Neutral Citation Number: [2004] EWHC 2337 (QB)

Case No: HQ 03X02745

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 October 2004

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

Collins Stewart Ltd and anr	**Claimants**
- and -	
The Financial Times Ltd	**Defendant**

- -
- -

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

Hearing dates: 4th 5th 6th October

- -

Approved Judgment

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

.....
The Honorable Mr Justice Tugendhat

Mr Justice Tugendhat :

1. On the 27th August 2003, just over a year ago, the Financial Times published an article headed " Reputations on the Line at Collins Stewart". On the 2nd September a claim form was issued by Collins Stewart Ltd, as first Claimant ("Ltd") and Collins Stewart Tullett Plc as second Claimant ("Plc"). The claim was for damages for libel and an injunction. On Monday 4th October 2004 I heard a number of applications in relation to this action. It is currently listed to be tried with a jury commencing on 6th April 2005 with a time estimate of 25 days. On 8th July 2004 the matter came before Eady J. He ordered that there be a split trial, the issues of liability and general damages to be tried first with a jury, and the claim in special damages to be tried thereafter. It is now common ground that the assessment of special damages be by judge sitting alone.

2. The applications before me on 4th October included the following:

   i) The Defendant's application notice dated 12th August 2004 to strike out paragraphs 3 to 6 of the Claimants` Particulars of Damages:

   ii) The Defendant's application under the same notice that all issues relating to damages (both general and special) be tried by judge alone

   The form of the applications is set out fully below.

   iii) An application by the Claimants for disclosure and

   iv) an application by the Defendants for disclosure.

   I heard and have already disposed of the third and fourth applications in so far as they were still live. As to the first and second applications, I heard argument over some two days and this is my reserved judgment.

3. On 17th September 2003 Particulars of Claim were served. The Claimants described themselves as follows. Ltd is a company incorporated in England and based in London. It carried and carries on the business of stock brokers in the United Kingdom and it is widely known to be a wholly owned subsidiary of Plc. Plc is a company also incorporated in England and is widely known to be the holding company of the Collins Stewart group, a financial service group whose services include institutional and private clients` stock broking, market making, corporate finance (all of which are carried on through Ltd), the supply of on-line financial information and inter-dealer broking.

4. The Defendant is the publisher of the Financial Times. That is, of course, a daily national newspaper with a substantial and influential circulation in the financial, business and professional communities.

5. The Particulars of Claim set out the whole of the article published on 27th August 2003. It is not necessary for me to read the whole of it. It includes the following

   > "Terry Smith has never been shy of a fight as one of the City's most outspoken stockbrokers. But the Chief Executive of

> Collins Stewart faces a no-holds-barred battle now to preserve the reputations both of himself and his firm after a former employee filed a highly-critical claim for wrongful dismissal.
>
> In the High Court Claim form and accompanying 32-page document sent to the Financial Services Authority, analyst James Middleweek paints a picture of a firm suffering from conflicts of interests. These conflicts, he alleges, put pressure on analysts to support corporate finance work, including low-quality new equity issues.
>
> The complaint comes not from a rank outsider but from an analyst who had been with the firm for seven years, covering Collins Stewarts core area of smaller companies and who never missed receiving his annual performance bonus. But Collins Stewart believes it is being subjected to a blackmail attempt by a former employee, who only raised complaints after being dismissed.
>
> It commissioned an independent investigation into the claims by lawyers Clifford Chance who had full access to all staff and tape recordings of conversations at the firm. It says this found no evidence to support any of Mr Middleweek`s claims including:"

There then follows six bullet point paragraphs setting out the claims said to have been made in the report accompanying Mr Middleweek's High Court Claim Form. The words complained of conclude:

> "Mr Middleweek also denies blackmail in the claim. He says his lawyers held a meeting in July 9 with Collins Stewart where the claim was discussed and that they had indicated that Mr Middleweek would be willing to not lodge a report with the FSA, providing his employment claims were settled. But he said he would like to know that an internal enquiry had been launched into his allegations. Mr Middleweek adds that Collins Stewart even after dismissing him for alleged blackmail, came back to him seeking a settlement along the lines originally proposed".

6. In paragraph 6 of the Particulars of Claim the Claimants plead the meanings, which they claim the words of the article bear. The first eight sub-paragraphs summarise the meanings complained of by reference to the bullet points which I have referred to above. Paragraph 6.9 summarises the gist of the meanings complained of as follows

> "The Claimants were thereby guilty of gross, widespread and institutionalised impropriety in the way in which they carried on business, and had committed or encouraged or acquiesced in the commission of serious criminal offences, in particular insider dealing, for which they would or should be successfully prosecuted by the Financial Services Authority ".

7. Before I turn to the question of damages which is what the applications before me both relate to, it is convenient to note the Defence of the Defendant filed on 12th November 2003. The Defendant alleges that the Particulars of Claim served by Mr Middleweek served in his court proceedings contained express reference to, and had physically annexed to them, a Report, that Mr Middleweek had prepared for submission to the Financial Services Authority. The Defendant claims that, by being annexed to the Particulars of Claim in that action, and being expressly referred to therein, that Report was a public document pursuant to the Defamation Act 1996 s.15 and part 1 paragraph 5 and/or part 2 paragraph 10 of Schedule 1 to that Act. Accordingly, says the Defendant, it is entitled to rely upon that statutory defence known as qualified privilege. Alternatively, it relies on the common law defence of qualified privilege, commonly referred to as *Reynolds* privilege. These defences are public interest defences available to defendants who cannot, or do not wish to attempt, to prove the truth of the allegations they have published. In this case, the Defendant is not claiming that Mr Middleweek's allegations are true, merely that it was entitled to publish them, whether they were true or not.

8. It is necessary to refer in more detail to the Claimants' case on damages, which gives rise to the questions which I have to decide in this judgment.

9. In paragraph 7 of the Particulars of Claim they plead:

> "by reason of the publication of the words complained of the Claimants have suffered extremely serious injury to their trading reputations and very substantial loss and damage".

10. In the following paragraph 8, they set out some substantial particulars by way of background, and then plead as follows:

> "8.6 …. the damage to the Claimants' reputations caused by the article complained of continues. The Claimants will invite the court to infer that all of the foregoing post-publication conduct on the part of the Defendant has added increasing momentum to the collapse in the Second Claimant's share price – as to which see further below.
>
> 8.7 After and as the foreseeable consequence of the publication of the allegations complained of, the Second Claimant has suffered a dramatic fall in the value of its share price. Since the close of trading on 26 August 2003, the day before the article was published, the share price has dropped by approximately 16% from 457.5 pence to a closing price on 16 September 2003 of 382.5 pence, against the background of a broadly positive market. This represents a fall in the Second Claimant's market capitalisation of approximately £141,000,000. For the avoidance of doubt, the Claimants will ask the court to infer that this fall reflects the damage to the market perception of the Claimants which has very substantially, if not wholly, resulted from the publication complained of and that it confirms the resulting substantial but necessarily unquantifiable general financial loss caused to the Claimants, in respect of which it will seek to recover such sum at trial as shall seem fair and just.

> 8.8 The Claimants will furthermore claim at trial for all special damage caused to the Claimants` business as a result of the publication complained of including all losses of profits actual and reasonably anticipated in future years. Particulars of such loss and damage, which is likely to run into millions of pounds, will be served as soon as the same have become available.

11. Before me the parties both state that paragraph 8.7 is to be taken as a claim for general damages and paragraph 8.8 as a claim for special damages.

12. Although for the purposes of this strike out application I must assume the facts pleaded in the Particulars of Claim will be established, nevertheless it is fair to the Defendant to set out what the issues in the action are. The Defence in any event will be relevant to the second part of the Defendant's application, namely for revision of the order for the split trial. In its Defence served on 12th November 2003 the Defendant pleads as follows as to damages:

> "12.6 Particular 8.6 is denied. In particular,and without prejudice to the generality of the foregoing denial and the fact that the Second Claimant bears the burden of proof in this regard, it is denied that the Defendant is responsible for any alleged fall in the Second Claimant`s share price. The Defendant is entitled to and will rely in support of this contention upon all of the press coverage during the relevant period, as well as a number of other factors including: (a) the fact the Second Claimant's share price had already fallen 6.6% on Tuesday 26 August 2003, the day before the Article was published; (b) the share price was in any event liable to retrenchment as a result of it having almost doubled in value between October 2002 and the middle of August 2003; (c) the ongoing concerns in the market about the FSA`s investigation into split capital trusts which encompassed the activities of the First Claimant; (d) the markets concerns about how the Claimants were handling the controversy surrounding Mr Middleweek`s litigation and the allegations made in those proceedings, which had been published in a number of newspapers; (e) the news on 3 September 2003 that the City of London's police had decided not to pursue the blackmail charges made against Mr Middleweek made by the First Claimant.
>
> 12.7 No admissions are made as to the first three sentences of particular 8.7. As to the remainder of this particular, it is denied that it is permissible to rely upon the alleged fall in the Second Claimant's share price as in any way indicative of financial loss caused to the company. In any event, as set out in sub-paragraphs 4.2 and 4.3 above, the Second Claimant has no actionable claim for libel as against the Defendant and the alleged fall in its share price is irrelevant to the computation of any claim for damages by the First Claimant.

> 12.8 Particular 8.8 is denied. At the date hereof, the Claimants have still not served any particulars of loss and damage.
>
> 13 If and in so far as necessary, the Defendant will rely in extinction (or alternatively diminution) of any damages awarded against them upon the facts and matters set out in paragraphs 8 and 9 above, as well as the fact that the Claimants have themselves posted the solicitors` letter of complaint on their own website at [and the address is given]. "

13. Included in paragraph 9 of the Defence is the following:

> "9.5… The bitter dispute between the First Claimant and Mr Middleweek was highly topical, having been initially triggered by the article in the *Financial Mail on Sunday* 24th August 2003 entitled "Top Broker Rocked by Insider Dealing Claim", to which the Defendant will refer at trial, along with the other press and media coverage at the time. That article also set out extracts from Mr Middleweek's Report. As far as the Defendant is aware, by the date hereof (let alone, at the time of the publication of the Article complained of), there had been no issue or threat, of proceedings by the First or Second Claimants over the publication of the *Financial Mail on Sunday* article nor had the Claimants ever publicly challenged the authenticity of the Report".

14. On 26th January 2004 a Reply was served by the Claimants. It contains detailed averments as to why the factual and legal basis of the defence of qualified privilege is challenged. It includes the following paragraph:

> "10.7 As to paragraph 9.5, there was no urgency about the information published by the Defendant, other than that imposed by the Defendant – for its own commercial reasons upon itself: as Mr Tassell well knew, the Claim Form in Middleweek's action had been issued as long before as 22nd July 2003, and the "story " of Middleweek's claim had been well ventilated in the national press, including by the Defendant itself, in articles preceding the articles complained of, commencing with articles published in the *Mail on Sunday* and *Sunday Times* on 24 August 2003. The dispute between the First Claimant and Middleweek was not "triggered" on 24 August 2003 (as pleaded), but when the claim had been issued, one month previously. The fact that the Claimants had not yet publicly challenged the authenticity [sic] of the report is irrelevant: the Defendant knew full well that the Claimants were vigorously disputing the truth of the allegations".

15. The Reply goes on to plead (in paragraph 11) that the Claimants make no claim for aggravated damages, and continues as follows:

> 11.3 As to paragraph 12.6, and in respect of the other factors sought to be relied on by the Defendant as causing the fall in the Second Claimant's share price:

11.3.1 As to factor (a), it is admitted that the share price had fallen approximately 6.6% - to 457.5- by the close of trading on the day before the article was published. It is averred, however, that even if the prior press coverage had created some downward momentum in the share price, this was wholly, or substantially, overtaken by the impact of the publication in the *Financial Times* of the article complained of and that the publication was wholly, or substantially, responsible for the much greater fall in the share price in the period commencing 27th August 2003.

