Neutral Citation Number: [2019] EWHC 344 (QB)

Case Nos: HQ13M03735
HQ14M02898

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**MEDIA AND COMMUNICATIONS LIST**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2019

**Before** :

**MR JUSTICE WARBY**

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**Between :**

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| **Frank Kofi Otuo** | **Claimant** |
| **- and -** | |
| **The Watch Tower Bible and Tract Society of Britain** | **Defendant** |

**And between:-**

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|---|---|
| **Frank Kofi Otuo** | **Claimant** |
| **- and -** | |
| **(1) Jonathan David Morley** | |
| **(2) The Watch Tower Bible and Tract Society of Britain** | **Defendants** |

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**The Claimant** in person
**Shane H Brady** (instructed by **Legal Department, Watch Tower Bible and Tract Society of Britain**) for the **Defendants**

Hearing dates: 11 and 15 February 2019

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# 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.

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MR JUSTICE WARBY

**MR JUSTICE WARBY :**

## Introduction

1. This is one of a series of rulings I have had to give during this prolonged Pre-Trial Review. It addresses two applications made by the defendants to these two actions for slander.

2. The first is an application, by notice filed on 1 February 2019, for an order dismissing all or parts of the claims on the grounds that the issues raised are not justiciable. That term means, in summary, that the issues are of such a nature that the Court cannot properly adjudicate. The grounds for so contending are, again in summary, that the claims require the Court to resolve issues of religious faith, doctrine or practice, which are matters which it is not institutionally competent to do, or on which it cannot objectively adjudicate. I shall refer to the overall issue raised by this application as the Justiciability Issue.

3. The second application was first intimated in a skeleton argument also dated 1 February 2019. It was later formalised in an extended form in an application notice filed on 12 February 2019. It is an application to strike out extensive passages in the claimant's Replies, pursuant to CPR 3.4(2)(a) and/or (c). I shall call this the Strike-Out Application.

## The claims

4. The two actions, which are listed to be tried together over 5-7 days commencing on 11 March 2019, concern imputations of fraud against the claimant, Mr Otuo, conveyed by words spoken (1) on 12 July 2012, at a meeting of the London Wimbledon congregation of Jehovah's Witnesses, announcing that Mr Otuo was no longer a Jehovah's Witness ("the Announcement") and (2) at a meeting just over a year later, on 22 July 2013, where Mr Otuo's application for reinstatement was under consideration. It is this religious context, and in particular the fact that both sets of words complained of concerned Mr Otuo's membership of the Jehovah's Witnesses, that gives rise to the Justiciability Issue.

5. The first action ("Claim 1") relates to the Announcement. It is brought against a single defendant, a limited liability organisation which I shall call "Watch Tower". The second action ("Claim 2") is brought against Watch Tower and Mr Morley, who spoke the words complained of.

## Procedural background

6. It is of course fundamental that an issue such as the Justiciability Issue cannot itself be determined until the issues in the case have sufficiently crystallised. That is why the Court has declined to deal with previous attempts by these defendants to have the claims dismissed for non-justiciability.

7. On 1 November 2013, before HHJ Moloney QC, the defendants applied for such an order. In a reserved judgment handed down on 5 December 2013, Judge Moloney dismissed the application, without prejudice to its renewal at a later stage. He reviewed the existing jurisprudence in some detail, focussing on a line of modern defamation

cases in which, on the particular facts, the Court had stayed a claim on grounds of non-justiciability: *Blake v Associated Newspapers Ltd* [2003] EWHC 1960 (QB) (Gray J), *Baba Jeet Singh v Eastern Media* [2010] EWHC 1294 (QB) (Eady J), and *Shergill v Purewal* [2010] EWHC 3610 (QB) (Sir Charles Gray).

8. Judge Moloney's conclusions were these:

> "25. In summary, my conclusion is that the application to strike out for non-justiciability has been brought prematurely and should be dismissed on that sole ground, with liberty to re-apply after the expiry of time for service of the Claimant's Reply. (Even then it may be better to await disclosure and/or exchange of witness statements.) I appreciate the reasons, financial, and otherwise, why the Defendant brought this application so soon after service of the claim. It is right to bring such applications reasonably early, and not leave them until trial as in the Sikh cases above, when they serve little useful purpose except to increase delay and expense. But, for the reasons given by Eady J and Gray J in the cases cited above, it is a grave matter to deny a trial or a remedy to a Claimant who, ex hypothesi, has been the subject of a defamatory publication and is presumed to have been injured thereby. It is insufficient for a Defendant simply to assert (in effect) that because of its religious status it is immune from suit. That would be to claim an absolute privilege which has never been recognised and could easily be abused. A ruling of religious non-justiciability has to be based on a close scrutiny of the specific issues arising on the pleadings in the particular case, and the burden is firmly on the religious body to put forward a clear and detailed case as to why the action must be struck out or stayed. As yet that burden has not been discharged here."

9. Two years later, on 10 December 2015, the Justiciability Issue was raised again, this time as one of a number of issues argued before Sir David Eady, the former Judge in Charge of the Jury List. Sir David said this:

> "2. The suggestion is that the claim gives rise to issues which fall outside the jurisdiction of the court because they are spiritual or religious in their nature. I recognise that there may be specific points arising in due course to which such concerns may legitimately be directed. It cannot be said at this stage, as a matter of generality, that the subject matter of the claim is bound to give rise to such issues; or that the claim *cannot* be resolved without going into matters which are, by their nature, non-justiciable.
>
> 3. It may emerge, for example, that there are issues of qualified privilege and malice, or it may be that the defence of truth or justification may be raised on the basis that the claimant is alleged to have committed "fraud". Those are matters which the courts are used to resolving almost every day of the week."

10. Another two and a half years passed before the Justiciability Issue was raised for a third time. On this occasion it was one of several issues dealt with over two days in June 2018, before a third defamation specialist, HHJ Parkes QC. (By this time, Judge Moloney and Sir David Eady had both retired). By a reserved judgment, handed down on 30 August 2018 ("the Parkes Judgment"), Judge Parkes determined that swathes of Mr Otuo's statements of case must be struck out, and his case re-pleaded. On 17 September 2018, Judge Parkes made an Order ("the Parkes Order") giving effect to that conclusion, and setting out detailed and prescriptive directions for statements of case to be filed and served, together with disclosure and the exchange of witness statements and the fixing of a trial date and a PTR.

11. In the Parkes Judgment, this was said:

> "67. Not until after the Reply has been served will it be appropriate for the court to hear argument that issues of church doctrine and procedure have been raised that are not justiciable by the secular courts. I am not prepared to rule on that question at a stage when the issues are still not properly identified in the statements of case."

Noting the conclusions reached by HHJ Moloney QC almost 5 years earlier, Judge Parkes agreed with what had been said in paragraph [25] of Judge Moloney's judgment, concluding that the burden that lies on the religious body "to put forward a clear and detailed case as to why the action should be struck out" had still not been discharged.

12. The Parkes Order therefore provided that if the defendants wished to renew their strike out application they could only do so at the PTR, after close of pleadings, and the exchange of witness statements (paragraph 8 of his Order); and then only if the defendants complied with paragraph 19 of his Order, which directed them to serve a skeleton argument not less than 14 days before that hearing, with the claimant, Mr Otuo, serving his skeleton no later than 7 days after that.

