Neutral Citation Number: [2024] EWHC 1672 (KB)

Case No: QB-2021-004234

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2024

Before :

DEPUTY HIGH COURT JUDGE SUSIE ALEGRE

- -

Between :

MIQAAD VERSI **Claimant**

- and –

MOHAMED HUSAIN (aka ED HUSAIN) **Defendant**

- -
- -

Gervase de Wilde (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**
Mark Henderson (instructed by **Rahman Lowe Solicitors**) for the **Claimant**

Hearing dates: 7 June 2024

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Approved Judgment

This judgment was handed down remotely at 3pm on 28 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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DEPUTY HIGH COURT JUDGE SUSIE ALEGRE

Susie Alegre :

1. This is my judgment on an application by the defendant for a Trial of Preliminary Issues (TPI) on the question of serious harm in a claim for defamation over a tweet published by the Defendant on 21 November 2020 ('the Tweet').

Background

2. The claimant, Miqdaad Versi, is the former director of media monitoring at the Muslim Council of Britain and describes himself as a campaigner in his own right against Islamophobia. The defendant, Mohamed Mahbub Husain (aka Ed Husain) is an author, academic and adviser to governments on Islamist extremism, terrorism and national security.

3. The claim is brought against the defendant over a tweet published for a brief period on the evening of 21 November 2020. Mr Justice Nicklin ordered a TPI on meaning, fact or opinion, and whether the statement is defamatory at common law on 28 April 2022. There was a TPI on meaning on 17 November 2022 before HHJ Lewis sitting as a Deputy Judge of the High Court.

4. In his judgment of 3 March 2023 [2023] EWHC 482 (KB) ('the Meaning judgment') HHJ Lewis defined the natural and ordinary meaning of the Tweet as:
    a. The claimant has expressed views that are supportive of the repressive regime in Iran, gender discrimination, blasphemy laws and sectarianism and which are anti-Western.
    b. The claimant has expressed views that are supportive of Hamas, a militant Islamist group with known links to violence.
    c. The claimant holds extremist, Islamist views. His endorsement of such views is so objectionable that he has no place participating in this public debate. [48]

    He found that limbs (a) and (b) were statements of fact while (c) was an expression of opinion [53]. He also found the meaning to be defamatory at common law [60].

5. Following the TPI on meaning, there was a Costs and Case Management Hearing on 20 December 2023 before Master Dagnall which resulted in an Order with a direction that the trial should be listed with a 5-day estimated length and a trial window between 1 October 2024 and 20 December 2024.

6. On 5 March 2024, the defendant wrote to the claimant proposing a TPI on the issue of serious harm. This was followed by a Consent Order issued by Master Dagnall on 15 March 2024 ordering the listing of this application to be heard before 7 June 2024 and a stay of proceedings pending the outcome of the application.

The Issues

7. The key issues for me to decide in this application are:
    a. to what extent does the Court have discretion to order a TPI on serious harm after a TPI on meaning, fact or opinion and common law defamatory status?
    b. would a TPI on serious harm be appropriate in the context and at the stage in proceedings of this case applying a cost/benefit analysis to the impact it would have on the proceedings?

The Law

8. The broad position is set out in CPR r.3.1(2) which provides that the Court may (i) direct a separate trial of any issue; and (j) decide the order in which issues are to be tried. The commentary on CPR r.3.1(2)(i) in the White Book 2024, Vol. 1, para 3.1.10, pg. 78 says:

> "In McLoughlin v Grovers (A Firm) [2001] EWCA Civ 1743; [2002] Q.B. 1312 at [66], David Steele J gave the following guidance: (i) only issues which are decisive or potentially decisive should be identified; (ii) the questions should usually be questions of law; (iii) they should be decided on the basis of a schedule of agreed or assumed facts; (iv) they should be triable without significant delay, making full allowance for the implications of a possible appeal; (v) any order should be made by the court following a case management conference.
> As to (i) (see above, issue should be decisive or potentially decisive), trying one issue separately can sometimes lead to huge savings in costs and delays if that issue is or may be determinative of the whole proceedings, or if a court decision upon it is likely to assist the parties to resolve other issues by means of settlement or ADR."