11.3.2 As to factor (b), the contention that the share price was due for retrenchment is misconceived:

11.3.2.1 The brokers UBS Investment Research had put out a positive analyst's note only about four weeks previously, which rated the Second Claimant as a " buy";

11.3.2.2 The unusually high volume of trading in the shares in the week beginning 26 August 2003, and the background of buoyant market conditions generally, are obviously inconsistent with the notion that retrenchment, or normal profit taking was taking place.

11.3.2.3 The fact that the shares in the Claimants` two main competitors Numis Corporation Plc and ICAP, Plc rose by 26% and 28% respectively between 22nd August 2003 and 24 January 2004 (whilst the Second Claimant's share price has fallen 6%) is inconsistent with the notion that retrenchments was taking place or liable in the Claimants' business sector.

11.3.3 As to factor (c), it is denied that this factor had any material effect on the Second Claimant's share price on 27 August 2003 and in the ensuing period.

11.3.4 As to factor (d), the Defendant is put to strict proof of the alleged concerns in the market. As to the allegations published in other newspapers, the Claimants aver (for the avoidance of doubt) that by far the most detailed, extensive one sided, and damaging report of the allegations was that published by the Defendant and which is the subject of this claim.

11.3.5 As to factor (e) the press reporting on 4 September 2003 of the CPS`s decision not to pursue the blackmail charges cannot as a matter of logic have had any material effect on the Second Claimant's share price in the period between 27 August 2003 and 8 September 2003. It is in any event denied that this factor had any material effect on the Second Claimant's share price thereafter.

12 As to paragraph 13, it is denied that any of the matters relied on serve to diminish (let alone extinguish) the damage for

> which the Defendant is liable or that the Defendant may rely upon the same for this purpose".

16. Meanwhile on 18th December 2003 Master Turner had made an order that the Claimants serve particulars of special damage no later than 29th March 2004. Particulars of Special Damage ("PSD") were served on that date including the following

> "1. The best particulars that the Claimants can presently give of their case on special damages is set out below. The Claimants reserve the right to amend and/or supplement these particulars as may be necessary or appropriate between the date hereof and trial, since (a) such losses are continuing (b) further and/or more up to date figures are likely to become available in that time
>
> 2. The Claimants repeat paragraph 8.1 of the Particulars of Claim and 11.3.4 of the Reply and will say that the Defendant is liable to compensate the Claimants for the very substantial majority of the losses identified herein, since by far the most detailed, extensive, one sided and damaging report of the allegations made by Middleweek was that published by the Defendant, and since its newspaper is by far the most influential in the business and financial sectors in this jurisdiction. They will seek an award of special damages in a sum equivalent to such proportion or proportions of the heads of loss identified herein as shall seem fair and just.
>
> 3. Further to paragraph 8.7 of the Particulars of Claim and by way of update thereto, as at the close of business on 26 March 2004 the share price of the Second Claimant was 445p, which amounts to a loss of 12.5p, or a decrease of 2.8% since the close of business on 26 August 2003 (when the share price closed at 457.5p).
>
> 4. In contrast, the share prices of the Second Claimant's very close comparators Numis and ICAP have risen 28.5% and 20.8% respectively between 26 August 2003 and 26 March 2004 (Numis`s share price rising from 517.5p on 26 August 2003 to 665p on 26 March 2004 and ICAP`s from 252.5p to 305p over the same period.)"

The figure 517.5 is footnoted as follows

> "London Stock Exchange's Historic Price Service quotes closing figures for Numis of 507.50p to 527.50p. The Claimants have taken the mean of those bid and offer figures as the price. "

The figure 252.5 is footnoted as follows

> "London Stock Exchange's Historic Price Service quotes closing figures for ICAP of 1252.50p and 1272.50p. The

Claimants have taken the mean of those bid and offer figures as the price, and divided by 5 to reflect the fact that between 26 August 2003 and 26 March 2004 ICAP shares were split 5 for 1".

"5. Measured against the performance of those very close comparators the Second Claimant's share price should have risen by 24.65% (being the mean of the percentage rise of Numis's and ICAP'S share prices over the period) rather than fallen by 2.8%. Accordingly, in order to keep pace with these close comparators, the Second Claimant's share price should have risen by 27.45% making its share price 567p at the close of business on 26 March 2004. (For the avoidance of doubt the Second Claimant's share price had tracked those of ICAP and Numis over the previous year to a correlation figure of .9334 and .9595 respectively). This represents a loss in the Second Claimant's potential market capitalisation since 26 August 2003 of approximately 122p per share, or £230,526,320 calculated on an issued share capital of 188,956,000 shares.

6. Further or alternatively to their case that the aforesaid dramatic loss in the Second Claimant's potential market capitalisation since the publication complained of evidences the damage to the Claimants reputation caused by the Defendant's conduct, and/or confirms the resulting substantial but necessarily unquantifiable general financial loss caused to the Claimants, the Claimants will also invite the court to assess the special loss suffered by the Claimants on the basis that this fall of £230.5 million is the best available reflection of the loss in future revenues which the Second Claimant has suffered and will suffer: it is the direct measure of the change in the market's assessment of the net present value (NPV) of future earnings of the company.

7. Further or alternatively, the Claimants have suffered the following heads of loss:

(1) Losses suffered by the First Claimant's stock-broking business: in the period September 2003 to end December 2003 the First Claimant suffered a loss of revenue from its brokerage activities (including market making revenue) of approximately £3.3 million. Such losses are continuing.

For the avoidance of doubt, the total figures are estimated on the basis of the reductions in the First Claimant's market share of all trades done on the London Stock Exchange from a figure of .95% in the year to July 2003 to figures of .56%, .64%, .83% and .70% in the months of September, October, November and December 2003 respectively.

By way of specific examples of identifiable lost custom, between the publication complained of and 1 March 2004, Schroders Fund Management refused to buy shares in

> companies for whom the First Claimant acted as nominated broker: in that period Collins Stewart would have received commission payments of approximately £250,000 from trades done with Schroders alone. Furthermore, Arca (an Italian company) and Allied Irish Bank both removed Collins Stewart form their panel of brokers for a period of approximately 1 month and 3 months respectively, thereby causing the First Claimant to lose commission of £30,000 and £43,000 respectively.
>
> (2) Losses suffered by the First Claimant's business of sponsoring Initial Public Offerings (IPO's) or secondary offerings in the market for smaller companies:
>
> Shortly after and as a direct result of the publication complained of one client, East Surrey Water, called an emergency meeting with the First Claimant and forced it to accept a substantially reduced commission fee on its proposed IPO (of 34.86 million shares at £3 a share), i.e. just over 2% instead of the usual figure of 3.5 to 4%. This translates to a loss of commission in the sum of at least £1,424,781.
>
> (4) Loss of expected new business from other territories: the First Claimant had recruited new salesmen to seek business from institutions in Ireland, Scandinavia, France and Germany and to seek to sell Japanese equities to UK clients. The salesmen struggled to get on business from such institutions, and on occasion found direct evidence of competitors raising the Defendant`s coverage of the Middleweek allegations with the potential client, resulting in a loss to it of approximately £ 1-2 million.
>
> (5) Private client business: the First Claimant`s private client business in both London and the Channel Islands has suffered substantial losses, including seventy days of additional staff time spent reassuring clients in order to keep their business at a total cost of £28,000, and very significant lost revenues and lost opportunity for new business. A total estimated losses for the London operation are £914,200, and for the Channel Islands £522,500.
>
> (6) Sums expended on engaging PR firms to mitigate the effects of the damage caused by the publication complained of: the Claimants have incurred invoices in the total of £398,429 to date".

17. It is paragraphs 3 to 6 of those PSD that the Defendant applies to strike out. No attack is made in this hearing on any other part of the pleading. So it follows that there will, in any event, go forward to any hearing for the assessment of damages the claim under paragraph 7 of PSD. This is also the subject of further information as mentioned below. As pleaded on 29th March 2003, the claim under paragraph 7 of PSD is in total approximately £8 million. The Defendant wrote by letter dated 1 June

2004 requesting Further Information of PSD . On 3 June a further letter was sent on their behalf explaining the position it was adopting. The Defendant indicated that before mounting an application to strike out the claim based on the fall in market capitalisation, it wished to afford the Claimants an opportunity to explain what on the face of it, they said, appeared to be a completely misconceived claim. Following the Claimants' refusal to provide answers to this request, the Defendant issued an Application, which was heard on 8 July 2004 before Eady J. He ordered that the Claimant should provide responses to all the requests made by the Defendant. These responses were provided in three consecutive tranches: the first on 2nd August, the second on 13th August and the third on 16th August.

18. There were in fact three Applications before Eady J on that day: one dated 4th June and one of 2nd July, both by the Defendant, and one dated 30th June by the Claimants. In addition to the order already referred to, and to various other orders and directions, Eady J ordered that the issues of (a) liability and general damages and (b) and special damages be tried separately. It is that part of the order which is sought to be revisited in the second substantive application which I am considering in this judgment and which I shall address below.

19. The first tranche of Further Information provided on August 2004, contains the following (the questions and answers have been reformulated to appear one after the other):

"3. Under paragraph 5 of the Particulars

Of: *"… the Second Claimant's share price should …have risen [but failed to rise] by 27.45% [which] represents a loss in the Second Claimant's potential market capitalisation since 26 August 2003 of approximately 122p per share, or £230,526, 320 calculated on an issued share capital of 188,956,000 shares."*

Requests [and Responses]:

3.1 The Claimants' are requested to state whether they contend that the market value of the shares in Plc is (a) an asset of Plc or (b) an asset of the shareholder.

[The market value of shares is not an asset of anyone. It is the value of the shares as attributed to them by the market in which the shares are traded. The shares themselves are an asset of their owners.]

3.2 If (a), please explain the factual and/or legal basis for that contention.

[Not applicable]

3.3 If (b), please explain how Plc suffers financial loss in respect of a reduction in the value of an asset which does not belong to it.

[The question proceeds upon a misreading of the Claimants' case, which is set out at paragraph 6 of their Particulars of Special Damage and further particularised below.]

3.4 What was the nominal value of Plc's issued share capital on 26 August 2003?

[The nominal value of the issued share capital was 188,955,937 (the number of Ordinary shares in issue) x 25p (the nominal value of those shares) = £47,238,984.25].

4. Under paragraph 6 of the Particulars

Of: *"… the special loss suffered by the Claimants [is to be assessed] on the basis that this fall of £230.5 million is the best available reflection of the loss in future revenues which the Second Claimant has suffered and will suffer …"*

Requests [and Responses]:

4.1 Please specify whether "revenues" is a reference to total income, total turnover, gross profit, net profit or some other measure of income.

["Revenues" is a reference to the net profit figure.]

4.2 Is it the Claimants' case that Ltd suffered the same loss in future revenues as that allegedly suffered by Plc?

[No, although the loss in future revenues as estimated by the market is likely to be very largely, if not exclusively, based on losses in future revenues suffered by the First Claimant's business, since it was allegations about that business that were specifically the words complained of.]

4.3 Please clarify the precise basis on which it is contended that the fall of £230.5 million reflects the loss suffered jointly by Plc and Ltd.

[See the preceding answer. Insofar as Plc will suffer a loss in future revenues, this is very largely, if not exclusively, based on losses suffered by the business of the First Claimant, its wholly owned subsidiary.]

Of: *"… the market's assessment of the net present value (NPV) of future earnings of the company …"*.

