

Case No: HQ10D02547

Neutral Citation Number: [2011] EWHC 3462 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2011

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

Between :

**THE HONOURABLE NATHANIEL PHILIP
VICTOR JAMES ROTHSCHILD**

Claimant

- and -

ASSOCIATED NEWSPAPERS LIMITED

Defendant

Hugh Tomlinson QC and Justin Rushbrooke (instructed by Schillings) for the Claimant
Andrew Caldecott QC and David Glen (instructed by Reynolds Porter Chamberlain LLP)
for the Defendant

Hearing dates: 15 December 2011

Judgment

Mr Justice Tugendhat :

1. The Claimant (“Mr Rothschild”) sues for libel on an article headed “EXCLUSIVE: Mandelson, an oligarch and a £500m deal” which was published by the Defendant (“ANL”) in the issue of the Daily Mail dated Saturday 22 May 2011 and online (“the Article”). The Article was described as a ‘special investigation’, and extended over the front page and pages 2, 8 and 9 of that issue. The headline on page 9 reads: “Revealed: the astonishing story of the night Lord Mandelson was flown to Moscow by private jet to join a billionaire friend desperate to strike a deal that cost British jobs”.
2. This is the Pre-Trial Review of the action, which is fixed to take place on Monday 16 January 2012, with a time estimate of 10 days. The applications upon which I have heard argument are:
 - (1) Mr Rothschild’s application to strike out the defences of justification and honest comment pursuant to CPR Part 3.4(2)(b) and/or Part 24. This was issued on 11 November 2011;
 - (2) ANL’s application to amend its Defence, so as substantially to re-cast its defence of justification as well as to delete the plea of honest comment. This was issued five days ago on 8 December 2011;
 - (3) Mr Rothschild’s application to vary mode of trial to judge alone. This was issued three days ago on 12 December 2011.
3. There are two further applications upon which I have not yet heard argument:
 - (4) Mr Rothschild’s application for the trial of a preliminary issue as to meaning: this was issued three days ago on 12 December 2011;
 - (5) a relatively minor application for approval of an amended costs budget, which was issued on 12 December 2011.
4. Mr Rothschild sues on the whole Article. However, it is important to keep in mind that the claimant is Mr Rothschild, not Lord Mandelson. It is also important to bear in mind that this action is not about whether the deal referred to cost British jobs, nor about tariffs or EU law. It is a libel action. The defamatory meanings attributed to the Article by Mr Rothschild are the following natural and ordinary meanings:
 - “(1) That, for the purpose of ingratiating himself with Russian oligarch Oleg Deripaska, the Claimant took extraordinary steps to ensure the attendance of his friend, EU Trade Commissioner Lord Mandelson, at a meeting between Oleg Deripaska and American aluminium executives which he must have known Lord Mandelson had no official reason for attending and which he must or ought to have foreseen would and did bring his friend’s public offices and personal integrity into disrepute and exposed him to accusations of conflict of interest.
 - (2) That there were strong grounds to suspect that the Claimant had facilitated the attendance of EU Trade Commissioner Lord Mandelson at a meeting between Russian oligarch Oleg Deripaska and American aluminium executives so that Oleg

Deripaska could close a £500 million deal by securing corrupt and improper disclosures and commitments concerning EU aluminium tariffs from Lord Mandelson.”

5. The three individuals named there are well known to many in Britain today.
6. Mr Rothschild describes himself as a member of the well known Rothschild banking family, who is a financier with substantial business interests. He states that he provides financial advice to Mr Deripaska, that he is a member of the International Advisory Board of United Company Rusal PLC (“Rusal”), the world’s largest alumina and aluminium producer, and (through a company controlled by him) the holder of shares in that company purchased for a sum in excess of \$100 million. He is also a director of EN+ Group Ltd, which holds substantial interests in a number of Russian metal, mining and energy companies, including a controlling stake in Rusal.
7. Mr Deripaska is the owner of EN+ Group. He is amongst those commonly referred to as Russian oligarchs. Since 2006 Mr Rothschild and Mr Deripaska, together with Mr Peter Munk, the Chairman and founder of Barrick Gold, have also had business interests together in a project for the development of a port in Montenegro.
8. Baron Mandelson of Foy (formerly Peter Mandelson) is a prominent and very well known Labour Politician. He served as a government minister between 2 May 1997 and 23 December 1998; between 11 October 1999 and 24 January 2001; and subsequently between 3 October 2008 and 11 May 2010. Lord Mandelson is, and has for many years been, a close and long standing friend of Mr Rothschild. They regularly socialise and take holidays together. In August 2004, it was announced that Lord Mandelson had been appointed as the next European Commissioner for Trade. He formally resigned his seat for the Hartlepool constituency on 8 September 2004, and commenced his term of office as Commissioner on 22 November 2004. He left his post as Commissioner on 3 October 2008 in order to return to the UK Government as Secretary of State for Business Enterprise and Regulatory Reform.
9. As Commissioner, Lord Mandelson was responsible for the European Commission’s Directorate-General for Trade. That is the body charged with designing, implementing and communicating EU trade and commercial policy. The Directorate-General’s stated remit includes: defining the trade interests of the EU in defensive and offensive terms; negotiating bi-lateral, regional or multilateral agreements with third countries; monitoring the implementation of international agreements and tackling unfair practices; devising and monitoring internal and external policies which have a bearing on the EU’s trade and external investments (including policies relating to inter alia, the single market, consumer, energy, competitiveness and competition).
10. Following an exchange of correspondence pursuant to the Defamation Pre-Action Protocol, the claim form was issued on 7 July 2010 and served with Particulars of Claim. On 17 September 2010 ANL served a defence of some 34 pages, pleading both justification (truth) and honest comment. A Reply was served on 20 December 2010.
11. The meanings which ANL pleaded that it intended to defend as true (Practice Direction to CPR Part 53 para 2.5) were:

“(1) [Mr Rothschild] facilitated the attendance of Lord Mandelson

at a dinner held at a Moscow restaurant for the purpose of closing a multimillion pound aluminium deal ('the Alcoa deal') in circumstances which foreseeably exposed Lord Mandelson to accusations of conflict of interest and which were liable to bring Lord Mandelson and his office into disrepute;

(2) There are reasonable grounds for believing that Lord Mandelson, when EU Trade Commissioner, discussed aluminium tariffs with Mr Deripaska, in terms which would be open to criticism as inappropriate, before the closure of the Alcoa deal and that the Claimant facilitated that contact."

12. On 11 March 2010 there was a case management conference. The Master ordered that Lists of Documents be exchanged by 14 March 2011 and witness statements by 6 June 2011. ANL disclosed few documents, and asked for an extension of time for exchange of witness statements to 1 September 2011. Upon a further request, the Master extended time to 7 October. On 7 October 2011 Mr Rothschild served seven witness statements. ANL has served no witness statements. Following correspondence, Mr Rothschild issued his application to strike out the defences, and the other applications were made, as set out above.

13. By the draft Amended Defence ANL abandoned the defence of honest comment, and it recognised that it could not prove the case it had thus far advanced, namely that the purpose of the trip to Moscow had been for Lord Mandelson to be present at a dinner to close an aluminium deal between Alcoa and Rusal. It applies to amend the meaning it seeks to justify as follows;

"(1) [Mr Rothschild] facilitated the attendance of Lord Mandelson on a trip to Russia in 2005, which he had no official reason for taking, at a dinner held at a Moscow restaurant for the purpose of closing a multimillion pound aluminium deal ('the Alcoa deal') in circumstances in which foreseeably he must or ought to have foreseen that he was exposing Lord Mandelson to accusations of conflict of interest between his relationship with the Claimant and Mr Deripaska (and Mr Deripaska's business interests, including Rusal) on the one hand and his duties as EU Trade Commissioner on the other in circumstances which were liable to bring Lord Mandelson and his office into disrepute but which were likely to further the Claimant's relationship with and impress Mr Deripaska;

(2) There are reasonable grounds for believing that Lord Mandelson, when EU Trade Commissioner, discussed aluminium tariffs with Mr Deripaska, on the trip referred to in (1) in terms which would be open to criticism as inappropriate, before the closure of the Alcoa deal and that the Claimant facilitated and encouraged an inappropriate relationship between Lord Mandelson and Mr Deripaska in which that contact could occur."

