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Case No: HQ03X02745

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 February 2005

Before:

THE HON. MR JUSTICE GRAY

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Between:

(1) Collins Stewart Limited	**Claimants**
(2) Collins Stewart Tullet Plc	
- and -	
The Financial Times Limited	**Defendant**

- -
- -

Richard Spearman QC and Justin Rushbrooke
(instructed by **Schillings**) for the **Claimants**
Desmond Browne QC and David Sherborne
(instructed by **Farrer & Co**) for the **Defendant**

Hearing dates: 11 February 2005

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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.

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THE HON. MR JUSTICE GRAY

Mr Justice Gray:

The issue

1. The question to be decided is whether, and if so in what circumstances, a corporate claimant in a libel action is entitled to increase the damages recoverable in respect of the single publication complained of by relying on subsequent publications which are not themselves sued on as separate causes of action.

The background facts

2. For the purpose of deciding that question, a relatively brief summary of the background facts will suffice. The Claimants are Collins Stewart Limited and its holding company Collins Stewart Tullett Plc ("Collins Stewart"). They have brought an action for libel in respect of an article published in the issue of *The Financial Times* for 27 August 2003 and entitled "Reputations on the line at Collins Stewart". The subject matter of that article was a claim for wrongful dismissal which had recently been initiated against Collins Stewart by one of their former analysts, named James Middleweek. Mr Middleweek's Particulars of Claim in that action were attached (as *The Financial Times* contends) to his Claim Form. The Particulars made reference to and annexed a 32-page report which had been prepared by or on behalf of Mr Middleweek and which was entitled "Collins Stewart Limited – issues of concern to the FSA" ("the FSA report"). A copy of the FSA report was also sent to the FSA. It contained several serious allegations of misconduct levelled by Mr Middleweek against his former employers. The complaint of Collins Stewart in the present action is that in its article of 27 August 2003 the newspaper adopted and repeated those serious allegations of Mr Middleweek.

3. *The Financial Times* relies in its defence upon both statutory privilege under paragraph 5, Part I and paragraph 10, Part II, schedule 1 of the Defamation Act 1996 and upon common law privilege of the *Reynolds* variety. Collins Stewart deny the entitlement of the newspaper to protection by either kind of privilege. It is not necessary for present purposes to say any more about the issues which arise in that regard.

4. What is material to the issue which has now to be decided is that *The Financial Times* published further articles referring to Collins Stewart on 28 and 30 August 2003. The articles published in the earlier issue of the newspaper were entitled "More than half of Collins Stewart IPOs underperform indices" and "Controversy over Milestone". Those published in the later issue were headlined "Collins Stewart rejects analyst's allegations" and "Middleweek plants a bomb in the City". The only article which is complained of as a libel in the action is that which appeared in the issue of *The Financial Times* for 27 August 2003. If the defence claim to privilege fails, Collins Stewart will be entitled to damages in respect of that article. However, Collins Stewart's letter before action dated 31 August 2003 made complaint of the subsequent articles. Although those subsequent articles are not complained of in the action as being separate libels and no separate claims for damages are made in respect of them, Collins Stewart rely upon their publication as increasing the damages to which they are entitled in respect of the publication of the first article.

The pleading objected to

5. It is of some importance to see how this part of the claim is formulated: paragraph 8.3 of the Particulars of Claim is in the following terms:

> "8.3.1 the two follow-up articles published by the Defendant in the issue of *The Financial Times* for 28 August 2003 under the headlines '**More than half of Collins Stewart IPOs underperform indices**' and '**Controversy over Milestone**' in which the Defendant repeated some of the allegations it had published on 27 August 2003 and made express reference to the 'stinging criticisms of Collins Stewart made by James Middleweek'. The articles conveyed a plain link between the alleged underperformance of the Claimant's IPOs and the allegations of Mr Middleweek. The prominent and sensational claim in the headline that '**More than half of Collins Stewart IPOs underperform indices**' was, in its context, particularly unfair to the Claimants in that a proper analysis of the more than 140 IPOs that took place on the Alternative Investment Market (AIM) since 2001 (as was in fact subsequently carried out by the specialist weekly newspaper *Financial News*) would have shown that Collins Stewart IPOs underperformed the market by a weighted average of a mere 0.9 percentage points. This performance put it in 9th position out of the 18 brokers that managed the IPOs on AIM since the beginning of 2001. It was hardly remarkable, and thoroughly undeserving of the Defendant's spin on the facts. The Claimants will also rely on the further particulars of unfairness, inaccuracy and distortion set out in their solicitor's letter of 15 September 2003 to the Defendant's solicitors.
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> 8.3.2 the following further articles published by the Defendant in the issue of the newspaper for 30 August 2003:
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> 8.3.2.1 an article appearing on the front page of the "FT Money & Business" section under the headline '**Collins Stewart rejects analyst's allegations**' which concluded with the words 'Mr Middleweek said: "I am content … for the truth of the matters to be determined in the appropriate forums"';
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> 8.3.2.2 an article appearing on page M3 (and trailed at the bottom of the article referred to immediately above) under the headline '**Middleweek plants a bomb in the City**' which repeated Mr Middleweek's allegations – which it described as 'explosive' – and concluded with the words: '…UXB has the ring of a company Collins Stewart might bring to market…' In the context of the article, this meant, and was intended to mean, that as a result of a lack of research, procedure and/or professionalism the Claimant's IPOs were significantly

> less attractive as investments than those of their competitors, and further that investors in the Claimant's IPOs were risking financial loss and damage and that the risks that those investors assumed by investing in the Claimant's IPOs were concealed or booby-trapped by the Claimants as they would be in an un-exploded bomb (for which UXB is an abbreviation)."

6. The contention of Mr Desmond Browne QC for the newspaper is in essence that Collins Stewart are not entitled to rely on the subsequent articles as aggravating damages since (i) they had chosen not to make them the subject of their action for defamation and (ii) they are corporate entities with no feelings to be affected by the alleged manner of the Defendant's conduct subsequent to the publication of the libel complained of. Accordingly *The Financial Times* seeks to strike out paragraph 8.3 of the Particulars of Claim. Before addressing that contention, however, I should deal with a preliminary objection to the application advanced on behalf of Collins Stewart.

Lateness

7. Mr Richard Spearman QC for the companies points out that the application to strike out comes extremely late. The Particulars of Claim were served promptly on 17 September 2003; the Defence was served on 12 November 2003 and the Reply on 26 January 2004. Mr Spearman submits, in reliance on CPR 3PD.5 that an application such as the present one should be made as soon as possible especially since the point is one of law. The newspaper has served evidence dealing with the contents of the subsequent articles (albeit on the basis that the evidence was served "without prejudice to [the Defendant's] right to apply to strike out paragraph 8.3 of [Collins Stewart's] Particulars of Claim"). The Defendant has given disclosure in relation to the matters complained of in the subsequent articles. The application to strike out was not made until 19 November 2004. Liability in the action is due to be tried before judge and jury commencing on 11 April 2005. If the application to strike out were to succeed, Mr Spearman points out that Collins Stewart would, on the face of it and subject to the provisions of CPR Part 17.4(1).(2), be precluded now from commencing proceedings in relation to the subsequent articles because the limitation period in defamation is one year and any claims in respect of those articles would be statute-barred.

8. Not only does Mr Spearman oppose the application on the grounds of lateness, he asserts further that *The Financial Times* has been guilty of overreaching. He claims that what has happened is that the newspaper has deliberately delayed making the application until after the expiry of the applicable limitation periods. The court should not countenance conduct of such a kind by a litigant.

9. In answer to this submission, Mr Browne maintains that the Defendant made clear its position from the outset, expressly reserving the right to apply to strike out. He says that neither in the pleadings nor in its disclosure has the newspaper addressed in the comprehensive manner which would be necessary the issues which would arise if Collins Stewart were entitled to rely on the subsequent articles. According to the newspaper, there has been no overreaching of any kind. The application was prompted by the contents of the lengthy witness statement of Mr Terry Smith, the

Chief Executive of Collins Stewart. That witness statement deals at considerable length with the allegations referred to in the articles published in *The Financial Times* on 28 and 30 August 2003.