Requests [and Responses]:

4.4 Please confirm that the reference to "the company" is intended to be a reference to Plc. If not, what company is being referred to?

[The reference to "the company" is intended to be a reference to Plc.]

4.5 What was the nature and source of Plc's/the company's direct earnings over the past three years and what was the annual amount of such earnings?

[See Response at …]

4.6 What was the net present value (NPV) to Plc/the company (itself) of its future earnings on 26th August 2003 immediately prior to the publication of the report?

[The net present value of Plc's future earnings on 26 August 2004 immediately prior to the publication of the report was assessed by the stock market to be £864,473,412. The Claimants will say that that is the best available figure for the NPV of Plc's future earnings as at that date.].

4.7 Please provide particulars of how the NPV referred to in Request 4.6 is calculated, estimated and/or arrived at.

[The figure is arrived at by analysts and investors estimating the future earnings of the Plc and then discounting those figures at the Plc's estimated weighted average cost of capital (WACC) to produce an NPV. The theory and methodology involved is well recognised, and is a matter of expert evidence which the Claimants will adduce at trial.]

4.8 Is it the Claimants' case that on 29th March 2004 the value to Plc/the company of its future earnings was £230 million less than the value to it of such future earnings on 26th August 2003 immediately prior to the publication of the report?"

[Yes].

20. Having received that first tranche, on 12th August the Defendant applied for:

"(1) An order that paragraphs 3- 6 of the Claimants` Particulars of Special Damage dated 29 March 2004 (the particulars) be struck out pursuant to CPR Part 3.4, because, they disclose no reasonable grounds for bringing the Claimants claim for special damages in that the claim is (a) not properly arguable as a matter of law and/or (b) a claim which neither of the Claimants has standing to bring and/or (c) unsupported by the facts set out in the Particulars or the Claimants` Further Information dated 2 August 2004 and/or (d) unparticularised or insufficiently particularised and/or (e) one which, if continued, would waste the resources of the Court and the parties or otherwise obstruct the just disposal of these proceedings.

(2) An order that all issues relating to damages (both general and special) be tried by Judge alone because the issues will involve prolonged examination of documents and/or expert evidence such as cannot conveniently be tried by a jury".

21. On the following day 13 August 2004 the Claimants served their second tranche of Further Information, which includes the following:

"1. **Under paragraph 1 of the Particulars**

Of: *"[The Claimants'] losses are continuing and … further and/or more up to date figures are likely to become available …"*

Requests:

1.1 Please state whether or not the Particulars set out are the best particulars the Claimants can give at the date of their response to this Request.

1.2 If not, please provide any up to date and/or amended particulars of special damage.

1.3 Please provide full particulars of the continuing losses which each of the Claimants has suffered.

1.4 Without limiting Request 1.3 above –

(a) the First Claimant ("Ltd") is requested to describe the precise nature of the losses which it allegedly continues to suffer, with a quantification of those losses;

(a) the Second Claimant ("Plc") is requested to furnish the same information (as requested in (a) above) in respect of itself; and

(c) where losses are quantified, each of Ltd and Plc is requested to furnish full details of how their respective alleged losses are calculated and arrived at.

1.5 Please clarify whether it is the Claimants' case that every loss suffered by one of them is automatically a loss suffered by the other.

(a) If so, please explain the factual and legal basis of that case.

(b) If not, (i) please identify how each head of special damages claimed is to be separated and/or apportioned between the Claimants and (ii) set out the reasons and basis for such separation and/or apportionment.

Answers:

1.1 The best particulars that the Claimants can currently give of their claim for special damage are as set out in the Particulars of Special Damage as supplemented by the answers set out below.

The Claimants will add a claim under paragraph 7(2) of the Particulars in respect of lost fees from the First Claimant's Initial Public Offering (IPO) business. After and as a direct result of the publication complained of the First Claimant suffered a dramatic drop in the number of new IPO instructions and consequently a drop in the commission fees generated from such instructions.

In the four month period May 2003 to August 2003 (that is immediately prior to the date of publication of the article complained of) the Claimants sponsored the following IPOs (which include the new and innovative Accelerated IPO structure employed in the Northumbrian Water deal):

[There then follows a table setting out the names of five customers and a calculation showing Total Commission of £18,675,099, total Corporate fees of £875,000, and the total of the two being £19,550,099]

In the four month period September 2003 to December 2003 (the period immediately after the publication of the article complained of) the Claimants sponsored the following IPOs (including the Accelerated IPO on behalf of Center Parcs) work in respect of which commenced prior to publication of the article:

[There then follows a table setting out the names of six customers and a calculation showing Total Commission of £19, 039,077, the total over the eight month period May 2003 to December 2003 being £38,588,176]

In contrast, in the seven months of 2004 to date the First Claimant has sponsored only the following IPOs, the work in respect of which commenced after publication of the article complained of. This was against a background of relatively buoyant market conditions:

[There then follows a table setting out the names of six customers and a calculation showing Total Commission of £10,280,090, total Corporate fees of £1,950,000 the total of the two being £12,230,090]

The number of clients securing new IPO mandates has therefore declined significantly, and the Claimants will claim a sum for lost commission and fee income therefrom of approximately £26,358,086.

1.2-1.4

(a) The Claimants will, at the assessment of damages hearing, update their claim under paragraphs 3-5 of the Particulars of Special Damage to take into account the Second Claimant's share price as at that date, and the movement in the share price relative to that of its close comparators, Numis and ICAP. These are publicly available figures and the Defendant is well aware of the basis on which this claim is calculated.

(b) The Claimants will likewise update their claim under paragraph 7(1) of the Particulars for losses suffered by the First Claimant's stockbroking business to take into account its market share figures for the further months from January 2004 and following. The figures up to June 2004 are set out at answer 5.3(b) below.

(c) The Claimants have updated their claim in relation to sums expended on engaging PR firms to mitigate the effects of the damage caused by the publication complained of and further

> particularise those claims in response to Requests 9.1 to 9.4 below.
>
> 1.5 It is not the Claimants' case that every loss suffered by one of them is automatically a loss suffered by the other. The Claimants repeat their answers to Requests 3 and 4, already served. Further:
>
> 1.5.1 If the 'no reflective loss' rule is held to apply in the present case (contrary to their primary case that it does not) the Claimants will seek to recover on behalf of the Second Claimant only a sum in general damages for loss of and damage to reputation, and will confine their claim for special damages to the First Claimant.
>
> 1.5.2 Their primary case, however, is that the Second Claimant may recover such special damages and that the best available method of assessing that damage is by reference to the movement in its share price, for the reasons already explained.
>
> 1.5.3 If, alternatively, the First Claimant recovers the special damages (and the Claimants do not of course seek to make double recovery), the measure of such damage will still be the same, since, as they will aver, it is the change in the market's assessment of the net present value of the earnings to be generated from the First Claimant's business which the movement in the share price has essentially reflected.
>
> 1.5.4 For the avoidance of doubt the losses claimed under Paragraph 7 of the Particulars are by way of alternative to the claim based on the movement in share price; they are identifiable losses suffered by the First Claimant and which will be claimed by the First Claimant, save for that claimed under paragraph 7(6), which will be claimed by the Second Claimant."

22. The Claimants point out, correctly, that no part of their case on the special damages accrued to date and continuing is sought to be attacked by the Defendant in their present application. It follows that the claims mentioned in the additional Further Information given in relation to paragraph 7 of the PSD now amounting to £11,019,083 up to the date of service of that Further Information on 13 August, and the further claims in respect of lost IPO business mentioned in the first answer quoted above, which amounts to £26,358,086 up to 13 August, will continue to remain part of the issues to be tried in this assessment of damages (if any), regardless of the outcome of the strike out application. At this hearing no formal point is taken by the Defendant on these particulars, but it is right to say that Mr Browne QC submits that there are criticisms to be made of the figures, including that they appear to be gross figures without any allowance for costs to be incurred in obtaining the business. Accordingly, the Defendant says, it would be wrong to assume that the claim under paragraph 7, which is the alternative claim to that based on a market capitalisation, amounts to the headline figure of some £38,000,000.

THE POWER TO STRIKE OUT A STATEMENT OF CASE

23. The Civil Procedure Rules Part 3.4 (2) provides as follows (so far as relevant):

> "The court may strike out a statement of case if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the courts process or is other wise likely to obstruct the just disposal of the proceedings:… "

24. The test to be applied has not been the subject of any dispute between the parties. A case, or here a part of a case, may be struck out under ground (a) if it is unwinnable, so that the continuance of that part of the case is without any possible benefit to the Claimant, and would be a waste of resources. Where an issue can be identified which will help resolve litigation, the courts are now encouraged to resolve it at an early stage, if that is possible, to achieve expedition and save expense. Mr Spearman QC for the Claimants rightly reminds me of the words of Lord Bingham of Cornhill in *Johnson v. Gore Wood and Co* [2002] 2 AC at page 36 E, where he says "at the strike out stage any reasonable doubt must be resolved in favour of the Claimant". A case should not be struck out if it raises a serious live issue of fact, which can only be properly determined by the court hearing oral evidence. For the purpose of a strike out application the Court must assume that the facts pleaded in the Claimants' Particulars of Claim and Further Information will be proved. I proceed on that basis.

DAMAGES AND THE LAW OF DEFAMATION

25. There is no dispute that, as Mr Spearman QC submits, the starting point for any consideration of the law of damages is the statement of Lord Blackburn in *Livingstone v. Rawyards Coal Company* (1880) 5 App. Cas. 25, 39 that the measure of damage is "that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation". However, in defamation there are particular considerations, which have led to other statements of the applicable principle. These are conveniently found in Gatley on Libel and Slander (10th ed) para 9.2 which includes the following:

> "General damages serve three functions: to act as a consolation to the claimant for the distress he suffers form the publication of the statement; to repair the harm to his reputation (including, where relevant, his business reputation); and as a vindication of his reputation. While actual financial loss (such as loss of business or employment) which is not too remote is clearly recoverable … it is a comparatively rare case in which evidence of such loss is given, simply because it is not available."

26. The Claimants also refer to Gatley

i) Para 26.29, under the heading 'special damage', where it is stated that:

> "Where the claimant claims to have suffered financial loss, he must allege such damage, including a general falling-off of business, with reasonable particularity, otherwise he will not be able to give evidence of such damage at the trial. The defendant is entitled to particulars of any special financial damage alleged so that he may know what case he will have to meet, and have an opportunity of inquiring into the allegation of damage before he comes to court."

ii) para 32.49, under the heading 'Actual damages' where it is stated that:

> "The claimant can lead evidence of actual loss, whether it be general loss of business or profits, or loss of particular earnings, customers, clients or patients, provided the details have been set out in the particulars of claim. The former may be a matter of inference if the words were likely to produce a general loss of business".

27. In *Ratcliffe v Evans* [1892] 2 QB 524 Bowen LJ at p529 Bowen LJ said:

> "If, indeed, over and above this general damage, further particular damage is under the circumstances to be relied on by the plaintiff, such particular damage must of course be alleged and shewn. But a loss of general custom, flowing directly and in the ordinary course of things from a libel, may be alleged and proved generally. "It is not special damage" - says Pollock, C.B., in *Harrison v. Pearce* … - "it is general damage resulting from the kind of injury the plaintiff has sustained." So in *Bluck v. Lovering.*…, under a general allegation of loss of credit in business, general evidence was received of a decline of business presumably due to the publication of the libel, while loss of particular customers, not having been pleaded, was held rightly to have been rejected at the trial: …
>
> *Macloughlin v. Welsh* was an instance of excommunication in open church. General proof was held to be rightly admitted that the plaintiff was shunned and his mill abandoned, though no loss of particular customers was shewn. Here the very nature of the slander rendered it necessary that such general proof should be allowed. The defamatory words were spoken openly and publicly, and were intended to have the exact effect which was produced. Unless such general evidence was admissible, the injury done could not be proved at all.'

