

Neutral Citation Number: [2012] EWHC 3445 (QB)

Case No: HQ10D04585

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30/11/2012

**Before :**  
**MR JUSTICE BEAN**

**Between :**  
**REGINALD MENGI      Claimant**  
**- and -**  
**SARAH HERMITAGE    Defendan**  
**t**

**Mr Richard Rampton QC and Mr Aidan Eardley** (instructed by **Whitman Breed**) for  
the **Claimant**

**Mr James Price QC and Mr Jonathan Barnes** (instructed by **Carter Ruck**) for the  
**Defendant**

Hearing dates: 31 October, 1, 6-9, 12-13, 16, 19 November

## **Judgment**

**Mr Justice Bean :**

1. The Claimant is a prominent Tanzanian businessman and philanthropist with ownership interests in the Tanzanian media, including the ‘Guardian’ and ‘Nipashe’ newspapers. The Defendant is an English solicitor who lived in Tanzania with her husband Stewart Middleton until February 2008. Mr Middleton acquired the lease to a farm, Silverdale Farm, from a company controlled by the Claimant’s brother, Benjamin Mengi. (I shall refer to the Claimant as “Mr Mengi” and to his brother as “Benjamin”.)
2. From humble beginnings Mr Mengi has achieved a position of enormous wealth and considerable influence in Tanzania. In a career with Coopers and Lybrand’s Tanzanian firm he rose to be chairman and managing partner, retiring in 1989. Since then, among many other posts, he has been chairman of the Media Owners’ Association of Tanzania since 2003, and Chairman of the National Board of Accountants and Auditors from 1984 to 2000. His evidence is that he plays no active part in any of the media companies which he owns. He devotes himself to philanthropic activities and to campaigning against corruption. His actions are regularly the subject of reports in his own newspapers. On a more controversial note, he called a press conference on 23<sup>rd</sup> April 2009 at which he named five individuals as being “sharks of grand corruption”. When attacked in a Parliamentary speech by a

Tanzanian MP he complained to the Speaker and obtained a ruling criticising the MP.

3. Mr Middleton and Ms Hermitage bought Silverdale Farm in 2004 with a view to making it their home and building up an agricultural business there (Mr Middleton being an agronomist). They acquired a lease from a company owned by Benjamin Mengi and his wife for US \$112,000.
4. The relationship did not remain harmonious for long. From October 2004 onwards Benjamin sought to have the lease assignment cancelled or otherwise set aside and in any event to avoid its registration. He mounted a campaign of harassment against Mr Middleton including threats to kill him, the taking out of vexatious court actions against him and the involvement of the local police and courts in the issue of trumped up criminal charges against him, on the basis of which Mr Middleton was repeatedly arrested and then imprisoned.
5. It is not necessary to set out the entire history of the Silverdale Farm dispute in detail, but a summary of the main incidents is required. On this aspect of the case the evidence of the Defendant and Mr Middleton is unchallenged. The Claimant's submission is that it would be "disproportionate" for him to be expected to produce contradictory evidence. I do not accept this. The Claimant has devoted enormous resources to this litigation; apart from his own costs, he has complied with orders requiring him to give security for costs of over £1.8 million. His English solicitors and Tanzanian lawyers between them ran up many hundreds of chargeable hours prior to the issue of these proceedings and thereafter in taking witness statements. It would have added very little to the costs of this trial for evidence to have been obtained from Benjamin to contradict that of the Defendant and Mr Middleton if it really was in dispute. There is no suggestion of an attempt to obtain evidence from Benjamin having been rebuffed. I therefore approach this case on the basis that the Defendant's evidence about the Silverdale Farm dispute is true.
6. Mr Middleton's account of the events of 2004-5, so far as material, is as follows:-

"Although I had maintained a working relationship with Benjamin Mengi throughout this time, everything changed after I had made the first payment of US\$60,000 and the lease had been assigned. More than once I was summoned to meetings with him where he would seek to renegotiate the terms of our agreement. We had agreed from the outset that the balance of the purchase price would be paid within 6 months. We had also agreed that his wife would continue to be permitted to have use of part of the land for her cattle, away from the area where we were growing our vegetable crops. However, he then also insisted that I must agree to pay him (or his heirs, if he died) US\$2,000 per month by way of "director's fees". When I questioned this, he became aggressive, telling me that the Co-operative Societies were not happy about the escrow arrangement and were now refusing to hand over the deeds. Since it was proposed that the "director's fees" would come out of his share of the profits, I reluctantly agreed.

It was clear to me from his conduct that there was no way

Benjamin Mengi and I could have a working relationship in running Silverdale (Tanzania) Ltd. On 8 November 2004 I therefore sent him a letter offering to buy his shares. I intended my letter to be friendly and hoped that it could resolve matters between us. I received no acknowledgment or reply to my letter (Benjamin Mengi never replied to any letters I sent him) and, on 1 December 2004, I wrote to him withdrawing my offer.

From this time onwards, Benjamin Mengi subjected me to a barrage of threats, litigation, and intimidation until eventually in February 2008 it was reported to me that Benjamin Mengi was determined to finish me off. At the same time, some of my staff were threatened by an armed man on the farm [and] I was advised not to walk around the farm. Sarah and I could stand no more, and fled from the country in February 2008. We had sought help from the British High Commission and from Tanzanian Ministers, police and the judiciary in Dar es Salaam. Despite their repeated assurances that our rights would be respected by the legal system, isolated as we were away from Dar es Salaam in a region where Benjamin Mengi with his business interests and influence could get the local officials to do whatever he wanted, we found in reality that we had no protection at all. The local police, officials and courts would act against us on whatever allegations Benjamin Mengi concocted against us; for our part, when we complained about his conduct, for example when I reported to the police information concerning a specific threat to kill me, either nothing happened at all or it would be turned around so that I or my staff would become the accused.

In early 2005, I learned that Benjamin Mengi had negotiated to re-sell the lease to Silverdale farm to another British investor, who also owned property in the region. From April 2005, Benjamin Mengi began in earnest to try to get me evicted from the farm and to get me thrown out of the country. On 23 April 2005, he turned up at the farm gates, accompanied by, amongst others, the local head of police in Bomo Ngombe (OCD), to deliver a letter in which he claimed that the assignment of the lease agreement was “null and void” and demanded we vacate the farm by 30 April 2005. I found it very disturbing and intimidating that Benjamin Mengi was able to enlist the support of the local police in what was, on my view, plainly a matter for the civil courts.

On 28 April 2005, I heard from a friend, Mrs Rose Whiteside, that a person by the name of Augustino had been contracted by Benjamin Mengi to have me killed. In light of Benjamin Mengi’s previous threats to kill me, made both face to face and over the telephone, I took this

very seriously. I met this person, and reported what he told me to the OCD, Boma Ngombe as well as the then Deputy Minister of Home Affairs, John Chiligati. As far as I know, no file on this was ever opened.

In May 2005, Benjamin Mengi, through his company Fiona Tanzania Ltd, brought a claim against Silverdale (Tanzania) Ltd in the District Land and Housing Tribunal. The claim was that, because I had not paid him the US \$7,000 he had improperly demanded from me, and for which I had signed the post-dated cheque payable to Peter Jonathan, the assignment of the lease from his company Fiona Tanzania Ltd to Silverdale (Tanzania) Ltd was entirely “null and void”, and we should be evicted from the property. It was not part of the case that he should repay any of the money we had paid him to purchase the lease. His case in essence was that since the US\$7,000 had not been paid, he was entitled to re-possess the farm. In addition his company claimed general damages for “...bother, psychological torture, frustration and the like as shall be assessed by the Tribunal”. This case was eventually dismissed by the court in March 2006 because the value of the property unquestionably took the claim outside its financial jurisdiction. In order to bring the claim, Benjamin Mengi had falsely certified that the value of the “land or property” in issue did not exceed Tsh 50 million (approx. £20,000).

Also in May 2005, Benjamin Mengi issued an urgent application before the same Tribunal, alleging that we had prevented his wife, Millie, from tending her herd of 98 cattle and 50 goats on the farm. The claim was a lie. From the time Benjamin Mengi started his campaign to drive us out, he used his small herd of cattle (which was said to be owned by his wife) as a weapon against us both in the litigation he brought and in order to damage our crops. I did not have a problem with Benjamin Mengi or his wife to continue to use part of the land for their cattle (where previously they had been allowed to roam free). The issue was that, as Benjamin Mengi knew full well, they had to be kept separate from the crops we were growing, otherwise we would lose our EUREGAP certification. The cattle were never properly looked after by Benjamin Mengi’s staff. They had 3-4 people who would come to milk them, but when Benjamin Mengi’s staff, and sometimes Benjamin Mengi himself, came onto the land they would frequently cause trouble with our staff. On several occasions, the gates were left open at night, so we would find the cattle among our crops the next morning, where they caused extensive damage.

At a meeting of the Co-operative Board on 19 May 2005, Benjamin Mengi alleged that I had sold half of the

Silverdale estate to Mufindi Tea Co (“Mufindi”). Mufindi and I had entered into an agreement whereby they would renovate and occupy one of the residential houses on Silverdale farm. Subsequently, I believe on 21 May 2005, Benjamin Mengi informed the General Manager of Mufindi that he was taking back the estates from me. Mufindi therefore had to remove all their personnel and materials from the estate by midday on that day, or he would come with the bailiffs and seize everything. This resulted in Mufindi abandoning the project, which was very financially damaging to us.

One of the major issues we had at this time was that, under pressure from Benjamin Mengi, the Co-operative Societies, in breach of their agreement with us, had not delivered the documentation necessary for us to register our lease. On 22 June 2005, with two of our friends and managers Deodat Mtenga and Abel Ngoja, I attended a meeting in Boma Ngombe which had been called by the Permanent Secretary, Ministry of Marketing and Co-operatives. The purpose of this meeting as I understood it, was to sort this out. However, before entering the meeting, Mr Mtenga was talking to Benjamin Mengi who informed him that he had evidence that Abel and I had ordered and collected seals on behalf of the Cooperative Societies. Furthermore, he threatened to have Abel and myself put into jail if I did not come to a compromise with him on the issues he had against me. At the meeting the Permanent Secretary, Dr Komba, informed me that the seals which had been used in stamping the amendments made to the Lease before it was assigned to Silverdale (Tanzania) Ltd were forged. This had nothing to do with me; it had all been handled by Benjamin Mengi and the Board of the Co-operative Societies. I realised that Benjamin Mengi was trying to fabricate a charge of forgery against me. I reported this to the police in Boma Ngombe that day, making clear that I wanted them to open a criminal case of fraud against him.

On 20 August 2005, I was summoned by the OCD in Boma Ngombe to attend the police station because Mr and Mrs Mengi had accused me of verbally abusing Mrs Mengi. I went to the police station where I found both Benjamin Mengi and his wife present, and the OCD confirmed that the charge had been brought against me. I explained that the charge was nonsense, as I had been in bed all that week with malaria. The OCD then changed tack after a conversation with Mrs Mengi in the presence of Benjamin Mengi, and said that it was Sarah who was accused. However, on the day that Mrs Mengi was supposed to have been verbally abused by someone, Sarah had been in Moshi all day. Sarah, the following day, wrote a letter to Dr Kimaro, copied to the then British

High Commissioner, Andrew Pocock, setting out the whole story, and referring to Benjamin Mengi's campaign to drive us out, and his threats to kill me.

