IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 93 of 2021

BETWEEN:

MORNE BOTES

PLAINTIFF

-AND-

LINDA CLARK

DEFENDANT

IN CHAMBERS

Appearances:	**Mr Colm Flanagan of Nelsons for the Plaintiff** **Mr Rupert Wheeler of KSG for the Defendant (who appears via video-link).**
Heard:	**11 May 2022**
Decision:	**11 May 2022**
Draft Written Reasons circulated:	**19 May 2022**
Written Reasons Delivered:	**26 May 2022**

HEADNOTE

Defamation - trial of preliminary issue pursuant to GCR O.82, r.3A - Whether or not the words complained of are capable of bearing a particular meaning or meanings attributed to them in the pleadings - finding in favour of Plaintiff - Whether to exercise discretion in relation to costs pursuant to GCR O.62, r.4, - Order that costs be in the cause.

REASONS FOR JUDGMENT

1. The Plaintiff had commenced proceedings by way of writ dated 7 June 2021 seeking damages from the Defendant for libel in connection with posts made and published on 8 May 2021 on the website Facebook.com in a group created by the Defendant called "Cayman Development Watch". On 28 March 2022 I heard the trial of a preliminary issue pursuant to GCR O.82, r.3A to determine whether or not the words complained of by the Plaintiff were capable of bearing the particular meaning or meanings attributed to them in his statement of claim. I issued a written judgment on 4 May 2022

setting out the reasons for finding in his favour. I reserved the question of costs and the parties filed written submissions in that regard. The matter came back before me on 11 May 2022 and, having heard counsel, I gave an oral decision that costs should be in the cause. These are the reasons for that order.

2. The parties both agreed that the preliminary issue should be tried. The Plaintiff issued a summons dated 13 October 2021 (the "Summons") seeking a preliminary hearing to determine meaning. Paragraph 4 of the Summons sought an order that "*the costs of and consequential to this Summons shall be costs in the cause*". There was no dispute about the trial of the preliminary issue taking place and agreed directions leading up to that trial were incorporated in a consent order dated 11 February 2022 (the "Consent Order"). The Consent Order was signed administratively by the Clerk of the Court and included the same phrase as paragraph 4 of the Summons.

3. The first argument by the Defendant in relation to costs is that the Consent Order agreed by the parties already provides for them and that there is no basis and no material of change of circumstances[1] that would enable the court to re-open that order whether by way of variation or by setting it aside. The Defendant says that the costs of the trial of the preliminary issue are consequential to the Summons so there is no room for an alternative costs order.

4. The Plaintiff disagrees and says that the intention was not to pre-agree the question of the costs of the trial of the preliminary issue and that the wording is an error.

5. Very similar wording found its way into a consent order for directions in the case of *Rogelio Antonio Hawkins v Ararbanel Ltd*[2]. The judgment was in relation to the costs of a matter dealt with as a preliminary issue. At paragraph 13, the Mr Justice Williams said as follows:

> *"Another factor which the Plaintiff contends amounts to an operative and distinguishing factor is the wording at paragraph 5 of the Consent Directions Order dated 28 September 2019 which stated that:*
>
> "The costs of and consequential to the Plaintiff's Summons and the Defendant's Summons shall be cost in the cause."

[1] See e.g. *O'Sullivan v Andrews* [2012] EWHC 4327, [2] – [9].
[2] Grand Court, unreported 8 June 2020.

Ordinarily when one sees a similarly worded proviso in a directions order it is related to the costs to date in relation to the relevant summons or to the costs of that hearing that is how I read that provision when I place it in context with the rest of the direction and the case as a whole. Paragraph of the Order does not fetter the wide discretion given to the Court when it is considering costs pursuant to GCR O.62,r.4."

6. Both counsel confirmed that leading up to the agreement of the wording of the Consent Order, there was no particular discussion about costs. My approach to the relevant wording is the same as Mr Justice Williams. Absent clear and unequivocal language that confirms that the parties were intending to agree the costs of the trial of the preliminary issue before it had been heard and thereby fettering the jurisdiction of the Court, my reading of those words in the context of the Consent Order and the case as a whole is that they only applied either to costs of the Consent Order or to the costs of the Summons to the date of the Consent Order. The language used is similar to *"costs of and occasioned by"* which are not prospective and do not deal with matters that have yet to be litigated or take place.

7. Pursuant to GCR O.62, r.4, the Court has a wide jurisdiction as to costs. Sub-rule (2) sets out the general rule as follows:

> *"(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court."*

8. The Plaintiff's main argument was that he has been successful and is entitled to his costs. His counsel referred to the case of *Merck KGaA v Merck Sharp & Dohme Corp & Others*[3] in which Mr Justice Nugee (as he then was) heard a preliminary issue and found in favour of the claimant. The issue was as to the law applicable to an agreement and a letter. Despite a number of arguments from the defendants including that:

8.1 success on the preliminary issue does not mean that the claimant would ultimately be successful in the action;

8.2 neither party had been unrealistic or unreasonable; and,

[3] [2014] EWHC 3867 (Ch)

8.3 costs incurred in relation to the preliminary issue which would have been incurred anyway in relation to the ultimate issue to be decided.

