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Case No: HQ 17 M 04572

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

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Before:

MR JUSTICE WARBY

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Between:

SEAN PRICE	**Claimant**
- and -	
MGN LIMITED	**Defendant**

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MR ROBERT STERLING (instructed by Carruthers Law) for the **Claimant**
MR ADAM WOLANSKI (instructed by Simons Muirhead & Burton) for the **Defendant**

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Approved Judgment

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

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(Approved)

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MR JUSTICE WARBY:

Introduction

1. On 30 October 2018, I granted the defendant's application for the trial of meaning as a preliminary issue in this libel action, and I tried the issue. I also heard the defendant's applications for summary judgment in its favour, or for an order dismissing the action as an abuse of the court's process. The hearing took 1 day. I reserved judgment.

2. On 8 November 2018, I handed down my reserved judgment, [2018] EWHC 3014 (QB), in which I found in favour of the claimant on all those applications. The result is that the action must proceed towards a trial.

3. One of the matters that I now have to deal with is what directions should be given towards that trial, but first I should deal with the costs of the application.

Costs

4. It is common ground that the claimant is entitled to an order for costs in his favour in respect of all the matters argued on 30 October, and it is accepted also that I should proceed with a summary assessment of those costs, and that it should be conducted on the standard basis. The dispute relates to the sum in which I should assess the costs.

5. Put shortly, the costs sought by the claimant are in 6 figures once VAT is taken into account. The grand total is £119,612.60. The defendant says that I should cut that figure by two-thirds or more, allowing only some £33,000.

6. Before coming to the detail, I should say something about costs and case management.

Costs budgeting

7. There is an emerging practice of mandatory case management and costs budgeting before trials of meaning or other substantial or preliminary applications come before the court. Dingemans J, Nicklin J and I have all had things to say on these issues.

8. In *Sube v News Group*, on 14 February 2018 I made an order without a hearing for the trial of preliminary issues and for hearing of various striking out applications. Those orders were made mostly by consent, but of my own motion I made cost management directions requiring the parties to file budgets, which I would then rely on to make a costs management order. In my written order I said this:

> "Recent experience in these courts suggest that it is necessary to impose some control over the costs of this kind of trial and to do so at an early stage. I therefore exercise the Court's costs management powers, having regard to PD3E at para 2."

9. On 15 March 2018, once the budgets had been filed, I made a costs management order. I cut down the claimant's budget substantially from over £105,000 to £41,810.

The defendant's approved budgets were much closer to their proposals. They were £28,800 for News Group Newspapers, the first defendant, and £18,550 for Express Newspapers, the second defendant.

10. Again, that was done without a hearing, but because that was my decision and not something agreed by the parties, any party was entitled to seek a hearing on the issues that I decided. Nobody did.

11. That case was in some ways similar to this one. It was a hearing of applications for the determination of meaning and applications to strike out. The hearing on 14 May 2018 lasted a day. As appears from the judgment that I handed down on 24 May, [2018] EWHC 1234 (QB), it involved preliminary issues on meaning in relation to a substantial number of articles and seven other applications for the amendment or striking out of various elements of a multi-stranded claim. It did involve more articles, more parties and more individual issues, but it required less of a factual investigation.

12. The budgeting exercise turned out to be unimportant from the perspective of the claimant's costs, because they lost on most of the main issues and ended up as the paying parties after the hearing, but that could not have been known in advance. The budgeting exercise was important to all parties anyway, though, because the defendants recovered a sum very close to their approved budget figures and the process of deciding what they should recover was straightforward.

13. The case of *Bokova v Associated Newspapers Limited* [2018] EWHC 320 (QB) illustrates the problems that can arise if there is no case and costs management of applications for preliminary trials. The applications in that case were heard before I made the cost management directions in *Sube*, but judgment was handed down a week later, on 21 February 2018.