During September and October 2005, Mr Mtenga, Mr Ngoja and I tried to press the local police to investigate the complaints which I had made against Benjamin Mengi. I complained that nothing had been done about the threat to kill me, which I had reported in April 2005, nor the charge of fraud which I had made in June 2005. In relation to the letter, I knew that at least one member of the Board of the Co-operative Societies had made a statement to the police that he had witnessed Benjamin Mengi himself take out the seals with which he had then himself stamped the amendments to the Lease in May 2004. At that time, this suited his purposes so that he would get the first payment of US\$60,000 due to him for the assignment of the lease. Mr Mtenga, Mr Ngoja and I were interviewed as witnesses several times by the police, under the pretext that the investigation was incomplete.

In early November 2005, the local police, specifically an officer by the name of Mshana, turned everything on its head, and Abel Njola and I became the accused. Mr Mtenga, Mr Ngoja and I were each interrogated (in my case for 8 hours) by Mr Mshana; in Mr Ngoja's interview, Mr Mshana made racist remarks about me which Mr Ngoja found very distressing. On 12 November 2005, a group of people, headed by the Regional Crime Officer (RCO) and Benjamin Mengi, accompanied by Mr Mshana and other police officers and members of the Co-operative Societies' Board, turned up at the gate to Silverdale farm. I offered to let the RCO in to discuss whatever he wished with me in the farm office, but refused to let the rest of them onto the property. Benjamin Mengi subjected me to a tirade of abuse, openly in front of the police shouting at me to *"get off his farm and go back to South Africa"*.

After I refused to let them in, Benjamin Mengi that day went with the police to see the Chairman of the Co-operative Societies' Board, the late Mr Mushi, who had supported our rights, and had in August 2005, with the authority of the Board, signed a letter confirming that Silverdale (Tanzania) Ltd was recognised as the legal leaseholder. Mr Mushi later told us that the police had searched his house that day, then summoned him to the police station in Moshi where he was held until late that night. Apologetically, he told us that whilst he was there he had signed a document presented to him by Benjamin Mengi which said that his company, Fiona Tanzania Ltd was the legal owner of the lease. Mr Mushi told us that he had been terrified, and wanted nothing more to do with the Co-operative Societies Board. I set out the full account

of these events in a letter which I sent to Mr Pocock on 19 November 2005.

I do not recall precisely when, but some time after I had written my letter of 19 November 2005 to Mr Pocock, telling him that Sarah and I had feared for our lives, and asking him to assist by arranging an audience with President Kikwete, Mr Pocock called to tell us that the Claimant had asked him to arrange a meeting to discuss the dispute I had with his brother.

From November 2005 onwards a huge concern to Sarah and to me was the very biased and damaging media coverage generated by Benjamin Mengi in the IPP Media newspapers owned and controlled by his elder brother Reginald Mengi, the Claimant in these proceedings. On 21 November 2005 both I and Abel Ngoja were arrested in Moshi, when I was charged with "*uttering a bounced cheque*" (that is the post-dated cheque for US\$7,000 made payable to Peter Jonathan) and we were both charged with "conspiracy" to commit forgery (that is, in relation to the seals which had been stamped onto the amended lease).

On the following day, reports of the charges, written by the reporter Jackson Kimambo, appeared in the IPP Media newspapers, the Guardian (English language) and Nipashe (Swahili). "Nipashe" is the Swahili for "Guardian". The articles on 22 November were headed "*Briton charged over dud cheque*" and "*Fake cheque sends British investor to court*". We found the Nipashe article posted around the farm on telegraph poles. I believe anyone reading the articles would have concluded that they were extremely serious, properly brought and based on evidence. Although I had found the charges as read out incoherent, both Mr Ngoja and I denied them, though even this was not reported in the IPP newspapers. There is no offence under Tanzanian law of "*uttering a bounced cheque*". The "evidence" regarding the seals which Benjamin Mengi produced was in the form of an affidavit, sworn before the lawyer Peter Jonathan in June 2005, in which it was alleged by a manufacturer of rubber stamps that in August 2004 Mr Ngoja and I had been to his office and ordered stamps for the three Co-operative Societies. The Affidavit stated I had done this months after the lease had been executed. The amendments to the lease had been made in May 2004. In reality, the charges were ridiculous and, after I had made representations to the DPP, they were dismissed on our first appearance before the Magistrates' Court in Moshi two weeks later, on 5 December 2005. However this was never reported by the IPP Media or other newspapers."

7. The Claimant's first involvement of which there is evidence consisted simply of a telephone call to Mr Middleton in July 2005 after Mr Middleton had met an official in the President's office, Dr Kimaro, in Dar es Salaam. Mr Mengi informed Mr Middleton that he had requested Dr Kimaro's assistance. Unfortunately nothing came of this call, and in November 2005 Dr Kimaro indicated to Mr Mtenga, one of Mr Middleton's managers, that he wanted nothing to do with the case. Dr Andrew Pocock, then serving as British High Commissioner in Tanzania, arranged a meeting between the Claimant and Mr Middleton, which occurred on 13<sup>th</sup> December 2005. Mr Middleton says, and I accept, that he did not initially want to go but was persuaded to attend because he did not wish to appear to be unwilling. Ms Hermitage did not go to the meeting.
8. Only three people were present at the meeting: the Claimant, Mr Middleton and Dr Pocock. The best evidence of what took place is contained in a letter from Dr Pocock to the Claimant written the following day. After thanking Mr Mengi for the meeting which gave Mr Middleton and Dr Pocock the chance "to seek your help in resolving the difficulties surrounding Silverdale Farm", he went on:-

"Stewart set out his concerns, the trumped-up legal case against him; the physical and other intimidation directed towards himself his wife Sarah and his staff and associates; and his inability to register the farm lease, which he has legally obtained and fully paid for.

You made clear your own position: it was possible to resolve the matter; you wanted to see justice done; you supported Stewart's wish legally to register his property; you would try to see whether the legal case might be withdrawn; and you would intervene with your brother to see what could be done to ease the situation.

We both appreciated this. We understand that you cannot guarantee success, but your understanding of Stewart's case and willingness to act on his behalf is most welcome. We will no doubt continue to keep in touch on this."

9. It is common ground that the meeting was amicable, and that it began with Mr Middleton and Dr Pocock commiserating with Mr Mengi on the recent death of his eldest son. After that there is some divergence between the respective recollections of Mr Middleton and Mr Mengi. Mr Middleton stated:-

"The Claimant initiated the discussion by saying that he was very concerned about the dispute his brother had with me as the Mengi family name was being made very public. He asked me what could be done to resolve the issue.

I made it clear that we had come to Tanzania to invest in a farm, to make a living and live a peaceful and productive life. Instead, his brother had embarked on a campaign of



harassment against us; he had issued frivolous court proceedings against me, he was responsible for having me arrested by using the police and the courts to support his campaign, and he was having defamatory articles against me printed in the IPP Media newspapers. The only comment the Claimant made on any of these issues was that he could not be responsible for everything that was printed in his media and he really did not know what was printed in his newspapers.

I had prepared all the documentation relevant to the purchase of the Lease Agreement from his brother in anticipation of being able to explain the situation from my point of view. Instead the Claimant told me that he had in his possession “*reams of paper*” relating to the issues and there was no need for an explanation.

As he required no explanation on the legalities of the purchase of the lease and as he raised no issues, I understood that he accepted them, that in essence I was right, and that his brother was misbehaving. I therefore requested him, as the elder brother, to: (a) speak to his brother about his behaviour and get him to stop the harassment, (b) stop the defamatory publications by IPP Media and allow us the right of reply before his newspapers printed further articles; (c) get his brother to cease opening frivolous cases against me in court; and (d) assist us in the registration of the Lease on the farm.

In response the Claimant said that he would: (a) speak to his brother about the harassment; (b) put a stop to the use of his media as it was publicising the Mengi name; (c) assist in the withdrawal of the cases in court; and (d) assist in the registration of the lease.

This was the end of the discussion. However, as we were leaving the room and I was confirming the agreement with the Claimant with a handshake, he told me that he would sort out the court cases and he would cover our legal costs. I thanked him and he replied that all he wanted was for us to live in peace, and all he wanted from me was a fine meal using fresh farm produce from the farm when he next came to Moshi.”

10. In his witness statement the Claimant says that to the best of his memory the following occurred:-

“We had a friendly dialogue about the dispute between Stewart Middleton and Benjamin Mengi and I expressed my hope that they would be able to resolve their dispute amicably and return to being friends. I expressed my belief that I would be able to act as a neutral mediator to

which Stewart Middleton agreed.

Stewart Middleton complained that the coverage of the dispute by The Guardian and Nipashe was defamatory and asked me to intervene. Without confirming or denying that the coverage was defamatory I told him that I would not be able to intervene and put a stop to the coverage.

Stewart Middleton complained that he was being harassed by Benjamin Mengi who was framing him with trumped-up cases and generally making his life miserable and I said that I would bring up the issue with Benjamin Mengi as part of my efforts to reconcile them.

Stewart Middleton complained about the Court case which Benjamin Mengi had instituted against him and I agreed to raise the issue with Benjamin Mengi as part of my efforts to reconcile them.

Stewart Middleton complained about the fact that the authorities were refusing to register the Lease Assignment in favour of Silverdale (T) Limited and I said that I would raise this issue with Benjamin Mengi.

I understand that the Defendant has stated that in the course of this meeting I made a statement to the effect that I was in possession of “reams of paper” relating to this issue. I did not have reams of paper and would therefore not have made such a statement.

I also understand that the Defendant has stated that during the course of the meeting I gave several assurances to Stewart Middleton and volunteered to pay for his and the Defendant’s legal costs and I deal with these allegations below.

As to the claim that I assured Stewart Middleton that I would intervene and stop the Guardian and Nipashe from further covering the dispute. I deny giving such assurance to Stewart Middleton or anyone else.

As to the claim that I assured Stewart Middleton that I would ensure that the Lease Assignment was registered in favour of Silverdale (T) Limited, I deny giving such an assurance beyond undertaking to raise the matter with Benjamin Mengi as part of my efforts to mediate the dispute.

As to the claim that I would stop Benjamin Mengi from harassing Stewart Middleton. I deny giving such an assurance beyond undertaking to raise the matter with Benjamin Mengi.

As to the claim that I privately spoke to Stewart

Middleton and promised to assist in the withdrawal of the Court case and pay the legal costs incurred by him and the Defendant. At the end of the meeting I shook hands and spoke to both Andrew Pocock and Stewart Middleton. At this distance in time I cannot recall whether I spoke to Stewart Middleton outside the hearing of Andrew Pocock but I never made any of the promises of the nature which the Defendant claims beyond stating that I would raise the issue of the Court cases with Benjamin Mengi as part of my efforts to mediate the dispute.

I did not make any assurances of the nature of which the Defendant states and I would not have because to do so would have been inconsistent with my role as a neutral mediator, which role I took seriously.”

11. In a written witness statement served on behalf of the Defendant and dated 17<sup>th</sup> September 2012 Dr Pocock, who was not required to attend the trial for cross-examination, wrote:-

“Mr Middleton said that Mr Benjamin Mengi was using his influence with the police and the courts to bring pressure and make threats against Mr Middleton. In response, Mr Reginald Mengi said that he would talk to his younger brother Benjamin.

