Case No: HQ09X04089

Neutral Citation Number: [2012] EWHC 1071 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2012

Before :

HIS HONOUR JUDGE RICHARD PARKES QC
(Sitting as a Judge of the High Court)

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Between :

WXY	**Claimant**
- and -	
(1) HENRY GEWANTER	**Defendant**
(2) PUBLIC PROFILE LIMITED	
(3) MARK BURBY	

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Aidan Eardley (instructed by **Archerfield Partners LLP**) for the **Claimant**
Christine Cooper for the **First and Second Defendants**

Hearing dates: 18 January 2012

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Judgment

HHJ Parkes QC :

1. I have to determine an appeal by the first and second defendants from costs orders made by Master Kay and an application for specific disclosure by the claimant.

2. The claimant is a woman with close connections to a foreign head of state. The first defendant, Mr Gewanter, is a public relations consultant, and the managing director of the second defendant, Positive Profile Ltd, which is his company. The third defendant, Mr Burby, was their client. He is not a party either to this application or to the appeal.

3. The claimant seeks damages against the defendants for misuse of private information and/or breach of confidence, and for harassment, and injunctions. There is an interim injunction in place which prevents publication of the information in dispute, and which protects the claimant's identity by anonymising her.

4. As far as Mr Burby is concerned, the trial of the claimant's claims against him took place before Slade J from 14th to 20th July 2011, the judge having ordered on 13th July 2011 that the claim against Mr Gewanter and Public Profile Ltd be adjourned on the grounds Mr Gewanter's ill health. Judgment for the claimant was handed down on 6th March 2012, and the detailed factual background to the claim is set out by Slade J in that judgment. I understand that the trial of the claim against these defendants is to take place in June 2012.

5. This action is apparently one of a series of claims arising from the actions of M, with whom the claimant had a brief non-sexual relationship in late 2003 and early 2004 and who then went on to seek to publicise information about that relationship, information which the claimant says is largely false. The claimant asserts that Mr Burby initially helped her to prevent M's claims from being publicised, and sought her help with a problem of his own, namely recovery of a judgment debt owed by a company under the control of people close to the foreign head of state. She says that she did what she could to help him, but the debt remains unpaid.

6. On the claimant's case, Mr Burby then embarked on the course of conduct which led to these proceedings. He operated a website on which he began to post private and confidential information about the claimant, and to threaten that he would post more information if his judgment debt was not satisfied. The claimant maintains that later, possibly in July 2009, Mr Burby obtained the assistance of Mr Gewanter and Positive Profile Ltd. The claimant's case is that Mr Gewanter and his company collaborated with Mr Burby in publishing the private and confidential material and threats on Mr Burby's website, and published the information both orally and otherwise to representatives of the media. As I understand these defendants' defence, which was settled by Mr Gewanter himself, they take issue both with the claim that the material in question is private and/or confidential and with the claims that they are responsible for publication of articles on Mr Burby's website and for harassment of the claimant.

DEFENDANTS' APPEAL FROM THE MASTER

7. Mr Gewanter and Positive Profile Ltd appeal by appellant's notice dated 11th June 2010, by leave of Eady J dated 31st January 2011, against orders of Master Kay made on 24th February and 7th April 2010. Those orders have been stayed pending determination of this appeal.

8. The background to the appeal is that on 4th December 2009 the claimant served a Pt 18 request for further information. On 10th December 2009, Master Kay ordered that these defendants should respond to the Request by 8th January 2010. Responses were served on 8th and 13th January 2010. The claimant regarded the responses as inadequate, and issued an application notice on 18th January 2010. On 24th February, Master Kay ordered these defendants to file a proper response to the outstanding requests by 19th March 2010. The Master also ordered that the defendants should pay the claimant her costs of the application, which were summarily assessed in the sum of £5740. He also made other orders, including another costs order against these defendants, which are not presently material. Because the defendants did not appear for the 24th February hearing, they were given leave to apply to set the order aside provided that the application was made within seven days of receipt of the order.

9. In the event, the defendants applied late, by notice apparently issued on 8th March, to set aside the order of 24th February. The application notice sought to set aside, vary or stay the Master's order because the defendants were not heard on 24th February, and because (for reasons which are not now material) Master Kay should have recused himself on grounds of actual or perceived bias. There was no express challenge to the order for costs.

10. The defendants' application was heard on 7th April 2010. The Master ordered that the earlier order be varied to give the defendants longer to provide the responses (paragraph 1), that time for payment of those costs be extended to 5th May 2010 (paragraph 2), and that the defendants should pay the claimant the costs of the application, summarily assessed at £1175 (paragraph 3). By paragraph 4 of the order, the defendants were given leave to apply to stay the orders for costs or to extend further the time for payment of costs, any such application to be made by 5th May 2010. On 26th May 2010, the defendants applied late to extend time for appealing from the Master's order of 7th April, or alternatively for complying with paragraph 4 of that order, and to stay paragraphs 2 and 3 of the 7th April order.

