



Neutral Citation Number: [2024] EWHC 1045 (KB)

Case No: QB-2020-004166

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 3 May 2024

**Before :**

**THE HONOURABLE MR JUSTICE MURRAY**

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**Between :**

**ALEXANDER ASLANI**

**Claimant**

**- and -**

**PAULINA SOBIERAJSKA**

**Defendant**

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**Steven Reed and Jessica Lavelle** (instructed by **Pinder Reaux & Associates Limited**) for the  
**Claimant**

**Bertie Beor-Roberts** (instructed by **Cranbrook Solicitors**) for the **Defendant**

Hearing date: 12 April 2024  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 3 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Approved Judgment**Mr Justice Murray:**

1. This judgment deals with a preliminary issue to be determined in relation to the application of Dr Alexander Aslani, the claimant, made by Application Notice dated 13 January 2022, as amended with permission on 5 February 2024 (“the Amended Committal Application”), for the defendant, Ms Paulina Sobierajska, to be committed for contempt for acting in breach of the order of Saini J dated 28 July 2021 (“the Saini J Order”).
2. The Amended Committal Application came before me to be heard on 12 April 2024, together with an application by Dr Aslani, made by Application Notice dated 18 March 2024 (“the Specific Disclosure Application”) for an order for specific disclosure and inspection under CPR r 31.12 or, alternatively, under CPR r 31.14. The Specific Disclosure Application in part relies on an alleged waiver of legal advice privilege by Ms Sobierajska in respect of legal advice referred to by her in paragraphs 29 and 68 of her second witness statement dated 20 February 2024.
3. The preliminary issue to be resolved in this judgment is whether the court should make a declaration that Ms Sobierajska has waived legal advice privilege and therefore should permit Dr Aslani to cross-examine her on the relevant legal advice.
4. At the hearing, for reasons explained below, I adjourned the Amended Committal Application and heard submissions on the Specific Disclosure Application, reserving judgment. In this judgment I give:
  - i) my reasons for adjourning the Amended Committal Application; and
  - ii) my decision, with reasons, on the preliminary issue and any other issues arising under the Specific Disclosure Application.

*Brief background*

5. Dr Aslani is a plastic and reconstructive surgeon, who is also the Chief Executive Officer of Cirumed Clinic in Marbella in Spain. He is a specialist in body contouring surgery, in particular, the “Brazilian Butt Lift”, a type of buttock augmentation surgery. Dr Aslani states that a large proportion of his clients are domiciled in England and Wales.
6. Ms Sobierajska, at the times relevant to this claim, operated a number of accounts on Instagram, including one with the account name “thegiirlyouhate” and one with the account name “cirumed\_clinic\_reviews”. She also operated an account on realself.com (“RealSelf”) with the account name “3unsuccessful rounds”. RealSelf is a website where customers leave user-generated reviews of plastic surgeons and dermatologists.
7. On 18 November 2020, Dr Aslani brought a claim against Ms Sobierajska for libel in respect of posts by Ms Sobierajska to the accounts referred to at [6] above. He alleges that those posts, which were made on 3 August, 1 September, and 14 October 2020, were defamatory of him.