Regarding the press coverage of Mr Middleton, I cannot now remember exactly what Mr Middleton or I said, but I am fairly certain that the issue was raised that the coverage had been unfair and untrue. I do recall Mr Reginald Mengi saying that he would look into the coverage but I do not myself remember any undertaking from Mr Mengi to stop his newspapers from referring to the Silverdale case during that meeting. However, at the end of the meeting I do recall Mr Mengi and Mr Middleton speaking between themselves. I was not party to that conversation and it is possible that such an undertaking was made to Mr Middleton at that point.”

12. I find that:-

i) The Claimant told Dr Pocock and Mr Middleton that he supported the latter’s wish legally to register his property;

ii) He also told them that he would intervene with Benjamin to see what could be done to ease the situation; he believed he could act as a neutral mediator;

iii) He also told them that he would try to see whether the case brought by Benjamin against Mr Middleton might be withdrawn. I am not satisfied that he promised to pay Mr Middleton’s costs of defending the case, but I am satisfied that he gave Mr Middleton that impression by a combination of the less specific assurances that he would try to have the case

withdrawn and would see what could be done to ease the situation;

iv) He said that he had not been responsible for the articles which had been published in his newspapers, and indeed did not always read them; he was not the editor;

v) I am not satisfied that he gave an assurance that he would stop his newspaper's defamatory coverage of the dispute. But neither am I satisfied that he told Dr Pocock and Mr Middleton that he could do nothing about the coverage or that it would be improper for him to intervene. I find that Dr Pocock's recollection is correct: that Mr Mengi said that he would "look into" the coverage; and that this also gave Mr Middleton the impression that something positive would be done.

13. After the meeting and before leaving Dar es Salaam, Mr Middleton phoned his wife to report on what had happened. His evidence, which I accept, is that he told her that he was "flabbergasted". The Claimant had agreed to stop the use of his media to print defamatory articles about them; to speak to his brother about the harassment; to assist them in obtaining registration of their lease; and (as they were leaving) added that he would speak to his brother to sort out the court case, and that they were not to worry about the costs of it.
14. On 16<sup>th</sup> December 2005, Mr Mengi, having spoken to Benjamin on the telephone, wrote to Dr Pocock as follows:-

"It was a great pleasure meeting with you and Stewart on the Silverdale Farm issue. I would like to reiterate my sincere undertaking to do all that is possible and in my power to ensure that justice is done and the matter is concluded amicably.

In this regard I have had preliminary discussions with Benjamin Mengi who has in principle agreed to withdraw the case against Stewart if Stewart will fully and unconditionally honour the Agreements dated 21<sup>st</sup> May 2004 and 2<sup>nd</sup> November 2004 and abide by his letter dated 21<sup>st</sup> October 2004 with regards to Benjamin Mengi's removal from the directorship of Silverdale (T) Limited by Stewart's one director's meeting of 30<sup>th</sup> August 2004. An early response to this proposal will be appreciated."

15. Mr Mengi told me, and I accept, that he simply took down the proposal set out in this letter as dictation from his brother over the telephone.
16. Mr Middleton was shocked by this letter. He told me that he regarded it as simply setting out Benjamin's demands, which the Claimant must have known were "totally unacceptable" to Mr Middleton. He states:-"The letter did not even represent a basis for further discussion. It was clear to me that, as we had feared at the outset, the Claimant was simply taking his brother's side, and leaving us without hope of assistance from him. I am not sure of the exact date, but I did phone the Claimant a

few days after receiving this letter to tell him that I was not prepared to meet his brother's demands. I also informed Dr Pocock of my decision."

17. Dr Pocock left Tanzania during January 2006.
18. Benjamin's next move was to issue defamation proceedings against the Defendant, Mr Middleton and Mr Mtenga in respect of the statements they had made to the police complaining of Benjamin's conduct. The plaint included a claim for aggravated damages in the sum of 2 billion Tanzanian shillings (approximately £800,000). Benjamin's lawyer acting in this case was Agapitus Nguma, who gave evidence before me. Mr Nguma has been Mr Mengi's personal legal adviser and close friend since 1982. He also was in 2005 and remains the chief corporate counsel to the Claimant's media companies, the company secretary of IPP Ltd (the holding company), and a director and company secretary of The Guardian Limited and of Independent Television Ltd, both being directly or indirectly owned by the Claimant and his family. Mr Nguma holds shares in The Guardian Limited as nominee for Mr Mengi. His law firm practises from the same building (indeed the same floor of the same building) as the head office of IPP Limited; it is also the address of the Claimant's office and that of his family trust. I should record, however, that both the Claimant and Mr Nguma were at pains to emphasise to me that there are two wings of the seventh floor at the relevant building, and that Mr Nguma's office is separated from the Claimant's by at least one conference room.
19. On 3<sup>rd</sup> January 2006 an article appeared in Nipashe headed "Investor Given Seven Days to pay 7/- Million". Although the correspondent is not named, Mr Luhanga, then chief sub-editor, told me that it was sent in by Jackson Kimambo. It read:-

"The National Social Security Fund (NSSF) Kilimanjaro Region branch has given Mr. David Stewart Middleton the Investor of Silverdale Farm an ultimatum of 7 days within which to pay workers' contributions arrears of Tsh. 7,842,00 /- to the Fund.

This step follows complaints by the employees of the company that contributions are not being submitted although they are being deducted by their employer since the company started. The NSSF Regional Manager for Kilimanjaro Mr. Somolo Ngusa, has directed the Manager of the Farm to pay the arrears of employees contributions within 7 days otherwise further action will be taken against him.

This Director has not paid contributions for 35 employees from June 2004 up to December 2005 and if he does not pay this debt stern action in accordance with the law will be taken against him.

There are complaints by the employees of the Farm that they are not being paid their salaries on time and deductions are being made from the salaries by not being submitted to the Fund.

“You will find that we sometimes go for 2 or more months without being paid our salaries and when we are paid it is only Sh. 5,000 or Sh. 10,000. Now even our contributions are not being submitted. I do not know what will be the situation in the days ahead” said an employee who did not want his name to be revealed. The employees also claimed that their employer has been sacking employees for no reason.

Recently this British national was arraigned before the Resident Magistrates Court at Moshi to face two charges one of which related to presenting a fake cheque to Moshi businessman Benjamin Mengi.

The second charge against Middleton is attempting to change documents over the Farm which legally belongs to three villages in the area.

The Investment Centre (TIC) for Moshi town has stated that it does not recognise British national Mr. Middleton as an Investor.

The Director was not available to comment on the allegations despite efforts by PST to contact him by telephone.”

20. Mr Middleton’s case on this story, which was not challenged, is that he had received from the National Social Security Fund prosecution department a summons to appear in court the following day to answer an allegation of not making social security payments. After a number of adjournments the magistrate dismissed the case. After he did so the prosecutor told Mr Ngoja, who had accompanied Mr Middleton to court, that Benjamin was responsible for everything that had happened and that it had been Benjamin that had instigated the charge.
21. Mr Price QC for the Defendant draws attention to the two paragraphs towards the end of the article telling the readers of the newspaper that Mr Middleton had recently been charged with presenting a fake cheque and with forgery. He had indeed: but what the article did not inform readers was that the charges had been dismissed a fortnight later, that is to say on 5<sup>th</sup> December 2005.
22. On 19<sup>th</sup> January 2006 both the Guardian and Nipashe published articles written by Jackson Kimambo headed “Moshi businessman takes back coffee plantation”, this article referred to the charges of issuing a fake cheque and of forgery without mentioning that these had been dismissed. The article alleged that “over 2,000 members” of the Co-operative societies who owned the Silverdale and Mbono farms, had attended a general meeting where they:- “unanimously denounced British national David Stewart Middleton as investor of the 500 acre farm and accredited it to Fiona (T) Ltd, a company owned by famous Moshi businessman Benjamin Mengi.”
23. Mr Middleton’s own evidence on this is as follows:- “The truth was that Benjamin Mengi staged the whole show to bring more pressure on us to leave. The Chairman of the Co-operative Board at that time, Mr Mushi, had throughout been supportive to me, recognising the legitimacy of our lease to the farm. Totally

improperly, Benjamin Mengi had got his crony supporters to call a meeting (of which the Chairman, improperly, had not been notified at all). At that meeting those who attended apparently decided amongst themselves to sack the old board and appoint a new one made of Benjamin Mengi supporters, to announce that Benjamin Mengi was the rightful owner of the lease, and that I should pay compensation. The article suggests that 2,000 members attended this meeting; I was not there, but based on my experience and what I was told I do not believe there could have been more than 50 people present at most, all cronies of Benjamin Mengi. The whole charade was staged by Benjamin Mengi as a publicity stunt with the intention that it would be reported by the IPP Media journalist Jackson Kimambo. The “meeting” was of no effect legally.”

24. On 24<sup>th</sup> February 2006 Ms Hermitage, describing herself as a non-practising solicitor of the Supreme Court of England of Wales, wrote a letter to the managing editor of the Guardian in Dar es Salaam headed “Allegations of libel and criminal libel: David Stewart Middleton, Abel Ngoja.” (I interpose at this point the fact that in contrast with this jurisdiction, where criminal libel was abolished by statute in 2009 and had fallen into desuetude for many years before that, Tanzania has the Newspapers Act 1976 which makes almost any libel a criminal offence potentially attracting up to two years imprisonment, provided that the defendant committed the libel deliberately and did so either personally or was concerned as a director or officer with the management of the affairs or activities of the company which published the libel). The letter enclosed the 19<sup>th</sup> January 2006 article in the Guardian and alleged that Jackson Kimambo had been the author of similar inaccurate and malicious articles over a period of months. Ms Hermitage set out her husband’s case as to the facts stated in the article at some length and continued:-

“You will be aware that the men have a reasonable right of reply to the article and they ask for your immediate confirmation that the Guardian will publish their replies in unedited form and in commensurate typeset as the offending article. The men seek an unqualified public apology from the Guardian for the untrue statements again in commensurate typeset as the offending article. ... Both men urge you to consider the seriousness of this matter and offer them damages as an alternative to legal action for the harm done to them as a basis of resolving it. ... The men of course sincerely hope that legal action will not be necessary.”

25. This letter was passed to Mr Nguma who asked his secretary to open an “SH” [i.e. Sarah Hermitage] case file. His secretary noted that “already there is a file of Silverdale/Middleton”: that was, clearly, the one which Mr Nguma kept in his capacity as advocate for Benjamin in his court action.
26. No reply was received to that letter. On 25<sup>th</sup> March 2006 Mr Middleton wrote to Mr Mengi as follows:

“Re: Allegations of Libel and Criminal Libel

I refer you to the enclosed newspaper articles many of which have been published in newspapers owned by IPP Holdings Ltd of which I am led to understand you are

Executive Chairman. Importantly, you will note, that many of the articles have appeared in newspapers published subsequent to our meeting held at your home together with the British High Commissioner in December 2005.

The language of the articles is emotive and part of a malicious and mocking campaign of press coverage deliberately perpetrated to do harm to me. In their entirety, the articles are libellous and actionable. The newspapers have shown a reckless disregard towards their common law and professional duty of care.

I have no doubt that you will agree, that the articles are deplorable and unacceptable by any media standards. The articles have not only enjoyed east African publication but in many cases have been published on the daily website of the IPP group and have thus been 'published' internationally.

