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Case No: HQ11DO1162

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/10/2011

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

Between :

(1) Tesla Motors Ltd (2) Tesla Motors Inc	**Claimants**
- and -	
British Broadcasting Corporation	**Defendant**

William McCormick QC (instructed by **Carter Ruck**) for the **Claimants**
Andrew Caldecott QC and Catrin Evans (instructed by **BBC Litigation Department**) for the **Defendant**

Hearing dates: 19 October 2011

Approved Judgment

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

.....

THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. The BBC asks the court to strike out this claim, or grant summary judgment against the Claimants. The claim is for malicious falsehood. It is brought in respect of a broadcast of the well known television programme Top Gear. The programme in question ("the programme") was first broadcast on BBC 2 on 14 December 2008. The claim was originally also for libel, but on 19 October 2011 I held that the meanings attributed to the allegedly defamatory words by the Claimants were meanings which the words complained of were not capable of bearing.

2. The Claimants describe themselves as follows in their Particulars of Claim:

> "(1) The First Claimant is a limited liability company registered in the jurisdiction and a wholly owned subsidiary of the Second Claimant which is a corporation registered in the United States of America.
>
> (2) The Second Claimant has, and at all material times has had, an established reputation around the world, including the jurisdiction, as the manufacturer and distributor of electric powered automobiles, one model being an electric powered sports car known as the Tesla Roadster ("the Roadster").
>
> (3) The First Claimant has, and at all material times has had, an established reputation within the jurisdiction, as the company responsible for the Second Claimant's European operations which include (a) the First Claimant's headquarters in Maidenhead (covering Roadster sales administration and marketing support for Tesla stores and sales operations in the UK and other countries in Europe including Germany, Switzerland, Austria, Denmark, Netherlands, France, Monaco, Italy and Spain) together with finance and human resources support, (b) manufacturing operations in Hethel (vehicle production and supply chain management), (c) logistics in Wymondham (pre delivery vehicle inspection, warehousing of manufacturing and service parts, shipping of vehicles to Tesla stores in UK and throughout Europe), and (d) the First Claimant's retail store in central London."

3. Although the programme was first broadcast on 14 December 2008, proceedings were not issued until 29 March 2011, over two years later. Since there is a one year limitation period applicable to claims for malicious falsehood, the claim is limited to re-publications of the programme within the twelve months immediately preceding the commencement of the action. That is to say it is limited to broadcasts after 29 March 2010. Moreover, during the course of the hearing before me, the Claimants accepted that their claim had to be limited to publications made to viewers within England and Wales.

4. The Particulars of Claim did not identify the publications complained of. There is no dispute that there were publications in the relevant twelve months, including a broadcast on 17 October 2010 to an audience estimated to be 1.7 million viewers.

There is also no dispute that the programme remains available to be viewed (and I have myself viewed it) on the Top Gear website. There have also been a number of broadcasts on the freeview channel Dave.

THE TORT OF MALICIOUS FALSEHOOD

5. The four essential constituents of the tort of malicious falsehood, and further information about it, were set out by Glidewell J in *Kaye v Robertson* [1991] FSR 62 at 67 as follows (the numbering is added):

> "The essentials of this tort are that the defendant has [1] published about the plaintiff [2] words which are false, [3] that they were published maliciously, and [4] that special damage has followed as the direct and natural result of their publication. As to special damage, the effect of Section 3(1) of the Defamation Act 1952 is that it is sufficient if the words published in writing are calculated to cause pecuniary damage to the plaintiff. Malice will be inferred if it be proved that the words were calculated to produce damage and that the defendant knew when he published the words that they were false or that they were reckless as to whether they were false or not."

6. Since the question of damage is central to the issue I have to decide I set out the precise words of the 1952 Act:

> "3(1) In an action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or any other permanent form…."

7. In the present case no actual damage is pleaded. The Claimants rely on Section 3(1) of the 1952 Act. For the purposes of this application it is common ground that the words "calculated to cause pecuniary damage" mean "more likely than not to cause pecuniary damage". See *IBM v. Websphere Limited* [2004] EWHC 529 (CH) at para 74. As Gray J noted in *Ferguson v Associated Newspapers Ltd* unreported 3 December 2001, Art 10 requires that any restriction of the right to freedom of expression must be strictly justified as necessary in a democratic society. An interpretation of the word "calculated" which permitted an action to proceed where the likelihood of any pecuniary damage was less than "more probable than not" would not be compatible with the Convention. Such an interpretation would therefore be precluded by the Human Rights Act 1998 s3.