Approved Judgment*Brief summary of the procedural history*

8. The following summary of the procedural history of this matter omits some steps that it may be important to consider at a later stage in the proceedings. However, for present purposes, the following summary will suffice.
9. On 6 January 2021, Master Thornett entered a default judgment in favour of Dr Aslani on his claim against Ms Sobierajska.
10. As Ms Sobierajska appeared not to live in the United Kingdom, Dr Aslani made an application for an order for alternative service on 11 March 2021, which was granted by Master Thornett on 8 April 2021.
11. On 28 July 2021, following a hearing to assess damages, which Ms Sobierajska did not attend and at which she was not represented, Saini J made the Saini J Order, in which he:
  - i) in paragraph 1, ordered Ms Sobierajska to pay Dr Aslani damages for libel in the amount of £40,000;
  - ii) in paragraph 2, granted an injunction prohibiting Ms Sobierajska from publishing, directly or indirectly, specified allegations defamatory of Dr Aslani and the conduct of his professional practice;
  - iii) in paragraph 3, ordered Ms Sobierajska to publish a summary of the Saini J's judgment handed down on 28 July 2021 setting out his reasons for making the Saini J Order ([2021] EWHC 2127 (QB));
  - iv) in paragraph 4, gave directions for the parties to agree a form of wording for the summary referred to at (iii) above and the time, manner, form, and place of its publication, failing which either party could apply to the court to settle the wording and/or give directions as to time, manner, form, or place of publication; and
  - v) in paragraph 5, ordered Ms Sobierajska to pay Dr Aslani's costs of the proceedings, summarily assessed in the amount of £27,041.37.
12. On 27 November 2021, Ms Sobierajska reposted a story from another Instagram user to one of her Instagram accounts.
13. On 13 January 2022, Dr Aslani issued the committal application that, after amendment with permission granted by the order made on 5 February 2024 by Steyn J ("the Steyn J Order"), is the Amended Committal Application.
14. In the Steyn J Order, Steyn J gave various directions in relation to the Amended Committal Application, including, at paragraph 7, in relation to any application for specific disclosure that either party wished to make. The Specific Disclosure Application was made pursuant to paragraph 7 of the Steyn J Order.
15. In January 2022, Dr Aslani had instigated bankruptcy proceedings against Ms Sobierajska in England as a result of her failure to comply with the damages provisions of the Saini J Order. On 26 September 2022, a bankruptcy order was made

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against Ms Sobierajska. Valentine Recovery Limited (“Valentines”) was appointed as her trustee in bankruptcy. Prior to that time, Dr Aslani had had difficulties communicating with Ms Sobierajska in relation to his claim against her. From that time, Dr Aslani communicated with Ms Sobierajska through Valentines. On 23 September 2023, Ms Sobierajska was discharged from bankruptcy, but Valentines kept the file open and continued to act as a means of communication between Dr Aslani’s legal team and Ms Sobierajska.

16. On 29 January 2024, Cranbrook Solicitors, Ms Sobierajska’s solicitors, notified Pinder Reaux & Associates Limited, Dr Aslani’s solicitors, that they were now acting for Ms Sobierajska.

*Adjournment of the Amended Committal Application*

17. On the afternoon of the day prior to the hearing, Ms Sobierajska provided her third witness statement dated 11 April 2024 and shortly after midnight on the day of the hearing she provided the accompanying exhibits to that witness statement.
18. At the start of the hearing on 12 April 2024, Dr Aslani applied for an adjournment of the hearing due to the late delivery of the third witness statement on the basis that he needed a fair opportunity to respond to this new evidence. He submitted that this new evidence from Ms Sobierajska went to the heart of the case, as it was relevant to the question of what and when Ms Sobierajska knew about the Saini J Order as well as the issue of whether it had been properly served on her.
19. Mr Steven Reed, counsel for Dr Aslani, submitted that the claimant needed to have a proper opportunity to consider the third witness statement and that it was likely that Dr Aslani had evidence that he would wish to adduce in response to it. There would also possibly need to be further disclosure. It was therefore unfair to require Dr Aslani to proceed at that hearing. Dr Aslani did not oppose Ms Sobierajska’s application for relief from sanctions in respect of the late delivery of Ms Sobierajska’s third witness statement and exhibits, provided that the hearing was adjourned.
20. In relation to relief from sanctions, Mr Bertie Beor-Roberts, counsel for Ms Sobierajska, noted that Dr Aslani was conceding the relevance of the evidence in Ms Sobierajska’s third witness statement by applying to adjourn rather than opposing the application for relief from sanctions. Mr Beor-Roberts submitted that although Ms Sobierajska had given her principal evidence in her second witness statement, she was entitled to put in additional evidence. It was regrettable that her evidence had arrived late, but this was not an ambush. The purpose of the third witness statement was to put Ms Sobierajska’s positive case ahead of her anticipated cross-examination. This was fair to and would, in fact, assist Dr Aslani. The evidence was not difficult to grasp or respond to. Fairness to Dr Aslani did not require that there should be an adjournment. Ms Sobierajska, who lives abroad, had arranged to attend in person and was ready to proceed. There would, therefore, be prejudice to her in not proceeding on that day.
21. I ruled that relief from sanctions should be granted, having considered the evidence in Ms Sobierajska’s third witness statement. I had regard to the criteria in CPR r 3.9(1) and bore in mind the guidance given by the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and *Denton v TH White Ltd* [2014] EWCA Civ 906. The evidence was relevant and would materially assist the resolution of the

