Neutral Citation Number: [2021] EWHC 1868 (QB)

Case No: QB-2020-002650

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 July 2021

Before :

THE HONOURABLE MR JUSTICE NICKLIN

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Between :

Julie Bindel	**Claimant**
- and -	
(1) PinkNews Media Group Ltd **(2) Benjamin Cohen**	**Defendants**

- -
- -

Heather Rogers QC and Chloe Strong (instructed by **Schillings International LLP**)
for the **Claimant**
Catrin Evans QC and Ben Silverstone (instructed by **Wiggin LLP**)
for the **Defendants**

Hearing date: 26 May 2021

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Approved Judgment

I direct 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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THE HONOURABLE MR JUSTICE NICKLIN

The Honourable Mr Justice Nicklin :

1. The issue before the Court is the circumstances in which the Court should order a trial of preliminary issues in a defamation claim.

The Claim

2. The Claimant describes herself in her claim form as a high-profile lesbian radical feminist, journalist, author, and broadcaster. The First Defendant is the publisher of the website PinkNews. The Second Defendant is the Chief Executive of the First Defendant.

3. On 17 May 2020, an article was published on PinkNews under the headline: "*The 'gender critical' feminist movement is a cult that grooms, controls and abuses, according to a lesbian who managed to escape*" ("the Article"). It is not necessary, for the purposes of this judgment, to set out the text of the Article.

4. The Claim Form was issued on 29 July 2020 with Particulars of Claim following on 13 August 2020. By consent, the Particulars of Claim were amended on 10 December 2020. The Claimant was not named in the Article. Nevertheless, the Claimant contends that she would have been identified by at least some of the readers of the Article. She complains that the Article defames her both in its natural and ordinary meaning and by way of innuendo. It is not necessary to set out passages from the Amended Particulars of Claim in this judgment. It suffices to summarise that the Claimant's case on reference is set out in Paragraph 7. Paragraph 8 sets out five meanings that the Claimant contends the words complained of bore by way of natural and ordinary and/or innuendo meaning. Paragraph 9 sets out facts relied upon by the Claimant "*in support of the meanings the Claimant contends the words complained of bear*". Paragraph 10 advances a further innuendo claim.

5. The Defendants have not yet filed a Defence. Instead, by a series of agreed extensions of time, the parties have postponed the time for service of the Defence. They did so whilst they explored the possibility of seeking the determination of meaning (and associated matters) as preliminary issues. With the benefit of hindsight, it is at this point that the parties should have sought to engage with the Court. Although parties are encouraged to cooperate in the early identification of issues and the best way of resolving them, case management is ultimately a matter for the Court. If the parties delay the service of the Defence, this also postpones the point at which the Court gets the opportunity to manage the case, and importantly to budget the costs, at the Case Management Conference. As will become clear, it has taken the best part of 9 months for the Court to get its first opportunity to manage this case. By which time, the parties had already spent over £½m on costs. This should not have happened.

6. In their letter of 16 September 2020, the Defendants' solicitors proposed that the Court be invited to direct the trial of preliminary issues of meaning (both natural and ordinary and innuendo), whether the words complained of referred to the Claimant, whether the words complained of made an allegation of fact or made (or contained) an expression of opinion and whether the meaning(s) found by the Court were defamatory at common law. Recognising that the preliminary issues would potentially require resolution of disputed facts, the Defendants' solicitors proposed that the Court be invited to resolve the issues based on various "*deemed facts*". Although contending that resolution of the

preliminary issues in the Defendants' favour would be likely to lead to the dismissal of the Claimant's claim, the Defendants held out the prospect that, were the preliminary issues resolved against the Defendants, they "*would be likely to consider making an offer of amends*".

7. The Claimant's solicitors were not attracted by this proposal, not least because they complained that the Defendants were seeking, by their proposed "*deemed facts*", to "*pick and choose*" from the Claimant's case. They also noted that the Defendants had not proposed that serious harm should be tried as a preliminary issue. This was recognised to be sensible – considering various observations by the Court about the unsuitability of serious harm to be tried as a preliminary issue – but leaving serious harm out of the preliminary issues risked there being an overlap of evidence and witness testimony at the trial of the preliminary issues on the issue of innuendo and reference and any subsequent trial of serious harm to reputation and damages. From the stance adopted by the Defendants to the claim, the Claimant's solicitors anticipated that serious harm was an issue likely to be disputed by the Defendants.

8. Correspondence between the parties continued and led, ultimately on 1 December 2020, to the Defendants providing to the Claimant a document headed "*Defendants' Statement of Case on the Issues of Reference and Meaning*" ("the Defendants' SoC"). The reason that the Defendants provided this document – instead of filing a conventional Defence – was an attempt to preserve the Defendants' ability to make an offer of amends under ss.2-4 Defamation Act 1996. Under s.2(5), an offer of amends cannot be made after serving a Defence.

