Neutral Citation Number: [2020] EWHC 1924 (QB)

Case No: QB-2020-000089

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2020

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

YVONNE AMEYAW	**Claimant**
- and -	
(1) CHRISTINA MCGOLDRICK	**Defendants**
(2) LOUISE COYNE	
(3) PRICEWATERHOUSECOOPERS SERVICES LIMITED	

- -
- -

The Claimant represented herself
Rupert Paines (instructed by **Fladgate LLP**) for the **Defendants**

Judgment without a hearing pursuant to CPR 23.8(b)

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MRS JUSTICE STEYN DBE

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 9 July 2020 at 14:00

Mrs Justice Steyn :

A. Introduction

1. This judgment addresses an application notice filed by the Claimant on 6 July 2020. No draft order was attached to the application. Nevertheless, it is apparent from the Claimant's submissions that:

   i) The Claimant makes an application to set aside certain paragraphs of an order I made on 3 July 2020 ("the 3 July Order") in which I directed that various matters would be determined on the papers. In particular, the Claimant asks for an oral hearing to determine the Defendants' application to strike out the claim and/or for summary judgment.

   ii) The Claimant applies for an order that there be an oral hearing of the Defendants' application within the next 21 days;

   iii) The Claimant applies under the *Barrell* jurisdiction for amendments to be made to the judgment I delivered on 2 July 2020: *Ameyaw v PwC* [2020] EWHC 1741 (QB) ("the Judgment"), or for it to be "expunged" in its entirety; and

   iv) The Claimant applies for a stay of proceedings pending determination of the recusal application she made on 2 July 2020 – albeit I delivered judgment on that application on 6 July: *Ameyaw v PwC* [2020] EWHC 1787 (QB) ("the Recusal Judgment") – and pending an intended appeal against that judgment.

B. Procedural history

2. The procedural history leading up to the hearing on Wednesday 1 July 2020 is addressed in paragraphs 4 to 26 of the Judgment.

3. The hearing on 1 July 2020 was listed to determine the Defendants' application dated 30 March 2020 ("the Defendants' application") seeking:

   i) the determination of preliminary issues on (a) the meaning of certain statements of which the Claimant complains; (b) whether those statements are defamatory of the Claimant at common law or under s.1 of the Defamation Act 2013; and whether the statements complained of are statements of fact or opinion;

   ii) an order striking out the Claimant's claim pursuant to CPR 3.4(2)(a) and/or (b); and

   iii) an order for summary judgment under CPR part 24 and/or s.8 Defamation Act 1996 against the Claimant on the whole of her claim, because she has no real prospect of succeeding on the claim or issue and there is no other compelling reason why the claim or issue should be disposed of at a trial.

4. At the outset of the hearing on 1 July 2020:

i) The Claimant applied for the application for an interim injunction which she had filed the day before, 30 June 2020, to be heard on 1 July;

ii) The Claimant made oral submissions in support of her application dated 29 June 2020, seeking to have parts of the Defendants' hearing bundle struck out; and

iii) The Claimant made an oral application for Mr Ogilvy to be permitted to make oral submissions on her behalf.

5. I made an order on 1 July 2020 ("the 1 July Order") in the following terms:

> "1. The Claimant's application for her interim injunction application dated 30 June 2020 to be heard at the hearing on 1 July 2020 is refused.
>
> 2. The Claimant's application for parts of the Defendants' hearing bundle to be struck out and ruled inadmissible is refused.
>
> 3. The Claimant's application for her McKenzie friend, Mr Ogilvy, to be permitted to make oral submissions on her behalf is refused."

6. I gave brief *ex tempore* reasons for my decisions on these applications and, having been asked by the Claimant at the hearing on 1 July 2020 to provide my reasons in writing, and to do so speedily because she wished to appeal, I handed down the Judgment at 10am on 2 July 2020.

7. I adjourned the hearing on 1 July 2020 without hearing any submissions on the Defendants' application. In short, I adjourned the hearing until Friday 3 July 2020 in circumstances where the Claimant was absent (following an adjournment) and I was informed that an ambulance had been called for her. The circumstances, and my reasons for adjourning, are more fully explained in the Judgment and the Recusal Judgment.

8. At 3.28pm on 2 July 2020 an email was sent to the Court from the Claimant's email account, but from her mother on her behalf, stating that her daughter "*is unwell*" and "*unable to attend court whilst sick*" and attaching a letter dated 2 July 2020 from the Claimant's GP. Although I had not received an application to adjourn the hearing, on receipt of this email and medical evidence I indicated to the parties that I intended to consider of my own motion whether to adjourn the hearing and I invited any further submissions the parties wished to make.

9. Having considered the parties' submissions, I directed that the hearing listed for 3 July 2020 should be vacated. The reasons for this order are attached to the 3 July Order. Paragraph 12 of those reasons states:

> "In my judgment, in circumstances where the Claimant appears to have collapsed or fainted on Wednesday and was assessed by her GP on Thursday as having a current viral illness, it would

> be contrary to the interests of justice to press on with the oral hearing on Friday 3 July. Although the medical evidence is rather thin, that is understandable in the time available and given (as I say), the Claimant's reported symptoms and the current pandemic. Accordingly, on 2 July I directed that the hearing should be vacated, informing the parties that my order/directions and reasons would follow."