9. The principles for deciding to exercise that discretion were explored in *Steele v Steele [2001] CP Rep 106 (Neuberger J)*, and summarised by Hildyard J in *Wentworth Sons Sub-Debt SARL v Lomas [2017] EWHC 3158 (Ch); [2018] 2 BCLC 696,* [33]-[34]:

> "32. In *Steele v Steele [2001] C.P. Rep. 106*, Neuberger J (as he then was) examined in detail the questions which must necessarily arise in considering
> whether the determination of a preliminary issue is appropriate. In summary, these were:
> (1) First, would the determination of the preliminary issue dispose of the case or at least one aspect of it?
> (2) Second, would the determination of the preliminary issue significantly cut down the cost and time involved in pre-trial preparation or in connection with the trial itself?
> (3) Third, whereas here the preliminary issue was one of law the Court should ask itself how much effort would be involved in identifying the relevant facts.
> (4) Fourth, if the preliminary issue was one of law to what extent was it to be determined on agreed facts?
> (5) Fifth, where the facts were not agreed the Court should ask itself to what extent that impinged on the value of a preliminary issue.
> (6) Sixth, would determination of the preliminary issue unreasonably fetter the parties or the Court in achieving a just result?
> (7) Seventh, was there a risk of the determination of the preliminary issue increasing costs and/or delaying the trial?
> (8) Eighth, the Court should ask itself to what extent the determination of the preliminary issue may turn out to be irrelevant.
> (9) Ninth, was there a risk that the determination of the preliminary issue could lead to an application for the pleadings to be amended so as to avoid the consequences of the determination?
> (10) Tenth, taking into account the previous points, was it just to order a preliminary issue?"

10. Guidance on the use of trials on preliminary issues in defamation proceedings is provided in the King's Bench Guide 2024 (and 2023) and the White Book 2024 (together 'the Guidance'). The King's Bench Guide 2024 states:

> *"Determination of meaning and other issues as preliminary issues*
>
> 17.30 At any stage of the claim, the court can determine the issue of what defamatory meaning or meanings were conveyed by a statement complained of. The determination of meaning is often suitable to be heard as a preliminary issue. Any such ruling on meaning will bind the trial judge; and following a ruling on meaning the court may, if appropriate, exercise its power to strike out a statement of case. Trials of Preliminary

> Issues in the MAC List are usually limited to issues that can be resolved without the need for disputed witness evidence.
> ....
>
> 17.34 The court will be slow to direct a preliminary issue as to serious harm involving substantial evidence: any continuing dispute as to serious harm should ordinarily be left to trial.
>
> *Serious harm (Section 1 of the Defamation Act 2013)*
>
> 17.35 In order to bring a claim under the 2013 Act it must be proved the publication of the statement complained of "has caused or is likely to cause serious harm to the reputation of the claimant" within the meaning of s 1(1) of the 2013 Act. The seriousness of the harm caused by a publication is to be determined "by reference to the actual facts about its impact and not just to the meaning of the words" (*Lachaux v Independent Print [2019] UKSC 27*).
>
> 17.36 If the defendant contends that a claim should not be allowed to proceed to trial as no serious harm can be proved, then in the ordinary course they should apply for summary judgment under CPR Part 24 or, if appropriate, to strike out the claim in accordance with the Jameel principles (see [2005] EWCA Civ 75).
>
> 17.37 Consideration of meaning will necessarily be part of any application under s.1 of Defamation Act 2013 ("serious harm") and so when the question of serious harm is in issue and not appropriate to be left to trial, issues of meaning and serious harm should ordinarily be dealt with together at an interim stage. Accordingly, applications concerning serious harm should be made to a judge of the MAC List."