10. I readily accept that applications to strike out should in general be made promptly. Failure to do so can and often will lead to costs being incurred unnecessarily and court time being wasted. That said, lateness will not of itself necessarily justify the court in dismissing an application to strike out. This must be particularly so where, as here, the basis of the application to strike out is one of law. Moreover, *The Financial Times* did expressly reserve the right to apply to strike out. As to the allegation that the Defendant has been guilty of overreaching, such conduct might well, if established, justify the court in refusing the application to strike out irrespective of its merits. The charge of overreaching is, however, a serious one and the court will require commensurately clear evidence before finding such misconduct proved. In the present case the evidence appears to me to fall well short of what would be required to justify my finding overreaching. I accept that the application was prompted by the contents of the witness statement of Mr Smith which indicated to the Defendant clearly and for the first time the manner in which Collins Stewart proposed to deal with the subsequent articles if and when there is a trial of the issue of damages.

Argument for the Defendant

11. I return to the question whether Collins Stewart are entitled to rely on the subsequent publications in the manner indicated in paragraph 8.3 of the Particulars of Claim. As to that, the submissions of Mr Browne for the newspaper are these: the starting point is that, for whatever reason, Collins Stewart chose not to sue on the subsequent articles as constituting separate and additional causes of action. It is submitted that on the face of them the particulars set out at paragraph 8.3 of the Particulars of Claim have the appearance of being particulars in aggravation of damages referring, as they do, to the negative impact of the original article being reinforced and to the ongoing damage being "exacerbated". It is suggested that it is not without significance that the Claim Form included a claim for aggravated damages.

12. Mr Browne acknowledges that Collins Stewart disavow any intention to seek aggravated damages in paragraph 11 of the Reply. That paragraph reads:

> "As to paragraph 12, for the avoidance of doubt (although the point is obvious) the Claimants make no claim for aggravated damages, and nowhere is such a claim pleaded. The facts and matters pleaded under paragraph 8.3 of the Particulars of Claim are relevant, admissible and properly pleaded (pursuant to CPR PD53, para 2.10(1)) for the purpose of notifying the Defendant of their case as to (a) the damage caused by the article complained of, (b) the subsequent failure of the Defendant to mitigate the damage caused and (c) the subsequent exacerbation by the Defendant of the damage caused, by its repetition of the allegations complained of and of allegations intimately bound up with those allegations…"

13. As to point (a) in paragraph 11 of the Reply, the newspaper submits that, since the post-libel publications make further and different allegations against Collins Stewart,

they cannot be probative of the damage caused by the original article. As to (b) Mr Browne accepts that, if the newspaper had mitigated the damage for example by publishing an apology, that would operate in reduction of damages but, he says, the converse does not apply in the case of a corporate claimant. Similarly, as to (c), the newspaper argues that "exacerbation" is a synonym for "aggravation" and aggravated damages are available, at least in a libel action, only where it can be said that the claimant's feelings have been injured. That is not possible in the case of a corporate claimant because corporations have no feelings.

14. Mr Browne cites a number of authorities in order to make good his contention that the essence of aggravated damages in defamation is an injury to the feelings of the claimant. Those authorities include *Lewis v Daily Telegraph Limited* [1964] AC 234, per Lord Reid at 262; *Rookes v Barnard* [1964] AC 1129, per Lord Devlin at 1221; *Sutcliffe v Pressdram* [1991] 1QB 153, per Nourse LJ at 183H and 184E; *Broadway Approvals v Odhams Press* [1965] 1WLR 805, per Davies LJ at 822; *Broome v Cassell* [1972] AC 1027; *Rantzen v Mirror Group Newspapers* [1994] QB 670, per Neill LJ at 684A; *Clarkson v Gilbert* (Eady J, unreported, 26.2.01); *McCarey v Associated Newspapers* [1965] 2QB 86, per Pearson LJ at 104G and Diplock LJ at 107E and *Syme v Mather* [1977] VR 516, per Lush J at 526.

