Case No: KB-2022-004807

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: Friday, 28th April 2023

Before:

MASTER DAVISON

- -

Between:

THAN HTUN WAI

Claimant

- and -

HTAY KYWE

Defendant

- -
- -

MR JOHN STABLES (Counsel) (instructed by **Brett Wilson LLP**) appeared for the **Claimant**
MX OSCAR DAVIES (Direct Access Counsel) appeared for the **Defendant**

- -

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MASTER DAVISON:

1. This defamation claim has been listed for a disposal/remedies hearing, judgment in default of acknowledgment of service having been entered on 20th February of this year, that order having been sealed on 27th February.

2. The claim form and particulars of claim were served on 16th December 2022. The claim is in respect of the publication on a Facebook site called Moe Joe News of an allegation that the claimant was an informer for the military regime in Myanmar. I will quote the relevant paragraphs of the particulars of claim:

> "6. In February 2021 the civilian government of Myanmar was forcibly removed in a coup by the Myanmar armed forces, known as the Tatmadaw. The military junta that was installed then and has been in control of Myanmar since is officially named 'the State Administration Council'. The military government has suppressed democratic opposition, executed democracy protestors and arrested and imprisoned thousands of political opponents, including former State Counsellor and *de facto* leader of the civilian government, Aung San Suu Kyi ...
>
> 8. To contain protest against its rule, the Tatmadaw has relied on its network of informers, known in Myanmar as 'dalan'. These informers have been used to gather intelligence on pro-democracy protest groups, often leading to the imprisonment, torture and murder of those suspected of involvement. Because of this, suspected dalan informers have been the target of violent reprisals.
>
> 9. Opposition to the military rule in Myanmar is principally organised by the National Unity Government of the Republic of the Union of Myanmar ..., a Myanmar government in exile. The armed wing of the [National Unity Government] is the People's Defence Armed Forces ...
>
> 11. On 9 December 2021 Moe Joe News published a post in the Burmese language on its Facebook page ... that reported the statements of Ko Nay Bhone Latt, a former member of the Myanmar parliament previously named in the Time 100 list of 'people who most affect our world', now a blogger and activist, that fighting by the PDF would soon begin and that a revolution would take place in Myanmar.
>
> 12. On 13 December 2021 the Claimant replied to [this post] in Burmese ... The Claimant's Post said, in translation, 'No need to give warning to the enemy. How many times have you given warning to your enemy? It would be logical if you launch a surprise attack on your enemy without a warning.' ...
>
> 13. On or around 13 December 2021 the Defendant posted a reply in Burmese ... to the Claimant's Post set out in paragraph 12 above. The Defendant's Post ... refers to and is defamatory of the Claimant. As translated the Defendant's Post said: 'Hey bastard, don't preach at us, stoolie!' ...

> 16. In their natural and ordinary meaning, the words of the Defendant's Post ... meant and were understood to mean that the Claimant clandestinely gathers information about individuals affiliated, or believed to be affiliated, with pro-democracy protest groups in Myanmar and discloses such information to the Tatmadaw, in the knowledge that it will be used to assist the Tatmadaw to imprison, torture and murder those suspected of involvement with pro-democracy groups."

3. The claim form and particulars of claim having been served, and no acknowledgment of service having been received (still less a defence), the claimant did not seek to enter judgment immediately. On the contrary, on 6th January, which was six days after an acknowledgment of service was due, the claimant's solicitors wrote to the defendant in these terms:

> "We write further to our letter of 14 December 2022 and its enclosures ... to which we have received no response.
>
> As the Claim Form and Particulars of Claim were deemed served on 16 December 2022, you were required to file and serve an Acknowledgment of Service or a Defence by 30 December 2022. We have checked the Court's e-file today and there is no record of your having filed either document.
>
> In the circumstances, our client is now entitled to apply for default judgment pursuant to Civil Procedure Rule 12.3 and this is what he will do unless you make an application by no later than 4.00 pm on 20 January 2023 for relief from sanctions so that you can seek to rely on a Defence within these proceedings.
>
> We again recommend that you take your own independent legal advice in relation to this matter."

That letter enclosed further copies of the claim form, the particulars of claim and the response pack. In the event, the application for judgment in default was not made until 31st January of this year, so more than three weeks later.

4. Although the defendant did not file a defence, and never has, he has responded to the claim in a variety of unsatisfactory ways, which I will try at least to sketch. His initial response to the claim, when a letter before action was sent back in January 2022, was to contend that the offending word in Burmese, and rendered phonetically "dalan", was in fact a rendition of the Malay word "dalang", meaning "puppeteer". The claimant's solicitors wrote back to the defendant, pointing out that this explanation was highly implausible and nothing more was heard on this topic at that time.

5. In later correspondence the defendant threatened to report, and I understand has reported, the claimant and his solicitors for cyber fraud. In letters to the court dated 11th January 2023, 12th February and 15th February 2023, the defendant said that he had done this, but he did not at any stage file a defence.