14. In *Bokova* the claimant had applied for an order for the determination by way of preliminary issue of the actual meaning of the words complained of. The defendant agreed that meaning should be determined as a preliminary issue and that the other applications, which were to strike out, should be heard at the same time; but no order for the hearing of a preliminary issue was sought from the court. The situation that confronted Dingemans J in that case was described by him in paragraph [3] of his judgment:

> "This meant that the parties turned up for a hearing of the preliminary issue on meaning before me on 8th February 2018 and for the hearing of the other applications without an order having been made for the preliminary issue to be heard."

15. The judge went on to say this in paragraphs [4-6]:

> "4. The approach taken by the parties to the application for a preliminary issue, which mirrors the approach taken by other parties in similar applications, raises a point of procedure. Parties must seek an order for the hearing of the preliminary issue. This is because the making of such an application to the

> Court for the hearing of the preliminary issue enables the Court, which has powers and duties of active case management, to determine whether a preliminary issue should be heard, see *Hope not Hate v Farage* [2017] EWHC 3275 (QB) at paragraphs 35 and 36.
>
> 5. In this case I agree with the parties that hearing a preliminary issue on the meanings of the articles was a sensible step to be taken. This is because it will enable the statements of case to engage with the meanings of the articles rather than a range of possible meanings. I therefore agree that the Court would have directed a hearing of the preliminary issue. However, in my judgment a Court, if it had had the chance, would not have also directed an immediate hearing of the application for the strike out application and application for judgment. This is because at least part of the strike out application will depend on the actual meaning of the articles as determined at the preliminary issue. Indeed at the hearing it became common ground that the applications to strike out and for judgment should be adjourned so that the Court could give a ruling on the meaning of the articles.
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> 6. Further, a Court deciding whether to order the hearing of a preliminary issue would also have had case management powers (pursuant to CPR 1.1(2)(b) and CPR 1.4(h); CPR 3.12, CPR 3.13 and PD3E at paragraph 3(a)) to make an order requiring the parties to file and exchange costs budgets for the application. As it was, the parties lodged costs schedules for all of the applications for the hearing before me which totalled over £105,000 for Mrs Bokova and over £50,000 for Associated Newspapers. I recognise the importance of the issues for the parties, which included on the face of the applications an application for judgment and an injunction. However, the sums in the costs schedules are very substantial sums which do not have the appearance of being proportionate to the hearing of a preliminary issue on meaning. Excessive and disproportionate costs should not be allowed to become or remain a barrier to either bringing or defending claims for libel."

16. Those words appeared in the judgment under the heading "The need for an order providing for the hearing of the preliminary issue".

This case

17. The defendant's application in this case was filed on 7 June 2018, several months after judgment had been handed down in *Bokova*, but it came before me without any prior order, in the expectation that I would grant the order and proceed immediately to try the issue.

18. That is what I did. But this procedure was at odds with the clear guidance given by Dingemans J, and it means that this is a case, as that was, where there has been no costs management. The upshot is that I must carry out a costs assessment after the event without any prior assessment of what would be reasonable and proportionate. That is particularly regrettable when the sum for which the claimant contends is £119,612.60 inclusive of VAT.

19. All of this serves to underline the need, in applications for substantial preliminary trials in media and communications cases, for the parties and the court to address separately and in advance the question of whether there should be a preliminary issue trial, whether on meaning or anything else. That issue should not be left for determination until the very date on which the trial is due to take place. That is so even if, as in *Bokova* and the present case, there is consent or no opposition to the application for a preliminary issue trial.

20. If a preliminary issue trial is sought, the parties and the court should address the question of costs budgeting. It is highly undesirable, particularly for defendants, if costs of over £100,000 are incurred by claimants in the preparation for and conduct of a substantial hearing without any form of prior costs control. I say it is particularly so for defendants because experience shows that their costs tend to be significantly lower.

21. Experience reveals another reason why an order for the trial of a preliminary issue should be sought and obtained before the trial itself. In some cases of this kind there may be also a need for judicial scrutiny of the application papers in advance of the substantive hearing. Trials on meaning are often accompanied by other applications, as was the case in *Sube*, *Bokova* and here. Other case management directions may be necessary, to avoid costs being wasted on unnecessary preparation for applications which are not ripe for determination, or not appropriate for determination simultaneously. The recent case of *Ashraf v Dunya News* provides another example. Nicklin J there found it necessary for case management reasons to confine the scope of the preliminary issues that the parties had agreed should be dealt with.

