



Neutral Citation Number: [2021] EWHC 3463 (QB)

Case No: QB-2021-001248

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/12/2021

Before :

SENIOR MASTER FONTAINE

Between :

Simon Blake (1)
Colin Seymour (2)
Nicola Thorp (3)
- and -
Laurence Fox

Claimants

Defendant

Heather Rogers QC and Beth Grossman (instructed by Patron Law Limited) for the
Claimants
Alexandra Marzec and Greg Callus (instructed by Gateley Tweed) for the Defendant

Hearing dates: 28 October 2021

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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SENIOR MASTER FONTAINE

Senior Master Fontaine :

1. This was the hearing of two Applications:
 - i) The Defendant’s application dated 23 June 2021 for judgment to be entered on the Defendant’s Counterclaim in default of any defence pursuant to CPR 12.3(2); and
 - ii) The Claimants’ application dated 23 June 2021 for an order directing a trial of preliminary issues as to meaning in accordance with CPR 53BPD in the claims and the counterclaims, and an extension of time for the service of Replies and Defence to Counterclaims until 28 days after judgment in the trial of preliminary issues.
2. I gave an oral judgment in the Defendant’s application, and made no order on the application. This judgment relates only to the Claimants’ application. There were two witness statements before the court, of Mark Lewis dated 22 July 2021 on behalf of the Claimants in support of their application and of Paul Tweed dated 19 October 2021 on behalf of the Defendant in response to the application. References in this judgment to documents in the hearing bundle are as follows: [HB page number].
3. Both the claims and the counterclaims are claims in defamation, arising out of an exchange on Twitter on 4 October 2020. The Claimants’ tweets the subject of the counterclaims were responsive to a tweet by the Defendant on 4 October 2020 and the Defendant’s tweets the subject of the claims were responsive to those tweets by the Claimants.
4. The Claimants seek the following issues to be determined in a trial of preliminary issues (“TPI”) in relation to each to each of the three tweets complained of in the claims and the three tweets complained of in the counterclaims:
 - i) The meaning(s) of each tweet in relation to the relevant person;
 - ii) Whether the meaning found was defamatory of the relevant person at common law;
 - iii) Whether, in that meaning, the tweet was a statement of fact or opinion.

Summary of the Claimants’ Submissions

5. The Claimants rely on the recognition of the courts of the benefits of an early determination of meaning in the context of defamation claims: *Bokova v Associated Newspapers* [2019] QB 861 per Nicklin J. at [3], [8] - [10]; *Morgan v Associated Newspapers* [2018] EWHC 1850 per Nicklin J. at [9] - [12], *Poroshenko v BBC* [2019] EWHC 213 (QB) per Nicklin J. at [35] – [42], *Bindel v Pink News Media Group Ltd* [2021] EWHC 1868 per Nicklin J. at [28] - [29] and *Vardy v Rooney* [2020] EWHC 3156 (QB) per Warby J. (as he then was) at [8]. In summary, if meaning is in dispute, and the court can determine this at an early stage without evidence being required and before a full defence is served, there is likely to be a huge saving in time and costs, because of the consequential effects on the potential defences to the claims, the benefits

to the court and the parties in case management, and the opportunities afforded for settlement.

