent in the offer of amends procedure, which limit the scope for continued proceedings and require claimants to

make clear the full scope of their claim so that defendants can make an informed decision as to whether or not to make an offer of amends.

169. The limited scope for continued proceedings depends on s3(2) Defamation Act 1996, which provides that

> *"The party accepting the offer may not bring or continue proceedings in respect of the publication concerned against the person making the offer, but he is entitled to enforce the offer to make amends …"*

170. So in *Murray v Associated Newspapers Ltd* [2004] EMLR 23 at [16], Tugendhat J regarded an oral hearing of a defendant's submissions that a claimant should be refused leave to make a unilateral statement as not being a normal procedure, and as coming close to the continuation of proceedings, contrary to s3(2). Once the offer is accepted the claimant may not, it seems, even be able to obtain an injunction to restrain further publication: *Warren v Random House Group Ltd* [2009] QB 600 at [12].

171. In effect, Mr Caldecott submits, acceptance of the offer 'freezes' the action, subject only to the outstanding assessment of the pleaded claim for damages and to the court's obligation to take into account under s3(5) the adequacy of the defendant's implementation of the offer of amends, which plainly requires a consideration of steps taken after acceptance. That proposition seems to me to be correct.

172. The other constraint cited by Mr Caldecott is the obligation on claimants to make clear the full extent of their claim, so that defendants can offer to make amends on an informed basis. Eady J, who was an author of the Neill Committee's July 1991 Report on Practice and Procedure in Defamation, which led to the enactment in 1996 of the offer of amends procedure, considered the issue in *Abu v MGN Ltd* [2002] EWHC 2345 (QB)**;** [2003] 1 W.L.R. 2201:

> *"[8] The Neill Committee recommendation was primarily directed towards providing a fair and reasonable exit route for defendants confronted with unreasonable demands from such manipulative or powerful claimants, who felt no doubt sometimes that they had them "over a barrel". Yet it was naturally hoped that the "offer of amends" would help to focus minds on achieving realistic compromise, and thus reduce the cost, for a much wider range of litigants. Whether any such reform will succeed, however, must depend on whether the statutory provisions as drafted are attractive to use. In this instance, it must provide an incentive to defendants to make the offer and to claimants to accept. In either case, a rational decision can only be made if it is possible within reasonable limits to predict the range of outcomes to which one is committing oneself. For example, before making an offer a defendant[1] needs to be able to assess the gravity of the impact*

[1] The judgment says 'claimant' but this is plainly an error.

> *of the libel upon the complainant's reputation and feelings, and this will generally have to be done in the light of the particulars of claim and/or letter before action. It would not seem fair if an offer is made and accepted on one basis, and the complainant then reveals for the first time elements of pleadable damage not previously mentioned, such as for example that his marriage has broken down or that he has lost his employment.*
>
> *[9] It would only accord with most people's sense of justice if the offer of amends is construed as relating to the complaint* as notified. *Such an approach would also accord with the modern "cards on the table" approach to litigation generally and, more specifically, with the thinking behind the Defamation Pre-Action Protocol."*

173. To similar effect are May LJ's words in *Nail v News Group Newspapers Ltd* [2004] EWCA Civ 1708; [2005] E.M.L.R. 12:

> *"[15] Both parties prepared bodies of evidence seeking respectively to aggravate and to mitigate the compensation. The judge either ignored or declined to admit most of this. He was right to do so. Speaking generally, there may of course be evidence from both sides relevant to the determination of compensation. But in principle it seems that a claimant should not normally be permitted to enlarge significantly pleaded allegations upon which the offer to make amends was made and accepted, for example by promoting a new case of malice. Nor should a defendant, who has made an unqualified offer which has been accepted, be permitted to water down significantly the pleaded allegations. Claimants should therefore plead the full substance for which they seek redress: defendants who wish to make amends for significantly less than that full substance should make appropriate qualifications to their offer."*

174. It is worth noting also Gray J's approach in *Loughton Contracts plc v Dun & Bradstreet Ltd* [2006] EWHC 1224 (QB), a case where a claim for special damages was envisaged but had not been pleaded. Gray J found at [24] that 'the procedural code laid down in sections 2 to 4 of the Defamation Act 1996 is a relatively strict one and that the scope for enlarging the claim for damages after the offer of amends has been accepted is and should remain limited in the way suggested in *Nail*'. He also pointed out the unfairness for a defendant, having made an offer of amends on the basis that a claim for damages is confined to that set out in the claimant's pleading, to be faced at a later date, and after committing to the offer of amends route, with a very much more substantial claim for damages. Similarly in *Angel v Stainton* [2006] EWHC 637 (QB) at [26] Eady J stated that it was well known that 'both claimants and defendants should put their cards on the table before an offer of amends is accepted. It is unlikely that permission will be given to introduce new material, on either side, once the parties have committed themselves to this statutory process'.

