

Case No: QB-2021-001248
[2023] EWHC 3351 (KB)

IN THE HIGH COURT OF JUSTICE
MEDIA AND COMMUNICATIONS LIST
KINGS BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 21 February 2023

BEFORE:

SENIOR MASTER FONTAINE

BETWEEN:

BLAKE & ORS

Claimants

- and -

FOX

Defendant

MS B GROSSMAN and **MS H ROGERS** (instructed by Doughty Street) appeared on behalf of the Claimants

MR G CALLUS and **MS A MARZEC** (instructed by 5RB) appeared on behalf of the Defendant

JUDGMENT

Approved

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1. THE SENIOR MASTER: This is a costs and case management conference, at which most matters have been agreed or determined, and the remaining issue that I am now dealing with is the defendant's application notice, dated 16 February 2023, for an order that the claimants be required to answer question 17 to 23 of the requests for further information, which I think was dated 1 February 2023, by 28 February 2023.
2. The requests are made in respect of the claimants' defence to counterclaim in this defamation case where there are claims on both sides by the claimants and their claim by the defendant in his counterclaim. The request has been answered, but the defendant takes the view that request 17 to 23 have not been properly or fully answered, and seeks a fuller and better answer.
3. All the requests relate to the issue of the meaning of racism and how that meaning is related to and forms a foundation of the defences of the claimants to the honest opinion defence that they provide in response to the defendant's counterclaim, and the third claimant's defence of truth, which she puts forward in response to the counterclaim.
4. The essential dispute between the parties is whether that meaning has been sufficiently addressed in the pleaded case and whether the matters on which the claimants rely in their case on that have been sufficiently addressed. There is a fundamental disagreement between the parties as to whether any further definition of meaning of racist in respect of the counterclaim is required, because there has been a preliminary issue trial in relation to both meaning and honest opinion by Nicklin J, following a hearing on 1 November 2022. Unfortunately we only have the transcript of the hearing and the judgment is not yet available, but the order that Nicklin J made is available, and that records that he determined the natural and ordinary meaning of the publications in the claim, which is not relevant for today's purposes, and in relation to the counterclaim he determined that the natural and ordinary meaning of each tweet, which are the publications relied upon, is that the defendant is a racist. He held that such meaning was defamatory at common law and that each publication was an expression of opinion. The distinction between the position of the parties in relation to all the requests is whether that meaning, having been determined by Nicklin J at the preliminary issue trial, relates to whether any further elaboration is needed in relation to the claimants' defences of honest opinion and truth.

5. As to the approach to a request for further information, I have been helpfully referred to a number of authorities, one of which is in the commercial court: *Al-Saud v Gibbs* [2022] EWHC 706 Commercial before Mr Richard Salter QC sitting as a deputy judge of the High Court, where he refers to the approach to Part 18, and also refers to the Practice Direction. At [34] he says:

"The terms of the Practice Direction also make it clear that requests and orders under CPR Part 18 must be strictly confined to matters which are reasonably necessary and proportionate for the stated purpose."

6. He also refers to another authority, which I have been referred to, *King v Telegraph Group Ltd* [2000] EWCA Civ 613 where Brooke LJ laid stress on the strictness required by the terms of the Practice Direction in confining this particular rule to strictly what is "necessary and proportionate and the avoidance of disproportionate expense."
7. It is submitted on behalf of the claimants that the application does not meet those requirements and the fact that the alleged absence of further particulars has not prevented the requesting party from providing the pleading or otherwise preparing for the CCMC is also relevant to whether the requests are reasonably proportionate and necessary by reference to the judgment in *Kings Security System Limited v Kings and Evans* [2019] EWHC 3620 [52 to 53].
8. I will now turn to the particular requests. Requests 17 and 18 relate to paragraph 28.5 of the defence to counterclaim, and the first is:

"Identify the highly controversial statement about race referred to in paragraph 28.5 stating the words used to state they were made in the manner in which the statements were made."

9. The answer given is that the claimants' case is sufficiently set out, and that it is part of the defendant's case that he makes statements publicly which, as he puts it, [descend] from a currently popular ideology of [recent] controversy. There is a reference to the defence and counterclaim at paragraph 80.7. It is said that the claimants have set out statements by the defendant in the Particulars of Claim at paragraphs 8 and 9, the reply

and defence to counterclaim at paragraphs 30.3 and 30.9, and 32.1 and 32.16. And it states that this is a request for evidence.

10. In my judgment the claimants have sufficiently identified the controversial statements about race in the statements of case referred to in the response, and the defendant cannot be under any doubt as to what those statements are; they have all been set out and I do not consider that any further elaboration is needed in response.
11. The same applies to request 18 which is, "Explain the relevance that the defendant made such allegedly controversial statements in the claimants' case in rebuttal of serious harm.". Serious harm is addressed at paragraph 28. The statements relied upon there are as set out in paragraph 28.5. The relevance there is obvious, I would have thought. Namely it is said that the defendant made such allegedly controversial statements and therefore the further tweets that the claimants made would not cause any further harm.
12. So no further elaboration is needed, beyond the response that has been provided, and it is said that this forms part of the claimants' case in response to the defendant's case advanced in the defence and counterclaim at paragraph 80, as to allege serious harm to his reputation.
13. Request 19 relates to paragraph 30.2 of the defence to counterclaim where it is said that in relation to the defence of honest opinion and the third condition in section 3.4 of the Defamation Act 2013, that an honest opinion could have held the opinion that the defendant is a racist based on any or all of the facts referred to in paragraphs 30.3 to 30.9, as set out in the defence to counterclaim. The request asks what meaning is ascribed to the word "racist" in that context, and in particular whether it is alleged that the way the word is defined in the claimants' statement of case dated 30 June 2022, or as defined in the defence and counterclaim at paragraph 79, or in both definitions or some other meaning.
14. This really brings into focus the issue between the parties. The defendant's position is that the judge determined the issue of the meaning of the claimant's tweets in the order made on the trial of preliminary issues, which I have read out in the order, namely that