10. The 3 July Order is in the following terms:

> "1. The hearing on 3 July 2020 is vacated.
>
> 2. The Claimant's recusal application will be determined on the papers, without an oral hearing.
>
> 3. The Defendants' application for the determination of preliminary issues as to (i) the meaning of certain statements of which the Claimant complains; (ii) whether those statements are defamatory of the Claimant either at common law or under s.1 of the Defamation Act 2013; and (iii) whether the statements complained of are statements of fact or opinion, will be determined on the papers, without an oral hearing.
>
> 4. The Defendants' application for an order striking out the Claimant's claim pursuant to CPR 3.4(2)(a) and/or (b) and/or for an order for summary judgment under CPR Part 24 and/or s.8 of the Defamation Act 1996 against the Claimant on the whole of her claim, will be determined on the papers, without an oral hearing.
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> 5. The parties may file further written submissions in respect of the applications referred to in paragraphs 3 and 4 above and any such submissions must be filed and served by no later than Friday 17 July 2020.
>
> 6. Paragraphs 4 and 5 of this order are made without notice and of the court's own motion, and the parties or either/any of them may apply within 7 days of service of this Order upon them, to set aside or vary paragraphs 4 and/or 5 of this order. Any such application must be served on all other parties.
>
> 7. Costs in the case."

11. At paragraphs 13 and 14 of the reasons attached to the 3 July Order I stated:

> "13. Although the Defendants' primary position was that the hearing should proceed, in the alternative, if I determined that the hearing should be adjourned, they have sought a direction that the applications should be determined without a hearing.

> 14. The Claimant had asked for her recusal application to be dealt with on the papers. The only reason not to do so had been because the Defendants had not had an opportunity to respond, a hearing was listed for the following morning and there had been no application to adjourn it. The position has now changed. Both parties have made written submissions on the recusal application and both parties ask for it to be determined on the papers. Accordingly, I direct that it should be determined without a hearing pursuant to CPR 23.8(b) and (c). I have received submissions from both parties on this application and so I will proceed directly to determine the application."

12. On Monday 6 July 2020, I gave judgment dismissing the Claimant's application to recuse myself: see the Recusal Judgment.

13. In respect of paragraphs 3, 4 and 6 of the 3 July Order, I stated my reasons as follows:

> "15. The Claimant also applied for the preliminary issues to be dealt with on the papers. I had refused that application because there was considerable overlap between the preliminary issues and the strike out/summary judgment application, the application had been listed for a hearing and there was no good reason not to hear oral submissions in respect of the preliminary issues in those circumstances. However, the position has now changed. I have adjourned the hearing. In these circumstances, the position of both parties is that the preliminary issues should be determined without a hearing, with the parties being given an opportunity to provide further written submissions. I consider that it is appropriate in the circumstances to direct that this part of the application be determined on the papers pursuant to CPR 23.8(b) and (c).
>
> 16. As regards the Defendants' application to strike out the claim and/or for summary judgment, the Defendants' position is (again) that if – contrary to their primary submission – I determine that the hearing should be adjourned, the application should be determined without a hearing, with the parties being given a further opportunity to make written submissions in accordance with a tight timetable. The Claimant has not indicated positive support for this part of the application being determined without a hearing, but nor has she indicated that she objects to this course.
>
> 17. I have decided that it is appropriate in the particular circumstances of this case for the strike out/summary judgment application to be determined on the papers. In making this determination I have had regard to the following factors:
>
> a. The nature of the application, raising issues of law on the pleadings, is such that it can be properly and appropriately addressed on the basis of written submissions;

> b. In circumstances where the hearing has had to be adjourned, this course is sought by the Defendants, including two individual Defendants, in the interests of saving time and costs;
>
> c. It is apparent from the fact that the Claimant has positively asked for a number of applications to be dealt with on the basis of written submissions that, in general, this is a form of proceeding with which she is comfortable.
>
> d. In seeking permission for her McKenzie friend to make oral submissions, the Claimant expressed concern that she was not in a position to address the matters of law raised by the applications. Dealing with the applications on the papers, with a further opportunity for the parties to make written submissions, enables the Claimant to seek assistance, if she wishes, in addressing the issues in writing.
>
> e. I consider that it is in the interests of justice, and in the interests of dealing with this claim fairly and proportionately, to determine all of the related applications on the papers.
>
> 18. As the Claimant has not applied for the strike out/summary judgment application to be dealt with without a hearing, and as she has not expressly consented to this course (albeit I have no reason to believe that she objects), I have given an opportunity to the parties to seek to have this part of my order set aside or varied." (emphasis added)

14. On 2 July 2020, at 10.37am, Mr Ogilvy sent an email to the Court seeking amendments to what he referred to as a "*draft judgment*". This email appeared, on the face of it, to be sent on his own behalf, rather than on behalf of the Claimant. Indeed, Mr Ogilvy said, "*I fear that this is now about me and no longer about the Claimant*".

15. On 2 July 2020, at 1.54pm, my clerk sent an email on my behalf to the Claimant acknowledging receipt of her recusal application and stating:

> "With regard to Mr Ogilvy's email below [i.e. the email sent at 10.37], the final judgment was handed down at 10am this morning. Any objection to it would be a matter for appeal. You may, of course, seek permission to appeal if you wish to do so."

16. On 2 July 2020, at 1.57pm, Mr Ogilvy sent an email to the Court stating:

> "It is not about permission to appeal.
>
> Please pass my email to the judge as l invoke the Barrel jurisdiction inviting the learned [judge] to review that aspect of her judgment which requires judicial determination."

17. On 2 July 2020, at 4:47pm, I invited Mr Ogilvy, if he wished to invoke the *Barrell* jurisdiction, to explain precisely what he was seeking, the basis for his application, and the basis on which he submitted it fell within the *Barrell* jurisdiction. On 3 July 2020, at 11.40am, Mr Ogilvy asked to be given until 6 July 2020 to file written submissions invoking the *Barrell* jurisdiction, to which I agreed. At 2.11pm the same day, the Claimant's mother emailed the Court seeking amendment of the Judgment. My clerk responded on my behalf at 3:42pm the same day:

> "The Judge understands from the Claimant's McKenzie friend that the Claimant wishes to seek amendments to the judgment handed down yesterday, pursuant to the *Barrell* jurisdiction. The Judge has invited the Claimant to explain what she is seeking, the basis on which any changes are sought, and the basis on which the jurisdiction is invoked. The Judge understands the Claimant intends to provide such submissions on Monday. If she does so, the Judge will consider them."

