Court of Appeal Reference A2/2005/1093(A)

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

Lower Court reference
Claim HQ03X03360

B E T W E E N:-

ALIN TURCU (Maris)

Claimant/Appellant

- and –

NEWS GROUP NEWSPAPERS LIMITED

Defendant/Respondent

SKELETON ARGUMENT ON BEHALF OF DEFENDANT/RESPONDENT

---

1. On 30 September 2005 Maris applied for permission to appeal on the grounds that he had recently obtained fresh evidence from, amongst others, Florim Gashi. Prior to obtaining the fresh evidence both the trial judge, Eady J (Bundle 1 tab 13), and Keene LJ (Bundle 1 tab 14) had refused applications for permission to appeal made on the grounds that (a) the Judge was not entitled to find that the articles complained of were substantially true, and (b) that the Judge erred in his approach to the evidential value of the covert recordings, misapplying *Re H (Minors)* [1996] A.C. 563, 586.

2. Permission to appeal, and for the application to be brought out of time, was granted by Rix LJ and Moses LJ after a hearing on 26 May 2006 at which the Defendant was not represented. A transcript of the hearing is at bundle 3 tab 7. The judgment of Rix LJ, with which Moses LJ agreed, is at bundle 3 tab 8. Rix LJ said at paragraph 10:

"although there are obvious difficulties in the way of Mr Gashi being received as a credible witness – he accepts for instance, that he lied to the police in his statement concerning these matters – nevertheless, looking at all the material put before us, including the admittedly limited concerns of the judge about the nature of the video evidence which he saw, and also some aspects of that video evidence which have been made available to us for the purposes of this application, and considering Mr Gashi's new witness statement, it cannot be said there is insufficient plausibility – at any rate, I put it no higher than plausibility – in his account to raise some realistic prospect that his evidence might be received and accepted by this court on an appeal."

Maris

3. The judgment of Eady J is at bundle 1 tab 15. The judge considered the case unusual in many respects. Maris sued under a false name, and only revealed his true name some two months before trial. He issued the claim almost at the end of the one year limitation period. He took no part in the trial and did not even serve a witness statement. The contact between Maris and his solicitor David Price had been sporadic – there had been no contact for a period of about two months before the trial started, though Maris got back in touch with his solicitor at some time during the first week of trial. The judge noted in paragraph [9] that it was "at least troubling that [the Defendant's] accuser has not put in an appearance".

4. The judge referred at paragraphs [4] to [6] of his judgment to further unattractive aspects of Maris's conduct: his dishonest statement made in support of his application for political asylum in the UK; his lies to the immigration authorities and others in this country about his age; his record of criminality in Romania, and his possession of forged identity documents when arrested in the UK.

5. It is worth noting at the outset of this appeal that the judge found at paragraph [112] that, in part because of the above factors which were raised in mitigation, and in part because of Maris's own conduct and observations in the course of the taped discussions which formed the key

evidence in the case, he would only have awarded a nominal sum to Maris if he had been successful – "*it would be quite unseemly for [Maris] to recover substantial damages*". This observation has importance in this appeal, since none of the new evidence sought to be adduced has any impact on the features which would serve to reduce any damages award to vanishing point. If Maris ever reached the stage of obtaining a verdict in his favour, the award of damages would be no more than nominal.

Funding

6. Another striking feature of the case, for which it received wide publicity and subsequent judicial consideration in the House of Lords (in *Campbell* - see below), was that, despite the absence from trial of the claimant, it had been litigated under a conditional fee agreement. The judge described at paragraph [6] the "wholly unenviable" position of the Defendant, faced as it was (and still is) by a claim for substantial damages brought by an individual from whom it had no prospect of ever recovering its costs even if it successfully defended the claim.

7. In *Campbell –v- MGN Limited (Costs)* [2005] UKHL 61; [2005] 1 WLR 3394 Lord Hoffmann cited the judgment at length and used the case to demonstrate the 'blackmailing effect' of cases of this kind (paragraph [31]). This is a factor to which it is submitted the court should give consideration in deciding whether to exercise its discretion to order a retrial. (There has been some suggestion in correspondence that Maris will obtain an after the event insurance policy to cover £100,000 of the Defendant's costs in the event that the Defendant wins at a retrial if such retrial is ordered. This would however only cover a modest proportion of the Defendant's costs which, for the first trial alone, were some £350,000; moreover there is the risk that the policy may be vitiated if the policy holder is found at trial to have told lies).

