Neutral Citation Number: [2021] EWHC 2824 (QB)

Case No: QB-2020-003528

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2021

Before :

SIR ANDREW NICOL

- -

Between :

SIMON BARD PARKES	**Claimant**
- and -	
(1) TOBY HALL	**Defendants**
(2) STEPHEN EARNSHAW AKA AMORA STEVE MELCHIZADEK	

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John Samson and Jake Rudman assisted by Chelsea Sparks (instructed by **direct access**) for the **Claimant**
John McLinden QC and John Critchley (instructed by **direct access**) for the **1st Defendant**
The 2nd Defendant in person for himself

Hearing dates: 11th and 12th October 2021

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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.

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SIR ANDREW NICOL

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 22 October 2021.

Sir Andrew Nicol:

1. This the hearing of several applications by the parties.

2. The Claimant was the founder or one of the founders of an organization called 'Connecting Consciousness' ('CC') which he set up in 2015. He says that it now has about 50,500 members.

3. The 1st Defendant is described by the Claimant as a former close friend of his and was a member of CC from 2015-2020.

4. The 2nd Defendant was also formerly a member of CC.

5. The claim which was issued on 30th September 2020 relies on 4 causes of action:

    a. Libel, relying on 13 publications;

    b. Harassment;

    c. Infringement of a reasonable expectation of privacy;

    d. Data Protection.

Procedural History

6. As I have said, the Claim Form was issued on 30th September 2020. It was served together with the Particulars of Claim.

7. What purported to be a defence was served by the 2nd Defendant on 12th November 2020 and what purported to be a defence was served by the 1st Defendant on 25th November 2020.

8. The assigned Master was Master Dagnall.

9. On 3rd December 2020 Master Dagnall plainly considered that the defences were deficient. That is why he ordered that each defendant file and serve by 15th January 2021a statement or schedule addressing each of the causes of action and (in the case of libel) each of the publications relied on by the Claimant, setting out in proper detail the nature of the Defendant's defence. The Master specified precisely what the Schedules should address. Provision was also made for the Claimant to serve a counter-schedule if he wished.

10. Neither Defendant complied with the Master's order and, on 10th February 2021, the Claimant applied to strike out the defences or for summary judgment in the Claimant's favour ('the February strike out')

11. On 8th March 2021 Master Dagnall set a new deadline of 16th April 2021. He gave directions for the hearing of the February strike out.

12. Neither Defendant complied with 16th April deadline.

13. The February strike out came before Master Dagnall again on 8th June 2021. He ordered that the February strike out should be adjourned to be heard by a High Court Judge in the Media and Communications List.

14. The Master further directed that

> 'There shall also be considered at that hearing, but this is subject to any directions of the judge at that hearing, in relation to each of the publications (a) whether they bore the meanings(s) contended for by the parties and (b) whether their meanings were or are defamatory at common-law.'

15. The Master set a new deadline of 23rd July 2021 and made this an 'unless' order, with the consequence that if a Defendant was in default of that deadline, his defence would be struck out (see paragraph 2 of the Master's order).

16. At the hearing before the Master, each defendant had, it seems, expressed a willingness to give certain undertakings to the Court regarding any further publication about the Claimant and the removal of any online publication concerning him. The Master's order directed that unless the Defendant in question gave such undertaking by 14th June 2021, his defence would be struck out. (See paragraph 4 of the Master's order). Whether those undertakings or equivalent injunctions should continue would be considered by the High Court Judge at the hearing referred to (paragraph 5 of the Master's order).

17. The Defendants were ordered to pay the Claimant's costs of the hearing of 8th June and the Claimant was given permission 'to apply for summary assessments or for payments on account.'

18. In a detailed schedule to his order, the Master specified what should be included in the schedules he required to be served.

19. Included in his reasons for the order was the following:

> 'a determination of meaning does not actually require a defence and will be necessary in any event. The same applies to the question as to whether the meanings are defamatory at common-law as it seems to me that there may be an argument that the alleged "astral" meanings are not so defamatory. The first matter before the Judge will, though, be the Claimant's application to strike out/ for summary judgment.'

