Neutral Citation Number: [2024] EWHC 1873 (KB)

Case No: KB-2022-004473

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2024

Before :

MRS JUSTICE HILL DBE

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Between :

ASHRAFUL ALAM KHOKAN — **Claimant**

- and -

JAWAD HOSSAIN NIRJHOR — **Defendant**

Re: Costs

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- -

Wakil Ahmed (Solicitor Advocate (Civil), Amanah Solicitors) for the Claimant
Russell Wilcox (**Counsel,** instructed by **Stone White Solicitors**) for the **Defendant**

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Approved Judgment

This judgment was handed down remotely at 2:00 pm on 19 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

Mrs Justice Hill DBE:

Introduction

1. This is my judgment on consequential matters arising out of the strike out of this claim. The claim was automatically struck out, pursuant to my order dated 7 June 2024, because the Claimant did not pay an outstanding costs order of £20,646.58 by 4 pm on 14 June 2024. That sum reflected an immediate costs order made by Senior Master Cook on 21 February 2024. On the same day I ordered the Claimant to pay security for costs. These issues are addressed in my judgment at [2024] EWHC 1872 (KB). I also conducted a Pre-Trial Review ("PTR") ahead of the trial of the claim, then listed to start on 1 July 2024.

2. The Defendant now seeks an order that the Claimant pay his costs of the claim, including his costs of the hearing to address consequential matters, on an indemnity basis. He also seeks to vary his costs budget. The Claimant seeks an order that the Defendant pay all his costs; alternatively a percentage of his costs to reflect the period of time until service of the Defence, to reflect the Defendant's failure to engage with the pre-action protocol process.

The claim in overview

3. The Claimant is a journalist of Bangladeshi origin living in the United States of America. He previously served as the Prime Minister of Bangladesh's Deputy Press Secretary from 2013 to 2022. The Defendant is an investigative journalist and editor-in-charge of corruptioninmedia.com, described as a non-profit outlet based in London, which investigates and reports upon corruption amongst Bangladeshi journalists and media organisations.

4. The claim related to the publication by the Defendant on 8 March 2022, on three separate social media platforms, of a video entitled "Gujob Khokan", meaning "Speculative Khokan". It was claimed that in their ordinary and natural meaning, each of the videos bore, and was understood to bear, a series of imputations about the Claimant that were defamatory, primarily as follows: (a) the Claimant was the mastermind behind the killing of a senior journalist on 4 September 2018, who was killed because he was having an affair with the Claimant's wife; and that the Claimant then tried to cover up the death; (b) the Claimant, through nepotism rather than merit, obtained a high-ranking position within the Prime Minister's Office in Bangladesh and subsequently abused his position by engaging in a slew of serious criminal activities, including embezzlement, extortion and corruption; and as a consequence he was removed from his position and forced to leave the country; and (c) the Claimant is a womaniser with an addiction to alcohol who had engaged in a large number of extra-marital affairs.

The general rule with respect to costs and the Defendant's application for judgment

5. The general rule regarding the making of a costs order is set out at CPR 44.2(2), to the effect that "If the court decides to make an order about costs (a) the general rule is that

the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order".

6. In his skeleton argument Mr Ahmed contended that the Defendant could not be considered the successful party for the purposes of CPR 44.2(2) because he had not filed an application under CPR 3.5 for judgment to be entered in his favour.

7. The Defendant sought to remedy that by making such an application very shortly before the hearing to address consequential matters on 15 July 2024.

8. Mr Ahmed indicated that he had not been able to take instructions on the application but he did not seek an adjournment to do so. He did not actively oppose the application.

9. The 7 June 2024 order was "self-executing" meaning that it specified that non-compliance by the Claimant with the relevant cost order would automatically lead to the claim being struck out, without further order. It is arguable that an application under CPR 3.5 is not required in respect of such self-executing orders. To the extent that it is, I allow the Defendant's application for judgment in his favour under CPR 3.5. I also abridge time for the service of the application to the extent necessary.

10. The Defendant having obtained judgment in his favour for the entirety of the claim, and the Claimant having achieved no part of what he sought to achieve by the claim, the Defendant is the successful party for the purposes of CPR 44.2(2). The general rule therefore applies, namely that the Claimant should be ordered to pay the Defendant's costs, unless there is a basis for making a different order.