Assessment

22. I turn to the costs assessment. I do not usually find it helpful to compare one side's costs with those of the other, as there are so many reasons why the two may differ. Among them, where the defendant is a media organisation, are discounted fee levels resulting from what might be called bulk buying by the media defendant. In this case, however, the disparity is so striking that it does seem appropriate to mention that the defendant's costs schedule for the one-day hearing came to £28,736 inclusive of VAT. That is a vast disparity. The disparity does not prove that the claimant's costs figure is disproportionate or unreasonable, but it does put me on the alert and tends to encourage close scrutiny of the figures.

23. That said, I am looking at these figures for the purposes of summary assessment and with hindsight, after the costs have been incurred. The fact that that has been allowed to take place makes this a rather different exercise from costs budgeting. It is easier to be fair when producing pre-estimates than it may be to cut down figures after the event. A party which has been set a budget can at least aim to stay within it. In the absence of a budget, there is less incentive, and less guidance.

24. I accept the submission of Mr Sterling that in all the circumstances I should not lean too far in the direction of an overly-critical examination of the costs here.

Principles

25. I adopt the approach prescribed by CPR 44.4(1)(a), that the receiving party is entitled to recover costs which are proportionately and reasonably incurred, and proportionate and reasonable in amount. These are cumulative tests. So, costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or even necessarily incurred. I resolve any doubts as to whether the costs were reasonably and proportionately incurred or were reasonable and proportionate in favour of the paying party, but with the caveat that I have mentioned.

26. I bear in mind the definition or guidance as to what is proportionate contained in CPR 44.3(5), which includes the following factors: the sums in issue; the complexity of the proceedings; and wider factors such as reputation or public importance.

27. I bear in mind the factors listed in CPR 44.4(3), to which I must have regard in deciding the amount of costs. One of those is a party's last budget, of which there is none here, but all the other factors do fall for consideration.

Submissions

28. On the facts, the big picture is that the solicitors for the claimant spent something in excess of 120 hours on this case at an hourly rate for a partner, the solicitor concerned being a sole practitioner. In addition, they spent a sum considerably in excess of £40,000 on counsel's fees.

29. The overall submission of Mr Wolanski is that the claimant's costs are "highly disproportionate".

30. I have considerable sympathy with that broad proposition although, as will appear, I do not go all the way with Mr Wolanski on the facts or the figures.

Discussion

31. This is and was a matter of great importance to the claimant and of importance to the defendant, and I have no doubt of that. It was reasonable for the claimant to devote significant resources to opposing the defendant's applications, other than the application for the trial of an issue on meaning. If successful, those applications would have resulted in the complete failure of this claim, with significant financial and personal consequences.

32. The claimant was entitled to address the applications evidentially, and to do so in some detail, because, as originally presented, they invited the court to reach, on a summary basis, final conclusions on factual issues of considerable significance to the claimant. As I said in the judgment, the application was initially grounded in the alleged truth of certain additional defamatory allegations. It is worth recalling that the case as set out in the application notice included the proposition that the investigative report into alleged misconduct on the part of the claimant was said to include findings of misconduct, the truth of which was asserted as part of the application.

33. I therefore accept that the way the case was put against this claimant justified a proper and reasonably full investigation by his solicitors of the background, to which they were new, which covered many years, and was complex.

34. There are, however, several factors that suggest that the exercise could and should have been undertaken at considerably lower expense.

(1) The meaning issues were not by any means complex. They turned purely on the application of established principles to the words of 3 articles, each of which was relatively short. Two counsel could not have been justified as between the parties for that part of the matter. There is no "going rate" for trials of that kind, but experience suggests that in the general run of cases costs of the order of £20,000 to £25,000 per side are towards the top end of the range, and costs in excess of £30,000 for one side would be hard to justify.