13. This was an impeccably designed regime. But things did not go altogether smoothly. Amended Particulars of Claim were served, followed by Defences and Replies. Disclosure and inspection were given. But things began to go wrong when it came to the exchange of statements. This was delayed by agreement, through no fault of either side. But the consequence was that it was impossible to comply with both of Judge Parkes' directions. The first was complied with, but the second was not. The defendants' attempts to redesign the procedural timetable failed, their skeleton was four days late, and Mr Otuo's fell due on the day of the hearing itself, 11 February 2019.

14. That procedural bungle, in a case where the claimant is unrepresented, was important and led me to accept Mr Otuo's application to put off the hearing of the application. Indeed, when the matter first came before me on 11 February, on the first of what have proved to be three days of PTR, I concluded that the hearing to resolve the Justiciability Issue would have to be vacated for non-compliance with paragraph 19 of the Parkes Order, and that the defendants should be required to make an out-of-time application to extend the period for serving a skeleton argument and obtain relief from sanctions.

15. The Strike-Out Application was also rather bungled, procedurally. The skeleton argument dated 1 February 2019 advanced the proposition that the "Claimant's reply

in Claim 2 should be struck out with no leave to amend". A short-written argument was presented in support of striking out of that Reply pursuant to CPR 3.4(2)(c), on the basis that it was incompatible with the way the claimant's statements of case had been dealt with in the Parkes Judgment and the Parkes Order. But at that stage, as it turned out, the defendants had (by an oversight, it seems) failed to file or serve any Application Notice corresponding to what was being said in the defendants' skeleton argument.

16. I therefore adjourned the hearing of that application, with liberty to restore, on condition that if they wanted to pursue it they must file an application notice supported by evidence, and a list identifying (a) each part of the Reply which they invite the Court to conclude is non-compliant with the Parkes Order and (b) the respect(s) in which that part of the Reply was said to be non-compliant. This they did on 12 February 2019. My order of 11 February provided that in that event the application should come back before the Court not before Friday 15 February 2019. In the event, the necessary procedural steps were taken and a further hearing took place on that date. I shall come back to this later.

17. In the meantime, on 11 February, I determined the actual innuendo meaning of the words complained of in Claim 2, and set the limits of the possible defamatory innuendo meanings conveyed by those words. This led to striking out part of Mr Otuo's claim in that action. But I refused the defendants' application for an order dismissing the remainder of Mr Otuo's claims on the grounds that they represent an abuse of the Court's process of the *Jameel* variety. In so doing I was following a path already trodden by Master Leslie in 2014 and, on appeal in 2015, by Sir David Eady, both of whom refused to dismiss Claim 2 on those grounds. In summary, I found that the imputations conveyed by the words complained of are serious, and that it could not be said that the claims could yield no tangible or legitimate advantage for Mr Otuo. They might result in substantial awards of damages and meaningful vindication. If the proceedings have absorbed resources disproportionate to their importance, that is not inherent in the nature of the claims, but is to a substantial extent due to the proliferation of unnecessary and/or unsuccessful applications and appeals, many of which have been made by the defendants. The court is not under a duty to dismiss the claims to protect the defendants' Convention rights.

18. The defendants have now made the necessary application for relief from sanctions, and at the adjourned PTR hearing on 15 February 2019 I granted it, for reasons which I reserved and have now given in a separate ruling, [2018] EWHC 341 (QB). I heard argument on 15 February as to the substance of both the applications now under consideration, and reserved judgment on both of those. I am therefore now in a position to survey the issues in the two claims, and to adjudicate on both of the defendants' applications.

19. I should add that Mr Otuo has some applications of his own, which are affected by my decision on his Reply in Claim 2, and which I shall need to address after and in the light of, my conclusions on the Justiciability Issue. The applications relate to his wish to serve witnesses summonses by email, on individuals from whom he has not obtained witness statements, requiring them to give evidence at the trial. To do that, he needs relief from sanctions, and the Court's permission. Those matters were all before me on 11 February 2019, but all had to go off for later consideration as well. So did Mr Otuo's very late application for permission to amend his statements of case to add a new cause of action in contract, and make some other changes. That was filed on short notice and

represented yet another application that was not ripe for decision at the time of the original PTR hearing.

## Facts and issues

20. Claim 1 arises from an Announcement made by Mr Mark Lewis on 12 July 2012, at a meeting of the London Wimbledon congregation of Jehovah's Witnesses, that Mr Otuo was no longer a Jehovah's Witness. The words complained of are "Frank Otuo is no longer one of Jehovah's Witnesses". Some years ago, HHJ Moloney QC determined that these words were incapable of conveying a defamatory natural and ordinary meaning, and struck out a plea to that effect. I have recently ruled that the words are incapable of defaming Mr Otuo in one of the true innuendo meanings he pleaded, but determined as a preliminary issue that, to at least five individuals who admittedly heard them, having relevant special knowledge, the words did bear two defamatory true innuendo meanings about him: that he was guilty of fraud, and had been disfellowshipped for that reason.

21. This means that, subject only to the question of whether those meanings are actionable without proof of special damage, the claimant has established all the ingredients of a cause of action for slander against the persons responsible for the publication of the words complained of. I have expressed the provisional view that such meanings are actionable per se, though it remains open to the defendant to dispute that. There is in any event a significant hurdle for the claimant to surmount, because the responsibility of Watch Tower for the publication complained of is in dispute. Unless he can establish that, a matter on which the burden lies on him, Mr Otuo's claim will fail.

22. The pleaded defences are that the claimant consented to the publication complained of; and that the publication took place on an occasion of qualified privilege. The privilege relied on is the common law privilege that protects statements made in good faith by a person with a duty to communicate on a given topic or legitimate interest in doing so, to others with a common or corresponding interest in receiving information on that topic. The pleaded case is that the elders in the Congregation had a legitimate religious and moral interest and duty to inform members of the Congregation and other interested parties of their decision to disfellowship the claimant; and the Congregation and interested persons had a reciprocal legitimate religious and moral interest to be informed of the decision.

23. This privilege would be defeated upon proof of malice, and Mr Otuo has pleaded malice, at length, in his Reply.

24. The Amended Defence also raises the Justiciability Issue, as follows:

> "32. Paragraph 9 is denied. It would appear the Claimant is describing the consequences he feels has experienced as a result of being disfellowshipped. It is averred that the disfellowshipping decision is not justiciable before the secular courts.
>
> …

> 38. It is denied that the Defendant has violated the Claimant's rights under Article 8 of the European Convention on Human Rights. The Defendant repeats paragraph 32 above and avers that Article 9 in conjunction with Article 11 of the European Convention on Human Rights protects the right of Jehovah's Witnesses to determine the membership of their religious community."

25. Claim 2 relates to words spoken by Mr Morley on 22 July 2013, at a meeting attended by the claimant and a number of others, to consider Mr Otuo's application for reinstatement as a Jehovah's Witness. Publication is admitted (there is a recording and a transcript). On 13 May 2016, Sir David Eady determined as a preliminary issue that the words complained of bore three defamatory natural and ordinary meanings, in summary: that Mr Otuo was guilty of fraud; that he had been disfellowshipped on that account; and that he was unrepentant.