14. The law as to the meaning of words in a libel action is technical. There is the following helpful summary in *Duncan & Neill on Defamation* 3rd ed:

“**12.16** Sometimes the publication complained of by the claimant will contain a single allegation, which may be a specific allegation (eg ‘X stole a diamond ring last week’), or a general allegation (eg ‘X is a thief’). But in many cases, particularly where the complaint relates to a book or a newspaper article or a television programme, the allegations against the claimant may be numerous, and in these cases it will often be important to determine whether the allegations are separate or distinct or whether they convey a common sting.

12.17 One can therefore identify four categories of publications:

- (a) A publication containing a single specific allegation.
- (b) A publication containing a single general allegation.
- (c) A publication containing more than one allegation, but where the allegations have a common sting.
- (d) A publication containing more than one allegation, but where the allegations are separate and distinct.

It ... it will be appreciated that there is a large measure of overlap in the rules relating to the various categories. In every case, the court will be guided by having regard to what is required in the particular case.”

15. The relevant cases (cited by Mr Caldecott) include *Warren v Random House Group Ltd* [2009] QB 600 para 102; *Cruise v Express Newspapers Plc* [1999] QB 931; *Polly Peck (Holdings) plc v Trelford* [1986] QB 1000, at 1021; *Warren v Random House* [2007] EWHC 3062, per Eady J at [29]; *United States Tobacco International Inc v BBC* [1998] EMLR 816; *Carlton Communications plc v News Group Newspapers* [2002] EMLR 16, per Simon Brown LJ at [46]. Since the principles are not in dispute it is not necessary to set them out further.
16. Mr Caldecott also submitted that the court should be alert to the danger of allowing a claimant to vindicate his reputation by tying the hands of the other side – see, for instance, the remarks of Kennedy LJ in *Mackenzie v Business Magazines (U.K.) Ltd* (CA, 18 January 1996) allowing a defendant to amend its plea of justification:

‘In my judgment it is particularly important in an action of this type that both sides should, if at all possible, be allowed to deploy their case as they wish. The Plaintiff seeks to vindicate his reputation. It would be a poor form of vindication if it were only obtained by half muzzling the other side.’

17. A similar point was made by Sir Thomas Bingham MR in *Basham v. Gregory* (21 February 1996) at page 10:

“The Plaintiff brings this action to vindicate his reputation, no doubt hoping that the jury will accept that he has been seriously libelled and award him damages appropriately. There must, I think, be a serious question as to how valuable vindication is if it is one against a Defendant who is not able to advance the defence he would wish.”

18. For Mr Rothschild Mr Tomlinson submits that this in practice is a case where the Article contains a single specific allegation, namely one that is tied to Lord Mandelson’s alleged attendance at the dinner to close the deal between Alcoa and Rusal. On his case, now that ANL accepts that it cannot justify that allegation, it follows that it cannot plead a defence of justification at all.
19. For ANL Mr Caldecott submits that the Article contains a general allegation, or more than one allegation where there is a common sting. On his case, even though ANL accepts that it cannot justify the allegation that Lord Mandelson’s trip to Moscow was for him to attend at the dinner to close the deal between Alcoa and Rusal, it can justify the general allegation, or the additional allegation that has a common sting.
20. Mr Tomlinson invited me to rule on the actual meaning of the words first. That would have the advantage of avoiding the necessity of considering what meaning the Article is capable of bearing. That question (under PD53 para 4.1) arises on ANL’s application to amend, and is logically prior to the question as to the actual meaning. However, Mr Tomlinson accepted that there is a difficulty in the way of my doing this. The actual meaning of words in a libel action is a question for the jury, if the action is to be tried with a jury. There is an existing order for the mode of trial to be with a jury, so to do as Mr Tomlinson suggests, I would have first to have varied the existing direction for the mode of trial and substitute a new direction that it be by judge alone.
21. Mr Caldecott invited me to hear first ANL’s application to amend. He accepted that if that application is dismissed, Mr Rothschild’s application for the defence of justification to be struck out must succeed. He argued that I could not vary the mode of trial to by judge alone until I had decided whether to permit the defence to be amended. In any event, no order has yet been made for there to be the trial of a preliminary issue on the actual meaning, and Mr Rothschild’s application of 12 December had been made so late that he was not ready to deal with it.
22. I ruled in favour of Mr Caldecott on this point, for the reasons he gave. If I were to attempt the short cut suggested by Mr Tomlinson I would have to make assumptions which may carry risks. The safer course is to address questions in a logical order.
23. It follows that in deciding whether or not to permit the amendment to ANL’s meaning, I must decide whether the Article is capable of bearing the proposed amended meaning. And in doing that I must apply the well known test most recently set out by Sir Anthony Clarke MR in *Jeynes v News Magazines Limited* [2008] EWCA Civ 130 at para 14 as follows:

"The legal principles relevant to meaning ... may be summarised in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any "bane and antidote" taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation...".... (8) It follows that "it is not enough to say that by some person or another the words might be understood in a defamatory sense".

24. Mr Tomlinson also opposed the application to amend on a second ground: that even if the Article is capable of bearing the proposed amended meanings, the particulars pleaded give to ANL no real prospect of success in proving those meanings to be true. For this point the test applicable is the one applied in applications under CPR Part 24. Again, there was no dispute about the law on this. It is as follows, as set out in the White Book (2011) at note 24.2.3:

“... It is sufficient for [the defendant] to show some “prospect”. i.e. some chance of success. That prospect must be “real”, i.e. the court will disregard prospects which are false fanciful or imaginary. The inclusion of the word “real” means that [the defendant] has to have a case which is better than merely arguable... the [defendant] is not required to show that their case will probably succeed at trial. A case may be held to have a “real prospect” of success even if it is improbable. The hearing ... is not a summary trial. The court... will consider the merits of the [defendant’s] case only to the extent necessary to determine whether it has sufficient merit to proceed to trial. The problem of disposal of an issue does not involve the court conducting a mini-trial... ‘ the criterion that the judge has to apply... is not one of probability: it is absence of reality (*Three Rivers v Bank of England (No 3)* [2001] 2 All ER 513)”.

25. Mr Tomlinson also opposed the application to amend the Defence on a third ground, namely case management (CPR Parts 1 and 3).
26. Mr Caldecott made submissions based on the Defamation Pre-Action Protocol. Under the heading "Defendant's Response to Letter of Claim", para 3.5 provides that the Response to a Letter of Claim should include the following:

- i) "... If more information is required, then the Defendant should specify precisely what information is needed to enable the claim to be dealt with and why.
- ii) If the claim is rejected, then the Defendant should explain the reasons why it is rejected, including a sufficient indication of any facts on which the Defendant is likely to rely in support of any substantive defence.
- iii) It is desirable for the Defendant to include in the response to the Letter of Claim the meaning(s) he/she attributes to the words complained of."