The general discretion with respect to costs

11. CPR 44.2(4)-(5) provide that:

> "(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
>
> (5) The conduct of the parties includes –
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action
> protocol;

> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

Whether to apply the general rule

12. The Defendant's overarching position was that there was no good reason why the general rule should not apply; and that this was underscored by various aspects of the Claimant's conduct under CPR 44.2(4)(a).

13. The Claimant, in turn, relied on various aspects of the Defendant's conduct as a basis for departing from the general rule.

(i) The Claimant's conduct of the litigation and his finances

14. Mr Wilcox submitted that the claim had many of the hallmarks of a Strategic Lawsuit Against Public Participation (a "SLAPP"). Reliance was placed, for example, on the fact that the Claimant has sought to bring a claim in the courts of England and Wales whilst he has failed to bring proceedings for defamation in other jurisdictions for similar statements against better resourced opponents, suggesting that he thought the Defendant, being of very limited means, was a "soft target". These points were further detailed in the 14 February 2024 witness statement from the Defendant's solicitor, Ushrat Sultana. I have already accepted, in my 7 June 2024 judgment on the unless order and security for costs applications, that the claim shares some of the features of a SLAPP.

15. He also contended that the claim had been brought and pursued by the Claimant with vigour until a very late stage. He had put the Defendant to great expense and inconvenience and then abandoned the claim. This was an accurate analysis. The claim was issued on 15 November 2022. The conduct of the litigation included complex contested hearings of applications before HHJ Lewis sitting as a Judge of the High Court on 11 May 2023, before Senior Master Cook on 21 February 2024 and before me on 7 June 2024. The claim was struck out on 14 June 2024, shortly before the 7 day trial that was due to commence on 1 July 2024.

16. Further, although Mr Ahmed submitted that the claim had simply been struck out due to the Claimant's impecuniosity, in my 7 June 2024 judgment I accepted the various criticisms the Defendant had advanced in respect of the Claimant's evidence as to his finances. I specifically accepted that the evidence suggested that the Claimant was being evasive, possibly even untruthful, in relation to his assets and was taking or had taken steps to conceal the extent of his assets. In those circumstances the Claimant's finances are not a good reason to depart from the general rule with respect to costs.

17. There is even more force in this point given that (i) the Claimant has still not paid Senior Master Cook's costs order, despite the order from me that he do so; (ii) he continues to engage lawyers at considerable expense at this late stage; and (iii) without prejudice save

as to costs correspondence which I have now been shown indicates that he has made offers to settle all the costs liabilities, but has not done so.

18. In any event, even if the Claimant's finances were the reason why he had failed to pay the costs order such that the claim was struck out, this would not necessarily justify a departure from the general rule that as the losing party he should pay the Defendant's costs: see, by analogy, *Nelson's Yard Management Company and others v Eziefuela* [2012] EWCA Civ 335; [2013] BLR 289 at [14].

19. In my judgment all these features of the Claimant's conduct of the litigation add weight to the argument that the general rule should apply.

(ii) The Defendant's conduct at the pre-action stage

20. Mr Ahmed relied on the Defendant's failure to engage with a series of pre-action letters sent from 1 April to 25 May 2022. This was, he argued, egregious conduct which should sound in costs. *Nelson's Yard* indicates that such conduct can sound in costs even where it is the Claimant who has ended the claim.

21. Mr Wilcox accepted that there may have been "mis-steps" with respect to the Defendant's conduct of the claim before he instructed lawyers. However it is relevant that this was a complex claim and the Defendant has a limited capacity to understand English.

22. Had the Defendant instructed lawyers earlier, it is likely that a substantive response to the letter of claim would have been sent. However this would in all likelihood simply have set out the defences the Defendant later relied on in the Defence. The fully pleaded Defence did not deter the Claimant for continuing with the claim and so it is unlikely that a greater engagement with the pre-action process by the Defendant would have done so.

23. It is also relevant that the Defendant's conduct at the stage before he instructed lawyers has already been penalised in costs by HHJ Lewis' order that he pay the Claimant's costs of his applications dealt with on that date, and of the hearing, even though those applications were dismissed.

