Neutral Citation Number: [2004] EWCA Civ 1708

Case No: A2/2004/0916

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR JUSTICE EADY
(2004) EWHC 647 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2004

Before :

THE RIGHT HONOURABLE LORD JUSTICE AULD
THE RIGHT HONOURABLE LORD JUSTICE MAY
and
THE RIGHT HONOURABLE LORD JUSTICE GAGE

- -

Between :

HQ03X00727	**(a) JIMMY NAIL**	**Claimant/**
HQ03X01413	**(b) JIMMY NAIL**	**Appellant**
	- and -	
	(a) (1) NEWS GROUP NEWSPAPERS LIMITED	**Defendants/**
	(2) REBEKAH WADE	**Respondents**
	(3) JULES STENSON	
	and	
	(b) (1) GERAINT JONES	**Defendants/**
	(2) HARPER COLLINS PUBLICATIONS LTD	**Respondents**

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Hugh Tomlinson QC and William Bennett (instructed by Schillings) for the Claimant
Adrienne Page QC (instructed by Farrer & Co) for the Defendants

Hearing dates : 10th November 2004

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Approved Judgment

Lord Justice May:

Introduction

1. Sections 2 to 4 of the Defamation Act 1996 enable a person who has published an allegedly defamatory statement to offer to make amends. If he does so, there are certain statutory consequences. One of these is that, if the offer is accepted by the aggrieved party but the parties do not agree the amount to be paid by way of compensation, the compensation is determined by a judge, not a jury, "on the same principles as damages in defamation proceedings" – section 3(5) of the 1996 Act.

2. On 26th March 2004, Eady J determined the compensation to be paid by each of two sets of defendants to Jimmy Nail, the claimant. Mr Nail says that the compensation payments were much too low. He says that the judge misapplied section 3(5). The core issue in this appeal concerns the extent to which the making of the offer of amends should go in mitigation of the amount of his compensation.

Sections 2-4 of the Defamation Act 1996

3. This is only the second appeal to this court concerning statutory offers to make amends. The first was *Milne v Express Newspapers plc* [2004] EWCA Civ. 664; [2004] EMLR 24 page 461, where the claimant, who had not accepted an offer to make amends, wanted to proceed to a jury trial. To be permitted to do so, he had to seek to establish that the defendants "knew or had reason to believe that the statement complained of … was both false and defamatory of [him]" – see section 4(3) of the 1996 Act. This court, in upholding the judge, construed these words as importing the concept of recklessness as discussed by Lord Diplock in *Horrocks v Lowe* [1975] AC 135 at 149-150. The claimant was unable to plead facts which were capable of amounting to recklessness. His claim failed, because the fact of an offer to make amends is a defence to defamation proceedings, unless the claimant can successfully rely on section 4(3).

4. The judgment of this court in *Milne* recounts in paragraphs 17 to 26 the statutory background to sections 2 to 4 of the 1996 Act. It is not necessary to repeat that material in this judgment. In short, section 4 of the Defamation Act 1952 had proved ineffective. The July 1991 report of Sir Brian Neill's Committee on Practice and Procedure in Defamation, of which Eady J, then in practice at the Bar, was a member, had recommended legislation to encourage sensible, economic compromise of defamation claims.

5. This court in *Milne* gave an account of sections 2 and 3 of the 1996 Act in paragraphs 13 and 14 of the judgment as follows:

> "13 Section 2 of the 1996 Act provides that a person who has published a statement alleged to be defamatory may offer to make amends under the section. The offer may be in relation to the defamatory statement generally or in relation to a specific defamatory meaning which the person

making the offer accepts that the statement conveys. The defendants' offer in the present case was unqualified. An offer to make amends is an offer to make and publish a suitable correction and a sufficient apology, and to pay such compensation and costs as may be agreed or determined. An offer to make amends may not be made after a person has served a defence in defamation proceedings brought against him in respect of the publication in question.

14 Section 3 provides that, if an offer to make amends is accepted, the party accepting the offer may not bring or continue defamation proceedings against the person making the offer in respect of the publication, but he is entitled to enforce the offer. The parties can agree the steps to be taken. If they do not agree, the party who made the offer may take such steps as he thinks appropriate. He may make the correction and apology by a statement in open court in terms approved by the court. He may give an undertaking to the court as to the manner of publication. If the parties do not agree the amount to be paid by way of compensation, it is to be determined by the court on the same principles as damages in defamation proceedings. Proceedings under the section are to be heard and determined without a jury. The court is to take account of any steps taken in fulfilment of the offer, including the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances: and the court may reduce or increase the amount of compensation accordingly. Thus, if in an ordinary case a claimant in defamation proceedings accepts an offer to make amends, he becomes entitled either by agreement or by determination of the court to full proper compensation for the defamatory publication. The defendant has capitulated at an early stage and before serving a defence on all issues except the amount of damages, if this is not agreed. The claimant can bring or continue the proceedings to determine the compensation. It is to be expected that most sensible claimants will accept unqualified offers to make amends. The main purpose of the statutory provisions is plain. It is to encourage the sensible compromise of defamation proceedings without the need for an expensive jury trial."