THE WORDS COMPLAINED OF

27. The passages set out below, represent the great majority of the article, or, in Mr Tomlinson's phrase, what it is all about. The numbers in brackets at the end of each paragraph reflect the numbering marked on the colour photocopy of the hard copy version which was prepared for the hearing. For ease of reference, key passages concerning the Claimant are underlined, and some of the passages which are merely incidental background or are repetitious have been omitted:

[On the front page and page 2:]

"Mandelson, an oligarch and a £500m deal over dinner that cost 300 British jobs (headline – also substantially repeated in large letters on page 9)

Damning questions about Lord Mandelson's role in a controversial Russian oligarch's £500million deal which undermined British manufacturing jobs are raised today. (1)

The former Business Secretary was a 'valuable extra' as a dinner guest as billionaire Oleg Deripaska entertained American aluminium executives in Moscow. (2)

The meeting, also attended by British-born financier Nat Rothschild, resulted in a deal to sell two of Deripaska's giant Russian-based RUSAL factories to a U.S. firm, Alcoa. (3)

But the 2005 agreement had for hundreds of British jobs. (4)

Mandelson - who was the EU Trade Commissioner - was in a position to allay 'concerns' over tariffs on imports from Eastern Europe. Indeed, over the following three years, they were slashed. (5)

This prompted the dumping of cheap aluminium on the European market, forcing at least four British factories to the wall. (6)

...

Questions were being asked last night about what exactly Mandelson told the Americans and Russians about EU tariffs. (9)

In the past, he has denied ever talking to Deripaska about aluminium or even meeting Deripaska before 2006. His presence at the private dinner has been confirmed to the Mail by eyewitness sources linked to both Alcoa and Rusal. Russian sources said he had been flown from Switzerland to Moscow in a private jet belonging to Deripaska's close adviser. Rothschild and Mandelson have been friends for years. (10)

The trip was 'unplanned' and made in such haste that Mandelson had no valid visa. A source close to Rusal said that it needed the

intervention of the company's head of security, a former senior KGB officer, to secure his entry into Russia. (11)

'It was a big headache,' said the source last night. (12)

'But Peter Mandelson's presence at that dinner was a very valuable extra for Deripaska.' (13)

A source close to Alcoa said: 'We certainly didn't expect Mandelson at the dinner, and assumed it would just be folks from Rusal and Alcoa. 'Nat has known Oleg a long time, and he played match-maker.' (14)

[On pages 8 and 9]

Sunday was never the busiest night at Cantinetta Antinori, a fashionable Tuscan restaurant in Moscow. But this one crackled with the electricity that only powerful tycoons and a £500 million deal on the table can generate. (1)

Holding court in a private room upstairs was Oleg Deripaska, controversial oligarch owner of Russia's giant aluminium producer, Rusal. (2)

He had only just returned to Moscow from the World Economic Forum in Davos. And, according to sources, his dinner had hardly begun when two more people appeared, hotfoot from Switzerland. (3)

One of the new arrivals was financier Nat Rothschild, scion of the British banking dynasty and ultra-loyal special adviser to Deripaska. (4)

Rusal executives will tell you that Rothschild liked nothing more than to please his billionaire patron. And to that end Rothschild had brought with him a 'surprise' VIP guest; none other than the European Union's Trade Commissioner, Peter Mandelson. (5)

By bringing his friend halfway across Europe in his own private jet - and getting him into Russia without a valid visa in his passport - young Rothschild had pulled a very unexpected and also rather useful rabbit out of his hat. How useful we can explain here for the first time. (6)

The bare fact that Mandelson had dinner with Deripaska in Moscow that Sunday evening in January 2005 was first made public 18 months ago. He had wanted it kept secret ...

But we can now reveal that there was much more at stake in the Cantinetta Antinori that night than the chance for Mandelson to break ciabatta with Deripaska. So important was it that Rothschild was prepared to cause what one former Rusal executive described to the Mail as a 'serious headache' by engineering Mandelson's visa-less arrival to Moscow. (9)

According to the same source, that headache was cured only by Rusal's head of security, a former senior KGB officer, pulling strings to get Mandelson through passport control. (10) ...

The presence of Alcoa chairman Alain Belda, executive vice-president Barbara Jeremiah and head of communications Jake Siewert, a former Press Secretary to President Clinton (and now an adviser at the U.S. Treasury) is enough to explain the real significance of Rothschild and Mandelson's helter-skelter trip across Europe. (13) ...

As EU trade supremo, Peter Mandelson, president of think-tank Policy Network, to which Dahdaleh donated £15,000 only months later, was a very welcome guest at the 'close of deal' dinner that night in Moscow. (23)

By his presence, Mandelson could, at the very least, bless the £500 million union of the metals giants. It also signalled that he was well disposed to their efforts, which were projected to make some £30 million annual profit under the Americans. (24)

In short, it is very hard to believe that by being there Mandelson had not done Deripaska an enormous business favour. Certainly, the Mail has been told, the Americans did not expect him to be there. It is hard to believe that tariffs were not discussed. (25) ...

It was an infamous holiday on Corfu in the summer of 2008 that first drew public attention to the links between Mandelson and the Russian oligarch. (28)

The Rothschild family's holiday villa is on the island, and Deripaska's super-yacht was moored offshore. That August, Mandelson and the then Shadow Chancellor George Osborne enjoyed the hospitality of both. (29)...

Amid the claim and counter-claim, it became clear that the Mandelson Deripaska association predated Corfu by several years. (31)

But Mandelson did not want the world to know. (32)

His EU spokesman had first stated that the two men met 'at a few social gatherings in 2006 and 2007', but had never discussed aluminium. This was not true and, under pressure, Mandelson soon had to admit he first met the Russian in 2004 'to the best of my recollection'. (33)

Certainly the pair were seen together in Moscow in October 2004, just after Mandelson had been appointed EU Trade Commissioner but before he'd taken up the post. (34)

He officially entered office as EU Trade Commissioner on November 22, 2004. ... (35)

The Cantinetta Antinori dinner ... threw a fascinating light on the dynamics in the relationship between Deripaska, Rothschild and Mandelson. (39)

'The dinner was simply supposed to be a meeting of Rusal executives and their counterparts at Alcoa,' says the former Rusal executive. 'Nat Rothschild bringing the EU Trade Commissioner to the table was a very valuable extra for Deripaska. (40)

'Mandelson's sudden arrival was one of the games Rothschild played to impress Deripaska and keep him close. It was all about Nat. You have to see the event through the prism of Nat. Rusal was full of young, ambitious Russians and they did not like Nat taking all the glory. But Nat was literally dictating the colour of the loo paper at Rusal.' (41) ...

Revealed: the astonishing story of the night Lord Mandelson was flown to Moscow by private jet to join a billionaire friend desperate to strike a deal that cost British jobs (sub-headline on p.9)

Left at the table was the complex Deripaska network of money and influence. (44)

As we have mentioned, there was Peter Munk, owner of Barrick Gold, the world's largest gold producer. (45)

Munk also sat on Rusal's international advisory board. Nat Rothschild sat on the equivalent board at Barrick Gold and Munk has reportedly invested heavily in Nat's Atticus hedge fund. (46)

Deripaska, Munk and Rothschild were also co-developing Porto Montenegro, a resort for the super rich near the town of Tivat. (47)

On January 31, 2005, fewer than 24 hours after the Moscow dinner attended by Mandelson, the Rusal-Alcoa deal was closed and triumphant press releases sent out. (50)

That night, Rusal and Alcoa executives went off to dine at the Cafe Pushkin, another of Moscow's high-end restaurants where Deripaska and Mandelson are known to have met in 2004. (51)

This time Mandelson was not present, according to one ex-Rusal executive. The Rothschild-choreographed favour had been done and the Trade Commissioner's use to Deripaska was at an end, for the moment. (52)

But over the next four years his department in Brussels was to make a series of decisions on tariffs which had huge benefits for those who attended the Cantinetta Antinori dinner. (53) ...