6. On 16th February of this year, he wrote to my listing clerk an email which, so far as relevant, was in these terms:

> "I would be grateful if you would kindly get my defence dated 11 January 2023 from the Court Manager at the Media and Communication Listing which I have sent by First Class Sign For.
>
> My defence has Claim Number KB-2022-004807 with page number written on each page ...
>
> Also I sent it to Brett Wilson by First Class Sign For."

He went on in that email to say that he had posted hard copies of his defence. In fact, no defence has ever been identified. (The letter of 11 January 2023 is not a defence and MX Davies did not contend otherwise.) As I have already noted, on 27th February judgment in default was entered. On that date the claimant's solicitors sent the sealed order and the notice of hearing for the disposal hearing to the defendant. It was then not until 17th April that the defendant, acting through directedly instructed counsel, filed his application to set the judgment aside. That application was listed to be heard today, alongside the remedies hearing, and, logically, it was to be dealt with first.

7. It falls to be dealt with under two headings, although the first one has really fallen away. The first heading is whether the defendant was entitled to have the judgment set aside as of right, and that would be on the basis of the statement that he has made in paragraph 7 of his witness statement: "The claim has never been served on me and I have never signed."

8. That aspect of the application is rightly no longer pursued. The claim was served by email and post on 16th December 2022 and there is a certificate of service to that effect. As I have noted, it was also re-served by letter dated 6th January 2023 and a process server called at the defendant's house on that day and on subsequent days to put service beyond doubt. Further, on 11th January 2023 the defendant wrote to the court quoting the claim number and the claimant's solicitor's fee account number, which he could only have got from the claim form. When these things were pointed out at the hearing, the defendant accepted that, by the time that he wrote to the court on 11th January, he had indeed received and opened the letter enclosing the proceedings.

9. I have, regretfully, come to the conclusion that the defendant has simply not been forthright and transparent about his knowledge of the claim. At any rate, it is plainly a regular judgment and therefore it can only be set aside under the provisions of CPR 13.3 which confer a discretion on the court, and it is to that that I now turn.

10. The application has been made some two months after judgment in default was entered. It is relevant that that judgment provided at paragraph 4:

> "Any application by the Defendant to vary or set aside this Order must be made within seven days of the service of the Order."

Of course, that provision was not complied with and, on any view, to apply two months after a default judgment has been entered is not a prompt application. The application comes in the context of (a) the claimant having given the defendant maximum opportunities to engage and (b) the defendant having neglected to take those opportunities, having been, as I have already said, somewhat less than transparent about his receipt of the claim and about the filing of a defence.

11. I regard the contents of paragraph 9 of the defendant's witness statement as being rather in the same vein. In that paragraph the defendant has said that he thought a defence would not be due until there had been a trial on meaning. He was given no such representation by the claimant's advisers or by the court, and it is obvious that a trial on meaning would never be ordered where the defendant was not responding to the claim at all.

12. Taking stock for a moment there, the procedural factors, as I will call them, certainly do not favour setting aside the judgment. But the substantive requirement in the rule is that the defendant has demonstrated a real prospect of successfully defending the claim, and I have come to the clear conclusion that the defendant has not demonstrated any such real prospect.

13. First of all, it is extremely unusual and unsatisfactory, especially where a defendant is legally represented by, if I may say so, very competent counsel, that there is no draft defence before the court. It is almost invariably by reference to a draft defence that the defences and their prospects of success are measured, and the court has not had the opportunity of doing that in this case.

14. Dealing with the defences that the defendant has offered, the first one is meaning. As I have noted, this was first raised, although not pursued, back in the very early part of 2022. There is, again very surprisingly, no evidence from a certified translator to support the defendant's case that the word he used was a Malay word meaning "puppeteer" and not a Burmese word meaning "stoolie". This was a publication in Burmese on a Burmese language website. The fact that a number of the claimant's acquaintances contacted him in the wake of publication about the comment, which they understood in the same sense that the claimant understood it, certainly supports his case on meaning. It has been pointed out that "puppeteer" would be a complete non sequitur in the context of the offending phrase.

15. I have reached the conclusion that the defendant has no real prospect of successfully demonstrating that that was the true meaning of the publication. That being so, there is no real material upon which to find that the defendant has some real prospect of demonstrating a defence of truth or justification. It is certainly not enough for him simply to say that he will, or may, raise such a defence. Plainly, it was incumbent upon him on an application of this kind to, as the phrase goes, condescend to particulars, but he has not done that.

16. Lastly, he has raised the defences of honest opinion and a public interest defence. I can deal with those very shortly. To call someone an informer is not an

expression of an opinion, and, furthermore, if it was, no basis has been offered for that opinion and no material has been put forward that could support the contention that an honest person could have held that opinion.

17. As to the section 4 defence, there is again simply no material to support the contention that the defendant had, or might have had, a reasonable belief that publication was in the public interest. I agree with the point made by Mr Stables that the fact that the defendant has accepted in paragraph 3 of his witness statement that prior to these events he had no knowledge of the claimant at all is fatal to both the public interest defence and the defence of honest opinion.