18. On 3 July 2020, at 12.45pm, Mr Ogilvy indicated that the Claimant objected to the strike out and summary judgment application being determined without a hearing. My clerk sent an email on my behalf at 1:31pm stating that the Claimant could, in accordance with the express terms of the order, seek to set aside or vary paragraphs 4 and/or 5 of the 3 July Order, and that if she wished to do so she should file an application.

19. On 6 July 2020, the Claimant filed the application which is the subject of this judgment. The Claimant sought determination of this application on the papers. On 7 July 2020, the Defendants filed submissions in response and confirmed that they agreed to the Claimant's application being determined without a hearing, pursuant to CPR 23.8(b).

C. Application to set aside parts of the 3 July Order

Paragraph 4 of the 3 July Order

20. The Claimant seeks to have the Defendants' application to strike out the claim and/or for summary judgment heard at an oral hearing. My order that it should be determined on the papers was made in circumstances where the Claimant had not objected to this course, and there were reasons to consider that it was a procedure she might prefer, but it was expressly stated to be variable precisely in order to give the Claimant an opportunity to object if she wished to do so.

21. The Claimant has now objected, and the Defendants agree that in these circumstances it is preferable for the Court to list an oral hearing. Accordingly, the Defendants' strike out and summary judgment application will be listed for an oral hearing and paragraph 4 of the 3 July Order will be set aside.

22. As this aspect of the Claimant's application is agreed, it is not necessary to address the Claimant's submissions on it. However, I should note that the Claimant's reference to the need for cross-examination appears to misunderstand the nature of a strike out and summary judgment application. It is of course open to the Claimant to contend that the claim cannot properly be determined without cross-examination and

so should not be subject to summary determination. The submissions that the claim should be allowed to go to trial will be a matter for argument when the Court hears the strike out/summary judgment application.

Paragraph 3 of the 3 July Order

23. Paragraph 3 of the 3 July Order provides for the preliminary issues identified in the Defendants' application to be determined without an oral hearing. Those preliminary issues are (i) as to the meaning of certain statements of which the Claimant complains; (ii) whether those statements are defamatory of the Claimant either at common law or under s.1 of the Defamation Act 2013; and (iii) whether the statements complained of are statements of fact or opinion.

24. In an application filed on 29 June 2020, the Claimant sought an order in the following terms:

> "The application for an order determining preliminary issues shall be without a hearing. The parties are ordered to file and serve any written submissions no later than 4pm on 6 July 2020."

25. In submissions attached to the application, the Claimant contended at paragraph 9:

> "In *Hewson v TNL & ANL* [2019] EWHC 650 (QB), Nicklin J (who was appointed as a specialist media judge in September 2017) opined that there was no practical reason why meaning cannot be determined without a hearing, based on the parties' written submissions, and that the resulting costs and time saving would clearly be in furtherance of the overriding objective. Whilst the parties in that case consented to such a procedure (as in *Hamilton*), he indicated that the court may nevertheless direct it in future cases. The court is respectfully urged to adopt this procedure in respect of meaning of words and give further directions related to this aspect rather than conflating meaning with the application for strike out."

26. By an order dated 30 June 2020 ("the 30 June Order") I refused the Claimant's application. In giving reasons I said:

> "The Defendants made their application three months ago and notice that the hearing was in the warned list for this week was given by the Court more than two weeks ago. The hearing is going ahead tomorrow and sufficient time is available for the preliminary issues (as well as other matters) to be heard. There is no good reason, and in the circumstances it would be unjust, to preclude the parties from making oral submissions in relation to the preliminary issues at the hearing that has been listed (in part) for that purpose."

27. As these reasons make clear, I refused the Claimant's application for the preliminary issues to be determined without a hearing essentially because they were listed for

hearing the following day. Pushing the preliminary issues off for determination on the basis of further written submissions, rather than hearing oral submissions the following day, would have added to the time and costs involved.

28. However, as I explained in the 3 July Order, the position changed when the hearing on 1 July was adjourned to 3 July, and then the 3 July hearing was vacated. First, the preliminary issues were no longer due to be determined at an imminent hearing. Secondly, the Defendants agreed that they should be determined without a hearing if the 3 July hearing had to be vacated.

29. Paragraph 6 of the 3 July Order did not give permission to seek to set aside or vary paragraph 3 because I understood the parties were in agreement that the preliminary issues should be determined without a hearing.

30. The Claimant's submissions in support of her application do not state that she asks the Court to set aside paragraph 3 of the 3 July Order and, as I have said, she has not provided a draft of the order she seeks with her application. The only paragraph of the Claimant's submissions which addresses paragraph 3 of the 3 July Order is paragraph 11, which states:

> "Paragraph 3 of the order dated 3 July 2020 is made on the court's own motion without regard to detailed reasons given on the matter in an earlier order dated 30 June 2020 refusing an application brought by the Claimant. At paragraph 5 of the reasons for that order it is said (with emphasis) that:
>
> > "… The Claimant seeks in her application of 29 June 2020 an order that the preliminary issues be determined without a hearing, based on the parties' written submission. I am not prepared to accede to this application. … There is no good reason, and in the circumstances <u>it would be unjust, to preclude the parties from making oral submissions in relation to the preliminary issues at the hearing that has been listed (in part) for that purpose</u>."" (Claimant's emphasis)

31. In this passage the Claimant appears to take issue with paragraph 3 of the 3 July Order, but she does not say that she asks the Court to set it aside or that, in fact, she now objects to the preliminary issues being determined on the papers, despite having recently requested this procedure.

32. As it was unclear from the Claimant's submissions whether she was seeking any variation of paragraph 3 of the 3 July Order, I invited the Claimant to clarify her position. My clerk sent an email to the Claimant on 7 July, at 4.17pm, which said:

> "The Judge would like to understand what the Claimant's position is in respect of paragraph 3 of the order dated 3 July 2020. This paragraph of the order is addressed in paragraph 11 of the Claimant's submissions but it is unclear what the Claimant is seeking. The Judge would be grateful if the Claimant would clarify the position:

(a) Is the Claimant asking for paragraph 3 of the order dated 3 July 2020 to be revoked?