A senior business figure who knows some of the parties present that night disputes that the relationship is without reward: 'I do not think there is some secret bank account where he has millions of pounds of under the table payments stashed away,' he said. (62)

But the people Mandelson seeks to mix with are able to equip the lifestyle he loves but cannot independently afford. They have the private jets, villas and yachts which they are prepared to put at his disposal. (63)

There is no evidence that Mandelson orchestrated these tariff reductions specifically to help his Russian friends, but he certainly has many questions to answer. (64)

Once again, his actions have brought his public offices and personal integrity into disrepute and exposed him to accusations of conflict of interest. (65)

By any standard, the desperate race to attend the Cantinetta Antinori dinner was another gross error of judgment. (66)''

28. Mr Tomlinson submits the Article is not about "the trip". It is all about "the dinner", and Mr Rothschild's role in facilitating Lord Mandelson's appearance at it for a specified improper purpose, in specified controversial circumstances, and with specified deplorable consequences. Insofar as the article refers to the relationship between Mr Deripaska, Mr Rothschild and Lord Mandelson, it does so briefly (paras 28-34) and by way of incidental background to the story with which the Article is almost exclusively concerned: the story of the dinner, and why Lord Mandelson was there.
29. The further one gets from the dinner, he submits, the further one gets from a meaning of the article that is defamatory of Mr Rothschild. It is one thing to say that a person knowingly exposed another person to accusations of conflict of interest because he took extraordinary steps to ensure that person's attendance at a business meeting, and

that he did so, or is reasonably to be suspected of doing so, in order that a deal could be closed on the basis of corrupt and improper assurances from that person. It is quite another to say that a person is to be criticised for inviting a friend to accompany him on a trip to visit a potential joint venture project, even if the friend is a person in Lord Mandelson's position.

30. In short, Mr Tomlinson says, the proposed new meanings cannot pass muster because they fail to include the essential ingredients contained in the Article – the contentions which make the article particularly damaging to Mr Rothschild and of which Mr Rothschild has complained from the outset. They do not meet the sting of the libel. A plea of justification which does not even purport to justify (whether in every detail or in substance) the true sting of the allegations complained of is no plea of justification at all (and is not to be confused with a plea of partial justification, which is permissible where there are two or more different charges and the defendant is only able to justify one or more but not all of them). See *Gatley on Libel and Slander* 11th ed at paras 11.8-11.9; 11.12; cf para 29.8. The proposed amended meanings delete all references to the dinner and to the Alcoa deal – substituting a generalised case concerning conflict of interest and “inappropriate relationships”. These are not meanings that the Article is reasonably capable of bearing.
31. Mr Caldecott submits that the Article has a number of themes, and he identifies paragraphs in the Article which relate to these:
- i) The Alcoa dinner: (this is not in dispute)
 - ii) wider allegations about the inappropriateness of Lord Mandelson's relationship with Mr Deripaska and Mr Rothschild's facilitating role: p2(10), (14), p8(5), (29)-(35), (39) and (41), p9(44)-(47), (51), (53), (63),
 - iii) the business interests of Mr Deripaska: (the passages are omitted from the citation above)
 - iv) Lord Mandelson's secrecy about his relationship with Mr Deripaska: p2(10), p3(29)-(35).

DECISION ON MEANING

32. In my judgment Mr Caldecott is correct to submit that the Article does include, as a significant theme, wider allegations about the inappropriateness of Lord Mandelson's relationship with Mr Deripaska and Mr Rothschild's facilitating role. It is not confined to the Alcoa dinner. And I accept that this theme does have a common sting with the allegations which are specifically related to the dinner. In my judgment the Article is capable of bearing the meaning in para (1) of ANL's amended meaning.
33. The Article is also capable of bearing the meaning in para (2) of ANL's amended meaning. It says in terms on p8(25): “It is hard to believe that tariffs were not discussed”. Those words appear in the part of the Article referring to the dinner, but the dinner is said to be part of the trip on 30 January 2005.

34. The next question is whether ANL has a real prospect of proving the truth of the proposed amended meanings on the basis of the Particulars of Justification, as ANL asks for permission to amend them.

THE FACTS

35. There are the following classes of facts: (1) those set out in the Article and Particulars of Justification that Mr Rothschild accepts are true; (2) those set out in the Article which ANL accepts that it cannot justify (which it is proposed to delete from the Amended Defence); and (3) those set out in the Reply and in the witness statements served by Mr Rothschild which ANL accepts it cannot dispute (and which ANL proposes to add to the Amended Defence, mainly at paras 6.42.1 to 6.42.6, 6.44, 6.46A and 6.46 and 6.48 to 6.49A, 6.50 to 6.50A.2). The most important facts in categories (1) and (3) are as follows.
36. The facts set out in the Article and Particulars of Justification that Mr Rothschild accepts are true, or does not materially dispute are as follows:
- i) Under the headings “The Claimant and his relationship with Oleg Deripaska”, “Lord Mandelson”, “Lord Mandelson’s obligations as European Commissioner”, “The public emergence of Lord Mandelson’s relationship with Oleg Deripaska and the initial response of Mr Rothschild and Lord Mandelson to that scrutiny” and “The true position as to Lord Mandelson’s relationship with Mr Deripaska” - paras 6.1 to 6.26. The issue, such as it is, is that Mr Rothschild disputes that a Rusal company benefited directly from the reduction of EU aluminium tariffs implemented during Lord Mandelson’s term as Trade Commissioner. He also disputes that Lord Mandelson and Mr Deripaska were very familiar longstanding acquaintances.
 - ii) Under the heading “The BBC interview with Lord Mandelson of 29 October 2008” (paras 6.33 to 6.34) in which it is pleaded that Lord Mandelson was asked about his relationship with Mr Deripaska, and repeatedly asked the specific question whether he had discussed aluminium tariffs with him, but Lord Mandelson did not answer these specific questions.
37. The events in relation to January 2005 which were originally pleaded in paras 6.42ff, and the truth of which is not, or not materially, in issue are as follows.
38. The World Economic Forum was held in Davos between 26 and 30 January 2005. Mr Rothschild, Lord Mandelson and Mr Deripaska all attended. On Sunday 30 January 2005 Mr Rothschild and Lord Mandelson flew from Davos to Moscow in Mr Rothschild’s private jet. Lord Mandelson did not pay for the flight which was funded by Mr Rothschild. Lord Mandelson did not declare the benefit in the Commissions public register of gifts. The trip was not made on EU business. It was arranged at such short notice that Lord Mandelson did not have a valid visa with which to enter Russia. Russia’s attitude to these and immigration formalities is strict. In Moscow Lord Mandelson had an unofficial meeting with a Russian Minister. On that evening two dinners were held in Moscow. One was the dinner (referred to as the “Alcoa/Rusal dinner”) on the first floor of the restaurant. This was attended by, amongst others, Mr Deripaska, other representatives of Rusal, representatives of Alcoa and Peter Munk the Chairman of Barrick Gold.

39. The events, as pleaded in the draft Amended Particulars of Justification are as follows:

“6.42.1 On 29 January 2005 [Mr Rothschild] had attended a dinner in Davos hosted by Mr Munk. That dinner was also attended by Mr Deripaska, Lord Mandelson as well as ... the Chairman of Alcoa.

6.42.2 At this dinner [Mr Rothschild], Mr Deripaska and Mr Munk discussed a potential joint venture into which they were contemplating entering and which was later to culminate in a joint bid made by their respective companies for Polymetal, a leading Russian gold producer. At the relevant time, the issue as to whether foreign owned companies should be allowed to compete for the rights to exploit the country’s strategic natural assets was a matter of considerable political sensitivity in Russia.

6.42.3 At the suggestion of Mr Deripaska, the parties to that joint venture agreed to continue their discussions in Russia the following day with a view to taking a site visit of industrial plants in Siberia which were relevant to that proposed deal.