15. Not only is the use to which Collins Stewart intend to put the later articles illegitimate, it would also, according to Mr Browne, give rise to complications at the trial. The jury (or, here, the Judge) has to take care not to include in any award damages in respect of any injury to reputation caused by those articles insofar as they constitute separate causes of action: see *Pearson v Lemaitre* [1843] 5 M&Gr 700. There is in addition the potentially complicating factor that it would be open to the newspaper to seek to prove the truth of the allegations contained in the subsequent articles or to defend them as fair comment.

Argument for Collins Stewart

16. In his skeleton argument Mr Spearman for Collins Stewart confirmed that it is their contention that the damage to their reputations caused by the article sued on was "exacerbated" by the four follow-up articles which included the repetition of some of the allegations published on 27 August 2003. The other allegations subsequently published are, according to Mr Spearman, intimately bound up with the original allegation sued on. It is further pointed out that *The Financial Times* is not seeking to strike out the contention in paragraph 8.6 of the Particulars of Claim that the court should infer that the post-publication conduct of the Defendant "has added increasing momentum to the collapse in the second Claimant's share price". It is also pointed out that in paragraphs 12.3 to 12.3.4 of the Defence the newspaper has, without apparent inhibition, set up a positive case in relation to what are described as the follow-up articles and in addition has given disclosure in relation to the issues raised by paragraph 8.3 of the Particulars of Claim. Mr Spearman draws attention to the fact that the issue of quantum has been ordered to be heard by judge alone, so that the jury need not be troubled at the trial on liability with the contents of the articles of 28 and 30 August 2003.

17. Citing the well-known passage from the speech of Lord Hailsham LC in *Broome v Cassell* at 1071 to 1072, where he speaks of damages in defamation being "at large" and capable of being increased if the defendant has behaved badly, Mr Spearman

contends that the subsequent articles are admissible in law on the issue of damages. He accepts that a company has no feelings and so cannot recover compensation for distress or injury to feelings caused, for example, by a failure to apologise. Nonetheless he contends that the acts of a defendant subsequent to the publication complained of may be relevant on the issue of damages even where the claimant is a corporation. A later publication may affect the damage caused by the original publication.

18. Mr Spearman asks rhetorically why, if an apology (as is accepted) may reduce damages, should not the converse be true where the defendant has by his post-publication conduct aggravated the damage. To say otherwise would be illogical and indefensible in principle, as well as to give the defendant the best of both worlds. Practical difficulties would arise because the manner of an apology is capable of increasing, rather than diminishing damages: see *Kelly v Sherlock* [1866] LR 1 QB 686 at 695; *Saunders v Mills* [1829] 6 Bing 200 and *Thomas v Bradbury Agnew* [1906] 2 KB 627 at 637.

19. Reliance is further placed on *The Gleaner Co Limited v Abrahams* [2004] 1 AC 628, where Lord Hoffmann, giving the opinion of the Privy Council, appears to express the view that compensatory damages may include a punitive function: see paragraphs 40 to 41. Reference was also made to *Houston v Smith* (CA 14.12.93, unreported), where the Court of Appeal substituted for the higher award of a jury an award of £50,000 in part because it was felt that the claimant was entitled to a substantial sum to vindicate his reputation because the slander originally uttered in a doctor's waiting room had culminated in "a greatly extended spread of the slander".

20. The flaw which Mr Spearman claims to have identified in the Defendant's argument is one of mislabelling: he submits that the newspaper is wrong to categorise the claim in paragraph 8.3 of the Particulars of Claim as being a claim for "aggravated" damages and also wrong to say that a claim for aggravated damages is nothing more than a claim for injury to feelings. Accepting, as he does, that a company has no feelings to injure, Mr Spearman nonetheless argues that aggravated damages are not confined to injury to feelings and may be awarded to a corporation. In the latter connection he cites a decision of Caulfield J in a union intimidation case, *Messenger Newspapers Group Limited v National Graphical Association* [1984] IRLR 397 at 407 and *Kiam v Neil (no. 2)* [1996] EMLR 493, where the Court of Appeal held that a jury in a defamation case is entitled to have regard to the fact that the publication complained of was irresponsible. Reference is also made to section 97 of the Copyright, Designs and Patents Act, 1998 which permits additional damages to be recovered in a copyright action on the grounds of the flagrancy of the infringement without distinguishing between the position of a corporate claimant and an individual claimant. Historically awards of additional damages have been made to corporate claimants in copyright cases: see the cases cited in paragraph 35 of Mr Spearman's skeleton argument.