The judge said at paragraph 6, that:

> *"The Defendants asked for a preliminary issue. They did so because it was thought to be helpful to the parties, and to the Court, for the question of proper law to be determined as a discrete issue. I agreed, which is why I acceded to their application. But the corollary of this is that the question did not arise as part and parcel of the trial but was tried separately. That necessarily involved a separate hearing with separate preparation and the incurring of separate costs on that issue. It is in general a salutary principle that those who lose discrete aspects of complex litigation should pay for the discrete applications or hearings which they lose, and should do so when they lose them rather than leaving the costs to be swept up at trial."*[4]

9. The case of *Merck* was cited in *Hawkins* and was considered by Mr Justice Williams. The preliminary issue in *Hawkins* involved determining whether the Moneylending Act 1938 of Jamaica was still in full force and effect in the Cayman Islands. The judge reviewed GCR O.62, r.4, the general rule in favour of a successful party and the wide discretion that the Court has in relation to the question of costs. He found that he saw no reason to depart from the usual rule on costs and said that he was fortified in his view by what had been said in *Merck.*

10. Apart from the point in relation to the Consent Order, the Defendant has approached the question of costs by reference to the approach taken to costs by the English courts in defamation cases. The Plaintiff points out that the practice in England (being considerably more advanced) is somewhat different to that in the Cayman Islands but both parties relied heavily on English authority at the trial of the preliminary issue so, although only persuasive, in the absence of any relevant Cayman Islands authorities, the approach England must be considered carefully.

11. The Defendant relies on the case of *Mian Muhammad Shabaz Sharif v Associated Newspapers Limited*[5]. The case involved libel actions and the court addressed the question of natural and ordinary

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[4] The judge also made it clear that the case in question was not one for departing from the general rule that the successful party gets their costs (paragraph 12 of the judgment).

[5] [2021] EWHC 343 (QB) heard with *Imran Ali Yousaf v Associated Newspapers Limited.* Both cases in the Media and Communications List of the Queen's Bench Division.

meaning as a preliminary issue. Having found that the claimant had been largely successful, Justice Nickel went on to consider the question of costs as follows:

> *"41. I have now to decide the issue of costs. Ms Page QC submits that the Court should make an order in favour of [the claimant] and direct that the Defendant should pay the costs. She submits that, looked at in broad terms, the Claimant has been largely successful in the sense that a larger number of elements of his meaning have been found in the Court's meaning. She says that this justifies the Court recognising that [the claimant] is the 'winner' and that the starting point is that the costs should follow the event. She submits that if the Court makes an order that costs should be in the case then that in some way encourages parties to take points on meaning and to require the Court unnecessarily to adjudicate on meaning. If parties thought that they were at risk of an adverse costs order, that would lead to more realistic positions being taken by parties on the issue of meaning.*
>
> *42. The Court obviously starts from the position that if there is a clear winner then usually costs follow the event. In many applications, it is a relatively straightforward exercise to decide whether a party has been wholly or largely successful. Often that will lead the Court to decide that, in justice, s/he should be awarded the costs (or a significant part of them).*
>
> *43. Meaning applications are somewhat different. Firstly, they are a preliminary issue trial. That means that determination of the issue is being advanced. Ordinarily, meaning would be determined as one of several issues to be resolved at the final trial. Modern defamation practice has now recognised that there are very good reasons why meaning should be resolved as a preliminary issue early in the proceedings: see e.g.* Morgan -v- Associated Newspapers Ltd *[2018] EWHC 1850 (QB) [9]-[10]; and* Bokova -v- Associated Newspapers Ltd *[2019] QB 861 [3]-[10]. I have to say that my experience, both as a Judge and at the Bar, has been that the instances where parties are agreed about the natural and ordinary meaning in a defamation claim are so vanishingly few as to be statistically insignificant. The reality, in most defamation claims, is that there will be a genuine dispute about meaning between the parties that requires resolution by the court. It is desirable for that dispute to be resolved quickly and economically.*
>
> *44. It has to be remembered that, where the Court has accelerated the determination of meaning as a preliminary issue, that is to remove it from being determined at the final trial. Where meaning is resolved at the final trial, unless there is justification for making an issue-based costs order (unlikely in most disputes about meaning), the costs of meaning would simply be swept up in the costs of the action. That means that a claimant could be wholly successful on the issue of meaning, yet ultimately lose the action if the court found for the defendant on a substantive defence. Absent some unusual feature, the Court would not, in that instance, make an order that the costs of meaning should nevertheless be paid by the defendant.*