6. In this particular case it is submitted that a TPI would be beneficial because:
- i) There are only six short tweets, which all arise out of the same background, and in the same context namely a statement made by Sainsburys about celebrating Black History Month and stated to be in response to the Black Lives Matter movement: see *Stocker v Stocker* [2019] 2 WLR 1033 at [41] – [47], *Vardy v Rooney* (QB) at [18] and *Miller and anor v Turner* [2021] EWHC 2445 (QB) per Collins-Rice J. at [11].
 - ii) The legal principles on meaning are well established, see: *Koutsogiannis v The Random House Group Ltd* [2020] 4WLR 25 at [11] – [17] and *Miller v Turner* per Collins-Rice J. at [8] – [9].
 - iii) The judge in charge of the Media and Communications list (“MAC list”) has held that if meaning is in dispute it is usually appropriate to determine meaning at a TPI to save potentially wasted costs: *Dahlen v Middle East Eye* [2019] EWHC 2261 (QB) [9] – [11]. The burden of showing that a TPI of meaning should not be ordered will normally fall on the party who makes such an assertion: *Poroshenko* at [51].
 - iv) The court’s practice is to order a TPI on meaning unless it cannot be determined without encompassing wider issues involving contested evidence, such as serious harm, or there is some other good reason showing that it is not cost effective: *Dahlen* at [9] – [11] and *Poroshenko* at [51].
 - v) Determination of meaning can often be dealt with on consideration of written submissions only, or in a relatively short hearing: *Bindel* at [27].
 - vi) There will be substantial case management benefits to a TPI, in terms of potential limiting of time and costs on pleading and/or amending statements of case (see *Bindel* at [36]), potentially ending one or more claims and enabling the parties to re-consider the future progress of the claims. For example:
 - a) If the First Claimant’s tweet is found not to have any defamatory meaning he will not have to serve a defence to the counterclaim, and that claim will be at an end;
 - b) If the Claimants’ tweets are statements of opinion, rather than fact, the Defendant may wish to consider whether to pursue his counterclaims and will need to reconsider his case on serious harm; the Claimants would not need to consider putting forward a statement of truth, and this issue would need to be determined before the issue of serious harm can be considered;
 - c) If the Defendant succeeds on his case that his publications were not defamatory at common law it would be in accordance with the overriding objective that that issue to be determined at an early stage; if the Defendant failed in his case then his defence of qualified privilege

(paras. 63-65 of Defence and Counterclaim [HB 41] would be difficult to sustain, and the Claimants would want to consider an application for summary judgment before considering the issue of malice, in rebuttal to the qualified privilege defence.

- vii) A TPI will be cost effective, as costs of £20,000 - £25,000 for each party are usually appropriate as the “*top end of the range*”: *Price v MGN* [2019] 1 WLR 1464 at [34] per Warby J. (as he then was).

Summary of Defendant’s Submissions

7. The Defendant resists the application for a TPI, on the basis that the Claimants have not made a convincing case that there is a triable issue which could be resolved separately from the issues in the case or that this could save costs and expense. It is submitted that the application for a TPI is premature for the following reasons:
- i) It is unclear whether the court has power to order a trial and thus final determination of issues that are not disputed in pleadings before the court, other than by consent. The application includes the determination of matters that are not disputed, or are not yet in dispute because the Claimants have not served Replies and Defences to the Counterclaims.
 - ii) The Defendant is unable to judge whether a TPI is appropriate until he has more information as to the nature of the defences to the Counterclaim, and the Claimants have refused to provide such details.
 - iii) Depending upon the Claimants’ defence to the Counterclaim, the Defendant is minded to apply for a trial by jury, given that the counterclaims concern the accusation of racism in a highly charged political climate on this particular issue. It would be submitted that it would be less appropriate for a judge to make a determination on this issue than a jury, who will be drawn from a random cross section of the public, so that their views would be more likely to reflect the public view. Under CPR 26.11(2) such an application cannot be made until the first case management conference, and the ordering of a TPI would force the Defendant to make an election to make such an application before close of pleadings, i.e. before he knows the case to be tried. Once an order is made for a TPI to be listed before a judge alone, it would effectively determine the mode of trial in favour of a judge sitting alone, rather than before a jury. If the application is refused now, and any application for a jury trial is also refused, the Defendant would be in a significantly better position to consider whether he could consent to a TPI, as he would have the benefit of all the statements of case.
 - iv) Although the Claimants rely on comments by judges of the specialist MAC list in support of the submission that TPIs of meaning are now the norm, it is clear from the authorities that the decision whether to order a TPI of meaning in defamation cases, as with TPIs in all cases, is not automatic and is a fact sensitive assessment. There have been cases where the judges of the MAC List have refused applications for a TPI: *Barry v Butler* [2015] EWHC 447 (QB) at [46], *Dahlen* (supra) at [6], *Reay v Beaumont* [2018] EWHC 2172(QB) per Nicol J at [4]-[5] and [11] and *Bindel* (supra) at [34]. Further many applications

for a TPI on meaning or under CPR 53BPD para. 6 are by consent, and there is little authority in relation to contested applications.