On the 24<sup>th</sup> February, my wife wrote to the managing editor of the Guardian and a copy of this letter is enclosed for your attention. My wife has not yet received the courtesy of a reply. Further, the articles here submitted are not complete, the Press Officer at the British High Commission has a complete set of publications which has now been requested.

Clearly, the conduct of the newspapers is not conduct that I can ignore. However, before taking any further steps in this matter, it is submitted to you for your consideration as to how you feel, as executive Chairman of IPP Holdings, that the damage done to my reputation and investments in Tanzania might be restored."

27. Mr Mengi did not reply but passed the letter to Mr Nguma. On 19<sup>th</sup> April 2006 Mr Middleton wrote a further letter to the Managing Editor, threatening defamation proceedings if no satisfactory reply was received in 21 days, and a further letter to Mr Mengi as follows:-

"I refer to my letter to you dated 25<sup>th</sup> March to which I have not received a reply.

I enclose a further letter written to the Managing Editor of the Guardian Newspaper the contents of which are self-explanatory.

You will remember that at our meeting called at your request in December 2005 with Andrew Pocock you were placed on notice of the libellous articles being placed in newspapers owned by the IPP Media Group. You personally gave an undertaking that they would cease.

At least four defamatory articles were published in



newspapers owned by the IPP Media Group after this meeting. As such, if legal proceedings are issued the managing Editors of the offending newspapers, the IPP Media Group and yourself, will be joined in the Plaintiff.

I feel I have been reasonable in all respects in this matter and I sincerely hope that legal process will not be necessary and the Managing Editors of the offending newspapers will act in a reasonable manner to rectify the damage they have caused.”

28. Again, Mr Mengi passed the letter to Mr Nguma. Before doing so, he underlined the sentence marked “You personally gave an undertaking that they would cease.”, added several question marks, and emphasised to Mr Nguma that he did not give the underlined undertaking. He also wrote on the document that “this is a Guardian Ltd matter”.
29. For the claimant Mr Rampton QC lays great emphasis on the fact that this is the first letter in which either Mr Middleton or Ms Hermitage alleges that Mr Mengi gave an undertaking at the meeting with Dr Pocock that the defamatory articles would cease. He relies on the delay as evidence that the allegation is malicious, in other words that it is a deliberate invention by Ms Hermitage who knew then and knows now that it is untrue. The same is said of the (far less significant) allegation that Mr Mengi had promised to pay the Middletons’ costs of defending Benjamin’s claim.
30. I reject the suggestion of malice, in respect of each of the two allegations. Mr Middleton told Ms Hermitage, initially in the telephone call and no doubt later at home, what he thought Mr Mengi had promised at the meeting. She relied on his account when writing the letters. Neither of them thought any purpose would be served by challenging Dr Pocock over what was not included in his letter.
31. Back at Silverdale Farm matters went from bad to worse. Benjamin introduced diseased cattle onto the land. He then began another civil claim against Mr Middleton, this time in the name of his wife, alleging that she was being prevented from looking after her cattle and claiming 10 million shillings for “loss of profit and psychological torture”. On 24<sup>th</sup> May 2006 Mr Mtenga was attacked with machetes by a gang of thugs in his own home, leaving him permanently crippled. Mr Mtenga was later told by the public prosecutor in a criminal case relating to this attack that one of the accused had admitted that they had been paid 300,000 shillings by Arnold Kimaro, Benjamin’s associate, to kill him.
32. The next day Benjamin attempted to “arrest” Mr Middleton, who was parking his vehicle outside the police station in Moshi. The following day, Benjamin, Arnold Kimaro, and several police officers including the local Chief of Police and a large group of other people turned up at the farm “to see that the papers in the case brought against [Mr Middleton] by Mrs Mengi were served”.
33. In July 2006 Mr Middleton was arrested for contempt of court on a complaint made by Benjamin relating to a refusal to allow the police to enter the farm on 27<sup>th</sup> June. This arrest was duly reported in the next day’s edition of Nipashe. Mr Middleton spent three nights in prison before he was granted bail in the High Court of Tanzania on the grounds that the magistrate hearing the case was prejudiced. The contempt of court case was dismissed two weeks later for lack of evidence. This was

reported in the Daily News (not an IPP newspaper) but not in any of the newspapers in Mr Mengi's group, including Nipashe. Mr Middleton's evidence is that he frequently saw Jackson Kimambo laughing and joking with Benjamin when he (Mr Middleton) was in court.

34. In January 2007 Mr Habibu, an employee of Benjamin, drove a herd of cattle into a field of baby corn, destroying the crop. When approached by Mr Middleton's staff, Mr Habibu threatened to kill Abel Ngoja and came at him wielding a machete. He was overpowered by Mr Middleton's staff after a brief struggle. The police were summoned. No-one attended for four hours after the first call, when an inspector arrived accompanied by Benjamin. Mr Habibu was handed over uninjured to the police and was then released without charge. Three days later Mr Middleton's employees were instructed to attend the local police station, being told that they had been charged with offences of grievous bodily harm against Mr Habibu. In fact none of them was arrested, charged or cautioned at that stage; but Benjamin told Mr Ngoja that he would see that they were sent to prison anyway. Benjamin subsequently went to the State Attorney's office, the men were charged and were sent to prison for six months. Mr Middleton and Ms Hermitage had to close down their farm operation.
35. On 2<sup>nd</sup> June 2006 the Tanzanian Daily News – not an IPP publication - had published what Mr Middleton describes as a fair and accurate report of the Silverdale Farm dispute: at any rate it gave his side of the story. The result was a claim for libel in a Tanzanian court by Benjamin against Ms Hermitage and Mr Middleton. An ex parte hearing was held and Benjamin was awarded 90 million shillings (approximately £36,000) damages in default of defence. Benjamin obtained an order of attachment over all the assets of Mr Middleton and Ms Hermitage in Tanzania.
36. In January 2008 Mr Middleton and Ms Hermitage found that cattle owned by local villagers had been driven onto their land overnight. An "urgent" summons was issued in the name of Benjamin's wife Millie alleging that Mr Middleton had intentionally and maliciously allowed local Masai to graze their cattle on the farm contaminating Mrs Mengi's cattle with disease. Ms Hermitage described in her witness statement how the story ended;

"I tried to defend the cases that Benjamin Mengi had brought against us in the courts and would stay up until the early hours of the morning preparing case law and arguments that were simply trashed and ignored when we were in court. We went to bed at night with the possibility of being hacked to death by machetes as more and more of our staff became compromised by Benjamin Mengi. In the end, we had no more than two young watchmen at night that we trusted but knew they had their limitations. Less than fifty yards from the house were Benjamin Mengi's men who sat all night (supposedly with the cattle) and watched our every move. We were powerless to move them from our farms.

In the last months of our time in Tanzania there were men with firearms on the farm that were high on dope. This was the normal way in Africa if you wanted someone killed. You gave them a few US \$ and drugs and that was a sure recipe. Stewart could not walk on the farm in the

mornings and one day, a senior businessman came to the farm, an adversary of Benjamin Mengi's but no supporter of ours and told us that he knew that Benjamin Mengi had taken a contract out again to kill us and that we were not safe. We both realised this was the end of the road. We had no police support, Benjamin Mengi had not succeeded in chasing us from Tanzania through his harassment through the courts etc. His only option was now to kill one or both of us. We also knew that if he did, he would not be held to account by the Tanzanian government.

The first time we left was during the day. We had heard that Benjamin Mengi had obtained a court order to arrest Stewart on some pretence and that the police were coming to arrest him. We literally stuffed our three dogs and cat into the Land Cruiser and with what else we could manage and took the back road through the farm out onto the Arusha Road. I phoned Tony Brennan at the British High Commission and told him what was going on and his response was, "He has finally done it then", i.e. invaded the farm. Stewart simply could not survive going to prison again.

We went to Arusha to stay with friends for the night; few friends would have us to stay under these circumstances as they were all so scared stiff of Benjamin Mengi. Our next door neighbours would not even store property for us. I had by this time moved my horses and given them away in Kenya which was added emotional stress as our animals are extremely important to us. When I woke in the morning I was angry. Philip Parham, the then British High Commissioner, had been in Moshi the day we left and we had to ask him to go to the farm for us, to our house and collect some possessions for us which he did. I was angry we were being chased out of the country like dogs when we had done nothing wrong. Although I had spent much time persuading Stewart that we should leave, I did feel that we should go back to the farm and sort out our personal possessions so we took a huge risk and returned to the farm for a few more nights and informed the British High Commission what we had done.

During all of this our loyal staff had stayed but most had been chased off the farm by Benjamin Mengi. It gave him much power in the eyes of the locals that we were seen to flee. My cook, Margaret, never then left our side. Deodat Mtenga moved into the house and stayed with us for the last few days. In African culture this was indeed a significant event.

We left Deodat Mtenga in charge of the farms, told the police he was our caretaker and provided the police with all the documents relating to the ownership of the farms.

It made no difference. The day after we left, Benjamin Mengi cut the locks to the farm gates, broke into our house, arrested our staff and stole all that was left of our property. Philip Parham spoke to the Regional Crime Officer who stated that Benjamin Mengi was a director of the company and had a right to the property.

We drove at night and crossed the border in Kenya where we stayed with good friends for three weeks to try and recover from our ordeal. We both felt that what had happened was just not possible, that somehow the British government would intervene and that we would return to our home. This did not happen and indeed the Tanzanian government by its inaction condoned Benjamin Mengi's conduct. Benjamin Mengi had done what he promised he would and that was to drive us out of Tanzania."

37. After leaving Tanzania the Middletons went to Europe, where the animals they had taken with them could be quarantined and where a friend's farm house was available. They reached the UK in early 2009. Mr Middleton suffered a severe breakdown as a result of his experiences at the hands of Benjamin and was ill for several months, though he has now recovered.
38. Ms Hermitage set up her website in 2009 and began writing articles about the Silverdale Farm dispute. She explained her reasons as follows: (1) to give herself a voice; (2) to warn other people not to go to Tanzania to invest; (3) because the British Government is (in her words) "pouring copious amounts of money into a country whose president travels around the world spouting rhetoric of good governance and upholding the rule of law, and there are some inconsistencies in that rhetoric which I felt needed to be recorded".
39. On 10 January 2010 there were broadcasts about the Silverdale Farm dispute on Independent Television and Radio One, both part of the IPP Media group. Mr Ngoja sent Mr Middleton an email about one of them the next day. Predictably, they seem to have been favourable to Benjamin, quoting a description of him as the "patriotic investor", and critical of Mr Middleton, who was said to have destroyed the farm by uprooting the crops. I am not in a position to make findings about the exact contents of the broadcasts; but they plainly gave the Middletons reason to think that the IPP media campaign against them was warming up again, though in the event this did not occur.

*The publications sued on*

40. Since the present claim was not issued until 1<sup>st</sup> December 2010 Mr Mengi could only complain in it of articles written within the preceding 12 months. The first one complained of is therefore that of 5<sup>th</sup> December 2009. This was headed "Reginald Mengi – A Look into his Mirror". It referred to comments by the Claimant responding to a Tanzanian government minister who had cautioned the media against attacking individuals. Mr Mengi is said to have urged journalists to adhere to media ethics and not distort the truth, stating:-

"The media is like a mirror which reflects due reality, one whose face is dirty cannot look into a mirror and expect to

see a clean one...”