11. The commentary in the White Book 2024 reflects this position:

> "53BPD.44 Since the decision of the Supreme Court in *Lachaux v Independent Print Ltd [2019] UKSC 27; [2020] A.C. 612*, it has become usual to leave the issue of serious harm to the trial of liability, unless it can be disposed of on an application for summary judgment under Pt 24, or possibly where the challenge to the claimant's case on serious harm is based on argument about meaning and does not involve contentious witness evidence. See also the King's Bench Guide 2023 para.17.34:
>
> "The court will be slow to direct a preliminary issue as to serious harm involving substantial evidence: any continuing dispute as to serious harm should ordinarily be left to trial."

12. Davis LJ, for the Court of Appeal in *Lachaux* made observations on the procedure by which the issue of serious harm was to be determined:

> "73. As I see it, therefore, if an issue has been raised as to whether serious reputational harm has been caused or is likely and if it is not considered appropriate for that issue to be left to be resolved at trial then it may be that it conveniently can be dealt with at a meaning hearing. The seriousness of the reputational harm is then evaluated having regard to the seriousness of the imputation conveyed by the words used: coupled, where necessary or appropriate, with the context in which the words are used (for example, in a newspaper article or widely accessed blog).
> ....
> 79. Whether in any given case the imputation is of sufficient gravity as of itself to connote serious reputational harm (quite apart from the question of consequential or special damage) should therefore normally be capable – where the question of serious

> harm is in issue and is not appropriately to be left to trial – of being relatively speedily assessed at the meaning hearing. If it is, nevertheless, desired by a defendant to put in evidence at an interlocutory stage designed to show that there is no viable claim of serious harm the summary judgment procedure under CPR Part 24 is available if the circumstances so justify. There may, for instance, be cases where the evidence shows that no serious reputational harm has been caused or is likely for reasons unrelated to the meaning conveyed by the defamatory statement complained of. One example could, for instance, perhaps be where the defendant considers that he has irrefutable evidence that the number of publishees was very limited, that there has been no grapevine percolation and that there is firm evidence that no-one thought any the less of the claimant by reason of the publication. Whether such evidence is in truth unanswerable and whether such matters are best resolved on a summary judgment application or best left to trial is then for the court to determine. Alternatively, if subsequent events or evidence show that there has ceased to be a "real and substantial tort" then a strike out application, in accordance with the principles of *Jameel*, may also be available. At all events, the *Jameel* procedure, with all respect to the judge who thought otherwise (see paragraph 50 of his judgment), in my view has not been wholly subsumed into s.1 of the 2013 Act, even if there is now a potential degree of overlap.
>
> 80. All this is salutary, as I see it, for another reason. If the imputation of the words used is serious, carrying with it the inference that serious reputational harm has been or is likely to be caused, then it is, in my view, not right for a claimant then to have to carry a further burden, at an interlocutory stage, of adducing further evidence to prove serious harm at a preliminary issue hearing. It is surely fairer, once such a case has been properly pleaded and the defamatory meaning is sufficiently grave for an inference of serious harm to be drawn, that it is then for a defendant to seek to show why the claim nevertheless should not be permitted to proceed to trial: whether by making an application under CPR Pt 24 or by a *Jameel* application. Otherwise, if the facts are contentious the case should be left to go to trial in the usual way – just as in any other tort case."

13. While the Supreme Court overturned the Court of Appeal's judgment on some aspects in *Lachaux [2019] UKSC 27; [2020] A.C. 612* the procedural analysis set out in the paragraphs above remained undisturbed and is reflected in the Guidance.