THE PUBLICATIONS OR BROADCASTS

8. Publication is pleaded as follows in paragraph 4 of the Particulars of Claim, so far as now material:

> "The broadcasts have been made and/or caused and or permitted by the Defendant in the following ways: (1) online [and the To Gear website address is given]: (2) on " Dave ja vu" and other television channels; (3) via sales of a boxed sets of Top Gear season twelve programmes;... inside the jurisdiction. The Claimants are unable at present to set out the precise details of the extent and nature of each of the above categories of broadcast. They will plead further following disclosure and/or the provision by the Defendant of further information relevant to this issue, which information is readily available to it. Pending the provision of such disclosure/information the Claimants rely on the inference that, because 'Top Gear' is a popular programme... within the jurisdiction, each of the categories of broadcast set out above will have been substantial."

9. In the Defence it is admitted that there were broadcasts of the programme as alleged. It is further stated, as is not in dispute, that the broadcasts before 29 March 2010 included the original broadcast on 14 December 2008, broadcasts through BBC iPlayer for seven days thereafter, and broadcasts through the Top Gear website, where it has remained accessible ever since.

10. There is no dispute that, as the BBC has disclosed, repetitions of the broadcast included the following:

> BBC 2: 21 December 2008 19.03 hrs, 30 August 2009 19.59 hrs, 14 March 2010 19.00hrs
>
> BBC 2 Scotland: 13 March 2010 18.29hrs
>
> BBC 3: 24 January 2009 20.01hrs, 24 April 2009 19.01hrs
>
> Dave: 14 Broadcasts on and between 12 January 2009 and 29 April 2009, and seven broadcasts on and between 4 January 2010 and 28 March 2010.

11. Those broadcasts are all more than 12 months before the issue of the claim form. Broadcasts on Dave within the 12 month period and in respect of which a claim is made were nine in number, made on and between 29 March 2010 and 6 June 2010.

THE ALLEGED FALSEHOODS

12. In the Particulars of Claim the Claimants set out the words complained of in the form of a transcript, but it is of the whole programme that they make a complaint, the images and sounds, as well as the words. So when in this judgment I refer to the programme, I am referring to what I saw and heard, and not to what I read from the transcript.

13. The allegation that the programme contains falsehoods is pleaded in paragraph 7 of the Particulars of Claim as follows:

> "(1) The first Roadster shown (which was silver in colour) did not run out of charge.
>
> (2) The first Roadster did not have to be pushed back into the hangar as a result of running out of charge.
>
> (3) At no point were the brakes of the first Roadster broken.
>
> (4) The second Roadster (which was grey in colour) did not become immobile as a result of over heating.
>
> (5) There was no time at which neither Roadster was available for driving."

14. The format of Top Gear is well known. Mr Clarkson and his colleagues take vehicles for test drives, and provide to viewers technical information in everyday language in a format which is entertaining. The part of the programme concerning the Roadster lasts some ten minutes. It starts with a description of the Roadster as being based on the Lotus Elise, which is a petrol powered car. A Roadster and a Lotus Elise are filmed racing one another. The Roadster is shown as being faster than the Elise. Mr Clarkson, driving the Roadster, is filmed saying

> "wave goodbye to dial up and say hello to the world of broadband motoring, 12 ½ rpm I cannot believe this. That is biblically quick. This car is electric.... literally. The top speed may be only 125 mph but there is so much talk it does 0 to 60 in 3.9 seconds. Not bad for a motor that is the size of a water melon and only has one moving part".

15. However, after that and other praise of the Roadster, Mr Clarkson moves to criticism. He said (in the form the words complained of are set out in the Particulars of Claim):

> "This car really was shaping up to be something wonderful but then ... (artificial dying motor sounds and music slowing down and stopping)... although Tesla say it will do 200 miles we have worked out that on our track it will run out after just 55 miles and if it does run out it is not a quick job to charge it up again. (Footage of people pushing the Roadster into the hangar followed by Jeremy Clarkson inserting the charger lead into the Roadster)..."

16. It is that part of the broadcast which is said to be false in the manner pleaded in sub paragraphs (1) and (2) of the particulars of falsity set out in para 13 above (it is not said the range of 55 miles of the Roadster, driven as it was driven on the Top Gear track, is false).

17. Mr Clarkson goes on to say

> "perhaps then the best idea is to have two Teslas, so you can use one whilst the other is charging. Unfortunately that is quite an expensive solution and it doesn't appear that you get much

> reliability either. I don't believe this... the motor has overheated and I have reduced power. (shot of Tesla sitting on the track) While it cooled down we went to get the silver car out again ... shot of back of silver Roadster in the garage with its bonnet up) only to find that while it was being charged its brakes had broken (shot of empty track) so then with the light fading we had no cars at all."

18. The Claimants had provided for the preparation of the broadcast two Roadsters one silver and one grey. The one in respect of which Mr Clarkson said: "the motor has overheated and I have reduced power" was the grey one.