6.42.4 [Mr Rothschild] invited Lord Mandelson to accompany the joint venture party on that trip. According to [Mr Rothschild]’s pleadings he did so because he knew that Lord Mandelson had not been to Siberia and was keen to see the area. In this regard:

a. The decision to travel overnight from Moscow to Abakan in Siberia on 30 January 2005 was made at short notice during the course of the Alcoa/Rusal dinner. When [Mr Rothschild] initially made his offer to Lord Mandelson at Davos the previous evening, the intention was for the joint venture party to fly to Siberia on the morning of 31 January.

b. Abakan is 4 hours ahead of Moscow. A flight from Moscow to Abakan International Airport would normally last in the region of four hours (assuming good conditions en route).

c. On 31 January 2005, the mean temperature in Abakan was recorded at -28.1 degrees centigrade. Temperatures dropped as low as -34 degrees centigrade.

d. Sunset that day was at approximately 5.33 pm and there were less than 9 hours daylight in total.

e. Lord Mandelson was required to be back in Brussels for a series of official engagements and meetings early in the morning of Tuesday 1 February 2005. [Mr Rothschild]’s

private jet was designated to fly Lord Mandelson back to Brussels and was booked to leave Abakan at 5.15am local time on the morning of 1 February. The plane was scheduled to land at Brussels Airport at 6.51am local time...

6.42.5 Had [Mr Rothschild] kept to the itinerary that was anticipated when he first invited Lord Mandelson and had the joint venture party flown to Abakan on the morning 31 January 2005, Lord Mandelson's supposed sight-seeing trip to Siberia would have taken place largely (and quite possibly entirely) in darkness, in extreme sub zero temperatures and would have barely lasted 12 hours in total. In the circumstances, there was no sensible reason for [Mr Rothschild] to invite Lord Mandelson to travel to Russia on 30 January 2005 if the object of the trip was merely to afford him an opportunity to visit Siberia as a place of interest.

6.42.6 Further [Mr Rothschild] must have applied his mind to the transport arrangements and to where Lord Mandelson would stay in Siberia on a private trip arranged at such short notice in mid winter. In view of subsequent events (see below) it is to be inferred that the understanding was that Lord Mandelson would fly with the rest of the party from Moscow to Siberia on Mr Deripaska's private jet, would stay at Mr Deripaska's compound/chalet in a ski resort in Siberia with the rest of the party at Mr Deripaska's expense and would be flown back to Brussels on [Mr Rothschild]'s jet or that of Mr Deripaska. As [Mr Rothschild] must also have known at this stage, Lord Mandelson would not be paying for the flights or the hospitality whose costs would be met by himself and/or Mr Deripaska. These were substantial benefits (in which context para 6.44 below is repeated). It is also to be inferred at this stage that when an overnight stay in Moscow was envisaged, that [Mr Rothschild] would have known that the hotel would have been of a high standard and that [Mr Rothschild] or Mr Deripaska would have paid that bill too.

6.42.7 [Mr Rothschild] must have known that it was unlikely that Lord Mandelson would have disclosed the fact of the trip or the details of the free travel and hospitality received precisely because it was compromising of his position.

6.43 On 30 January 2005 [Mr Rothschild] and Lord Mandelson flew from Davos to Moscow in [Mr Rothschild]'s private jet. Lord Mandelson did not pay for the flight, which was funded directly or indirectly by [Mr Rothschild] and represented a substantial benefit to Lord Mandelson ...

6.44 [Mr Rothschild] would or should have appreciated that in giving himself, and arranging for Mr Deripaska to give such favours to Lord Mandelson he was exposing Lord Mandelson

to allegations of taking favours from [Mr Rothschild] and Mr Deripaska in the context of a private business trip and where Mr Deripaska's business interests in particular (including Roussel) closely engage (and were likely to continue to engage) issues relating to EU trade policy. The trip was not made on EU business and was not paid for by the EU. Nor in consequence were any representatives of the EU present to record what Lord Mandelson did or said or to ensure transparency. Notwithstanding the fact that he met with a Russian government minister during the trip Lord Mandelson similarly failed to disclose either the fact or nature of the visit to two officials at the European Commission on his return to Brussels.

6.45 These actions by [Mr Rothschild] and the resulting favours exposed Lord Mandelson to the accusation that he was thereby beholden to [Mr Rothschild] and Mr Deripaska and Rusal.

6.46A By its very nature (see paragraph 50 below), [Mr Rothschild]'s decision to invite Lord Mandelson on a business trip to Russia was likely to involve Lord Mandelson being placed in situations pertaining to the commercial interest of Mr Deripaska and [Mr Rothschild] and thereby would expose him to accusations that he was beholden to or unduly close to or unfavourably predisposed to the commercial interests of Mr Deripaska (and those of his companies and business partners, including [Mr Rothschild]) in a way which conflicted with the objectivity and independence of commercial interests required of his role as EU trade commissioner.

6.46 Prior to leaving for Moscow Mr Deripaska was engaged by [Mr Rothschild] to arrange a private meeting between a Russian minister and Lord Mandelson which the latter had requested. Mr Deripaska arranged for the dinner to take place at the Cantinetta Antinori Restaurant. Lord Mandelson did not disclose the fact or nature of the dinner to the European Commission on his return to Brussels. The dinner was arranged without any reference to Lord Mandelson's office. [Mr Rothschild] must have known that Mr Deripaska was keen to foster a relationship with Lord Mandelson ... and it was at least likely that the dinner and the private room would be paid for by Mr Deripaska, having regard also to paragraph 6.47 below.

6.47 On the evening of 30 January 2005 a "closing dinner" was held in Moscow in anticipation of the Alcoa deal's completion. The dinner which was booked by Mr Deripaska, was held in a large private room on the first floor at the Cantinetta Antinori and was attended by Mr Deripaska together with others [including representatives of Alcoa] and Peter

Munk, who had hosted the dinner in Davos the previous evening was also present.

6.48 On arrival in Moscow (if not before) [Mr Rothschild] was invited by Mr Deripaska to join the dinner referred to in paragraph 6.47. By then (if not before) [Mr Rothschild] knew that Mr Deripaska had arranged for Lord Mandelson to dine with a Russian minister at the same restaurant as his own party. [Mr Rothschild] went to the restaurant with Lord Mandelson.

6.49 On arrival at the restaurant or if not before, [Mr Rothschild] knew that Mr Deripaska had booked a large private room at the Cantinetta Antinori for his own party and therefore that he had, or was likely to have guests with business interests connected with his own. [Mr Rothschild] took Lord Mandelson to the large private room (the Russian minister having not yet arrived) and introduced him to a party which essentially of those involved in the Alcoa-Rusal deal and those involved with the potential joint venture in Siberia (the unifying feature being Mr Deripaska's private business interests). This was likely to give the impression that Lord Mandelson was well disposed towards Mr Deripaska and [Mr Rothschild] and their commercial interests, especially in the context of the favours given to Lord Mandelson in terms of travel and hospitality. All those present would have appreciated the obvious importance of EU trade policies generally, and EU aluminium tariff policies in particular, to Mr Deripaska's commercial interests.

6.49A After Lord Mandelson had left the Alcoa dinner to take up his engagement with the Russian minister, [Mr Rothschild] and Mr Deripaska subsequently went downstairs to the room where that dinner was taking place and stayed with Lord Mandelson and the Russian minister for a period of some 15 minutes.

6.50 In bringing him to the dinner and then appearing with Mr Deripaska at Lord Mandelson's meeting with the Russian minister, [Mr Rothschild] self-evidently exposed Lord Mandelson to the accusation that he was by his attendance favourably disposed to Mr Deripaska and his commercial interests, so compromising (or at the least putting at risk) Lord Mandelson's independence as Commissioner and calling his integrity into serious question. That exposure was aggravated by the background of favour arising from the undeclared travel and hospitality (given and to be given) as pleaded above and below.