6. The critical verbatim words in section 3(5) are:

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

7. The Neill Committee had expressed the view that a judge fixing compensation under their proposals would clearly take into account such mitigating factors as the defendant's willingness to restore the plaintiff's reputation fully and promptly. They considered that their proposals would achieve a relatively quick and cheap vindication and discourage unreasonably high demands for damages (see *Milne* paragraph 22). This court said at paragraph 45:

> "We see the main parliamentary intention as promoting machinery to enable defamation proceedings to be compromised at an early stage without the expense of a jury trial. If there is no issue as to the defamatory meaning of the statement published, an offer to make amends tenders to the claimant appropriate vindication and proper compensation. The defendant does not get out cheaply. If compensation is not agreed, it is determined by the court on the same principles as damages in defamation proceedings. As Eady J said in *Abu v MGN Ltd* [2003] 1 WLR 2001, the procedure is not to be confused with summary disposal under sections ss. 8-10 of the 1996 Act. There is no artificial cap on the level of compensation."

Eady J had gone on to say in *Abu v MGN* that there should be nothing in any sense "rough and ready" about the assessment of the claimant's reputation under the offer of amends procedure. It would clearly be inappropriate to deprive either party of a proper analysis of its case. In response to a submission that parliament cannot have intended that the defence based on a rejected offer of amends should be unanswerable, and, that if it were, the statutory mechanism would promote irresponsible journalism, this court said at paragraph 46:

> "It is obviously correct that parliament intended to and did shift the balance in favour of the making of offers to make amends. This is not perhaps to say that the balance is shifted in favour of defendants, since claimants also benefit. … We do not consider that a mechanism which offers appropriate vindication and proper compensation is a recipe for irresponsible journalism. Further, the legislation does not apply only to journalists."

The two actions

8. In the present case, Eady J was concerned with two actions. The first in time was a claim by Mr Jimmy Nail against News Group Newspapers Limited, the publishers of the *News of the World*, complaining of an article published on 19th May 2002 on the newspaper's centre page under the heading "Auf Wiedersehen Jimmy's Secret Bondage Orgies". The former editor, Rebekah Wade, and the journalist who wrote the stories, Jules Stenson, were also joined as defendants. The second action was against Geraint Jones, the author of a book called *Nailed: The Biography of Jimmy Nail*. This was published towards the end of 1998, but the claim form in this action was not issued until 6th May 2003, nor served until 11th August 2003. The publishers of the book, Harper Collins Publishers Limited, were also joined as defendants.

9. In each action, there were offers to make amends, which were accepted. After negotiation, agreed apologies were published. The judge was concerned only with assessing the appropriate compensation to be paid under section 3(5) of the 1996 Act.

10. Mr Nail is a well known actor who has appeared in a number of television series and films. He has also performed as a singer and musician. He is probably best known for his parts in the television series *Spender* and *Auf Wiedersehen Pet*, to which the News of the World headline alluded.

11. The book *Nailed* was published more than five years before Eady J's hearing. The distribution and sale of the large majority of its copies were outside the statutory limitation period for bringing defamation proceedings in the Harper Collins action. Mr Nail had read the book at around the time of its first publication. He found it offensive and full of inaccuracies, but he decided on advice not to sue over its contents, nor to make any complaint at all. The judge accepted this explanation for at least the early period of delay before proceedings were launched. Contrary to Mr Nail's claim in his witness statement that the book had received no publicity at the time, it was established that its publication had been covered, in some instances with extracts, in four separate daily newspapers. The judge correctly noted that this fact did not go in mitigation of damages – see *Associated Newspapers Limited v Dingle* [1964] AC 371.

12. The News of the World publication on 19th May 2002, timed to coincide with a new series of *Auf Wiedersehen Pet*, was largely based on the contents of the book. The newspaper publishers gave no warning to Mr Nail of the impending publication. This was contrary to the guidance in the Press Complaints Commission Code of Practice, but the judge believed that it was thought unlikely that Mr Nail would object to the regurgitation of the same stories, when he had not complained about the book.

13. I take the defamatory allegations from the judge's summary in paragraphs 10 to 25 of his judgment as follows:

> "10. It is necessary now to say something about the *News of the World* allegations themselves. Miss Page did not overstate the literary quality of the

article or make any claim to investigative prowess. She described it as "classic tabloid fodder for which readers buy such newspapers". The defamatory words related to events supposed to have happened many years ago. It is no part of the case of any of these Defendants to assert that they were true. That would be quite incompatible with the offer of amends procedure which they have adopted, and they have accepted, without any qualification, that the allegations are defamatory *and* untrue, as Mr Nail has maintained throughout.

11. Unfortunately, I do need to rehearse them to some extent in order to explain my decisions on the appropriate level of compensation. There is no doubt in my view that they have caused considerable distress and embarrassment to Mr Nail, and also to his partner, who provided an unchallenged witness statement for the proceedings, and who sat in court throughout the assessment hearing.