24. For these reasons I am not persuaded that the Defendant's failure to engage with the pre-action process should sound against him in costs.

(iii) The Defendant's alleged failure to engage with settlement offers and Alternative Dispute Resolution ("ADR") during the currency of the claim

25. Mr Ahmed submitted that the Defendant failed to engage with the Claimant's attempts to settle the claim, once it had been issued, including the making of a Part 36 offer and proposals for ADR, and that this should be reflected in costs. I was taken through the various items of without prejudice save as to costs correspondence illustrating this process, from 13 October 2023 to 14 June 2024.

26. I have had regard to the guidance given by the Court of Appeal in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002. I remind myself that a failure to engage in ADR, even if unreasonable, does not automatically result in a costs

penalty: *Gore v Naheed* [2017] EWCA Civ 369; [2017] 3 Costs L.R. 509; [2018] 1 P & CR 1 at [49].

27. In my judgment it is not accurate to say that the Defendant entirely failed to engage with the prospect of settlement: the correspondence makes clear that the Defendant did make at least one counter-offer, as set out in his solicitor's letter of 13 June 2024, and I was told that there was at least one settlement meeting.

28. Moreover, I consider there is force in Mr Wilcox's submission that some of the offers made by the Claimant (such as one requiring him to give an undertaking in respect of the conduct of third parties in respect of re-publication) were ones he was entitled to be reticent about accepting.

29. Overall I do not consider that the Defendant's conduct of this aspect of the claim was such that it should be reflected in a costs order against him.

(iv) The merits of the claim and the correspondence about the intelligence reports

30. Mr Ahmed contended that the Claimant's claim was plainly meritorious and that I should take this into account when assessing costs. However as Mr Wilcox highlighted, the merits of the claim were hotly contested and will not now be the subject of determination by the court at trial.

31. The Defendant had relied heavily on two reports into the Claimant's conduct said to have been produced by the Bangladesh National Security Intelligence Agency. On the basis of matters detailed in those reports the Defendant had pleaded defences of truth and public interest.

32. However the Claimant had obtained letters from the High Commission to the People's Republic of Bangladesh in London and the press secretary to the Prime Minister of Bangladesh suggesting that the intelligence reports had been fabricated. The Claimant also provided me with a letter purportedly sent by the High Commission to the Defendant's solicitors on 27 June 2024 standing by the earlier correspondence. On the basis of this correspondence Mr Ahmed contended that the Defendant had behaved egregiously in relying on the false intelligence reports such that the defence was bound to fail at trial. These letters, he said, vindicated the Claimant's claim.

33. The Defendant did not accept that this correspondence was genuine, pointing out that the letters are not signed or supported by statements of truth. He had intended to test this matter at trial, but that will not now occur. Further, in Ms Sultana's 11 July 2024 witness statement, she gave evidence that the 27 June 2024 letter had never been received by her firm and that it was not clear how and under what circumstances the Claimant's solicitor had received that letter, nor who had written it. Resolving these issues involves potentially sensitive diplomatic matters.

34. However in *Nelson's Yard* at [14] and [32], the Court of Appeal reiterated the general principle, derived from several authorities, that once there is to be no trial it is not the function of the court considering costs to decide whether or not the claim would have succeeded. It is perhaps for this reason that the merits of the claim do not feature as one

of the general criteria to be taken into account in exercising the discretion with respect to costs under CPR 44.2 (4)-(5).

35. For these reasons I consider that it would be entirely inappropriate for me to seek to determine the veracity of the intelligence reports, or the various items of correspondence purporting to be from the High Commission or the press secretary to the Prime Minister of Bangladesh, for the purposes of determining the costs issues. I cannot therefore accede to the Claimant's argument that this correspondence illustrates the strong merits of the claim, or egregious conduct by the Defendant; or to take into account either factor against the Defendant in costs.

(v) The Defendant's alleged comments on social media during the currency of the claim

36. The Claimant provided a lengthy witness statement for the hearing in relation to consequential matters, without permission. This contained reference to a significant number of posts on social media said to have been made by the Defendant. It was said that these posts were abusive of the Claimant and his family and had breached the undertaking not to use documents disclosed in litigation for a collateral purpose.