18. Lastly, the defendant has submitted that there is, to use the exact phrase in the rule, "some other good reason" why he should be permitted to defend, that reason being, to quote from MX Davies' skeleton argument, that he is "seriously concerned that this claim is being brought as a SLAPP", SLAPP being an acronym for Strategic Litigation Against Public Participation.

19. I am afraid it obvious that there is nothing in that point. SLAPP is not in itself a defence and, furthermore, in the present context it is absurd. The claimant is an ordinary person of ordinary means who complains that he has been characterised as an informer for a violent and repressive regime and wants to vindicate his reputation. There is no basis at all to characterise a claim of that kind as a claim seeking to suppress public participation in matters of public interest.

20. I turn then to the remedies, the first of which is damages, and which I can deal with economically. To call someone an informer for a murderous regime is self-evidently a very serious allegation. It is at least as bad as calling someone a fraudster or a child groomer, and it is worse than calling someone a struck off solicitor. These are comparisons with the cases that I was referred to by Mr Stables; namely, the cases of *Doyle v. Smith*, *Monir v. Wood* and *Woodward v. Grice*.

21. The scale of publication is hard to gauge. I accept the force of the point made by MX Davies that this was a comment on a comment on a post, the post being on a Facebook site with something around 14,000 followers. It was taken down after a week. Doing the best that I can and adopting a phrase used by King J in the *Woodward* case, I think the scale of publication is probably in the hundreds rather than the thousands. But there is also in this case the grapevine or percolating effect that is bound to take place within a small community of Burmese speakers.

22. The particular effect on the claimant has been described in paragraphs 32 to 37 of his witness statement, which I will not read out. Suffice it to say that the publication has exposed him to contempt. It has caused people to shun or avoid him or, at the very least, treat him with suspicion. It has rendered it unsafe for him or his wife to return to Myanmar on account of fears for their personal safety, it has caused him great personal upset, and also led to him and his wife now leading lives that are much more withdrawn than they were before the publication.

23. I have come to the conclusion that, without any sum for aggravated damages, the proper figure is £30,000. Given that the claim is limited to £30,000, that renders a

discussion of whether the claimant is or would be entitled to aggravated damages academic.

24. The claimant additionally asks for an injunction and an order under section 12 of the 2013 Act. I will offer the defendant the opportunity to give an undertaking not to repeat the publication. If he does not give that undertaking, then I will make an injunction in the terms sought, and I will also order, pursuant to section 12 of the 2013 Act, that the defendant publish a summary of the court's decision.

25. It seems to me that this is a paradigm case for such an order in order to vindicate the claimant's reputation. Absent an order under section 12, this judgment would be likely to be given little or no publicity at all. The community to which it is relevant is (a) small and (b) Burmese speaking. It seems to me that, in the absence of a section 12 order, the claimant simply will not receive the vindication which was the whole purpose of bringing the proceedings in the first place. I do not agree that an order under section 12 will, to use MX Davies' phrase, add fuel to the fire or risk further litigation. I do not think there is any basis for either fear and so, for those reasons and as I have said, I will make that order.

(**Submissions Followed**)

26. Because the claimant made a Part 36 offer on 10th March 2022 - which was an extremely reasonable offer and which the defendant would have been well advised to accept and which the claimant has now very comprehensively beaten - the consequences set out in CPR 36.17(4)(a) to (d) follow unless I consider it unjust to impose those consequences. Manifestly, it is not unjust and so it seems to me that I should indeed make what amounts to further awards as provided for in the rule.

27. In no particular order, the further sums that I will order are a 10% uplift on the amount of the award, which will come to £3,000. I will order that the defendant must pay the claimant's costs on the indemnity basis from 31st March, but not before then because I do not think that the defendant has strayed into indemnity costs territory. He was until very recently a litigant person and it seems to me that I ought to take that into account in deciding the basis of costs assessment.

28. In fact, it does not make a lot of difference, because, in my view, the total of £45,517.12 is not disproportionate for this kind of specialist work where the claimant's solicitors have acted throughout and who have conducted the litigation in a way that seems to me to have been exemplary, especially having regard to the fact, which I have already mentioned, that the defendant was a litigant in person. Similarly, although obviously the reasonableness of the figures is something that I can look at both before and after the operative date, which was 31st March, I do not find the figures in the schedule unreasonable. As to £35,000 worth of those figures, that being the amount of costs attributable to the period after 31st March, it was for the defendant to show that the figures were unreasonable and the defendant has not done so.

29. What that means is that I will summarily assess the costs in the amount of the schedule. I will order that the defendant should pay interest on those costs from

31st March at the rate of 7.5%, and I will further order interest on the award of damages at 7.5% from the relevant date, which is 31st March.

(This Judgment has been approved by Master Davison.)

Digital Transcription by Marten Walsh Cherer Ltd
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Telephone No: 020 7067 2900 DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com