28. However, in the immediately following passage on p531 he said in relation to libel:

> "If, in addition to this general loss, the loss of particular customers was to be relied on, such particular losses would, in accordance with the ordinary rules of pleading, have been required to be mentioned in the statement of claim…"

29. On p532 Bowen LJ made the following observation in relation to malicious falsehood and other cases where damage is not presumed (as it is in libel). Nevertheless, both counsel relied on it as applying to a claim for special damages in libel, and I accept that it does. Bowen LJ said:

> 'The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of the sort has been insisted upon for centuries: … In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry. The rule to be laid down with regard to malicious falsehoods affecting property or trade is only an instance of the doctrines of good sense applicable to all that branch of actions on the case to which the class under discussion belongs. The nature and circumstances of the publication of the falsehood may accordingly require the admission of evidence of general loss of business as the natural and direct result produced, and perhaps intended to be produced. An instructive illustration, and one by which the present appeal is really covered, is furnished by the case of *Hargrave v. Le Breton* …, decided a century and a half ago. It was an example of slander of title at an auction. The allegation in the declaration was that divers persons who would have purchased at the auction left the place; but no particular persons were named. The objection that they were not specially mentioned was, as the report tells us, "easily" answered. The answer given was that in the nature of the transaction it was impossible to specify names; that the injury complained of was in effect that the bidding at the auction had been prevented and stopped, and that everybody had gone away. It had, therefore, become impossible to tell with certainty who would have been bidders or purchasers if the auction had not been rendered abortive. This case shows, what sound judgment itself dictates, that in an action for falsehood producing damage to a man's trade, which in its very nature is intended or reasonably likely to produce, and which in the ordinary course of things does produce, a general loss of business, as distinct from the loss of this or that known customer, evidence of such general decline of business is admissible."

30. By way of background it is to be noted that the assessment of general damages in libel has been subject of guidance by Court of Appeal in the light of ECHR Art 10 (the right of freedom to expression). The position has been summarised in 2003 by the

Privy Council in *The Gleaner v Abrahams* [2003] UKPC 55; [2003]3 WLR 1038 as follows:

> '(ii) Awards in other libel cases
>
> …. in *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, …. the Court of Appeal said that article 10(2) of the European Convention on Human Rights, which required that any restrictions on freedom of speech should be "prescribed by law" and "necessary in a democratic society", required that awards of damages for libel should be more controlled and predictable than they were. Leaving the award to a unguided jury and refusing to interfere unless the damages were such that "no twelve men could reasonably have given them" might not comply either with the principle of legal certainty or the requirement of proportionality. Their view was later confirmed by the European Court of Human Rights in *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442 in which an award of £1.5 million by a jury under the pre-*Rantzen* regime was held to be excessive having regard to the absence of any judicial guidance.
>
> *Rantzen's* case therefore made two changes in the law. First, juries should still not be told of awards made by other juries but could be referred to awards made by the Court of Appeal in the exercise of its new powers… Secondly, the Court of Appeal decided that in future the awards of juries would be subjected to "a more searching scrutiny" than in the past. The question, in relation to compensatory damages, would be:
>
> "Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and re-establish his reputation? ([1994] QB 670, 692)." …..
>
> (iii) General damages in personal injury cases
>
> Reference to awards in personal injuries cases is far more controversial. It was advocated as a legitimate comparison by Diplock LJ in *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86, 109-110 but rejected by Lord Hailsham of St Marylebone LC in *Broome v Cassel & Co Ltd* [1972] AC 1027, 1070-1071 and by the Court of Appeal in *Rantzen's* case [1994] QB 670, 695. In *John v MGN Ltd* [1997] QB 586 the Court of Appeal reversed itself and since then juries have regularly been told to have regard to awards of general damages (for pain, suffering and loss of amenity) in personal injury actions. These are themselves conventional figures: the current scale was fixed by the Court of Appeal in *Heil v Rankin* [2001] QB 272 and runs to a maximum of £200,000 for the most catastrophic injuries. As a result, Eady J said in *Reed & Lillie v Newcastle Borough Council* [2002] EW HC 1600 (QB) at paras 1547-1551 that there is now a ceiling of £200,000 for compensatory damages in libel cases.'

31. In this connection, Mr Browne QC for the Defendants has throughout accepted that a decline in the share price of a claimant company can be relevant to general damages on the footing that it is evidence of damage to the goodwill of the company. He refers to Duncan & Neill on Defamation 2nd ed., para 18.12, footnote 2, to which I shall return below. But Mr Browne QC submits that the 'ceiling' of £200,000 would apply to general damages in this case, and that since a corporate claimant can recover no compensation for distress, the award should be correspondingly lower. While making no concessions, Mr Spearman QC has argued these applications on the footing that that may be a correct view of the law. I have not been required to make any decision on this point in this judgment.

DAMAGES IN COMPANY LAW

32. The parties were agreed on the general principles relating to claims where a shareholder and a company are, or might, both be involved in a claim. Each side referred me to the speeches in *Johnson v Gore Wood* [2002] 2 AC 1, and in particular to the following passages from those of Lord Bingham of Cornhill and Lord Millett.

33. At p35E-36E Lord Bingham of Cornhill said:

> 'These authorities support the following propositions. (1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. So much is clear from *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, particularly at pp 222-223, *Heron International*, particularly at pp 261-262, *George Fischer*, particularly at pp 266 and 270-271, *Gerber* and *Stein v Blake*, particularly at pp 726-729. (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. This is supported by *Lee v Sheard* [1956] 1 QB 192, 195-196, *George Fischer* and *Gerber*. (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other. I take this to be the effect of *Lee v Sheard*, at pp 195-196, *Heron International*, particularly at p 262, *R P Howard*, particularly at p 123, *Gerber* and *Stein v Blake*, particularly at p 726. I do not think the observations of Leggatt LJ in *Barings* at p 435B and of the Court of Appeal of New Zealand in *Christensen v Scott* at p 280, lines 25-35, can be reconciled with this statement of principle.

> These principles do not resolve the crucial decision which a court must make on a strike-out application, whether on the facts pleaded a shareholder's claim is sustainable in principle, nor the decision which the trial court must make, whether on the facts proved the shareholder's claim should be upheld. On the one hand the court must respect the principle of company autonomy, ensure that the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered. On the other, the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation. The problem can be resolved only by close scrutiny of the pleadings at the strike-out stage and all the proven facts at the trial stage: the object is to ascertain whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible, and whether (to use the language of *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 223) the loss claimed is "merely a reflection of the loss suffered by the company". In some cases the answer will be clear, as where the shareholder claims the loss of dividend or a diminution in the value of a shareholding attributable solely to depletion of the company's assets, or a loss unrelated to the business of the company. In other cases, inevitably, a finer judgment will be called for. At the strike-out stage any reasonable doubt must be resolved in favour of the claimant.'

34. At pp61C-63E Lord Millett said:

> 'A company is a legal entity separate and distinct from its shareholders. It has its own assets and liabilities and its own creditors. The company's property belongs to the company and not to its shareholders. If the company has a cause of action, this is a legal chose in action which represents part of its assets. Accordingly, where a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue. No action lies at the suit of a shareholder suing as such, though exceptionally he may be permitted to bring a derivative action in right of the company and recover damages on its behalf: see *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 210. Correspondingly, of course, a company's shares are the property of the shareholder and not of the company, and if he suffers loss as a result of an actionable wrong done to him, then prima facie he alone can sue and the company cannot. On the other hand, although a share is an identifiable piece of property which belongs to the shareholder and has an ascertainable value, it also represents a proportionate part of the company's net assets, and if these are depleted the diminution in its assets will be reflected in the diminution in the value of the shares. The correspondence may not be exact, especially in the case of a company whose shares are publicly traded, since their value depends on market sentiment. But in the case of a small private company like this company, the correspondence is exact.
>
> This causes no difficulty where the company has a cause of action and the shareholder has none; or where the shareholder has a cause of action and the company has none, as in *Lee v Sheard* [1956] 1 QB

192, *George Fischer (Great Britain) Ltd v Multi Construction Ltd* [1995] 1 BCLC 260, and *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443. Where the company suffers loss as a result of a wrong to the shareholder but has no cause of action in respect of its loss, the shareholder can sue and recover damages for his own loss, whether of a capital or income nature, measured by the diminution in the value of his shareholding. He must, of course, show that he has an independent cause of action of his own and that he has suffered personal loss caused by the defendant's actionable wrong. Since the company itself has no cause of action in respect of its loss, its assets are not depleted by the recovery of damages by the shareholder.

The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder. These principles have been established in a number of cases, though they have not always been faithfully observed. The position was explained in a well known passage in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 222-223:

> "But what [the shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a 'loss' is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only 'loss' is through the company, in the diminution of the value of the net assets of the company, in which he has (say) a 3% shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the defendant does not affect the shares; it merely enables the defendant to rob the company. A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing £100,000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff. The plaintiff holds the key of the cash box. The defendant by a fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its

> assets; and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £100,000 to nil. There are two wrongs, the deceit practised on the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely a step in the robbery. The plaintiff obviously cannot recover personally some £100,000 damages in addition to the £100,000 damages recoverable by the company."
>
> It is indeed obvious that (on the given facts, where no consequential losses are stated to have arisen) the defendant cannot be made liable for more than £100,000 in total. It is equally obvious, however, that if the damages were recoverable by the shareholder instead of by the company, this would achieve the same extraction of the company's capital to the prejudice of the creditors of the company as the defendant's misappropriation had done.'

35. At pp66G-67A Lord Millett continued:

> 'Reflective loss extends beyond the diminution of the value of the shares; it extends to the loss of dividends (specifically mentioned in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204) and all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds. All transactions or putative transactions between the company and its shareholders must be disregarded. Payment to the one diminishes the assets of the other. In economic terms, the shareholder has two pockets, and cannot hold the defendant liable for his inability to transfer money from one pocket to the other. In principle, the company and the shareholder cannot together recover more than the shareholder would have recovered if he had carried on business in his own name instead of through the medium of a company. On the other hand, he is entitled (subject to the rules on remoteness of damage) to recover in respect of a loss which he has sustained by reason of his inability to have recourse to the company's funds and which the company would not have sustained itself.'

ASSUMPTIONS

36. As noted above, the Court on a strike out application has to assume that the facts alleged in the Particulars of Claim will be proved. The assumption is purely for the sake of legal argument. It involves no judgment at all as to what is the likely outcome of the action. In this case Mr Spearman QC also asks me to make two alternative assumptions, not only that both Claimants succeed, but, alternatively that each one alone will succeed on liability.

37. What is sought to be struck out is para 3-6 of PSD, and nothing else. So if the application is successful, Particulars of Claim pars 8.7 and 8.8 will remain, and PSD para 7 will stand as the particulars of para 8.8. The Defendant accepts in principle that Plc is entitled to advance a claim for past or future losses of specific business income along the lines pleaded in PSD para 7, although they have criticisms of that pleading which are not relevant to the applications I have to consider today.

38. So for the purposes of this judgment, although causation will be contested at trial, it must be assumed that each of the Claimants has suffered loss as a result of the article complained of, that part of the losses has already occurred, but the losses are continuing, and that they will continue after the trial.