- v) The authorities in non-specialist list claims give numerous warnings about the risk that TPIs might seem superficially attractive, but often proves to be “*treacherous shortcuts*”: Lord Scarman in *Tilling v Whiteman* [1980] AC 1, and see also Lord Neuberger MR in *Rossetti v Marketing Diamond Sofa Co. Ltd* [2013] Bus LR 543 at [1]. As drafted the Claimants’ application would not meet the 10-point test formulated by Neuberger J. (as he then was) when considering whether to order a TPI in *Steele v Steele* [2001] CP Rep 106.
- vi) The proposed issues for the TPI may not all be real issues; for example:
 - a) the meaning of the Claimants’ tweets alleging racism is not likely to be in dispute, or at least not of such significance to merit a TPI;
 - b) whether each racism tweet is defamatory at common law is not likely to be in dispute, save for the tweet of the First Claimant (“*What a mess. What a racist twat...*”) which is said in the Claimants’ correspondence not to bear a defamatory meaning;
 - c) the ordinary meaning of the Defendant’s tweets of “paedophile” will not be in dispute;
 - d) the Defendant does not deny that an allegation of paedophilia is seriously defamatory: Defence para. 69(1);
 - e) the Defendant’s case is that the correct meaning of his tweets, and whether they were defamatory at common law, depends heavily on the context in which it was seen and read by individual readers, at different times, and unless the Claimants accept his case on context the Defendant would wish to adduce documentary and other evidence, possibly including expert evidence, so this is not an issue suitable for a TPI;
 - f) the context of the Defendant’s tweets is unlikely to be severable from the issue of serious harm;
 - g) whether each of the Claimants’ tweets was a statement of fact or opinion is an issue that engages s.3 Defamation Act 2013, and the Claimants have set out their case on only one component of a s.3 defence, namely under s. 3(2) they aver that their tweets were statements of opinion, so the defence relying on ss. 3(3) and 3(4) would have to go to trial in any event, and the Claimants would have to decide whether or not to plead a truth defence in case they did not succeed on ss. 3(3) and(4);
 - h) With regard to the Defendant’s tweets, the Defendant does not rely on a defence of honest opinion (or of truth), so this is not an issue for a TPI.
- vii) The Defences to the Claims include defences of qualified privilege, based on ‘Reply to Attack’, (see *Gatley on Libel & Slander 12th edition* paras. 14.51-54 and 14.67-68) which will involve a proportionality assessment that compares

the ‘reply’ (the Counterclaim tweets) to the ‘attack’ (the Claim tweets). Similarly the defence of equitable set-off could require the quantum of each six tweets to be assessed comparatively, where meaning and serious harm are both major factors in the calculation of quantum. The claims and counterclaims in this case are therefore likely to be unsuitable for a TPI on discrete issues.

- viii) A TPI would be likely to take more than a day, and 2-3 days if context could not be agreed, in order to go through the differing contexts of each of the three tweets which found the claims and those which found the counterclaims. The Defendant’s solicitors have estimated the costs of a 3 day TPI plus a full trial of 5 days at £502,525 whereas the costs of a single 7 day trial are estimated at £360,725, i.e.. £160,000 less expensive than split trials, but if a jury trial was ordered, an additional £129,875 is estimated, leaving the saving at only £29,525.
- ix) The only issues that are accepted could be suitable for a TPI are in relation to the Counterclaim, namely:
 - a) Whether the First Claimant’s tweet is defamatory;
 - b) Whether the Claimants’ tweets are statements of fact or opinion.