26. In this action there is a limited defence of justification. The second of these three meanings is said to be true. It is not suggested that either of the others is true. Again, a defence of consent is pleaded, and there is a plea of qualified privilege on similar lines to the plea in Claim 1. Some years ago, in a judgment of 26 June 2015, [2015] EWHC 1839 (QB), before this defence was pleaded out, Sir David Eady observed at [16] that:-

> "although the evidence would need to be carefully considered in the context of the prescribed rules for the relevant internal procedures, there is quite a strong *prima facie* case to that effect. Nonetheless, the claimant wishes to put forward a plea of malice …"

27. That is what Mr Otuo has since done, at considerable length.

28. The Defence in Claim 2 also raises the Justiciability Issue. It does so in a similar fashion to the Defence in Claim 1. Paragraph 12(b) of the Defence responds to a plea about the announcement of the disfellowship decision (not an aspect of the alleged slander) by asserting that "disfellowshipping is a part of the Scripturally based internal religious procedures of Jehovah's Witnesses" rather than a determination of any private or public law rights and hence non-justiciable before a secular court" Paragraph 57 denies an allegation in paragraph 25 of the Re-Amended Particulars of Claim, relying on Article 9 of the Convention. It goes to state that the claim appears to arise in relation to Mr Otuo's disfellowship "which is not the subject of this claim and is in any event non-justiciable…" It is averred that Article 9 of the Convention in conjunction with Article 11 protects the right to determine the membership of a religious community "as held by the Grand Chamber of the European Court of Human Rights in *Sindicatul "Pastorul cel Bun" v Romania (*no 2330/09, 136, 137, 165, 9 July 2013)."

29. It will be convenient to address the defendants' applications separately, as they do raise quite different issues. That said, there is an extent to which they inter-relate, as will become apparent.

## The Justiciability Issue

30. As is evident from the passages I have cited, the references to non-justiciability in both Defences appear in the context of, and as responses to, references to the decision to disfellowship, and to claims for damages, and complaints that the defendants' behaviour represented interferences with the Convention rights of the claimant. It seems clear to me that those contentions of the claimant are not to be read as advancing separate causes of action. Both Particulars of Claim begin with the unequivocal assertion that "This is a claim for slander". They do not purport to be claims under the Human Rights Act 1998, and have never been treated as such. It is nowhere alleged, nor could it be, that either of the defendants is in any sense a public authority. It would seem, therefore, that Mr Otuo's reliance on the Convention could only have a bearing on the way the Court interprets and applies domestic law, pursuant to its duties under ss 2 and 6 of the Human Rights Act 1998. So in terms of the statements of case, the Justiciability Issue appears to be a minor, and subsidiary issue, the precise relevance of which is not crystal clear at this juncture.

31. The application notice, however, seeks "strike out of the claims (in whole or part) on the grounds that the claims are non-justiciable". This is clearly a much broader proposition, or set of propositions, than any which is currently pleaded in either of the Defences. To that extent, at least, it seems an ambitious application.

32. More ambitious still, so it strikes me, is one of the submissions relied on in support of the present application, that one of the problems with the present claims is that they do ***not*** involve issues which are non-justiciable. That is perhaps a tendentious way to characterise one of Mr Brady's submissions, but it was a most unusual and rather remarkable argument. I do not believe I summarise it unfairly, in this way. The defendants would have wanted to plead a full defence of justification, asserting the truth of the imputation of fraud, but they have not done so because the issue thus raised would not have been justiciable. That is because the plea would have asserted that, as a matter of religious doctrine, Mr Otuo was guilty of fraud. The Court could not have adjudicated on the question. Further, it would be unjust to restrict the defendants to the defences they have pleaded, as their fair trial rights embrace the right to plead and seek to prove the full range of available defences, including in particular the strongest.

33. This was not one of the arguments set out in the skeleton argument of 1 February 2019 or if it was, then it was not set out at all clearly. In that document, it was argued that the Court would be confronted "at almost every turn" with the need to evaluate and pronounce on the legitimacy of the defendants' religious beliefs and practices. It was said (in paragraphs 5.12 to 5.17) that one of the "questions the Court would need to answer when deciding the merits of C's claims" was "Were the words complained of truthful?" It was submitted that "To decide whether the words spoken were actually true, a secular court would first have to study and understand what constitutes the Biblical sin of fraud according to the religious beliefs and practices of Jehovah's Witnesses" and then "determine whether D committed the Biblical sin of fraud according to the religious beliefs and practices of Jehovah's Witnesses." At the hearing on 11 February, I pointed out the inaccuracy here: the only plea of justification was the limited defence in Claim 2, to which I have referred above, which does not call for any such determination. The argument I have cited here was not advanced orally at the hearing on 15 February. Mr Otuo and I were then confronted instead with the very different line of argument which I have sought to summarise at [32] above.

34. Besides the absence of a skeleton argument giving notice of these contentions, I had not noticed any evidence to support it. Mr Brady confirmed that there was none. He said the inability to plead that the allegation was true was a matter of law, not requiring evidence. I have not identified any jurisprudence to support the proposition that a party is disabled from asserting a proposition which cannot be adjudicated upon. If that were true it would make the resolution of justiciability issues yet more complex than they already are. I do not think it can be right. The ordinary way in which a justiciability issue arises (and the way it arose in each of *Blake*, *Baba Jeet Singh* and *Shergill v Purewal*) is by one or both parties pleading a case which one or both then suggest cannot be adjudicated upon compatibly with the relevant principles.

35. Even if Mr Brady was right as a matter of law, I do not see what obstacle there was or would have been to the submission of evidence in support of the factual propositions that the defendants wished to plead the full justification defence, and would have done so, but did not do so because they felt unable to do so on account of its non-justiciability. I certainly do not believe that in the absence of any such evidence I could, in fairness to Mr Otuo, or in accordance with established principle, stay or dismiss a claim which discloses a reasonable basis for a remedy and is not an abuse of process, on the footing that the defendant(s) might have pleaded a defence which, if it had been pleaded, would have been beyond the competence of the court to resolve. There are many reasons for that, but one of them is that in the absence of any evidence or even a draft pleading it is quite impossible to determine whether any tenable plea to that effect could have been formulated, with a statement of truth beneath it.

36. At the hearing on 15 February 2019, Mr Otuo invited me, again, to defer consideration of the Justiciability Issue to the trial, contending that I could only really address its merits once I was fully apprised of the full details of the statements of case and the evidence, having read in fully in readiness for 5-7 days of evidence and argument. I do not consider that is necessary, or that it would be appropriate. I am familiar enough by now with the issues to address the question before trial.

37. In my view, the pleader of the Defences (who was not Mr Brady) exercised a wise discretion. I do not consider that it can properly be said that either of these slander claims is, as such, non-justiciable. There are some aspects of Mr Otuo's Replies which raise issues which may be non-justiciable, but which I prefer to rule out on other (principally case management) grounds, as those are quite sufficient and compelling enough to justify the decision.