20. I shall examine later in this judgment whether either or both of the Defendants complied with paragraph 4 of the Master's order.

21. On 22nd July 2021 and so shortly before the Master's deadline for compliance with paragraph 2 of his order, the 2nd Defendant provided a document entitled 'Annexed Material'. On 23rd July 2021 the 2nd Defendant provided further: documents entitled: Final Schedule (4); Annexed Material (2); Annexed; Annexed Final Schedule (2).

22. By the deadline for compliance with paragraph 2 of the 8th June order, the 1st Defendant had not served any schedule. He did apparently make what the Claimant calls informal applications for extensions of time on 22nd July (the extension then sought was until 23rd August 2021). He made further applications on 23rd August (for an extension until 28th August 2021), 28th August 2021 (for an extension until 3rd September 2021) and 3rd September 2021 seeking an extension until 8th September 2021). The 1st Defendant served his schedule on 8th September 2021. On 9th September he indicated an intention to amend the schedule and on 10th September he provided an Amended Schedule and a list of amendments. I say that the 1st Defendant indicated an intention to amend his schedule: he made no application to amend, nor did he seek a further extension of time to comply with paragraph 2 of the Master's order.

23. By an email dated 6th August 2021, Master Dagnall expressed the preliminary view that the 2nd Defendant had done sufficient to comply with paragraph 2 of his order of 8th June 2021. He granted the Claimant an extension of time to provide any counter-schedule in response to the 2nd Defendant's schedule. The new time limit for the Claimant was 3rd September 2021.

24. On 26th July 2021 the Claimant applied for a payment on account in accordance with the permission granted to him by the Master. Nicklin J. set procedural directions for the present hearing on 29th September 2021.

25. On 1st October 2021 the Claimant applied for an order that the Defences were struck out for failure to comply with both paragraph 2 and paragraph 4 of the order of 8th June 2021.

26. On 4th October 2021 the 1st Defendant applied for relief against sanctions for any failure to comply with the Master's orders of 3rd December 2020, of 8th March 2021 and/or of 8th June 2021.

Summary of Matters presently before the court

27. It seems to me that there are the following matters for determination:

    a. The Claimant's application for strike out or summary judgment as issued in February.

    b. The Claimant's application that the Defences are struck out because of the Defendants' failure to comply with the terms of paragraph 2 and/or paragraph 4 of the Unless Order of 8th June.

    c. If properly before the court, the 1st Defendant's applications for an extension of time for compliance with the Unless Order.

    d. The 1st Defendant's application for relief from sanctions.

    e. If either of the above applications by the Claimant succeeds what further consequential orders or directions should follow.

    f. If I choose to do so,

i. The meanings of the publications.
ii. Whether the publications were defamatory at common law.

g. If the Defences are not struck out and summary judgment is not given in the Claimant's favour, directions for the further conduct of the action.

h. The Claimant's application for a payment on account or summary assessment of his costs of 8th June hearing.

28. There is **not** before the Court any application by the Defendants to strike out the claim or any part of it.

The order of the hearing

29. This was controversial. Mr Samson for the Claimant submitted that I should take first the Claimant's application that there had been a failure to comply with the Master's Unless order of 8th June 2021, together with the 1st Defendant's applications for extension of time to comply with paragraph 2 of that order and, if necessary, the 1st Defendant's application for relief against sanctions.

30. Mr McLinden QC for the 1st Defendant resisted that proposal. He submitted that the issues for the hearing were all bound up together and that it would be more economical in terms of the Court's time for all of the matters to be dealt with together.

31. I agreed with Mr Samson. It seemed to me that if I acceded to the Claimant's application that the defendants were in default of the Master's Unless order (and refused extensions of time and relief from sanctions) so that the defences were struck out, many of the other issues would not be relevant or could be dealt with more swiftly. In any event, the time allocated for the hearing was limited (though 2 days had been allowed for it) and I was doubtful whether all of the issues could be properly canvassed in the time available. Mr McLinden would be able to advance any submissions relevant to the issues which I was addressing.