37. Given the short timescale between service of the statement and the hearing, and the number of allegedly abusive posts relied on, the Defendant's legal representatives had been unable to verify the translations of the posts by the Claimant or take proper instructions on them. Mr Wilcox submitted that it would not be fair for me to rely on these allegations without affording the Defendant time to check the translations and provide his own evidence of allegedly abusive threats made recently by the Claimant to the Defendant and his family. Mr Wilcox said, on instructions, that there had been such threats made. He also directed me to parts of the Defendant's witness evidence for trial in which he detailed examples of similar previous conduct by the Claimant.

38. In my judgment it would not be appropriate for me to make findings at this stage about the veracity of the comments relied on by the Claimant for the reasons given by Mr Wilcox; and it would not be proportionate to permit the Defendant to provide further evidence on this issue. Even if such evidence were to be provided in future, a "mini-trial" in relation to the allegedly abusive posts on both sides would be disproportionate to the costs issues, in the context of the circumstances of the case as a whole. It would also arguably be inappropriate in principle, not least as it would sit uncomfortably with the observations about the lack of relevance of the merits to costs issues set out in *Nelson's Yard* at [14] and [32].

Conclusion

39. For all these reasons I consider that there is no good reason to depart from the general rule that the Claimant as the unsuccessful party should pay the Defendant's costs of the claim.

The Defendant's costs budget

40. As to the level of the Defendant's costs, the original costs budget dated 8 November 2023 involved incurred costs of £18,913.70 and estimated costs of £76,000.

41. In my order from the PTR, I made provision for the parties to file proposed revisions to their costs budgets in the form of Precedent T's by 21 June 2024. The Defendant did not do this because by this point the claim had been struck out. He did not serve his Precedent T until 8 July 2024. I am satisfied that he was entitled to wait until the hearing to determine consequential matters before serving the Precedent T.

42. However the revisions sought are very extensive and reflect an additional £82,954.78 in estimated costs, thereby more than doubling the estimated costs figure if permitted.

43. The Defendant seeks to increase the budgeted figure for the issue/statements of case, disclosure, witness statements and PTR phases. These are said to reflect, respectively, (i) the need for counsel to provide further voluntary particulars of the claim and a detailed Advice engaging with the alleged SLAPP element of the claim, and recent overseas authority on the same; (ii) additional work to consider a further 222 pages of material disclosed by the Defendant during the process of preparing witness statements and some 47 hours to transcribe and translate some audio/visual material; (iii) preparing witness statements for two further witnesses whose existence emerged after the Case Management Conference where the original budget was approved; (iv) the fact that the PTR went ahead; and (v) the fact that the Defendant had already had to pay for the flights, accommodation and a visa for his witnesses to attend trial as well as the foreign process service fee, given that the claim was only struck out three weeks before trial.

44. The Defendant also seeks to amend his costs budget to reflect Contingencies A and B, namely (i) the costs incurred on the various interlocutory applications; and (ii) the costs of the hearing to determine consequential matters.

45. CPR 3.15A provides as follows:

> "(1) A party ("the revising party") must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions.
>
> (2) Any budgets revised in accordance with paragraph (1) must be submitted promptly by the revising party to the other parties for agreement, and subsequently to the court, in accordance with paragraphs (3) to (5)".

46. Mr Ahmed contended that the revisions to the Defendant's budget should not be permitted because the applications to revise the budget had not been made promptly, as required by CPR 3.15A(2). He cited *Persimmon Homes Ltd v Osborne Clarke LLP* [2021] EWHC 831 (Ch). At [99]-[101] thereof, Master Kaye reiterated that before revisions to a costs budget can be considered, there has to be a significant development warranting a revision and there has to be promptness. It is only if both those mandatory requirements are met that the threshold test is satisfied, such that the court will go on to consider whether as an exercise of discretion it should approve, vary or disallow the proposed variations pursuant to CPR 3.15A(5).

47. Applying those principles, I am satisfied that the revisions to the disclosure, witness statements, trial and PTR phases should be permitted. The same is true of the addition of Contingency A insofar as it reflects the Defendant's applications for an unless order and security for costs which came before me on 7 June 2024 and the addition of Contingency

B. In my judgment these all reflect significant developments in the litigation that were raised at the PTR or which relate to the process of determining consequential matters and which it is appropriate should be reflected in the costs budget.