6.50 Following the conclusion of the Alcoa dinner [Mr Rothschild], Mr Deripaska, Mr Munk and Lord Mandelson travelled from Moscow to Siberia. As to this trip to Siberia:

6.50A.1 In fact, and as pleaded in paragraph 6.42.4(a) above during the course of the Alcoa/Rusal dinner on 30 January 2005 a decision was taken by [Mr Rothschild], Mr Deripaska and Mr Munk to depart from Moscow that evening – i.e. after the conclusion of the dinner and after [Mr Rothschild], Mr Munk and Lord Mandelson had been allowed an opportunity to return to their hotel to gather their belongings. The reason for this decision was apparently to afford the joint venture parties sufficient daylight to inspect the relevant industrial plant. In this regard:

a. The parties (including Lord Mandelson) flew from Moscow to Abakan International Airport in Mr Deripaska's private jet.

b. On arrival at Abakan Airport the parties immediately travelled to the industrial plant. This visit took up the majority of the day. It is to be inferred that Lord Mandelson also accompanied Mr Deripaska and Mr Munk on the site visit at the said plants, not least having regard to: the suddenness and ad hoc nature of these arrangements; Lord Mandelson's status; the presence on that site visit of another person with no direct interest in the proposed joint venture (Mr Taylor); the matters pleaded in paragraph 6.50A(c) below; the adverse weather conditions in Siberia.

c. The parties then travelled to Mr Deripaska's Siberian compound/chalet where they spent the evening being entertained by Mr Deripaska. Lord Mandelson and Mr Munk stayed in the same chalet there, prior to Lord Mandelson having to leave sometime before the anticipated departure of [Mr Rothschild]'s private jet from Abakan at 5.15 am the following morning. Neither that flight, nor any of the hospitality which he received while in Siberia was declared by Lord Mandelson on his return to Brussels..."

6.50A.2 Accordingly [Mr Rothschild] invited Lord Mandelson on a business trip:

a. The principle purpose of which was to allow [Mr Rothschild], his patron Mr Deripaska and latter's business partner, Mr Munk, to inspect assets relevant to the viability of a major and politically sensitive venture;

b. Which was organised, paid for and funded by Mr Deripaska, the owner of companies with substantial and continued interest in the EU market, and by a person closely associated with those interests ([Mr Rothschild]) and which necessarily involved Lord Mandelson accepting (and being seen to accept) substantial hospitality and travel benefits

from Mr Deripaska and [Mr Rothschild] in the direct context of that proposed commercial venture;

c. Which self-evidently conflicted with Lord Mandelson's role as Trade Commissioner and which was accordingly likely to leave Lord Mandelson susceptible to the charge that he was favourably disposed or aligned to Mr Deripaska and the commercial interests of his company;

d. Which hospitality and benefits by the same token Lord Mandelson was most unlikely to declare formally or otherwise publicly admit.

6.51 Against this background and, further, in light of:

(1) the reality of Lord Mandelson's relationship with Mr Deripaska and the false statements which he made in October 2008 to the effect that his relationship with Mr Deripaska had commenced only in 2006 (as pleaded at paragraphs 6.19-6.25 above and which [Mr Rothschild] also would have known were false);

(2) Lord Mandelson's extraordinary evasiveness in October 2008 as to whether he had discussed aluminium tariffs with Mr Deripaska (paragraphs 6.33-6.34) and his failure to disclose the fact or nature of his visit to Russia between 30 January and 1 February 2005 to the European Commission (paragraph 6.43, 6.44 and 6.50 A.1(c) above).

(3) [Mr Rothschild]'s own conduct in seeking to divert political and media attention away from investigating the truth of Lord Mandelson's relationship with Mr Deripaska (paragraphs 6.26 – 6.32 above);

(4) [Mr Rothschild]'s willingness on other occasions: to seek to acquire political influence on behalf of Mr Deripaska and his companies by means which [Mr Rothschild] knew to be insalubrious (paragraph 6.32(c) above); To place Lord Mandelson in a situation where he was (or ran the risk of being seen to be beholden to Mr Deripaska) despite his awareness of Lord Mandelson's role as Commissioner and the scrutiny his conduct was likely to attract as a result of his past conduct (paragraph 6.15 and 6.21 above),

There exist reasonable grounds for believing that:

a. Lord Mandelson did discuss aluminium tariffs with Mr Deripaska on the Russian trip in terms which are open to criticism as inappropriate;

b. [Mr Rothschild] facilitated contact and encouraged an inappropriate relationship between Lord Mandelson and Mr Deripaska in the context of which those discussions could occur.”

SUBMISSIONS

40. In support of his submission that the proposed case on justification has no reasonable prospect of success Mr Tomlinson makes the following submissions. The Particulars, albeit very long, are notably short on any substance as regards Mr Rothschild. It is not said why Mr Rothschild should have foreseen or did foresee that he was exposing Lord Mandelson to accusations of conflict of interest. Further any accusations of conflict of interest would be highly unreasonable so they could not reasonably bring Lord Mandelson into disrepute. ANL must accept that Lord Mandelson was there as a friend of Mr Rothschild (because the case for ANL is now based on Mr Rothschild’s own evidence). Lord Mandelson had no interest (professional or otherwise) in the proposed joint venture between Mr Deripaska and Mr Munk. So there were no interests which might conflict with any duties of Lord Mandelson as EU Trade Commissioner.
41. Similarly, Mr Tomlinson submits that there are no reasonable grounds for believing that Lord Mandelson discussed aluminium tariffs with Mr Deripaska on the trip to Siberia. Further, Lord Mandelson and Mr Deripaska had been together in Davos and there was nothing to suggest that any discussion they had took place on the trip to Siberia. There were no particulars as to the alleged discussion.
42. Further, Mr Tomlinson submits that even assuming (which is denied) that Lord Mandelson’s conduct in accepting Mr Deripaska’s hospitality could fairly be criticised, what has to be justified is a defamatory meaning that Mr Rothschild is responsible for this, and there is no basis for suggesting that he was responsible.
43. Having carefully considered these submissions, I nevertheless come to the view that ANL does have a real prospect of success in proving the truth of the meanings which it proposes to include in the Defence if given permission.
44. It is important for me to stress that I am, in this judgment, making no finding that ANL’s case will probably succeed at trial. This is important not only for Mr Rothschild but also for Lord Mandelson. This judgment cannot be read as containing any criticism or finding of fact adverse to Lord Mandelson. He is not a party to these proceedings and no submissions have been made on his behalf. It would not be fair of anyone to read these remarks as a criticism by me of him. In the circumstances it is not appropriate that I should set out in detail the reasons why I consider the case proposed to be pleaded in the Amended Defence have the sufficient prospect of success to go forward.

CASE MANAGEMENT CONSIDERATIONS

45. Both parties agree that even if the proposed Amended Defence satisfies the tests considered above in this judgment, nevertheless as a matter of discretion the court can refuse permission on case management grounds. Mr Tomlinson submits that permission should be refused on this basis. He submits the application is too late, and

the lateness has not been adequately explained. He refers to the timetable of the proceedings which I have briefly set out above. ANL served no witness statements, and offered no explanation for its failure to do so, and its failure to make its position clear as recently as last month.