14. In the recent case of *Amersi v Leslie [2023] EWCA Civ 1468*, Warby LJ described the approach of the Court to a TPI on serious harm post *Lachaux* at para 35:

> "Although the question of whether the serious harm requirement is satisfied is in one sense a threshold issue the standard approach nowadays is to decide it at trial. The early practice of trying serious harm as a preliminary issue fell into disfavour after it was deprecated by the Court of Appeal in *Lachaux v Independent Print Ltd [2017] EWCA Civ 1334, [2018] QB 594.* In principle, a defendant can seek "reverse" summary judgment on the issue of serious harm pursuant to CPR Part 24 but such applications risk wasting costs (see *Ames v Spamhaus Project Ltd [2015] EWHC 1417, [2015] 1 WLR 3409*) and are rare."

15. Gatley (13th edition) also directly addresses this issue:

> 32-002 - So far as concerns serious harm to reputation under s.1 of the Defamation Act 2013 (which also came into force on 1 January 2014), which has now been authoritatively held by the Supreme Court to involve the consideration of factors other than meaning, where it is disputed that the publication has caused or is likely to cause serious harm to the claimant's reputation, unless the matter can be disposed of by an

> application for summary judgment under CPR Pt 24, it should ordinarily be left to the trial of liability. (p.1111)
> 32-045 - the Court of Appeal has made it clear that [preliminary] trials should only be applied for or ordered where to do so would be proportionate and cost-effective and would actively promote the overriding objective of the CPR. The latter requirement will in general rule out the possibility of serious harm being tried as a preliminary issue where the defendant wishes to call evidence to disprove the claimant's case on the point. Where a defendant wishes to challenge serious harm evidentially, the issue should normally be left to the trial of liability and damages if it cannot properly be made the subject of an application for summary judgment or to strike out the claim as a Jameel abuse. Defamation defendants have no entitlement to have "threshold issues" such as publication, reference, serious harm or even meaning determined as preliminary issues. (p.1168)

16. Footnote 361 to para 32-045 of Gatley provides the following analysis of the impact of the Court of Appeal's judgment in *Lachaux*:

> "It is submitted that nothing that Lord Sumption said on appeal ([2019] UKSC 27;[2020] A.C. 612) undermined the sense of the observations of the Court of Appeal in respect of case management. See further the Queen's Bench Guide 2022 at para.17.34: "The court will be slow to direct a preliminary issue as to serious harm involving substantial evidence: any continuing dispute as to serious harm should ordinarily be left to trial"; and at para.17.29: "Trials of 8 Preliminary Issues in the MAC List are usually limited to issues that can be resolved without the need for disputed witness evidence".

17. In the case of *Bindel v Pink News [2021] EWHC 1868 (QB); [2021] 1 WLR 5497,* Nicklin J noted in relation to the issue of a TPI on serious harm that:

> "the defendants had not proposed that serious harm should be tried as a preliminary issue. This was recognised to be sensible – considering various observations by the Court about the unsuitability of serious harm to be tried as a preliminary issue" [7]

18. He went on to provide the following guidance in such cases:

> "a case in which the Court directs determination of [a] preliminary issue that will require resolution of disputed issues of fact – involving disclosure, witness statements and cross-examination – must be regarded as an exception to the general rule, and one that requires careful consideration by the Court and very clear justification" [33]

19. Cases where a TPI on serious harm has occurred following the Court of Appeal judgment in *Lachaux* include *Hope Not Hate Ltd & Another v Nigel Farage [2017] EWHC 3275 (QB)* and *Hodges v Naish [2021] EWHC 1805 (QB).* No explanation was given for this decision, on the part of Jay J at an earlier hearing, in the judgment of HHJ Parker QC sitting as a Deputy Judge of the High Court in *Hodges.* In *Hope not Hate,* Warby J noted at [36]:

> "What is also clear, however, as I mentioned in *Brown v Bower*, is that all these cases depend on their particular facts. I accept Mr. Hudson's submission that it is for the court to decide whether a preliminary issue trial should proceed. Such a decision is, however, a classic instance of discretionary case management. The court must apply the overriding objective, seeking to identify what the issues would be, and how they fit within the overall picture of the litigation. It must strive to balance the competing considerations - of which there are many - in such a way as to best achieve the overriding objective."