175. In my judgment there is no pleaded claim for continuing special damage. There is no reference in the special damage claim (paragraph 13) to continuing loss. In the case

on serious harm, the claimant pleads (paragraph 10(3)) that the presence on the internet of the words complained of means that further serious harm to the claimant's reputation is likely in the future, and (paragraph 10(4)) that the words complained of have been repeated and republished by other websites, 'so increasing the scope of publications here and the serious harm to the claimant's reputation for which the defendants … are responsible'. Those averments are designed to enable the claimant to surmount the preliminary hurdle put in place by s1, Defamation Act 2013, namely that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the claimant's reputation. They are asserting that the current presence on the internet of the words complained of, and the repetition and republication of those words which have taken place (of which three examples are given), have the effect that there will be further serious harm, *scilicet* from further publication of those existing internet postings. They do not allege that further republications are likely, let alone that the claimant intends to seek to recover the cost of taking down such republications.

176. If, as Mr Tomlinson would say, that is a narrow construction of the claimant's pleaded case, it surely accords with the requirement that claimants should plead the full substance for they seek redress, so that defendants can decide on an informed basis whether or not they should make an offer of amends. I therefore conclude that the special damage claim must be taken to be limited to that which was notified in the Particulars of Claim, namely the cost of removing from the internet the repetitions and republications complained of at paragraph 13 by reference to paragraph 10(4).

177. The only particulars that have been supplied by the claimant are the rolling monthly invoices submitted by DLA Piper. On 2 September 2016 Wiggin asked for a breakdown of the costs involved in dealing with the original three websites and others, but (see [152] above) the request was refused. Mr Caldecott submits that any claim for the cost of removing republications must be reasonable and proportionate and must show a reasonable basis for assuming that the serious harm requirement would be satisfied. It could not extend to work done merely (for example) to remove mention of the claimant's former name. There should have been a pleaded case as to the nature and foreseeability of each republication, the basis of ANL's liability, the harm that would be likely to be caused by it, and the cost incurred in dealing with it. The rolling monthly invoices show only the billed time that DLA Piper spent on the work. They do not provide any basis on which the court can assess whether the work done was reasonable, necessary or proportionate.

178. Mr Tomlinson objects that if Mr Caldecott was right, he would have to plead particulars of serious harm in respect of every republication, which might involve hundreds of pages. The pleading obligation must be limited to that which is proportionate.

179. It seems to me that this argument is over-stated. Even if in principle it is permissible, as in my view it certainly is, for the claimant to recover the reasonable cost of mitigating the damage done to her by removing republications for which ANL is liable and which are likely to cause her serious harm (which would entail showing at least some readership in this jurisdiction), it would not have been difficult to plead continuing loss so as to put the defendants on proper notice, and to have given proper particulars of the republications relied on, the basis on which the s1 serious harm requirement was satisfied, and of the discrete cost of dealing with each republication.

As matters stand, even leaving on one side questions of remoteness, and even of likelihood of serious harm, it is quite impossible for the court to assess the recoverable cost of removing damaging and defamatory republications for which ANL was in truth liable. It simply is not enough, in my judgment, for the claimant to assert in broad terms that her solicitors' monthly costs of following up references to the claimant on the internet should be allowed.

180. My provisional conclusion, therefore, is that the special damage claim should be dismissed, even to the limited extent that it is properly advanced. Mr Caldecott contends that it is too late to order a separate assessment of special damage. Moreover, the cost of further proceedings might well be disproportionate to the amount likely to be recovered, so that the process would not be worth the candle, as well as arguably running counter to the policy considerations underlying s3(2) of the 1996 Act. However, I will not shut the claimant out from at least applying to go down that road, if so advised. But if she were to be permitted to do so, the assessment would have to be limited to the claimant's pleaded case.

DISPOSAL

181. In the result, my starting point for an award of general damages was £90,000. I discount that figure by 40% to take account of the offer of amends, and my award of general damages for libel will therefore be £54,000. I dismiss the special damage claim, subject only to any application for a separate assessment of such special damage as I have found to have been properly pleaded. I order that the claimant should pay the defendants' costs of the claimant's application of 18 March 2016, to be subject to detailed assessment unless the parties wish me to conduct a summary assessment when this judgment is handed down.