Neutral Citation Number: [2008] EWHC 278 (QB)

Case No: TLJ/07/0677

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2008

Before :

MR JUSTICE TUGENDHAT

Between :

Sheldon Adelson & **Las Vegas Sands Corporation**	**Claimants**
- and -	
Associated Newspapers	**Defendant**

Mr James Price QC, Mr Justin Rushbrooke & Mr Godwin Busuttil (instructed by **Schillings**) for the **Claimants**
Mr Mark Warby QC & Mr William McCormick (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing dates: 28, 29, 30th January 2008

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.

.....

MR JUSTICE TUGENDHAT

MR JUSTICE TUGENDHAT
Approved Judgment

Mr Justice Tugendhat :

1. At the start of the hearing on 28 January 2008 I made an order pursuant to Section 4 (2) of the Contempt of Court Act 1981. Eady J is expected to be the judge who tries this case. Applications which involve disclosure of information which a trial judge and a jury (if there is to be one), should not know have been listed before me. Such information includes offers under Part 36 and open offers: see Gatley on Libel and Slander 10th ed para 29.25. The terms of the order are:

> "**IT IS ORDERED** THAT:
>
> 1. there be no publication of any reference to (a) the fact of or any information about any CPR Part 36 offer of settlement or payment into court, (b) any communications between the parties relating thereto, (c) the amount of compensation offered by the Defendant to the Claimants as part of its open offer of settlement dated 6th November 2007 or (d) evidence or argument as to the Defendant's motives or state of mind in connection with the open offer".

2. The action is for libel in respect of an article published in the issue of the Daily Mail dated 28 May 2005. Included in the title are the words which give the gist of the piece:

> "Revealed... the ruthless casino baron who rules Las Vegas and is helping United's new owner in a desperate bid to fund his debt".

3. "United" is Manchester United Football Club, whose new owner was a Mr Glazer. The "Casino Baron" is identified in the article as the First Claimant ("Mr Adelson"). The article contains an account of Mr Adelson's business activities from when he was aged 12 until the present day. He is in his seventies. In the article he is referred to as "the owner of the Las Vegas Sands Gambling and Leisure Empire", but none of the companies controlled by him is identified by its name. In the Particulars of Claim it is said that Mr Adelson is the Chairman and Chief Executive Officer of the Second Claimant, which is a public company incorporated in Nevada, USA, and that the Second Claimant (through its operating subsidiaries) predominantly trades and operates in the gambling industry, developing and running casino-based gambling, entertainment and leisure resorts and their associated hotel, restaurant and retail facilities.

4. The article refers to a proposal for a joint venture between Mr Glazer and Mr Adelson for a vast new casino to be opened in Manchester. This would, of course, have required a licence under the Gambling Act 2005, which had, at that time, been much discussed in the media and by the public for some time. The theme of the article is that such a venture would bring unwelcome changes to football in general and to Manchester United in particular. As Eady J noted on 19 December 2007 para 18, in July 2007 the Government apparently abandoned what was known as the "super casino project".

5. The Claimants are represented before me by Mr Price QC, Mr Rushbrooke and Mr Busuttil. The Defendants are represented by Mr Warby QC and Mr McCormick.

6. This action has been the subject of several judgments, including that of the Court of Appeal of 9 July 2007 to be found at [2007] 4 All ER 330, [2007] EWCA Civ 701, my own of 1 May 2007 [2007] EWHC 997 (QB), in which the Particulars of Claim are set out, and Eady J's of 19 December 2007 [2007] EWHC 3028 (QB).

THE DEFENDANT'S APPLICATION NOTICE

7. On 13 December 2007 the Defendant issued an Application Notice. It applied for four heads of relief. The fourth and most important was for the order that all further proceedings in this action be stayed, or that it be dismissed, on the ground, briefly, that a full trial is neither necessary nor justifiable, that the game is not worth the candle (a phrase cited from *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75; [2005] QB 946 para 69). Jurisdiction to stay a claim is to be found in CPR Part 3.1(2)(f). While it is strenuously defending the action, the Defendant nevertheless recognises that Mr Adelson's claim is real and substantial. What it says has now made the pursuit of that claim an abuse of the process of the court is the combination of two factors. First, the parties estimate that the costs to both parties of taking the case to trial would be over £8m, of which about half has already been incurred, £2.95m by the Claimants and £1.2m by the Defendant. Second the Defendant made an Open Offer on 6 November 2007 ("the Open Offer"), which, it submits, affords the Claimants all reasonable vindication and financial and other relief, so that it is now disproportionate for the Claimants to pursue their claim further. If the Claimants are not willing to accept the offer, they should not be permitted to proceed with the action. It is not suggested that either party lacks the resources to fund the litigation on this scale, or to pay the costs of the other if ordered to do so.

8. If this jurisdiction to stay proceedings can be invoked in a case such as this, it provides a procedure for defendants, not hitherto recognised, in addition to the procedures under CPR Part 36 and under the summary jurisdiction in s.8 of the Defamation Act 1996, whereby a defendant can be saved from incurring costs which are disproportionate to what is, or remains, in issue in the action. In *Jameel* at paras 54, 70-71 the Court of Appeal confirmed that it can be an abuse of process to continue to commit the resources of the court, including substantial judge and possibly jury time, to an action where very little is at stake. In cases where that jurisdiction has been exercised hitherto, it has been because that was considered to be the character of the claimant's claim, taken by itself, at the time the stay was imposed (see *Schellenberg v BBC* [2000] EMLR 296 and *Wallis v Valentine* [2002] EWCA Civ 1034; [2003] EMLR 175). The novelty of the present case is that it is accepted that the proceedings were not an abuse of the process of the court until the Defendant made an Open Offer, but it is submitted that that offer gives all the relief that the claimants can properly expect to obtain in the action, so that, if they do not accept the offer, the continuation of the proceedings will be an abuse of process.

9. The Defendant's application for a stay does not relate to the whole action. In particular it does not relate to those words complained of by the Claimants, in respect of which the Defendant has made an offer of amends, or admitted liability. In respect of matters where there is an offer of amends, which has been accepted, the Defendant asks for an order that the court assess the appropriate relief without a full trial. It is

also said that two other matters in respect of which liability is admitted should be resolved without a full trial. Finally, (although first in order on the Application Notice) the Defendant applies for an order that the issues in this case are fit only for trial by a Judge sitting without a jury. This is advanced as a subsidiary point to the primary application for a stay or dismissal of the action, in case it needs to be decided for that purpose.