12. I will attempt to summarise the allegations under various categories based upon the meanings complained of on the Claimant's behalf.

13. First, there is the suggestion to which the headline refers; namely, that he "queued for an orgy with an outrageous sex-mad woman who demanded to be roped to a bedstead". Thus restrained, it seems, she entertained her gentlemen callers *seriatim*. "Nobody appeared to bat an eyelid". Her identity remained in obscurity to the readers of the book. Perhaps the only original contribution of the *News of the World* was to track her down as a "popular" young woman formerly known in the locality as "Randy Mandy". There is then a certain amount of misty eyed reminiscence. One former beau fondly recalls how in those days "We all loved Mandy".

14. Whenever she was supposed to be conducting herself in this way, if she ever was, it would appear to have been some time in the early seventies. What matters, however, is that Mr Nail says he simply had nothing whatever to do with her.

15. There is another specific incident when it is alleged that "another nude lover" (a brunette) was seen by a housemate to be jammed up against the cold enamel of his kitchen cooker. Miss Page emphasised, however, that from the article this

appears to have been entirely consensual. They were both "at it hammer and tongs" in the onlooker's presence. This is based on a less fastidious passage in the book which adds an element of improvisation to the same occasion. It was said that fat from the nearby chip pan was then spontaneously utilised as a makeshift lubricant. The story is recounted third hand as deriving from "one of the lads". I understood Miss Page to suggest that this allegation was barely defamatory at all and more akin to an infringement of privacy. She thought there was nothing particularly unusual about the conduct alleged – save perhaps for the *ambiance*. Indeed, in the book the episode is described as demonstrating the Claimant's "masterly composure and dexterity of thought".

16. There was also another episode described as "loud nookie in a broom closet". Miss Page submits that Mr Nail may be a little over-sensitive, since few people would think the worse of him. It is once more simply a question of location. In these matters, however, location can sometimes be critical.

17. There were also more general allegations of indecent exposure and indiscriminate sexual encounters with fans in pubs and clubs.

18. I am not sure that I would accept Miss Page's characterisation of such episodes as merely infringements of privacy rather than defamatory. She suggests, I think, that most reasonable readers would not think the worse of the Claimant. It would probably be dismissed as youthful high spirits. I believe nevertheless that a significant number of readers would find the allegations fairly unappetising – even by modern standards. The matter hardly needs to be debated, however, since it is an application for the assessment of damages following the acceptance of an unqualified offer of amends. I must take the allegations, therefore, to be false and defamatory. I have no particular difficulty in doing so.

19. Another more specific charge is that the Claimant "tried to seduce the wife of his rock star pal". This is said to have occurred at a time when he was with his current partner, with whom he has been in a permanent relationship for the last 24 years. It therefore involves disloyalty towards not only her

but also his friend. That allegation is given a degree of apparent confirmation, so far as readers are concerned, by a photograph of the two people posing together. Again, of course, it is accepted as being quite untrue.

20. A different allegation is that Mr Nail once ate a can of dog meat when pressed for cash in Germany. An "old friend" called Stan is quoted as saying, "He was that hungry. Still there's nothing wrong with the stuff. It doesn't kill dogs". That perhaps adds to an overall impression of general coarseness.

21. So far, the allegations might be thought, although no doubt distressing and offensive, not to impinge directly on Mr Nail's professional reputation. But the article also went on to allege that "Jimmy became more difficult to work with as his fame grew". He was portrayed as arrogant, rude and inconsiderate to "extras" in the background of a shot. "A man they'd so admired turned out to be a heartless, rude, b***d". That is clearly defamatory.

22. In a similar vein is the suggestion that, having bought a leather jacket he had worn in the first series of *Auf Wiedersehen Pet*, he then charged a few hundred pounds extra for allowing it to be used in the next series. He is thus portrayed again as arrogant, small-minded and mean. Miss Page suggests that this again is not defamatory and conveys an impression simply of a man with an astute business eye.

23. Counsel for Mr Nail summed up the impact of the newspaper coverage as follows. "It maps out a life in which he has progressed from being a dog meat eating yob, who engaged in grubby and obscene sexual behaviour, to heartless prima donna". The overall impression is thus far from flattering.

24. The book contains some similar suggestions, as I have indicated, but there are other defamatory implications as well. These include the allegation that he shunned his father in the latter years of his life, despite the fact that he suffered from emphysema. There is also an implication that he exploited the untimely death of a long time colleague "in order to extract a tawdry financial advantage for himself.

> 25. Another strand of meaning in the book is that the Claimant, as the Thatcher era dawned, became a property developer "possibly with the help of financiers who would not be found advertising their services in Yellow Pages". The implication is clearly (as it is pleaded) that he "… financed his new business by illegal, probably criminal, means". (Another accusation is that he portrayed his origins as more impoverished than was truly the case.)"