(b) If so, is that because the Claimant now objects to the preliminary issues being determined without a hearing?"

33. Mr Ogilvy responded at 5.14pm in these terms:

"Please Take Notice that the Claimant has objected severally to her Preliminary Issues to be dealt with on the papers (this is objectionable as it is linked to the Respondent's substantive application) in emails and in particularly the email sent to the learned judge on 3 July 2020 timed at 12:45, which pertinently read insofar as relevant as in paragraphs 4 and 5 of that email;

"Furthermore, there are preliminary objections raised in the Claimant's skeleton on the substantive application to strike out and those preliminary objections, it is clear should be heard fully with the benefit of Counsel at any oral hearing to strike out.

These are complex issues that cannot be resolved on paper for obvious reasons whereby clarification may be sought from the learned judge whilst the case is argued by someone on their feet, and any lingering doubt either way cannot be resolved on the papers."

The above was written and sent on 3 July 2020, when read together with the Defendants representations earlier today, whereby they wrote;

"it is desirable to list an oral hearing of the Defendants' adjourned applications before the end of Trinity Term 2020".

In previous order made the learned judge had decided that on the Defendants instigation they agreed that the substantive hearing be heard remotely, and this is the third time the learned judge's position is being altered.

However, on further consideration and in the light of the Defendants position to hear their substantive application orally, the Preliminary Objections at paragraphs 2 letters a - h of the Claimant's Skeleton argument objecting to the strike out/summary judgment be heard at the oral hearing of the Defendants substantive applications requested to be listed before the end of the Trinity Term 2020. The outstanding application for an injunction be directed to be heard first before the Defendants substantive applications, since the Defendants have now had sufficient notice of the said injunction to be heard orally also and with all these **applications and cross**

> **applications and preliminary objections to be heard together in order to save time and expense (and if the Claimant is still unable to obtain the services of counsel) there should be a direction that Mr Ogilvy should be granted leave to speak on behalf of the Claimant (to avoid having to whisper to the Claimant one by one to then have the Claimant repeating it will impact on the flow of the proceedings and indeed even taken longer than the allocated time and eaten into it, and proceedings becoming pressed and Claimant getting agitated and given the Claimant's … [medical history] (revert to medical evidence previously sent to the court), taken together with paragraphs 1.2; 1.10 - 1.11 of the Barrel Jurisdiction's application which passages expressly deals with McKenzie Friend issue, taken all these factors into account leave be exceptionally granted on health grounds**.
>
> I trust this clarifies the position." (Mr Ogilvy's emphasis)

34. Unfortunately, Mr Ogilvy's response did not clarify the position. What he refers to as the Claimant's "*Preliminary Issues*" or "*Preliminary Objections*" are points taken, as his email states, in the Claimant's skeleton argument for the hearing on 1 July, at paragraph 2a-h. Whereas paragraph 3 of the Order of 3 July addresses the procedure by which the preliminary issues identified in the Defendants' application will be determined.

35. The Defendants' submissions on this issue are in the following terms:

> "Paragraph 11 of the Claimant's submissions is very unclear. In material summary:
>
> > (1) The Claimant's application dated 29 June 2020 sought inter alia an order that "The application for an order determining preliminary issues shall be without a hearing. The parties are ordered to file and serve any written submissions no later than 4pm on 6 July 2020" (paragraph 2 of the Claimant's draft Order on that application).
> >
> > (2) The Defendants at that stage opposed that application, on the basis that the hearing had been listed and that it was sensible to deal with everything together. By paragraph 4 of the reasons accompanying the Order of 30 June 2020, the Court rejected the Claimant's application and maintained the listing of the preliminary issues for the hearing on 1 July 2020.
> >
> > (3) In the light of the adjournment of that hearing, the Defendants agreed to the (Claimant's) proposal that those issues be determined without a hearing. That is reflected in paragraph 3 of the 3 June Order, together with §15 of the reasons accompanying that Order.

> (4) §11 of the Claimant's submissions suggests that the Court has failed to have regard to the Order made on 30 June 2020. However, (i) that Order rejected a proposal made by the Claimant; (ii) that Order is expressly referred to in the second sentence of §15 of the reasons accompanying the 3 July Order; (iii) no proposal is made in the application notice, or the Claimant's submissions, for any variation to paragraph 3 of the 3 July Order.
>
> Accordingly, the Defendants proceed on the basis that (i) the Court will determine the preliminary issues without a hearing pursuant to CPR 28.3(b); and (ii) written submissions on the preliminary issues will be filed and served by 4pm on 17 July 2020."

36. In my judgement, the Defendants' analysis is correct. Despite the doubt thrown on the issue by paragraph 11 of the Claimant's submissions, there is no statement in the Claimant's application, or the Claimant's submissions, to the effect that she now wishes to have an oral hearing in respect of the preliminary issues identified in the Defendants' application or that she seeks to revoke, set aside or vary paragraph 3 of the 3 July Order. The Claimant has been asked expressly whether she seeks revocation of that paragraph and there is nothing in the response sent by Mr Ogilvy to indicate that she has changed her mind on this issue. I also note that the email from Mr Ogilvy sent at 12.45pm on 3 July is consistent with the Claimant seeking an oral hearing of the strike out/summary judgment but not of the Defendants' preliminary issues. This conclusion is further affirmed by receipt of a draft order from Mr Ogilvy (pursuant to the Recusal Judgment) in which the preamble records that the Claimant has applied to set aside paragraphs 4 and 5 of the 3 July Order (not paragraph 3).

37. Accordingly, as no application to vary or set aside paragraph 3 of the 3 July Order has been made, that paragraph stands.