10. The Defendant also has a separate, but related, application in relation to the Second Claimant. See para 111 below.

11. A summary of the Defendant's position can be taken from what is referred to as the Rider to the Defendant's Application Notice, in relation to the First Claimant. It reads as follows:

> "3 D has made and C1 has accepted an offer of amends in respect of two defamatory statements complained of by C1, namely statements about C2 suing itself … and about C1 allegedly sending a friend to tell his wife that he wanted a divorce… The court can and should assess the appropriate relief in respect of those matters without a full trial.
>
> 4 There are two further statements complained of in respect of which D has admitted liability and apologised to C1. These are statements about the way the agreement with Manchester United was announced… and about the C1's share dealings with his stepsons… The only remaining issues as to these aspects of the article are what defamatory meanings were conveyed and remedies. The court can and should determine meaning and the appropriate relief without a full trial.
>
> 5 D has made, in respect of the statements referred to at 3 and 4 above and the C1's other claims which are disputed by D ("C1's Remaining Claims"), a comprehensive open offer ["the Open Offer"], unlimited in time to settle the claim. The relief first made available includes substantial damages, undertakings not to repeat and a correction and apology to be made in court and reported in the newspaper. If necessary, the judge can rule on the defamatory meanings to be corrected and apologised for, and the terms of the statement in court. There is no realistic prospect of C1 achieving at a trial any additional tangible or legitimate advantage which would outweigh the disadvantages to the parties and to the wider public in terms of court resources of the case proceeding to a trial; pursuit of the claims to a trial would be contrary to the overriding objective and an abuse of the court's process. If C1 does not accept D's offer within 21 days (or such other period as the court shall determine) C1's remaining claims should be stayed or dismissed".

THE CLAIMANTS' APPLICATION NOTICE

12. On the same day the Claimants issued an Application Notice. It reflects the Defendant's application. The Claimants apply for an order that, given the proposed admissions of falsity in the draft Statement in Open Court, the defence of justification be struck out, and that judgment be entered for the Claimants, alternatively for the First Claimant, on liability, with damages to be assessed.

CHRONOLOGY

13. So far as material to the issues I have to decide, the timetable of events is as follows. The words complained of were published in the issue of the Daily Mail dated 28 May 2005. Complaints about the article were made on behalf of the Claimants by solicitors in letters dated 2nd and 8th June 2005 and 20th September 2005. On 19th October 2005 the Claim Form was issued and Particulars of Claim served.

14. On 10th January 2006 the Defendant made a qualified offer of amends under the Defamation Act 1996 Section 2. The Defendant accepted that the article bore two "defamatory meanings which are not justifiable or otherwise defensible". These were:

> "(a)That one of the pieces of litigation brought or caused to be brought by the Claimants was a bizarre and irrational claim for damages by the second Claimant and one of its own affiliated companies against another related company, the Venetian Casino resort.
>
> (b) That the first Claimant behaved callously by sending a friend to tell his first wife he wanted a divorce, on the night before she underwent an operation for cancer".

15. On 12 January 2006 the Defendant served a Defence. It advanced a substantive defence of justification in respect of meanings similar to those complained of in two paragraphs of the Particulars of Claim and a defence of reporting privilege in respect of another paragraph. The Particulars of Justification extended to sixty four paragraphs.

16. On 15 May 2006 the Claimants served a Reply. On 12 June 2006 Master Yoxall gave directions. These included a trial window of between 1 May 2007 and 31 July 2007.

17. On 29 June 2006, in a letter marked "without prejudice save at to costs" ("WPSAC"), the Defendant made their first offer to settle the entire claim pursuant to CPR Part 36. The offer was to pay compensation of £65,000 in total. This was allocated as to £57,500 to Mr Adelson's claim and as to £7,500 to the second Claimant's claim. They also offered to publish a short apology, a draft of which they produced. The Claimants' position on this offer was that it was inadequate both as to the amount and as to the terms of the proposed apology. The words which the Defendant was prepared to agree to were subject to a number of matters, including any reasonable amendments the Claimants might wish to suggest. The words summarised the meanings complained of and then included the following:

> "We are happy to accept Mr Adelson's assurances that such allegations are unfounded, and that it is similarly untrue that he asked his first wife for a divorce on the night before a cancer operation. We apologise for any embarrassment or distress caused. We are also happy to reiterate that fraud claims made against Mr Adelson by his stepsons were proved in court to be unfounded".

18. On 10 October 2006 the trial was fixed to start on 18 June 2007. On 17 October 2006 the Defendant made its second Part 36 offer ("the Part 36 Offer") to settle the entire claim. The figure in respect of Mr Adelson's claim was increased to £97,500, making the total amount of money offered £105,000. The Defendant offered to join in a Statement in Open Court "if suitable wording can be agreed", to publish in the *Daily Mail* a summary of any agreed statement, to give suitable undertakings not to republish, and to pay the costs of the litigation on the standard basis, to be assessed if not agreed. On this occasion the Defendant did not put forward a draft of the proposed Statement in Open Court.

19. There followed an exchange of correspondence marked WPSAC. This continued until March 2007.

20. On 3 November 2006, the Claimants' solicitors wrote in reply to the Defendant's letter of 17 October 2006. They emphasised the importance the Claimants attached to the wording of a Statement in Open Court. They said that it was of cardinal importance that the parties establish as soon as possible what each other's position was in relation to that. They enclosed a draft which they described as non-negotiable, subject only to reasonable editorial amendments. They added that if agreement could be reached on the statement and what was to be published by way of apology in the *Daily Mail*, there seemed a good prospect of the parties reaching terms of settlement. In other words, the Claimants at that stage raised no issue on the amount of damages, although they did not formally accept that the figure paid into court was sufficient.

21. The terms of the draft proffered by the Claimants on 3 November 2006 subsequently became of importance, because in 2007 they were largely used in a draft prepared by the Defendant as part of the Open Offer. The Claimants' draft was in the conventional form, in that it included text to be read out by counsel for the Claimants. This makes up the bulk of the Statement. It sets out the meanings complained of and includes the words "all of the allegations are absolutely and utterly false". It then summarises the Claimants' version of the events in question. It then includes words which the Defendant characterises as attacking its' "editorial integrity."

22. The draft continues with a text to be read by counsel for the Defendant. It is in conventional words as follows:

> ".... I wish to associate myself on behalf of the Defendant with everything that has been said by [Counsel] for the Claimants. The Defendant unreservedly withdraws the allegations against Mr Adelson and Las Vegas Sands and wishes to apologise personally and publicly to them for the damage and distress caused by the publication of this article. The Defendant undertakes to the Court that they will not further publish or

> cause or permit to be published the allegations complained of or any of them".

23. On 22 November 2006 solicitors for the Defendant responded that the Part 36 offer was their client's final position. They made no comment on any particular part of the draft statement. They wrote:

> "Your client will be entitled to a Statement in Open Court and its terms and coverage by our client are all matters to be dealt with if your clients now wish to accept the Part 36 offer, but that decision needs to be made first".