Whether the 2nd Defendant's has complied with paragraph 2 of the order of 8th June

32. The Claimant submits that, although the 2nd Defendant filed what purported to be a schedule in compliance with the paragraph 2 of the Master's order, it was in fact nothing of the sort. The schedule was confused, contradictory and failed to follow what the Master had directed in the Schedule to his order. It was impossible to understand the case that the 2nd Defendant was advancing.

33. Mr Earnshaw disputes this. He draws my attention to an email from the Master of 6th August 2021 in which the Master said,

> 'My *provisional* view is that there is sufficient to be said for an argument that Mr Earnshaw has complied with my order regarding Paragraph 53B and his meanings and paragraph 4.2 and 4.3 of PD53B, that I am unlikely to determine this summarily against Mr Earnshaw. I am more likely to adjourn any application as to non-compliance with my Unless Order to the Judge to be heard with the other applications. However, I

> have not come to any concluded view as to this. However, it is confirming my view that there needs to be a determination of meanings and whether they are defamatory at common law and which is a matter for the Judge (see paragraph 6 of PD53B).' [the Master's emphasis].

34. Mr Earnshaw also argues that part of the confusion was due to the alteration of the format of the schedules which the Master required. Thus, at paragraph 159 of his Schedule, Mr Earnshaw was addressing 'old section e)' and at paragraph 181 he turned to 'old section f)'.

35. In my view, Mr Samson is right: the schedule which the 2nd Defendant filed on 23rd July did not adequately respond to what the Master had ordered, I also agree with Mr Samson that the filed document is confusing, contradictory and it is impossible to understand the case which the 2nd defendant wishes to advance.

Whether the 1st Defendant and/or the 2nd Defendant has complied with paragraph 4 of the Master's order of 8th June 2021?

36. Paragraph 4 of the Master's order said that,

> 'Unless the Defendants make the following undertakings ('the Undertakings') to the Court (which were agreed by both Defendants in principle at the hearing) by no later than 4.00pm on Monday 14th June, their defences will be struck out and judgment entered for the Claimant without further hearing:
>
> A. Both Defendants will refrain, whether by themselves or by their servants or agents, associates or otherwise from, making any further publications about the Claimant, and
>
> B. Both Defendants will remove any online publications (including but not limited to videos, blog posts and website pages) about the Claimant which are in their control or the control of their agents or servants.'

37. On 13th June 2021 the 1st Defendant emailed the court. He said,

> "I can and will (do) agree to a clear and **achievable** proposal/agreement with the wording I propose below. I trust the Master and the Court will consider and will hopefully concur when having read my reasons for the need for this amendment to Mr Rudman's [M Rudman had been counsel for the Claimant at the hearing on 8th June] wording above which puts me in an impossible and possibly ruinous position regarding the actions of others over whom I have absolutely no control. My proposed assurance and undertaking to the Court is as follows.

> I Toby Roger Hall will refrain from making any further publications about the Claimant, Simon Bard Parkes whilst this case is ongoing. I will remove any online publications (including but not limited to videos, blog posts and website pages) about the Claimant which are in or under my control. I undertake not to ask or suggest that other people or parties make any comments or publications concerning the Claimant whilst this case is ongoing. I cannot be responsible for the actions of other people or parties.
>
> I set out below some of the reasons why I feel I must limit my guarantee the above statement. Should the court need or want more. I can supply them promptly…."

38. At 11.41 on 14th June Mr Rudman responded that his draft 'reflects precisely what the Master ordered to which both of you [defendants] agreed at the hearing.'

39. At 12.38 on 14th June 2021, the 2nd Defendant sent an email which said,

> 'Dear all, for sake of clarity please accept this email as my acceptance of the undertaking made within the order of Master Dagnall on 8th June 2021 and as it is presented within the draft in the attachment that is authored by Mr Rudman. I accept the draft as an accurate reflection of the Judge's order [of] that date. I reply now without prejudice to my response by way of email to all parties on 11th June 2021 in connection with matters ancillary to the undertaking.'

He attached the draft order as Mr Rudman had drafted it.