Paragraph 5 of the 3 July Order

38. It follows from the variation of paragraph 4 of the 3 July Order that paragraph 5 of the Order should be varied to remove reference to paragraph 4. However, paragraph 5 stands insofar as it provides the parties with an opportunity to provide written submissions by 4pm on 17 July in respect of the Defendants' preliminary issues, as those are the matters to be determined without a hearing.

D. Application pursuant to the *Barrell* jurisdiction

39. The Claimant seeks:

    i) The withdrawal of the Judgment which she contends should not have been handed down at all; or

    ii) The removal of paragraphs 41-50, 66(v) and 70-74 of the Judgment which the Claimant contends should be "*expunged from the record*"; and

    iii) The addition to the Judgment of various further matters.

Jurisdiction

40. The court has jurisdiction to reconsider its judgment at any point before the order is sealed. The existence of this power was addressed by Lady Hale (giving the judgment of the Court) in *Re L-B* [2013] UKSC 8; [2013] 1 WLR 634 at [16]-[19]. Lady Hale concluded at [19]:

> "Thus there is jurisdiction to change one's mind up until the order is drawn up and perfected. Under the Civil Procedure Rules (rule 40.2(2)(b)), an order is now perfected by being sealed by the court. There is no jurisdiction to change one's mind thereafter unless the court has an express power to vary its own previous order. The proper route of challenge is by appeal."

41. In *Robinson v Fernsby* [2003] EWCA Civ 1820 May LJ observed at [94]:

> "Once a judgment has been handed down or given, there are obvious reasons why the court should hesitate long and hard before making a material alteration to it. These reasons have been rehearsed in the cases to which I have referred and I need not elaborate them further. The cases also acknowledge that there may very occasionally be circumstances in which a judge not only can, but should make a material alteration in the interests of justice. There may for instance be a palpable error in the judgment and an alteration would save the parties the expense of an appeal. On the other hand, reopening contentious matters or permitting one or more of the parties to add to their case or make a new case should rarely be allowed. Any attempt to do this is likely to receive summary rejection in most cases. It will only very rarely be appropriate for parties to attempt to do so. This necessarily means that the court would only be persuaded to do so in exceptional circumstances, but that expression by itself is no more than a relatively uninformative label. It is not profitable to debate what it means in isolation from the facts of a particular case."

42. In the same case, Peter Gibson LJ added, at [120]:

> "With one possible qualification it is in my judgment incontrovertible that until the order of a judge has been sealed he retains the ability to recall the order he has made even if he has given reasons for that order by a judgment handed down or orally delivered. That was established in two decisions of this court: Millensted v Grosvenor House (Park Lane) Ltd [1937] 1 KB 717 and Pitallis v Sherefettin [1986] QB 869. Such judicial tergiversation is in general not to be encouraged, but circumstances may arise in which it is necessary for a judge to have the courage to recall his order. If, as in Millensted and Pitallis, the judge realises that he has made an error, how can he be true to his judicial oath other than by correcting that error so

> long as it lies within his power to do so? No doubt that will happen only in exceptional circumstances, but I have serious misgivings about elevating that correct description of the circumstances when that occurs as exceptional into some sort of criterion for what is required for the recalling of an order before it is sealed. "

43. In *Re L-B* the Supreme Court held that the jurisdiction is not subject to a limitation preventing its exercise save in "*exceptional circumstances*" (the formulation used in *In re Barrell Enterprises* [1973] 1 WLR 19): *Re L-B* at [27]. The court's ultimate obligation is "*to deal with the case justly*": *Re L-B* at [27]. The Supreme Court endorsed "*some examples of cases where it might be just to revisit the earlier decision*" given by Neuberger J in *In re Blenheim Leisure (Restaurants) Ltd (No.3),* The Times, 9 November 1999, while emphasising these are only examples (see *Re L-B* at [24] and [27]), namely:

> "a plain mistake by the court, the parties' failure to draw to the court's attention a plainly relevant fact or point of law and the discovery of new facts after judgment was given".

44. In my judgement, in applying the *Barrell* jurisdiction, while context is everything, (i) the court should have regard to the obvious public interest in the finality of judgments (see *AR v ML* [2019] EWFC 56, per Mostyn J at [8]); and (ii) applications for reconsideration should not be seen as a substitute for appeal, or as an opportunity to reargue the merits.

45. In this case, having given brief *ex tempore* reasons on 1 July 2020, I drew up and signed the order the same day. I handed down fuller reasons in writing at 10am the following morning. At that time, the parties were sent the Judgment, together with a signed but unsealed version of the 1 July Order. Having checked the position in light of the Claimant's application, I understand that the 1 July Order was sealed at 12.03pm on 2 July 2020 i.e. it had already been sealed before Mr Ogilvy stated at 1.57pm that he wished to invoke the *Barrell* jurisdiction.

46. The jurisdiction exists until the order is sealed. As the 1 July Order has been sealed, the short answer to the Claimant's application is that I do not have jurisdiction to make substantial amendments to the Judgment. Nevertheless, I shall address the merits of the Claimant's application. For the reasons I give below, the application is wholly without merit and, if I had jurisdiction, I would not have exercised it.

Objection to promulgation of the Judgment

47. The Claimant contends that no judgment should have been given following the hearing on 1 July.

48. ***First***, the Claimant submits that:

> "the learned judge neither heard (i) the Defendant's application for a strikeout and/or summary judgment; nor heard (ii) the Claimant's application for an injunction. In fact, the learned judge heard no applications at all."

49. It is correct that on 1 July 2020 I did not hear the Defendant's application. Nor did I hear the Claimant's application for an injunction. I have not given judgment on either of those applications.