24. On 28 November 2006 solicitors for the Claimants wrote requesting that that letter and their letter of 3 November 2006 be treated as formal requests pursuant to CPR 36.9 for clarification of the Part 36 offer in relation to two matters namely, the publication of an apology in the newspaper and the terms of a Statement in Open Court.

25. On 4 December 2006 solicitors for the Defendant replied. They said that if the money paid into court were accepted, then they hoped it would be possible for the parties to agree a wording for a Joint Statement in Open Court. They envisaged that that would include an apology which would also appear in the newspaper. They did not accept that the letters were valid requests under CPR Part 36.9. They ended saying that unless the Claimants stated unequivocally whether or not they were prepared to accept the money in court, on the footing that detailed negotiations on wording of a Joint Statement would follow, then the litigation would have to continue.

26. On 22 December 2006 solicitors for the Claimants replied. They made no mention of the money. Instead they emphasised that the action was brought to obtain vindication, and that there could be no progress unless and until the Defendant put forward concrete proposals as to the content and prominence of the Apology and the Statement in Open Court. After a further letter from the Claimants, on 26th February 2007 solicitors for the Defendant wrote again. They said that "we now take it that our clients' Part 36 offer of damages is in itself acceptable". They reminded the Claimants that they had provided the wording of an apology on 29 June 2006. They objected to the Claimants' draft sent on 3 November 2006, insofar as it contained what they said was an attack on the Defendant's editorial integrity.

27. In January 2007 the Defendant served Further Information of its own case and requested Further Information about the Claimants' case. Directions were given by consent for disclosure and exchange of witness statements. On 2 February 2007 standard disclosure took place in accordance with the agreed directions, but witness statements were not exchanged on the agreed date of 16 March 2007. That date was postponed by agreement to 30 March 2007, following a request by the Defendant for further disclosure. The Claimants served the Further Information that had been requested in January.

28. As mentioned above, on 19 March 2007 the WPSAC correspondence between the parties came to an end. The Part 36 offer was not rejected, but the Claimants declined to commit themselves on the money, and the Defendant declined to advance matters as to the terms of any statement.

29. On 27 March 2007 the Claimants' solicitors wrote to the Defendant in relation to the Defendant's requests for further disclosure and information made on 12 and 21 March 2007. The Claimants' position was that the Defendant's requests were unreasonable and disproportionate, and that the Defendant was not complying with the overriding objective. The next day, which was now two days before the revised agreed date for the exchange of witness statements, the Defendant issued an Application Notice seeking an Order for the further disclosure and information which it had requested. On the same date the Claimants accepted the Defendant's offer of amends made on 10 January 2006 in respect of the allegations that the second Claimant had sued itself and Mr Adelson had sent a friend to tell his wife that he wanted a divorce.

30. On 13 April 2007, the Claimants issued an Application Notice to amend the claim to add two new corporate Claimants, and to expand Mr Adelson's claim for aggravated damages. On 17 April the Defendant issued an Application Notice applying, amongst other relief, for an order that the second Claimant's claim be struck out or summary judgment given against it.

31. Those applications came before me for argument on 25 April 2007. On 1 May 2007 I refused permission to the Claimants to add the two new Claimants and refused the application to strike out or give summary judgment against the second Claimant. I also refused the application of Mr Adelson to amend his plea of aggravated damages. At the time I delivered that judgment the trial was still fixed for July 2007. The Claimants applied to the Court of Appeal for Permission to Appeal against my decision. That court refused permission in relation to the aggravated damages, granted permission in relation to the joinder of the two new Claimants and, on 9 July 2007, dismissed the appeal.

32. Meanwhile, on 20 and 23 April 2007 Eady J had ordered that exchange of witness statements be deferred to 22 May 2007. On 4 May 2007, the Defendant issued an Application Notice for permission to amend the Defence and Particulars of Justification. The new allegations sought to be introduced included:

    i) That Mr Adelson and the second Claimant were guilty of corruption in relation to political donations;

    ii) That Mr Adelson denounced one of the beneficiaries of his political donations, not to expose the unethical nature of their actions, but out of revenge for that person daring to vote against him in relation to a planning application for the Venetian;

    iii) That Mr Adelson and the second Claimant while engaged in a lawsuit before the Labour Relations Board concerning collective bargaining, caused witnesses to give evidence when they knew that the witnesses were dishonest. Before that the Claimants had brought an "utterly unmeritorious" and "hopeless" claim against the Las Vegas Convention and Visitors Authority "which was rightly dismissed by the court";

    iv) That the Claimants funded TV advertisements attacking Shelley Berkley, their former in-house legal counsel, intending to

prevent her succeeding in an election and to manipulate the democratic process;

v) The Claimants pursued an oppressive unreasonable and absurd libel action against the *Las Vegas Sun* in an attempt to stifle legitimate press criticism of their operations;

vi) In relation to the Claimants' proposal to site a casino at Old Trafford in Manchester, they had shown a reckless and callous disregard for the welfare of the people whom [they] hoped to persuade to gamble, and for the welfare of the wider community in which those people live.

33. On the same day the Defendant abandoned four paragraphs of its existing Particulars of Justification. These concerned an allegation that the Claimants "had quite deliberately sought to release news of the tie up with Manchester United quietly and without drawing attention to it". The Defendant recognised that this was wrong and that it was appropriate to apologise.

34. On 11 May 2007 Eady J made an order including that the Defendant's application for the action to be tried by judge alone be adjourned, with liberty to restore after exchange of witness statements. That application has in fact been restored before me, notwithstanding that exchange of witness statements has not occurred. The reason why it has been restored, submits Mr Warby, is that on one view (albeit not his primary submission) it may be necessary for me to resolve the mode of trial in order for me to be able to reach a decision on his primary application for a stay of proceedings.

35. On 14 May 2007 the Defendant admitted that the allegation that Mr Adelson had behaved improperly in relation to his share dealings with his stepsons was unjustified. On 18 May 2007 Eady J gave permission for the amendments to the Defence and adjourned the trial date (for the first time) to 22 October 2007. Exchange of witness statements was put back to 13 July 2007.

36. As already mentioned, on 9 July 2007 the Court of Appeal dismissed the Claimants' appeal against my refusal to permit the addition of two new Claimants. On the same day, which was four days before the date for exchange of witness statements, the Defendant served draft amendments to their Further Information of Particulars of Justification. This was a 41 page document which related to litigation with a Mr Zukov. That litigation was referred to in the article complained of (although Mr Zukov was not identified). In the Particulars the Defendant made allegations of grave misconduct by the Claimants in relation to the litigation against Mr Zukov. These included, deliberate delay and intimidation, deliberate suppression of discloseable documents, dishonestly misleading the court and attempting to blackmail the court into granting certain relief sought.