*Legal principles*

38. As Mr Brady submits, there are two separate strands of jurisprudence which bear on the application: domestic, and Convention. The domestic principles were reviewed and authoritatively summarised in the judgment of Lords Neuberger, Sumption and Hodge (with whom Lords Mance and Clarke agreed) in *Shergill v Khaira* [2014] UKSC 33 [2015] AC 359 ("*Shergill"*). I cite the following passages at some length as they state the essential principles with such clarity:-

> "41 There is a number of rules of English law which may result in an English court being unable to decide a disputed issue on its merits. Some of them, such as state immunity, confer immunity from jurisdiction. Some, such as the act of state doctrine, confer

immunity from liability on certain persons in respect of certain acts. Some, such as the rule against the enforcement of foreign penal, revenue or public laws, or the much-criticised rule against the determination by an English court of title to foreign land (now circumscribed by statute and by the Brussels Regulation and the Lugano Convention) are probably best regarded as depending on the territorial limits of the competence of the English courts or of the competence which they will recognise in foreign states. Properly speaking, the term non-justiciability refers to something different. It refers to a case where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter. Such cases generally fall into one of two categories.

42 The first category comprises cases where the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers. Cases in this category are rare, and rightly so, for they may result in a denial of justice which could only exceptionally be justified either at common law or under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The paradigm cases are the non-justiciability of certain transactions of foreign states and of proceedings in Parliament. The first is based in part on the constitutional limits of the court's competence as against that of the executive in matters directly affecting the United Kingdom's relations with foreign states. So far as it was based on the separation of powers, *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888, 935–937 is the leading case in this category, although the boundaries of the category of "transactions" of states which will engage the doctrine now are a good deal less clear today than they seemed to be 40 years ago. The second is based on the constitutional limits of the court's competence as against that of Parliament: *Prebble v Television New Zealand Ltd* [1995] 1 AC 32*1*. The distinctive feature of all these cases is that once the forbidden area is identified, the court may not adjudicate on the matters within it, even if it is necessary to do so in order to decide some other issue which is itself unquestionably justiciable. Where the non-justiciable issue inhibits the defence of a claim, this may make it necessary to strike out an otherwise justiciable claim on the ground that it cannot fairly be tried: *Hamilton v Al Fayed* [2001] 1 AC 395.

43 The basis of the second category of non-justiciable cases is quite different. It comprises claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law. Examples include domestic disputes; transactions not intended by the participants to affect their legal relations; and issues of international law which engage no private right of the claimant or reviewable question of public law. Some issues might well be non-justiciable in this sense if

> the court were asked to decide them in the abstract. But they must nevertheless be resolved if their resolution is necessary in order to decide some other issue which is in itself justiciable. The best-known examples are in the domain of public law. Thus, when the court declines to adjudicate on the international acts of foreign sovereign states or to review the exercise of the Crown's prerogative in the conduct of foreign affairs, it normally refuses on the ground that no legal right of the citizen is engaged whether in public or private law: *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin); *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin). As Cranston J put it in the latter case, at para 60, there is no "domestic foothold". But the court does adjudicate on these matters if a justiciable legitimate expectation or a Convention right depends on it: *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76. The same would apply if a private law liability was asserted which depended on such a matter. As Lord Bingham of Cornhill observed in *R (Gentle) v Prime Minister* [2008] AC 1356, para 8, there are
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> > "issues which judicial tribunals have traditionally been very reluctant to entertain because they recognise their limitations as suitable bodies to resolve them. This is not to say that if the claimants have a legal right the courts cannot decide it. The defendants accept that if the claimants have a legal right it is justiciable in the courts, and they do not seek to demarcate areas into which the courts may not intrude.""

39. The majority in *Shergill* went on to cite the decision of the Supreme Court of Canada in *Bruker v Marcowitz* [2007] SCR 607, as an illustration of the important distinction between adjudicating on religious beliefs or practices, and determining civil rights. The Canadian Court there reversed a decision of its Court of Appeal not to adjudicate on an issue arising in a divorce case, which involved examination of Jewish religious law. At [50] the Supreme Court of Canada accepted that the courts "should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, 'obligation', precept, 'commandment', custom or ritual". But this did not prevent them from giving effect to the civil consequences of religious acts. So, while a court could not enforce the husband's religious obligations as such, their religious nature was consistent with their being enforced as a civil contract.

40. Lords Neuberger, Sumption and Hodge continued:

> 45 This distinction between a religious belief or practice and its civil consequences underlies the way that the English and Scottish courts have always, until recently, approached issues arising out of disputes within a religious community or with a religious basis. In both jurisdictions the courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites. But where a claimant asks the court to enforce private

> rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment. The court addresses questions of religious belief and practice where its jurisdiction is invoked either to enforce the contractual rights of members of a community against other members or its governing body or to ensure that property held on trust is used for the purposes of the trust. We consider each circumstance in turn.
>
> 46 The law treats unincorporated religious communities as voluntary associations. It views the constitution of a voluntary religious association as a civil contract as it does the contract of association of a secular body: the contract by which members agree to be bound on joining an association sets out the rights and duties of both the members and its governing organs. The courts will not adjudicate on the decisions of an association's governing bodies unless there is a question of infringement of a civil right or interest. An obvious example of such a civil interest is the loss of a remunerated office. But disputes about doctrine or liturgy are non-justiciable if they do not as a consequence engage civil rights or interests or reviewable questions of public law."

41. Building on this authority, and by reference to *Forbes v Eden* (1867) LR 1 Sc & Div 568 and other cases cited by the Supreme Court, Mr Brady submits that the truth of beliefs, or the validity of religious rites are forbidden territory for the Courts. Outside these fields, the Court will only venture into religious issues in so far as they are capable of objective ascertainment. He refers to the "Club" cases, such as *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329 (CA), in which the Court will intervene only to a limited extent, to ensure compliance with the basic rules of natural justice. He submits that the present case is all the stronger than a mere club case. The claimant seeks to impugn the decision-making of various internal organs of the Jehovah's Witnesses, in ways which the court would not entertain even if the matter concerned a mere Club.

42. Turning to the Convention, Article 9 is less familiar than Articles 10 and 11. It contains qualified rights, provided for as follows:

> "(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

43. Mr Brady submits that the Convention jurisprudence goes beyond the principles established in the domestic authorities, and demonstrates that religious decisions about membership of a church or similar are immune from scrutiny and fall within the first of the two main categories identified by the Supreme Court in *Shergill*. He relies for that argument on *Izzettin Doğan and Others v. Turkey* Application no. 62649/10, Judgment of 26 April 2016, and the *Sindicatul "Pastorul cel Bun"* case, cited in the Defence to Claim 2 (see above). He submits that these authorities establish that the State's duty of neutrality and impartiality, implicit in Article 9:

(1) "excludes any discretion on its part to determine whether religious beliefs or the means used to express such beliefs are legitimate" and requires that it respect that "only the highest spiritual authorities of a religious community, and not the State (or even the national courts), may determine" issues of religious doctrine and faith;

(2) prohibits the State "from obliging a religious community to admit new members or to exclude existing ones", including by a collateral attack as in this case, and requires instead that the State accept that the right to freedom of religion "does not guarantee any right to dissent within a religious body; in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual's freedom of religion is exercised through his freedom to leave the community";

(3) requires the State to "accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image or unity".