Parties' Arguments

20. In his skeleton argument and oral submissions, Mr de Wilde, for the defendant, submitted, in summary, that the Application for a TPI on serious harm should be granted for the following reasons:

    (a) The Court has a broad discretion to order a TPI on serious harm applying a cost/benefit analysis.

    (b) The threshold test to serious harm can be seen to be increasingly demanding in light of recent decisions on serious harm which he says indicates a paradigm shift in the approach to the issue post *Lachaux*. Serious harm is increasingly a determinative issue at trial. An inferential or speculative case is unlikely to be sufficient, and the polarised social media context puts a claimant under a particularly acute burden, where parties are on opposite sides of a partisan social media dispute. A TPI on serious harm would be appropriate in light of these developments.

    (c) In these proceedings there would be little analysis for the Court to undertake on serious harm, the evidence would be minimal with no need for expert evidence, and key findings on context have already been made in the determination of meaning.

    (d) The discretionary cost/benefit analysis comes down on the side of ordering the Serious Harm TPI. The resources devoted to defending the claim at a full trial will be wasted if the Defendant's view on the weakness of the Claimant's case on serious harm is borne out and it would be just to order the Serious Harm TPI.

    (e) A TPI on serious harm would not delay the proceedings and could be arranged without changing the current timing of the trial.

21. Mr Henderson for the Claimant, in his skeleton argument and in submissions before me, argues, in summary:
    a. The current application for a second TPI on serious harm at a late stage of the proceedings flouts the authoritative guidance both as to how an application in relation to serious harm should be made and when the issue of serious harm should be considered if it is not to be left to trial.

    b. A TPI on serious harm would require the consideration of evidence which would create a significant overlap with the evidence that would be needed at trial. A TPI on serious harm would not necessarily be determinative.

    c. This appears to be an application for summary judgment by the backdoor. The guidance makes clear that defendants should not evade the test for summary judgment by instead making applications for a TPI on serious harm.

    d. A TPI on serious harm would add to costs and delay proceedings by effectively having three trials which is unnecessary.

22. He described the Defendant's reasoning for stepping away from the guidance based on evolving case law on serious harm as "thin gruel", and submitted that the 2024 King's Bench guidance on this issue was an indication that the Supreme Court in *Lachaux* had not shifted the procedural position in relation to TPI's on serious harm established in the Court of Appeal judgment in that case.

Analysis

A - discretion to order a TPI on serious harm after a TPI on meaning, fact and opinion and common law defamatory status

23. I accept that the Court has a general discretion to order a TPI (CPR r.3.1(2)), the question is how it should be exercised in relation to the issue of serious harm in defamation proceedings. Mr. de Wilde sought to persuade me that the case law does not indicate that a TPI on serious harm should be exceptional in such cases.

24. The authorities, however, make it abundantly clear that the Court "should be slow" [King's Bench Guide 2024] to order a TPI on serious harm in a defamation case. And Nicklin J in *Bindel v Pink News* explicitly described the ordering of a TPI of this kind as "an exception to the general rule, and one that requires careful consideration by the Court and very clear justification." [33]. It is, therefore, for the defendant making this application to show that the circumstances of this case merit such an exceptional approach and to provide compelling reasons to justify a departure from the usual approach.

25. Mr. de Wilde provided detailed submissions on the evolution of the case law following *Lachaux* regarding the substantive assessment of serious harm in defamation proceedings and the burden on the Claimant to demonstrate serious harm (e.g. *Sivananthan v Vasikaran [2022] EWHC 2938 (KB) [2023] E.M.L.R. 7* and *Hayden v Family Education Trust [2023] EWHC 950 (KB)*). But he failed to point to any clear authority to show that there had been a shift in the procedural approach which could justify a TPI on serious harm in these proceedings, at this stage, or in general.