> *45. I do not know ultimately who is going to be successful in this litigation at any trial. Even if it were possible to detect a clear 'winner' on the issue of meaning in this case, there is still a potential unfairness by making what is, in effect, an issue-based costs order at this stage. Although that party might have 'lost' the meaning issue, the party may yet ultimately 'win' at trial. In the ordinary course, therefore, the costs of determination of the preliminary issue of meaning should follow the ultimate event; the result of the action.*
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> *46. The circumstances in which, in my judgment, a Court is likely to be sympathetic to an application for costs following a preliminary issue trial of meaning is where the Court is satisfied that a party has adopted an unreasonable stance on the issue of meaning and that has caused unnecessary costs to be expended. One example might be a case in which a defendant advanced an argument that the meaning of the publication could not be Chase level 1[6] because it was simply repeating the allegations of somebody else. If the Court rejected that argument as hopeless, then it might find that the party's reliance on it was unreasonable. Cases like that are unusual, and this is not one of them, but that is by way of example of sort of circumstances in which the Court might be sympathetic to a submission that the Court ought to reflect that unreasonable behaviour by making an order for costs against the unsuccessful party.*
>
> *47. In my judgment, this case is a fairly typical example of litigants who have genuinely been unable to reach agreement about the meaning of an article. There is no clear winner, and no party has taken an unreasonable stance on the issue of meaning. In those circumstances, there is nothing to take this case out of the ordinary. There is no justification for departing from an order that costs of the preliminary issue should be costs in the case. Ultimately, the party that loses overall will pay the costs of determining meaning as a preliminary issue in these cases.*

13. The starting point for the Court when considering costs must be that the successful party should be awarded their costs. However, that is not an invariable rule. GCR O62, r.4, (5) makes it clear that:

> *"If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."*

14. Having considered the arguments of both parties I am of the view that defamation is undoubtedly a specialist area of law. In my opinion, cases that involve the determination of meaning as a preliminary issue can and should be distinguished from cases such as *Merck* and *Hawkins.*

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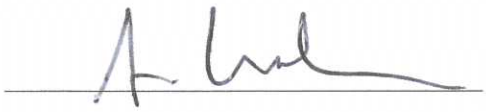
[6] One of three levels of meaning referred to as Chase levels after the case of *Chase v News Group Newspapers* [2002] EWHC 1101 (QB), Level 1 being an allegation of wrongdoing amounting to guilt.

15. On that basis, I am satisfied that it is appropriate to depart from the normal costs rule and adopt the approach of Mr Justice Nickel in *Sharif.* Applying his approach to the instant case and having dealt with the trial of the preliminary issue, I am of the view that there was a genuine dispute as to meaning and both parties approached that issue in a reasonable way. However, as Mr Justice Nickel observed, there is no way of knowing who might prevail overall in the case. Therefore, in my opinion the correct and fair order for costs in this case is that there be costs in the cause and they will fall to be determined at the final trial of the action.



Hon. Mr Justice Alistair Walters
Acting Judge of the Grand Court

Joanne Cox

Subject: FW: GC 209 of 2019 - Velma Bailey v Veloneek Blake - Draft Judgment

From: Joanne Cox
Sent: Thursday, May 19, 2022 1:22 PM
To: 'Colm Flanagan' <CFlanagan@nelsonslegal.com>
Cc: Veloneek Blake <velcblake@gmail.com>; Alice Carver <ACarver@nelsonslegal.com>
Subject: RE: GC 209 of 2019 - Velma Bailey v Veloneek Blake - Draft Judgment

Dear Mr Flanagan,

Thank you for submitting the draft order. Please note however that as there have been two separate decisions taken by the Judge, it will be necessary to file two orders - The first hearing of 28th March resulted in the judgment of 4th May. The second hearing on 11th May resulted in an order of 11th May.

Grateful if you could therefore proceed to file two drafts with the requisite fees.

Many thanks,

Joanne

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IN THE GRAND COURT OF THE CAYMAN ISLANDS

2 orders

CAUSE NO: 93 OF 2021

BETWEEN:

MORNE BOTES

PLAINTIFF

And

LINDA CLARK

DEFENDANT

In Chambers

Before the Hon. Justice Walters

28 March 2022 and 11 May 2022

ORDER

UPON the hearing of the Preliminary Issue as defined by the Consent Order for directions dated 11 February 2022

AND UPON hearing counsel for the Defendant and the Plaintiff on 28 March 2022 and 11 May 2022

and by way of additional written submissions on 8 April 2022.

AND UPON reading the Affidavit of Maylin Moxam, together with the exhibit and the other material on the Court file.

AND for the reasons set out in the Judgment delivered 4 May 2022 and orally on 11 May 2022.

IT IS HEREBY ORDERED that: -

1. The natural and ordinary meaning of the words complained of in the Plaintiff's claim against the Defendant are that the Plaintiff:

   1.1 was engaged in, or assisting with money laundering or other associated criminal offences;

   1.2 is or was acting dishonestly; and/or

   1.3 the BARKERS Beach Resort is not legitimate and/or is associated with or is engaged in money laundering or other illegal or corrupt practices.

2. The costs of and consequential to the Preliminary Issue hearing shall be costs in the cause.

DATED this 11th day of May 2022

FILED this ~~18~~ 19th day of May 2022.

Hon Justice Walters

Judge of the Grand Court

Agreed as to form and content this 18 day of May 2022:

Nelsons

Nelsons

Attorneys for the Plaintiff

KSG

KSG

Attorneys for the Defendant