The claim for aggravated and exemplary damages

8. An important aspect of the original claim was the claim for aggravated and exemplary damages. This was based largely upon serious allegations of misconduct on the part of the Defendant's journalist Mazher Mahmood. These were set out at paragraphs 10.9 to 11.4 of the Particulars of Claim (Bundle 1 tab 19). The judge noted that this accusation of dishonesty against the Defendant's journalist was at the forefront of the claim – paragraph [16]. Having heard evidence from several of the Defendant's journalists, Eady J wholly rejected the attack on Mr Mahmood (judgment paragraphs [113] – [114]).

9. Maris has now dropped in its entirety the claim for exemplary damages. The claim for aggravated damages, insofar as it arises out of the conduct of Mr Mahmood, has also been jettisoned. The attack on Mr Mahmood's conduct, and in particular the allegation that he knew the allegations in the articles were false, or was reckless as to their truth, has been abandoned. Draft amended Particulars of Claim have been served confirming this (bundle 1 tab 19).

10. Any suggestion, therefore, that the case serves a wider public interest in exposing corrupt journalistic methods can no longer be sustained. The case is now purely about the receipt of damages by Maris to compensate him for the damage caused to his reputation by the publications complained of, which in any event must be nominal.

<u>The appeal</u>

11. CPR 52.11(2) provides:

> Unless it orders otherwise, the appeal court will not receive (a) oral evidence; or (b) evidence which was not before the lower court.

12. In determining whether or not to admit fresh evidence, the court must strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result. This task is in accordance with the overriding objective.

Hamilton v Al Fayed [2001] EMLR 15.

13. However the question of whether or not a retrial should be ordered on the grounds of fresh evidence cannot be a simple balancing exercise: strong grounds are required. The principles reflected in the rules in *Ladd v Marshall* [1954] 1 W.L.R. 1489 *per* Lord Denning at 1491 remain relevant to any application for permission to rely on fresh evidence, not as rules but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an appellant to rely on evidence not before the court below.
Per Morritt LJ in *Banks v Cox* (unrep) 17 July 2000, cited in *Hertfordshire Investments v Bubb* [2000] 1 WLR 2318 at 2325 F.

14. The *Ladd v Marshall* criteria, each of which the appellant must satisfy, are:

14.1 it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

14.2 the evidence must be such that, if given, it would probably have had an important influence on the result of the case, though it need not be decisive;

14.3 the evidence must be such as is presumably to be believed – it must be apparently credible, though it need not be incontrovertible.

Ladd v Marshall limb 1: whether the fresh evidence could have been obtained with reasonable diligence for use at the trial.

15. The fresh evidence is from Florim Gashi (bundle 1 tab 2). In addition there is fresh evidence from Roy Greenslade (bundle 1 tab 6), Gary Weston (bundle 1 tab 7), Dominique Morris (bundle 3 tab 15), and Robin Hallsworth (bundle 3 tab 14) (obtained since the permission hearing). The focus for this appeal is, of course, upon the evidence of Mr Gashi.

16. Maris's representatives could have obtained the evidence of Gashi before trial if they had exercised reasonable diligence.

17. *Prior to* service of witness statements on 4 March 2005, Maris's representatives assumed that Gashi would be a witness for the Defendant – see their letter of 11 March 2005 (Respondent's bundle tab 15). Maris was advancing a case that Gashi and Mahmood had colluded in setting up the 'gang' targets. Maris's representatives knew from Mr Altman's speech (bundle 1 tab 37 page 275) that the Crown had undertaken "a thorough investigation and review of Gashi's background, which has included procuring and assembling any material from other investigations of this type in which Gashi has been involved in order to determine whether there is, or maybe evidence which impacts adversely upon his credibility."

18. From the same speech (page 275) Maris's representatives knew that the Crown had "recently come into possession of detailed information concerning another News of the World investigation in which Gashi has been the informant, where there was some evidence that Gashi had set up the individuals concerned."

19. Any reasonable solicitor in the position of Maris's representatives would have sought and obtained the material referred to by the Crown. An application for disclosure of materials which touched on Gashi's relationship with Mahmood and the alleged setting up of targets would have yielded not only that material available to the Crown in 2003 but also the fact that Gashi had in September 2003 given an interview to the police (indeed the very same DI Horrocks who had investigated the criminal case) during which Gashi had sought to make damaging (though, as it happens, untrue) allegations about his dealings with Mahmood: disclosure of the September 2003 materials is being sought at the time of drafting this skeleton.