50. However, it is plainly wrong to contend that I heard no applications at all. On the contrary, I heard applications by the Claimant (i) for her injunction application to be heard on 1 July, and before the Defendants' application; (ii) for parts of the Defendants' hearing bundle to be struck out (i.e. ruled inadmissible); and (iii) for Mr Ogilvy to be permitted to address the Court. Those are the applications addressed in the Judgment. In addition, as I have said, I adjourned the hearing of my own motion and the Judgment gives my reasons for doing so.

51. I gave brief *ex tempore* reasons. When I refused the Claimant's applications, she positively sought an immediate written judgment, expressing her intention to appeal. I acceded to the Claimant's request to put my reasons for refusing her applications into writing, assuring her at the hearing that I would do so, and I delivered the written judgment speedily as she had requested.

52. ***Secondly***, the Claimant contends that the effect of the 30 June Order was to "*place significant restrictions on open justice such that it cannot be properly said that a public judgment is [an] appropriate course to have taken*". She submits that

> "The position is analogous to the release of information in a pre-trial appointment to which the principle of open justice does not apply until the contents can be contested in a public trial: see *Blue v Ashley* [2017] 1 WLR 3630. The public interest is promoted through accurate contestations at a final hearing. The principle of open justice was not engaged and the judge on her own motion did not engage it."

And contends:

> "There is no real public interest to receive the information (via means of a public judgment) because the application for strike out was not heard and the hearing was not finally dispositive of the trial. The Claimant's Article 6 and 8 ECHR rights are fully engaged."

53. The hearing on 1 July 2020 was held in public. The 30 June Order granted the Claimant's request for the hearing to be held in court rather than as a remote video hearing. It was open to any member of the press or the public who wished to attend the hearing to do so by coming to court, in the usual way. The "*restriction*" to which the Claimant refers is the order enabling two of the Defendants' representatives to attend the hearing remotely, via video link.

54. There is an obvious public interest in the Court giving reasons in public for judicial decisions. If the hearing had been in private, that would have reinforced, not lessened, the need for a public judgment: see *PJS v News Group Newspapers* [2016] EWHC 2770 (QB).

55. In *Blue v Ashley* [2017] EWHC 1553 (Comm) the court determined that certain witnesses statements which had been prepared for use at a trial should not be made publicly available before the witnesses had given evidence, in circumstances where the witnesses' statements were likely to be published (if they were made available) before they attained the status of evidence. This provides no support for the Claimant's contention that it was improper for the Court to give a written judgment explaining its decisions.

56. ***Thirdly***, a related submission is the Claimant's complaint that the Judgment "*goes way beyond the scope of the ex tempore judgement given*". I address the contention that the Judgment determines issues on which it is alleged I heard no argument below. The Claimant's broader criticism that the Judgment expresses my reasons more fully than I had done orally is ill-founded. The purpose of giving a written judgment was to explain my reasons more fully, as I had said I would, and as the Claimant herself had asked me to do. It is not objectionable for short oral reasons to be given followed by a more detailed written judgment: see *R (Nettleship) v NHS South Tyneside CCG* [2020] EWCA Civ 46, [2020] PTSR 928 at [80]-[81].

Objection to the Judgment being handed down without prior circulation of a draft

57. The Claimant objects to the fact that the Judgment was handed down without prior circulation of a draft. It was handed down in approved form "*subject to editorial corrections*". The latter proviso enabled the parties, if they noticed any typographical errors, to bring them to the Court's attention so that they could be corrected before the Judgment is perfected.

58. The Claimant observes, correctly, that High Court Judges often circulate their judgments in draft before an approved version is handed down.

59. In *Robinson v Fernsby* [2003] EWCA Civ 1820 May LJ observed at [95]-[96]:

> "The practice of providing the parties' legal representatives with a draft of written reserved judgments a day or two before the date appointed for handing them down is intended to promote efficiency and economy. Typographical corrections may be made so that the judgment is available in its final form for publication on the day that it is handed down. The parties are enabled to agree the form of any order and consequential order, for instance as to costs. The court time taken in delivering the judgment is reduced to a minimum. … It is not provided so that parties may reopen its substance. …
>
> It scarcely needs saying that judges should not send draft judgments to the parties' legal representatives in accordance with the Practice Statement, if they themselves perceive a risk that they may want to change them materially before they hand them down. More importantly, perhaps, parties should understand that this procedure is not an invitation to pick holes in the substance of the draft judgment nor to invite the court to reopen or add to contentious matters. …"

60. The practice referred to is to circulate the draft judgment to the parties' *legal representatives*. Legal representatives should be aware of the limited purpose for which a draft is provided, whereas the parties themselves may not be. It is clear that there is no obligation on the Court to circulate a draft. It is common, for example, not to circulate a draft if there is reason to hand down the judgment speedily. In this case, the Claimant had pressed for an immediate written judgment and there were no legal representatives for the Claimant to whom a draft could have been circulated. In the circumstances, I did not circulate a draft to either party. This gives rise to no tenable ground for complaint, still less does it provide any support for an application for the Judgment to be expunged from the record.

Objections to paragraphs 41-50 of the Judgment

61. The Claimant contends that the "*Judge did not hear from the Claimant on the substance of preliminary objections set out in the Claimant's skeleton argument at paragraph 2a-h and the grounds for objections to strike out and summary judgment set out in the Claimant's skeleton argument*". On this basis, the Claimant submits that "*paragraphs 41-50 of the judgment must be expunged from the record*".

62. Paragraphs 41-50 fall within part D of the Judgment which runs from paragraphs 41-58 and addresses the question whether certain documents which had been put in evidence by the Defendants should be "*struck out*" i.e. ruled inadmissible. This issue was raised by the Claimant in her application of 29 June 2020 and I indicated in my order of 30 June 2020 that I would hear oral submissions rather than determine it on the papers. The issue was also addressed in the parties' written submissions.

63. The Claimant's positive case at the hearing on 1 July was that this issue had to be determined before the Defendants' application could be heard. As reflected in paragraphs 43 and 54 of the Judgment, the Claimant made oral submissions in support of her application. When she had done so, the only point on which I sought submissions in response from the Defendants concerned the question whether the version of the Grewal Judgment attached to Mr Drew's statement was a draft (see Judgment at [54] to [57]). I invited the Claimant to reply and she did so.