14. The defendants had made unqualified offers to make amends for both the newspaper article and the book. The court therefore had to take it that the words complained of bore the pleaded meanings. The judge accepted that exaggerated or distorted meanings should be ignored, but in such circumstances it was to be supposed that a defendant would make a qualified offer of amends. It would seem unfair, said the judge, on a claimant who accepts an unqualified offer to find that the court dismisses his meanings as untenable when it comes to assessing the damages.

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

The judge's judgment

16. The judge accepted that the primary function of financial compensation should be directed to Mr Nail's distress, embarrassment and hurt feelings. But the judge had no difficulty in accepting Mr Nail's evidence about how much the publications had impacted on his own feelings and his family life. The effect had been more serious than would be implied by the somewhat dismissive word "embarrassment". Distress or other consequences from passages in the book which were not complained of had to be discounted.

17. Any claim for the defamatory content of the book was confined to a mere 119 copies (out of a total of some 4,500) sold or distributed in the 12 months before the issue of proceedings in the Harper Collins action. A claim for the defamatory publication of the other copies was statute barred. On the other hand, the News of the World has sales of approximately 4m. and a readership of perhaps double that.

18. The judge said that he must approach the allegations on the basis that they were false and defamatory and that they caused major and continuing distress to Mr

Nail, which undermined his family relationships. This was not in the sense of damaging them permanently. But there were intrusion and tensions which would otherwise not have been there. Although the newspapers' allegations did not come quite as a bolt from the blue, since he had read the book several years earlier, the judge was prepared to accept that the huge publicity which the article attracted would have impinged upon his life far more than the book. Reading the book in 1998 would hardly have prepared him for the impact of the unannounced tabloid coverage some 3½ years later.

19. The judge then asked what was the correct approach to determining compensation under the offer of amends regime. This was only the second case to come before a judge for determination of compensation. The first was *Cleese v. Clark* [2004] EMLR 37, which Eady J had also heard. It was not possible to compare past jury awards which came about in quite different circumstances. There are now very few libel actions to reach trial with a jury. Such awards as are made normally follow a contest on liability. That put a very different complexion on matters. The judge then said at paragraph 35 to 37:

> "35. The offer of amends regime provides, as it was supposed to, a process of conciliation. It is fundamentally important that when an offer has been made, and accepted, any claimant knows from that point on that he has effectively "won". He is to receive compensation and an apology or correction. In any proceedings which have to take place to resolve outstanding issues, there is unlikely to be any attack upon his character. The very adoption of the procedure has therefore a major deflationary effect upon the appropriate level of compensation. This is for two reasons. From the defendant's perspective he is behaving reasonably. He puts his hands up, and accepts that he has to make amends for his wrongdoing. As to the claimant the stress of litigation has from that moment at least been significantly reduced.
>
> 36. Whereas juries used to compensate for the impact of the libel "down to the moment of the verdict", once an offer of amends has been accepted the impact of the libel upon the claimant's feelings will have greatly diminished and, as soon as the apology is published, it is also hoped that reputation will be to a large extent restored. It is naturally true that if a defendant or his lawyers thereafter should behave irresponsibly, or try to drag in material to "justify by the back door", that will be an aggravating factor. On the whole, however, once a defendant has decided to go down this route, it would make sense to adopt a conciliatory approach and work towards genuine

> compromise over matters such as the terms of an apology or the level of compensation.
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> 37. As I observed in *Cleese v Clark* at para [33], "I am not concerned with hypothesising as to what a particular group of 12 lay persons might have done, on the basis of what other groups of lay persons have done in the past". It is now appropriate, since the Court of Appeal's decision in *John v MGN* [1997] QB 586, to have an eye to personal injury awards with a view to keeping a sense of proportion and remembering the value of money."

20. The judge said that one of the reasons for the Neill Committee's recommendations of the new offer of amends procedure was to give media and other defendants a possible exit route when they face the uncertainty and arbitrariness of historic jury awards. It was in an attempt to remedy the difficulties over proportionality and unpredictability that the Court of Appeal suggested the changes of practice in *John v MGN Ltd*, in part responding to the decision of the European Court of Human Rights in *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442. In *John v MGN Ltd*, the Court of Appeal held that, in assessing the amount of an award of damages in defamation proceedings, a jury's attention could properly be drawn to awards which had been approved or substituted by the Court of Appeal and to conventional compensatory scales of damages awarded in personal injury actions. This was not as a precise correlation, but as a check on the reasonableness of the proposed award.

21. The judge then said at paragraphs 40 and 41:

> "40. Miss Page has indicated, in the course of her submissions, that parties in libel litigation are still feeling their way under the new offer of amends regime and, although it is being increasingly used "after a slow start", this process could well go into reverse if media defendants feel that they are still going to be subject to arbitrary and disproportionate awards; or, to put it another way, if they are not to be given due credit, in financial terms, for using the system and placing themselves in the hands of the court. It was not an *in terrorem* point, and it is entirely fair to make it, because of the public policy objectives underlying the adoption of the statutory scheme by Parliament. If they do not feel confident of getting a "healthy discount" for adopting what is, in effect, a conciliation process, then I suspect (although Miss Page did not put it in this way) that there may be a return to the tactic (sometimes encountered on the part of media defendants in the old days) of using their considerable resources to complicate and

> prolong litigation with a view to discouraging less wealthy litigants.
>
> 41. In my judgment, Miss Page is right to press for a "healthy discount" for the reasons I have already indicated. Media defendants who act promptly when confronted with a claim are entitled to be rewarded for making the offer and, correspondingly, the claimant's ordeal will generally be significantly reduced with immediate effect."