20. In the light of the above, once witness statements had been exchanged on 4 March, there would have been no basis for assuming that Gashi was "in

the defendant's camp". Indeed, arguably to the contrary. Maris's representatives were apparently at a loss to understand why he was not being called by the Defendant (see letter of 11 March 2005 (Respondents bundle tab 15)).

21. The onus on Maris's representatives was particularly great given the paucity of evidence they had available in support of their client's case. They served three brief statements and one witness summary. None of the statements contained material relevant to the issue of justification. The witness summary was from Adrian Pasaraenu (bundle 1 tab 25), whom Maris sought unsuccessfully to witness summons during the trial (Pasaraenu relied upon the privilege against self incrimination, a matter dealt with by the judge at [51] to [58] of the judgement). No statement was served from Maris. As of 4 March 2005 by far the most obvious potential avenue of enquiry was Mr Gashi.

22. It is argued on behalf of Maris that Gashi was plainly in the Defendant's "camp", so Maris's solicitors cannot be criticised for failing to attempt to contact him. However:

22.1 Gashi was not plainly in the Defendant's camp. While it is correct that he had been prepared to give evidence in support of the Crown's case when giving interviews to the police in the immediate aftermath of the publication of the story (end of 2002 and beginning of 2003), two years had now elapsed. The Defendant was not relying upon his evidence. Reasonable diligence at least required an enquiry as to what Gashi would now say.

22.2 Gashi was obviously a complex and unpredictable character. Maris knew from the statements given by Gashi to the police that he was someone with a turbulent upbringing who had had severe psychological difficulties (witness statement of 16 January 2003, Respondents bundle tab 6 p. 192). They would also have seen that Gashi repeatedly emphasised to the police his desire to do good for the community and act as a moral crusader (witness statements of

9 November 2006, Respondents bundle tab 5, p.23, 16 January 2003, Respondent's bundle tab 6 p.25-26). He had claimed to be ashamed of his criminal past (witness statement of 9 November 2002, Respondents bundle tab 5, p.23). Again it is submitted that reasonable diligence required Maris's representatives to inquire of Gashi whether some 20 months after the prosecution had been dropped, he would have been prepared to tell the "truth" about what had happened?

22.3 As to the suggestion that Gashi would not contradict what he previously told the police, Gashi had already been prepared to admit to the police that a previous account he had given – regarding payments he had received– had been untruthful. (Altman, bundle 1 tab 37 p.280).

22.4 As to the suggestion that Maris's representatives could not have expected Gashi to help on account of the risk of being prosecuted for perjury, Gashi had already been exposed in court not only as unreliable, but further as a "liar" (at least in respect of payment), yet no prosecution for perjury had followed. With that in mind, and his professed wish to do good for the community (ironically, perhaps, now repeated for this appeal) reasonable diligence at least required the enquiry to be made.

23. It is also suggested that it would in some way have been improper or inappropriate to question Gashi, on account of the facts that (a) he was a witness for the other side and (b) it would be disproportionate given Maris was represented under a conditional fee agreement. This is plainly wrong:

23.1 There was no question of Maris's solicitors running the risk of being criticised for seeking to persuade him to change his evidence. Gashi was not a witness in the case and was not due to give any evidence.

23.2 There is no property in a witness and no professional rule which would have prevented Maris's solicitors from speaking to Gashi.

Maris's representatives were of course aware of this – they were prepared to meet DI Horrocks, one of the Defendant's witnesses, before trial in order to explore "the interaction that had occurred between him and Mazher Mahmood before the publication of the article complained of" (Morris paragraph 2). They did this despite the fact they apparently thought Horrocks would not want to assist them (Morris paragraph 7).

23.3 Trying to contact Gashi would not have involved disproportionate cost – indeed, all it would have initially involved is the drafting of a letter to be handed to DI Horrocks to be passed to Mr Gashi. Given the hugely expensive nature of the case (the Claimant's representatives indicated that their costs of the action including the trial were in the region of £200,000 *before* the addition of an uplift) there could have been no grounds for criticising Maris's solicitors for making such an effort. Again, they went to the trouble of contacting and interviewing Horrocks who, on any view, was a witness whose evidence was of peripheral importance.