40. On 14th June at 15.01 the 1st Defendant sent an email in which:

a. He drew attention to the problems that he was having with the internet.

b. He said he would be signing the Master's order on the Claimant's application of 10th February 2021.

c. He posed certain questions for the Master.

d. He said,

> 'I take his [Mr Rudman's] point and from it I draw the conclusion from that above that the order would not preclude me from making a one-time statement containing facts stated by the Claimant without comment or opinion. Obviously such facts as stated by the claimant himself can not be considered defamatory by the claimant nor if presented only once nor could they be considered harassment. I seek permission to make one such publication that I believe to be in accordance with the Master's order.'

e. He asked the Master what points in his defence he considered inadequate.

f. He said he shared the 2nd Defendant's comments on costs and the undertaking.

41. On 14th June 2021 at 15.53, the 1st Defendant emailed a copy of the order as drafted by Mr Rudman. However, he said that the date of the order was 16th June 2021. He also dated his endorsement of the order '16/06/21.'

42. On 15th June 2021 at 9.23, Mr Rudman:

a. Thanked the 2nd Defendant for his undertaking which he would accept as sufficient in form.

b. Commented that the 1st Defendant's had signed the draft order but had also indicated his intention to make a certain further publication. Mr Rudman added,

> 'The dates of the signed document are also incorrect. Inexplicably it is dated two days in the future. It is difficult to know why, but perhaps this was done in the hopes that it would allow his intended "one time statement" if he publishes it within the next two days.'

43. In two emails of 16th June 2021, the 1st Defendant refuted the idea that he had failed to provide the necessary undertaking.

44. On 28th June 2021, Master Dagnall emailed the parties to say that,

> 'It does seem to me at first sight (and the Claimant may seek to contest this) that the Defendants have provided the Undertakings by their emails of 14th June 2021.'

45. Mr Samson submitted that, despite the Master's provisional view, the 1st Defendant had not complied with paragraph 4 of the Master's order. Mr Samson submitted that the 2nd Defendant was also in default in this regard. He argued that the 2nd Defendant's email of 11th June rowed back from a clear agreement to the undertaking. Mr Rudman seemed to have indicated that the 2nd Defendant had complied. In my view Mr Rudman was there right. What Mr Samson regarded as equivocation by the 2nd Defendant preceded Mr Earnshaw's unequivocal acceptance of the undertaking in his email of 14th June at 12.38. I agree with Mr Earnshaw that his email of 14th June 2021 at 12.38 did comply with paragraph 4 of the Master's order.

46. So far as the 1st Defendant is concerned, my conclusion is different. I agree with Mr Samson that the 1st Defendant did not unequivocally give the undertaking which had been orally proffered at the hearing or which paragraph 4 of the Master's order required him to make. His email of 13th June 2021 offered an undertaking which was significantly different. It is true that the following day he signed Mr Rudman's draft order, but he dated this 2 days in the future (which would also have been 2 days after the deadline set by the Master). I agree with Mr Samson that this cannot be simply excused as a typographical (or rather handwritten) error in view of the 1st Defendant's intention to make a further one-off statement. There seems force in Mr Rudman's comment in his email of 16th June that the advance dating of the signature was deliberate to give time for such a further one-off statement. I have reached a different

conclusion on this matter than the Master, but he recognised that that view had been expressed in advance of hearing submissions from the Claimant and expressly recognising that the Claimant should have the opportunity to make such submissions.

47. I accept that there has been no breach of the Undertaking and Mr Hall apparently did not make his 'one-off publication' but that does not alter my conclusion that the 1st Defendant failed to comply with the Master's Unless order that he provide the Undertaking by 14th June 2021.

Whether the 1st Defendant has complied with paragraph 2 of the Master's order of 8th June 2021?

48. This divides into two issues: timing and substance.

49. As to timing, it is indisputable that the 1st Defendant had provided nothing by the time of the deadline set by the Master of 23rd July. That will then bring into play the issue of whether he should be granted an extension of time to comply with paragraph 2 of the Master's order. To that I now turn.

Should the 1st Defendant be granted extensions of time until 8th September 2021 to comply with paragraph 2 of the Master's order of 8th June 2021?

50. The Claimant submits that any application for an extension of time which is properly before the court should be refused.