9. The Defendants' SoC is a substantial document. It consists of 18 pages accompanied by a further 300 pages of documents in 3 Annexes. In it, the Defendants denied that the words complained of in the Article referred (or would be understood to refer) to the Claimant. One of the principal bases on which the Defendants dispute the Claimant's contention that identified third parties had understood the words to refer to her was that these individuals had not read the Article, but had instead been influenced by commentary on it by other third parties. The Defendants denied that the words complained of bore the meanings advanced by the Claimant, whether in their natural and ordinary meaning or by innuendo, and they denied that the words complained of bore any meaning defamatory of the Claimant. Further, as anticipated by the Claimant's solicitors, the Defendants' SoC denied that the publication caused or was likely to cause serious harm to the Claimant's reputation or that it had caused any upset or distress to the Claimant. Finally, the Defendants relied on the fact that, on 18 May 2020 (the day after publication of the Article), the Claimant had herself published a Tweet indicating that she was the subject of the Article. On any view, the Defendants' SoC, whilst not, at that stage, advancing any substantive defence to the Claimant's claim or the Defendants' case on the issue of damages (should it arise), comprehensively attacked every basis upon which it was brought.

10. The Claimant's solicitors remained unconvinced that a trial of the proposed preliminary issues was a sensible way of proceeding. They considered that the issues that would require resolution were too ambitious, having regard to the factual disputes that would require determination. In their letter of 18 December 2020, the Claimant's solicitors stated, in summary:

> "This matter is not appropriate for a trial of preliminary issues (TPI). We recognise that a TPI can represent a practical, fair and efficient way of progressing many, perhaps most, defamation claims and that meaning is an issue which can generally be determined without the need for any evidence beyond the publication itself. The advantages of early determination of meaning have been stated by the courts and the position is well-known. The pitfalls, however, of ordering a TPI in unsuitable cases are also familiar and obvious, such that it can be a 'treacherous shortcut'. Each case must be considered on its facts and circumstances and, for the reasons briefly outlined, a TPI is not appropriate in this case."

11. The matters that the Claimant's solicitors considered rendered the case unsuitable for a trial of preliminary issues were the substantial disputes of fact that would have to be resolved and the need, therefore, for disclosure, witness statements and a trial at which it could be anticipated there would be a need for the witnesses to be cross-examined. They also questioned whether the expense and inconvenience of a trial of preliminary issues could be justified on the speculative basis that, if the issues were determined against the Defendants, they would consider making an offer of amends.

12. Matters were not resolved by agreement so, on 13 January 2021, the Defendants issued an Application Notice seeking the trial of the preliminary issues that they had previously canvassed. The Application was supported by a witness statement by the Defendants' solicitor, Caroline Kean. There was, however, a potentially important change in the Defendants' position. In her witness statement, Ms Kean confirmed that, if the Claimant succeeded on the preliminary issues, the Defendants "*will not substantively defend the claim*". Although not stated in terms, this suggested that, if the preliminary issues were resolved against the Defendants, they would make an offer of amends.

13. The Application Notice came before me on the papers on 19 January 2021 for directions. I directed that the Application be fixed for a hearing, and set a timetable for the exchange of evidence. On 21 January 2021, the Claimant's solicitors wrote to the Defendants' solicitors. Noting the change in the Defendants' position, they sought clarification that the proposed trial of the preliminary issues would dispose of the issue of liability. The Defendants' solicitors provided the confirmation sought, on 22 January 2021. On 26 January 2021, the Defendants' solicitors wrote to the Court to indicate that the Claimant was now content to agree to the proposed trial of the preliminary issues sought by the Defendants.

14. On 2 February 2021, I nevertheless refused to direct a trial of the preliminary issues sought without a hearing. Instead, I directed a hearing at which the Court would consider whether there should be a trial of the proposed preliminary issues. The order explained my reasons and concluded:

> "I am very far from convinced that the parties' proposal offers sufficient by way of 'upside' to justify the very substantial costs, delay and resources that would inevitably be involved in the preliminary issue trial that is proposed. I can see much force in the alternative course of refusing to order a preliminary issue and directing the proceedings to proceed towards one trial at which all issues would be resolved in the conventional way. Nevertheless, if the parties consider that I have not properly understood the benefits of the proposed trial of preliminary issues, then

> they can advance their arguments at the hearing I had directed at which the Court will make the final determination."