THE STRIKE OUT APPLICATION

THE DEFENDANT'S CONTENTIONS

39. Mr Browne QC's submissions can be summarised under the following headings.

i) *The market's assessment of any loss is irrelevant*. It is for the Court to assess damages itself. The Court should not take the assessment of the market or anyone else. There is no knowing what factors the market takes into account.

ii) *The shortfall in market capitalisation in Plc's shares is a loss which neither Claimant has suffered (the reflective loss principle)* The Court is bound to treat the two Claimants as separate entities, there being no circumstances which justify lifting the corporate veil, notwithstanding the consolidation of accounts. Mr Browne QC contends that Ltd is seeking to recover the loss suffered by shareholders – the added complication being that it is not in fact the loss of its own shareholder, Plc, but the loss of Plc's shareholders. And, he contends, Plc is seeking to do the same thing that is to recover the loss suffered by its own shareholders. But in addition, he submits, Plc is also seeking to do what the other shareholders have sought to do in the decided cases, that is, in its capacity of shareholder in Ltd, to recover the losses suffered by Ltd, which are not losses suffered directly by itself.

iii) *Lack of certainty and precision.* The share price of Plc varies from date to date. If the date of the assessment is at whatever is the date of the hearing, that date, and so the price, will be arbitrary and fortuitous. Further, a case based on Plc's share price as at date of trial would be unjusticiable: it would require examination of why Plc's share price was at the level it was immediately before the article complained of, and why it was as it was at the date of calculation; whether the two comparators are true comparators; and the same examination of the levels of each of the comparator's share prices at the date immediately before publication, and at the date of trial.

iv) *Risk of double recovery confusion and waste of time.* If Plc recovers damages on the basis of a diminution of its share price at the date of trial, and Ltd recovers substantial damages on the basis of its claim for loss of particular business (pleaded in PSD para 7) there will be an unavoidable risk of double recovery. There is no way of knowing to what extent the market price is based on any assumption that Ltd will recover a substantial sum under PSD para 7.

v) *ECHR Art 10* Mr Browne QC draws attention to the exceptional size of the claim. He accepts that if special damages of that amount can be properly argued and established at trial, the award of such a large sum for a publication will not in principle fall foul of the ECHR judgment in *Tolstoy*. But he submits that the fact that the claim advanced is so large does have a chilling effect on financial journalism, and so calls for careful scrutiny to ensure that it is indeed

arguable that any award can be properly established in accordance with the law, and is necessary and proportionate.

vi) *Developments in Claimants' pleaded case* Mr Browne QC draws attention to the way the pleaded case has developed with each further statement, such as the introduction of comparators in PSD, and the introduction of the proposed assessment of Special Damage on the basis that £230m is the 'best available reflection of the loss', and the changing phraseology.

vii) *Inconsistent out of court statements by Plc's CEO.* In addition, Mr Browne QC had made submissions on out of court statements reported to have been made by Mr Smith in Plc's financial statements, and in the press. I can put these submissions to one side immediately. They could not fairly be adjudicated upon without further evidence, which has not been adduced at this hearing. I pay no regard to these matters.

CLAIMANT'S CONTENTIONS

40. Mr Spearman QC submits that the losses will have to be assessed as at the date of the hearing on damages, on the basis of the facts that have occurred up to that point, and that there will also have to be an assessment of losses that will be in the future at the date of that hearing. He submits that there are two main questions that then arise. The first question is whether it is arguable that the future losses can be measured by reference to the market price of the shares in Plc. The second question is the identity of the company which is entitled to recover, Ltd or Plc.

41. Mr Spearman QC submits that the following is arguable (citations are taken from his Skeleton Argument):

i) there is a diminution in the market value of Plc which 'is properly calculated as the difference between the value (as attributed by the market in which the shares are traded) that all the shares in the Second Claimant would have had if those libels had not been published and the value that those shares have as a result of publication of those libels. This contention raises questions of fact and/or expert evidence, and cannot be disposed of on the strike-out application'.

ii) 'that calculation (carried out by comparing the fall in the price of shares in Plc with the increase in the price of shares in appropriate close comparator companies [namely Numis and ICAP]) shows that the diminution in the market value of Plc caused by the libels complained of was some £230,526,320 [ie as at 26 March 2004]. Again, this contention raises issues of fact and/or expert evidence, and cannot be disposed of on the strike-out application'.

iii) 'In the event that only one company had been libelled and that the loss of net profits had been occasioned to only one LSE-listed company, the Claimants contend that the position would be straightforward. The best measure of likely future losses would be that provided by the market in which the shares in the

company were traded, because the price that is set by the market for those shares is a direct reflection of the market's estimate of the net present value of future profits of the company, and the market's approach to these matters is reliable.'

iv) 'that aspect of their case has more than a real prospect of success, and in truth, and as already pleaded on the Claimants' behalf, involves a theory and methodology that is well recognised. While the Claimants adhere to their pleaded case that this is a matter for expert evidence in due course, they would point out that it has support from numerous respected publications. These include the Defendant's own publication "Corporate Valuation" by David Frykman and Jakob Tolleryd, which devotes the whole of Chapter 6 to "Discounted Cash Flow Valuation", stating that "The most commonly used standalone valuation model is the discounted cash flow (DCF) model" and that "The main idea behind the McKinsey model (and all other cash flow models) is that the value of a company today is equal to all future free cash flows, discounted back to the present with a discount rate that reflects the level of risk inherent in those cash flows", and explaining that such models are so popular and widely used "Primarily, [because] the model is theoretically 'correct' and is compatible with financial theory and other models used on the capital markets ….Company valuations produced by the DCF model fit very well with the way capital markets value companies in practice". The first element of the authors' analysis of the McKinsey model concerns WACC, which is fully in accordance with the Claimants' pleaded case.'

v) 'In the present case, two companies are involved. It is the business of one company (Ltd) that has been primarily affected by the allegations complained of. However, that company is not a listed company; rather it is a wholly-owned subsidiary of another company (Plc), which is a listed company. Moreover, the losses of future revenue of the Group of which Plc is the holding company are largely, if not exclusively, based on losses suffered by the business of Ltd. In these circumstances, the loss of future net profits of Ltd is reflected not in a reduction in the price of the shares in Ltd, but in the shares of Plc. The measure of the loss that has been produced by this means is £230,526,320.'

vi) 'As it is obvious that one or other of the companies must be entitled to effect this recovery, the Claimants' primary submission on the present application is that it is a sterile debate and a waste of the resources of the parties and the time of the Court to force the Court to give a definitive ruling on this matter at this stage. The artificiality and futility of this exercise is, we would suggest, all the greater in the case of a company such as the Second Claimant which produces its accounts on a consolidated basis.'

DISCUSSION

42. It is to be emphasised that in the present case the share price referred to by the Claimants is the share price on the market of the holding company Plc. So neither Claimant is claiming that any shares of which it is the owner are less valuable as a result of the wrong done to either Claimant. The shares in Plc are not the property of Plc, nor are they the property of Ltd. In PSD para 6 Plc is claiming that the fall (or failure to rise) of the shares in itself is the measure (or reflection) of the loss it has

suffered and will suffer. But PSD para 6 (as explained in the Further Information) is a claim by the Claimants that the shortfall in the market capitalisation of Plc's shares is a measure of the NPV of Plc's 'future earnings', because 'the company' in the last line of that para has been explained as meaning Plc. The suggested reflective loss in question is thus the converse of that considered in the cases such as *Johnson* cited above: in the present case each company is seeking to recover by reference to a loss allegedly suffered by shareholders in the parent company, Plc.

43. The terminology used in their case has been explained by the Claimants. For the purpose of this application the court makes no judgment upon whether these terms are, or are not, appropriate. The task is to determine whether the case so expressed is in law arguable or not.

44. PSD para 4 has footnotes which specifically state that the prices relied on in relation to the shares of Numis and ICAP are those quoted as closing figures by the London Stock Exchange's Historic Price Service, taking the mean of the bid and offer figures as the price. I take it that the same source and method has been used in relation to Plc's share prices.

45. In the further information the market is referred to in metaphorical language. The pleading includes the following statements: 'the market value of shares … is the value attributed to them by the market in which the shares are traded' (Answer 3.1); '… the loss in future revenues as estimated by the market …' (Answer 4.2); '… the market's assessment of the net present value (NPV) of future earnings of the company' (PSD para 6); 'The net present value of Plc's future earnings on 26 August 2004… was assessed by the stock market …' .

46. It is of course only individuals who attribute, estimate, or assess anything. That may explain why, at Further Information para 4.7, the case shifts and it is stated:

> "The figure is arrived at by analysts and investors estimating the future earnings of the Plc and then discounting those figures at the Plc's estimated weighted average cost of capital (WACC) to produce the NPV. The theory and methodology involved is well recognised, and is a matter of expert evidence which the Claimants will adduce at trial. "

In their Skeleton Argument it is repeated that this is a matter for expert evidence, but reference is made to what is called 'the most commonly used stand alone valuation model … the discounted cash flow model," as explained in a book published by the Defendant 'Corporate Valuation' by David Frykman and Jakob Tollard.

47. The DCF model explained in that book (a copy of which has been provided to me) involves a complicated mathematical calculation, to which a chapter is devoted. Nowhere in the present statements of the Claimants' case is such a calculation made in relation to Plc or either of the comparators. And it is clear that whatever interpretation may be put upon share prices published by the London Stock Exchange's Historic Price Service, those prices are not said by the Claimants to be arrived at, as a matter of fact, by such a mathematical calculation. Thus there is no answer to the Defendant's question 4.7. That question was: 'Of '… the market's assessment of the net present value (NPV) of future earnings of the company' … 4.7…Please provide particulars of how the NPV … is calculated, estimated and/or arrived at'. There could be no answer. The market assesses figures only

metaphorically. So far as the Claimants' pleading is concerned, the reasons why a share is traded at a particular price in any given deal are unknown, or, at best, matters of conjecture. It may well be that this is also the reality: this being a strike out application, I have heard no more about it than is in the pleadings. But, in general, I take it that a market price is the product of numerous decisions by people who cannot be asked what their reasons were for trading, or, which may be just as important, for deciding not to trade.

48. The term 'market capitalisation', as used by the Claimants in PSD paras 3 to 5 and elsewhere in their arguments, is a figure which they explain by the arithmetic set out in those paragraphs. They simply multiply the number of issued shares by the price at which the shares are reported to have been at close of business on 26 August 2003 and 26 March 2004. The Claimants work out what they say the share price should have been at close of business on 26 March 2004, by a comparison with the share price of the two comparator companies. So the closing prices of the shares, as relied on by the Claimants, bears a close relation to actual prices at which particular deals were done on the dates in question. But the figure for market capitalisation is not alleged to bear any particular relation to any deal in the entire issued share capital of the company in question. The Claimants do not say that the entire issued share capital of Plc has been traded, or has been available to be traded, as a block at any material time, or that the market capitalisation on the dates referred to represents a figure at which the entire issued share capital of Plc would have been traded on any actual or hypothetical basis.

49. Of course, I accept that market capitalisation calculated in that way is a concept which is very well recognised and has many uses. The question is whether it can be used in an assessment of damages, and in that context it has achieved very little recognition, as the cases show.

50. So the submission cited above is a novel submission, ie. the submission that the proposed measure of damages does calculate 'the difference between the value (as attributed by the market in which the shares are traded) that all the shares in the Second all the shares in the Second Claimant would have had if those libels had not been published and the value that those shares have as a result of publication of those libels'. I cannot accept that the way that the market capitalisation is arrived at in the pleadings can be reconciled with the submission that 'that calculation (carried out by comparing the fall in the price of shares in the Second Claimant with the increase in the price of shares in appropriate close comparator companies [namely Numis and ICAP]) shows that the diminution in the market value of the Second Claimant caused by the libels complained of was some £230,526,320'. The Claimants' pleadings do not allege, and I would be surprised if they did allege, that the market capitalisation is the 'market value' for the entire issued capital of Plc. As discussed below, assessments of damages are commonly made in contract cases, and in some tort cases, by reference to the market value of shares and other property. But in those cases it is assumed that the claimant could have gone into the market to buy substitute shares or goods for those which have not been delivered, or have been destroyed. In those cases, the court is not being asked to have regard to the market capitalisation of a company, as Mr Spearman QC asks this court to do.