64. Any objection to paragraphs 41-50 of the Judgment would be a matter for appeal. Even if the order had not already been sealed, the Claimant's submissions provide no basis for contending that this section of the Judgment should be removed.

Objection to paragraph 66(v) of the Judgment

65. In her submissions, the Claimant contends that paragraph 66(v) of the Judgment should be removed. This paragraph appears in the context of part E of the Judgment which addresses the Claimant's application for Mr Ogilvy to be permitted to make oral submissions on her behalf (in addition to her wish to make oral submissions herself).

66. The Claimant's first objection is that the point made at paragraph 66(v) had not been made in my *ex tempore* judgment. I have already addressed this point at paragraph 56 above.

67. The Claimant's second objection is that it was unnecessary to refer to Mr Ogilvy's convictions in the Judgment, or to the passage in the Grewal Judgment which is unfavourable to him. The Grewal Judgment is a public document and it was in evidence before me. It records facts about Mr Ogilvy's convictions that are true and undisputed. For the reasons given in my Judgment, I considered that those facts were of some relevance in determining whether to grant him a right of audience. The Claimant's ability to represent herself was also relevant and the view taken by a tribunal which had seen the Claimant representing herself, as well as Mr Ogilvy representing her, was material.

68. Any objection to this subparagraph would be a matter for appeal. There is no proper basis for asking me to delete it.

Objection to paragraphs 70-74 of the Judgment

69. The Claimant contends that "*paragraphs 70-74 must be expunged from the judgment which dehumanizes and seeks to wholly misrepresent what transpired in the courtroom*". She further contends that her "*collapse in the courtroom must be accurately and fully recorded*".

70. These submissions relate to part F of the Judgment in which I explained the decision to adjourn the hearing on 1 July, of the Court's own motion, in the absence of the Claimant. My reasons were based on the information available to me when I made the decision at about 2.15pm on 1 July. I have addressed information that I received <u>after</u> I adjourned the hearing in the 3 July Order and in the Recusal Judgment.

71. In essence, the Claimant contends that I should have found different facts to those found and recorded in the Judgment. The Claimant's remedy is to seek permission to appeal. There is no proper basis for the application to delete the identified paragraphs of the Judgment.

McKenzie friend/alleged inaccuracies

72. The Claimant contends that paragraph 59 of the Judgment

> "is deficient due to its inaccuracies in stating that the Claimant "wished Mr Ogilvy to act as her McKenzie friend". The Claimant was well aware what the role of a McKenzie Friend was and that its role was limited hence, she did not refer to Mr Ogilvy as a McKenzie Friend at any point in hand."

73. Paragraph 59 of the Judgment states:

> "The Claimant was accompanied at the hearing by Mr Ogilvy (as well as two other supporters). In an email sent prior to the hearing she had identified Mr Ogilvy as her "litigation friend". At the start of the hearing, I explained to the Claimant that a litigation friend is a person who acts for a child or a protected party whereas a McKenzie friend is a lay person who provides assistance to an unrepresented party. The Claimant made clear that she wished Mr Ogilvy to act as her McKenzie friend."

74. The Judgment states that the Claimant used a term "*litigation friend*" which was inapplicable, but it was nevertheless clear from what she said – even if she did not say it in terms – that she wished Mr Ogilvy to act as her McKenzie friend.

75. The Claimant's submissions suggest that the role she wished Mr Ogilvy to perform was not that of a McKenzie friend but of a "*Lay Representative*". She refers to the Lay Representatives (Rights of Audience) Order 1992. These submissions were not made at the hearing on 1 July and they are misconceived. The Lay Representatives (Rights of Audience) Order 1992 was repealed on 18 May 1999 by the Lay Representatives (Rights of Audience) Order 1999 which was made pursuant to ss.11 and 120 of the Courts and Legal Services Act 1990. It is not concerned with rights of audience before the High Court; the Order permits lay representation (subject to its terms) in small claims in the county court. A lay representative who seeks a right of audience before the High Court is referred to as a McKenzie friend (whether he is in receipt of any fee or not).

76. The Claimant refers to paragraph 68 of the Judgment where I said:

> "By way of postscript to this decision, in light of the matters to which I refer below, I note that an example of "special circumstances" which may justify granting a McKenzie friend the right to make oral submissions are where the litigant has health problems which preclude her from addressing the court, and the litigant cannot afford to pay for a qualified legal representative. That was not a ground raised at the hearing on 1 July. If it is submitted that circumstances have changed since I made the decision referred to above, I am prepared to reconsider. However, any such submission will need to be supported by evidence."

77. The Claimant contends that, on health grounds, Mr Ogilvy should have been allowed to make submissions on her behalf – although no application was made on such grounds, and no medical evidence supporting such a ground has been adduced. The Claimant's submissions under this head amount to a contention that I have erred in refusing to give Mr Ogilvy permission to make oral submissions. I have given my reasons for my decision. If the Claimant wishes to challenge my decision her remedy is to seek permission to appeal.

78. I note that Mr Ogilvy's email of 7 July (see paragraph 33 above) seeks reconsideration of my decision not to grant him a right of audience. No medical evidence capable of supporting an application for reconsideration has been adduced. The decision stands.

E. Totally without merit

79. The Defendants contend that the following applications are totally without merit ("TWM") and should be recorded as TWM:

    i) The Claimant's application for various documents to be removed from the hearing bundle; and

ii) The Claimant's application to invoke the *Barrell* jurisdiction.

80. The Defendants draw attention to the requirement in CPR 23.12 to consider whether to make a civil restraint order ("CRO") if an application is dismissed as TWM, albeit they do not ask the Court to make a CRO at this stage.