22. Miss Page had suggested a standard discount, possibly as high as two thirds. She referred to Morland J's decision in *Mawdsley v Guardian Newspapers Limited* [2002] EWHC 1780 (QB). Morland J was there concerned with whether the summary judgment procedure under sections 8 to 10 of the 1996 Act, with its ceiling of £10,000, was appropriate in a case in which a jury after a trial might award £30,000. He decided that it was appropriate. Under that procedure, there was also available a judicial declaration of falsity. In the present case, the judge was concerned with what was appropriate, necessary and proportionate for compensating Mr Nail in the circumstances in which he now found himself. It was dangerous to speak of a discount when there was no comparable starting figure because libel actions vary so much. The conduct of the litigation can also be very important. The judge then said at paragraph 46:

> "46. I think it is more helpful to focus on what I would have been inclined to award for these libels following a trial (i.e. sitting as a judge alone) in which there had been no significant aggravation (such as a plea of justification) and no significant mitigation (such as an apology). This is not a wholly artificial scenario. It might arise in various ways; for example, if there were a trial confined to meaning or qualified privilege (neither of which, at least in theory, adds further injury to the claimant's reputation). I would tend to ask, having regard to the current conventional overall ceiling for damages of £200,000, what the particular libel is worth on that scale of gravity. I would then aim to make a significant reduction to take account not only of any actual apology but also of the very willingness of the defendant to use the offer of amends route. A defendant is in those circumstances effectively laying down his arms, and inviting meaningful negotiation over compensation and restoration of reputation."

23. The judge applied his approach to the facts. In summary, he noted the following:

> (a) Most of the 4,500 copies of the book were out of bounds for limitation reasons.

(b) Without criticising Mr Nail or his lawyers, the judge could not entirely ignore the fact that Mr Nail had not complained about the initial publication of the book.

(c) The allegations in the book were serious and offensive, both personally and professionally.

(d) There were web site apologies. Few readers may have seen them, but there was little else the publishers could do.

(e) The newspaper article was very different. Tabloid coverage could be very frightening and disorienting. "The publication of a libel in a tabloid can be an intensely distressing experience, but the great advantage of the offer of amends system is that it does at least tend significantly to mitigate the impact and, to a greater or lesser extent, enable the relevant claimant (to adopt a modish phrase) "to draw a line" under the episode and to make a fresh start".

(f) The range of damages suggested on behalf of Mr Nail - £70,000 to £100,000 – was very high when set against personal injury awards, to which however one must not be too tied.

(g) The newspaper article was prominently published. The apology was not as prominent, although it was reasonably eye catching and published relatively quickly after proceedings were issued. There was nothing unusual about the sequence of events leading to the apology which had a bearing on the level of compensation.

(h) There was no attempt to contact Mr Nail before publication, although most of the allegations had already been published in the book without complaint.

(i) There was a short lived indication that the defendant might seek to justify some or all of the allegations.

(j) The judge accepted Mr Nail's explanations for why he was slow in pursuing his remedies.

(k) There was nothing in the conduct of the negotiations which justified any element of aggravation in either action.

24. The judge assessed compensation for the book publication at £7,500, which he described as a modest but by no means nominal level. His starting point for the newspaper publication would be £45,000, that is to say without taking account of mitigating factors. For those factors, he made a reduction of 50% to reach £22,500. Even after the discount, the judge described this figure as by modern standards still substantial.

Ground of appeal and submissions

25. Mr Nail's grounds of appeal contend that the judge applied a wrong principle that compensation, where there has been an offer to make amends, should be discounted to encourage other defendants to use the offer of amends procedure. Mr Tomlinson QC points to passages in the judgment: paragraph 35, that the very adoption of the procedure has a major deflationary effect on the appropriate level of compensation: paragraph 41, that Miss Page was right to press for a healthy discount for adopting a conciliation process otherwise there may be a return to tactics of the old days; and that media defendants are entitled to be rewarded for making the offer: paragraph 46, where the judge was aiming for a significant reduction to take account, not only of the actual apology, but *also* of the very willingness of the defendant to use the offer of amends route. This, says Mr Tomlinson, is contrary to the very terms of section 3(5), since there is no principle on which damages are awarded in defamation proceedings which gives a discounting benefit for adopting the statutory policy behind offers to make amends. The claimant should receive proper compensation (see *Milne*), not discounted compensation which penalises him for being conciliatory.

26. The proper purpose of compensation for defamation is, so far as money may, to mend hurt feelings, to restore reputation and to provide vindication. Vindication includes the claimant being able for the future to point to the size of the award to show the world that the defamatory publication was held to be untrue. Mr Tomlinson accepts that an offer to make amends and a prompt agreed apology may properly have a mitigating effect, but the need for proper vindication remains.