19. Under the Particulars of Malice certain further information is given as to the alleged falsity. In particular it is said:

> "The Claimant's engineer Stuart Brierley and Mr Cochrane explained to various members of the Top Gear crew and Mr Whitehead that all that had happened was that a fuse within an electrical circuit providing additional power to the brake pedal had 'blown' meaning that while the brakes were entirely safe, the brake pedal needed to be pressed down harder than would otherwise be the case."

20. Further it is pleaded:

> "... The second Roadster was at no time 'immobile' due to overheating. It did not overheat (but rather reduced the torque available to prevent overheating) and ... at all times it remained capable of being (and was driven) by Mr Clarkson, including being driven by him to the point it was shown sitting immobile on the track."

21. As to falsity, the Defence is pleaded over five pages. The BBC denied that the programme showed the Roadster as having run out of charge. The BBC say that the programme meant that the Roadster would run out of charge, and that it demonstrated visually what would happen when it did. The image of the silver car being pushed into the hangar was merely a device to illustrate the hypothetical point that it would run out after the range of 55 miles.

22. As to the brakes, it is said that Mr Clarkson and his colleagues were unable to continue driving the silver car because Tesla wanted to repair the brakes. This involved taking the wheel off and then testing the car once the problem had been fixed. It is said that, for part of that time, the grey car was also unavailable.

23. It is said that there was more than one incident when the cars overheated and required a cooling off period. In particular it is pleaded in the Defence:

> "The first silver car had begun recharging at about 11am... the silver car came off charge sometime not long after 2pm... Before going back onto the track there was the problem of its brakes which lasted from 2.20 pm until 3pm... Therefore as at

> 2.20 pm the grey car was cooling down after overheating and the silver car was still unavailable because the brakes were broken and were being fixed. The cooling down took about 15 minutes and accordingly during that time neither car was able to be used for filming..."

24. There is no Reply so it is not clear to what extent those timings are in issue.

25. Whether words complained of are false depends on what they mean. In this case there are issues as to what the images and words complained of mean. In some cases whether a statement is true or false may be simply a matter of binary choice: it is either one or the other. In other cases there may be degrees of falsity. It appears that in the present case, even on the Claimant's case, most of the broadcast is accepted to be true. In respect of those parts of the broadcast which are said to be false, they are said to be false in the sense that they are not wholly true or are exaggerated. It is an allegation that they are partially false. That is not to understate the force of the Claimant's case. A partial falsity may be very important and may be very damaging in particular circumstances.

26. The grounds on which the BBC advances this application to strike out are not directed to the allegations of falsity and malice. While these allegations are strongly contested, it is not said that they have no real prospect of success. So I do not set out the pleading on these points.

THE PLEA OF DAMAGE

27. The plea of damage consists, and consists only, of the following:

> "9. Each of the broadcasts was and is calculated to cause pecuniary damage to each of the claimants in respect of its business".

28. It is the BBC's case that the allegation of damage is wholly inadequate for reasons to which I will refer below. The BBC's case on falsity is relevant to the issue of damage. The damage relied on by a claimant has, of course, to be damage caused by the falsehoods complained of, not damage from parts of the words complained of which are true.

29. But, in addition, and at the forefront of its case, the BBC makes a quite different attack on the Claimants' case. As pleaded in the Defence, this is the defence pleaded under the heading "Waiver or acquiescence or estoppel, or failure to mitigate damage or abuse of process". It is pleaded over ten pages in paragraph 8. It is based on communications between the parties in the period commencing 16 December 2008 and ending with the issue of a claim form, upon public statements issued by or on behalf of the Claimants in that period relating to the programme, and to statements relating to its financial position issued by the Second Claimant pursuant to the requirements of the US law and the Securities and Exchange Commission.

30. The BBC relies in particular upon three statements issued on behalf of the Second Claimant. One statement relied on was made on or about 28 June 2010, when the Second Claimant made an initial public offering of its shares NASDAQ stock

exchange in the USA. The US authorities require publication of certain financial information in a format known as Form 10-K (for a period of a year) and Form 10-Q (for quarterly periods). The Second Claimant completed Form 10-Q for two quarters: the period ending 30 June 2010 and the period ending 30 September 2010. In none of these was there any mention of the programme or any damage from it. This is contrasted with what the Second Claimant said in its form 10-Q for the quarter ended 31 March 2011 which was prepared after the BBC had raised points about the omission in the earlier statements of any reference to any damage or risk of damage from the programme.

31. The BBC also rely on statements which Mr Musk, the Chief Executive of the Claimants, is reported to have said. It is contended that these demonstrate that the purpose of the pleadings is to achieve some collateral commercial benefit and not any proper purpose for which proceedings for malicious falsehood may be brought.