Decision

- 8. I have concluded that granting the application at this stage would for all practical purposes prevent the Defendant from succeeding in any application for a jury trial, although I have very serious doubts whether any such application would be likely to succeed. I note that there have not been any successful applications for jury trials in defamation claims for several years, and it is doubtful whether the additional costs of a jury trial would be proportionate in this case. However, I do not consider it is appropriate to pre-judge the outcome of such an application, nor to deprive the Defendant to have the opportunity to properly consider such an application with the benefit of knowing the nature of the Claimants’ defences to the counterclaims.
- 9. Although the Claimants say that the Defendant would not be prevented by CPR 26.11(2) from applying at any time for a CCMC at which such an application could be listed, that ignores the context in which the Claimants’ application came before the court, which I addressed in my judgment on the Claimants’ application for relief from sanction. The Claimants’ decisions not to serve defences to the counterclaims, without either agreement from the Defendant or order of the court, effectively derailed a CCMC being listed in the normal course (after close of pleadings and filing of Directions Questionnaires). Alternatively, if an application to extend time for service of defences to counterclaim had been made, as it should have been, this would have required the Claimants to explain the reason for the extension was because they intended to make an application for an order for a TPI, which would have given the Defendant had the opportunity to inform the court why it opposed such an extension on the terms sought. One of those reasons would have been because he wished to know what the Claimants’ defences were to be, both so he could consider whether a TPI was something he could agree to, and in the context of whether he needed to make an application for a CCMC at which an application for a jury trial could be heard, before the Claimant’s application for a TPI was heard. The Claimants’

approach (as explained in my *ex tempore* judgment on the Claimant's application) denied him that opportunity.

10. Having reached that conclusions, I consider that the options available to me are:
 - i) to order either a response to the Defendant's request for more information as to the Claimants' defences to counterclaim, or service of such defences; and adjourn a decision on the application to a CCMC; or
 - ii) to refuse the application on the basis of the evidence and submissions made.
11. I have concluded that the parties should have the opportunity to consider further whether any agreement can be reached as to whether there are preliminary issues that could usefully be tried before a full trial, which would achieve the aim for which they are ordered in defamation claims, namely to determine discrete issues referred to in CPR 53BPD para.6 by means of a short and relatively inexpensive hearing that would potentially save costs and assist in settlement of the claims. The application, in its original or an amended form, can come back to the court at a CCMC, at which any application by the Defendant for a jury trial can first be heard and determined.
12. In most cases where a TPI on meaning is ordered, this is determined prior to service of a defence to save costs. But the court recognises that a claimant needs to know what a defendant's case on meaning is before a trial of meaning. The court's practice is usually to order instead that the Defendants must file and serve a written notice setting out their case on the preliminary issues on a specified date before the trial. I propose to order that the Claimants serve a written notice setting out their case on the counterclaim. Mr Tweed's statement at Paragraph 9 [HB 236 -7] gives an indication of what will be required. The costs in preparing such a statement rather than a Reply and Defence to Counterclaim will be much more limited. Once this has been served I suggest that the parties consider carefully which issues would be suitable for a TPI. It may also assist the parties in their considerations if I set out the reasons for my conclusion and my preliminary thoughts on the application having heard full submissions.
13. In this case both the claims and the counterclaims are unusual in that the ordinary and natural meaning of the words published are unlikely to be in dispute, and there is no innuendo meaning pleaded. Nor would there be likely to be any issue that the accusations of being either a racist or a paedophile are defamatory in their natural and ordinary meaning. Thus the usual issues for a TPI on meaning are not present save for the First Claimant's tweet. The remaining issue on meaning is whether the Defendant's tweets are actionable defamatory statements in the context in which they were made, where the Defendant's case is that the context makes it clear that his tweets were rhetorical comments on the Claimants' tweets. Although the Defendant's preliminary trial time estimate of 2-3 days may be an over estimate, I do not consider that this issue is likely to be able to be dealt with in the usual short (half to one day) TPI on meaning unless the evidence relating to such context can be appropriately limited and agreed. The description of the evidence on which the Defendant seeks to rely provided by his Counsel in oral submissions to support his case on meaning in respect of the claims made this apparent.
14. In addition, the issue of serious harm to the Claimants as a consequence of the Defendants' tweets is linked with the meaning that the Defendant pleads in relation to