(2) The summary judgment application, with its attendant evidence, did justify the devotion of significant time and expense, and would take this case well outside the norm for pure meaning trials. But, in the end, the argument successfully advanced on behalf of the claimant relied more on matters of fundamental legal principle, which did not require extensive research or analysis, than they did on detailed factual investigation or explanation.

(3) The *Jameel* strike-out application was of a fairly standard kind, and did not give rise to any unusual issues or investigations that took the hearing beyond the normal parameters.

35. Turning to the specifics, there are 5 main areas of contention, each of which I shall seek to take relatively shortly.

Hourly rates

36. The first is hourly rates, including the distribution of work within the claimant's solicitors. The claim is for a large number of hours of work by a partner at Grade A for an hourly rate of £350. The firm is in Liverpool, where the guideline rate under the Guidelines of 2010 is £217 for a Grade A partner.

37. Mr Wolanski submits that the rate is much too high and that the work was, to a considerable extent, appropriate for someone more junior.

38. Mr Sterling points out that his instructing solicitor does not have anyone more junior, he is a sole practitioner, but he is working in a specialist field, and albeit in Liverpool his work on this important case justifies a rate much higher than the guideline.

39. In all the circumstances, my conclusions are that the appropriate rate for partner work on this case for a sole practitioner of Mr Carruthers' experience and standing in Liverpool is £250 on the *inter partes* basis.

40. I conclude that some of the work done would not have justified the attention of a solicitor on a rate as high as that. If this were a firm with other junior personnel within it, it should in principle have been delegated. The fact that that could not in

fact be achieved is nothing to the point. I take those points into account when I deal with the more specific aspects of the figures.

Time spent

41. There has been debate about the time spent working on documents, which is in excess of 81 hours. Depending on the calculations, some 32 or 41 hours were spent on the claimant's witness statement. It matters not. I have been taken with some care by both sides through the narrative of the work done, and my conclusions are these.

42. A substantial period of time was justified in preparing the witness statement. The time that was justified is not confined to the time that would be reasonable for the preparation of the ultimate output of the exercise. Anyone who has ever been engaged in such a process knows that there is a good deal of work that in the event does not get reflected in the document that is produced, and in this case the nature of the allegations which the defendant sought to establish as true made it reasonable for an investigation of considerable depth to be undertaken.

43. Nonetheless, I do not think all the time that was spent was justified. Nor do I think that all of it should have been conducted at partner level. I would allow 15 hours at £250 and 15 hours at £175, which I reckon adds up to £6,375.

44. For the further work done on documents I would allow a further 40 hours in total, of which 30 could be justified as partner work, and the figure that I arrive at is £9,250.

Attendance

45. There has been criticism of the figure for attendances. I reduce the figure for attendances in the latest schedule to £6,750. None of those figures cover any of the work done for today's hearing.

Counsel's fees

46. The same is true of counsel's fees. I remain of the view that I expressed in the course of argument that no criticism can be made of the fees for work done prior to the hearing, and I allow in full those that are set out on pages 2 and 3 of the latest schedule for junior counsel's work, but I do consider the total fees for counsel on the brief for the substantive hearing are excessive, even in the light of the importance and complexity of the matter. I allow brief fees of £30,000 in total.

Other disbursements

47. As for the disbursements, which are travel expenses, accommodation expenses and a fee for the cost of a London agent to file a witness statement, despite some misgivings I am going to allow those in full at the sum of £2,250.79.

48. So the overall figure is not one that I can calculate at the moment, but it will be the sum of the figures I have mentioned, and all of those are exclusive of VAT, and excluding the costs of today.

(Further discussion followed)

49. It is going to be claimant's costs in the case. The claimant will recover the costs if he wins and his solicitors will get their success fee if he wins at trial or secures a settlement. The defendants have not been successful except in reducing by a significant amount, but they have not beaten their own offer. So I think the costs should be the claimant's if the action succeeds.