51. Mr Samson on the Claimant's behalf submits as follows:

a. The Defendants have been given considerable indulgence already by the Court. They were ordered by Master Dagnall to provide full and detailed defences in accordance with detailed instructions given by the Master on 3rd December 2020. The Master noted in his reasons for that order that,

> 'It is important that the Rules be complied with, and because they enable the case to be dealt with justly and in accordance with the overriding objective.'

The Claimant submits that it was implicit in this comment that the Master considered that the defences which had by then been lodged originally did not comply with the Rules and, he submits, that was manifestly the case.

b. The Defendants were given a second opportunity to provide full and proper defences by Master Dagnall's order of 8th March 2021. That set a deadline of 16th April 2021 which again was not met. The Defendants on this occasion were specifically told that they must include their full responses to the claims for harassment, breach of privacy and data protection. On 8th June 2021 the Master again spelt out in detail the format which the ordered schedules must follow.

c. Thus, by the time of the Master's order of 8th June 2021 the Defendants had been given two opportunities to provide defences in proper form. Paragraph 2 of the recitals to the order of 8th June recorded the Master's finding that the

Defendants had failed to comply with the orders of both 3rd December 2020 and 8th March 2021.

d. Although the Defendants are litigants in person, the Master went to great trouble to explain precisely what was required. There is also some evidence that the 1st Defendant at least had had had some access to legal advice (this is a reference to what appears to be a comment by Stephen Gisby, a solicitor, on a draft defence).

e. It was unsurprising that the Master imposed an Unless Order on 8th June. Paragraphs 2 and 4 specifically provided that, in the event of breach, the Defences would be struck out without a further hearing.

f. Because of the time that the Master had taken to finalise his order, he had lengthened the time for compliance (in relation to paragraph 2) from 16th July - 23rd July 2021.

g. Not only did the 1st Defendant fail to comply with the 23rd July deadline, he made no less than 4 applications for extensions of time and failed also to meet his own self-imposed deadlines except (subject to what follows) in relation to the 4th application for an extension. Mr McLinden and Mr Critchley were instructed on 10th August 2021 and they must have been in a position by the time of the application on 3rd September to assess how much time they needed to complete the task set by the Master. However, there was yet a further application for an extension on 3rd September.

h. Even in relation to the schedule which was served on 8th September 2021, on 10th September 2021, the 1st Defendant purportedly served an Amended Schedule. There was no permission by the Court for such a document and there is no application by the 1st Defendant for permission to amend or for a further extension of time. It is apparent, submits Mr Samson, that what had been served on 8th September was incomplete.

i. The Master gave his provisional opinion that the 1st Defendant should be allowed his first extension, but

> i) The Master recognized that the Claimant had not been heard on that matter. He set a time for the Claimant to make submissions by replying to all, which the Claimant did on 27th July 2021. The Claimant complied with that direction. There has been no subsequent adjudication on that matter.
>
> ii) The 1st Defendant did not meet his own self-imposed revised deadline or deadlines.

j. The 1st Defendant had not taken the urgent steps which he could have done to bring the applications for extension or extensions of time before the duty judge in court 37.

52. Mr McLinden submits that the 1st Defendant's applications for extensions of time should be granted. It is apparent from the Schedule which was produced that it took

an enormous amount of work. The 1st Defendant's witness statement of 4th October also describes some of the investigation that was necessary before the pleading could be finalised.

53. Mr McLinden was also critical of the Claimant for not having sought the trial of a preliminary issue on the meanings of the words complained of and/or whether they were defamatory at common law. He submitted that such preliminary issue hearings were now standard. As to meanings, there were significant issues as to whether the words complained of were speaking of sexual assaults in the real world or only in the astral or paranormal plane.

54. I agree with Mr Samson that the 1st Defendant's applications for extensions of time should be refused for all of the reasons which Mr Samson gave. I agree with Mr Samson that, although the Defendants were litigants in person, the Master had gone to considerable trouble to explain precisely what their defences needed to include. With respect to him, the Master is to be commended for the pains he took in this regard.