his own tweets. Thus the parties should consider whether the issue of meaning in respect of the Defendants' tweets is distinct and severable from other issues in the case: see *Barry v Butler* at [46] per Warby J. (as he then was) and *Reay v Beaumont* per Nicol J at [11]. Of course this may also mean that if meaning in respect of the claims could be determined at a TPI, this could limit the evidence on serious harm at a final trial.

15. The issues for consideration at any TPI ordered on the basis of the Claimants' formulation appear to be:
 - i) Whether the First Claimant's tweet was defamatory at common law;
 - ii) Whether the Defendant's tweets were defamatory at common law;
 - iii) whether the Claimants' tweets were statements of fact or opinion: although that would not resolve the issue of whether the Claimants could rely on s. 3 of the 2013 Act as a defence to the counterclaim, if the Claimants failed in their case that their tweets were statements of opinion, the issues as to whether ss. 3 (3) and (4) are satisfied would not need to be determined.
16. Provided that some or all of those issues could be determined at a short (half to one day) hearing, that might well be worthwhile in terms of narrowing issues and saving costs. I suggest that the parties also use the time before the CCMC to think carefully about costs, as the Defendant's solicitors' costs estimate for the application, and the Claimants' own estimate might also be instructive.
17. I appreciate and support the Claimants' attempts to narrow and resolve issues in the hope that this might lead to the possibility of settlement as well as narrowing the issues. In my judgment the parties should, preferably before, or in any event in tandem with, preparing for the CCMC, seek to resolve this dispute by negotiation and settlement. The Defendant's Counsel describes the publications out of which these claims arose, aptly in my view, as an "unattractive Twitter spat". It would seem incredible to most ordinary people that the parties are prepared to spend what could amount to hundreds of thousands of pounds on such a pointless exchange. There are many more useful ways in which the parties, all apparently intelligent and talented people, could expend their energy and resources. I urge them to consider seriously how they might find a way to reach a compromise and end this dispute.
18. I propose to order that:
 - i) the Claimants are to file and serve written notices setting out their cases on the Reply and Defence to Counterclaim within 14 days of handing down this judgment (or such other time as the parties agree);
 - ii) The Claimants and the Defendant are to consider whether there are any issues that could usefully be listed at a TPI; and notify each other of their conclusions within 14 days of service of the Claimants' written statement, (or such other time as the parties agree);
 - iii) The Claimants are to notify the Defendant within 28 days of service of their written statement whether they intend to restore their application for hearing at

the CCMC, and if so, whether in its original or in an amended form, (or such other time as the parties agree);

- iv) The Defendant is to notify the Claimants within 28 days of service of the Claimants' written statement whether he intends to issue an application for an order for trial by jury;
- v) The parties are to file with my clerk within 14 days of handing down this judgment mutually available dates for a CCMC and a time estimate.

Addendum

19. The Defendant also relied on Nicklin J.'s judgment in *Vine v Belfield* QB-2021-001846 (unrep.) where he adjourned a TPI on the day that it was due to be heard. The transcript was not available at the date of the hearing. It has since become available, and it is apparent that it was the defendant's default in twice failing to comply with the judge's directions to set out his case on the preliminary issues that meant that the hearing could not proceed, and the defendant was ordered to pay the costs thrown away by the adjournment. The judge ordered a defence to be served, and a CCMC to be listed before the Master, at which the issue of whether to proceed with the TPI could be re-considered. Accordingly I do not consider that this authority is of assistance to the issues before me.