44. Mr Brady's overarching submission is that the application of defamation law in this unique case to Watch Tower's two membership decisions is an obvious interference with the defendants' rights to freedom of religion, freedom of expression, and freedom of association guaranteed by Articles 9, 10, and 11 of the Convention, which cannot be justified as prescribed by law, pursuing a legitimate aim, and necessary in a democratic society. The claims are said to represent an interference with Watch Tower's membership decisions, under the guise of defamation law, which cannot be justified. They are, as Mr Brady puts it, a collateral attack on those decisions.

45. Mr Otuo submits, quite straightforwardly, that his slander claims do not challenge the propriety of his expulsion, but are claims in defamation. The defendants' argument is close to an invitation to confer immunity from tort liability on all the actions of a religious institution, on that account alone. That would be wrong, because the key issues involve matters which are capable of objective ascertainment, and the authorities make clear that the Court will enter into questions of disputed doctrine if it is necessary to do so with reference to a claim to vindicate a civil right. He draws attention to paragraph [48] of *Shergill*:

> "members of a religious association who are dismissed or otherwise subjected to disciplinary procedure may invoke the jurisdiction of the civil courts if the association acts ultra vires or breaches in a fundamental way the rules of fair procedure. The

> jurisdiction of the courts is not excluded because the cause of the disciplinary procedure is a dispute about theology or ecclesiology. The civil court does not resolve the religious dispute. Nor does it decide the merits of disciplinary action if that action is within the contractual powers of the relevant organ of the association: *Dawkins v Antrobus (1881) 17 Ch D 615*. Its role is more modest: it keeps the parties to their contract."

46. Mr Otuo also draws attention to a later passage in *Shergill*, which I agree is of some real importance in the present case, as it puts the defendants' arguments about defamation in their proper context. At [57] the Supreme Court said this:

> "The defendants referred to the judgments of Gray J in *Blake v Associated Newspapers Ltd* [2003] EWHC 1960 (QB) and Simon Brown J in *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex p Wachmann* [1992] 1 WLR 1036 in support of their contention that the dispute in this case was non-justiciable. But neither case supports that contention. In the former case the court stayed an action for defamation by Mr Blake against the publisher of the Daily Mail for describing him as a "self-styled" or "imitation" bishop. The claimant had relinquished his status as a priest within the Church of England and had established with a Mr Palmer an organisation called "The Province for Open Episcopal Ministry and Jurisdiction". Mr Palmer had purported to consecrate him a bishop. The case raised questions of doctrine and ecclesiology: the question was whether he was a bishop or merely a self-styled bishop. We do not think that the court was correct to refuse to adjudicate on that issue on the ground that it was non-justiciable. The claim was a civil claim in tort and the court will enter into questions of disputed doctrine if it is necessary to do so in reference to civil interests. See also *Forbes v Eden* (1867) LR 1 Sc & Div 568, per Lord Cranworth, at pp 581–582 and Lord Colonsay, at p 588. The problem that such defamation claims face, which will usually doom them to failure, is that they raise issues of religious opinion on which people may hold opposing views in good faith. The expression of such views without malice is likely to be protected by the defence of honest comment - what used, until *Joseph v Spiller (Associated Newspapers Ltd intervening)* [2011] 1 AC 852, to be called fair comment."

47. Mr Otuo submits that the onus lies on the defendants to identify specific points of doctrine or the like which are in issue, but cannot be determined by the court without entering the prohibited territory. He argues that critical examination of the aspects of the Replies which are under attack will show that no such matters arise. His pleading identifies rules to which the defendants are subject, rather than religious doctrine. He suggests that the defendants' application is an attempt to evade accountability for going beyond the limits of their powers.

*Discussion and application of principles*

48. I regard the claims in these two actions as, in themselves, falling clearly outside the prohibited zones identified in the domestic jurisprudence. It is not suggested, nor could it be, that the English authorities afford religious bodies a privilege akin to Parliamentary Privilege, such that whatever is said within the context of an official meeting or ceremony of a church or other religious institution is absolutely immune from suit in defamation, or any other tort. The thrust of the domestic authorities is quite different. It is that claims to enforce civil rights should generally be entertained by the Courts, even if they involve some determination of the internal rules or practices of a religious institution, unless that process necessitates an investigation of some matter that is, by its nature, incapable of being objectively assessed. The validity of religious beliefs or rites is such a question, at least as a general rule (I conceive that there may be truly extreme cases in which the Court might determine that a given practice was unlawful; an instance was given by Mr Otuo of human sacrifice).

49. To characterise these claims as a collateral attack on religious decisions is, in my judgment, unjustified. The claims seek to vindicate the civil right to the protection of reputation. That, in a case such as this, engages Article 8 of the Convention. There is a clearly pleaded case that Mr Otuo's ordinary enjoyment of his private and family life have been materially interfered with as a result of the publications complained of. The merits of that case remain to be determined. But it would require strong grounds to justify denying Mr Otuo the right to a determination of his civil rights in that context. I do not consider that, objectively analysed, the pleaded case makes it inescapable for the Court to determine matters of religious doctrine, still less (to quote the Convention jurisprudence relied on) "whether religious beliefs or the means used to express such beliefs are legitimate". Put another way, I do not believe the claims represent an interference with the Article 9(1) right.

50. Here, the only matters which Mr Otuo still has to prove to establish prima facie claims are, in Claim 1, that Watch Tower is responsible for the publication complained of and, in both claims, that the words complained of, the meanings of the which the Court has determined, are actionable without proof of special damage. Neither of those questions impinges on questions of religious freedom or requires determinations which are religious in nature, and/or cannot be made on an objective basis. The burden then shifts to the defendant to establish a defence. As to that:

    (1) The very limited defence of justification that actually exists does not confront the parties or the Court with any question that could sensibly be said to be beyond the pale, by reason of the need to respect the freedom of religion, or to abstain from interference with beliefs or rites.

    (2) The consent defences would require an investigation of some rules which the defendants themselves assert are applicable. (I note that they have not felt inhibited from pleading the rules in this context). But I see nothing in the statements of case on either side that requires the court to evaluate any religious belief or rite, or is incapable of objective ascertainment.

    (3) The pleaded defences of qualified privilege do rely on some principles and beliefs of Jehovah's Witnesses, but in my judgment, these are neither integral to, nor are they necessary ingredients of the plea. The core question raised by

each defence is whether the publisher(s) and publishees had common or corresponding duties and/or interests in the communication of the information conveyed by the words complained of. Most defamation lawyers would take the view that Sir David Eady expressed several years ago: the defendants have a good *prima facie* case. I do consider that the Replies go into a great deal of unnecessary and unhelpful detail on the issue of what the relevant rules say. Of course, the existence of a duty is a matter of law, but the fact (if it be so) that the individuals concerned reached their decision by a procedurally improper route is a matter that would go to malice. For that purpose, there is no need to examine any religious doctrine. The issue of privilege is not by any means inherently incapable of being tried and resolved. The questions raised are, instead, matters of sensible case management, to keep the matter within sensible bounds. I am sure that is compatible with a fair trial.