46. Further, Mr Tomlinson submits that it is wrong in principle for a defendant to advance a case based upon a claimant's witness statements. A claimant is under no obligation to adduce the evidence contained in those statements: see *Pell v Express Newspapers* [2003] EWHC 1649 at para 24 and *McPhilemy v Times Newspapers* (2) [2000] WLR 1732. Moreover, insofar as a defendant may be entitled to rely on the evidence of a claimant, he must take it as it stands. He cannot select parts of the statements and reject others. In the present case for example the statement of the claimant rejects any notion that Mr Deripaska ever discussed aluminium tariffs with him, or, so far as Mr Rothschild is aware, with Lord Mandelson when in Davos, Moscow or otherwise.
47. Mr Caldecott submits that the lateness of the application, and the unusual way in which the case has proceeded are both attributable substantially to the course which Mr Rothschild has chosen to pursue, which, he submits, is not consistent with the Pre-Action Protocol and the modern practices based on the CPR in particular the overriding objective. These are sometimes summarised as being based on the principle that the parties should put their cards on the table. Mr Caldecott relies on the observations of Eady J in *DAR v Taylor* 17 May 2001 unreported para 26 and *Abu v NGN Limited* [2003] 1 WLR 220 1 at para 9. Mr Rothschild had written a letter of claim in accordance with the Pre-action Protocol dated 26 May 2011.
48. Mr Caldecott submits that the provisions of the Pre-Action Protocol are a key part of the Civil Justice Reforms instituted over ten years ago now. Its purpose is to allow the parties to make "an informed judgment" on the merits, through "earlier access to the information they need". It follows that if a claimant omits to give a candid response to questions from a defendant and in particular if he fails to give sufficient explanation to enable the defendant to appreciate why the words are inaccurate, that in itself may be significant in terms of the inference which a defendant is entitled to draw as to the true facts. The Defamation Pre-Action Protocol represents a policy change of importance. Before that change, claimants were able to rely on the burden of proof, that is the presumption of falsity, in declining to give defendants any pre action assistance as to the nature of the claimant's case.
49. In the letter of claim dated 26 May 2010 Schillings for Mr Rothschild included the following in support of the contention that the gist or sting of the Article was false:

"Firstly Lord Mandelson merely greeted those at the Alcoa/Deripaska dinner as a natural courtesy while he was waiting for another meeting to begin. Tariffs were never discussed by Lord Mandelson and those at the Alcoa/Deripaska dinner.

Secondly the Alcoa/ Deripaska deal was already completed at that stage. It was a completion dinner so it is logically impossible for Lord Mandelson's presence to have (as you directly allege) "resulted in a deal to sell two of Deripaska's

giant Russian based Rusal factories to a US firm, Alcoa”; (our emphasis).

It follows therefore that our client cannot logically have been a part of a plot to deploy Lord Mandelson as an ace to seal the Alcoa/Deripaska deal, when no such plot existed”.

50. On 7 June ANL replied saying it was making enquiries. On 22 June 2010 Schillings wrote complaining of this failure to respond. On 1 July 2010 ANL did respond the letter included the following:

“...You have not really dealt with the facts in the article, or your clients position. Presumably therefore you accept the following matters are accurate statements:

2.1 Your client has over the past few years become a close friend and advisor of Mr Deripaska, who is also your clients patron. Although this was not reported in the article as it was not relevant, Mr Deripaska and your client have jointly invested in projects for example in Montenegro. Their connection has been recognised for a number of years. ...

2.2 Your client is also a close friend of Lord Mandelson who at the time of the dinner was the European Union’s Trade Commissioner.

2.3 Your client is a businessman who does not hold high or, indeed, any public office. The rules under which your client and Mr Mandelson operate are therefore naturally very different.

2.4 Your client flew Lord Mandelson in his private jet to Moscow

2.5 The article notes that the trip was arranged with such speed that Lord Mandelson did not have a visa and one had to be arranged by a head of security of Rusal.

2.6 Your client attended the dinner in Moscow in January 2005 at the invitation of Mr Deripaska.

2.7 Your client invited Lord Mandelson to go to Cantinetta Antinori, knowing that the Rusal/Alcoa party and others were present.

2.8 The deal between Rusal and Alcoa was announced the day after the dinner. The Alcoa representatives were in Moscow to complete the deal and the dinner took place the following night to celebrate the completion.

3. However, although you ignore most of the contents of the article, you put forward two points which you say show that the sting (an artificial construct in itself) is false:

3.1 You make the point that Lord Mandelson was waiting for another meeting to begin. This rather misses the point. The central point is that he was there at all, but that is a matter for Lord Mandelson. You also overlook the fact that the article does not say that trade tariffs were discussed at the dinner at which Lord Mandelson was present...

4. Finally, you suggest that no attempt was made to check the facts. The same could be said in reply. A list of questions were put to Rusal, for whom your client is an advisor, on the day before publication. They offered no comment. Lord Mandelson was also given the opportunity to comment prior to publication.

In these circumstances, unless you are able to shed more light on your complaint, your client's demand for damages, and undertaking a statement in open court and an apology are not appropriate."

51. No reply was received from Mr Rothschild. On 7 July 2010, he wrote issuing proceedings saying that ANL had still failed to address the substance of his complaint.
52. Mr Caldecott submits that the following matters are to be noted in relation to what Mr Rothschild was saying before issuing the claim form. His letter of 26 May did not reveal that the other meeting which Lord Mandelson was present at the restaurant to attend was an unofficial dinner at the same restaurant with a government minister arranged by Mr Rothschild with the assistance of Mr Deripaska. Mr Rothschild does not suggest that he did not know in advance Mr Deripaska was entertaining Alcoa at that restaurant. Mr Rothschild did not advance any explanation as to why Lord Mandelson went to Moscow at such short notice. There is no reference at all to the trip to Siberia, which is now said to be the true purpose of the entire trip. It was clear from the Article that ANL was at that stage unaware of the trip to Siberia. At that stage, therefore, it appeared to ANL that Lord Mandelson and Mr Rothschild did know in advance that the Alcoa deal was taking place.
53. Mr Caldecott also submits that the letter of claim failed to point out another matter which is now said to be erroneous in the Article. It did not suggest that Mr Rothschild had no hand in arranging Lord Mandelson's visa, or that it was arranged by someone other than Rusal's head of security, as is now Mr Rothschild's case.
54. It follows that the absence of any response to the letter of ANL dated 1 July meant that ANL was reasonably entitled to assume that the matter set out in that letter were true in particular those in paragraphs 2.5 and 2.7.
55. The matters in relation to the Pre-Action Protocol correspondence were fully pleaded by ANL in para 9 of its defence. The point is unanswered in the Reply.

56. The case advanced by Mr Rothschild in relation to the visit to Siberia emerged for the first time in the Reply, but only in part. It is not until 13 June 2011 that Mr Rothschild revealed for the first time, in a letter from Schillings, that Mr Deripaska was involved in arranging the meeting between Lord Mandelson and the minister at Mr Rothschild's request. The case made for the first time in the Reply at 4.38.4 that "prior to his arrival at the dinner Mr Rothschild was not aware that anyone other than Mr Munk and Mr Deripaska would be attending the [Alcoa/Rusal] dinner" contradicts one of the points put by ANL in its letter of 1 July 2010, at para 2.7. There is no explanation for why it was not forwarded in July 2010. ANL had sought clarification in a Part 18 request for further information dated 13 July 2011, but Mr Rothschild had declined to respond by letter dated 15 July 2011, and the Master declined to make an order in view of the pending exchange of witness statements.
57. It was the witness statements that revealed for the first time the following matters which have been included in the draft Amended Defence:
- a) The "potential joint venture" which constituted the reason for the last-minute trip to Russia concerned gold mining opportunities in Russia and the former Soviet States. These discussions culminated in an agreement between Mr Rothschild, and Mr Deripaska and Mr Munk to make a joint bid via their respective companies for Polymetal, a leading Russian gold producer. This is now pleaded in the Draft Amended Defence at 6.42.2 which also pleads that:

"At the relevant time, the issue of whether foreign-owned companies should be allowed to compete for the rights to exploit the countries strategic natural assets (and if so on what terms) was a matter of considerable political sensitivity in Russia".
 - b) The joint venture was a subject of discussion between Mr Rothschild, Mr Deripaska and Mr Munk at a dinner function which Mr Munk had hosted at his Davos chalet on the evening of 29 January 2005 (at which the Chairman of Alcoa was also present). It had been agreed between the parties that discussions should continue in Moscow the following day (30 January) with a view to visiting industrial plants in Siberia which were relevant to the proposed deal. This is now pleaded in the Draft Amended Defence at 6.42.1.
 - c) The evidence gave more detail of the arrangements made by Mr Deripaska for an "informal dinner" to be attended by Lord Mandelson and a Russian Minister. A table was reserved for Lord Mandelson and the Minister in a smaller private dining room at the Cantinetta Antinori. Later in the evening, Mr Rothschild and Mr Deripaska had left the Rusal/Alcoa dinner and went downstairs to the room where Lord Mandelson and the Russian Minister were eating and stayed for around ten minutes. This is pleaded in the Draft Amended Defence at 6.48 to 6.50.