55. Mr Samson is also right that the Court must consider the position of the Claimant as well as the Defendants. It has been often said that for claimants in libel, vindication of their reputations is at the heart of their causes of action. Delay is therefore particularly invidious. That, of course, is why the limitation period in defamation is particularly short. This claim was begun over a year ago and yet the claimant does not yet know with proper clarity what are the defences on which the defendants are relying. The defendants had been given two previous opportunities to put their pleadings in order. It was unsurprising that this further opportunity was, as Mr Samson put it, the Last Chance Saloon. Correspondingly, the obligation to meet the deadline set by the Master was particularly important.

56. I appreciate that the Master was inclined to grant the 1st Defendant's application for an extension of time, but that was expressly a provisional view and the Master recognised that the Claimant may wish to argue the contrary. In any event, the 1st Defendant failed to meet his own alternative deadline, or indeed the 2nd and 3rd deadlines that he set himself.

57. For all of these reasons as well as the other submissions by Mr Samson I refuse the 1st Defendant's applications for an extension of time beyond the date set by the Master in paragraph 2 of his order.

58. Since I would anyway refuse the applications for extensions on their merits, it is unnecessary to consider whether those applications are properly before the Court.

Setting time aside, has the 1st Defendant complied with paragraph 2 of the Master's order?

59. I am grateful to Mr McLinden and Mr Critchley for the very considerable work which they have obviously put into responding to the Master's order. However, I agree with Mr Samson that the 1st Defendant's Amended Schedule (together with the list of amendments) served on 10th September show that the original schedules filed on 8th September were incomplete. There is no application to amend the 8th September document, nor is there any further application for an extension of time.

60. Mr McLinden submitted that there had been substantial compliance with the Master's order by the document which the 1st Defendant served on 8th September and that this was sufficient to avoid the draconian sanction of striking out the 1st Defendant's defence.

61. The difficulty with this argument is that the amendments put forward on 10th September were substantial and, as Mr Samson submitted, showed up gaps in what had been served on 8th September. It is plain that the Master was allowing the defendants only a limited opportunity to put their pleadings in order. The amendments of 10th September showed that the 1st Defendant had not done that even by 8th September.

62. On two points I do not accept Mr Samson's submission. First, he argued that the Master had required the Schedule to be supported by a statement of truth, yet Mr Hall had only typed his name in support of the statement of truth. Had that been the only default on the 1st Defendant's behalf, I would have given him a further short opportunity to sign and serve the document in the correct form. However, since this was not the only default by the 1st Defendant, this qualification does not assist him.

63. The second qualification to my agreement with Mr Samson's submissions is that I accept Mr McLinden's comment that the Master envisaged the Schedules which he ordered the defendants to serve were to take the place of the original defences. It would have thus been superfluous and unnecessary for the 1st Defendant to apply to amend his original defence.

64. Nonetheless, I regard the 1st Defendant to be in breach of paragraph 2 of the Master's order in terms of substance as well as timing.

Should the Defendants be granted relief from the sanction of having their defences struck out?

65. Only 1st Defendant has issued an application for relief from sanctions. However, as I understood Mr Samson, he was prepared for me to treat the application for relief as having been made by both defendants so far as that was necessary.

66. As Mr Samson and Mr McLinden submitted, this brings into play the threefold test in *Denton v T.H. White (De Laval Ltd Part 20 defendant)* [2014] EWCA Civ. 906, [2014] 1 WLR 1926, namely,

    a. Is the breach serious or significant?

    b. What is the explanation for the breach?

    c. In all the circumstances where does the justice of the case lie?

67. Although Mr McLinden did not concede it, in my view the breach was plainly serious and significant. I reach that view for the following reasons:

    a. The starting point for consideration of an application for relief against the sanction of an Unless order is that the sanction was properly imposed. What was broken were Unless orders. They provided that in the event of breach the defences would be struck out without a further hearing.

b. The imposition of such orders followed two further orders by the court (in December 2020 and March 2021) when the Defendants had also been directed to put their pleadings in order.

c. All this has to be seen against the background which, as I have said, views libel actions as requiring particularly expeditious conduct.

68. There is no evidence from the 2nd Defendant as to why his breach occurred, although it is obvious that he is a litigant in person.