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principal issues in the case. The late delivery of the evidence was not a trivial failure of compliance with the rules and the reasons for the lateness were weak, but nonetheless I considered that relief from sanctions should be granted, having regard to all the circumstances of the case and having regard, among other things, to factors (a) and (b) in CPR r 3.9(1).

22. Having admitted this late evidence from Ms Sobierajska, I was persuaded by Mr Reed that fairness required an adjournment so that Dr Aslani could prepare to deal with it and, if necessary, adduce evidence in response. I left it to the parties to agree directions for the hearing of the Amended Committal Application and reserved that application to be heard by me given that I was already familiar with the case, having done substantial pre-reading ahead of the hearing. I ordered that Ms Sobierajska attend the adjourned hearing in person. I reserved costs to be determined at the adjourned hearing.

*The Specific Disclosure Application*

23. We then turned to the Specific Disclosure Application. I heard submissions from Ms Jessica Lavelle, counsel for Dr Aslani, and Mr Beor-Roberts. I reserved judgment, which I now give on the Specific Disclosure Application.
24. The Specific Disclosure Application seeks specific disclosure of the following documents:
- i) legal advice that Ms Sobierajska states in her witness statement dated 20 February 2024 at paragraph 29 that she received concerning the “required standard” being “personal service” and that Dr Aslani had not met “that standard”; and
  - ii) the legal advice that Ms Sobierajska states in her witness statement dated 20 February 2024 at paragraph 68 that she received “highlighting” her “mistakes and the potential consequences they could have” on her.
25. The Specific Disclosure Application originally sought disclosure of an additional document referred to at paragraph 71 of Ms Sobierajska’s first witness statement dated 1 February 2024, but in correspondence prior to the hearing Dr Aslani’s solicitors indicated that it was no longer required.
26. In relation to the documents at [24] above, the Specific Disclosure Application relies on cases such as *PCP Capital Partners LLP v Barclays Bank Plc* [2020] EWHC 1393 (Comm) at [48] as the basis for maintaining that Ms Sobierajska had waived legal advice privilege in relation to those documents.
27. In correspondence prior to the hearing, Ms Sobierajska’s solicitors stated that the legal advice referred to at paragraphs 29 and 68 of Ms Sobierajska’s witness statement dated 20 February 2024 had been given orally. There were, therefore, no documents to disclose.
28. Accordingly, at the start of the hearing, in relation to the Specific Disclosure Application Dr Aslani was simply seeking a declaration by the court that Ms Sobierajska had waived legal advice privilege in relation to the legal advice referred

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to at paragraphs 29 and 68 of her second witness statement, so that he could cross-examine her on the content of that advice.

29. Paragraphs 29 and 68 of Ms Sobierajska’s second witness statement read as follows:

“29. My lawyers have advised me that the required standard is personal service and the Claimant has not met that standard. Therefore, the Claimant’s application must fail.

...

68. I was unaware that a case filed against me in the United Kingdom, a country where neither I reside nor the doctor who performed the surgery on me – who lives in Spain, along with the location of the surgery – would have legal implications that required my attention. My understanding of the validity and implications of the communications sent to me was lacking, and I did not grasp the seriousness of the situation until it was explained in detail by a lawyer. This legal advice highlighted my mistakes and the potential consequences they could have on me.”