41. The Defendant’s blog, after asking “What does Reginald Mengi and IPP Media’s mirror reveal?”, and setting out a brief summary of the Silverdale Farm story, continued:-

“In late 2005, Reginald Mengi reported to the British Government he felt the Silverdale case was damaging his business interests. He told former British High Commissioner to Tanzania Mr Andrew Pocock he was going to issue a statement on the case. Mengi was asked to explain IPP Media’s defamation of the investors and he gave his assurance it would stop. Mengi lied. Three weeks later, IPP Media began a relentless campaign of defamation against the investors amounting to criminal libel under the penal code of Tanzania.”

42. On 15<sup>th</sup> December 2009 Ms Hermitage published on the website an article headed “Reginald Mengi, IPP Media openly supports corruption”. Underneath this heading was a cartoon of a puppet-sized man and a camera each suspended from the little finger of someone’s hand with the caption “Jackson Kimambo reporting live for IPP Media above (sic) Silverdale Farm”. It cited the hostile article of 11<sup>th</sup> April 2007 published in Swahili, noted that it gave a one-sided account of the circumstances in which Mr Middleton and his wife had been ordered to pay defamation damages based on comments accredited to them in the Daily News in 2006, and continued:-

“Instead of demonstrating a commitment to investigative journalism with a commitment to fighting corruption and good governance, the above media practice amounts to nothing short of a cowardly, deliberately inaccurate and abusive attack on the British investors, which appears to be nothing short of journalistic terrorism.

All the publications are couched in a language of suspicion and unqualified accusations of guilt against Mr Middleton and his staff. No right of reply was ever given and all viciously attack Mr Middleton’s commercial interest and reputation, not only in Tanzania but worldwide given that the articles were published on the internet.

In November 2005 Reginald gave his personal assurances to the British government that IPP Media would not engage in defamatory practises against the British investors in the “Silverdale case”.

He lied.”

43. The third website article complained of was published on Christmas Day 2009. It was entitled “Reginald Mengi, IPP Media, corrupt and libelous journalism”. The article began:-“In early November 2005 Reginald Mengi gave his word to the British government that IPP Media would cease to publish libellous material in the Silverdale Farm case. He lied!”

44. The next website article complained of was published on 31<sup>st</sup> January 2010. At the top of the page, under the heading “The Silverdale Farm Case”, Ms Hermitage wrote:- “This is the story of British investors Stewart Middleton and Sarah Hermitage driven from Tanzania by violence, abuse and intimidation instigated by Benjamin Mengi and facilitated by the police, judiciary and senior members of the Tanzanian government. Tanzania receives copious amounts of aid from the UK. In return, the country has abused British citizens. President Kikwete has made numerous promises to the British government to apply the rule of law to this case and has failed to do so.”
45. The article underneath this is headed “Kikwete’s commitment [sic] to agriculture and investment undermined by the Silverdale Farm case”. After citing remarks of the President about agriculture it continues:-

“It would seem that his commitment [sic] to both agriculture and investment is nothing more than rhetoric [sic] as he deliberately fails to address the corruption involved in the Silverdale case involving Benjamin and Reginald Mengi which has destroyed both agriculture and investment where British investors were exporting vegetables to Europe and supplying the local market. ”

Both the Tanzanian investment center and head of the PCCB (corruption bureau) have informed Kikwete that the lease to Silverdale and Mbono Farms belongs lawfully to British investors Stewart Middleton and Sarah Hermitage and that the Mengi’s have engaged in corruption to invade the farms and steal the lease forcing the investors from the country.”

46. The final website article complained of was dated 11<sup>th</sup> March 2010. It was entitled “IPP Media accuses British investor of serious criminal assault”. It then set out the article published three years earlier on 3<sup>rd</sup> February 2007 in the Guardian about the alleged assault on Mr Habibu. It continued:-

“The continued harassment against the British investors in the Silverdale Farm case included a defamation campaign by IPP Media, with publications appearing in Tanzania in high profile English and Swahili newspapers owned by the company, radio stations and, published world wide on the Web. All the publications are couched in a language of suspicion and unqualified accusations of guilt against the investors or their staff. They attack the investors status in Tanzania and accuse them of criminality.

In late 2005 Mr. Reginald Mengi expressed his concerns to the British Government that the case involving his brother was damaging his own business interests and reputation. The British High Commissioner to Tanzania at the time, Mr. Andrew Pocock, stated that he was concerned about our reputation and about the defamatory statements appearing in IPP Media publications. Mr.

Mengi stated that he was not aware of the defamatory publications and that, as CEO of IPP Media (i.e. not the editor), he could not be held responsible for them. He requested a meeting with my husband and Mr. Pocock at his home in Dar es Salaam. At this meeting Mr. Mengi promised the British Government that he would address his brother's behaviour and that he would personally pay for our legal costs arising from the vexatious litigation started by his brother. Mr. Mengi did not honour these promises. Far from diminishing, the defamation campaign in IPP Media publications escalated from this point onwards."

47. In the meantime, on 24 January 2010, Ms Hermitage had sent the first of two emails in respect of which the Claimant sues her. This was addressed to the Rev. Mark Hanson, the presiding bishop of the Lutheran Church in Tanzania, but also copied to another bishop, six diocesan email addresses, the office of the Secretary General of the Church, a Church information officer, a medical centre connected with the church, a company providing aviation services for the Tanzanian clergy, and two other individuals with English email addresses. The email included a detailed narrative of the Silverdale affair including the activities of Benjamin Mengi. It continued:-

"There is a particular aspect of the campaign that is relevant to you. The continued harassment against us including a defamation campaign by the local organisation IPP Media, with publications appearing in Tanzania in high profile English and Swahili newspapers owned by the company, radio stations and published world wide on the Web. All the publications were couched in a language of suspicion and unqualified accusations of guilt against our staff and us. They called into question our investor status in Tanzania, accused us of criminality in the face of clear evidence to the contrary, and damaged our commercial interests and personal reputation. No right of reply was ever given. These defamatory publications are on going with a broadcast last week by IPP Media Radio One, network, that we had stolen the lease to the farm and that the lease had been given to 'patriotic investor' Benjamin Mengi.

The relevance to you is that IPP Media is owned and run by Mr Reginald Mengi, the brother of Benjamin Mengi. Both hold themselves out to be staunch followers of the Lutheran Church in Tanzania. The former states himself to be a 'church leader' and 'elder' and the later (sic) is publicly afforded (sic) high status by the Church and is constantly referred to and supported by the media generally and particularly, media owned by IPP Media.

In late 2005 Mr Reginald Mengi expressed his concerns to the British Government that the case involving his brother was damaging his own business interests and reputation.

The British High Commissioner to Tanzania at the time, Mr Andrew Pocock, stated that he was concerned about our reputation and about the defamatory statements appearing in IPP Media publications. Mr Mengi stated that he was not aware of the defamatory publications and that, as CEO of IPP Media (i.e. not the editor) he could not be held responsible for them. He requested a meeting with my husband and Mr Pocock at his home in Dar as Salaam. At this meeting Mr Mengi promised the British Government that he would address his brother's behaviour and that he would personally pay for our legal costs arising from the vexatious litigation started by his brother. Mr Mengi did not honour these promises. Far from diminishing, the defamation campaign in IPP Media publications escalated from this point onwards.

It is well known that many African administrators and judicial systems do not live up to the standards of the developed world. However, the Lutheran Church is committed of course to maintaining and building on high standards even in countries where the operating environment is difficult in an attempt to build sustainable and accountable community in which corruption can play no part.

In April 2009, Reginald Mengi stated in the Guardian (IPPMEDIA) that "rampant corruption was a major reason for increasing abject poverty among the people in the country (being) a source of poverty facing most of our people, but surprisingly, there are some Tanzanians born and raised from poor families, who perpetrate its practice. The (sic) even dare to protect thieves and become traitors to their own nation, only a clean person can stand up bravely against corruption.

In June 2009, Bishop Martin Shao (ELCT Northern Diocese) speaking at a special Mass [...] commended Mr Mengi (sic) actions stating "everybody in this country has the right to fight corruption. However, not everybody has the guts to attack people suspected to be taking bribes. Let us support the few who have been given the powers by God to fight corruption".

Mr Mengi clearly has the support of the Lutheran Church within Tanzania and as a result, is for many, the 'face' of the church within the community and perceived to aspire to the ethic advocated by the church and deserved of its support.

[...]

In our view, it will not be long before a headline such as 'Lutheran church leader/elder in Tanzania intimidates



British Investors in order to grab their property” hits the newsstands.

[...]

Defamation is a tort, a civil wrong. However, in common law jurisdictions, it can also represent the crime of criminal libel. The legal advice we have is that, under normal circumstances, the actions of the IPP Group, and (since the meeting with the British High Commissioner, at which he promised to have the defamation stopped) Mr. Reginald Mengi himself, would probably meet the threshold of proof for this crime. [...] Mr Mengi’s conduct is wholly inconsistent with his rhetoric.

[...] I respectfully ask you to consider, as Head of the Lutheran Church, if Mr. Mengi’s conduct in this case promotes the ethics and reputation of the church or those of civil society”.

48. The final publication complained of was an email addressed to Amadou Mahter Ba, Chief Executive Officer of the Africa Media Initiative (“AMI”), which is based in Kenya and, the Defendant told me, subsidised by the British government. It was copied to Linus Gitahi, Chief Executive of the Nation Media Group in Kenya, another employee of that Group, and the Guardian newspaper in London. Ms Hermitage wrote:-

“In November, the African Media Leaders Forum, a flagship AMI project is being held in Cameroon, Mr Reginald Mengi, owner and chief executive of IPP Media in Tanzania has been appointed co-chair of this Forum. This Forum is being held to provide an opportunity for African media professionals of a thorough exploration of media related issues including, the issues relating to ethical standards, It is on the issue of ethics that I am now writing to you.

There is a particular aspect of the campaign that is relevant to you. The continued harassment against us included a defamation campaign by IPP Media, with publications appearing in Tanzania in high profile English and Swahili newspapers owned by the company, radio and television stations and published world wide on the Internet where many remain. All the publications are couched in a language of suspicion and unqualified accusations of guilt. The viscously (sic) attack our investor status in Tanzania, accuse us of criminality in the face of clear evidence to the contrary, and damaged our commercial interests and personal reputations. No right of reply is ever given. The publications continue with the latest being an IPP Radio 1 and ITV television production early this year stating we stole the lease to Silverdale Farm and the lawful owner was the ‘*patriotic investor*’,

Benjamin Mengi. IPP Media is owned and run by Mr Reginald Mengi, the brother of Mr Benjamin Mengi, Mr Reginald Mengi [sic].

In late 2005 Mr Reginald Mengi expressed his concerns to the British Government that the Silverdale case was damaging his own business interests and reputation. The British High Commission to Tanzania at the time, Mr Andrew Pocock, stated that he was concerned about our reputation and about the defamatory statements appearing in IPP Media publications. Mr Mengi stated that he was not aware of the defamatory publications and that, as CEO of IPP Media (i.e. not the editor) he could not be held responsible for them. This, is in complete contradiction to Tanzanian Law. At this meeting Reginald Mengi promised he would stop the defamation. Far from doing this, the defamation escalated from this point onwards.