the defendant is a racist. That is the natural and ordinary meaning of the word which clearly the judge felt at that stage, certainly, that no further elaboration was needed.

15. There is also a dispute as to whether the judge intended to embark on a further elaboration and did not do so at that stage, simply because he did not want there to be any pre-judging of the claimants' defence to counterclaim in terms of their honest opinion and what that opinion was. I have been referred to the transcript where the judge says on two occasions effectively "I will cross that bridge when I come to it" and "It is not necessary at this stage". The defendant's position is that that bridge will have to be crossed because otherwise the court is not going to be able to determine at trial the issues of honest opinion and truth, that those cannot be determined in a vacuum and it will have to be determined against a further elaboration of the meaning, other than the word itself.
16. I have been taken by the claimants' counsel to the decision in *Bokova v Associated Newspapers Ltd* [2018] EWHC 2032 QB before Nicklin J, where it was held that:

"It was wrong in principle for a defendant to a defamation claim to advance as being true meanings which were at variance with the actual meanings found by the court, that following the court's determination of the actual meaning of the words 'complained of', the only relevant and permissible route open to a defendant who wished to advance a defence of truth, was to plead, if it could, that it would prove the implications found in the court's meanings to be substantially true."

17. At paragraph 37 of the judgment, the judge stated:

"In my judgment advancing Lucas-Box meanings that are at variance with the actual meaning found by the court is wrong in principle."

18. Based on that decision, and the determination of the judge at the trial of preliminary issues on meaning, I agree with the defendant's position that no further definition is required, and that an answer to request 19 is not required. If the parties, as had been submitted on behalf of the defendant, were required to provide some further elaboration, in fact both of them have done so in the paragraphs that are referred to in the case of the defendant, and in the statement of case dated 30 June 2022 in the case of the claimants. Both those definitions are stated to be objective determinations of

meaning, but they can, in my view, be no other than subjective in the sense that the objective or natural and ordinary meaning has already been determined by the court, and the court felt that no further elaboration of the word itself was needed.

19. In response to request 20, which is:

"Clarify so that the defendant may understand the claimants' case, how the word is used in all the Particulars."

I think it is meant to refer to paragraph 30.3(1) to 30.9 of the defence to counterclaim, and the word is "racist". The claimants have responded to say that the request is misconceived and unnecessary and I agree with that approach because that follows from my determination in respect of request 19, and for the same reasons.

20. Request 21 and 22 relate to the defence of truth in paragraph 32 of the defence to counterclaim, and again asks for an objective meaning for, what the third claimant's case is, an objective meaning of racist and whether it is as set out in paragraph 79 of the defendant's defence and counterclaim or the claimant's statement of case dated 30 June 2022, and if neither of those are in the third claimant's view the objective meaning, state what the third claimant's case is. Again, for the same reason as in relation to request 19 and 20, I agree with the defendant's position that the request is misconceived because the natural and ordinary meaning of the word as found by the court has already been determined. As I have already stated, each of the parties has put forward a different or alternative position as to what their view of the word is so that each know each other's case on that. Insofar as there is any further elaboration needed, it is not agreed between them and there is, as Mr Callus has said, no overlap between them. That indicates to me that those are subjective positions rather than objective positions.

That answers both of those requests 21 and 22.

21. As to request 23, that relates to paragraph 34.1 of the defence to counterclaim, which is the defendant's claim for injunctive relief, and the defence states:

"So far as a claim for an injunction is concerned, each claimant believed at the time of publication that the defendant was a racist and continues to believe it."

22. The request asks in relation to that:

"Explain how that word is used in the context of this averment, explaining in the case of each claimant if their case on this issue differs, what they mean by a racist."

23. And again, the claimants have put forward statements by the defendant on which they rely in support of that belief, and have explained in an alternative submission in their statement of case of 30 June 2022 what their meaning is of that word.

24. Finally, in relation to the application as a whole, it seems to me that I am being asked to take matters further in terms of what was actually argued before Nicklin J at the trial of preliminary issues. These matters seem to me, from the limited view I have been able to take of the long transcript of that hearing, that all of these matters were included in Mr Callus's submissions, and he has frankly accepted that he disagrees with the judge's approach to that and felt that there should have been a further description of the meaning of the word. But it seems to me in those circumstances I am being asked to determine what has already been decided, and in any event I do not consider that the requirements of the Practice Direction are met, the information is not necessary, the position and the cases of the claimants are clear from the already pleaded cases to enable the defendant to understand what case he has to meet.

25. So the application is dismissed.

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