48. However I take a different view in respect of the other elements of the Defendant's application to vary the costs budget. I obviously do not know the date of counsel's Advice but the voluntary further particulars were signed on 3 April 2024. I have no record of the need to vary the budget to reflect these developments being raised at the PTR. It is not clear why these issues were not raised earlier. Raising them at this late stage cannot be considered prompt.

49. The same is true of the other applications reflected in Contingency A, namely the Defendant's application to amend his Defence and the Claimant's application for summary judgment, which came before the Senior Master on 21 February 2024. The latter costs have, in any event, been summarily assessed on the indemnity basis and constitute the £20,646.58 unpaid costs order which led to the claim being struck out. On that basis, an application to vary the costs budget to reflect them seems otiose.

50. For these reasons I grant the Defendant permission to vary his costs budget but limited in the ways I have set out.

The basis of assessment

51. The Defendant contends that the Claimant should pay his costs on an indemnity costs basis throughout.

52. Mr Wilcox placed reliance on the principles set out in *Excelsior Commercial and Industrial Holdings Ltd* [2002] EWCA Civ 879; [2002] CP Rep 67, *Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595 and *Three Rivers DC v Bank of England* [2006] EWHC 816 (Comm); [2006] 5 Costs LR 714.

53. In summary, it is necessary to have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide. The critical requirement before an indemnity costs order can be made is that there must be some conduct or some circumstance which takes the case "out of the norm", which means "something outside the ordinary and reasonable conduct of proceedings".

54. In my judgment it is relevant that the Claimant's conduct has already been marked by indemnity costs orders by Senior Master Cook and by myself in respect of significant applications.

55. In *Three Rivers* Tomlinson J made clear that the court can and should have regard to the conduct of an unsuccessful claimant both before and during the trial, including the fact that a claim includes wide-ranging allegations of dishonesty or impropriety sustained over an extended period of time. Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that can be a further ground for indemnity costs.

56. However, here, there are allegations of dishonesty or impropriety on both sides. In essence the Defendant says that his publication about the Claimant was justified by

intelligence reports. The Claimant relies on correspondence which he says shows those reports have been fabricated. The Defendant doubts the veracity of that correspondence. For the reasons given at [31]-[35] above it would not be appropriate for me to seek to determine these issues for the purposes of the costs issues.

57. For all these reasons I am not persuaded that the Claimant's conduct of the claim justifies an order that he pay the entirety of the Defendant's costs on an indemnity basis.

The costs of determining the consequential issues

58. In my judgment a hearing on consequential matters was required given the disputes between the parties. The Defendant has succeeded on many, but not all, of the points he raised. Mr Ahmed has highlighted the late service of the Defendant's late application for judgment in his favour (see [7]-[9] above) as conduct that should sound in costs. However this application did not occupy much time during the hearing; was not actively opposed; and was arguably unnecessary, given that the claim had already been struck out.

59. In my judgment the appropriate order is that the costs of this aspect of the case are costs in the case. As the Defendant has succeeded overall, this means that the Claimant will pay those costs.

60. In my judgment the Defendant's costs of dealing with consequential matters should be summarily assessed, despite Mr Ahmed's submission to the contrary. They are a modest amount and the hearing in question was listed for 1 hour (although it took longer).

61. The Defendant sought costs in the sum of £6,357.48. This was lower than the £7,480 figure sought by the Claimant, but this reflected the fact that the Claimant chose to file the lengthy witness statement referred to at [36] above.

62. The costs sought by the Defendant included the costs of attendance at the hearing of two fee earners as well as counsel; and 3.5 hours preparing a bundle of over 1,500 pages of all the background documents in the case. I agree with Mr Ahmed that both these elements of the Defendant's costs were disproportionate. I therefore summarily assess the Defendant's costs of this aspect at £5,500.

Conclusion

63. For all these reasons, I order that the Claimant pay the Defendant's costs of the claim, on the standard basis. I permit some variations to the Defendant's costs budget. I have also addressed the costs of determining the consequential issues above.