At the forthcoming Forum in Cameroon, the perception is that AMI endorses Reginald Mengi and the ethics of the media he controls. The mission of the AMI is to promote democratic governance, social development and economic growth by transforming and strengthening the continent's media sector. We had the potential to provide sustainable development in Tanzania and improve the lives of the poor line with the values of the AMI. There (sic) is no doubt, that IPP Media was constructive in destroying that investment and the lives of 150 Tanzanian, who lost their jobs some of who remain under threat in Tanzania due to the overt corruption in this case.

I ask you to consider if having appraised yourself of the above facts and established my credibility, you feel Reginald Mengi's conduct in the Silverdale case meets the mission statement of the AMI by supporting democratic governance, social development and economic growth and strengthens Africa's media in a manner that aids investment on the continent and whether his position as co-chair of this Forum is appropriate."

### *Meaning*

49. There is a good deal of repetition in these postings and emails. I agree with Mr Rampton that it is not necessary to subject each line of each individual publication to detailed analysis (although one passage in the 31 January 2010 blog requires special consideration). He is right to say that essentially there are three allegations directed at Mr Mengi. I find that the meaning of the passages complained of is as follows:

(1) Mr Mengi encouraged IPP's media outlets to conduct a campaign of deliberately inaccurate, abusive and defamatory attacks on the British investors in Silverdale Farm (the Middletons), which under Tanzanian law is also a crime;

(2) This campaign of “journalistic terrorism” facilitated Benjamin’s corruption of local officials and intimidation of the Middletons and thus helped Benjamin to destroy their investment and grab their property; Mr Mengi was in that sense complicit in Benjamin’s corruption and intimidation;

(3) Mr Mengi lied to the British High Commissioner by making promises which he had no intention of keeping, namely: (a) to have the defamatory media campaign stopped; (b) to speak to Benjamin and “address his behaviour”; and (c) to pay the Middleton’s costs of defending the claim brought against them by Benjamin.

50. The last sentence quoted in paragraph 44 above from the 31 January 2010 posting, if read in isolation, might suggest that Mr Mengi had himself taken part in invading the farm and stealing the lease. However, it must be read in the context of the introductory paragraph of the same posting, as well as other recent postings on the website; and with that context it should have been clear to the ordinary reader that this was not suggested. The meaning is that Mr Mengi enabled Benjamin to do these things, and was thereby complicit in corruption and intimidation.

#### *Mengi v Manji*

51. Mr Yusef Manji is a businessman in Tanzania. On 26 October 2010 Mr Mengi issued a civil claim against him in the Ilala District Court alleging that he had conspired with the Middletons to tarnish Mr Mengi’s reputation. Much of what was said in the plaint reproduces what Mr Mengi has alleged in this claim, but in one respect it goes further, claiming that part of this conspiracy involved Mr Manji paying the Middletons US \$55,000 to further the campaign. The claim in *Mengi v Manji* was abruptly discontinued shortly before the beginning of this trial. It was suggested that this was on legal advice, but a redacted advice from Mr Eardley produced to me only suggested that any award of damages on one case would be taken into account in reducing the damages recoverable in the other. Since I have been told that the Claimant’s primary concern is to vindicate his reputation rather than recovering damages, this does not seem a convincing reason for the discontinuance.

#### *No substantial tort?*

52. On 8 October Tugendhat J heard an application under what is generally described as the *Jameel* jurisdiction (*Jameel v Dow Jones & Co Inc* [2005] QB 946) to strike out the claim in respect of the website publications on the ground that the evidence served on behalf of the Claimant failed to establish any substantial tort. Mr Rampton made it clear that the objective of the Claimant was to clear his name and obtain an injunction to prevent future republication of the defamatory allegations: while not conceding that Mr Mengi has no claim for damages, Mr Rampton recognised that the Defendant would be unlikely to be able to pay any damages awarded. Tugendhat J said: “The main difficulty facing the Defendant in her application to strike out seems to me to be the fact that she has not removed the words complained of from her blog. ....I am not suggesting that she should have removed the words complained of from the blog. Whether she ought to have done that, or not, depends on whether she wrote was true, or protected by any other defence in law, and those are issues to be tried in the action, as is the issue of meaning. However she has decided to

exercise what she claims to be her right to freedom of expression.

Given the seriousness of the allegations made in the weblog, and the Defendant's insistence that she is entitled to continue publishing the words complained of, I cannot conclude that it is an abuse of the process of court for the Claimant to continue to prosecute this action.

In the circumstances, it would be inappropriate for me to express a view on the strength or otherwise of the Claimant's case as to the extent to which the words complained of in the blog have been published in the past. But as a matter of case management, in the light of the foregoing, I would expect that little time will be spent at the trial on the issue of who read the words complained of on the blog, and in what jurisdiction."

53. At the trial Mr Price QC sought to revive the *Jameel* argument. As I indicated in the course of argument, I was not prepared to accede to it. The jurisdiction to strike out can be exercised even at the end of a trial, but only in very exceptional circumstances: see the decision of the Supreme Court in *Fairclough v Summers* [2012] 1 WLR 2004 and the judgment of Tugendhat J in *Abbey v Gilligan* [2012] EWHC 3217, the latter handed down the day after I reserved judgment in the present case.

54. The position might well have been different if clause 1 of the Defamation Bill at present before Parliament had been enacted and brought into force. That provides that "a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant". There is no evidence that Ms Hermitage's website postings, the latest of them in 2010, have caused or are likely to cause serious harm to Mr Mengi's reputation. But of course I have to apply the law as it now stands, not as it may be in the future.

#### *Two significant issues of fact*

55. I have already made findings about what was said at the meeting with the High Commissioner. Before coming to the defences of justification and qualified privilege advanced by Ms Hermitage it is necessary to consider two other issues of fact which I regard as even more central. The first is Mr Mengi's relationship with Benjamin. The second is the extent to which Mr Mengi encouraged or knowingly permitted the one-sided coverage in his newspapers of the Silverdale dispute.

#### *The Claimant's relationship with Benjamin: NICO Ltd*

56. The Claimant's 184-paragraph witness statement had only 3 paragraphs devoted to the question of his relationship with Benjamin, as follows:

"100. My brother, Benjamin Mengi is based in Moshi Town while I am for all intents and purposes geographically based in Dar as Salaam although I have a residence and a business, namely Bonite Bottlers Limited, in Moshi Town. We are not involved in each other's business and neither of us is a partner, director or shareholder in any of the companies or businesses of the

other.

101. For the most part Benjamin and I lead separate lives and do not socialize or move in the same social circles except for a few filial engagements in which we participate by virtue of being related.

102. I would not and have never allowed my relationship with Benjamin Mengi to compromise my principles and responsibilities. For example:

a) In 2005 the National Environment Management Council while under my chairmanship intervened and stopped the growing of Genetically Modified Tobacco, which was being conducted by Benjamin Mengi through a company called Alpha Tobacco Limited at Silverdale Farm.

b) In 2007 I resigned in protest as Chairman of the Investment Committee of the National Investment Company (NICO) after the company invested in a company in which Benjamin Mengi has an interest without following the proper protocols. I exhibit a copy of my letter of resignation at RAM 1 pages 170 and 171.”

57. The exhibited letter signed by Mr Mengi, dated 3<sup>rd</sup> August 2007 and addressed to Mr Felix Mosha, Chairman of the Board of Directors of NICO, was headed “Resignation as Chairman and Member of the Investment Committee of NICO”, and stated:

“I would like to inform you with regret that I wish to resign from the Chairmanship and Membership of NICO from the date of this letter for the following reasons:-

1. NICO has invested in Interchem Pharma Ltd. This investment was not recommended by the Investment Committee because the proposal thereof was not submitted to the Committee as it was required. In other words, it was approved by the Board without the recommendation of the Investment Committee of which I am the Chairman.

2. Interchem Pharma was and is still partly owned by my brother Benjamin Mengi. Because the intention to invest in the company was not submitted to the Investment Committee as stated above, I did not have knowledge that NICO was going to have such business relationship with my brother because I was not so informed at any time. Even though I did not participate in any in way in the decision to invest in Interchem, my conscience haunts me both as an individual and Chairman and member of the Investment Committee.

May I clarify that my action is not in any way suggesting that the investment was wrong value wise but ethically wrong because of my brother's interest in Interchem Pharma Ltd."

58. On 10<sup>th</sup> August 2007 Mr Mosha replied saying that "the issue of Interchem should no longer be a matter of concern to you because, as you will note from the enclosed NICO Board resolution, the Board of NICO has decided that NICO will divest all its shares (51%) from Interchem..... We hope that this decision on Interchem by the NICO Board will now make it possible for you to withdraw your resignation."
59. On 6<sup>th</sup> October 2007 NICO Ltd issued a Prospectus inviting the general public to buy 50,000,000 shares in the company. The prospectus mentions the investment already made in Interchem, and assures readers that "although one of the original shareholders is related to one member of the investment committee, NICOL would like to confirm that the agreement was signed at arm's length". But no divestment had occurred: on the contrary, the prospectus speaks of the prospect of more funds being required "to enable NICOL to complete its investment portfolio in this venture at a cost of TZS 2.5 billion". Mr Mengi was still held out to investors as Chairman of the Investment Committee. He was still Chairman of the Investment Committee on 15<sup>th</sup> July 2008, when NICOL's Annual Report for 2007 was published, again making favourable reference to Interchem; and on 26<sup>th</sup> July 2008 he became a director of NICOL. Later Interchem was placed into receivership and NICOL's investment was written down to zero. Mr Mosha, chairman of NICOL, was appointed a director of IPP Media Solutions Ltd in 2009 or 2010.
60. On 9<sup>th</sup> June 2009 the Tanzanian Capital Markets and Securities Authority (CMSA) sent the Board of NICO a highly critical report. It found that NICO had invested over 1.7 billion Tanzanian shillings in Interchem Pharma without conducting independent due diligence. It states that "Doubts surround the whole deal as to what was the motivation for NICOL to invest in the Company without obtaining independent review from a qualified valuer and based solely on balance sheet values." It noted that the investment proposal had not been discussed by the Investment Committee as required by that Committee's terms of reference approved by CMSA, but was apparently approved by four directors: and that a final instalment had been paid to Interchem even after a due diligence report had been issued and a creditor Bank had served a default notice. It directed NICO to reconstitute its Board by removing all Directors who participated in approving the investment. Mr Mengi, as already noted, had not been a director at the time the investment in his brother's company was approved, but accepted appointment to the Board at about the time that the investment was written off.
61. Mr Mengi then wrote a further letter to Mr Mosha on 3<sup>rd</sup> September 2009 saying that his name had "appeared in several allegations that I engineered the NICOL investment in Interchem for my benefit and that of the Mengi family. Undisputedly, my name has been tarnished by these allegations and these allegations will continue so long as I continue playing an active role in the management of the business of NICOL as a member of the Board of Directors. For this reason and in order to save my reputation, I regrettably have no option but to resign as a member of the Board of Directors of NICOL with effect from the date hereof."
62. Mr Price put it to Mr Mengi that either his letter of 3<sup>rd</sup> August 2007 to Mr Mosha, Mr Mosha's reply a week later, and the Board's "divestment decision" enclosed with

it were shams, or the information given to the investing public by the directors of NICO in the prospectus of October 2007 and the annual report of July 2008 (when he was still chairman of the Investment Committee, and just before he accepted appointment to the Board) was nonsense. Mr Mengi had no satisfactory answer to this: he emphasised repeatedly that he had no control over the Board of NICO, could not be held responsible for their publications, and was entitled to assume that they would disinvest because that was what they told him in August 2007 that they would do.