24. Maris's representatives appear now to believe that there existed in early 2005 no opportunity for them to find out where Gashi was, if they had wanted to contact him – see response to a question from Rix LJ at the permission hearing ("what opportunities were there for you to find out where [Gashi] was, if you wanted to contact him"; answer: "*I had no opportunity at all*" (bundle 3 tab 7 p. 199). In so far as Helen Morris, a solicitor working for Maris in 2005 gives evidence to this effect, the Defendant wishes to test the position, particularly bearing in mind the following:

24.1 The Appellant's solicitors knew that Gashi was on a witness protection programme (Morris, bundle paragraph 5);

24.2 The Appellant's solicitors met DI Horrocks on 29 March, 7 days before the trial was due to start. DI Horrocks was the relevant

police officer who had responsibility for the matter (Morris paragraph 4).

24.3 The Appellant's solicitors would have known that DI Horrocks could have passed any correspondence onto Gashi if they so wished, and indeed would have been obliged to if such a request had been made.

24.4 Despite all this, the Appellant's solicitors at no stage raised the matter of Gashi with DI Horrocks, not even during the face to face meeting (see witness statement of DI Horrocks: bundle 3 tab 17).

25. Reliance is placed by the appellant on *Bills v Roe* [1968] 1 WLR 925 to support the proposition that a solicitor cannot reasonably be expected to contact a witness who appears to be in the other side's camp. There are important distinctions between *Bills* and the current case:

25.1 in this case, unlike in *Bills,* Gashi had given a previous account which supported the Defendant's case, yet the Defendant was now choosing not to call him;

25.2 in this case, unlike in *Bills*, there was no prospect of Maris being sued by Gashi, so this did not exist as a deterrent to contacting Gashi;

25.3 *Bills* was a straightforward case with none of the complexities of the current case. In *Bills* the fresh evidence was to come from a person who was known to be a friend of the respondents, in circumstances where the court found that it was "unlikely in the extreme" he would be willing to give evidence against his friends. By contrast, given the background to the current case, no one in the position of those representing Maris could have predicted in March 2005 what Gashi would, if questioned, have said about the matters in issue. He was an unknown quantity.

Ladd v Marshall limb 2: Would the fresh evidence probably have had an important influence on the result of the case if had been given at trial?

26. It is submitted that, on proper analysis, Gashi's evidence would not probably have had an important influence on the result of the case if it had been given at trial. It is the impact upon that trial *which took place* which matters – not an assessment upon the impact of his evidence on any retrial. Any retrial may or may not include evidence from Maris but the trial which is the subject of this appeal did not.

27. In summary, the findings of the judge at trial fell into three broad categories:

(a) the taped conversations showed Maris participating in discussions about genuine crimes, including a planned robbery of a Sotheby's security guard. (paragraph [64]). Those conversations took place with a "group of loose associates who were prepared to take part in whatever criminal activity that suited them and ...would, from time to time, work in concert" (paragraph [94]).

(b) Maris was a "petty criminal who at least gave the impression that he was prepared to take part in more serious activities if given the opportunity and sufficient incentive" (paragraph [94]). It was "inconceivable that he would have been allowed to participate unless he was a trusted associate." (paragraph [96])

(c) In relation to the plot to kidnap Victoria Beckham, the judge found that the kidnap plot was real and not 'idle pub banter'. He found that Maris did not have any direct involvement in any kidnap plot (paragraph [14]) but 'entered into the spirit of things' when such a plot was discussed, for example contributing to the debate as to how much time would be required to withdraw the ransom money and when the kidnap should take place. The judge also found that even if Gashi had initiated the kidnap idea "that would not absolve any other willing participants from criminal

responsibility" (paragraph [48]). The judge drew attention to the absence of any convincing explanation as to *why* the 'gang' members had behaved as they had if there had been no real plot, e.g. *why* Pasaraenu had been prepared to convince Qureshi of the genuineness of the kidnap plot.

Categories (a) and (b)

28. Gashi's evidence would have left unchanged the judge's conclusions as to (a) and (b). There was discussion of real crime amongst the 'gang' members – Gashi concedes the Sotheby's robbery plan was genuine, and there can be no doubt that the theft of the turban from Sotheby's was a sophisticated crime. Luli had undoubtedly obtained fake documents (judgment of Eady J paragraph [32]).