21. Finally Mr Spearman, citing *Slipper v BBC* [1991] 1 QB 283 and *McManus v Beckham* [2002] 1 WLR 2982, argues that it is no answer for *The Financial Times* to say that the subsequent articles do not in terms repeat the whole of the contents of the original article or its full sting. Partial repetition will entitle a claimant to republication damage.

Conclusion

22. In order to deal with these competing submissions it is necessary to say a little more about the subsequent articles relied on. The first article published on 28 August 2003, the headline of which I have already quoted, asserted that more than half of the initial public offers (IPOs) sponsored by Collins Stewart since the start of 2001 have underperformed benchmark indices. No mention had been made of this topic in the earlier article. It is apparent that such a claim would be damaging to Collins Stewart and might well be defamatory of them. Litigating the accuracy and fairness of the newspaper's analysis and statistical approach would be a complex task. The second article of 28 August dealt with the valuation put on a company named Milestone Group by Collins Stewart prior to its flotation. Milestone had featured in the earlier article of 25 August 2003. Whilst the later article repeated Mr Middleweek's claim that Collins Stewart had over-valued Milestone, it did also include Collins Stewart's answer to the claim.

23. As its headline suggests, the first article published by *The Financial Times* on 30 August 2003 quoted extensively from an interview with the Chairman of Collins Stewart who roundly dismissed as "complete rubbish" the allegations made by Mr Middleweek. A single paragraph at the end of the article quoted Mr Middleweek as saying "I am content … for the truth of the matters to be determined in the appropriate forums". It is not easy to see how this article, read as a whole, can be said to exacerbate the damage caused by the first article. The second article published on 30 August refers in its headline to an "unexploded bomb". The meaning put upon this article in paragraph 8.3.2.2 of the Particulars of Claim is quoted at paragraph 5 of this judgment. The case for *The Financial Times* is that Collins Stewart have misconstrued the article: the unexploded bomb refers to Mr Middleweek's allegations and not to the IPOs sponsored by Collins Stewart. If paragraph 8.3.2.2 stands it is evident that there would be considerable debate at trial as to the meaning of this article and the extent to which it can be defended as justified or as fair comment.

24. The starting point for any discussion of the legitimacy of the use to which Collins Stewart wish to put the subsequent articles is that they could, if they had chosen to do so, have complained of them as separate causes of action. Issues of meaning and any defences could then have been debated at trial in the usual way. In the event that Collins Stewart failed to establish that any of the subsequent articles was defamatory of them or *The Financial Times* established a defence to it, no question of additional damages would arise. If on the other hand liability were to be established against the newspaper, Collins Stewart would be entitled to further separate awards after the judge had directed the jury (or himself) to take care to avoid double-counting. This is a familiar and workable scenario.

25. However, Collins Stewart, for whatever reason, did not take that course. It is necessary to look with some care at the position which arises as a result of their having confined their cause of action to the original article. As it appears to me, Collins Stewart would be entitled to recover by way of compensatory damages the damage to its reputation, standing and good name flowing from the publication of the article of 27 August. Relevant factors would include the gravity of the libel and the extent of its circulation. As Lord Hailsham LC made clear in his speech in *Cassell v Broome* (op. cit.) at p1071, the claimant is further entitled to seek an award of damages sufficient to vindicate his reputation:

> "… in case the libel, driven underground, emerges from its hiding place at some future date, [the claimant] must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge".

Bingham LJ made the same point in *Slipper v BBC* (op cit) when he said at 300:

> "The law would part company with the realities of life if it held that the damage caused by the publication a libel began and ended with the publication to the original publishee. Defamatory publications are objectionable not least because of their propensity to percolate through underground passages and contaminate hidden springs."