27. Mr Tomlinson submits that the judge's approach would result in irresponsible journalism. Irresponsible newspapers may be tempted to make defamatory publications confident that, if they are sued, a relatively cheap procedure is available which is likely to result in modest compensation. In *The Gleaner Co Limited v Abrahams* [2004] 1 AC 628; [2003] UKPC 55, a decision of the Privy Council on appeal from Jamaica, Lord Hoffmann, giving the opinion of the Board, indicated that there was, or perhaps should be, a deterrent element in the amount of damages in defamation cases. The Jamaican Court of Appeal had reduced a jury's award of damages to an amount which was still well above the contemporary English scale. The Privy Council upheld the Court of Appeal's decision, Lord Hoffmann saying at paragraph 72 that the Court of Appeal was entitled to take the view that, if their assessment had a chilling effect on the conduct of the kind under consideration, that would be no bad thing. The Board expressed no view on the current practice in England. But Lord Hoffmann said that the English practice of referring juries to awards in personal injury cases was controversial. He discussed the problem in paragraphs 49 to 56 of the opinion. He said at paragraph 53 that awards in an adequate amount may be necessary to

deter the media from riding roughshod over the rights of other citizens. As Sedley LJ had said in *Kiam v MGN Limited* [2003] QB 281; [2002] EWCA civ 43, at paragraph 75:

> "In a great many cases proof of a cold-bloodied cost-benefit calculation that it was worth publishing a known libel is not there, and the ineffectiveness of a moderate award in deterring future libels is painfully apparent … judges, juries and the public face the conundrum that compensation proportioned to personal injury damages is insufficient to deter, and that deterrent awards make a mockery of the principle of compensation."

Lord Hoffmann discussed the need for vindication in libel cases in paragraph 55, particularly if the defendant has not apologised and withdrawn the defamatory allegations.

28. Mr Tomlinson now accepts the judge's starting point of £45,000 for the newspaper publication. He accepts that an apology can have a mitigating effect, but says that the extent of the mitigation all depends on the facts, which the judge did not analyse properly. In particular, he did not take into account the actual effect which the apology had on Mr Nail. Mr Nail's evidence, which the judge accepted, included the complaint that the apology in the newspaper was small and misplaced, and he said that he himself continued to feel ashamed, notwithstanding the apology. In *Cleese*, the judge had taken into account the claimant's evidence that he was not satisfied with the apology. The judge did not take proper account of the timing of the apology which was some 14 months after the newspaper publication. Although proceedings were not brought until March 2003, there had been a letter of claim soon after publication. The judge did not take proper account – although he referred to it in paragraph 69 of his judgment – of the reality that most readers are unlikely to analyse or dwell on the contents of an apology.

29. In short, Mr Tomlinson submits that the mitigating effect of the apology in this case was very limited indeed. Further, there were aggravating features in a large volume of evidence served by the respondents at a late stage designed to show that Mr Nail had a general bad reputation. £45,000 should have been, not only the judge's starting amount, but the amount he ended with. If there should have been some reduction, 50% was far too great.

30. In contrast with the newspaper article, whose circulation was massive, the relevant publications of the book were few. But for these publications, the judge was wrong to say that Mr Nail contributed to his own misfortune by not bringing proceedings earlier. He should not have been criticised for not resorting to litigation. He should not have been criticised for not writing a letter of complaint in 1998. There was no point in doing so, if he had reasonably decided not to bring proceedings.

31. The judge did not explain how he reached £7,500, but Mr Tomlinson suggests that he must have given an equivalently wrong healthy discount, and wrongly taken into account the effect of previous publications.

32. Mr Tomlinson drew our attention to awards in other cases, whose details appear in *Kiam* from paragraph 35 in the judgment of Simon Brown LJ. These included *Gorman v Mudd*, 15th October 1992, where the publication had only been to 91 people. The Court of Appeal reduced a large jury award to £50,000. There were, however, features of that case which do not help Mr Tomlinson's submission. A plea of qualified privilege was upheld, but the jury found express malice. There was no apology. Rather, Mrs Gorman had been subjected to unpleasant cross-examination which had increased her sense of humiliation. In *Houston v Smith*, 16th December 1993, this court again reduced a jury award to £50,000. The publication was to a very small number of people, but again there had been no apology, a contested trial and a number of aggravating features. Further, Hirst LJ said that, if a prompt apology had been published the appropriate award would have been a very small fraction of £50,000.

33. Mr Tomlinson submitted that the judge's award in the present case was out of line with the award of £45,000 upheld by this court in *Kiam v Neil (No. 2)* [1996] EMLR 493. There was an allegation of insolvency against a well known businessman. An apology in agreed terms was published after 3 weeks. Miss Page points out that this court was reviewing the award of a jury. She submits that the libel in that case was much graver than in the present, the publication putting the claimant alongside Robert Maxwell. For her part, Miss Page submits that the present award in the newspapers action was in line with Eady J's award in *Cleese*, and with the award of Jack J as judge alone in *Jack Greenaway v Robert Poole* (see *Gatley* 10th edition at 1255). Jack J awarded £25,000 to each of two claimants for libels published in a newsletter and two election pamphlets making allegations of dishonesty, corruption and misappropriation by the claimants in connection with their roles in local politics.