Hearing on 26 May 2021

15. The hearing was fixed for 26 May 2021. The parties had filed costs budgets setting out the incurred costs of the action and estimates of costs based on two alternative scenarios: first, that the Court directed the trial of the preliminary issues and, second, that the action proceeded to a single trial. At that stage, the Claimant's incurred costs were £371,770 and the Defendants' incurred costs were £174,179.

16. Skeleton arguments were filed by the parties in the usual way. Unusually, the Court faced the position of both parties urging the Court to direct the trial of the preliminary issues, with the only potential opposition coming from the Court.

17. As it was the Defendants' Application, Ms Evans QC made her submissions first. There were two principal issues which I wished the parties to address. First, if the Claimant was successful in the trial of the preliminary issues, what would then happen. Second, what discount would the respective parties contend was appropriate in respect of any offer of amends made by the Defendants following determination of the preliminary issues.

18. Ms Evans QC's submissions on the first point satisfied me that there was a significant element of the unknown about what would happen next. In response to questions, Ms Evans QC did make clear that the Defendants, whilst conceding that an offer of amends would dispose of the threshold issue of serious harm, were reserving their position to challenge the Claimant's case on causation of damage and to advance a case in mitigation of damages under ***Burstein -v- Times Newspapers Ltd*** **[2001] 1 WLR 579**. On the second point, Ms Evans QC submitted that, if that stage were reached, the Defendants would seek a discount of up to 30%, reflecting the mitigating effect of the offer of amends, on the appropriate figure of damages.

19. Having heard Ms Evans QC's submissions in answer to my question "what happens next?", Ms Rogers QC asked for a short break to consider the position with her client. After the break, she informed me that the Claimant no longer wished to support the Defendants' application for a trial of the preliminary issues. She took me through the authorities relevant to the offer of amends regime and submitted that, although the Defendants were signalling an intention to make an offer of amends, they wanted a trial first. That, she argued, was not a procedure that the offer of amends regime had ever envisaged. As to the appropriate discount, Ms Rogers QC stated that the Claimant's position would be that the Defendants would be entitled to nothing, or very little, by way of discount having regard to the way in which the Defendants would have challenged the Claimant's entitlement to relief at practically every turn.

20. In her skeleton argument, Ms Evans QC had submitted that the Court should direct the trial of the preliminary issues of the "threshold issues", i.e. issues on which the Claimant bore the burden of proof, prior to service of a Defence, to enable the Defendants to preserve their option to make an offer of amends. She argued that, as the offer of amends regime was recognised as providing an important "*exit route*" for defendants from libel proceedings and played a role in protecting the Article 10 rights of defendants, "*the Court should be slow to limit the availability of that procedure*". The implications

of that submission are potentially significant. If it were right that, to preserve the ability to make an offer of amends, defendants were *entitled* to have "threshold issues" determined, if necessary, as preliminary issues, prior to the requirement to file a Defence, the consequences of such an "entitlement" would be potentially far reaching. Included within those "threshold issues" would be not only defamatory meaning and reference, but also publication and serious harm under s.1 Defamation Act 2013. Such a procedure would risk producing two "trials" for each defamation claim. First, a trial of the "threshold issues" and, only if the claimant succeeded on those, then a trial of any substantive defences, if the defendant did not make an offer of amends. That would risk overlapping issues in the two trials (e.g. serious harm in the first trial and, if it arose, damages in the second) and would threaten to return defamation litigation to procedural complexity, delay and expense perhaps worse even than the era when actions were tried by juries.

21. To assess Ms Evans QC's submissions, it is necessary to look first at the offer of amends regime and then the approach to the trial of preliminary issues both generally and in the specific area of defamation litigation.

Offer of Amends regime

22. As noted above, the current offer of amends regime is contained in the Defamation Act 1996. A predecessor, under s.4 Defamation Act 1952, had not proved successful, and was hardly ever used in practice. Sir Brian Neill's Committee on Practice and Procedure in Defamation, which reported in July 1991 ("the Neill Committee Report"), identified the following factors that had discouraged its use:

    i) The regime was not 'user-friendly' because the procedural steps were cumbersome and impractical (e.g. the defendant had to provide, with his/her offer of amends, an affidavit "*specifying the facts relied upon… to show that the words in question were published by him innocently in relation to the party aggrieved*").

    ii) It was extremely difficult for a defendant to establish his/her innocence because, where a publication was admitted to be defamatory, it was almost always possible to show that some further step(s) could have been taken by the publisher.

    iii) By the time the defendant had investigated the complaint and taken advice, it was generally too late for the offer of amends to meet the requirement that it should be made "*as soon as practicable after the defendant received notice that [the words] were or might be defamatory of the plaintiff*".

    iv) Finally, under s.4(6), the offer of amends was not available to a defendant, such as a newspaper editor, publisher or proprietor, who was not the author of the words complained of, unless s/he proved at trial that the author was not malicious.