37. On 26 July 2007 Eady J gave permission to the Defendant to introduce the new case in relation to the Zukov litigation provisionally, pending service of the Claimants' response to that new case. At the same time he adjourned the trial for the second time, and it was refixed to commence on 3 June 2008 with an estimate of 6 to 9 weeks. The Claimants say that in order to prepare their answer to these 41 pages of

new allegations they had to incur huge expenditure of time and costs, that they recognise that the new case will be definitively permitted to be adduced at least to some extent, but at this stage they submit that it is not possible to know how much will be permitted.

38. On 16 October 2007 the Defendant abandoned two parts of its defence of Justification. First, they abandoned the allegation that the Claimants had involved themselves in an inordinate number of court cases, and used litigation excessively and disproportionately. Secondly, they abandoned the case, added on 4 May 2007, that Mr Adelson had made a corrupt contribution to an election campaign.

39. On 17 October 2007 solicitors for the Claimants wrote that costs of about £240,000 had already been incurred by the Claimants in responding to the Defendant's amended case on the Zukov litigation which had been permitted by the order of Eady J on 26 July 2007. The Claimants asserted that they interpreted that Order as meaning that the Defendant was to pay those costs.

40. On 25 October 2007 the Claimants made two new applications. The first was for permission to amend the Particulars of Claim to permit the Second Claimant to include, as part of its claim for damages, a claim for damage caused to the reputation to the Las Vegas Sands Group as a whole. An application was also issued on behalf of two corporations, those whose joinder I had refused to permit in May 2007, for an order pursuant to "Section 32A of the Limitation Act 1980", dis-applying the limitation period in respect of claims for libel which were to be advanced in respect of the same article as that sued on by the existing Claimants.

THE OPEN OFFER

41. Up to this point in the litigation there was nothing in any of the steps or stances taken by the parties which is in principle unfamiliar to lawyers practising in this field. But on 6 November 2007 the Defendant took a step which, whether or not it is unprecedented, is one that has not come before the courts for consideration before. They made their Open Offer of settlement. The offer included:

    i) To publish an appropriate correction and apology by way of a joint statement in open court to be fully reported in the newspaper;

    ii) Undertakings not to repeat the words complained of;

    iii) To pay the total sum of £105,000 to compensate both Claimants for all aspects of the claim including those the subject of offers of amends, to be apportioned between the Claimants as they consider appropriate;

    iv) An offer for costs in terms set out below.

42. Enclosed with the letter of 6 November was the draft of texts to be published in the Daily Mail newspaper and of the joint Statement in Open Court. The text of the draft Statement was substantially based on the text submitted by the Claimants a year earlier, on 3 November 2006, except that it omitted the passages which the Defendant claims impugn its editorial integrity. Significantly the text included the words "all of the allegations are absolutely and utterly false", together with the words taken from

the 2006 draft, to be said by counsel for the Defendant. For the purpose of the proceedings before me, nothing turns on any differences there may be between the Claimants' text in 2006 and the Defendant's text in 2007.

43. Two weeks later, on 20 November 2007, the solicitor for the Defendant signed the statement of truth at the end of the forty one page document containing further information on the defence of justification relating to the Zukov litigation. The wording is of course in the standard form, but in the light of the submissions of Mr Price, it is to be noted that that form is as follows:

> "The defendant believes that the facts stated in the "Amendments to Defendant's Further information" are true and I am duly authorised by it to sign this statement on its behalf".

44. Although the Statement of Truth is dated 20 November 2007, the draft itself is signed by counsel and dated 9 July 2007. The Claimants' response to that document covers one hundred and fifty six pages. It was served on 29 November 2007. The Defendant has not served a reply to the Claimant's response, but would be expected to do so, if the action proceeds.

45. Meanwhile on 26 November 2007 solicitors for the Claimants wrote their response to the Open Offer. They did so in the form of two letters, one open and one marked WPSAC. The open letter made no reference to the figure offered as damages. The open letter expressed delight at the terms of the draft Statement in Open Court while not going so far as to agree to it in terms.

46. In the Open Offer the Defendant had included the words:

> "Our client is not, by this letter abandoning the defences or other points which are currently pleaded on its behalf. It hopes that the offer will be acceptable and will be accepted, but unless and until it is accepted our client will be entitled to maintain its pleaded position..."

47. In their open letter of response of 26 November 2007 the Claimants' solicitors raised a number of points. The most important are these. As to the text of the draft statement, while they welcomed it, they said that it no longer went far enough because the Defendant had made a number of very hurtful and damaging allegations since November 2006 in the course of the proceedings, in particular allegations of corruption. They required that the Statement be expanded to deal with these aggravating matters. However, that was not the most important point from the Claimants' point of view. They contended, as they have contended before me, that the Open Offer is fundamentally defective and incapable of acceptance or performance, for two main reasons.

48. The Claimants submit that a defendant cannot at the same time, and publicly, both assert the truth of a defence of justification and state that they are willing to make a Statement in Open Court acknowledging that the allegations, the subject of the plea of justification, are "absolutely and utterly false". This point is premised on the well established proposition that a defendant may not put on the record a plea of justification unless he believes it to be true: see *McDonald Corporation v. Steel*

[1995] 3 All ER 615. But it is fortified by the more recent requirement in the CPR that parties verify all statements of case with a Statement of Truth. The Defendant had made a fresh Statement of Truth, in respect of part of the Defence of Justification since making the Open Offer, and could not face both ways.

49. Mr Price, in his submissions before me, further submitted it must follow that either the Statement of Truth was dishonest, or the offer to make the Statement in Open Court was dishonest.

50. The second main point made in the Claimants' open letter of 26 November was that the proposal in relation to costs was also defective. This point is considered in detail below.

51. In summary, in the light of the Open Offer, the Claimants contend that the defence of justification must in any event be withdrawn or struck out if the case proceeds, subject to any clarification of its position that the Defendant may give. And if the case is to be settled there must be, not only a different proposal as to costs, but also agreement on an expanded Statement in Open Court, and further discussion as to damages.

52. In the Claimants' letter of 26 November 2007 WPSAC they required an offer of damages increased to take into account the new allegations made since November 2006. They stated that they had little doubt that the damages awarded by a jury or a judge sitting alone would exceed £105,000. They did not specify a figure. On 12 December 2007 they continued to decline to specify the figure they required. While that remained the Claimants' stance before me, Mr Price also made clear that a difference between the parties as to the amount to be paid in respect of damages was unlikely, by itself, to prevent a settlement being reached.

53. On 13 December 2007, as already recorded, the parties issued the Application Notices which are now before me. Meanwhile on 4 December 2007 Eady J heard the Claimants' Application to Re-Amend the Particulars of Claim and the application under Section 32A of the Limitation Act 1980. On 19 December 2007 Eady J gave judgment dismissing these applications. On 21 January 2008 applications were made to the Court of Appeal for permission to appeal against those decisions of Eady J. The outcome of those applications is not yet known.