(4) A similar answer applies to the pleas of malice, although these do present more serious case management challenges. That is because they plead so extensively, and in such an unhelpful way, so much detail about the rules and principles that allegedly should have been applied in dealing with Mr Otuo's case. In the end, I have concluded that I am justified in taking some hefty pruning shears to Mr Otuo's Replies, and trimming them hard back to reveal the primary branches of his case. At the core of his case against the defendants is an allegation of actual dishonesty: that they knew he had not committed fraud, or did not honestly believe that he had. He gives reasons for saying that which would appear to be cogent ones; which is to say that if established they would tend to support a conclusion that the defendants acted dishonestly. None of that requires the Court to rule on the validity, as opposed to the existence or sincerity, of any religious belief.

(5) The limited pleas of non-justiciability which are set out in the Defences, and quoted or referred to above, are quite capable of being dealt with if they arise, in the context of the trial. They do not justify a stay of either claim, nor do they call for any more limited strike-out order at this stage.

51. Putting it very broadly, there seem to be two central issues in these two claims: first, (assuming, for this purpose that the process was undertaken in good faith), is the defence of qualified privilege defeated by reason of some procedural irregularity or impropriety of such gravity as to undermine the validity of the conclusions arrived at, so that the publishers and publishees did not have the reciprocal duties and interests relied on; secondly, if not, were the publishers malicious, that is to say did they have some improper collateral motive which was the dominant reason for making the statements complained of? This question, in this case, is essentially a question of honesty. It may be that in that context the Court will have to assess whether Mr Lewis and Mr Morley genuinely believed that Mr Otuo had committed the sin of fraud. But that is a different matter from determining the truth or falsity of such a belief. I am not persuaded that either of those issues is inherently non-justiciable, according to established principle.

## The Strike Out Application

*Some more procedural background*

52. As will be apparent by now, this seems to me in the end to raise, at a practical level, the more important issues on the applications with which I am now dealing.

53. To put this application in context, it is necessary to fill in some further background.

54. The Parkes Judgment and the Parkes Order represented the outcome of substantial applications heard over two days in June 2018, one of which was an application by the defendants to strike out large parts of Mr Otuo's Re-re-Amended Particulars of Claim in Claim 1. The Parkes Judgment had some strong things to say about Mr Otuo's statement of case. Having set out in their entirety paragraphs 9 to 27 of the then Particulars of Claim, he said this:

> "35. There are obvious objections to be made to these paragraphs.
>
> 36. One is that almost nothing contained in them is a necessary component of properly pleaded Particulars of Claim. …."

55. Judge Parkes went on to say (at [38]) that the statement of case with which he was concerned contained "evidence, and such a prolix volume of evidence that the material facts are obscured" and "references to 'breaches of natural justice' and the suffering of physical injury, which might be thought to suggest other causes of action in what otherwise purports to be a slander claim" (para. [40]). There was, he said "material which … does not appear to have any bearing on the state of either man [Mr Morley or Mr Lewis], or if it does, this is not made clear.": see [61]. He concluded as follows:

> "63. …., in my judgment, the whole of paragraphs [9] to [27] must be struck out. Paragraph [9] must go because it contains argument instead of pleading material facts, and paragraph [10] because it alleges a further cause of action for which no permission had or would be granted. The remainder must go because it contains a substantial volume of material which appears not to have any clear relation to a plea of malice; because it is prolix; because it pleads evidence; and because the plead of malice should not be advanced in the Particulars of Claim.
>
> …
>
> 67. Finally, Mr Otuo must then serve a reply, in which (if he still proposes to advance a case of malice) he must plead those facts, and those facts only, from which an inference of malice is to be drawn against Mr Lewis and Mr Morley, and which make clear how he says that Watch Tower is answerable for the state of mind of either man. The court will not tolerate yet further lengthy accounts of alleged procedural deficiencies in the process of the Jehovah's Witnesses, unless they are plainly linked to the men's state of mind. The material relied on must focus tightly on matters which go to the state of mind of Mr Lewis and Mr Morley in publishing or cause or approving the publication of

> the words complained of, and there must be no annex documents accompanying the Reply."

56. Reflecting these conclusions, though possibly not their full flavour, the Parkes Order provided for the striking out and re-pleading of the Particulars of Claim to be followed by an Amended Defence, and then that:

> "6. … the Claimant shall serve a Reply on the Defendant in which (a) (if he still proposes to advance a case of malice) he must plead those facts, and those facts only, from which an inference of malice is to be drawn against Mr Lewis and/or Mr Morley; and (b) he must make clear how he says that the Defendant is answerable for the State of mind of either man.
>
> 7. There must be no annex of documents to the Reply and it should focus on matters which go to the state of mind of Mr Lewis and/or Mr Morley."

57. The Parkes Judgment contained a separate section dealing with Claim 2 (paragraphs [69-85]). In this section, Judge Parkes made some observations about the Reply in that action, as it then stood:

> "82. The Reply is grossly prolix. Mr Otuo misunderstands the function of a Reply, wrongly believing that he is obliged to plead to every paragraph of the Defence. ….
>
> 83. Most unfortunately, Mr Otuo has pleaded malice for a second time in his Reply, and he has done so repetitively and at great length….
>
> 85. The state of the Reply is unfortunate. It serves to obfuscate rather than identify the true issues in the action. However, Watch Tower does not have to plead to it, no application is made to strike any part of it out, and in broad terms, the case in malice against Mr Morley can be understood. At this stage of the proceedings I would not want to encourage any further interlocutory disputes."

58. The Reply in Claim 1 was served on 17 November 2018. That Reply is, in principle, vulnerable to attack on the grounds that it (i) fails to comply with the Parkes Order and/or (ii) tends to obstruct the course of justice and/or (iii) fails to disclose any reasonable basis for a claim.

59. Mr Otuo served a further, Amended Reply in Claim 2 on 7 February 2019. That Reply is, in principle, vulnerable to attack on grounds (ii) and (iii) above, but not ground (i) because the Parkes Order was in no way concerned with the form of the Reply in Claim 2.

60. When the matter first came before me on 11 February 2019, it was the Reply in Claim 2, and only that Reply, that was under attack. Mr Brady was nonetheless relying on the parts of the Parkes Judgment and Parkes Order relating to Claim 1, that I have cited

above. He sought to persuade me that I could take a broad brush approach to his striking out application, reviewing in general terms Mr Otuo's Reply in Claim 2 – a very lengthy document; noting from a few examples given by him that it contained arguments and other impermissible elements; and on that basis striking it out as a whole without further or more detailed scrutiny.

61. I was not persuaded that this would be a just approach. And as I said at the time, I am duty bound to give a reasoned judgment on an application of this kind, which justifies the Draconian step of striking out. What I am asked to do, after all, is to excise from the case an entire and potentially decisive limb of Mr Otuo's claim. I was also concerned by the fact that, as Mr Brady accepted, there is a significant degree of overlap between the two claims, and the Reply alleging malice in Claim 1 had never yet been the target of a strike-out application.

62. It was for these and other reasons that the defendants' strike-out application had to be adjourned, and I directed the service of the Schedule to which I have referred, setting out each respect in which the defendants contend that the Reply is non-compliant, and identifying the nature of the non-compliance. That is a very helpful document, which alone has made the hearing of this application manageable, in my opinion.