30. Ms Sobierajska opposes the granting of the declaration of waiver sought by Dr Aslani. At the hearing, through her counsel, she was asked to confirm that none of the relevant advice had been given in writing. Mr Beor-Roberts then indicated to the court that Ms Sobierajska now recollected that some of the legal advice, relating to jurisdiction, might have been in writing.

31. Accordingly, to decide the Specific Disclosure Application, I need to consider whether there has been a waiver of legal advice privilege, as alleged, and, if so, whether to order the specific disclosure of any documents setting out such advice or any part of it.

### *Legal principles*

32. The legal principles may be briefly summarised. Other than perhaps in one respect, which is essentially a matter of emphasis, the principles are not disputed. A waiver of legal advice privilege will be held to have occurred where the party who had received the advice:

- i) referred to the content or gist of the advice, and not merely its effect; and
- ii) relied on that reference in some way to support or advance their case on an issue that the court has to decide.

33. Waksman J set out this test in *PCP Capital Partners* at [48] and then conducted a review of relevant authorities at [49]-[84] to consider whether his summary was supported by, or at least not inconsistent with, those authorities. Much of that discussion is concerned with the distinction between reference to the effect and reference to the content or gist of legal advice and how to determine which category a particular

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reference falls in. This determination is not always straightforward and has given rise to “judicial disquiet” ([50]).

34. In *PCP Capital Partners* at [51]-[60], Waksman J discussed the effect/content distinction, with particular reference to the Court of Appeal decision in *Marubeni Corporation v Alafouzos* [1986] WL 408062. At [60], Waksman J drew the following conclusion:

“... in my judgment the correct approach to applying the content/effect distinction is this: the application of the content/effect distinction, as a means of determining whether there has been a waiver or not, cannot be applied mechanistically. Its application has to be viewed and made through the prism of (a) whether there is any reliance on the privileged material adverted to; (b) what the purpose of that reliance is; and (c) the particular context of the case in question. This is an acutely fact-sensitive exercise. To be clear, this means that in a particular case, the fact that only the conclusion of the legal advice referred to is stated as opposed to the detail of the contents may not prevent there being a waiver.”

35. In terms of the general approach that the court should adopt in determining a question of waiver of legal advice privilege, Waksman J said the following in *PCP Capital Partners* at [47]:

“... ”

- (4) Applications for documents based on a waiver of privilege entail at least the two following fundamental questions:
- (a) Has there been a waiver of privilege?
- (b) If so, is it appropriate to order production of privileged documents other than those to which reference has been made which was the foundation for the waiver?
- (5) The concept of fairness underpins the rationale for having a concept of waiver which can then entail the production of further privileged documents. This is because if the party waiving is, by the waiver thereby creating a partial picture only of the relevant legal advice, it is unfair to the other party to allow him to ‘cherry pick’ in this way.
- (6) That said, it is also clear that the question of whether or not there has been a waiver is not to be decided simply by an appeal to broad considerations of fairness.”

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36. Mr Beor-Roberts agreed with the foregoing summary of the relevant law drawn from *PCP Capital Partners*, but he also drew the court's attention to the following passage in *Brennan v Sutherland City Council* [2009] ICR 479, a decision of the Employment Appeal Tribunal, where Elias J (President) said the following at [67]:
- “... in our view, the answer to the question whether waiver has occurred or not depends upon considering together both what has been disclosed and the circumstances in which disclosure has occurred. As to the latter, the authorities in England strongly support the view that a degree of reliance is required before waiver arises, but there may be issues as to the extent of the reliance. *Ultimately, there is the single composite question of whether, having regard to these considerations, fairness requires that the full advice be made available.* A court might, for example, find it difficult to say what side of the contents/effect line a particular disclosure falls, but the answer to whether there has been waiver may be easier to discern if the focus is on the question whether fairness requires full disclosure.” (emphasis added)
37. In addition to his submission that ultimately the test for waiver was one of fairness (whether fairness required that the full advice be made available for cross-examination), Mr Beor-Roberts submitted that, given the importance of legal advice privilege, any ambiguity in the application of the test should be construed in Ms Sobierajska's favour.
38. I, of course, bear in mind, as Elias J noted in *Brennan* at [66], that the authorities make clear that legal advice privilege is an extremely important protection, and that waiver is not easily established.
39. It is necessary for the court in any specific case, including this one, to apply the distinction between reference to content and reference to effect in a “contextual and nuanced fashion” (*PCP Capital Partners* at [61]) and then to consider for what purpose that reference is relied on, which is “an acutely fact-sensitive exercise” (*PCP Capital Partners* at [60]). The overriding principle is one of fairness. In this case that means that if Ms Sobierajska has referred to and is relying on the content of legal advice in order to advance her case, then fairness requires disclosure of that advice so that Dr Aslani can properly assess that assertion (see *Mid-East Sales Limited v United Engineering & Trading Company Limited* [2014] EWHC 892 (Comm) (Males J) at [15], quoted in *PCP Partners* at [79]).