54. Also on 13 December 2007 the Defendant served a draft re-amended Particulars of Justification by which they proposed to justify the allegation that Mr Adelson acted unreasonably and oppressively in the course of a dispute between himself and Moshe Hananal, and that in relation to other litigation Mr Adelson was responsible for the making of an unfounded allegation of fraud and malice.

APPLICATION TO STRIKE OUT THE DEFENCE OF JUSTIFICATION

55. Further clarification was sought by the Claimants and given by the Defendant on whether the Defendant believes the matters pleaded by way of defence of justification to be true (other than those which it has specifically withdrawn and accepted to be false). There is now no ambiguity. Mr Warby has stated clearly in court that the Defendant does believe in the truth of these matters. In the light of that, as Mr Price accepted in his skeleton argument, the Claimants' application to strike out the defence of justification cannot succeed.

56. However, Mr Price submits that it follows from this that the draft Statement in Open Court cannot be read. I turn to that question next.

COULD THE STATEMENT IN OPEN COURT BE READ?

57. On the facts of this case, the Defendant cannot at the same time believe that the matters pleaded by way of justification are true, and that the allegations against the Claimants, as summarised in the draft Statement, are all absolutely and utterly false. Nor did Mr Warby submit that the Defendant could at the same time believe both these propositions to be true.

58. It is important to note that that is the position in this particular case. It will not necessarily be the position in other cases in which there is a plea of justification on the record, and where the defendant is making an offer of settlement which includes a Statement acknowledging the falsity of allegations summarised in the statement. The defendant's state of mind may have changed over an intervening period, so the statements which would be inconsistent if made simultaneously, are not inconsistent. In settlement negotiations conduct without prejudice or WPSAC it may be possible for a defendant to indicate a possible willingness to make an apology and retraction, without revealing whether he has yet made up his mind whether he still believes in the plea of justification or not. He may conduct such negotiations before he has made up his mind. His mind may fluctuate, depending on whether the evidence he expects becomes available or not.

59. There may also be cases where words of the proposed statement may not be incompatible with the matters pleaded in justification (for example where a defendant is justifying a meaning other than the meaning relied on by the claimant). Or there may possibly be other reasons why there is not contradiction. But there is no suggestion that belief in the truth of the plea of justification, and willingness to make the statement in open court can be reconciled in this case in any of these ways.

60. Mr Warby advances two answers to Mr Price's submission. First, he submits that it is possible honestly to maintain the truth of published allegations whilst simultaneously stating openly a willingness to acknowledge publicly that they are false. He submits that there is no significance in the fact that in the present case the offer was made openly. Such offers are commonly made in correspondence marked "without prejudice" or WPSAC, and if Mr Price's submission is right, it would follow that a defendant who made such an offer which was not accepted would be taking a very grave risk. If the case then went to trial, and the claimant recovered less than a sum that the defendant had paid into court, the WPSAC correspondence would become open. The judge would then see that the defendant had pursued to trial (and failed on) a plea of justification which, at an earlier time, he had been willing to acknowledge was false. The successful claimant would then ask for costs on the basis that the pursuit of the defence had been dishonest and an abuse. Mr Warby does not suggest there is any case where this has happened, and I am not aware of any case where it has happened in the past. But that does not affect the point of principle. Mr Warby accepts that the Defendant has taken that risk in the present case. If this action goes to trial, and if the plea of justification fails, it will be open to the Claimants to submit on costs that in November 2007 the Defendant was equivocating as to whether it believed the plea.

61. This submission of Mr Warby does not seem to me to engage with the point at issue. Rather it is directed to the inconvenience that would follow if Mr Price's submission be right. I accept that inconvenient consequences do follow if Mr Price is right. The court encourages attempts at settlement and compromise, and it is inconvenient if the parties cannot safely indicate a particular negotiating position. There is a relationship between the amount of damages which is proper in a libel action and the form of any statement to be made in open court.

62. In *Cleese v Clark* [2003] EWHC 137 (QB); [2004] EMLR 37 Eady J addressed that relationship between the amount of damages and the form of any statement. He did so in the context of compensation to be awarded on the offer of amends procedure under s.3(5) of the Defamation Act 1996. But what he said at para 20 applies equally to settlement negotiations:

> "... the amount of financial compensation is likely to be assessed partly be reference to the timing, scope and effectiveness of any apology made, or proffered, and it clearly makes sense for the two matters to be on the agenda for discussion at the same time."

63. A claimant has an incentive to ask a defendant to join in a statement saying that the allegations are all false, because that provides greater vindication. And a defendant has an incentive to agree, since if he does, the claimant is likely to be willing to accept less money.

64. I accept Mr Warby's submission that there is no difference in principle between an open offer and one made WPSAC in so far as this issue is concerned.

65. Mr Price submits that a defendant must act according to his beliefs, and accept the financial consequences of his own convictions. If he believes the words complained of to be true, but does not wish to continue defending the action, he does not have to join in the making of a Statement saying the words complained of are false. One option open to him is to pay money into court, and make either no statement, or a statement which does not declare the words complained of to be false (provided the claimant will accept that). Another option open to a defendant is not to defend the claim on liability, and submit to an assessment of damages. In each case, of course, it is implicit that the defendant would be exposing himself to a greater liability in damages than if he were willing to say, what he does not believe, namely that the words complained of are false.

66. The matter is not solely in the hands of the parties. The court must also be involved in any statement. The parties do not have a right to make a Statement in Open Court. They have to seek permission of the judge. See the White Book para 53PD.43, and CPR Part 53 Practice Direction para 6, which reads:

> "6.1 This paragraph only applies where a party wishes to accept a Part 36 offer or other offer of settlement in relation to a claim for – (1) libel; ...

> 6.2 A party may apply for permission to make a statement in open court before or after he accepts the Part 36 offer in accordance with rule 36.9(1) or other offer to settle the claim.
>
> 6.3 The statement that the applicant wishes to make must be submitted for the approval of the court and must accompany the notice of application.
>
> 6.4 The court may postpone the time for making the statement if other claims relating to the subject matter of the statement are still proceeding."

67. It is unusual for a judge to refuse permission for a bilateral statement. Before giving permission, the judge will not carry out any investigation of whether the statement to be read is true or false. It is not the function of the court to carry out an independent investigation. As Lord Wilberforce put it in *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 438:

> "In a contest purely between one litigant and another, such as the present, the task of the court is to do, and be seen to be doing, justice between the parties - a duty reflected by the word "fairly" in the rule. There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter: yet if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done."

68. In a libel action there may be a verdict or judgment which is not, and is known not to be, the whole truth of the matter. That would be the position after the trial if a defendant, having evidence to prove a defence of justification, did not adduce it. That may happen for a number of reasons. He may have no legal right to adduce the evidence (eg because it is protected by a third party's legal professional privilege). He may be unable or unwilling to afford the costs that he would incur, or risk, if he did adduce it. Or he may simply choose not to adduce it, for whatever reason.