23. The current offer of amends regime was enacted by Parliament, in the Defamation Act 1996, following the recommendations in the Neill Committee Report. Eady J, who had been a member of the Committee prior to his appointment as a Judge, explained the background in ***Abu -v- MGN Ltd*** **[2003] 1 WLR 2201** [4]-[19] and ***Milne -v- Express***

Newspapers **[2003] 1 WLR 927** [11]-[17]; [35]-[41]. An offer of amends was supposed to provide a "*fair and reasonable exit route for defendants*" confronted by potentially expensive libel actions and a situation in which defendants sometimes felt "*over a barrel*": ***Abu*** [8]. The Neill Committee Report had recommended a defence for defendants who had "*admittedly wronged the claimant but who have recognised the error of their ways and behaved fairly and reasonably after the tort has been committed*": ***Milne*** [17]. The offer of amends regime, provided by the 1996 Act, provided "*an exit route for journalists who have made a mistake and are willing to put their hands up and make amends*": ***Milne*** [41].

24. It is to be remembered that, when the revised offer of amends procedure was introduced in the 1996 Act, libel actions were still typically tried by juries. The scope, at that time, for the early determination of meaning – so often, then as now, a matter of substantial contention between the parties to defamation claims – or indeed trial of any other preliminary issue, was extremely limited. This was one of the factors that contributed, significantly, to the "*over a barrel*" phenomenon sometimes experienced by publishers. A defendant, who disputed meaning, had practically no option, other than to go to trial, to have the issue resolved by the jury. The offer of amends regime, under the 1996 Act, by also affording the option to make a qualified offer of amends, enabled a defendant, whilst rejecting the claimant's meaning, to accept that a publication bore a specified meaning defamatory of the claimant. If this qualified offer was not accepted, it would then be a defence to any libel claim in respect of that meaning, subject to a claimant proving statutory malice under s.4: see ***Milne*** [41]. In the 25 years since the current offer of amends regime was implemented, I am aware of only one instance of a claimant having successfully proved statutory malice in an offer of amends case: ***Thornton -v- Telegraph Media Group*** **[2012] EMLR 8**

25. Following its enactment, the principles, scope and day-to-day working of the offer of amends regime under the 1996 Act have been established by the Courts in several key decisions: e.g. ***Abu***; ***Nail -v- News Group Newspapers Ltd*** **[2005] EMLR 12**); ***Warren -v- The Random House Group Ltd*** **[2009] QB 600**; ***Milne***; ***Tesco Stores Ltd -v- Guardian News & Media Ltd*** **[2009] EMLR 5**; ***KC -v- MGN Ltd*** **[2013] 2 Costs LR 269**; and ***Undre -v- Harrow LBC*** **[2017] EMLR 8**.

    i) In ***Warren*** the Court of Appeal dismissed an appeal from Gray J in connection with an attempt by the defendant to withdraw an offer of amends that had been accepted. Sir Anthony Clarke MR, giving the judgment of the Court of Appeal, set out the Judge's analysis of the history of the offer of amends procedure, and the amendments made to the regime in the 1996 Act following the Neill Committee Report, and concluded [15]:

> "We agree with the judge… that the provenance of sections 2 to 4 sheds valuable light on the purposes underlying them and the objectives which might be achieved by introducing a streamlined procedure. We further agree with him that those objectives include the provision of an exit route for a defendant who is unwilling or unable to advance a substantive defence in respect of the whole or a part of the clam against him the opportunity for a claimant to achieve an economical and rapid resolution of his complaint or part of it…"

ii) In ***KC -v- MGN***, the Lord Chief Justice described the offer of amends regime as follows [13]:

> "Without attempting to rewrite the terms of ss.2-4 of the 1996 Act, it is plain that its purpose was to enable those who had been wrongly traduced to be vindicated by an apology and an appropriate offer of amends, and to provide those responsible for the defamatory statement with a means of acknowledging their error and making an offer of compensation to provide appropriate amends. The objective, to the advantage of both sides, is vindication without litigation. If the court concludes that the offer of amends was adequate, it would normally follow that any litigation following such an offer was indeed inappropriate and unnecessary. As Eady J observed in ***Cleese -v- Clarke*** **[2004] EMLR 37**, 'the purpose of the offer of amends procedure is to reduce delay and expense', a view endorsed by this court in ***Warren***, which underlined that ss.2-4 of the 1996 Act provided 'an exit route for a defendant who is unwilling or unable to advance a substantive defence' while providing the claimant with an opportunity 'to achieve an economical and rapid resolution of his complaint or part of it'…"

iii) In ***Tesco***, Eady J held that a claimant could not hold off accepting an offer of amends indefinitely and pursue a malicious falsehood action in the same action in the meantime. The judgment contains a thorough and helpful analysis of the offer of amends regime:

> [14] The philosophy underlying Parliament's introduction of the offer of amends regime contained in ss. 2-4 of the 1996 Act was to enable the parties in defamation proceedings, or even prior to the issue of proceedings, to achieve a relatively speedy and relatively inexpensive disposal of a complaint of injury to reputation, where the defendant was prepared to acknowledge that it had published defamatory allegations which were essentially inaccurate.
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> …
>
> [16] The statutory scheme was intended to impose discipline on the parties, in the sense that the complainant would have little choice but to accept an offer of amends in order to achieve vindication or reject it and take on the burden of proving malice, with a view to obtaining a verdict following a trial (with or without a jury). Only if malice is proved would the claimant be able to overcome the statutory defence under s.4(2) and recover damages assessed in the traditional way.
>
> [17] That would be the only issue in the case on liability, since a defendant relying on a s.4(2) defence is precluded from relying on any other defence such as qualified privilege, justification or fair comment. That is because the making of an offer of amends itself recognises that the claimant has been wronged by the publication and is entitled to be compensated. Where an offer is not accepted, the focus inevitably shifts on liability to the defendants' state of mind and whether the publication was motivated by malice in the sense explained by Lord Diplock in ***Horrocks -v- Lowe*** **[1975] AC 135, 150**.
>
> …

> [21] The offer of amends regime was intended to be conciliatory in its effect and requires the parties to operate it in a constructive manner. Since its enactment an additional spur has been provided in the form of the CPR (CPR) and the court's focus upon narrowing the issues and achieving a fair resolution of the "real issues" between the parties as effectively as possible.
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> …
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> [23] One of the main purposes underlying the enactment was to afford an additional defence to journalists; specifically of course those who had got their facts wrong but were willing to make amends. An interpretation of the Act which undermined that purpose would tend, therefore, to undermine indirectly the right of free expression protected by art.10.
>
> [24] To compel or encourage a claimant to take advantage of the statutory regime, once an offer has been made, does not undermine either its art.8 rights or its art.6 rights. On the contrary, they are advanced because restoration of reputation can be achieved via the court's processes more quickly and less expensively (it is hoped). The objective in a libel action is to achieve the restoration of reputation and that must not be obscured by seeking to obtain some collateral or tactical advantage. That would be to use the court's processes for an inappropriate purpose.
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> …
>
> [27] The statutory provisions have to be construed so far as possible in a way which makes them workable and in a way that is consistent with the obvious underlying purpose…
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> …
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> [44] … The whole point of the offer of amends procedure as the Neill committee expressed it, and as Parliament adopted it, was to provide assistance to journalists who found themselves "over a barrel" because they had got their facts wrong.
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> [45] The regime enables them to climb off the barrel by putting their hands up and making an offer of amends. The claimant has to accept the offer or else take on the risks of overcoming the statutory defence by proving malice. That is a tough choice for claimants sometimes, but so it was meant to be. It is not simply to provide the claimant with a wider menu of options.
>
> [46] The s.4(2) defence is a defence on liability. It is wholly unrealistic to suggest that the offer can be kept open, at the option of the claimant, until judgment or just before it so that the claimant can see how the trial goes. If the cross-examination of the journalists does not go too well, the suggestion seems to be that the claimant could, at that point, simply pull the plug on the statutory defence by accepting the offer and be subject only to adverse costs orders. That would be to bypass

> the discipline intended by the Neill committee, and adopted by Parliament.
>
> [47] Some support was sought to be derived by Miss Page from the Scottish decision of ***Moore -v- Scottish Daily Record & Sunday Mail Ltd*** **[2007] CSOH 24**, but I am not bound by that decision and, with respect, I do not find its reasoning persuasive. There comes at some point a fork in the road. A claimant has to go to the right or the left and, depending on that choice, either the s.3 or s.4 will come into operation.
>
> [48] That choice cannot be postponed indefinitely. It is even more unreal to suggest that, even where an offer is accepted, the claimant can go on to allege malice nevertheless by means of a claim for malicious falsehood. That would simply be to enable a claimant to thumb its metaphorical nose at the legislative intention. It would mean that the discipline would simply be rendered ineffective. There is no right to plead a cause of action just because it exists. The court is there to do justice and, especially nowadays under the CPR, to have regard to the overriding objective. Litigation is no longer intended to be regarded as a game for lawyers; it is a means provided by the state of achieving justice for the parties, which almost always is going to be imperfect and to involve compromises. It was the need for compromise which underlay the offer of amends regime.

iv) Finally, and consistent with the theme in the authorities I have identified that an offer of amends is an "*exit route*" available to a defendant that accepts liability for having libelled a claimant, in ***Brown -v- Bower*** **[2017] 1 WLR 4703**, Warby J noted [56(3)]:

> "… The primary purpose of the offer of amends regime is to bring about swift settlement, ideally before litigation begins. It was clearly not intended to operate as a fallback for defendants, after they have tried their luck with a preliminary issue on some substantive issue."