SUBMISSIONS FOR THE BBC

32. Mr Caldecott's first submission is one of general principle relating to Article 10 (freedom of expression). He submits that what has been said in the two cases cited below about defamation proceedings and Article 10 applies equally to proceedings for malicious falsehood, at least in a case such as the present. Mr McCormick did not dispute that and I accept Mr Caldecott's submission.

33. In *Jameel v Dow Jones* [2005] QB 946 Lord Phillips MR said at para [55]:

> "Keeping a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged."

34. In *Lait v Evening Standard Ltd* [2011] EWCA Civ 859 the Court of Appeal adopted this formulation of the principle by Laws LJ at paras [42] and [45]:

> "42. The principle identified in *Jameel* consists in the need to put a stop to defamation proceedings that do not serve the legitimate purpose of protecting the claimant's reputation. Such proceedings are an abuse of the process. The focus in the cases has been on the value of the claim to the claimant; but the principle is not, in my judgment, to be categorised merely as a variety of the *de minimis* rule tailored for defamation actions. Its engine is not only the overriding objective of the Civil Procedure Rules but also, in Lord Phillips' words, the need to keep "a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation"...
> 45. ... The balance to be struck between public interest and private right is increasingly to be seen as a function of our constitution; and the law of defamation is increasingly to be seen as an aspect of it."

35. Next Mr Caldecott submits that CPR Part 16.4 and the Practice Direction para 8.2 (8) require that the Particulars of Claim should include the facts relied on in relation to the plea of damage. The plea must identify with appropriate particularity the nature and amount of the damage which is said to be the probable result of the particular publications of which complaint is made, and any facts relied on as giving rise to that probability.

36. He submits this is necessary to enable a judge to investigate at an early stage in the proceedings whether the allegation is one of a real and substantial tort. It is also necessary to enable the defendant to assess its potential liability (with a view to making an appropriate proposal in accordance with the modern practice of encouraging early settlement, or a part 36 offer) and to allow a defendant to plead its case and define the scope of the disclosure required and to determine what witness evidence should be sought. He refers to the Pre-Action Protocol For Defamation para 3.2, which requires that a letter of claim should include details of any particular damage caused by the words complained of. It is particularly important where, as here, the relevant damage is subject to the principle of remoteness, that is to say it must (as stated by Glidewell LJ) follow "as the direct and natural result of [the] publication [complained] of".

37. Tesla accepts the viewing figures given by the BBC. For the period expiring before the commencement of the twelve months in respect of which this claim is made, they are as follows. The original transmission on 14 December 2008 attracted 7.4 million viewers and that on the 1st repeat namely 21 December attracted 2.7 million viewers. For the nine broadcasts on the Dave channel between March and June 2010 the viewers numbered between 43,000 and 165,000 per broadcast.

38. Mr Caldecott submits that the pleading of damage in the Particulars of Claim is inadequate on its face. But the BBC has also adduced evidence as to what the representatives of the Claimants have said, and not said, on different occasions, which, submits Mr Caldecott, demonstrates the particular need for detailed pleading in relation to damage in the present case. It is submitted that these statements demonstrate that there are important issues on causation and remoteness of damage which would arise if the Claimants are permitted to advance their claim as they appear minded to do.

39. The American requirements for a Form 10-K and Form 10-Q included that the Second Claimant give a comprehensive summary of its performance, including any "risk factors" which "could materially affect" their "business, financial condition and future results".

40. On 20 June 2010 the Second Claimant issued a prospectus for the initial public offering of shares. Nowhere in this document is there any reference to the programme.

41. On 13 August 2010 the Second Claimant filed a Form 10-Q for the period ended 30 June 2010. It contains no mention of any risk posed to the Second Claimants by the continuing publication of the programme. Shortly before, on 28 May 2010, Ms Konrad had written on behalf of the Claimants to the BBC to complain about the programme. She complained of numerous factual errors including "showing a fully

functioning Roadster being pushed into a garage and claiming the car didn't work". She wrote that the Roadsters did not at any point run out of power. She wrote

> "the Top Gear episode was negative, but after a few weeks, the mainstream media indicted Top Gear's credibility – not Roadster's. This mitigated damage to Tesla's nascent and developing image in the UK. But re-runs and video on demand versions of the programme online continue to expose millions of viewers to Mr Clarkson's inaccurate portrayal of Tesla and these viewers often take it for fact not fiction. Left unchecked by the media (after all, Mr Clarkson's drive in an electric car is now very old news). The unedited re-runs don't reflect Top Gear's acknowledged manipulation of the footage and the facts".