51. It appears to me that this conclusion is consistent with what Lord Millett said in *Johnson* at p62B. Lord Millett was not considering any specific pleaded claim for special damages, as I am, so his comments cannot be applied directly to this case. But what he said is this:

> '… although a share is an identifiable piece of property which belongs to the shareholder and has an ascertainable value, it also represents a proportionate part of the company's net assets, and if these are depleted the diminution in its assets will be reflected in the diminution in the value of the shares. The correspondence may not be exact, especially in the case of a company whose shares are publicly traded, since their value depends on market sentiment. But in the case of a small private company like this company, the correspondence is exact.'

52. In the case of an unquoted company the value of its share capital will be arrived at by identifiable individuals, either experts preparing a valuation, or individuals dealing with one another more or less directly over the shares. Mr Spearman QC submitted (in relation to Lord Millett's phrase) that, strictly speaking it is the price of quoted shares which is derived from the market, and that may not be the same as their value. But the point Lord Millett is making is that the market value or price may not be same as the value or price that would be arrived at if the same shares were not traded on a market, or if the value was calculated by individuals. Mr Spearman QC also submits that 'sentiment' in that passage means goodwill in the sense of the 'the potential the business had'. He refers to Waller LJ's comments in *Giles v Rhind* [2002] EWCA Civ 1428; [2003] Ch 618 para [28]. But 'the potential the business had' is a much wider concept than is embraced by future 'revenue' or 'net profits' as used in the Claimant's pleaded claim. It might, for example, include the prospect of a sale of the company (presumably at a price higher than the current market capitalisation) as was mentioned in the assessment of damages in the case of *Beta Construction*, cited below.

53. My view also seems to me to be consistent with the decision of the Court of Appeal in *Lonrho v Fayed (No 5)* [1994] 1 All ER 188 (the report at [1993] 1 WLR 1489 is abbreviated and omits some of the passages relevant to this point). That was a claim in conspiracy in which damages for injury to the business reputation of Lonrho Plc were claimed, amongst other heads of damage. The case is best known as authority for the proposition that a claimant cannot, by an action in conspiracy, recover damages for injury to reputation if the defendants have combined to publish the truth about him. But a claim in conspiracy requires proof of actual pecuniary loss (none being presumed, as they would be in a claim in libel). No such loss had been pleaded. So the Court of Appeal was invited to give leave to amend for Lonrho to do so.

54. The draft amendment in that case included schedules running to some 40 pages. They are not set out in the report, and so it is not possible to see whether the way that Lonrho put its case by reference to the fall in its share price is the same as the way that the Claimants put their case before me. However, Dillon LJ said this at p194f:

> ' A further issue is whether, in the case of Lonrho plc, injury to business reputation can be recovered as a form of injury to property, sc goodwill; that involves considering what is meant by goodwill and—on the way the case has been argued by Mr Beveridge—whether fluctuations in the share price of a company reflect its goodwill and reputation.'

55. Mr Browne QC submits that Dillon LJ gives a negative answer to the question: do fluctuations in the share price of a company reflect its goodwill and reputation? I accept that that is the answer given. Later at pp196a-g Dillon LJ continued:

> 'To prove loss of orders and loss of trade is another matter; that is recognisable pecuniary damage. The claim in respect of the joint venture with Iranian interests referred to in part II of schedule 2 to the particulars of damage could come in under this heading if a link between the loss of the venture and Miss Pollard's campaign is sufficiently proved. Such loss of orders, for example, would involve injury to the goodwill of a business which may be one of the most important assets of the business. But goodwill in that sense must have the meaning put on that word in *Trego v Hunt* [1896] AC 7 esp at 17–18, 24, [1895–9] All ER Rep 804 esp at 809–810, 813 per Lord Herschell and Lord Macnaghten. It cannot mean some airy-fairy general reputation in the business or commercial community which is unrelated to the buying and selling or dealing with customers which is the essence of the business of any trading company.
>
> Again the well-established right to damages in passing off where deceptive goods have been put on the market and passed off as the plaintiff's goods has a practical relationship to the plaintiff's business, which is a long way from the allegations of injury to the business goodwill of Lonrho in the particulars: see *Draper v* Trist [1939] 3 All ER 513 at 519 per Greene MR and *A G Spalding & Bros v A W Gamage Ltd* (1918) 35 RPC 101 at 116, where Swinfen Eady LJ cited from the speech of Lord Sumner on the hearing of an earlier stage in that case in the House of Lords; those were straightforward deceptive goods cases which bear no resemblance at all to the elaborate allegation of injury to business goodwill or business reputation in the particulars in the present case.
>
> Beyond that, Lonrho's share price is not an aspect of Lonrho's goodwill in the sense referred to above. The share price of Lonrho is not an asset of Lonrho at all. That the share price may be affected by the perceptions of stock market analysts, financial commentators and business journalists does not mean that the assets of Lonrho are affected by such perceptions or that Lonrho suffers pecuniary damage if its share price falls as a result of the publication of such perceptions…
>
> Accordingly I would refuse to allow amendment to introduce the proposed sub-head (a) in the proposed particulars of the claim by Lonrho, and the whole of schedule 3 there referred to, and also the repetition of schedule 3 in para 1 of part 1 of schedule 4.'

56. In *Trego* at p 24 Lord Macnaghten had said:

> 'What "goodwill" means must depend on the character and nature of the business to which it is attached. Generally speaking, it means much more than what Lord Eldon took it to mean in the particular case actually before him in *Cruttwell v. Lye* where he says: "the goodwill which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place." Often it happens that the goodwill is the very sap and life of the business, without which the

> business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money.'

57. In *Lonrho* at pp205a-d Stuart-Smith LJ said:

> ' I turn to the specific heads of damage in the proposed re-re-amendment.
>
> (a) 'Damages for injury to Lonrho's right of property in the goodwill of its business the value of which was diminished by each and/or all of the conspiratorial acts identified in part I of Schedule 2 hereto.'
>
> With the exception of the allegations in the Esterhuysen proceedings and the demonstration outside Lonrho's annual general meeting by Miss Pollard, these are all statements made by Miss Pollard. The manner in which goodwill is said to have been damaged is set out in schedule 3. In my opinion this schedule is nothing more than a complaint of injury to reputation with some wholly unspecified and unquantified injury to goodwill, which ranges from damage to the confidence of customers, the ability to attract employees and backers, the perception of stock market analysts, financial commentators and journalists and the impact on Lonrho's share price. I would refuse leave to amend to include this paragraph. I reach this conclusion without regret because I consider the claim in para (a) even if it were or could be properly quantifiable as virtually untriable. The number of witnesses on both sides would be likely to be legion and how a judge could determine that it was Miss Pollard's letters and other effusions, assumed for this purpose to be true, rather than other extraneous factors such as poor service, overborrowing, weak managerial control or the caprice of African ministers that cause a loss of business, if any, or adverse opinions of analysts, journalists, staff and others, I do not know.'

58. For completeness I mention two other cases in which a fall in a share price has been considered in connection with damages for libel. Mr Spearman QC relies on these as far as they go, which is no further than what in any event Mr Browne QC concedes. They do not go anywhere to support the way in which the Claimants advance their case that it is the shortfall in the share price at the date of assessment of damages that is to be looked at to measure the loss. At best they show that this contention, if sound in law, could have been advanced in them, but no one saw the point.

59. In *Lewis v Daily Telegraph Ltd* [1963] 1 QB 340 a number of claims were considered by the Court of Appeal (and later the House of Lords)), including a claim by Rubber Improvement Ltd against The Daily Telegraph Ltd. After the judge had summed up at the trial, the jury asked whether they might have evidence of the movements in value of the plaintiff company's shares for 10 days after the publication of the words complained of. The judge of course said that no further evidence could be called. There is a passage from the judgment of Holroyd Pearce LJ (the decision of the Court

of Appeal was upheld, see [1964] AC 234), most of which is cited in Duncan & Neill on Defamation 2nd ed para 18.12 under the heading 'Special damage'. There is footnote in Duncan & Neill which reads: 'A decline in the price of the shares would be evidence of damage to the goodwill of the company'. The passage reads as follows:

> 'If a person libelled has suffered specific damage he can plead it as special damage and recover it. That claim will then have the advantage (or disadvantage) of a careful scrutiny, supported by documents and oral evidence from which a court can decide whether in truth a decline of business resulted from the libel. The plaintiffs would then have to give particulars and facts and figures to support it. The plaintiffs or their accountants could produce figures of turnover and graphs showing any sudden downward tendency, such as, for instance, that in the week after the libel orders noticeably declined and so forth. Managers, salesmen, and others could give supporting evidence. *Evidence could be called to show that the price of the shares in the stock market had declined*. And the defendants would have an opportunity of calling evidence to counter the plaintiffs' claim for special damage. The plaintiffs did not take this course. They did not plead any special damage. But even though the plaintiff pleads no special damage, he may rely on a general loss of business if the words were in their very nature intended or reasonably likely to produce a general loss of business (*Ratcliffe v. Evans*, [1892 2 QB 524, 532] *per* Bowen L.J.). That is a reasonable way of dealing with some general loss from a libel which can reasonably be inferred and cannot be proved. Nevertheless, if large sums are to be attributed to loss of business from a libel, it is plainly desirable that they should be pleaded, particularised, and so far as possible supported by evidence' (emphasis added).

60. The last of these cases is *McCarthy Stone plc and others v The Daily Telegraph* unreported, Court of Appeal, 11 November 1993. Mr Browne QC produced a Lexis transcript, thanking a journalist with *The Guardian* for drawing it to his attention, although he did not himself rely upon it. This was only one of a number of indications I received in Court that great attention and publicity has been given by the media to the present case. Lord Williams QC, for the plaintiffs in *McCarthy*, had wished to open his case to the jury with a reference to the fall of £10m in the plaintiff companies' market capitalisation which, the plaintiffs claimed, occurred because of the defendant's article complained of in that case. Lord Williams QC submitted that the fall in the share price was admissible evidence as one indicator of the effect of the article on the goodwill of the company. The Court decided that evidence of the share price movement should be excluded, because no notice had been given that the point was intended to be relied on, and there was to be no evidence as to causation: the jury were simply being asked by Lord Williams QC to infer causation from the fact of the fall that occurred after the publication. But Rose LJ (with whom Hoffmann LJ agreed) said this:

> 'With regard to the evidence of share price, I am prepared to accept that this may be relevant to goodwill as well as to special damages, as Lord Williams submits, and that so far as it is relevant to good will rather than special damage, it does not have to be pleaded'.

61. When the Claimants plead, as they do in PSD para 6, that the alleged shortfall between Plc's actual market capitalisation on 26 March 2004, compared with its potential market capitalisation on that date, ie £230.5m, 'is the best available reflection of the loss in future revenues which the Second Claimant has suffered and will suffer', that is a proposition which the court is invited simply to take on trust. No indication is given that there will be any evidence or authority to establish it.

62. Moreover, that proposition is not a statement of fact. This is accepted impliedly by the Claimants when they say that it is a matter for expert evidence. However, I do not accept that it is even a matter for expert evidence. I have not been referred to any possible expert evidence, other than relating to the DCF method of calculation. But since (as already noted) no such calculation has in fact been pleaded by the Claimants in this case, there can be no evidence to support it.