*Submissions*

40. For Dr Aslani, Ms Lavelle submitted that it is clear from the text of paragraphs 29 and 68 of Ms Sobierajska's second witness statement that she is referring to the content, and not merely the effect, of legal advice that she has received and that she is doing so to further her case on an issue the court has to decide.
41. In relation to paragraph 29, Ms Lavelle submitted, Ms Sobierajska is relying on the content of advice to support her case that personal service has not been effected, which is an issue central to the Amended Committal Application. In relation to paragraph 68, which was the focus of her oral submissions, Ms Lavelle submitted that Ms Sobierajska



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is clearly relying on the content of advice to advance her case that she did not understand the Saini J Order, an issue that the court will have to decide when considering the question of contumacy, should this matter reach the sentencing stage. Ms Lavelle submitted that the content and timing of the advice referred to also go to the issue of Ms Sobierajska's knowledge of the Saini J Order at the time of her alleged breaches of it. For these reasons, Ms Lavelle submitted, fairness requires that the court declare that Ms Sobierajska has waived legal advice privilege in relation to the advice referred to in each case, so that she may be cross-examined as to the content of that advice.

42. For Ms Sobierajska, Mr Beor-Roberts focused his submissions on paragraph 68. In that paragraph, he submitted, Ms Sobierajska referred to legal advice simply to explain why she had taken active steps to engage with the court's process. She had not done so previously because she had thought that an English judgment could not be relevant to her, given that she did not live in the UK, Dr Aslani did not operate his business in the UK, and the surgeries he had performed on her did not take place in the UK. Mr Beor-Roberts noted that Ms Sobierajska did not deny that she knew that an English judgment had been entered against her.
43. Mr Beor-Roberts submitted that fairness does not require that cross-examination of Ms Sobierajska on the legal advice she received should be permitted, given the limited nature of her reference to it and the limited relevance, if any, of the advice to the question of her knowledge of the Saini J Order or her alleged breaches of it.

*Analysis*

44. In relation to each of paragraphs 29 and 68, Ms Sobierajska is clearly referring to the content of the legal advice that she has received and not merely to the effect of it. In relation to paragraph 29, Ms Sobierajska states that she was advised that the required standard is personal service, that Dr Aslani has not met that standard, and therefore "his application", the Amended Committal Application, must fail. That is clearly the substance of the advice, not its effect.
45. In relation to paragraph 68, Ms Sobierajska states that she believed, due to a lack of connection to the UK of key factual elements (her residence, the domicile of Dr Aslani's business, and where the surgeries were performed), that Dr Aslani's claim issued in England would have no "legal implications that required my attention". Her belief in this regard was altered by the legal advice she received, which was the relevant effect of the legal advice. She then says that the advice "highlighted my mistakes and the potential consequences they could have on me". While those words do not set out the detail of the legal advice she received, but they constitute a clear reference to its content.
46. Therefore, it is necessary to consider in relation to each of paragraphs 29 and 68 of Ms Sobierajska's second witness statement whether she is relying on her reference to the substance of the legal advice in order, in some way, to support or advance her case on an issue that the court has to decide. Key issues for the Amended Committal Application are whether Ms Sobierajska was ever properly served with the Saini J Order, what (if anything) she knew about the Saini J Order, and when and how she obtained that knowledge.