42. On 12 November 2010 the Second Claimant filed Form 10-Q for the period ending 20 September 2010. On 3 March 2011 they filed their Form 10-K for the year ended 31 December 2010. Neither of these documents contained any reference to the programme.

43. However, on 15 November 2010 the Claimants' very experienced specialist solicitors had sent a five page letter before action. The letter claimed that "self evidently the false statements and accompanying sounds and visual images were highly likely to significantly deter potential customers from purchasing the Roadster and thus cause pecuniary damage to our client". The letter also concluded:

> "Since it first aired in 2008 our client has suffered irreparable harm as a result of the numerous false, malicious and defamatory statements made in the programme. With each subsequent publication... there is increasing damage to our clients' reputation and the sales of Roadster cars".

44. It was in response to this letter that, on 21 December 2010, the BBC (in an eight page letter) drew attention to the Forms 10-K and 10-Q, and noted the contrast between the statements in the solicitors' letter and the absence of any corresponding statement in those Forms.

45. On 13 May 2011 the Second Claimant filed the next Form 10-Q for the period ended 31 March 2011. It included the following:

> "Our success could be harmed by negative publicity regarding our company or products. From time to time, our vehicles are evaluated by third parties. For example the show Top Gear which airs on the British Broadcasting Corporation did a review of the Tesla Roadster. Top Gear is one of the most watched automotive shows in the world with an estimated 350 million viewers worldwide and is broadcast in over 100 countries. The review of the Tesla Roadster included a number of significant falsehoods regarding the car's performance, range and safety. Such criticisms create a negative public perception about the Tesla Roadster, and to the extent that these comments

> are believed by the public, may cause current or potential customers not to purchase our electric vehicles which would materially adversely affect our business, operating results financial condition and prospects". (emphasis added).

46. The BBC also state, as is not in dispute, that the model of the Roadster which was the subject of the programme has been modified since the date of the programme, and that in its current form it will cease to be manufactured and sold in 2012.

47. There have been press releases issued by the Claimants, one being dated 9 November 2010. This includes the following:

> "We are very pleased to report steady top-line growth and significant gross margin driven by the continued improvement in Roadster orders and our growing power trained business" said Elon Musk – CEO of Tesla Motors. "Roadster orders in this quarter hit a new high since the third quarter of 2008, having increased over 15% from last quarter. While some of this is due to seasonal effects associated with selling a convertible during the summer months, we are pleased with the global expansion of the Roadster business and the continued validation of Tesla technology evidenced by our new and expanding strategic relationships". (emphasis added)

48. A press release on 4 May 2011 claims that "total revenues and gross margin were the highest in the company's history". Other press releases announced expansion in the Claimants' business in Europe.

49. Mr McCormick submits, as is not in dispute, that the mere fact that a company has sold increasing numbers of a product does not mean that it could not have sold more. If it was more likely than not that a malicious falsehood published by the BBC resulted in fewer sales than would otherwise be achieved, the fact that the sales actually achieved were increasing in number is nothing to the point. However, in any claim for damages for loss of sales (and such claims are common in breach of contract cases) a Claimant must, as part of his case, demonstrate that he could have supplied a greater number of the product if the demand had been greater. There can be no loss of sales if demand in any event exceeded supply.

50. The BBC referred to documents issued by the Second Claimant on this point. In the Form 10-Q filed on 13 May 2011 for the period ending 31 March 2011 it is stated that future sales and production of the Roadster are likely to be limited by the fact that they are dependant on Lotus to manufacture what is referred to as "the Glider", which is the partially assembled vehicle without electric power into which the power unit supplied by Tesla is fitted. The document states that the Claimants have already sold about 1,650 Roadsters and that they intend to manufacture a total of 2,500 (increased from 2,400) of the current generation of the model, being the number provided for in the contract with Lotus.

51. The BBC exhibit a copy of an article which appeared in the San Francisco Chronicle dated 17 June 2011. It attributes the following statements to Mr Musk.

> "People in Europe and Japan probably have another six months to place orders for the Roadster... If somebody has an interest in buying a Roadster they had best put in an order very soon".

52. Other documents issued by or on behalf of the Claimants could be understood as suggesting that the loss in respect of which they wish to claim may be a loss of sales of models other than the Roadster, whereas it was only the Roadster model which was the subject of the programme. Mr Ricardo Reyes the Claimant's vice president of communications is reported to have said on 30 March 2011 (the day after these proceedings were served) in an article published on the website "wired.com":

> "This [that is to say the proceedings] is our last recourse. It's not that we're hurting. We sold more than 1,500 Roadsters and our cars have done more than 10 million miles. The broader issue here is the impact on EVs [electric vehicles].... We'd like them to admit that they lied, and they keep pushing these lies. This is not about money. We just want them to set the record straight. "

53. The evidence for the BBC is in the form of a witness statement from Ms Grace and exhibits thereto. It is dated 30 June 2011.