69. The court will normally give permission for the Statement to be read (unless there is some other point, such as a valid objection by a third party: *Barnet v Crozier* [1987] 1 WLR 272). It may be that on occasions in the past parties have made Statements in Open Court which one (or even both) do not believe to be true, or know to be false. If that fact does not come to the attention of the judge before the Statement is read, then he will be likely to grant permission. No case has been cited to me where the judge had to consider a statement by a party which that party was asserting to be false.

70. In my judgment the judge will not give permission for a Statement in Open Court to be read if, before the Statement is read, he is informed by one of the parties that that party proposing to join in the making of a statement which he believes to be false. It is one thing for the court to be unable to guarantee that all its judgments or verdicts are the whole truth. It is quite another for the court to permit itself to be used for the

making of a statement that the maker is at the same time declaring he believes to be untrue.

71. Mr Warby submits that it is "somewhat curious" that the Claimants have chosen not to accept the vindication offered, given that they assert that vindication is their primary aim. His Skeleton argument includes that:

> "For some reason the First Claimant appears unwilling to engage fully in a process which offers the public vindication he is claiming…"

72. Mr Price responds that an apology that is not full or frank does not appease the feelings of the person defamed and does not undo the harm to the claimant's reputation, that is to say, that it does not provide vindication. The editors of *Gatley on Libel and Slander* 10th ed para 29.2, citing Cockburn CJ in *Risk Allah Bey v Johnstone* (1868) 18 LT 620, 621 and *Malcolm v Moore* (1901) 4 F 23, 26, write of an apology that:

> "… it should invariably include 'a full and frank withdrawal of the charges or suggestions conveyed'".

73. In *Charlton v EMAP plc* The Times June 11, 1993, HHJ Previté sitting as a judge of this court, rejected the submission of the defendant in a libel action that the claimant should be refused permission to read a Statement of Open Court in the form for which the claimant sought permission. The defendant did not oppose the claimant's application for permission to make a statement at all. The ground of its opposition was that the claimant should have included in the statement and explanation of the defendant's reasons for paying money into court. The defendant had explained that this was "entirely for commercial reasons and does not reflect our view of the strength of [the defendant]'s case on the merits." There was a plea of justification. The judge held that in the circumstances of that case the claimant was entitled to a statement which wholly vindicated and exonerated her.

74. I accept Mr Price's submission. The Claimants' position is not curious. The court expects an apology to be frank. It does not expect a claimant to accept an apology which is not full and frank, and which the defendant does not believe in. The court does not accept that a false apology gives vindication which is as good as that given by a true apology.

75. Mr Warby has a second answer to Mr Price's submission. He submits that there is nothing wrong in waiving a defence at one stage of proceedings, whilst reserving the right to resurrect it at a later stage. He cites *Milne v Telegraph Ltd* [2001] EMLR 760. That was an application by the defendant for summary judgment to be entered against itself under s.8(3) of the Defamation Act 1996. The advantage to the defendant in asking for summary judgment against itself was that the maximum damages that could be awarded against it under the s.8 procedure was £10,000, and it would achieve an overall saving, compared with going to trial. At a trial, if there was to be one, it proposed to rely on a defence of qualified privilege. But for the court to have jurisdiction under s.8(3) it had to appear to the court that "there is no defence to the claim that has a realistic prospect of success, and that there is no other reason why the claim should be tried". Accordingly, in its application under s.8(3), the defendant said

it was waiving the defence of qualified privilege (although it was also saying that that defence would, if pursued, have a realistic prospect of success).

76. The claimant objected that it was a wrong use of the court's procedure for a defendant to be prepared to waive a defence for one purpose, but, if it is unsuccessful, then to go back and rely on it, if there is a full trial: see para 25.

77. In the same paragraph Popplewell J accepted that:

> "... if summary trial is the appropriate way of dealing with this expeditiously and inexpensively, there is no reason why the defendant should not be allowed to say: 'We will accept that there is no defence to this action for the purpose of this summary disposal application'".

78. The defence of qualified privilege does not require that, at the time the defence is advanced, the defendant believe the words complained of to be true. Of course, the defence is in most cases defeated if the claimant can show that, at the time of publication, the defendant did not believe the words to be true. But at the time the defence is advanced, the defence is available to a defendant who then believes that the words complained of are, or may be, false. So a defendant who intends to persist in a defence of qualified privilege if settlement negotiations fail, can, without self contradiction, offer to join in the making of a Statement in Open Court to the effect that the allegations are all false.

79. Popplewell J was not concerned with a defence of justification. A court has to be satisfied that a defence has no realistic prospect of success, if there is to be jurisdiction under s.8 (3) of the Defamation At 1996. A judge cannot in giving judgment say that a plea of justification has no realistic prospect of success, so long as a defendant is credibly asserting that the defence pleaded is true. In giving judgment the judge would have to make a statement analogous to that made in para 25 of *Milne* in relation to qualified privilege. Such a statement would have to be along the lines that the defendant has chosen not to pursue a plea of justification for financial reasons, while at the same asserting its belief that the contents of the plea were true. Mr Warby submits that under the Press Complaints Commission Code para 1(iv) the Defendant would be bound to report "fairly and accurately" the outcome of the action. It is not to be expected that a claimant would want a newspaper to publish a report of such a statement as it appears to me the judge would have to include in his judgment. It is likely to be seen as a repetition of the libel: cf *Gleaner Co Ltd v Abrahams* [2004] 1 AC 628; [2003] UK PC 55.

80. So I do not find the case of *Milne* to be of any assistance in deciding whether the Defendant in this case can join in the making of a statement in terms of the draft proposed.

81. In my judgment it follows that, as matters now stand, that is, so long as the Defendant is asserting its belief in the truth of the plea of justification, that part of the Open Offer involving the making of a Statement in Open Court cannot be performed. That is an essential part of the Open Offer, and it follows that the Claimants cannot accept it. That conclusion is sufficient to dispose of the Defendant's application for a stay of proceedings in favour of the Claimants.

THE PROVISION FOR COSTS IN THE OPEN OFFER

82. The terms of the Open Offer on costs are:

> "The sum stated above is not intended to cover any legal costs. The offer is made on the basis that if it is accepted the costs of this litigation will be decided by the judge according to ordinary principles".

83. These terms bear some similarity to the offer of amends procedure under the Defamation Act 1996 s3(6). That provides:

> "If the parties do not agree the amount to be paid by way of costs, it shall be determined by the court on the same principles as costs awarded in court proceedings".