63. Mr Mengi's evidence on this subject was evasive and unsatisfactory; and paragraph 102(b) of his witness statement, cited above, is grossly misleading. Even on the assumption, which may be generous to him, that the August 2007 documents were genuine, he did not "resign in protest" in August 2007 as he said in his statement. Instead, he was persuaded to stay on as chairman of the Investment Committee, and subsequently accepted appointment to the Board, notwithstanding that the company had made what he himself described in 2009 as an "ethically wrong" investment in his brother's company. He did not resign until 2009, by which time all the money invested by NICO in Benjamin's company had been written off.
64. No doubt Mr Mengi took care not to be party to the formal decision to approve the investment in his brother's company. But that does not make it irrelevant for present purposes. The clear inference which I draw from the NICO affair is that he is much closer to Benjamin than he would have me believe: and that he is content to allow organisations with which he is concerned to give Benjamin preferential treatment, so long as he is not the one making the decision

*The Claimant's relationship with Benjamin: the role of Mr Nguma*

65. Turning from NICO to the Silverdale dispute, I have already noted that Mr Nguma, chief corporate counsel for the IPP media group and chairman of The Guardian Ltd, was also acting for Benjamin in his civil action against Mr Middleton. Any lawyer of any experience would have seen that this created a conflict, at any rate if the IPP media really were independent of the Mengi family.
66. Mr Nguma seems to have been aware of the concept of conflict of interests, though such awareness did not prevent him from acting for Benjamin. Asked by Mr Rampton what advice he gave to the managing director of the Guardian in relation to the Defendant's letter of complaint of 24<sup>th</sup> February 2006, Mr Nguma replied: "I told him to use their complaints settlement to investigate the matter, and if they did find there was some wrongdoing they should consult an external lawyer, because I had a conflict of interest with the defendant in the case I was doing for Benjamin Mengi."
67. This was not what Mr Nguma had said in his witness statement. In it he had described how the letter was forwarded to the Managing Director of the Guardian (Mr Mshana) and then to him, in accordance with the established practice of referring matters which may have serious legal implications to the Legal Department. He added: "In line with this routine, I considered the letter and gave legal advice to TGL, privilege in which is not waived."
68. Mr Nguma accepted in cross-examination that he had not given them legal advice – on the contrary, he had declined to do so on conflict of interest grounds – and that what he had written in his witness statement was highly misleading. I agree.
69. Later he told me that Mr Mengi personally had asked him for legal advice about

one of the Middletons' letters. Mr Price's questions and the witness' answers continued:

Q: In that situation it was your plain duty to tell him, "I cannot give you legal advice because I am acting for your brother against the Middletons"

A: Yes.

Q: Did you do that?

A: No

Q: Why not?

A: I just decided not to.

Q: Why

A: As it was not at that stage important.

Q: It was extremely important because it was the Chairman's own brother, was it not?

A: I do not think so.

.....

Q: You have accepted that it was your plain duty to tell Mr Mengi that you could not give him legal advice because you were conflicted, in a case which involved his own brother. Why did you not carry out your duty as a lawyer, Mr Nguma? There must be an explanation, please can we have it?

A: There was not any real reason why not.

70. Mr Nguma then gave the explanation that he thought Mr Mengi already knew from Benjamin that he was handling his case. Mr Price put it to him that there was all the more reason simply to tell Mr Mengi that he (Mr Nguma) could not advise him on the same matter: Mr Nguma did not have any coherent answer to this, though a little later he said that he had advised Mr Mengi that he should not reply to the letter on the ground that Mr Middleton's letter of 25<sup>th</sup> March 2006 is addressed to Mr Mengi as Executive Chairman of IPP Holdings Ltd, and no such company exists (the correct name of the holding company being IPP Ltd).

71. In his own evidence before me Mr Mengi was categorical that in early 2006 he was unaware that Mr Nguma – his friend and trusted counsellor for 32 years, with an office one or two rooms away from his own - was acting for Benjamin. I do not believe that either of them was telling the truth. I am quite satisfied that Mr Nguma would not have taken on Benjamin's case unless he had either been asked by Mr Mengi to do so or at the very least had sought and obtained Mr Mengi's permission. Mr Mengi, therefore, either encouraged or knew and approved of Mr Nguma's decision to act for Benjamin in litigation against the Middletons. It follows from this that when, instead of replying to Mr Middleton's letter of 25 March 2006, he passed



it to Benjamin's lawyer, he was demonstrating partisanship rather than neutrality.

*The Claimant's relationship with Benjamin: his view of the Silverdale dispute*

72. Perhaps the most remarkable feature of the evidence in this case is what Mr Mengi has *not* said. In the course of his lengthy witness statement, several hours in the witness box, and years of correspondence since the meeting with Dr Pocock, he has at no time uttered a word of criticism of his brother nor a word of sympathy for Mr Middleton and Ms Hermitage. In this respect, at least, he has not been insincere.

*The Claimant's influence over his newspapers*

73. Mr Mengi's evidence is that he adopts a hands-off approach to his newspapers. He repeatedly emphasised that he never "tampers" with the judgment of his editors, and that the IPP group's media policy emphasises the importance of complete editorial independence. As Mr Rampton put it, "he is entitled to wash his hands of what appears in his newspapers".
74. The Claimant was supported on this point by a number of witnesses holding senior positions within the IPP group.: Mr Nguma, the group's chief corporate counsel; Wallace Muggo, managing editor of the Guardian; Jesse Kwayu, managing editor of Nipashe; Joyce Mhavi, managing director and managing editor of ITV; Boniface Luhanga, chief sub-editor of Nipashe; and (in a written statement) Stephen Chuwa, head of news and current affairs at ITV.
75. Before looking at coverage of Benjamin and Silverdale it is worth looking at coverage of Mr Mengi himself. It is readily understandable that his press conference about "sharks of grand corruption", or the Speaker's ruling in his favour, should have been covered in his newspapers: they were newsworthy by anyone's standards. More surprising is the fact that a speech in April 2009 by Professor Lipumba, then leader of the largest opposition party in Tanzania, was reported in several non-IPP papers as containing passages strongly critical of Mr Mengi, but the Guardian somehow omitted the criticisms and told its readers that Prof Lipumba had "commended" Mr Mengi.
76. I was also struck by the frequent coverage in IPP papers of the Claimant's uncontroversial activities such as speeches at school prizegivings. He told me, and I accept, that he hardly ever visits the newsrooms of his papers (which are several miles from his office in Dar es Salaam); but he has a press secretary who does, with press releases issued on his behalf. I was solemnly assured that each of these was considered on its merits and only published if it was considered newsworthy. No one, however, told me of any occasion when the press secretary's offerings were "spiked".
77. Turning to coverage of the Silverdale story, there was no dispute between counsel that the series of articles, mostly though not always written by Jackson Kimambo, gave a slanted and partisan account wholly supportive of Benjamin. The dispute is over *why* this was so. No one suggested that the Guardian or Nipashe has an editorial policy of supporting the violent expropriation of foreign investors generally. So with that possibility discarded there are, as it seems to me, only two logical alternatives. One, advanced by the Claimant's witnesses, is that the editors accepted at face value copy filed by Mr Kimambo and other correspondents based in Moshi, whose integrity they had no reason to doubt; exercised their customary editorial independence; and

printed those stories which they considered newsworthy without fear or favour, affection or ill will. The other, advanced by the Defendant, is that the Guardian and Nipashe are mouthpieces for Mengi family interests, and that journalists and editors alike ensured that there was no coverage adverse to Benjamin because they knew that those were Mr Mengi's wishes.

78. Mr Kimambo is, I am told, alive and well and still regularly filing copy for IPP media companies. The Claimant's failure to adduce any evidence from him is very striking. Mr Kimambo might, for example, have testified how it came about that he covered Mr Middleton's arrest on 21 November 2005, but did not cover the magistrate's dismissal of the charges a fortnight later. He did not do so.
79. The witness with the most detailed involvement in the editing of the Silverdale copy was Mr Luhanga. His evidence was that there were two editorial meetings per working day until 2008 and three thereafter: in other words, several hundred meetings a year.
80. The first article dealt with specifically in Mr Luhanga's witness statement is the one which appeared in Nipashe on 22 November 2005. Mr Luhanga stated:

“This article was submitted by Jackson Kimambo a PST correspondent in Moshi. I handled the story at various stages as follows:

- a) I spoke to Mr Kimambo about the story in the morning before the post-mortem meeting and we agreed that he should attend the court proceedings and brief me on what had transpired.
- b) During the course of the day I spoke to Mr Kimambo several times although at this distance in time I cannot remember exactly how many times and he briefed me about the case.
- c) As the acting News Editor I presented the story idea at the editorial meetings where it was decided that the story should be carried.
- d) I received a copy of the article written by Mr Kimambo and asked the assistant News Editor to edit it which he did.
- e) After the article being edited I sent it to the Chief Sub Editor where the story was edited again and a headline was created.

All the decisions relating to the story and in particular whether to carry it and if so how much prominence it should be given were made solely by the editors in the editorial meetings. As such I can state that the story was treated in the normal manner and the fact that the story also involved Reginald Mengi's brother never came up and was not a consideration in the decision to carry the

story.

At no time before or after the story being published was I approached Mr Mengi [sic] or anyone acting on his behalf.”

81. This wording, including the typing error, is faithfully reproduced for each of seven other articles which had appeared in Nipashe between November 2005 and April 2007.
82. Mr Luhanga gave his oral evidence through an interpreter, and I therefore make allowance for the fact that there may be some lack of precision in the translation of particular words or phrases; but the meaning was clear enough. He tried for some time in cross-examination to maintain the line that in 2012, when his witness statement was compiled, he had an actual recollection of each of his conversations with Mr Kimambo, and the course he took at the relevant editorial meeting, several years earlier. Plainly he did not. As the formulaic wording of the witness statement makes clear, he could only tell me what usually happened or was supposed to happen.
83. Mr Price asked why the article about Mr Middleton’s arrest and appearance in court did not mention that the accused denied the charges. Mr Luhanga said that unfortunately the story did not mention it: it was supposed to be written, but it was not. “It was maybe the unprofessional way, this information”. Later Mr Price showed the witness that Mr Middleton’s release, ordered by the High Court, had been reported in the Daily News (a non-IPP paper) but not in Nipashe, Mr Luhanga said that unhappily Nipashe’s correspondent missed the story. He described it as “a lack of professionalism in how it is written, but it is human error”. He gave the same explanation for the fact that a story reported in the *East African* under the headline “Terrified British farm investors flee from Moshi”, and telling its readers that the investors had fled after receiving persistent death threats, should not have been reported in Nipashe at all. Again, he said, “maybe my correspondent did not get it, missed [it] out”. He denied that his managing editor or managing director had instructed him not to report anything favourable or sympathetic to Mr Middleton.
84. The mechanistic evidence of Mr Luhanga served to confirm my view that there is only one realistic explanation for the one-sided coverage of the Silverdale Farm dispute in the Guardian and Nipashe: namely that Mr Mengi has appointed a loyal team of editors who lay down the party line, with his approval, that nothing is to be published which criticises the Executive Chairman or his family.
85. Mr Rampton submitted that Mr Mengi “is entitled to wash his hands.....of what is in the Guardian because he does not run the editorial content and he has no power in the company. He could, I suppose, call an extraordinary general meeting and have the directors dismissed. Beyond that, he has no power to interfere. He is not a director.” No doubt that is an accurate statement of the formal position in English or Tanzanian company law. But it is, I find, very far from the reality of the IPP Media Group.
86. Taking the evidence in this trial as a whole, in particular the consistently partisan coverage of the Silverdale affair; the mendacious attempts by Mr Luhanga to distance himself from it; the fact that Mr Mengi, despite his denials on oath, plainly knew and approved of Mr Nguma’s acting for Benjamin in litigation against the Middletons; and Mr Mengi’s steadfast refusal to express any criticism of Benjamin or any

sympathy for the Middletons, I am in left in no doubt that Mr Mengi encouraged the campaign in his newspapers to praise his brother and denigrate the Middletons; and did so by making senior editorial staff aware, through Mr Nguma or otherwise, of what line the journalists on the ground were expected to take.