26. Such is the relatively generous ambit of recovery of compensatory damages in a libel action. What is the position where a claimant is the subject of a series of articles? There are various possibilities. Assume that the defendant publishes three defamatory articles referring to the claimant, articles A, B and C. If articles B and C add to the damage caused by the publication of the original article A and are not defensible, then I think that articles B and C should in principle generally be made the subject of separate complaint as separate causes of action. To do so would make matters simpler and clearer for the jury (or judge) if and when it comes to assessing damages. If on the other hand articles B and C, whilst defamatory of and damaging to the claimant, do not repeat the libel which was contained in article A, it appears to me to be objectionable in principle to allow the claimant to rely on articles B and C in connection with damages recoverable for the publication of article A. Articles B and C would be separate torts giving rise to separate claims for damages. If on the other hand articles B and C consist in part of the repetition of the libel contained in article A and in part of other distinct libels on the claimant, formidable problems will in my opinion arise in disentangling the recoverable and the irrecoverable damage in respect of article A.

27. My starting point is therefore that there are sound reasons both of principle and of practice why a claimant, whether an individual or a corporation, should not be permitted to seek to recover increased damages in respect of the publication by the defendant of article A by reason of the publication by that defendant of subsequent articles B and C which are not themselves the subject of complaint.

28. Particular problems arise where the claimant is a corporation. In certain circumstances a libel claimant may be entitled to "aggravated" damages in addition to basic compensatory damages. (I say nothing about exemplary damages because they do not arise in the present case). Neither side had been able to cite an authoritative statement defining or de-limiting the circumstances in which an award of aggravated damages may be recoverable. It is therefore necessary to see in what circumstances such awards have historically been made.

29. A convenient starting point is *Rookes v Barnard* (op. cit.). At 1221 Lord Devlin said:

> "… It is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant

> where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation".

In *Broadway Approvals v Odhams Press* (op. cit.) Davies LJ said at 822:

> "If the libel outrages the plaintiff, it is a proper element in compensatory damages, but if the jury award damages because the libel outrages them, that would be punitive".

The concept of a claimant being "outraged" appears to me to be akin to his or her feelings being injured. Next, Pearson LJ in *McCarey v Associated Newspapers* (op. cit.) said at 104G:

> "… If there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the plaintiff's pride and self confidence, those are proper elements to be taken into account in a case where the damages are at large".

In the same case Diplock LJ at 107E made reference to the two heads of damage to reputation, firstly, the diminution in the esteem in which others hold the claimant (i.e. damage to reputation) and, secondly, the grief or annoyance caused to the claimant by the publication of the defamatory statement (i.e. injury to the feelings of the claimant). In *Syme v Mather* (op. cit.) the same distinction was drawn, Lush J referring at 526 to the defendant's conduct aggravating the subjective hurt to the claimant. In *Broome v Cassell* (op. cit.) Lord Diplock at 1124 described the three heads under which damages are recoverable for those torts for which damages are "at large". Of the second category, which he said Lord Devlin had called "aggravated damages", Diplock LJ said:

> "Additional compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it".

Finally, in *Rantzen v Mirror Group Newspapers* (op. cit.), Neill LJ said at 684A, in the context of a discussion of aggravated damages:

> "… If one looks at the matter not from the point of view of the state of mind of the defendant but for the purpose of assessing the injury to the plaintiff's feelings, it is easy to see that a contest which involves justification or fair comment may increase the injury and add greatly to the anxiety caused by the proceedings which the plaintiff has had to bring to clear his name".

30. It appears to me from those authorities that Mr Browne is right when he says that the defining characteristic of an award of aggravated damages is that its function is to provide a claimant with compensation ("*solatium*") for injury to his or her feelings caused by some conduct on the part of the defendant or for which the defendant is responsible. The concept of injury to feelings runs through the cases, whether caused by the high-handed or insulting behaviour of the defendant either before or after publication or by repetition of the libel or by persistence in a plea of justification or by a failure to apologise. It seems to me that the essence of an award of aggravated damages in libel is not making good damage to the claimant's reputation as such but rather compensating the claimant for the extra injury to his or her feelings.