69. In support of his application for relief from sanctions (as well as extensions of time) the 1st Defendant has served a witness statement dated 4th October 2021.

70. From this, the following points emerge to explain the delay:

a. The claim was complex overing 13 publications (so far as libel was concerned and a total of 4 causes of action.

b. There was a very large volume of documentation.

c. The 1st Defendant lacked funds to pay for legal assistance.

d. Defamation proceedings are particularly complex.

e. Preparation of the schedule required further investigation. These included the following:

i) Investigation of complaints to several different trading standards departments and a BBC inquiry concerning the Claimant's Bioshield device.

ii) Sensitive inquiries into the Claimant's extra-marital affairs, which required particularly sensitive handling, but which led to a witness statement from a woman referred to as W13.

f. The investigations referred to above have taken longer because of the COVID epidemic.

71. Mr Samson submits that none of these are good explanations or sufficient to justify the lengthy delays by the 1st Defendant.

72. I agree with Mr Samson in this regard. While defamation litigation is complex, the Master, as I have said, went to great pains to explain to the defendants precisely what their schedules should address. I also agree with Mr Samson that it is significant that this was the Defendants third opportunity to plead their defences (or fourth, if the original defences which had been filed, are taken into account).

73. That is, of course, not determinative, but it requires the court to consider all the circumstances of the case to decide whether relief should be granted.

74. As to this stage, Mr Samson submits:

a. CPR r.3.9 (which concerns relief from sanctions) itself emphasises the importance of parties complying with Rules, Practice Directions and Court orders (and see *Denton* at [32]-[34].

b. CPR The order in the present case was an 'Unless Order' and, as the Court said in *Eaglesham v Ministry of Defence* [2016] EWHC 3011 (QB), 'Unless orders should mean what they say.' (see [46]).

c. In *Marcan Shipping (London) Ltd v Kefalas and another* [2007] EWCA Civ 463, [2007] 1 WLR 1864 at [14] Moore Bick LJ noted at [34] that the sanction of an Unless order took effect on default without further order of the Court. This meant:

i) It is unnecessary for the 'innocent party' to make an application to the court for the sanction to be activated: it takes effect automatically;

ii) The party in default must apply for relief from sanctions;

iii) Because the consequence is automatic, the court ought to take care before making an Unless order.

d. While the Court must take into account the 1st Defendant's rights under the European Convention on Human Rights and in particular Article 6(1) (to a determination of his civil rights) and Article 10 (to freedom of expression), this did not prevent the Court regulating its own procedure. As Sharp J. said in *Hayden v Charlton* [2020] EWHC 3144 (QB) at [78],

> 'In considering whether it would be appropriate to strike these actions out, I have borne in mind that doing so will deprive the Claimants of access to a court, a matter which it might be argued by the Claimants, has implications for their rights pursuant to Article 6(1) of the ECHR to a "fair and public hearing with a reasonable time and to an independent tribunal established by law." However as Hale LJ (as she then was) said in *Khalili v Bennett* [2000] EMLR 996 at [50] when considering whether a decision to strike out a claim for delay deprived a party of his Art 6(1) rights,
>
> "National laws are entitled to regulate their domestic procedures, and this includes prescribing timetables and steps which have to be taken within a limited period. If a claimant has not complied with these rules, then normally he will not be able to complain under Article 6"'.

e. Mr Samson relied as well on the points which he made in relation to the 1st Defendant's application for extensions of time.

75. Mr McLinden emphasised that the 1st Defendant had substantially complied with the Master's requirement to put his defence in order. With the further amendments which the 1st Defendant wished to make to his schedule, as set out on 10th September, it was now clear to the Claimant the case which he had to meet. It was further plain (as it

had been from the original defences) that there were substantial issues which needed to be determined as between the Defendants and the Claimant.

76. Mr McLinden also submitted that the Claimant, who had the assistance of experienced defamation counsel, was at fault in not seeking an earlier ruling as to the words complained of. It was plain that the Master thought meaning was critical and, as the Master said, the determination of meaning was not dependent on there being a defence.