*Coverage of the President*

87. The hollowness of the pretence that the editorial teams at Mr Mengi's newspapers exercise robust independence at all times is illustrated by a memorandum of 16<sup>th</sup> October 2008 from Mr Kiondo Mshana, Managing Director of the Guardian, to Sakina Dato, then IPP Print Media Group's Editorial Director. Headed "Publication of stories on the President", and copied to Mr Nguma in his capacity as a director of The Guardian Ltd, the memo read:

"You will recall my having officially notified you recently that it is absolutely necessary for my advice to be sought before any of The Guardian Limited publications runs controversial or any otherwise sensitive stories on President Jakaya Kikwete.

I told you that I must actually see the copy in question before it goes to print or, in case circumstances make that impossible, that I be contacted by telephone so that I can advise as appropriate.

I take this opportunity to state that this remains the Company's official stand and that all editors are obliged to observe it without fail. Doing so has many advantages.

Please, ensure no-one defaults on this. Many thanks for your understanding and cooperation."

88. The next day Mr Mshana was slapped down by Mr Nguma, who wrote: "In my view, this is direct interference with editorial independence and I hope that you will not do this again in the future in respect of this or any other case".

89. Mr Nguma was right: the memo was indeed direct interference with editorial independence. But, Mr Price asked, how did it come about that Mr Mshana was under the impression that a policy of not criticising the President in the Guardian without asking the managing director's permission *remained* the Company's "official stand" which all editors were "obliged to observe....without fail"? Mr Mshana was identified by Mr Kabendera, a young Tanzanian journalist who worked for the Guardian in 2009-10 and gave evidence for the Defendant, as having been present in court during part of the evidence before me. Nevertheless no evidence from Mr Mshana, written or oral, was produced, with the result that he could not be asked for his explanation.

90. The obvious inference to be drawn from Mr Mshana's memo is that it was a momentary glimpse of the truth. The memo is also consistent with evidence from Mr Kabendera that he and other reporters at the Guardian were told that they must never publish anything negative about President Kikwete. This supports the conclusion that they had also been told that they must never publish anything negative about Mr Mengi or his family.

### *Justification*

91. I can now give my conclusions on justification in respect of each of the allegations complained of:

*Mr Mengi encouraged IPP's media outlets to conduct a campaign of deliberately inaccurate, abusive and defamatory attacks on the British investors in Silverdale Farm (the Middletons);*

I find that this factual allegation is true, and thus justified at common law.

*.....which under Tanzanian law is also a crime.*

As to whether Mr Mengi was committing the offence of criminal libel under Tanzanian law, it is a nice question whether an Executive Chairman of a holding company (in this case IPP Ltd) who is not a "director" of the subsidiary company (in this case The Guardian Ltd) which publishes a newspaper is nevertheless to be regarded as an officer of the subsidiary. But since I find that Mr Mengi encouraged the defamatory campaign, that appears to me to be sufficient to have founded personal liability in Tanzanian criminal law, in the event – which was surely theoretical – that the authorities decided to prosecute him.

*This campaign of "journalistic terrorism" facilitated Benjamin's corruption of local officials and intimidation of the Middletons and thus helped Benjamin to destroy their investment and grab their property; Mr Mengi was in that sense complicit in Benjamin's corruption and intimidation;*

I find that the campaign in the Guardian and Nipashe facilitated Benjamin's corruption of local officials and intimidation of the Middletons and thus helped Benjamin to destroy their investments and grab their property; and that Mr Mengi, since he either encouraged or knowingly permitted the campaign, was in that sense complicit in Benjamin's corruption and intimidation. The allegation is thus substantially true, and justified at common law. The phrase "journalistic terrorism" is a comment, which Ms Hermitage was entitled to make as a fair description of the newspapers' campaign: she did not say that Mr Mengi was a terrorist.

*Mr Mengi lied to the British High Commissioner by making promises which he had no intention of keeping, namely: (a) to have the defamatory media campaign stopped; (b) to speak to Benjamin and "address his behaviour"; and (c) to pay the Middleton's costs of defending the claim brought against them by Benjamin.*

As I have found already, this set of allegations was not entirely true. As to (a), Mr Mengi lied when he promised to look into the media coverage, but he did not promise to have it stopped; (b) is not precisely correct, though very nearly so, in that Mr Mengi promised to speak to Benjamin and see what could be done to ease the situation; and as to (c), Mr Mengi promised to see what could be done to get Benjamin's case against them withdrawn, but did not promise to pay the costs.

92. To this extent, the defence of justification therefore fails at common law. But it succeeds under s 5 of the Defamation Act 1952. This provides that: "In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of

every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.”

93. The allegations that Mr Mengi encouraged or knowingly permitted and approved of his newspapers' defamatory campaign against the Middletons, and that by doing so he facilitated Benjamin's campaign of corruption and intimidation and in that sense was complicit in it, are separate and distinct from, and far more serious than, the allegations of making false promises to the High Commissioner. I find that the allegations which Ms Hermitage has not proved do not materially injure Mr Mengi's reputation having regard to the truth of the allegations which she did prove. (Nor do the references to criminal libel, even if I am wrong in my understanding of Tanzanian criminal law.)

*Qualified privilege: reply to attack*

94. In addition to justification, Mr Price relied on the defence of qualified privilege on two alternative bases: (a) reply to attack; and (b) common duty and interest. He did not rely on *Reynolds* privilege.
95. The type of qualified privilege based on reply to attack is described in *Gatley* as follows: “A person whose character or conduct has been attacked is entitled to answer such attack, and any defamatory statements he may make about the person who attacked him will be privileged, provided they are published bona fide and are fairly relevant to the accusations made..... Mere retaliation, which cannot be described as an answer or explanation, is not protected, but the defendant is not required to be diffident in protecting himself and is allowed a considerable degree of latitude in this respect.....”
96. Lord Oaksey said in *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449: “The law does not concern itself with niceties in such matters. If you are attacked by a prize fighter you are not bound to adhere to the Queensberry rules in your defence.”
97. There is no requirement of necessity. In *Watts v Times Newspapers Ltd* [1997] QB 650 at 671C Hirst LJ said that the victim of the attack had: “a right to reply in order to rebut the accusations against him and to do so with a considerable degree of latitude, so long as he did not overstep the bounds and include entirely irrelevant and extraneous material.”
98. Eady J said in *Hamilton v Clifford* [2004] EWHC 1542 (QB): “The defendant would be entitled to protect his reputation by a proportionate response which was appropriate both in terms of subject matter and scale of publication. In order for a defendant to avail himself of this form of privilege, the response should not go into irrelevant matters or, in particular, cross over into an attack on the integrity of the claimant if it is not reasonably necessary for defending his own reputation.”
99. Mr Price accepted that the reply to attack must be proportionate, relevant and appropriate for the privilege to apply. It is also common ground that no distinction should be drawn between Ms Hermitage and Mr Middleton for these purposes: the privilege is not confined to attacks on the defendant, but extends to action taken by him or her to defend family or friends.
100. The first question is whether Mr Mengi can be held responsible for the attack to which Ms Hermitage was responding. For the reasons I have given in relation to

justification he can. Mr Kimambo was the instrument of both Mengi brothers in leading the attack. As the great Irish judge Palles CB said in *Dwyer v Esmonde* (1877) Ir R. 11 C.L. 542, “A person libelling another in the public Press cannot by sheltering himself under anonymity, or under the name of another, abridge the right of his adversary to defend himself”.

101. The next issue is whether the delay between the attacks and the reply removed the privilege. Again, this is a question of fact. The reason for the delay was that (a) Ms Hermitage did not dare to make public criticism of Mr Mengi while she and her husband were still in Tanzania; (b) they were in transit during 2008, and Mr Middleton then suffered a breakdown in his health. Only when they were safely back in the UK and his health had improved did she begin her campaign. On the facts Ms Hermitage’s blog and emails, despite the passage of time, were plainly a reply to the original attack. If, which I doubt, the email to Bishop Hanson and his colleagues dated 24 January 2010 has to be considered separately, it was triggered by the broadcasts of a fortnight earlier.
102. Mr Rampton further argued that the fact that Ms Hermitage replied more than once to the attack deprives her of privilege. He was unable to find a case in this jurisdiction which has so held as a matter of law, but he cited a first-instance decision from Western Australia, *Heytesbury Holdings Pty Ltd v City of Subiaco and Costa* [1998] WASC 183. The defendant council, under attack from the claimants, had responded in newspaper articles of 13 and 15 March 1996. They then issued a news release to similar effect on 20 March 2006. Steytler J held (at p 83): “In those circumstances it seems to me not to be open to the defendants to contend that the purpose of the news release on 20 March 1996 was that of vindicating their character or actions. Their position had by then been set out in the preceding newspaper reports.....The news release was merely a further shot in the battle, which shot had been provoked, to some extent at least, by the 13 March article. It did nothing new in order to vindicate the character or actions of the City or Mr Costa.”
103. If Steytler J was intending to lay down a rule of law that the person replying to the attack only has one “shot” in response to each salvo from the attacker, I respectfully disagree. In my view it is a question of fact whether the defamatory statement complained of is a reply to an attack; and, if it is, whether it is reasonable, proportionate and relevant. Ms Hermitage did indeed publish a number of entries on her website over a period of about 18 months (I accept Mr Rampton’s submission that the articles published before December 2009 can be taken into account for this purpose even though they are statute-barred); and in addition she sent one email to Mr Ba, and one to every Bishop of the Lutheran Church. They were a reasonable, proportionate and relevant response to the campaign waged against Mr Middleton in IPP publications over a period of several months. Indeed, the reply was in my view measured, even restrained, when compared with the attack.
104. As I have already found in relation to justification, Ms Hermitage was not guilty of malice in publishing any of the articles or emails.
105. The defence of qualified privilege therefore succeeds on the grounds of reply to attack. It is unnecessary to consider whether it would also have succeeded on the grounds of a reciprocal interest and duty between Ms Hermitage and her readers.
106. Mr Mengi is evidently highly sensitive to criticism, perhaps because he is not

used to it. But this case recalls to mind the old French nursery rhyme:

*Cet animal est tres méchant;*

*Quand on l'attaque, il se défend.*

*Conclusion*

107. I find for the Defendant on both justification and qualified privilege. Mr Mengi's claim is dismissed.