34. In the Harper Collins case, Mr Tomlinson again submits that the apology, on their website and in the "Bookseller", should be regarded as slight mitigation only. He suggests a starting point in this case of £25,000, reduced, if at all, to no less than £20,000.

Discussion and decision

35. There is no dispute as to the principles on which damages are awarded in defamation proceedings. They were referred to by Sir Thomas Bingham MR giving the judgment of the court in *John v MGN Limited* at page 607 as follows:

> "The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also relevant; a

> libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation; but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross examines the plaintiff in a wounding or insulting way. Although the plaintiff has been referred to as "he", all this of course applies to women just as much as men."

36. The second paragraph of section 3(5) of the 1996 Act requires the court determining compensation under that sub-section to take account of matters which the court would take account of under the general law.

37. It is, in my view, important to bear in mind that determining compensation under section 3(5) of the 1996 Act is to be done by a judge alone. The judge is directing himself, not a jury. The need to give directions to try to avoid maverick or disproportionate awards scarcely arises. The judge is concerned to determine what he considers the proper compensation should be, not to speculate what a putative jury might award. Awards of general damages in personal injury cases are scarcely comparable, but the practice in this jurisdiction at the level of this court is to moderate awards in libel cases so that they are not disproportionately large when set against personal injury awards.

38. In the present appeal, it is not necessary to consider in depth comparisons with personal injury awards or the appropriateness of their use, although Eady J did consider personal injury awards. Mr Tomlinson, as I have said, now accepts that £45,000 was an appropriate starting amount for the newspaper publication. The practical issue is whether there should be any increase in, or reduction from, that amount, and, if a reduction is required, whether 50% was too great. As to the book, a practical approach, in my view, is to consider the judge's award of £7,500 with proportionate regard to this court's conclusion in the appeal in the claim against the newspaper.

39. I accept that the court must be careful not to drive down damages in libel cases to a level which publishers might with equanimity be tempted to risk having to pay. The obvious corollary is that the level of damages should not be so disproportionately high that freedom of expression is unduly curtailed. But in cases in which an offer to make amends has been made and accepted, questions of deterrence may not be of any great significance. As the facts of *The Gleaner* and *Kiam v MGN Limited* both illustrate, the possibility of deterrence is more often associated with conduct which might result in aggravated or exemplary damages and with malice. Malice is less likely to be in play where there has been an

accepted offer to make amends. A defendant against whom malice is alleged is less likely to make an unqualified offer to make amends. A claimant who wishes to establish malice, in the face of an offer which does not accept malice (as in *Milne*), would have to reject the offer and assume the burden of establishing the matters required by section 4(3) of the 1996 Act. More generally, an offer to make amends and its acceptance are in their nature conciliatory and there is no policy which needs to deter conciliation.

40. I accept Mr Tomlinson's submission as to the proper (and obvious) construction of the first sentence of section 3(5) of the 1996 Act. Compensation under the sub-section is to be determined "on the same principles as damages in defamation proceedings". As this court said in *Milne*, the claimant is entitled to proper compensation.

41. One principle on which damages are awarded in defamation proceedings is that they are assessed as at the point of assessment. Of necessity, they are not in fact assessed at the date of publication, nor are they notionally assessed then. A further consequent principle is that conduct of the defendant after the publication may aggravate or mitigate the damage and therefore the award. Each case depends on its own facts and this will apply to the determination of compensation under section 3(5). That said, if an early unqualified offer to make amends is made and accepted and an agreed apology is published, as in the present cases, there is bound to be substantial mitigation. The defendant has capitulated at an early stage without pleading any defence, has offered to make and publish a suitable correction and apology (and has in fact done so in agreed terms in the present cases) and has offered to pay proper compensation and costs, these to be determined by the court if they are not agreed – see sections 2(4), 3(5) and 3(6). The claimant knows that his reputation has been repaired to the full extent that that is possible. He is vindicated. He is relieved from the anxiety and costs risk of contested proceedings. His feelings must of necessity be assuaged, although they may still remained bruised (and he is still entitled to say so, if that is so). He can point to the agreed apology to show the world that the defamation is accepted to have been untrue and unjustified. There may be cases in which some of these features are absent, or in which their impact may be slight. An example could be if the defendant had offered and published a correction and apology, which the claimant had not agreed and which the court found to be unsuitable and insufficient – see section 3(5), second sentence. There may also be aggravating features, although the use of the procedure would generally suggest that there is unlikely to be significant aggravation after the making of the offer to make amends. "A healthy discount" may be a more colourful phrase than "substantial mitigation", but they mean the same thing.