26. Unlike the regime under the 1952 Act, offers of amends are now made frequently in defamation claims. Whilst there are still occasional instances of the Court being asked to determine issues arising from an offer of amends, most cases are resolved, by agreement between the parties, without the need for any determination by the Court. There are few occasions on which the Court is asked to review the operation of the regime itself.

Trials of preliminary issues

27. The utility of the present offer of amends regime has also benefited from the abolition of the 'right' to trial by jury by s.11 Defamation Act 2013. This has offered previously unavailable case management opportunities in defamation litigation, one of the most significant of which is early determination of the natural and ordinary meaning of a publication (and other related issues): see the discussion in ***Bokova -v- Associated Newspapers Ltd*** **[2019] QB 861** [3]-[10]. As the natural and ordinary meaning of a publication is an issue upon which, usually, no evidence beyond the publication itself is admissible, a trial of this issue can be, and now regularly is, dealt with at a hearing

typically lasting around 2 hours. Such hearings can usually be accommodated in a matter of weeks after the direction for trial is given. There is no need for disclosure or witness statements and no witnesses are called at the trial. The issues are resolved by applying established legal principles to the publication itself. In appropriate cases, the determination can be made by the Court, without a hearing, based on written submissions: ***Hewson -v- Times Newspapers Ltd*** **[2019] EWHC 650 (QB)**.

28. The experience of the Media & Communications List is that early determination of meaning assists and promotes the speedy resolution of defamation claims. The issue of meaning, which, for decades, had bedevilled the resolution of defamation claims, can now be determined quickly, efficiently, and at proportionate cost.

29. Good case management, and furtherance of the overriding objective, almost always favours the early resolution of these preliminary issues *before* service of the Defence in a defamation claim: ***Morgan -v- Associated Newspapers Ltd*** **[2018] EWHC 1850** [10]. That is because the cost of resolving the preliminary issues is limited, and the benefits of doing so – for both parties – are significant. The fact that this also preserves a defendant's opportunity to make an offer of amends is largely serendipitous: ***Bokova*** [10]. The Court is not resolving these preliminary issues, prior to service of the Defence, *in order* to preserve a defendant's recourse to an offer of amends: cf. Warby J's observations in ***Brown -v- Bower*** (see [25(iv)] above).

30. Outside this established category of preliminary issues in defamation cases, which can be resolved quickly, efficiently, and at proportionate cost, experience has shown that directing a trial of other preliminary issues is to be done carefully. The more complicated/costly it is likely to be to resolve the preliminary issue(s), the more cautious and wary the Court must be before directing it. The sort of cost/benefit analysis the Court performs, and the factors considered, are set out in ***Steele -v- Steele*** **[2001] CP Rep 106** (see also ***Wentworth Sons Sub-Debt SARL -v- Lomas*** **[2017] EWHC 3158 (Ch)** [33]-[34]). Lord Neuberger MR later warned against heeding the "*siren song*" of agreeing to, or ordering, preliminary issues which, he suggested, "*should normally be resisted*": ***Rossetti Marketing Ltd -v- Diamond Sofa Co Ltd*** **[2013] Bus LR 543** [1]. As Lord Scarman famously observed in ***Tilling -v- Whiteman*** **[1980] AC 1, 25**, "*preliminary points of law are too often treacherous short cuts.*" That was a warning about points of law; *a fortiori* preliminary issues that involve substantial disputes of fact.

31. Reflecting these principles, and for good and sensible reasons, the current edition of the Queen's Bench Guide suggests (§17.29): "*Trials of preliminary issues in the MAC List are usually limited to issues that can be resolved without the need for disputed witness evidence.*" This practice reflects the decisions of Warby J, the former Judge in Charge of the Media & Communications List, in ***Hope Not Hate -v- Farage*** **[2017] EWHC 3275 (QB)** [37] and ***Brown -v- Bower*** **[2017] 1 WLR 4703**.

32. Outside this specialist area, in ***McLoughlin -v- Grovers*** **[2002] QB 1312** [66], the Court of Appeal stated that the approach to ordering the trial of preliminary issues should be as follows:

> "(a) Only issues which are decisive or potentially decisive should be identified.
>
> (b) The questions should usually be questions of law.

(c) They should be decided on the basis of a schedule of agreed or assumed facts.

(d) They should be triable without significant delay, making full allowance for the implications of a possible appeal.

