



Neutral Citation Number: [2022] EWHC 3333 (KB)

Case No: QB-2017-006111

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**

**As amended under the slip rule pursuant to CPR 40.12 (1)  
on 21 December 2022 by Mr Justice Freedman  
Amended pursuant to the order of Mr Justice Freedman  
dated 25 May 2023 lifting Reporting Restrictions**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/12/2022

**Before :**

**MR JUSTICE FREEDMAN**

-----  
**Between :**

**(1) BES COMMERCIAL ELECTRICITY  
LIMITED**

**(2) BUSINESS ENERGY SOLUTIONS LIMITED**

**(3) BES WATER LIMITED**

**(4) COMMERCIAL POWER LIMITED**

**- and -**

**CESHIRE WEST AND CHESTER COUNCIL**

**Claimants**

**Defendant**

-----  
**Phillip Marshall KC and Matthew Morrison (instructed by Weightmans LLP) for the  
Claimants**  
**Fiona Barton KC and Sarah Dobbie (instructed by Clyde & Co LLP) for the Defendant**

Hearing date: 5 December 2022  
-----

**Costs Budget and Permission to Appeal Approved  
Judgment**

**This judgment was handed down remotely at 10.30am on Wednesday 21 December 2022 by circulation to the parties or their representatives by e-mail. Following a lifting of reporting restrictions the judgment was released to National Archives on 25 May 2023.**

**~~REPORTING RESTRICTION~~**

**~~By reason of the order made by the Court on 29 November 2021 imposing reporting restrictions in this case, the publication of this judgment in any manner whatsoever is prohibited until the conclusion of the Criminal Proceedings or further order of the court.~~**

**LIFTING OF REPORTING RESTRICTIONS**

**By reason of an order made by the Court on 25 May 2023, the Reporting Restrictions previously in operation as a result of an order made by the Court on 29 November 2023 have been lifted.**

**MR JUSTICE FREEDMAN:**

1. As part of the consequentialia to the hand-down of the judgment, two issues arose for consideration, namely the Defendant's application to depart from the Costs Budget and the Claimant's application for permission to appeal. The determination of the Court in respect of these matters is as follows.

**Costs Budget**

2. The Defendant seeks an order that the Defendant had good reason to depart from its Precedent T in respect of the PTR, Trial Preparation and Trial phases due to the extended duration of the PTR and Trial and significant developments in the litigation subsequent to the budgeting process. The costs of such phases to be assessed by a costs judge if not agreed.
3. The Defendant filed a Precedent T on 16 November 2021 and applied to increase its costs budget. The matter was raised in open court on 17 November 2021 but was not determined. The Precedent T set out the amount of the increase being sought and the grounds in support of that increase.
4. The Claimants say that this is a matter which is reserved to the costs judge and that the Court does not have jurisdiction to deal with it. In the event, it is not necessary for the Court to decide whether it has jurisdiction because I am satisfied that it is more expedient that the Costs Judge should deal with the points. That is for the reasons which follow.
5. In respect of most of the matters, the Costs Judge will have more information than this Court to make the assessment. This applies especially to the following:
  - (i) The costs projected for the PTR and the reasons why this extended. This Court knows about the application which was added to the PTR of the application to strike out witness statements, but the detail of the other applications and how they became extended or more expensive are matters where the Costs Judge will have more information than is available to this Court;
  - (ii) The trial preparation which became dogged by issues regarding trial bundles and the like are again not known to this Court. I was able to see that there was a vast number of bundles, and it is not difficult to imagine the difficulties of the kind of which I was told. However, the Costs Judge will be able to see the nature and extent of the problem and its consequences and will thereby have a deeper understanding.
  - (iii) As regards the trial itself, I do have some greater degree of knowledge than about other matters. However, my knowledge is not greater than that which will be available to a fully appraised Costs Judge. The Costs Judge will see the documents in the context of an examination about costs, whereas I was island hopping from file to file, able to see the magnitude, but with little appreciation of how the documents grew to a

degree which has prompted the application to depart from the costs budget. The Costs Judge will look at the documents with a degree of experience of when such growth of the documents is a usual incident of a case leading to a long High Court trial, and when the volume of documentation and the length and complexity of the case is such that there is a good reason to depart from the costs budget.

6. In the alternative, I was asked to provide a narrative of matters which were within my knowledge where I could give indications to the Costs Judge short of directing the Costs Judge. The trial grew very considerably in size due at least in part to (a) the length of the evidence, (b) the applications made at trial and contested for (i) reporting restrictions, and (ii) the use of materials obtained in the execution of the search warrants (both applications being of great importance to both parties), and (iii) the very extensive written submissions of unusual length with citation of over a hundred authorities. There was a gap in time between the conclusion of the evidence and the oral submissions for the preparation of closing submissions. I am reminded that the gap in time was of 6 days, and an analysis of the respective written submissions will indicate that a gap of some time at least, perhaps the whole of the 6 days, was required.
7. I do not embark upon a narrative. I do not wish to do that because I wish the details and the exercise as a whole to be left to the Costs Judge. As I said in argument, a narrative might be counter-productive because in emphasising some points, it might be thought, however I were to couch it, that these were the only, or the main, points. In my judgment, the parties are well able to give to the Costs Judge a perspective which will be fuller and more valuable to a Costs Judge than my observations. A particularly helpful feature for the parties is the ability to refer to the daily transcripts from which submissions as to the length of the hearing and the ways in which the case is alleged to have become more complex can be developed and cross-referenced.
8. Any narrative by reference to the points set out in paragraph 6 above can be developed in much greater detail by the parties for the benefit of the Costs Judge. The above is anodyne rather than some unique perspective or set of views which a trial judge might in a particular case be able to give. I wish to add that in not providing a narrative, in no way am I giving a silent steer to the effect that there is no good reason to depart from the Costs Judge. From what I have seen, this will be a very detailed and perhaps hotly contested application. I shall say no more and leave the rest to be developed by the respective parties before the Costs Judge.