42. Paragraph 40 of the judge's judgment was in large part reciting a submission of Miss Page. In paragraph 41, the judge said that Miss Page was right to press for a healthy discount "for the reasons I have already indicated". These reasons, as I read the judgment, were those in paragraphs 35 and 36, in which the judge gave his version of the same mitigating features to which I have referred. The adoption of the procedure will have what the judge referred to as a major deflationary effect upon the appropriate level of compensation because adopting the procedure is bound to result in substantial mitigation. I do think that the judge's use of the

word "rewarded" in paragraph 41 is superficially open to misinterpretation. But there is no distinction in substance between a reduction in compensation on account of the substantial mitigation bound to result from the use of the procedure and a "reward" for using the procedure, provided that the mitigating factors are not brought into play twice. I do not consider that these paragraphs taken as a whole indicate such an error of principle. Nor do I consider that the judge's use of the word "also" in the penultimate sentence of paragraph 46 indicates that he was making an erroneous double discount as a reward for using the procedure. The first part of the sentence refers to a reduction to take account of any actual apology. But an apology is by no means the only mitigating feature likely to be derived from the use of the procedure, as I have indicated. There was "also" the "very willingness of the defendant to use the offer of amends route", which includes, for instance, the willingness to pay proper compensation and costs, and to subject these to judicial determination if they are not agreed.

43. I do not therefore consider that the judge made, as Mr Tomlinson contends, an illegitimate discount in his determinations. In the News of the World action, he assessed the effect of what he correctly regarded as substantial mitigation at 50%. The question whether he was wrong to reduce his starting figure by as much as 50% raises no further point of principle.

44. It is important to recognise the assumptions which the judge made in reaching his starting point and the notional point in time at which he took it. Miss Page was correct to emphasise this; correct also, I think, to suggest that Mr Tomlinson's submissions sometimes strayed from those assumptions and that notional point in time. The judge spelled out these matters in paragraph 46 of his judgment. He took as his starting point the end of a trial in which there had been no significant aggravation (such as a plea of justification) and no significant mitigation (such as an apology), for example if there were a trial confined to meaning or qualified privilege. Importantly, therefore, the judge's notional claimant had to carry the proceedings with their attendant costs risks to the end of a trial. There was no apology, no mitigation. By contrast, the making and acceptance of an offer of amends with an agreed apology results in substantial mitigation having the features which I have indicated.

45. I turn to Mr Tomlinson's particular submissions. First, the judge was correct in my view to say that there were no aggravating features. Both parties came to court with additional documents. The defendant's documents were in part brought to answer documents which the claimant might seek to introduce. In the result, the judge correctly took account of neither side's documents. I should perhaps also add that a defendant who takes a judicial determination of compensation to the conclusion of a contested hearing does not by that fact alone aggravate the damage. Mr Tomlinson did not submit that this should be seen an aggravation. The defendant is simply exercising the statutory right to have compensation determined by the court when, for whatever reason, it cannot be agreed. This is in contrast with some defendants who unsuccessfully contest full libel proceedings with, for instance, a plea of justification.

46. Second, I do not consider that the apology in the News of the World case can properly be regarded as late. Its terms were the subject of negotiation and the apology was published within a reasonable time of the issue of proceedings.

Third, the judge did take account of the position and prominence of the published apology and its likely impact. Fourth, I agree that Mr Nail's evidence that his feelings were not assuaged was relevant, but this cannot neutralise the objectively necessary personal improvements for the claimant which the use of the procedure in this case must have brought about. The judge's judgment, taken as a whole, shows quite clearly that he had well in mind the "major and continuing distress to Mr Nail" to which he referred in paragraph 33 of his judgment.

47. In these circumstances, the question is whether the judge's determination of £22,500 for the News of the World publication was wrong to the extent that this court should interfere to increase it. I do not consider that it was. The judge made no error of principle. He gave proper and full consideration to all relevant factors and reached a balanced conclusion. The possibility that another judge might have reached a somewhat higher amount does not mean that Eady J's conclusion was wrong. I would reject entirely any idea that there might be a conventional or standard percentage discount when an offer to make amends has been accepted and an agreed apology published. Each case will be different and require individual consideration. But most such cases will, as I have said, exhibit substantial mitigation. This was, in my view, such a case.

48. As to the appeal in the Harper Collins case, Mr Tomlinson is likely to be correct that the judge, who must have found equivalent substantial mitigation, went through equivalent thought processes. Mr Tomlinson was also correct in accepting pragmatically that the award in this case should be proportionate to the proper award in the News of the World case. Proceedings were not started until they were, and the claim concerned a small number of relevant publications. Mr Tomlinson's additional submission that the judge was wrong to penalise Mr Nail for not bringing proceedings earlier, seems to me to be of little weight. The judge merely said in paragraph 47 that he could not ignore it entirely on the issue of compensation.

49. As with the News of the World publication and for equivalent reasons, in my judgment this court cannot say that the judge's award of £7,500 was wrong to the extent that this court should interfere with it.

50. For these reasons I would dismiss this appeal.

Lord Justice Gage :

51. I agree.

Lord Justice Auld:

52. I also agree.