31. If that be the correct analysis of the proper function of aggravated damages, it seems to me to follow that aggravated damages are in principle not available to a corporate claimant. The reason is that, as Mr Spearman rightly concedes, a company has no feelings to injure and cannot suffer distress: see *Lewis v Daily Telegraph* [1964] AC 234, per Lord Reid at 262.

32. In arriving at that conclusion I do not overlook the decision of Caulfield J in the *Messenger Newspapers* intimidation case already referred to. True it is that in that case the judge said at paragraph 77 that aggravated damages can be awarded against inanimate legal entities like limited companies. But he went on at paragraph 78 to make clear that he was eliminating from the award of aggravated damages which he went on to make the element of injury to feelings. That fact, together with the tenor of the passage relied on by Mr Spearman, suggests that the additional damages which the Judge awarded to the corporate claimant in that case were in truth what would nowadays be labelled exemplary damages. I note that the rationale for the award was that the award of compensatory damages was "not adequate".

33. As to the copyright cases relied on by Mr Spearman, I accept of course that additional damages may be recoverable by individual and corporate claimants alike where the infringement has been flagrant. But it is noteworthy that the entitlement to additional damages arises from statute, namely section 97 of the Copyright, Designs and Patents Act, 1998. No case was cited in which a corporate claimant has been held entitled to additional damages at common law to reflect the flagrancy of the infringement. Besides, it appears to me that damages recoverable under section 97 have more in common with exemplary damages than they do with aggravated damages in the senses in which those terms are used at common law.

34. I am not persuaded that it is illogical or unprincipled for the court on the one hand to reduce the award of damages to reflect the mitigating conduct of the defendant in apologising for the libel and on the other hand to refuse to permit the claimant to seek increased damages because of the aggravating or exacerbating conduct of the defendant. The reason why an apology has the effect of reducing compensatory damages is that the apology, to a greater or lesser extent depending on its terms, reduces or repairs the original damage to reputation. If there is no apology, the appropriate compensatory award is unaffected. A failure to apologise (where an apology was called for) introduces an entirely new element, that is, an entitlement on the part of the claimant to extra damages which are not for injury to reputation but for the additional separate element of injury to feelings. A corporate claimant is not entitled to recover that element. The same applies where the claimant seeks to argue

that a so-called apology has in fact increased the hurt (cf the cases cited by Mr Spearman and referred to in paragraph 18 above).

35. I do not consider that Mr Spearman can derive significant assistance from the remarks of Lord Hoffmann in *The Daily Gleaner Co* case (see paragraph 19 above). What Lord Hoffmann said was that compensatory damages, at least in libel, may include a punitive function. That may or may not be anomalous. But it provides no basis for a corporate claimant to recover aggravated damages because of the conduct of the defendant after the commission of the tort. No-one doubts that a corporate claimant can recover exemplary damages where the behaviour of the defendant merits punishment and the other conditions for such an award are established; nor is there any doubt that the conduct of the defendant subsequent to the tort can be relied on in the context of a claim for exemplary damages. The considerations which come into play where a corporate claimant seeks aggravated damages are in my judgment entirely different.

36. Returning to paragraph 8.3 of the Particulars of Claim in the present action, to which objection is taken. The opening words of that paragraph speak of the "negative impact" of the original article being "reinforced" and the "on-going damage being 'exacerbated'" by the follow-up articles. Those complaints have the ring of a claim for aggravated damages about them. The comments about the follow-up articles and the arguments deployed about them in paragraphs 8.3.2.1 and 2 serve only to underline the conclusion at paragraphs 26 and 27 that there are sound reasons of principle and practice why Collins Stewart should not be permitted to rely on the subsequent articles in the manner pleaded in paragraph 8.3.

37. My decision is that paragraph 8.3 must be struck out on grounds (a) and (b) of the Application Notice, that is that the matters there set out are not properly arguable as a matter of law and disclose no reasonable grounds for bringing a claim for damages. Even if I had taken a different view of grounds (a) and (b), I would have struck out the paragraph on ground (c), that is, on grounds of case-management and proportionality.