81. The application for documents to be struck out consisted of:

i) An application to remove from the Defendant's hearing bundle seven public judgments/decisions;

ii) An objection to the version of the Grewal Judgment exhibited by Mr Grew; and

iii) An application to remove correspondence which the Claimant contended was without prejudice.

82. In respect of (i), I described the objection as having "*no merit*" (Judgment, [47]) and observed at [52] that there was "*no basis on which the Court could properly preclude the Defendants from referring to these public judgments in support of their submissions*". However, I also noted that while some of the judgments/decisions were of direct relevance, some others were more peripheral and a different judgement call might have been made to exclude some of them (Judgment, [79]).

83. In respect of (ii), I rejected the submissions that the Defendants had tampered with the Grewal Judgment as baseless and "*wholly without merit*" (Judgment, [83]). Nevertheless, the Claimant had raised a genuine query as to whether, given the differences between the versions, the one in the Defendants' bundle was an approved version or a draft and, as a result, I determined that the version in the Claimant's bundle should be used (Judgment, [57]).

84. In respect of (iii), for the reasons I gave at [58], there appeared to have been a clear waiver of privilege and the Claimant had put forward no basis for contending otherwise. In her oral submissions, the Claimant did not expand on the written submissions made in respect of the documents that were said to be legally privileged.

85. The question whether to certify this application as totally without merit is finely balanced. It is certainly close to the line. But as I have explained, although the application has been dismissed, some aspects of it were not devoid of merit. In these circumstances, I have not certified the application for documents to be removed as TWM.

86. However, I take a different view of the application to invoke the *Barrell* jurisdiction. The entire application is devoid of all merit. I am confident after careful consideration that the application is truly bound to fail: see *R (Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1091 at [15]. The order will record that the application is totally without merit. A single application that is recorded as TWM would not be a sufficient basis to make a CRO and I will not do so.

F. Application for a stay

87. The Claimant seeks a stay of proceedings pending an (intended) appeal against the Recusal Judgment. I rejected the application, observing that "*it is clear and obvious that there are no proper grounds for recusal*" (Recusal Judgment, [36]). As yet, no application for permission to appeal has been made. No grounds of appeal have been formulated and I have not been able to identify any ground of appeal which would have any real prospect of success.

88. In considering whether to exercise the discretion to grant a stay, it is necessary to balance the risks of injustice to each party: *Hammond Suddard Solicitors v Agrichem* [2002] CP Rep 21 at [22]. The Defendants' application was filed more than three months ago. They would be prejudiced by a stay. In circumstances where no application for permission to appeal has even been made, and the proposed appeal against the Recusal Judgment appears to be very weak, I refuse the application for a stay.

G. Listing and scope of the oral hearing

89. As I have indicated, there will be an oral hearing to determine the Defendants' strike out/summary judgment application. On 2 July 2020, the Claimant submitted evidence, in the form of a letter from her GP, stating that the Claimant "*feels she will be unable to attend court for a period of 4 weeks*". The Claimant's application filed on 6 July 2020 seeks an oral hearing "*within the next 21 days*", but also states that "*the Claimant is about to obtain a definitive confirmation of counsel instructed on behalf of the Claimant who would need some time to prepare and attend court*".

90. The Defendants agree that their application should be heard quickly. Although they do not seek a listing "*within 21 days*", they submit that "*any hearing should be listed before the long vacation (subject of course to the Court's availability)*". They suggest that further delay would be a waste of the Court's and the Defendants' time and resources having to prepare in full again for a hearing; and that it would unfairly leave the allegations made by the Claimant hanging over the individual Defendants.

91. Although I have considerable sympathy with the parties' wish to have this matter re-listed before the end of term, that is not feasible without moving other matters that are already listed to be heard in the few remaining weeks of this term. This case is not so urgent that it would be justifiable to do so. It will therefore be listed for a hearing on the first available date (subject to Counsel's availability) before the end of the Michaelmas term.

92. The Claimant's application for an injunction was filed on 30 June 2020. As the Defendants have now had notice of that application, it should be listed for hearing on the same day as the Defendants' strike out/summary judgment application, with a time estimate of 1 day.

H. Further recusal submissions

93. The 3 July Order directed that the recusal application would be determined without a hearing, both parties having agreed to that course. Whereas in respect of the Defendants' application I made an order permitting further submissions to be filed, no

such permission was given (or sought) in respect of the recusal application. The reasons attached to the 3 July Order recorded at [14]:

> "Both parties have made written submissions on the recusal application and both parties ask for it to be determined on the papers. Accordingly, I direct that it should be determined without a hearing pursuant to CPR 23.8(b) and (c). I have received submissions from both parties on this application and so I will proceed directly to determine the application." (emphasis added)

94. I handed down the Recusal Judgment at 2pm on 6 July 2020. The submissions filed in support of the Claimant's application include "*further submissions on recusal*". No application to make further submissions on recusal was made, nor was any indication given that the submissions entitled "*Invocation of the Barrel jurisdiction/Submissions, Application to Set Aside Para and Other Matters*" attached to the application dated 6 July 2020 contained further submissions in support of the Claimant's recusal application. The Recusal Judgment was handed down before I saw these unheralded further submissions and so I did not address them. They do not alter my judgment.

H. Conclusion

95. For the reasons given in this judgment:

i) The preliminary issues identified in the Defendants' application will be determined without a hearing, in accordance with paragraphs 3 and 5 of the 3 July Order;

ii) The Defendants' strike out/summary judgment application will be listed for an oral hearing on the first available date before the end of the Michaelmas term, and paragraphs 4 and 5 of the 3 July Order will be varied to reflect this;

iii) The Claimant's application dated 30 June 2020 will be listed for an oral hearing together with the strike out/summary judgment application;

iv) The Claimant's application to invoke the *Barrell* jurisdiction is dismissed, and certified as totally without merit; and

v) The Claimant's application for a stay pending an (intended) appeal against the Recusal Judgment is refused.