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47. In relation to paragraph 29, in my view it is reasonable to infer that Ms Sobierajska is relying on her reference to the substance of the legal advice she received in order to:
- i) defend herself against the Amended Committal Application on the basis that the Saini J Order was never properly served on her, and she was therefore not bound by it; and
  - ii) mitigate her breach of the Saini J Order, should any breach be established to the satisfaction of the court, on the basis that the breach was not intentional or knowing, and therefore not contumacious, given her belief, based on advice, that the Saini J Order did not bind her.
48. The first of the two purposes set out at [47] above is not a sufficient purpose to justify waiving legal advice privilege. If it is true that the Saini J Order was not properly served on Ms Sobierajska, then that is so independently of any legal advice given to her. In other words, her reference to that advice does not “advance” her case on the question of service.
49. The latter of the two purposes set out at [47] above, however, is a sufficient purpose to justify waiving legal advice privilege, but only once the question whether the Saini J Order was validly served on Ms Sobierajska has been resolved, and the court has found that she has breached it or, in other words, only at the sentencing stage, if that stage is reached.
50. In my view, it would not be fair to Ms Sobierajska to declare that she had waived legal advice privilege until Dr Aslani has established to the court’s satisfaction that the Saini J Order was properly served, and that Ms Sobierajska committed one or more breaches of it.
51. Accordingly, I will not at this stage make a declaration that Ms Sobierajska’s legal advice privilege has been waived in relation to the advice referred to at paragraph 29. However, it may be appropriate to do so if and when the sentencing stage is reached.
52. In relation to paragraph 68, Ms Sobierajska is relying on her reference to the substance of the legal advice she received in order to advance her case that she did not understand the Saini J Order, including what it required and the consequences of breaching it. That is a purpose sufficient to constitute a waiver of legal advice privilege in relation to the issue of her state of mind for purposes of determining the appropriate penalty if a breach of the Saini J Order is established against her. It would not, however, in my view be fair to determine that Ms Sobierajska has waived her privilege in relation to the legal advice referred to in paragraph 68 unless and until the court establishes that she has breached the Saini J Order, and the sentencing stage has been reached.
53. Accordingly, I will not at this stage make a declaration that Ms Sobierajska’s legal advice privilege has been waived in relation to the advice referred to at paragraph 68. However, it may be appropriate to do so if and when the sentencing stage is reached.

*Conclusion*

54. I have at this stage resolved the preliminary issue raised by the Specific Disclosure Application against Dr Aslani. Ms Sobierajska is not seeking to rely on her references

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to legal advice in paragraphs 29 and 68 of her second witness statement to advance her case on the threshold issues that the court must decide in relation to the Amended Committal Application, namely, whether the Saini J Order was properly served on Ms Sobierajska and, if so, whether she has breached it.

55. If, however, after consideration of the Amended Committal Application, the court determines that the Saini J Order was properly served on Ms Sobierajska and that she has breached it on one or more occasions, then I consider that Ms Sobierajska has waived legal advice privilege in relation to the legal advice to which she refers in paragraphs 29 and 68 of her second witness statement as far as that legal advice is relevant to the question of the appropriate penalty for breach. This is because her evidence about that legal advice goes to the issues of what she knew about the Saini J Order, when she knew about it, and how she obtained that knowledge.
56. In relation to any other issues arising from the Specific Disclosure Application, it follows from the foregoing that it is premature to order specific disclosure of the documents referred to at [24] above, to the extent that there are any such documents.
57. Accordingly, although I will make no declaration of waiver of legal advice privilege and no order for specific disclosure at this stage, and therefore I will dismiss the Specific Disclosure Application. I will do so, however, without prejudice so that Dr Aslani may renew his application should these proceedings reach the sentencing stage.