### **Permission to appeal**

9. The Claimants seek permission to appeal on two points out of the many points which were decided in the course of the case. The threshold is a real prospect of success or some other compelling reason for the appeal to be heard: see CPR 52.6.
10. Although the application is about two specific points, it is important to note at the outset that the points are not hermetically sealed but are to be seen in the context of

the findings as a whole in the case. They both concern aspects of the conduct of Mr Bourne. There were two days of cross-examination set aside for Mr Bourne. There were also days of cross-examination of witnesses whose statements had been taken by him. The Court had the benefit of reading a substantial body of contemporaneous evidence against which its findings were made. All of this lasted many days both inside and outside the courtroom.

11. In numerous respects, Mr Bourne's evidence was characterised as dishonest and malicious including procuring false statements. There were in the Claimants' closing submissions about 35 pages of submissions about his evidence and supplemented by an appendix making some further observations about Mr Bourne. The Defendant had an appendix containing a further 15 pages of extracts from Mr Bourne's evidence. The Judgment considered Mr Bourne and his evidence at paras. 149-251. I found that Mr Bourne was neither dishonest nor malicious, and dealt in detail with large aspects of his evidence, whilst saying at para. 148 that I would not deal with every point in the Judgment.
12. In respect of the submission regarding the Human Rights Act 1998 ("HRA"), I reject the submission that on the facts of this case, there is a point of law requiring further elucidation. As set out in the Judgment, I found that the communications were limited in their ambit, were not specific and there was no evidence that they had any significant effect: see [267]. In this context, I found that the matters alleged did not reach the minimum level of seriousness required to engage the operation of the Convention. This is a challenge about facts and a conclusion which was available to the Court on the evidence as a whole.
13. The Claimant criticised the fact that the relevant duties regarding confidentiality and the like relevant to Article 8 were not developed in the section of the judgment about the HRA. In fact, they were considered in the section about unlawfulness in connection with untargeted malice in the Judgment at [141-147]. This reflected the Claimants' opening and closing in connection with untargeted malice: see their opening at [15-29] and their closing at [477-478]. In connection with the disclosure of information for the purpose of the HRA, they simply referred back to the sections in respect of misfeasance: see [483]. Likewise, the Judgment, the section in respect of the HRA referred back to the section about misfeasance [258, 260, 268]. The application for permission to appeal contains a different emphasis from the Claimants' closing: see the Judgment at [255-256].
14. The Court cited the relevant law as regards a certain level of seriousness at paras.261-263. Everything depends on the facts of each case, and the detailed reference to case law during the oral application for permission only underlines how different each case is and how they are each to be determined on their own facts.
15. The Judgment explains why the minimum level of seriousness was not reached in the instant case, and in particular, the communications were
  - (i) very limited in their ambit; see para. 267(1);
  - (ii) not particularly specific revelations about the investigation: see para. 267(2);

- (iii) to people with whom the Defendant was in contact and was entitled to have some communication in connection with the investigation: see para. 267(2);
  - (iv) to people who were already committed to obtaining redress whether for themselves or others, and who were going to provide statements in any event: see para. 267(1) and para. 267(2);
  - (v) neither to the media (as in the case of *Richard v BBC* [2019] Ch. 169 cited at length by the Claimants in oral submissions in the permission application) nor to members of the public who were previously ignorant of the information provided: see para. 267(1).
16. It is also part of the analysis as to whether it reached a certain level of seriousness that there was no identified loss or evidence that they had any significant effect: see para. 267(2) and para.267(3). It is not an answer to this that causation and loss was hived off in that it was relevant to the minimum level of seriousness that some significant consequence could be identified.
17. In the instant case, there were extensive findings of fact which rejected the very wide ranging attack of Mr Bourne’s evidence and of his actions. Although most of the Judgment is not the subject of criticism, in respect of the selection of what remains, these are challenges of factual matters which, in my judgment, do not give rise to a real prospect of success on appeal.
18. The same applies to the challenge to the findings in respect of untargeted malice. The Claimants submitted that the communication of Mr Bourne with Mr Scrivener in the face of an identified need to “take a step back from Mr Scrivener” cast the position of Mr Bourne as regards malice and dishonesty in a completely different light. This does not provide a basis for a challenge in that (a) the Judgment took into account these communications: see especially [194-200], (b) nothing was identified which compromised the investigation, (c) the communications as a whole have been considered in detail and led to conclusions which are not invalidated because of particular observations of the Claimants. Such attacks on factual findings have no real prospect of success in an appeal: see *Watson Farley and Williams v Ostrovitzky* [2015] EWCA Civ 457 at [6-9] per Burnett LJ (as he then was) citing *McGraddie v McGraddie* [2013] UKSC 58 and *Fage UK Limited v Chobani UK Limited* [2014] EWCA Civ 5.
19. Although the Claimants’ written submissions comprised about 12 pages and their oral submissions were in excess of an hour, the foregoing brief matters suffice in addition to the Judgment itself. In my judgment, the threshold for permission to appeal is not reached, and accordingly, the application is refused.