54. On 4 October 2011 Mr Whittaker made a statement. He is the General Legal counsel for the Second Claimant. He gives some further information relevant to damage. He states that the Second Claimant has sixteen wholly owned subsidiaries, the primary purpose of which is to market and/or service Tesla vehicles. One of these subsidiaries is the First Claimant. It employs 83 people in the UK and 36 people in the rest of Europe. The European subsidiaries are managed by the UK subsidiary. The Second Claimant's primary manufacturing facility is in the UK at the Lotus facility at Hethel. As of the date of this witness statement 1,800 Roadsters are being driven in over 31 countries.

55. Mr Whittaker does not give any detailed information as to how the vehicles are sold, either retail to drivers in the UK, or from the facility at Hethel to other resellers elsewhere in the world. He does not assist as to how the viewers in the UK might be affected in their willingness to purchase Tesla vehicles by reason of broadcasts of the programme occurring after March 2010. Instead Mr Whittaker presents the case more broadly. He states

> "the publication of the false and defamatory statements comprised in the words images and sounds on the Top Gear programme complained of have seriously damaged the company's reputation".

56. I take that to be a reference to both Claimants. But I note that the damage referred to in this passage is actual damage. There is no plea of actual damage in the Particulars of Claim. It is also to be noted that the damage is said to be the result not only of the allegedly false statements, but also of the allegedly defamatory statement, whereas I have held that the words complained of are not capable of bearing any of the defamatory meaning attributed to them by the Claimant. So the damage referred to

includes damage allegedly suffered as a result of a part of the statement which is not actionable.

57. Mr Whittaker goes on to say:

> "The continuing publication of the Top Gear programme has tainted the launch of future Tesla vehicles. … A car company's entire reputation is in its brand and our brand has been unjustly wrongly and without basis torn apart by the Top Gear programme. …".

58. As to the Forms 10-Q and 10-K, he states that there are many risks to the company and "we do not call out every single risk specifically though consistent with our reporting obligations we endeavour to describe all material risk in general terms". He states that having seen the point being raised by the BBC the Claimants agreed that there was some merit in that critique and it was for this reason that they included the words already quoted above in the Form 10-Q filed on 13 May 2011.

59. Mr Whitaker goes on to say "the substantial damage is continual and ongoing" apparently in a further reference to actual damage which is not pleaded. He states that a new model called Model Sedan is due for commercial launch in mid 2012. He states that the Claimants' reputation will attach to that model and any other cars that it produces. He then states this:

> "The Roadster continues to be a success for Tesla. However, whether we would have sold them sooner if not for Top Gear or sold them for more, we do not know. However, it is fundamental (and obvious) *non sequitur* to assert that this precludes the existence of damage from the programme. Tesla believes that this success has been in spite of the damage done by the programme and reflects the hard work of its staff in countering that damage. The Top Gear show has had a reputational impact on the company as a whole. As such the perceptions created by the show have an ongoing impact on potential customers demands for new models".

60. This passage appears to foreshadow a claim for damages based on the (actual occurrence of, or the probability of) delayed receipt of the proceeds of sale of the cars which have in fact been sold and, or in the alternative, the difference between the price at which the cars were in fact sold and some other unspecified higher price at which it is suggested they might have been sold. It may also foreshadow a claim based on the probability that the Claimants would incur expenditure in mitigation of damage. But it does not specify any figure, or give any other information, which might enable the BBC to know what is said to represent the probable amount, or the actual amount, of any damage.

61. There are a number of documents exhibited by Mr Whittaker. One is an e-mail dated 19 October 2010 recounting information reported by the head of sales in the London showroom. He had taken seven calls the previous day from people about the programme. Two people said words like, "I cannot possibly imagine your car is this

bad. What is the real story?" He states that British people bring up the show all the time. He also makes a new point:

> "In addition to the lies and false implications, the show also used two pre-production 2008 cars that do not nearly have the level of refinement of today's cars, yet there is no time stamp or other obvious date on the story".

62. Other documents exhibited relate to viewers in Japan and in Continental Europe who are now accepted to be outside the scope of the claim in these proceedings.

63. Mr McCormick says very little about the claim in respect of damage in his skeleton argument. At para 70 he states that the Claimants are under no illusions that in the absence of the plea of special damage any monetary award will be modest. However, he submits that assuming that the claims are otherwise successful the claimants are entitled to the benefit of section 3 of the 1952 Act.