63. Rather it seems to me that the Claimants' proposition as to the shortfall in market capitalisation is, if anything, a proposition of law. Damages in contract are commonly assessed by reference to a market price, where there is an available market for the shares or goods in question. Damages may also be assessed in that way in some cases of tort, for example where property is destroyed. Where the damages are so assessed, it is because property to replace that which has been destroyed, or not delivered, can be obtained in an available market. The court will determine the date at which they could have been obtained, in the light of the facts of each case. For the reasons I have given, the market capitalisation of a company is not itself a market price, or comparable to a market price, in this sense. And this case is not a case where the Claimants suggest that a business or property has been destroyed.

64. There are well developed legal rules governing damages for torts generally, and defamation in particular, some of which I have set out above. Other rules, which I have not set out, relate to claims for loss of a chance of obtaining future business or other benefits. These rules exist to ensure that a successful claimant obtains the compensation that is just, but no more than what is just. The court can do no more than speculate as to the factors which have influenced the fluctuations in the market capitalisation in Plc since August 2003. Whatever those factors may be, it is plain that they are not confined to the publication of the words complained of.

65. The phrase in Mr Spearman QC's submission 'the diminution in the market value of Plc caused by the libels complained of was some £230,526,320' is suggestive of damage to property, to be compared with damages for wrongful interference with goods. Damages for wrongful interference with goods are sometimes assessed by reference to market prices, but the general rule is then to assess them at the time of the wrong was committed, not the time of the trial. I accept Mr Spearman QC's submission that there are no absolute rules, and that what Lord Wilberforce said in relation to contract damages (*Johnson v Agnew* [1980] AC 367, 400) can also be applied to tort: 'if to follow [the rule] would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances'. But a date which is

ascertainable by a rule, rather than by the chances of listing the case for a hearing, is to be preferred as a matter of principle.

66. It follows that in my judgment the suggested measure of damages is far too uncertain to be acceptable as a legal basis for assessing damages.

67. I am fortified in this conclusion when I note the difficulty that the Claimants themselves have had in formulating their case. The pleadings variously refer to what the market value of the shares values as 'future revenues…. future earnings' (PSD para 6) and 'net profits' (FI Answer 4.1). When I asked Mr Spearman QC whether or not I should assume that it took into account any view on the outcome of this action, or of the effect of any vindication that may be given in court, no clear answer could be given by reference to the pleaded case as it stands. But I was told that it did not take into account any view on the outcome of this action.

68. Like Stuart-Smith LJ in *Lonrho*, I have reached my conclusion without regret. For the purposes of this application I have assumed that a shortfall in share price relative to the comparators will be established, and that it was caused by the publication of the words complained of, to the extent that that is pleaded. Those issues are contested (see Defence para 12.6), which I ignore today. But just looking at the claim itself, I see that the Claimants accept that not all the alleged damage is the result of the Defendant's publication (PSD para 2 includes: '… the Defendant is liable to compensate the Claimants for the majority of the losses identified herein… They will seek an award of special damages in a sum equivalent to such proportion or proportions of the heads of loss identified herein as shall seem fair and just).

69. During the hearing I raised queries on the graph set out in the article complained of. Mr Spearman QC agreed that for the purposes of this hearing I could take the graph to be correct. It shows that between late 2000 and the takeover by Plc of Tullett and Tokyo Liberty in March 2003, Plc's shares had fluctuated with a low of about 260p and a high of about 450p. After the takeover, in the few months before the publication complained of, the price had risen from around 350p to nearly 500p. The suggested measure of damages would involve investigation of the business of not only the Claimants, but also of the two comparators, for a period commencing some time before the publication complained of until the date of assessment of damages, which is unlikely to be for at least another year. And in the pre-publication period the share price was fluctuating widely.

70. I accept Mr Browne QC's submission that the case would be untriable and a waste of the resources of the court.

71. In case the matter should go further, I next consider whether in this case reference to Plc's market capitalisation could be appropriate.

72. The Claimants ask me to consider the cases of each Claimant separately. This is difficult, since they are not separately pleaded. Each Claimant is asking the Court to measure damages suffered by itself by reference to a change in the value of property, that is shares, which is owned by neither of them. This is not the situation that the courts were considering in *Johnson* or in *Giles v Rhind* [2003] Ch 630. In each of those cases the claimant was claiming in respect of losses suffered by a company of which he was the shareholder, neither company being quoted on a market. In *Johnson* there was no reference to share prices. In *Giles* there was a reference to the price of £331,000 at which the defendant had sold his shares in the company in question at an

early time, which is contrasted with Mr Giles being unable to obtain a penny for approximately the same number of shares (per Waller LJ para [18]). It appears that some reference to that price might be relevant to the trial, when it took place.

73. Mr Spearman QC submits that if the article is defamatory of Ltd alone, then Plc will have no claim for damages. But Ltd's damages, he submits will be reflected in the reduction in the price of Plc's shares. The reason for this, it is said, is that 'the losses of future revenue of the Group of which [Plc] is the holding company are largely, if not exclusively, based on losses suffered by the business of [Ltd]'. The argument is that once the court has awarded, and the defendant has paid, the £230.5m, then the shortfall in the share price of Plc will be made up.

74. Whether this offends the reflective loss principle depends on whether it can be shown that Ltd have in fact lost a sum equal to the shareholders' loss. If that can be shown by an approach to, the assessment of damages which is certain enough to be good in law, then there is no need to have recourse to the shortfall in market capitalization. If that cannot be shown by such an approach, then it is impossible to know whether or not the reflective loss principle is infringed, and the case should not be allowed to go forward.

75. The figures here suggest that the reflective loss principle may well be being infringed. The claim under PSD para 7 has now risen to a gross figure approaching £40m. It may have risen more by the date of any assessment of damages. Mr Spearman QC sought to argue that that was commensurate with a total loss of £230.5m. That might be a matter of expert evidence, but there is no such evidence available at the moment. I cannot form a view on that submission in this strike out application. So, it remains the case, in my judgment, that the argument by reference to market capitalization cannot be free standing.

76. However, there is a further point. This argument must assume, as Mr Spearman QC confirmed to me his case does assume, that the market price of Plc's shares does not already reflect the chance of that judgment being obtained. As Chadwick LJ put it in *Giles* at para [52]: 'If the company's assets would otherwise have been diminished by reason of [the defendant's wrongful act] they were enhanced by a corresponding amount equal to the value of the company's claim or claims in respect of that wrong'. See also a similar observation of Hobhouse LJ, cited by Chadwick LJ in para [64].

77. It is helpful to consider the supposition that (to continue the metaphor) the market were to be assessing this claim as one which is bound to succeed in the sum of £230.5m. If that is the market's assessment, then whatever shortfall in the share price there has been, it is not attributable to the libel: that damage will be made good by the court's order, and Plc's assets are to be treated as already enhanced correspondingly. If there is no shortfall attributable to the libel (because the market assesses that claim as bound to succeed), and if, also, the court must have regard the movement in the share price to assess damages, and since the claim is against a solvent defendant, then the damages the court will award will be nil, because ex hypothesi there is no relevant shortfall.

78. The proposed argument is circular, as can be shown by a simpler illustration. Lord Millett in Johnson at p63 quoted the passage from *Prudential* citing the example of a company with one asset, cash in a box containing £100,000, of which it is robbed. It was said that 'The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its

assets; and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £100,000 to nil.' But if the assumption is that the alleged thief stands and fights, that he has no defence, and that he is solvent, then the value of the plaintiff's shares in that example will remain at or close to £100,000, because judgment will be given for that amount in due course – provided damages are assessed by reference to the value of the property stolen. If, instead, the damages are assessed by reference to the value of the shares, then no loss would appear. So assessment by the value of the shares involves circularity, and is impossible.

79. Moreover, the premise for the argument is not reasonable, ie the premise that the market price of Plc's shares does not already reflect the value of the chance of a judgment for £230.5m being obtained. If the market price is assumed to be so rational as to afford a reliable measure of damage, then it is inconsistent to assume that there is not also factored into the market price of Plc's shares a figure which represents the market's assessment of the value for the present claim. It is not reasonable to postulate a market which is both rational enough to provide a sound measure of damages, but which does not also take into account the prospects of the claimant recovering compensation for the damage in legal proceedings of which the market is aware. I say this, of course, in the context of this case, where the amount of the claim, and these proceedings, will have received sufficient publicity through the press for the market to have the information that it ought (if it is rational) to take into account.

80. Furthermore, there is an order for a split trial in this case. Special damages will fall to be assessed only if and after there has been a trial on liability. The assessment of damages will thus proceed only on the footing that the Claimants have been vindicated in the trial on liability. The public will know that there is no defence of justification, that is, no suggestion by the defendant that the words are true (even if there is any confusion about that today, which there should not be). The verdict of a jury in favour of libel claimant itself provides a measure of vindication, as does an admission or Statement in Open Court when a case is settled. That is part of the point. So damages will fall to be assessed at a time when the only issue is the measure of damages, not whether damages will be recovered at all. So it would be irrational, at that stage, for anyone to give the claim no value at all.

81. Mr Spearman QC submits that if the article is defamatory of Plc and not of Ltd, then Ltd will have no damages claim, and the claim for special damages will revolve around the losses sustained by Plc. He submits that this is the case (considered in *Johnson*) of a company (Ltd) having suffered a loss as a result of a wrong done to its sole shareholder (Plc), but Ltd has no cause of action in respect of its loss, such that its shareholder, Plc can sue and recover damages for its own loss, using its own cause of action to do so. The fall in the price of shares Plc is put forward by it as the measure of the loss sustained by it by reason of the diminution in the value of its shares in Ltd that has been caused by the losses sustained by Ltd.

82. Any claim by Plc based on losses suffered by Ltd does appear to me to be a claim that is most likely to fall foul of the reflective loss principle as explained in *Johnson*. I cannot follow the premise in the context of this libel claim. It is difficult to see why Ltd's business should have suffered any loss at all as a result of a libel on Plc, if the articles complained of are not also understood to refer to it. The words complained of in this case relate to the activities of a trading company, and not of a mere holding company. As Mr Browne QC put it, if Ltd fails because the words complained of are

held not to refer to it, then there is nothing 'arbitrary' (to use Lord Bingham's word) in its being deprived of compensation.

83. Cases of the kind relied on here include *Lee v Sheard* [1956] 1 QB 192. In that case a company suffered loss because its shareholder and director suffered personal injuries and was unable to work and earn money for the company. The company, of course, had no cause of action for the director/shareholder's personal injuries. The shareholder received less from the company than he would have done had been working for it. I can see little analogy with this case. If Plc recovered damages on this hypothesis, it seems that the court assessing damages would be acting inconsistently with the hypothetical verdict that the words complained of did not refer to Ltd. However, it is not necessary for me to decide the case on this basis, and I do not do so, since the other decisions that I have reached apply as much to a claim made by Plc alone, as to one by Ltd alone, or to both Claimants`.

84. The Defendant makes another point, by reference to claims made by Ltd for losses apparently suffered, not by itself, but some subsidiaries of it which trade in the Channel Islands. I would see the force of Mr Browne QC's submissions, if made at trial on appropriate evidence. But I accept that for the purposes of a strike out application there is not sufficient information on the pleadings for the argument to succeed.

85. So for the reasons given above, paras 3-6 of the Claimants Particulars of Special Damage dated 29 March 2004 shall be struck out.