26. The recent examples of TPI's on serious harm are fact specific. In *Hope not Hate*, Warby J pointed out that "all these cases depend on their particular facts." And in *Hodges*, serious harm was only one of the issues addressed at the TPI and no explanation was given for the exercise of discretion in favour of a TPI on serious harm in the case. They do not provide authority as to a general change of approach in relation to TPIs on serious harm.

27. I have, however, also considered the other arguments put forward by Mr. de Wilde in favour of a TPI on serious harm as a general proposition in light of the *Steele* principles.

28. Firstly, he suggests that a TPI on serious harm would be desirable because, if the Court found there was no serious harm, the TPI would be dispositive and would avoid the significant wasted time of a lengthy trial with a shortened time frame.

29. A TPI on serious harm would only be dispositive if it concluded that there was no serious harm caused to the claimant. Summary judgment would have the same dispositive effect in those circumstances. The main difference is that, in the case of summary judgment, the burden would be on the defendant to show that there was no serious harm, while in a TPI, the burden to demonstrate serious harm would be on the claimant.

30. While a refusal of summary judgment would not trespass on the evidence at trial, a TPI that found there was serious harm would risk binding the court at trial with findings on evidence that could be equally relevant to the question of damages and/or relevant defences. A TPI on serious harm would have the effect of a summary judgment by the back door, shifting the burden of proof onto the claimant. But following a TPI on meaning, the appropriate route for a dispositive outcome avoiding the need for a full trial in such circumstances is an application for summary judgment or a strike out application.

B - cost/benefit analysis of a TPI on serious harm in these proceedings

31. While I am not persuaded that a TPI in serious harm would be appropriate in defamation proceedings in any but exceptional circumstances, I have considered the arguments put forward

in the context of the cost/benefit analysis set out in *Steele* to assess whether this might be such an exceptional case.

32. Mr. de Wilde submits that a TPI on serious harm would not require extensive evidence and that there would not be significant overlap with any evidence that might be required at trial if the claimant was able to show serious harm. He points to the lack of clarity from the claimant on evidence to be adduced at trial and, in summary, suggests that a TPI on serious harm would push forward disclosure so that the evidential basis of the claimant's case would be clearer at an earlier stage without the cost of a full trial.

33. Mr. Henderson submits that there will be at least one witness in addition to the claimant, possibly a second and, potentially, an expert witness, although the identity of the witnesses and the exact nature of their evidence was not explained.

34. Although it is not yet entirely clear what evidence the claimant will bring in relation to serious harm, which is regrettable at this stage in the proceedings, it is clear that the issue of serious harm cannot be neatly separated from other issues at trial from an evidential perspective. In particular, the polarised context is a matter relevant to serious harm, but also to aspects of the defence such as honest opinion and qualified privilege. It may also be relevant to the question of damages. I find that there is, therefore, a significant overlap in the evidence that might be required to demonstrate serious harm in a TPI and the evidence that would be needed at trial in relation to both defences and damages. This tips any cost/benefit analysis very heavily against a TPI on serious harm in this case.

35. This application for a TPI on serious harm comes a full year after the Meaning judgment. There might have been an opportunity to consider serious harm alongside meaning in the first TPI if the defendant had raised this issue before Mr Justice Nicklin in April 2022. But the defendant did not seek to explore this option at that point.

36. In court, Mr de Wilde submitted that one reason for the timing of this application was lack of disclosure by the claimant. He referred to the recent disclosure by the claimant of a screenshot confirming that the Tweet complained of was posted at 8.53pm. There was some dispute about the relevance of this during the hearing followed up with unnecessary submissions about the evidence of timing of the Tweet in writing post-hearing. In essence, however, the position regarding timing of posting and removal of the Tweet has changed very little since the Meaning judgment and this point is of very little relevance to the overall assessment of this application.