64. Mr McCormick submits that the proper time to address the points raised by Mr Caldecott for the BBC is at trial. Mr McCormick reminds me that the application before me is one for an order striking out the claim, or for summary judgment in favour of the BBC. He submits, as is not in dispute, that the Claimants do not have to plead actual damage and are entitled to rely on section 3 of the 1952 Act. He cites *Joyce v Sengupta* [1993] 1 WLR 337 where Sir Donald Nicholls V-C said at page 347A:

> "The whole purpose of section 3 was to give the plaintiff a remedy in malicious falsehood despite the difficulty of proving actual loss. A plaintiff is seldom able to call witnesses to say they cease to deal with him because of some slander that had come to their ears. In consequence actions for malicious falsehood have become extremely rare... section 3 was enacted to right this injustice. The section would fail in its purpose if, whenever relied on, it could lead only to an award of nominal damages".

65. Mr McCormick also cites *Ajinomoto Sweeteners v Asda Stores Limited* [2010] EWCA Civ 609; [2011] 2 WLR 91 at para 28 where Sedley LJ stated that the two torts of libel and malicious falsehood:

> "both concern the protection of reputation albeit one protects the reputation of persons and the other the reputation of property, typically in the form of the goodwill of a business".

DISCUSSION

66. In my judgment if a trader, such as each of the Claimants in this case, makes a claim for malicious falsehood and, as he is entitled to do, he relies not on any actual damage, but on probable damage such as is referred to in the 1952 Act section 3, the Claimant must nevertheless give particulars of the nature of the allegedly probable damage and the grounds relied on for saying that it is more likely than not. For example, if what is relied on is the probability of such a trader having to incur

expenses in advertising and other forms of publicity in order to counter the effects of the alleged falsehoods, then the Particulars of Claim should identify that probable damage. On the other hand, the damage which, it is said, is more likely than not to be a consequence of the alleged falsehood, may be delay in sales of a given number of vehicles, or loss of sales of a given number of vehicles, or the difference between the price at which vehicles will be saleable following publication of the falsehood complained of and the higher price at which it is said they would probably have been saleable but for the publication of the falsehood complained of. In such cases, then the Particulars of Claim should likewise identify that probable damage.

67. There are particular difficulties in the absence of a proper plea of probable damage in the present case. One difficulty arises from the fact that the broadcast has been repeated to a vast number of people over a lengthy period since 2008, but the claim is, and can only be, brought in respect of broadcasts after March 2010. That raises formidable questions of causation. Nothing in the evidence, or in the submissions of Mr McCormick, gives any indication as to how that difficulty might be addressed by the Claimants.

68. A further difficulty arises from the difference between the public statements made in the Forms 10-K and 10-Q, and the claim as now pleaded. The formulation of 13 May 2011, in the Second Claimant's Form 10-Q for the period ended 31 March 2011is in terms that damage 'may' or 'could' occur. That formulation does not come up to the standard ("more likely than not") for pecuniary damage, without which a claim in malicious falsehood will fail.

69. Another point raised in the present case, but which does not appear to have arisen in any other malicious falsehood case known to counsel, is that the alleged falsehoods in the ten minute item are preceded by the words and images which are very positive about the Roadster. There are also words and images which are unfavourable, but admittedly true to some degree, such as that there was a failure relating to the brakes, and overheating.

70. This is not a dispute between rival producers of goods. The programme is a form of independent review of motor vehicles. Top Gear is, in principle, a programme on which a manufacturer would be pleased to see his product appearing. That may be inferred from the fact that Tesla supplied the two cars to the Top Gear team, together with at least two of their own personnel. The question therefore arises as to whether, in assessing any damage which a claimant alleges is more likely than not to be caused by false statements made on Top Gear, the court must take into account the benefit to the Claimants accruing from the words of praise, and from the fact that the product appears on such a high profile programme at all.

71. Mr McCormick submitted that the Claimants do not have to give any credit to the BBC for the publicity, and the parts of the programme which are favourable to the Claimants. The Claimants can select the falsehoods and claim that it is more likely than not that pecuniary damage would result from the falsehoods, just as if it would if the falsehoods had been broadcast alone.

72. Mr Caldecott on the other hand submits that what the words of section 3 of the 1952 Act say is that it shall not be necessary to allege or prove special damage "if the words upon which the action is founded" are calculated to cause pecuniary damage.

Thus he submits that the court must look at the whole of the words and images in the programme.

73. Although Mr Caldecott made no such concession, it may be that if the programme had included only the words complained of as allegedly false (and there had been no issue of causation arising from the delay in issuing proceedings), a court would have had little difficulty in accepting that it was more probable than not that those words would cause some pecuniary damage to the Claimants. That would not relieve the Claimants of the need to particularise the nature of the damage which they are claiming to be more probable than not. But it would go some way towards proving causation. However, if the court has to take into account, not only the allegedly false words, but also the natural and probable consequence of the programme as a whole, it seems to me the position of the court might very well be quite different. Because of the view I have taken of the lack of particularity of the claim, it is not necessary for me to form a view on this point.