84. Mr Price submits that this part of the offer is also incapable of performance, or at least that it would not be just for the judge to attempt to make the adjudication on costs that the Defendant proposes. He referred to *BCT Software v C Brewer & Sons* [2004] FSR 9 and *Promar International v Clarke* [2006] EWCA Civ 332. In *Promar* at para 40 Bennett J, with whom Hallett LJ agreed, reiterated and reinforced the warnings given by the Court of Appeal in *BCT* and another case, *Venture Finance plc v Mead* [2006] 3 Costs LR 389 EWCA Civ 325, of the dangers of judges being persuaded to decide issues of costs when all issues, save costs, have been settled or resolved without the necessity for a judgment.

85. Mr Warby submits that it cannot be legitimate for a party to refuse to allow the Court to rule on costs. He concedes that acceptance of the Defendant's offer would inevitably entitle the Claimants to their reasonable costs up to the date on which time for acceptance of the Part 36 offer expired (7 November 2006). But according to him, costs thereafter would be subject to argument based on well established principles. These principles include, he submitted, a rule analogous to that set out in CPR Part 36.21. The Defendant wishes to argue that the Open Offer, if accepted, would leave the Claimants in a position which was no more advantageous to them than the position in which they would have been if they had accepted the Part 36 offer. Mr Warby submits that, if he is right about that, the Claimants would be ordered to pay to the Defendant its costs incurred since the expiry of that offer (that is the costs of the period of about the 12 months preceding the Open Offer). A lot turns on this point.

86. Mr Warby submits that this is a straightforward case in which it will be relatively easy for the judge to tell how the costs should be borne. He relied on paras 6-7 of *BCT* in which Mummery LJ said:

> "In my judgment, in all but straightforward compromises, which are in general unlikely to involve him a judge is entitled to say to the parties, "If you have not reached an agreement on costs, you have not settled your dispute. The action must go on, unless your compromise covers costs as well"... The judge has a discretion to decline to do what the parties ask him to do. If, on the one hand, the action is for damages, it will be relatively easy for the judge to tell from the size of the settlement sum

and from the litigation history (offers, payments in, and so on) how the costs should be borne".

87. I asked the parties whether I was being invited to embark on the exercise of deciding costs in accordance with the Open Offer. It seemed to me that if I am in a position to embark on that exercise (if I were to think it right to do so), then I may be in a position to consider whether the Claimants should be permitted to pursue their claims to trial after refusing the Open Offer.

88. Neither party wished me to embark on deciding, or considering whether to decide, the issue of costs. Mr Warby said the Defendant would want to adduce evidence, in particular as to what form of apology and bilateral statement would have been likely to have been agreed following the Part 36 Offer, if the Claimants had agreed the money.

89. Mr Price said that the argument on costs would be a complex one on which I have not received submissions. The Claimants would want to contend for an order for costs related to the different issues in the case, and to the unreasonableness with which the Claimants contend the Defendant has conducted the case. He also referred to the fact that there are orders already made, under which costs are to be dealt with by the trial judge. On 18 May 2007 Eady J made such an order in respect of the costs thrown away by the postponement of the trial. On 26 July 2007 he ordered that the trial be postponed a second time, and that the costs occasioned by that be in the case, and that the costs of the hearing of the Defendant's application to amend the defence to bring in further allegations about the Zukov litigation be reserved to himself. He submitted that these costs could not be easily dealt with by the procedure envisaged by Mr Warby.

90. The costs incurred by each party from the expiry of the time for acceptance of the Part 36 offer and the making of the Open Offer are enormous. The Claimants' estimate of their costs to date is nearly £3m, of which £1.1m had been incurred by May 2007. I infer that the Claimants' costs since the expiry of the time for acceptance of the Part 36 offer have therefore been about £2m. The Defendant says that it benefits from more advantageous terms with its solicitors, but its costs to 5 December 2007 were £1.211m. The Defendant has not given the figure for the relevant period, but I infer it is a substantial part of the whole. The Defendant claims that the Claimants outspend them by a ratio of 5:2.

91. The Defamation Act 1996 s.3(6) places an obligation upon the court in the context of a specific statutory procedure. There is no such obligation under the general jurisdiction which Mr Warby relies on.

92. I cannot accept that a judge deciding the issue of costs, if the Open Offer were accepted, would be bound to consider this a straightforward case of the kind envisaged by Mummery LJ in *BCT*. I think there is at least a real prospect that he would say: "If you have not reached an agreement on costs, you have not settled your dispute. The action must go on, unless your compromise covers costs as well". If that were to happen, then there would be no binding settlement. Acceptance of the Open Offer by the Claimants would have achieved nothing. Until a judge gives his decision on the exercise, there can be no knowing whether there is a settlement.

93. It follows in my judgment that the Open Offer was, for this reason also, too uncertain to be capable of a binding acceptance. Accordingly, it could not be just to stay the proceedings on the ground that a full trial is neither necessary nor justifiable, or because the matter can be resolved summarily by a judge. For this reason also the Defendant's application must be dismissed.

94. I add that I am also concerned at Mr Warby's submission that he would wish to call evidence on the issue of costs. He did not have an opportunity to explain in detail what form the evidence would take. But evidence on what would or might have happened if the Part 36 offer had been accepted seems to me to open up a prospect of satellite litigation which should cause the court concern.

OTHER POINTS TAKEN BY THE CLAIMANTS

95. In addition to the two points I have already decided, Mr Price raised a number of other grounds for resisting the application for a stay. He submitted it would be inconsistent with the express provision Parliament has made in the Defamation Act 1996, and in CPR Part 36, for resolving the problems that libel defendants may face.

96. Mr Price submits the Defendant is asking the court to develop a jurisdiction in many respects similar to that created by the offer of amends and summary procedures under ss.2 and 8 of the Defamation Act 1996, while at the same time ignoring or not incorporating the limits on those jurisdictions that Parliament framed after careful consideration of the balance to be struck between the parties to a libel action, notably s 8(3) (£10,000 limit for summary jurisdiction), s.2(5) (the bar on post-Defence offers of amends), and s.4(4) (a person relying on an offer of amends defence may not rely upon any other defence). In a case to which these two statutory procedures applied, it would be impossible for a defendant to adopt the contradictory stance which the Defendant is attempting to adopt in the present case.

97. Moreover, whereas in the statutory procedures s.3(5) and s.9(1)(c) make express provision for the court to assess compensation on the same principles as in defamation proceedings, in the procedure advocated by the Defendant, there is only the assessment that the sum offered by the Defendant will adequately compensate the Claimants, which is analogous to the threshold test provided in s.8(3) where an application for summary disposal is made by a defendant. The proposed procedure would not involve any proper assessment of damages, but only a rough and ready assessment of whether £105,000 was adequate (he referred to *Abu v MGN Ltd* (Practice Note)[2003} 1 WLR 2201, para 22).

98. For the reasoning and principles underlying these provisions, Mr Price referred to the Neill Committee's Report of July 1991, the Consultation Paper published by the Lord Chancellor with the draft Defamation Bill, and Hansard.