37. In the Meaning judgment HHJ Lewis estimated the time of the Tweet as around 9pm [at paragraph 23]. The relevant material identified in that judgment also showed that the Tweet was a quote tweet of the claimant's tweet posted at 8.38pm [at paragraph 24], therefore, contrary to the claimant's original pleaded case, it was clear, by the time of the TPI on meaning, that the Tweet was posted sometime after 8.38pm. The relevant material also contained a tweet from another user indicating that the Tweet had been taken down that same evening, making it clear that the Tweet was published for a limited time. The significance of recent disclosure, therefore, changes the position established in the Meaning judgment by a very short time - a matter of 7 minutes at least and a couple of hours at most. This would have a relatively trivial impact on the assessment of harm compared to the position already established in the TPI on meaning, and disclosure after the application was filed can clearly provide no real support for the timing of the application itself. This does not, in my view, give rise to a serious shift in the balance of a serious harm assessment such as to justify an exceptional TPI on serious harm.

38. Having carefully considered the circumstances of this case, I am not persuaded that the arguments put forward by the defendant give clear justification for a departure from the guidance or any good reason to grant a TPI on serious harm at this stage in these proceedings.

It seems clear, in this case, that what the defendant is seeking is, in effect, a reverse summary judgment that shifts the burden of proof onto the claimant. In these circumstances, it would not be appropriate to exercise my discretion to bypass the usual procedure.

39. In addition, having regard to the cost/benefit analysis principles in *Steele*, I find that determination of serious harm at a TPI in this case would unreasonably fetter the parties or the Court in achieving a just result because it would require findings on evidence that overlaps with potential evidence at trial.

40. I agree with Mr. Henderson that an additional trial, at this stage, making it a three-trial process if the TPI resulted in a finding of serious harm is excessive and unnecessary. I am not convinced that it would be possible to stay within the current timetable for the proceedings with an additional trial.

41. To allow for a further TPI on serious harm would go against the overriding objective and potentially add significant time and costs to already lengthy proceedings. There appears to be a significant risk of the determination of the preliminary issue in this case increasing costs and/or delaying the trial. If the defendant was confident in his case on serious harm, it could be dealt with dispositively by way of summary judgment without the additional risk of binding a trial judge and muddying the evidential waters that would accompany a TPI on serious harm at this stage. Taking account of all these factors, I do not think it is just to order a TPI on serious harm in this case.

Costs

42. The general rules on costs are set out in CPR 44. CPR r.44.2(1) lays out the Court's discretion as to making an Order on costs. CPR r.44.2(2) provides that where the Court decides to make an Order on costs, (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but (b) the Court may make a different Order.

43. The parties made written submissions on costs. Mr de Wilde proposed that the court should deviate from the general rule and make an order for costs in the case using the same approach as that set out by Nicklin J in relation to a Meaning TPI in ***Sharif v Associated Newspapers Ltd*** [2021] EWHC 343 (QB) at [42]-[45]. He suggested this would be appropriate in light of the issues around lack of clarity in the claimant's evidence about witnesses in particular. In the alternative, he proposed an order for claimant's costs in the case. Mr Henderson argued that there was no justification for departing from the general rule in CPR 44 in this case noting that an application for a TPI on serious harm was a significant departure to the usual procedure in defamation cases.

44. Having refused this application for the reasons given above, there is no doubt that the claimant is the successful party in this case. Unlike a TPI on meaning, this application has not resolved any of the issues that will need to be addressed at trial, therefore it has not resulted in any overall savings in the costs in these proceedings. The application in this case was 'novel' at best and procedurally misconceived at worst. In these circumstances, I can see no justification for departing from the general rule and therefore make a costs order in favour of the claimant to be assessed summarily.

Conclusion

45. For the reasons given, the application for a TPI on serious harm is refused. Costs in the application for the claimant to be assessed summarily.