74. In my judgment the claim under section 3 of the 1952 Act is so lacking in particularity that it cannot be allowed to proceed. Unless it is capable of remedy, the claim must be struck out.

75. In the light of the different statements that have been made by or on behalf of the Claimants as set out above (both in the witness statements and in the Forms 10-K and 10-Q), it appears to me that there are great obstacles in the way of formulating a proper plea in this case. However, I do not feel able to say (without having given the Claimants an opportunity to make further submissions) that there is no possibility of a proper plea being put before the court by way of amendment. So, if so requested by the Claimants, the order I shall make will be that the claim be struck out unless the Claimants apply for and obtain permission to amend the claim for damages, or unless the BBC consent to such an amendment.

THE DEFENCE OF ABUSE OF PROCESS

76. Whether or not the claim should be struck out on *Jameel* grounds is one of the matters that will fall to be considered if and when the claimants apply to amend the plea of damage.

THE DEFENCE OF WAIVER ETC.

77. In para 8 of the defence it is pleaded that:

> "By their conduct since the original broadcast the Claimants have lost any right to contend that the programme was actionable and/or it is an abuse of process for the Claimants to claim damages or an injunction in the circumstances pleaded below ".

78. The matters relied on include (but are not confined to) matters which I have already set out above, being statements made or not made by or on behalf of the Claimants either through the press or in the forms 10-Q and 10-K. The Claimants rely on a number of well known authorities including *Duke of Leeds v Earl of Emhurst* (1846) 2 Phillips 117, 41 ER 886 at page 123; *Moorgate Mercantile v Twitchings* (1976) QB

225 at page 241; *Dickson v Kennaway* (1900) 1 h 833 at 838 and *Flood v Times Newspapers* 2009 EMLR 18. That is the closest to the present. Lord Neuberger MR said at para 82:

> "If a claimant says in clear terms that he does not want the publication to be amended or withdrawn, or even that he does not care whether it is amended or withdrawn, then at least as at present advised I consider he could be held to have lost any right to contend that the defendant's failure to amend or withdraw the article was actionable: it could be a simple case of waiver or estoppel, or if there was consideration, of contract".

79. As Mr Caldecott recognised, that is an obiter dictum, and the facts of the case were materially different from those of the present case.

80. Mr McCormick cited a number of cases including *Fisher v Brooker* [2008] EWCA Civ 287, at para 83, and *Leicester and Hardy v Woodgate and Woodgate* [2010] EWCA Civ 199 at paras 25, paras 34-37 and para 42. He also cited passages from Gatley on Libel and Slander 11th edition, and other textbooks, on the defence of consent. He submits that this is not a point which can be resolved summarily, but must go to trial.

81. This point does not arise if the claim is to be struck out on the grounds discussed above. If it is not to be struck out on those grounds, then I would accept the submission of Mr McCormick on these defences.

82. It seems to me that this is a point of general importance arising on relatively new facts and, for that reason also, I would not think it appropriate to decide it summarily. It seems to me possible to envisage circumstances in which a claimant might be held to have lost any right to complain about publications that had occurred before he issued proceedings, but nevertheless not have lost the right to complain about, and seek to prevent, future publications.

83. There is under English law (as it is at present at least) no single publication rule. It is not difficult to imagine circumstances in which a publication is made repeatedly over a substantial period of time during which the publisher reasonably believes that it is true, or that it is in the public interest to make the publication. But there may come a time when that position is manifestly no longer sustainable. What had been thought to be a fact may turn out not to have been one. For example a conviction may be overturned on appeal after a long delay.

84. Further, it is most unusual for a defence of consent to be raised in the context of libel or a related causes of action. One reason for this is that the law on consent generally requires that the person alleged to have given the consent should have done so freely and with full information. Moreover, consent when given is generally not for an unlimited period, and may be withdrawn at any time. And even if it is for a fixed period, as for example it may be under a contract, it does not necessarily follow that it is wholly irrevocable.

85. These points could in theory always have arisen in relation to libel and related torts. However, what gives them their novelty is that cases such as the present one did not

in practice arise. Until very recently a newspaper publication, or a radio or television broadcast, would either not be repeated at all, or would be repeated only infrequently. The position is now quite different, when a programme originally broadcast in December 2008 is available to be watched on a website by anyone at anytime into the indefinite future.

CONCLUSION

86. Accordingly for the reasons given above I shall strike out the claim in this action unless the plea of damage is amended by agreement between the parties, or with the permission of the court. I will invite counsel to agree a form of order.