(e) Any order should be made by the court following a case management conference."

33. I accept the Defendants' submission that the Court retains an overall discretion – in furtherance of the overriding objective – to direct trials of preliminary issues that do not meet these criteria (or all of them). Indeed, before Easter this year, there was a trial of a preliminary issue in a MAC List case on the disputed factual issue of whether the defendant had broadcast the programme upon which the claimant has sued (*Junejo -v- New Vision TV Limited*). Nevertheless, a case in which the Court directs determination of the preliminary issue that will require resolution of disputed issues of fact – involving disclosure, witness statements and cross-examination – must be regarded as an exception to the general rule, and one that requires careful consideration by the Court and very clear justification.

34. The last point noted by the Court of Appeal in ***McLoughlin*** [66(e)] is important for two reasons. First, it emphasises that the decision as to preliminary issues is one to be made by the Court in exercise of its case management powers. Second, the Case Management Conference in an action takes place *after* the parties have served and filed their statements of case. It is only after the statements of case have been filed that the parties and the Court are able to ascertain the full extent of the disputed issues between the parties. As Warby J noted in ***Brown -v- Bower*** [55] "*it may be hard for a defendant to persuade the court to order a preliminary issue without providing some kind of answer to the obvious question: 'preliminary to what?* "'.

35. The Defendants in this case clearly recognised that they had to set out their case (at least partially) in their efforts to persuade the Claimant to agree, and ultimately the Court to sanction, the proposal for a trial of preliminary issues. As I have noted, this involved provision of the Defendants' SoC. The preparation and submission of this document was not sanctioned by the Court, and its status is uncertain. It bears Leading Counsel's name, but it is not verified with a statement of truth. It is common, now, when the Court directs the determination of preliminary issues of natural and ordinary meaning, fact/opinion and/or whether the publication is defamatory at common law, for a direction to be given that the defendant must set out, in writing, its case on the preliminary issue(s). However, reflecting the relatively narrow compass of the issues to be resolved, this requirement is usually satisfied in little more than a single page.

36. This is the second case this year in which I have seen the parties, anxious to avoid filing a Defence, generating what I would describe as shadow pleadings, at what must be significant cost. Unless expressly sanctioned by the Court, this must not happen. The parties must comply with the conventional steps and timetable provided by the CPR. If they wish to depart materially from them, then the Court's approval must be sought and obtained. Although the parties to litigation have a duty to assist in the case management of a claim, ultimately the Court must remain in control. In this case, the parties have taken considerable time, and expended very large sums of money, devising elaborate preliminary issues, and preparing the Defendants' SoC. All this industry, and

its associated cost and delay, took place without the Court being asked for approval at any stage. This must not happen.

Decision

37. I refuse to direct the trial of the preliminary issues identified by the parties. They are factually complicated, will require disclosure, witness statements and cross-examination of witnesses at a three-day trial. They do not meet the criteria for trial of preliminary issues, and I am not satisfied that this is one of the exceptional cases where the benefits nevertheless outweigh the significant downsides in terms of cost and potential complexity and delay. It is also apparent, from the indications already given by the Claimant and Defendants in correspondence, that there are disputed issues of law that would require resolution in any trial of the preliminary issues sought. That raises the spectre of the decision on the preliminary issues giving rise to an appeal.

38. I recognise that the Defendants' indication that, if the Claimant were to prevail after the trial of those preliminary issues, they would make an offer of amends is a factor to be considered. Understandably, it was this that originally attracted the Claimant to the proposal, and it does attempt to meet what would otherwise be a substantial objection as to the extent of what would remain to be resolved in the claim if the Defendants were unsuccessful at the trial of the preliminary issues.

39. However, in my judgment, there remain fundamental problems with this approach. I sought to explore, at the hearing, how the Claimant or the Court could enforce the promise to make an offer of amends, if the preliminary issues were resolved in the Claimant's favour. One possibility, canvassed at the hearing, was the Court requiring an undertaking from the Defendants that they would make an offer of amends, as a condition of making the direction for trial of the preliminary issues. But, I am instinctively uncomfortable at this suggestion. Not only would such an undertaking require very careful drafting, as ***Warren*** demonstrates, but circumstances in litigation can also change, and a defendant may – for perfectly legitimate reasons – subsequently not wish to make an offer of amends because of some unanticipated development. It would hardly be consistent with the offer of amends regime 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. I can see that fundamental objections might be raised to such a course, and the whole issue would be positively bristling with points that could easily lead to an appeal.

