Court refuses application for trial of preliminary issues in defamation claim (Bindel v PinkNews)

This analysis was first published on Lexis®PSL on 16 July 2021 and can be found here (subscription required):

TMT analysis: The High Court has refused the defendants' application for a trial of preliminary issues (TPI) on the basis that the issues for determination were too ambitious and would require disclosure, witness evidence and cross-examination. Trials of preliminary issues should be limited in scope and justify the costs, delay and resources in line with the overriding objective. Written by Lily Walker-Parr, barrister at 5RB.

Bindel v PinkNews Media Group Ltd and another [2021] EWHC 1868 (QB)

What are the practical implications of this case?

This judgment is a key authority in respect of the factors to consider when seeking a TPI in defamation actions (see in particular paras [27]–[36]). Key points include:

- the decision to order a TPI is a case management decision for the court, and parties should engage with the court at the earliest opportunity so that costs can be appropriately budgeted. (Mr Justice Nicklin criticised that the parties had incurred costs amounting to over £500,000 before the court was given the opportunity to manage the case) (para [5])
- TPIs should usually be limited to issues that can be resolved without the need for disclosure and disputed witness evidence (para [31]). Issues which are complex, whose resolution requires determination of significant factual dispute, are unlikely to be suitable for preliminary issues (para [41])
- the court retains a discretion to order a TPI in furtherance of the overriding objective, notwithstanding that witness evidence, disclosure and/or cross examination may be required. However, such TPIs are an exception to the general rule, requiring careful consideration and very clear justification (para [33])
- short Statements of Case limited to the preliminary issues are now commonplace in TPIs, but should be sanctioned by the court (para [35])

Nicklin J also explored the interplay between TPIs and the offer of amends procedure under the Defamation Act 1996 (DeA 1996). The defendants had sought to have the 'threshold issues' of publication, defamatory meaning, reference and serious harm determined at an early stage before making an offer of amends. The court held that the offer of amends procedure could not be used by a defendant who significantly disputes the claimant's entitlement to relief; it was intended by Parliament to be used by publishers who find themselves 'over a barrel' after making a mistake and are willing to hold their hands up.

Finally, the court held that innuendo meanings and natural and ordinary meanings should be pleaded as separate causes of action. The oft-pleaded wording that the words complained of bore 'in their natural and ordinary meaning and/or innuendo meaning' is not appropriate where multiple meanings are advanced. (However, this issue was not canvassed during the hearing and the claimant has permission to advance further argument).

What was the background?

The claimant brought a libel claim in respect of an article published by the defendants on the website, PinkNews. Following service of the claim form and the Particulars of Claim, the parties agreed to postpone the deadline for filing the defence while they explored the possibility of a TPI (including meaning and other matters).

Recognising that the proposed preliminary issues would require consideration of disputed facts, the defendants proposed that the court be provided with 'deemed facts'. This suggestion was refused by the claimant on the basis that it could lead to evidentiary overlaps between issues determined at the TPI and the trial itself.

The defendants subsequently filed a comprehensive, 18-page, 'Statement of Case (the SoC) on the issues of Reference and Meaning'. Although it did not advance any substantive defences in an attempt to preserve the defendants' ability to make an offer of amends, it challenged every aspect of the claimant's case. The claimant's solicitors disagreed that the issues raised in the SoC were appropriate for resolution at a TPI, as they were too ambitious and would require determination of factual disputes.

The defendants then filed an application for a TPI and confirmed that, if the TPI was resolved in the claimant's favour, they 'would not substantively defend the claim' suggesting that an offer of amends under DeA 1996 would be made) thereby disposing of the issue of liability. This represented a change from an earlier, more speculative, position in which they contended that an offer of amends would only be 'likely'. On this basis, the claimant agreed to the proposed TPI.

However, notwithstanding the agreement between the parties, Nicklin J refused to direct a TPI without a hearing as he was not satisfied that the significant cost, delay and resources were justified.

At the subsequent hearing of the application, the defendants made clear that they still reserved their position to challenge the claimant's case on causation of damage and advance a case in mitigation of damage (under *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579). Following this submission, the claimant withdrew her support for the TPI application on the basis that the defendants appeared to want a trial of the claimant's case before making an offer of amends, which was not the intended purpose of the regime.

What did the court decide?

Application for a TPI refused

The court held that the issues for determination in the present case are factually complicated, requiring disclosure, witness statements and cross-examination at a three-day trial. This is not an exceptional case where a TPI may nevertheless be ordered. There are also disputed areas of law which could give rise to an appeal (para [37]).

There were fundamental problems with relying on the defendant's promise to make an offer of amends following a TPI notwithstanding that it could determine liability—it would be difficult to enforce and the court would be uncomfortable to demand the same by way of an undertaking:

> 'It is not consistent with the [offer of amends] procedure to compel a defendant to make an offer it does not want to make, on pain of proceedings for contempt of court for breaching an undertaking.'

This, too, could give rise to an appeal (paras [38]–[39])

In any event, the TPI was found to be unlikely to resolve the litigation—even if the defendants made, and the claimant accepted, an offer of amends, the defendants indicated that they would still challenge elements of the claimant's case (para [40]).

The defendant was not entitled to have 'threshold issues' (issues as to which the claimant bears the burden of proof, namely: publication, reference, meaning, whether the words are defamatory at common law and/or serious harm to reputation) determined by way of a TPI. While some of these may have been suitable for determination at TPI, others were not. The question is whether the overriding objective would be served by a TPI, not simply to preserve the defendant's ability to make an offer of amends (para [41]).

It was not the intention of the offer of amends regime to be available to a defendant significantly disputing, on several fundamental grounds, the claimant's entitlement to relief. The defendants are contesting liability, albeit in respect of the 'threshold issues' and not by way of substantive defences para [42].

The court held that the defendants must therefore either:

- dispute liability in a defence, or
- make an offer of amends, as the complex issues of dispute are not suitable for a TPI

An offer of amends cannot therefore, in this case, be used a 'fallback' (para [43]).

Case details:

- Court: Media and Communications List, Queen's Bench Division, High Court of Justice
- Judge: Mr Justice Nicklin
- Date of judgment: 7 July 2021

Lily Walker-Parr is a barrister at 5RB. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysiscommissioning@lexisnexis.co.uk.