77. Mr McLinden submitted that it would be wrong to strike out the defences and enter judgment for the Claimant without resolving these fundamental issues. The rights of the Defendants to a determination of their obligations pursuant to Article 6(1) ECHR and their rights to freedom of expression under Article 10 ECHR should be respected.

78. In my view the submissions of Mr Samson are to be preferred.

i) The Master gave clear instructions as to what the schedules had to contain. He coupled this with an Unless Order. Substantial compliance was not required: detailed and precise compliance was. The 1st Defendant's schedule did not comply with this standard. I do accept that substantial compliance would be material to the third *Denton* stage. But the difficulty here for the 1st Defendant is that the gaps in the document served on 8th September were substantial as the amendments of 10th September showed.

ii) The procedural background was important. The two previous requirements of the Master had not been observed. I agree with Mr Samson that the Master was giving the Defendants a final opportunity to put their pleadings in order. Mr Samson was right to characterise this as the Last Chance Saloon.

iii) I also agree with Mr Samson as to the 1st Defendant's delay in providing his schedule and that this delay should not be excused.

iv) I do not agree that the Claimant is to be criticised for not seeking a ruling on meaning. While such rulings are often helpful, they are not invariably so and, where a defendant is going to advance a plea of truth (or some other defence which is dependent on the meaning which the words are said to bear), it is often sensible to defer any ruling on meaning until there is a properly pleaded allegation of the rival contentions as to meaning.

v) As to the ECHR arguments, what Sharp J. and Hale LJ said are relevant. Sharp J and Hale LJ were there specifically concerned with the Claimants' rights under Article 6 ECHR, but in my judgment, the additional rights of these Defendants under Article 10 ECHR would not significantly change matters.

vi) I also agree with Mr Samson that it is relevant the application for relief was only made by the 1st Defendant on 4th October, whereas such an application should be made promptly.

79. It follows that the 1st Defendant's application for relief against sanctions is refused.

80. There was no application for relief from sanctions by the 2nd Defendant, but, on Mr Samson's concession, I have considered whether he should be granted relief. I have concluded that he should not. His breach (although only in relation to paragraph 2 of the Master's Unless order) was also serious and significant. He has advanced no explanation for the default, save so far as the points made by the 1st Defendant apply also to him. In my view there is no adequate explanation for the 2nd Defendant's breach. As to the third of the *Denton* questions, for all of the reasons which I have given in relation to the 1st Defendant, I conclude as well that the 2nd Defendant should also be refused relief from sanctions.

Further conduct of the application:

81. Since I shall be striking out the defences anyway, the Claimant's application in February for striking out the defences or summary judgment is moot (save possibly as to costs).

82. For the purpose of deciding whether the Defendants have complied with the Master's Unless order it has not been necessary for me to determine the meanings to be attributed to the publications complained of. So far as Mr McLinden submitted that I was obliged to do so, I reject his argument. In my view it has been possible to decide whether the Master's order has been broken and whether relief against sanctions should be granted without determining the meanings of the words complained of.

83. I shall invite the parties to consider what, if anything, of the other matters which I was due to deal with at this hearing still needs to be resolved.

Summary of Conclusions

84. In summary I conclude:

a. The 1st Defendant's applications for extension of time to comply with paragraph 2 of the Master's Unless order are refused.

b. The 1st Defendant is in breach of paragraph 2 of the Master's Unless order both as to timing and as to substance.

c. The 2nd Defendant is in breach of paragraph 2 of the Master's Unless Order as to substance.

d. The 1st Defendant failed to comply with paragraph 4 of the Master's Unless order.

e. The 2nd Defendant did comply with paragraph 4 of the Master's Unless order.

f. The 1st Defendant's application for relief from sanctions is refused.

g. It follows that the 1st Defendant's defence is struck out in accordance with paragraphs 2 and 4 of the Master's Unless order.

h. The assumed application by the 2nd Defendant for relief against sanctions is also refused.

i. It also follows that the 2nd Defendant's defence is struck out for failure to comply with paragraph 2 of the Master's Unless order.

j. I shall invite the parties to try to agree an order which reflects this draft judgment.