63. It seems tolerably clear that what has happened here is that a hasty and muddled attempt at a strike-out has mutated into a more considered and tightly-focused application.

*Principles*

64. The application notice of 12 February 2019 seeks "strike out pursuant to CPR 3.4(2)(a) and (c) of parts of the claimants replies dated 17.11.18 and 07.02.19 in both claims". So the scope of what is under attack has changed since 1 February 2019, and the grounds of attack have been modified as well.

65. CPR 3.4 provides:

> "(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.
>
> (2) The court may strike out a statement of case if it appears to the court
>
> > (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
> >
> > (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
> >
> > (c) that there has been a failure to comply with a rule, practice direction or court order."

66. In the context of r 3.4(2)(c), the defendants have referred to PD53, which contains these relevant provisions at 2.1:

> "Statements of case should be confined to the information necessary to inform the other party of the nature of the case he has to meet. Such information should be set out concisely and in a manner proportionate to the subject matter of the claim."

67. Oddly, perhaps, in view of the background I have described, the defendants' application notice did not invoke r 3.4(2)(b). But, as I made clear to the parties before this hearing began, I propose to consider the applicability of that provision, not least because the Court's powers under this rule are available, and ought to be used whether or not another party has invoked them, provided this can be done fairly.

68. There is a further aspect to the matter. For well over thirty years, if not longer, it has been acknowledged that defamation cases can get out of hand, and must be kept under close control. In 1986, O'Connor LJ identified a number of principles to be followed in this area of litigation. One was this:

> "The fourth principle is that the trial of the action should concern itself with the essential issues and the evidence relevant thereto and that public policy and the interest of the parties require that the trial should be kept strictly to the issues necessary for a fair determination of the dispute between the parties."

*Polly Peck Plc v Trelford* [1986] QB 1000, 1021.

69. Thirteen years later, in *Rechem International v Express Newspapers Ltd* (1992) 12 June 1992, unreported, Neill LJ recalled these words, and had this to say (at pp19-20):

> "There has been a great deal of criticism both in appellate courts and more generally about the length of the trial of libel actions and about their expense and complexity. It may well be that in the past insufficient attention has been paid to the importance and relevance of this principle. On the other hand, it is to be remembered that nothing should be done to impede or restrict the rights of the Press and the public to report and to comment about matters of public interest and concern. A balance has to be struck between the legitimate defence of free speech and free comment on the one hand and on the other hand the costs which may be involved if every peripheral issue is examined and debated at the trial."

70. The CPR reinforced this principle, introducing the overriding objective and making it express that relevance and admissibility are not the only criteria to be applied when making case management decisions; the Court is entitled and may be bound, in performing its case management duties, to curtail the case of one or possibly both parties. In *GKR Karate (UK) Ltd v Yorkshire Post Ltd* [2001] 1 WLR 2571 the Court of Appeal upheld a decision of Popplewell J to direct that some issues in a complex libel action – the defence of Reynolds privilege - should be tried separately as preliminary issues, and that the evidence to be adduced at the trial should be limited in certain ways. The appellants complained, among other things, that the Judge's decision deprived them of the opportunity to rely on post-publication misconduct in support of their plea of malice. The decision under appeal had been made under the Rules of the Supreme Court, 1998 version, but the Court upheld it as in accordance with the spirit of the Civil Procedure Rules which, at that time, were brand new. May LJ (at 2577) referred to CPR 32.1 and said this:

> "This means, in my judgment, that the parties no longer have any absolute right to insist on the calling of any evidence they choose provided only that it is admissible and arguably relevant. The court may exclude admissible and relevant evidence or cross-examination which is disproportionately expensive or time-consuming, provided that to do so accords with the overriding objective."

71. As Lord Phillips MR observed in *Jameel v Dow Jones, Inc* [2005] EWCA Civ 75 [2005] QB 946 [54]:-

> "It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play on it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice"

72. The present context is different from that in any of these authorities, but all these observations have powerful resonance nonetheless. I note that the non-justiciability cases in defamation show that the Court will be astute to assess whether, if a non-justiciable issue arises, the case can be cut down or reformulated in such a way as to allow a fair determination of the civil rights in play without trespassing into the forbidden territory.

*Application of principles*

73. I have sought to apply the principles I have stated above to the very extensive statements of case pleaded by Mr Otuo. The outcome of that process is most conveniently set out in the form of a Schedule, following – broadly – the form of the Schedule produced by the defendants in accordance with my directions of 11 February 2019. The Schedule is the Appendix to this judgment.

74. Some of the principal features of the Appendix, in summary, are these:

(1) In accordance with the Parkes Judgment and paragraphs 6 and 7 of the Parkes Order, I have excised material which in my judgment is not "tightly focused" on the state of mind of the individuals who spoke the words complained of: Mr Lewis and Mr Morley. In Claim 1, any other approach would permit Mr Otuo to contravene the Parkes Order, without sanction. Judge Parkes plainly had in mind that the same approach should apply across the board. Other material, concerned with the state of mind of other individuals, is either irrelevant, or its investigation would be wholly disproportionate.

(2) I have refashioned the Replies so as to focus on what Mr Lewis and Mr Morley knew and believed in relation to the facts relating to the alleged fraud, which seems to me to be at the heart of the case.

(3) I have in the process cut out or cut down "lengthy accounts of alleged procedural deficiencies in the process of the Jehovah's Witnesses". I refer here in particular to Mr Otuo's case about the "Two Witness Rule", evidently derived from passages in Matthew 18. There is a dispute here, about the propriety of the

procedural steps taken by the defendants, in which Mr Otuo invokes this Biblical text. As the Supreme Court of Canada observed in *Judicial Committee of the Highwood Congregation of Jehovah's Witnesses v Wall* [2018] SCC 26 [38], "The courts lack the legitimacy and institutional capacity to determine whether the steps outlined in Matthew have been followed. These types of procedural issues are also not justiciable." But this inquiry would in any event plainly take up considerable resources, and seem to me to be incapable of adding much if anything of value to Mr Otuo's case. Ruling out such an enquiry not only eliminates needless prolixity, but also avoids the waste of time on what would be an unnecessary and disproportionate examination of the intricacies of procedural rules based on Biblical teaching.