99. Mr Warby submits that the Civil Procedure Act 1997, under which the CPR were made, post-dates the Defamation Act 1996, and so that the court should not be concerned at the prospect that the later Act may contain provisions which render the provisions of the earlier Act otiose or obsolete. He submits that the principle of the court assessing whether a particular sum in damages affords adequate compensation (as opposed to an assessment of damages on conventional principles) has already been recognised as acceptable in the Defamation Act s.8(3) for cases where a figure not

exceeding £10,000 is adequate. He submits that some of the claims of the Claimants are already subject to the offer of amends procedure under s.2 of the 1996 Act, and that others would have been, but for s.2(5). The CPR now permits the court in effect to ignore the £10,000 limit in s.8 and the bar on post-Defence offers of amends in s.2(5), and the requirement that an offer of amends defence be run without any other defence.

100. He submits that CPR Part 3.1 came after the Defamation Act 1996, and the court should not hesitate to make use of the new powers that were not envisaged when the Defamation Bill was being promoted.

101. He further submits that there are cases, of which *Miller v Associated Newspapers Ltd* [2005] EWHC 773 (QB) is an example, where, at the end of the trial it can be seen that the claimant has pressed on after an offer with no hope of achieving anything worthwhile. He submits that the court should not have to wait to the end of a trial before it is in a position to reach such a determination. By that time the only sanction at its disposal is costs. What is needed is that the court should intervene before the abuse has occurred, rather than attempt to impose sanctions in costs after the event.

102. These arguments were each advanced, and answered, with great thoroughness. It would greatly lengthen this judgment if I were to address them. I do not think it necessary or appropriate that I should deal with such important issues of principle, given the clear views I have formed on the issues I have decided. I would have to address these arguments on the hypothetical basis that there might be a form of open offer which the Defendant could make which would be capable of binding acceptance and performance. Of course, there is an offer which the Defendant could have made, and can now make, namely a further offer under Part 36. That would raise no issue of principle in itself. It is to be noted that the Defendant does not contend that the continuation of the proceedings after the Part 36 offer was or is an abuse of the process of the court.

103. I am not at present persuaded that there is a form of open offer which could be devised, and which would be more attractive to the Claimants than a new Part 36 offer, while also being capable of binding acceptance and performance. I cannot exclude the possibility that there may be libel actions in which the payment into court is so great, having regard to what the claimant complains of, that a court might consider before trial that it would be an abuse of process for the claimant to be permitted to continue with the action to trial. If such a case is possible (and I do not say that it is), then I have no reason to think that the present case is likely ever to fall within that category. The Claimants have through their solicitors and through Mr Price, repeatedly made clear that an offer of settlement is unlikely to be rejected solely on the basis that the monetary offer is inadequate.

104. Mr Price has a further alternative submission. He submits that if anything is disproportionate in this case, it is the plea of justification being advanced by the Defendant. If the Defendant considers that it cannot be tried with proportionality, it is for them to limit themselves to a plea that can be tried proportionately. And if they do not do that, then the logic of the arguments the Defendant advances is that the court should use its case management powers to limit the scope of the plea of justification, not stay the claim. If the Defendant abandons its defence of justification, there can be no suggestion that pursuit of the action to trial would be disproportionate.

105. Mr Price referred to a number of cases, some very well known, where claims have been litigated to the highest level in circumstances where the costs were out of all proportion to the monetary award. Amongst the best known these is Ms Campbell's claim in respect of the publication of images and information relating to her attendance for treatment, for which the award in damages was in four figures. See the discussion on costs in *Campbell v MGN Ltd (No 2)* [2005] 1 WLR 3394. No one suggested that that case should have been stayed because the game was not worth the candle. If that were the rule, and so long as damages for publications of private information remain at the level of reported awards, Mr Price submits that it is difficult to see how any privacy claims could be successfully pursued.

106. He further submits that the Defendant is barred or estopped from seeking such an order by its own delay or acquiescence, or by its own conduct in expanding the allegations against the Claimants, and running up enormous costs, since it made the Part 36 Offer. This too is an argument that I do not need to deal with in the light of the decisions I have reached.

107. The Defendant's submission includes (as noted in para 11 above at para 5 of the Rider) that :

> "If necessary, the judge can rule on the defamatory meanings to be corrected and apologised for, and the terms of the statement in court."

108. Mr Warby identified the jurisdiction he submits exists for this as arising under CPR Part 53 Practice Direction para 6 which is set out in para 66 above.

109. I questioned in argument whether that paragraph gives to the court the jurisdiction for which Mr Warby contends. Mr Warby clarified the offer. The Defendant's offer is to join in making a Statement in Open Court in whatever terms the Court approves on an application by the Claimants.

MODE OF TRIAL

110. In reaching the decisions I have reached, I have not found it necessary to reach a decision on the mode of trial. It is accepted by Mr Warby that in these circumstances the mode of trial should be determined by Eady J, as ordered by him on 11 May 2007, that is after the exchange of witness statements.

SUMMARY JUDGMENT AGAINST THE SECOND CLAIMANT

111. There is a free standing application by the Defendant for summary judgment against the Second Claimant. In the Application Notice it is recorded that the Second Claimant has accepted an offer of amends in respect of the allegation that it sued itself. In the light of the decision I have reached, not to strike out the other claims of the Claimants following their non-acceptance of the Open Offer, Mr Warby does not contend that I should in this judgment exercise the court's powers under the offer of amends procedure (assessment of suitability and sufficiency of the Defendant's, of compensation and of costs). It is accepted that if other matters are to go to trial, this should be considered in conjunction with the matters to be tried, as may be directed in the future.

112. But Mr Warby does pursue his application that I should exercise the court's powers under s.8 of the 1996 and enter summary judgment in favour of the Defendant on each of the Second Claimant's remaining claims.

113. Mr Price objects to this course on a number of grounds, procedural and substantive. He submits that the Defendant has not complied with the requirement to adduce evidence (imposed by CPR 53PD para 5.1(2) and 24 PD para (2)(3)(b)) that the Second Claimant has no real prospect of succeeding on its claim.

114. Further, an application for summary judgment against the Second Claimant was made before me on 25 April 2007, under CPR Part 24 by Notice dated 17 April 2007. The application was in the alternative to an application to strike out the claim under CPR Part 3.4(2)(a). I dealt with that application in paras 63-72 of my judgment, concluding that if these points were to arise again, then they should be argued on the basis of a revised draft amendment of the Particulars of Claim, and of any witness statements or other evidence then available.

115. The procedural history since then is set out above. There is still not available the revised draft amendment that I envisaged, and witness statements have not been exchanged.

116. The renewal of this application at this point might have been appropriate if I had acceded to the other applications by the Defendant which are considered above. But since I have refused these other applications, it seems to me that the position should remain as I set out in para 72 of my earlier judgment.

CONCLUSION

117. The applications of the Defendants and of the Claimants are all dismissed.