- d) The original plan was that the party would stay in a Moscow hotel overnight on 30 January and fly to Siberia from Moscow on the morning of 31 January 2005;
- e) Lord Mandelson needed to be back in Brussels for a meeting early on 1 February 2005. Mr Rothschild's private jet was designated to fly Lord Mandelson back to Brussels and was booked to leave Abakan at 5.15 am local time on the morning of 1 February. The plane was scheduled to land at Brussels airport at 6.51 am local time thus allowing Lord Mandelson to attend his various engagements and Mr Taylor who was also an intended passenger on the flight to make a connecting flight. The consequences of that timetable for the sightseeing scenario are pleaded in the Draft Amended Defence at 6.42.4-5 and 6.42.6-7.
- f) In fact during the course of the Alcoa/Rusal dinner on 30 January 2005 a decision was taken to leave Moscow that evening instead (after the conclusion of the dinner and after Mr Rothschild Mr Munk and Lord Mandelson had been allowed an opportunity to return to their hotel to gather their belongings). The reason for this decision was apparently to avoid "losing most of the next day".
- g) The parties (including Lord Mandelson) flew from Moscow to Abakan in Mr Deripaska's private jet. This had not previously been revealed.
- h) On arrival at Abakan airport the parties immediately travelled to the industrial plants, (a visit which took up the majority of the day). It appears that Lord Mandelson also accompanied Mr Rothschild Mr Deripaska and Mr Munk on their site visit.
- i) The parties then travelled to Mr Deripaska's Siberian compound or chalet where they stayed the evening (with Mr Munk and Lord Mandelson sharing a chalet and the latter presumably leaving some time before his scheduled departure to Brussels on Mr Rothschild's jet at 5.15 am). This narrative appears in the Draft Amended Defence at 6.50 A.1.

58. Mr Caldecott has not made an application to amend on any alternative basis, such as *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579. In that case the court held that the defendant newspaper was entitled to adduce evidence of "directly relevant background context" in mitigation of damages. Nevertheless, he submits that Mr Rothschild cannot in practice expect to seek vindication from the court in the form of damages, including aggravated damages, and an injunction, without the court being informed of the account of events now given in the Reply and witness statements. In reality no claimant can expect to obtain vindication in the form of substantial damages or an injunction unless he chooses to give evidence in person. Mr Caldecott makes no specific submissions as to how the story might emerge if Mr Rothschild were to choose not to adduce in evidence the witness statements that Mr Rothschild has served. These include statements by himself, Mr Munk and Mr Taylor in addition to statements from others who were on the flight from Davos to Moscow or at one of the dinners referred to on 29 and 30 January 2005.

59. Mr Tomlinson accepts that in order to obtain substantial damages and injunction Mr Rothschild would have to give evidence. He also submits that it would be open to ANL to seek permission to amend to introduce these matters as *Burstein* particulars.
60. I accept Mr Caldecott's submission that there has been a significant change in the way in which libel proceedings (amongst others) are now conducted since the introduction of the CPR and the Pre-Action Protocols. These procedural changes have not of course altered the substantive law of libel, namely that a claimant is entitled to rely on the presumption of falsity. But the days when major libel trials could be conducted without either party knowing in advance the substance of the evidence to be adduced by the other have long since gone. The arguments advanced by Mr Caldecott on the basis of the Pre-Action Protocol letters, and the availability of new information from the witness statements served by Mr Rothschild, are arguments which could not have been advanced to a court before the introduction of these new procedural changes. No case has been cited to me in which these arguments have been advanced in a similar context before now.
61. In my judgment, having regard to the overriding objective, it would be unjust and disproportionate to refuse permission to ANL to amend its defence on case management grounds. The new case arises out of information provided by Mr Rothschild, it is closely related to the original case and it does not materially extend the scope of the action or the issues to be investigated at trial. On the contrary, the matters in dispute are reduced. It is common ground that, in any event, this information should be before the trial court in some form, for the purposes of deciding what relief may be appropriate.

DECISION ON THE APPLICATION FOR PERMISSION TO AMEND AND THE APPLICATION TO STRIKE OUT THE PLEA OF JUSTIFICATION.

62. For the reasons given above, I shall grant permission to ANL amend its Defence in the form proposed.

MODE OF TRIAL.

63. It is now common ground that, as a matter of law, the fact that an order as to the mode of trial may have been made by consent for trial by judge and jury does not bind the court if the application for trial by jury was not made in accordance with CPR 26.11. In this case it was not. It is section 69(3) of the Senior Courts Act 1981 that applies. In these circumstances it is necessary for the court to consider the question of mode of trial afresh. The presumption is in favour of trial by judge alone: see *Thornton v Telegraph Media Group Ltd* [2011] EMLR 29 (CA). It is not suggested in the present case that any of the specified statutory criteria would apply if it were a case under section 69(1), that is to say it is not suggested that this is a case that would, for example, involve prolonged examination of documents.
64. Mr Tomlinson submits that the trial should be by judge alone. Mr Rothschild is not Lord Mandelson and his conduct does not involve any issue of public policy. Neither party is a public authority or arm of the state. Although it is not a case involving prolonged examination of documents, the case does require an understanding of matters of background which are of some complexity. A jury trial has to proceed at the pace of the slowest. It can be assumed that a judge would either know, or quickly

come to understand, the circumstances that form the background of the events in question.

65. Further, there is the advantage which always accrues from trial by judge alone in that the judge can determine the actual meaning of the words complained of by way of the trial of a preliminary issue, with all the potential benefits in time and costs saved that may follow.
66. Mr Caldecott submits that the expectation of a trial with jury which the parties have so far entertained is an important factor, albeit he recognises that it is not decisive (*Thornton* at para 12). The parties have conducted the preparation for the trial on the basis that it would be with a jury and no other suggestion has been made until the application dated 12 December. While it is true that neither party is a public figure, what is involved is the activities of Lord Mandelson when he held high public office, and that is within the spirit of the reasoning accepted by Neuberger LJ in *Fiddes v Channel Four Television Corp* [2011] EMLR 3 at para 20 citing *Rothermere v Times Newspapers* [1973] 1 WLR 448. The background facts can be explained to a jury and the issues of fact are narrow. The jury can be provided with agreed facts, an agreed chronology and other means to help them in their understanding of the case and their deliberations.
67. In my judgment, the arguments of Mr Tomlinson are to be preferred. I accept that the reasons that he gives are ones that should prevail and I direct that the mode of trial should be by judge alone for those reasons.

CONCLUSION

68. For the reasons given above, ANL will be permitted to amend its Defence, and the mode of trial will be altered, to be by judge alone. It follows that no decision is required on the application of Mr Rothschild that the defence be struck out and/or for summary judgment, which has been superseded by the amendment. The application in relation to the costs budget remains to be determined.
69. I draw attention to para 44 above, in so far as this judgment refers to Lord Mandelson, who is not a party, and who has made no submissions to the court.