**CLAIM Nos: HQ13D03735 & HQ14D02898**

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**MEDIA AND COMMUNICATIONS LIST**
**BETWEEN:**

**FRANK KOFI OTUO**

Claimant

**v**

**WATCH TOWER BIBLE AND TRACT SOCIETY OF BRITAIN**

Defendant

AND

**FRANK KOFI OTUO**

Claimant

**v**

**(1) JONATHAN DAVID MORLEY**
**(2) WATCH TOWER BIBLE AND TRACT SOCIETY OF BRITAIN**

Defendants

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## APPENDIX TO JUDGMENT [2019] EWHC 344 (QB)

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| Paragraph(s) | Matter to be struck out | Grounds of striking out |
|---|---|---|
| **Reply in Claim 1** | | |
| 22<br><br><br><br><br><br>23 | Words from "Elders have no business…" to end of paragraph<br><br><br><br><br><br>Whole paragraph | No reasonable basis for rebutting the defence of privilege. The issue (or the only issue it is proper to litigate) is whether there was a duty to communicate the decision, not whether the decision-making process was procedurally proper. The cited rules are in any event incapable of supporting the pleaded contention. |
| 26 | "which was founded on matters failing outside their scope pastoral care and duty" | As above |
| 27 | Entire paragraph | The issue of whether or not congregation members have a choice to cease associating with a disfellowshipped person or must do so |

| | | |
|---|---|---|
| | | automatically is irrelevant and/or the enquiry would be disproportionate |
| 28 | Final sentence | See reasons at 22, 23, 26 above |
| 34 | All but the first, second and final sentences | The composition of the Judicial Committee is immaterial and/or its investigation disproportionate |
| 35 | "It is the claimant's view that" and "It is not surprising that…" | Expressions of opinion have no place in a statement of case. Similarly comment and argument. |
| 36 | "It is the claimant's position…" to the end. | Argument and irrelevant assertion (see 22, 23 above) |
| 39 | Whole paragraph | Comment and evidence not relevant fact |
| 40 | "As with many decisions thereafter" | Vague and prejudicial assertion not clear fact |
| 40 | Last sentence | Matter of law, not pertinent or helpful. The point of unfairness leading to an inference of dishonesty is clear on the face of the pleaded facts |
| 42 | Final sentence and definition | Invites irrelevant inquiry into definitions which will be of little or no assistance to the resolution of the real issues |
| 43 | "bizarrely" | Argument and comment |
| 44 | Words in brackets | See comments on 42 above |
| 46 | All the words from "It is necessary for the court …" to "is demonstrated when". | Discursive account of generalised allegations about Mr Morley's character. Character is not a legitimate fact on which to rely, in the absence of particulars of specific conduct with which the Defendants can deal factually. |
| 47 | "The claimant's refusal was novel to him ..." | See comments on 46 above |
| 48 | First two sentences | Irrelevant and/or disproportionate |
| | Fourth sentence | Ditto |
| | Fifth sentence, save for the concluding words from "Mr Morley was not willing to be challenged …" | Ditto |
| 49 | Whole paragraph, except: first two sentences; words "Mr Morley failed to disclose this fact to the Claimant"; and the last but one sentence | Irrelevant and/or disproportionate, comment, assertion not fact. |
| 50 | Whole paragraph | Wholly irrelevant. Incapable of supporting the plea of malice. |
| 51 | Whole paragraph | Post-publication conduct which is not more consistent with malice than its absence (see [2019] EWHC 350 (QB) [36]) and/or in any event is remote and |

| | | |
|---|---|---|
| | | would call for a disproportionate inquiry. |
| 52 | "The Court now knows" | Improper form of pleading. Comment / argument |
| 53 | "As the Court knows now" | Ditto |
| 54 | Final sentence: "for fear that Mr Morley …" to the end. | Mr Brierley's motives are irrelevant |
| 55 | Whole paragraph, except "When the Claimant applied to the defendant for a judicial review …" | An inquiry into Mr Morley's state of mind about compliance with Matthew 18 would be disproportionate: see [2019] EWHC 344 (QB) [74(3)] |
| 59 | First sentence | The pleading of dictionary definitions of ordinary words is unnecessary and inappropriate. |
| 66 | "… as defined by the defendant …" to the end | Invites unhelpful and disproportionate enquiry into the details of a peripheral matter |
| 67-71 | Whole section, save for Heading: "MSLA failed to investigate the real issues that were before them" and last three sentences (on p31 of the internal numbering)k | This section contains allegations of procedural impropriety and unfairness from which an inference of malice is invited. There is quite enough of this without the need to enter into the matters pleaded here. The claimant's essential case is manifest and deliberate unfairness. Striking this out does not disable him from making that case. |
| 73 | All but first sentence | Repetitive, confusing and tends to obstruct the administration of justice |
| 75 | Last sentence | A further attempt to introduce procedural niceties, which is unnecessary and disproportionate |
| 76 | Whole paragraph | Repetitive and argumentative |
| 77 | Whole paragraph | See comments on paragraph 46 above |
| 78-79 | Whole section | See comments on 22 and 55 above. |
| 81-82 | Whole paragraphs | Not proper pleadings of facts but rather mere (repetitive) assertions of matters stated in his Particulars of Claim, coupled with assertions as to evidence. Moreover, this is now in part irrelevant following the court's rulings on meaning |
| 85, 86 | Whole paragraphs | Ditto |
| 88 | Whole paragraph | Repetitive, pointless, and hence obstructive of the ends of justice |
| 90 | Whole paragraph | Ditto |

| **Reply in Claim 2** | | |
|---|---|---|
| 4 | Everything after the words "vicariously liable" | Pleading of law and evidence, which tends to obscure and complicate, coupled with unnecessary averments which are not properly responsive to paragraphs 7 and 8 of the Defence |
| 5 | Everything from "according to the religious teaching … to "letters written by the 'Appeal Committee. However." | Invites an irrelevant and/or unnecessary and disproportionate investigation into the niceties of the fraud definition in ks10. Otherwise, pleads evidence and argument. |
| 8 | Penultimate sentence | Irrelevant, obstructing the course of justice |
| 10 | Whole paragraph | Repetitious, unnecessary |
| 11 | Whole paragraph | Irrelevant and/or unnecessary and disproportionate allegations of procedural impropriety and/or argument |
| 12 | Middle sentence | Ditto |
| 13 | Everything following "put to strict proof of the assertion." | Ditto |
| 14 | Everything from "makes a written plea for reinstatement" | Ditto. |
| 18(b) | Whole sub-paragraph | Untenable. Discloses no reasonable basis for alleging malice. |
| 24 | Words in brackets | Invites irrelevant inquiry into definitions which will be of little or no assistance to the resolution of the real issues. Cf 42 in Claim 1. |
| 27 | All the words from "It is necessary for the court …" to "is demonstrated when". | See 46 in Claim 1 |
| 28 | "The first's defendants overbearing nature was repulsively demonstrated when .." | Character, and argument t |
| 29 | Whole sentence beginning "The claimant's refusal was novel to him… " | Generalised character. See 46 in Claim 1 |
| 30 | As per 48 in Claim 1 | As per 48 in Claim 1 |
| 31 | As per 49 in Claim 1 | As per 49 in Claim 1 |
| 32 | Whole | As per 50 in Claim 1 |
| 33 | Whole | As per 51 in Claim 1 |
| 34 | "The court now knows" | As per 52 in Claim 1 |
| 35 | "As the Court now knows" | As per 53 in Claim 1 |
| 39 | Whole paragraph, except "When the Claimant applied to | As per 55 in Claim 1 |

| | | |
|---|---|---|
| | the defendant for a judicial review …" | |
| 43 | First sentence | As per 59 in Claim 1 |
| 45-49 | As per 67-71 in Claim 1 | As per 67-71 in Claim 1 |
| 50 | All but first two sentences | As per 73 in Claim 1 |
| 52 | Last sentence | As per 75 in Claim 1 |
| 53 | Whole paragraph | As per 76 in Claim 1 |
| 54 | Whole paragraph | As per 77 in Claim 1 |
| 55-56 | Whole paragraphs | As per 78-79 in Claim 1 |