29. Similarly, Gashi's evidence would have had no impact on the finding that Maris willingly participated in these conversations, entering into the spirit of things. In particular, Maris discussed obtaining a pepper spray for the violent robbery of a Sotheby's guard. Maris also discussed how the attack on the guard would take place (judgment paragraph [64]). Gashi does not provide any cogent explanation as to why Maris contributed in this way to the discussions. Neither does Gashi's evidence have any bearing on the fact that Maris was present when drugs importation was discussed, and when the theft from Sotheby's was discussed (judgment paragraph [65]).

30. Gashi's evidence would not have affected the judge's finding there was a group of loose associates who were prepared to take part in any criminal activity that suited them and they would, from time to time, work in concert on the basis of "horses for courses" (judgment paragraphs [66] to [67], [94]).

31. Nor would Gashi's evidence have had any effect on the finding that Maris was a "trusted associate", at least of Sorin (judgment paragraph [67], [77]), and prepared to commit crimes with him; and Sorin in turn was

most likely a dangerous and potentially violent criminal, having been involved in the plan to rob a Sotheby's guard.

32. Also unchanged as a result of Gashi's evidence would have been the finding that Maris was a petty criminal with a list of criminal charges and convictions in several countries, and had forged documents at the time of arrest which he intended to use to commit crimes.

33. The impact of these findings was, of course, not merely that they heavily influenced the judge in reaching his conclusion that Maris would have been a willing participant in the plans, however incomplete, the 'gang' had made to carry out a kidnap. The findings also provided the basis for the judge's conclusion that, even if the justification defence failed, Maris would be entitled to no more than a nominal sum by way of damages (judgment paragraph 112).

Category (c)

34. As to category (c), Gashi's commentary about the demeanour of those taking part in the conversations, and as to the content of the taped conversations (whether the plans were hypothetical or not), would have provided the judge with no assistance in performing the task of assessing the video and transcript evidence which he scrutinised at length in court. The judge's conclusions about the contributions made by Maris and the reasons for them would have been unaffected by Gashi's own alleged assessment.

35. Gashi's assertion that the plot to kidnap Victoria Beckham was his idea would have changed nothing. The judge made clear that (as is plainly right) it was the fact of participating in the discussions about kidnap, not the fact of initiating the idea, which mattered (judgment paragraph [48]). Maris's representative appears to accept that it simply does not matter whether Gashi came up with the idea (third skeleton, bundle 3 tab 1, paragraph 11).

36. Moreover Gashi says almost nothing in relation to the important finding by the judge that the idea of kidnap (though not necessarily the kidnap of Victoria Beckham) originated with Luli, a "gang" member (judgment paragraph paragraph [76]). Thus the judge's finding that at least one of the members of this criminal 'loose association' had been willing to participate in an earlier kidnap plot would have remained undisturbed by Gashi's evidence – which boldly (but without any explanation) dismisses the earlier kidnap plot as a fiction, albeit one he can remember nothing about (paragraph 14 of Gashi's statement).

37. Furthermore, Gashi gives no cogent explanation as to *why* Maris, and the other "gang" members, were prepared to discuss in such detail matters such as the ransom amount, difficulties of obtaining ransom money and the obtaining of knock out sprays, and most particularly discussing such matters during the course of conversations about admittedly genuine crime. It was this last point which particularly impressed the judge (judgment paragraph [93]). Gashi says of Maris's discussion about obtaining a pepper spray for use in the Sotheby's robbery that this "was clearly pub talk under the influence of alcohol" – it is submitted that this is, in fact, very far from obvious, and certainly was not obvious to the judge who viewed the film of the discussion.

38. Gashi does not even attempt to explain *why* Pasaraenu, a qualified doctor and therefore not an "idiot" as contended on behalf of Maris, was not only prepared to pose as a heavy criminal with a gun himself, but was moreover in that role prepared to recruit a man he believed to be a serious criminal and to instruct him to take steps in preparation for the supposed crime (i.e. acquiring the necessary van). Gashi merely says that he told Pasaraenu that he "owed some money to someone and that I wanted to persuade this person that I had a job for him that could earn him a lot of money. That way he would stop hassling me for money".

39. This explanation is plainly wholly inadequate, being unable to address the fundamental question of why Pasaraenu agreed to present himself in the way that he did.