MODE OF TRIAL

86. Section 69 of the Supreme Court Act 1981 provides as follows:

> "(1) Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue – …
>
> (b) a claim in respect of libel, …
>
> the action shall be tried with a jury, unless the court is of the opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury…
>
> (3) An action to be tried in the Queen's Bench Division which does not by virtue of subsection (1) fall to be tried with a jury shall be tried without a jury unless the court in its discretion orders it to be tried with a jury.
>
> (4) Nothing in subsections (1) to (3) shall affect the power of the court to order, in accordance with rules of court, that different questions of fact arising in any action be tried by different modes of trial: and where any such order is made, subsection (1) shall have effect only as respects questions relating to any such charge, claim, question or issue as is mentioned in that subsection"

87. Since it is common ground that the claim for Special Damages must be tried by judge alone, the question I have to decide is a narrow one, relating to the claim for general damages. To what extent does the claim for general damages in this case give rise to different questions of fact from the claim for special damages, and if and in so far as it does, will those questions come within s.69(1), ie. will their trial require any prolonged examination of documents or accounts which cannot conveniently be made with a jury?

88. The submissions for the Defendant included the following. These submissions are not disputed in principle.

89. In *Aitken v Preston* [1997] EMLR 415 at 421 Bingham LCJ stated:

> "In the course of his judgment the judge conducted an extensive review of the relevant authorities and correctly extracted the following principles:
>
> (i) The basic criterion, viz that the trial requires a prolonged examination of documents, must be strictly satisfied, and it is not enough merely to show that the trial will be long and complicated (*Rothermere v Times Newspapers* [1973]). However the word "examination" has a wide connotation, is not limited to the documents which contain the actual evidence in the case and includes, for example, documents which are likely to be introduced in cross-examination (*Goldsmith v Pressdram* [1988])."

90. The triggers of “prolonged examination” and “inconvenience” are not two separate requirements and must be considered together, although it is convenient to take them separately: *Field v Local Sunday Newspapers Limited* (unreported) 10 December 2001, Gray J.

91. Gray J also held in *Field*, that the word “documents” is not limited to ‘contemporaneous’ documents or cross-examination material but would also include any written directions that would need to be given to a jury.

92. The question of convenience concerns the efficient administration of justice rather than the probable difficulty of any issue involved, and the word "conveniently" means without substantial difficulty in comparison with the carrying out of the same process by a judge alone: see *Goldsmith v. Pressdram* as cited by Gray J in *Field:*

> “16. I come then to the linked and more difficult question whether it can be said that the examination of those documents cannot conveniently be made with a jury. The connotation of "conveniently" is less clear than the meaning of "prolonged examination" which is relatively straight forward. Some guidance can, however, be derived from the authorities. In *Goldsmith v Pressdram Limited* Slade LJ at p74H said:
>
> > "Correspondingly, I infer that the legislature, in using the particular word "conveniently" in the context of the

> sub-section, was directing its attention to the efficient administration of justice, rather more than the probable difficulty or otherwise of issues involved There may be many cases where numerous documents will be required to be looked at, but no substantial practical difficulties are likely to arise in their examination being made with a jury. On the other hand, cases may, I concede, arise where relatively few documents will require examination, but nevertheless long and minute examination of them is likely to be required, and, because of their particular nature, a satisfactory examination of them by a jury will present formidable practical difficulties".

In the same case Kerr LJ said at p74A:

> "Conveniently' means, as I see it, without substantial difficulty in comparison with carrying out the same process with a Judge alone. On the issues raised in this case the investigatory process of arriving at the ultimate answer would be a difficult task for any judge despite constant reference to documents, and far more difficult, and therefore inconvenient as a forensic process, when it has to be done in a way that is capable of being followed and understood by 12 jurors".

93. In *Aitken v Pressdram* Lord Bingham (at p421) adopted a similar construction and added that amongst the factors to be considered are the additional length and cost of a jury trial compared with trial by judge alone and any special difficulties or complexities in the documents themselves. He cited *Beta Construction Limited v Channel 4 Co Ltd* [1990] 1 WLR 1042, especially per Stuart Smith LJ at 1047C-D and per Neill LJ at 1055H, referred to and applied in the case of *Taylor v Anderton* [1995] 1 WLR 447.

94. In *Beta Construction v Channel Four* [1990] 1 WLR 1042, Stuart-Smith LJ at 1048-9, identified four areas in which the efficient administration of justice might be made less than convenient if trial takes place with jury:

> The physical problem of handling large numbers of documents in the jury box;
>
> The prolongation of the trial because of the number and complexity of the documents;
>
> The increased expense, both by the added length of the [jury] trial and copying; and
>
> The risk that the jury may not understand the documents.

95. The main point taken on behalf of the Claimants is that this application is an attempt to revisit a decision as noted above which was made by Eady J. as recently as 8 July 2004.

96. What the Claimants say is that the Defendant capitulated on this issue before Eady J, and for that reason he cannot reopen the matter citing *Chanel v. Woolworth Ltd.* [1981] 1 WLR 485, 492 to 493. It is said that nothing material has changed since 8 July.

97. It is clear from the judgments which Eady J gave on 8th July that the matter was dealt with at short notice. In one of the three judgments that Eady J gave on that day, he makes clear that he did not regard the matter as having been dealt with once and for all. He said the following:

> "1. I have heard very helpful submissions this morning, albeit at short notice, which is to some extent regrettable, but nevertheless Counsel have been able to do their clients justice on both sides on this very and important issue.
>
> 2. The Application before me is that of the Defendant that there should be a split trial, and the way that it is put is that the issue of special damages should be separated out and dealt with apart from liability and general damages. That was clarified in the course of argument this morning. It is not suggested (*at the moment at any rate*) that the issue of general damages should go off for separate trial along with special damages.
>
> 3. I have no hesitation at all in coming to the conclusion that this is a case for separate trials at any rate on special damage as compared to the other issues. *At the moment, as things stand, it looks as though the trial, certainly on liability and possibly on general damages, is going to be by Judge and Jury… "* (emphasis added)

98. In any event it seems to me that this is a case management decision in which, in an appropriate case, the Court would give priority to the interests of the administration of justice at the time when any decision has to be made, and pay correspondingly less regard to what had or had not been conceded by one party at an earlier stage of the proceedings. Of course, one judge will rarely contemplate changing the order made by another judge within the period of a few months. What has changed since the 8 July is, first, that I have acceded to the strike out application. That in itself tends to make the case simpler than it might have been if I had not done that (although there is still a related issue raised in para 11 of the Reply, cited above). On the other hand, the claim for special damages under paragraph 7 of the PSD has been considerably extended by the Further Information provided in the second tranche served on 13 August 2004, which I have quoted above. There were also considerable further particulars which I have not quoted in this judgment. So there is no doubt that the assessment of special damages, if it comes to that, will be a very heavy matter involving prolonged examination of documents and accounts as well as experts` reports and other related documents.

99. I gain assistance from a further passage in the judgment of Stuart - Smith LJ. in *Beta Construction* (1990) 1 WLR at page 1050 B:

> "The second plaintiff's claim derives solely because of his association with the first plaintiff and the libel upon it. Much of the same evidence will be relevant to the claims of both plaintiffs. While no doubt a jury will be directed by the judge not to take account of any financial loss to the second plaintiff and to award only damages for injury to his reputation and injured feelings, in my view the claims of the two plaintiffs are so closely linked that the task of both jury and judge would be made difficult if they had to assess damages independently of each others. I think that there is a risk of double compensation or possibly under compensation and the possibility of inconsistent verdicts…".

100. That passage is of course referring to the claims of two different Claimants. However it seems to me that the position is analogous in the situation with which I am concerned, where there are also different kinds of claim by the same claimant.

101. It is difficult in principle to draw the line between what can be claimed as general damages and what is special damages. The two terms are not always used in the same sense, and it is better to look at the substance of what is claimed, rather than the label attached to it. See *Ratcliffe v Evans* [1892] 2 QB 524, Bowen LJ at p529.

> "In this judgment we shall endeavour to avoid a term [special damages] which, intelligible enough in particular contexts, tends, when successively employed in more than one context and with regard to different subject-matter, to encourage confusion in thought. The question to be decided does not depend on words, but is one of substance."

102. In McGregor on Damages 17th ed paras 1-029 to 1-034 no less than four meanings of the two terms, general and special damages, are discussed.

103. *Beta Construction* was considered a second time in the Court of Appeal, after the trial (unreported Lexis Transcript 31 July 1992). It demonstrates how complicated claims for general financial loss can be. Neill LJ then said:

> "'It is apparent that the judge's award to Beta of £90,000 general damages was a round figure which was not based on any exact calculation. Indeed no special damages have ever been claimed by Beta'."

104. What the claim was in that case is apparent from the report of the first appeal at p 1046B. The claim was for £1,096,720 for the period 1 November 1987 to 31 October 1997 as follows :

> "(i) In the period 1 November 1987 to 31 October 1988 [Beta] suffered a loss of net profit of £109,672 after deduction of corporation tax. (ii) The estimated loss of net profit after deduction of corporation tax for the next nine years is at the rate of £109,672 p.a., excluding any allowance for growth of business or inflation. "

There was a report which accompanied the particulars, which was 16 pages in length and was accompanied by appendices and schedules running to 65 pages. The report sought to show:

> "(1) that there was a substantial fall in turnover in Beta's business in the year following the programme; (2) based upon the previous progress of Beta and five identified competitors, that Beta could have expected an increase in turnover in that year; (3) that the loss of profit on such increased turnover was £109,672 and that such loss is attributable to the programme; (4) that the market in asbestos stripping will increase over the next five years'. "

105. In the present case, I do not think that the questions of fact to be considered in the two claims for general and special damages can be said to be clearly different. A judge sitting without a jury to assess both general and special damages in a case such as this would be likely to start with, or at least be greatly influenced by, his assessment of special damages. When he has decided what damage, in the form of lost business, has already occurred by that date, he will be able to use that finding to help in his assessment of what further similar damage is likely to be suffered in the future.

106. If the claims for general and special damages in this case were to be tried separately, the jury would assess general damages first, without the benefit of knowing what the special damages might be. The directions of law to the jury would be difficult to understand, and would require prolonged consideration. And, since juries do not give reasons, it would be a matter of conjecture for the judge on the later hearing as to what view the jury had taken on the issues of fact which led them to reach the figures they had reached. There would then be a real danger of double compensation, or under compensation, and of inconsistent verdicts, if general damages and special damages were tried separately.

107. At one point in his submissions Mr Spearman QC submitted that, pursuant to Section 69(4) there might be a separate issue to be tried by judge alone. This submission was in relation to share price movements, which of course no longer arises in the light of the ruling I have already made. However, it is not a course that I would readily entertain in any event.

108. Claims for special damage in libel actions are relatively uncommon. In cases where they have been made, there have been a number of examples of orders made for a split trial in which general damages are to be tried with liability and special damages tried separately (as Eady J ordered on 8 July). In cases where there is a personal Claimant the argument for splitting the proceedings in that way is often strong. In cases where there is a personal Claimant the jury may well be considered the tribunal best fitted for assessing the appropriate measure of compensation for distress, and, in cases where it arises, aggravated damages as well. These are closely linked to the meaning of the words complained of, which is something which the jury have to decide, but which they do not explain in their verdict. However, in this case there is no personal claimant and so no claim for damages for distress. The only issues as to damages are those that relate to the amount appropriate for vindication, and for damage to or loss of business and goodwill.

109. It seems to me that the case for having a jury assess damages is weak in this case. The claim for general damages is linked closely to the claim for special damages. Both fall

within s.69(1). There is no good reason for my exercising my discretion to order trial of the claim in general damages to be by judge and jury.

110. I therefore order that the order of Eady J of 8 July 2004 be varied and there be substituted an order that there be a split trial, with the issue of liability to be tried first by judge and jury, and all issues of damages to be tried thereafter, if they arise, by a judge alone.