40. Even if this issue could be satisfactorily resolved, I would still refuse to direct the trial of the preliminary issues. Fundamentally, I am not prepared to direct the trial of preliminary issues where there remains significant uncertainty as to the parameters of the litigation thereafter. Although the Defendants have indicated that they would make an offer of amends if the Claimant prevailed at the preliminary issue trial, it is quite clear that this will not be the end of the litigation. Whilst Ms Evans QC quite properly, and frankly, indicated the issues that the Defendants intend to challenge even if the offer of amends were accepted (see [18] above), as no Defence has been served, it is impossible for the Court (or the Claimant) to assess the extent of this challenge. The absence of a Defence is due to the Defendants' efforts to preserve their ability to make an offer of amends.

41. I reject Ms Evans QC's submission that a defendant has any 'entitlement' to have "threshold issues" in a defamation claim determined by way of preliminary issues. There is no such entitlement. If a defendant wishes to dispute a claimant's claim in respect of one or more of the "threshold issues" (i.e. publication, reference, meaning, whether the words are defamatory at common law, and/or serious harm to reputation) it can do so. Some of these issues may be suitable for determination by way of preliminary issue, as set out above, and capable of resolution prior to service of a Defence. Others are not. Whether the Court directs resolution of a particular preliminary issue, prior to service of a Defence, will require consideration of whether the overriding objective would be served by so directing, not simply to preserve a defendant's ability to make an offer of amends. In some defamation claims – like this one – the proposed preliminary issues are complex, and their resolution would require determination of significant factual dispute. As in this case, the Court may conclude that such issues should not be resolved as preliminary issues, and certainly not before ascertaining the full extent of the disputed issues in the claim following exchange of statements of case.

42. Ms Rogers QC was right when she summarised that the Defendants were prepared to make an offer of amends, but wanted a trial first. That is not how it works. As is established clearly in the authorities, the offer of amends regime is available for those defendants who wish to admit liability. Here, far from 'putting their hands up' and looking for an 'exit route', the Defendants are disputing – on several fundamental grounds – that the Claimant is entitled to any relief at all. The Defendants are not admitting liability; they are vigorously contesting it (albeit in respect of several "threshold issues" rather than by raising one or more substantive defences).

43. The Defendants are fully entitled to take this position – and to ask the Court to resolve the issues that they raise in opposition to the Claimant's claim. However, because of the complexity of the issues raised and their unsuitability to be resolved as preliminary issues, in this case, they will have to choose between raising this challenge (and disputing liability) in a Defence or making an offer of amends. In Warby J's words, the Defendants have sought to preserve the option of making an offer of amends as a "*fallback… after they have tried their luck with a preliminary issue*". On the facts in this case, they cannot achieve this because the issues they want the Court to resolve are not suitable for determination by way of preliminary issue.

44. Indeed, in their efforts to preserve the option of making an offer of amends, the Defendants seem to me to have rather lost sight of the economic reality of this approach. The Defendants have (already) incurred costs of some £174,000 (ignoring the Claimant's costs of the exercise). Ostensibly, this has been done to try and preserve a discount on any damages (that would otherwise be payable) as a result of making an offer of amends. Even assuming that the Defendants were successful in obtaining a discount in the order of the 30% suggested by Ms Evans QC, the costs of securing that discount would almost certainly exceed the ultimate value of it. And that is before the Court has resolved whether, where a defendant has made a comprehensive attack on a claimant's entitlement to any relief in his/her claim and contested a three-day preliminary issue trial, a defendant would get anything like a 30% discount under the offer of amends regime. The point does not arise for determination now, and it may arise for decision in a subsequent case, but I can see force in Ms Rogers QC's submission that a discount of 30% may well not be appropriate.

45. For these reasons, the Defendants' application for a trial of preliminary issues is refused.

46. There is one final point on the Claimant's Amended Particulars of Claim that needs to be addressed before the time for service of a Defence is fixed. Paragraph 8 of the Particulars of Claim sets out five meanings that the words complained of in the Article are said to bear, "*in their natural and ordinary meaning and/or by way of innuendo*". A further separate innuendo meaning is advanced in Paragraph 10 of the Particulars of Claim. This form of pleading – although common – is rarely appropriate where multiple meanings are advanced. A claim in respect of an innuendo meaning is a separate cause of action. The rolled-up nature of Paragraph 8 leaves it unclear which of the meanings is being alleged to be conveyed by way of natural and ordinary meaning or innuendo (or both). The pleaded case should make this clear. This is a point that has occurred to me following the hearing. As Ms Rogers QC has not had an opportunity to make submissions on it, I will give the Claimant an opportunity to advance any arguments when this judgment is handed down. My provisional view, subject to further argument, is that the Amended Particulars of Claim, should be further amended so that the claims in respect of natural and ordinary meanings and innuendo meanings are clearly and separately identified. Once a timetable is fixed for that to be done, a date for service of the Defence can be fixed.