40. The Defendant accepts that for the purposes of this appeal the evidence of Gashi taken together with the evidence of Weston, Hallsworth and Dominique Morris provides credible evidence that the gun featured in the film was a replica gun supplied by Gashi to Pasaraenu. It is however submitted that this evidence, in reality, would have had rather less impact on the judge's view of the case than might at first seem.

41. It was not and never has been in dispute that Gashi was trying to deceive Pasaraenu so that he could capture Pasaraenu on film discussing the kidnap. And so on any view of the kidnap plot Gashi was setting up Pasaraenu in this video. The issue of whose gun was used (or whether it was a replica) matters little. What matters is Pasaraenu's preparedness to pose as a heavy criminal, recruiting what he believed to be a serious criminal for a serious crime, which begged an explanation – an explanation which Pasaraenu refused to give and which is *still* not forthcoming from Gashi.

42. In summary, Gashi's evidence, which concerns his efforts to capture members of the 'gang' on film and tape discussing the kidnap plot, does not address the essential point that the 'gang' members willingly engaged in such discussions in the context of discussing serious crimes; and in the case of Maris and Pasaraenu were prepared to present themselves to others as being genuinely engaged in such activity. It is therefore submitted that Gashi's evidence would not probably have had an important influence on the result of the case if given at trial.

Ladd v Marshall limb 3: Whether the evidence is such as is presumably to be believed

43. It is suggested on behalf of Maris that there are three areas of potential corroboration for Gashi's evidence: (a) Pasaraenu's statement to the police; (b) the Weston/Hallsworth evidence about the gun; and (c) evidence of cash payments from the Defendant to Gashi for previous

stories and of regular contact between Mahmood and Gashi during the trial.

44. As to (a), for reasons set out by the judge at [58], very little weight can be attached to hearsay statements made by Pasaraenu given he did not appear as a witness at trial. Moreover even less weight ought to be attached to confirmation by Pasaraenu bearing in mind that on any view he did not tell the police the whole truth in respect of his dealings with Qureshi via Gashi (e.g. when challenged about the gun incident he failed to mention that he had previously met and sought to recruit Qureshi for the kidnap plot). Further, it is unlikely in the extreme that Gashi was unaware of what Pasaraenu had said to the police by the time he came to make his witness statement in these proceedings.

45. As to (b), the impact of the 'gun' evidence would have been limited for the reasons set out above in paragraphs 40 to 41 above.

46. As to (c), there is no corroboration of the assertion that Gashi received cash payments for stories before the Beckham kidnap story. It is correct that Mahmood's telephone records show that there were some telephone conversations between Mahmood and Gashi during the trial. There is however no corroboration of the assertion that Mahmood told Gashi to "keep his head down".

47. Save for the above Gashi remains uncorroborated. It is proposed that he should be the subject of cross examination before the court to demonstrate that he is plainly not a witness "presumably to be believed". He has on numerous occasions been prepared to deceive the authorities, the police and the courts, including on occasions making false allegation in respect of his dealings with Mazher Mahmood for no apparent reason.

Other relevant factors

48. The Court must have regard to the overriding objective in determining whether or not there should be a retrial. It is submitted that there are two further factors that weigh against ordering a retrial.

49. First is the continuing unfairness to the Defendant of being faced by a CFA funded Claimant. This has in one case been cited as a factor relevant to the exercise of the abuse jurisdiction: *Pedder and Dummer v News Group Newspapers Limited* [2003] EWHC 2442 (QB); [2004] EMLR 348.

Further the Claimant, despite his protestations to the contrary, cannot even be guaranteed to attend a retrial.

50. Second is the fact that the nominal award of damages which the Claimant stands to win if successful would provide him with no vindication. The court is entitled and bound to apply the overriding objective having regard to proportionality and in particular to consider whether the possible benefits to the Claimant that might accrue rendered the expense of the proceedings worthwhile. A claim in which the court could not award more than nominal damages falls to be struck out as an abuse of process:
Wallis v Valentine [2003] EMLR 8

Gatley on Libel and Slander paragraph 30.38.

51. In In *Jameel v Dow Jones and Company* [2005] EWCA Civ 75 Phillips LJ said at paragraph [54]:

> "An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing-field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice."

52. The conclusion of Phillips LJ in *Jameel* was (at paragraph [69]):

> "If the Claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick."

53. It is submitted that, in all the circumstances, the appeal should be dismissed.

05 February 2007

JOHN KELSEY FRY QC
Cloth Fair Chambers
ADAM WOLANSKI
5RB