11. On 28th May 2010, Mr Gewanter appeared before Master Kay and obtained an order extending time to appeal from the 7th April order to 11th June 2010, which was the date on which the appellant's notice was issued.

12. The grounds of appeal, which I assume were drafted by Mr Gewanter, were simply that the defendants were not present at the 24th February hearing, that they had provided the information requested, that there was no merit in the claimant's application, which should have been adjourned in view of the defendants' absence, and that the claimant was not entitled to her costs. The same grounds were repeated for the 7th April hearing, notwithstanding that the defendants were present on that occasion.

13. On 25th June 2010 Tugendhat J granted the defendants an extension of time until 9th July 2010 for service of their skeleton argument, and granted applications for stays of paragraph 6 of the Master's order of 24th February 2010 (the order for payment of £5740 costs within 21 days) and paragraphs 1, 2 and 3 of the order of 7th April 2010 (extension of time until 28th April to provide responses to Part 18 request, extension of time to 5th May for payment of costs ordered on 24th February, and the order for payment of £1175 costs within 21 days) pending the hearing of the application for permission to appeal.

14. On 13th July 2010, the skeleton argument in support of the appeal was served. On 20th August, the defendants' application came before Nicol J, presumably on paper. He refused permission to appeal from the Master's orders but gave Mr Gewanter leave to renew his application. Nicol J observed that it was not reasonably arguable that the Master erred in his discretion to proceed in the Defendants' absence on 24th February, and that the Master had a discretion to make the costs orders that he did. To the defendants' complaint that an obligation to pay costs would impede their ability to defend the case, Nicol J said that he had seen no evidence of such matters being placed before the Master on 7th April 2010, and that in any event mere assertion might not be enough.

15. The matter came before Silber J on 2nd December 2010, on the defendants' renewed application for permission to appeal. Despite the clear indication given by Nicol J, the defendants had still not put any evidence of means before the court. Silber J ordered that the application be adjourned so that the defendants could adduce evidence of means by way of a witness statement to be filed and served by 17th December 2010. The witness statement was duly served on the last day for service. It was drafted by Mr Gewanter. On 31st January 2011, Eady J gave the defendants permission to appeal against Master Kay's orders. After that, it took nearly a year before the appeal came on for hearing.

16. Very late in the day, the defendants instructed Miss Cooper to represent them on the hearing of the appeal. Understandably, her brief skeleton argument could not be produced before the morning of the hearing. Nonetheless, I was very grateful to have her submissions. There was in the event no challenge to the correctness of the Master's order that the defendants should file proper responses to the claimant's Part 18 request, and her argument proceeded on two distinct grounds.

17. Miss Cooper's first submission was that the Master did not need to make a costs order on 24th February 2010, when (as the attendance note shows) he had a fax from Positive Profile Ltd. I have been shown the fax, in which Mr Gewanter explained that he was ill and could not be present, and expressed the hope that the Master would not proceed in his absence. Miss Cooper argued that the Master could have deferred a decision, and could have heard argument on a later occasion both on the principle of the order to be made and on quantum. I am not impressed by that submission. The Master had to consider the interests of the claimant also: she was present by counsel and ready to proceed. He expressly ordered that the defendants should be able to apply to set the order aside within 7 days. That was a sensible and proportionate course which it was fully within his discretion to take. There might have been no application, whereas adjourning the question of costs inevitably entailed another hearing and further costs. The defendants had their opportunity to come back, and in the event they took it, albeit out of time (their application notice appears to have been issued on 8th March 2010). I do not see any unfairness in that, and I agree with Nicol J that the contrary is not reasonably arguable.

18. Mr Eardley submitted that there was no reason to disturb the Master's decision to make the costs orders that he did and to assess the costs summarily. I agree with him, and say no more about it.

19. Miss Cooper's second submission related to the time for payment of the summarily assessed costs. The normal order is that they should be paid within 14 days: CPR 44.8.

On 7th April, when Mr Gewanter appeared in person, the Master varied his 24th February order to give the defendants more time to comply and to extend time for payment of the 24th February costs until 5th May 2010, and he gave the defendants permission to apply by 5th May 2010 to stay or further extend time for payment of the 24th February costs and of the further costs which he ordered the defendants to pay in respect of the 7th April hearing. The defendants did not take that opportunity, instead making the application dated 26th May 2010 to which I have already referred.

20. Miss Cooper explained that although paragraphs 4 and 5 of the 7th April order showed that the Master envisaged an application on the merits as to the prejudice caused by making costs payable immediately instead of at the end of the proceedings, Mr Gewanter did not understand that, as is apparent from his letter to the Master dated 11th May 2010. He thought, it seems, that the Master was considering the representations made on 7th April, would consider his responses to the Pt 18 request, and would then make a decision as to whether any costs should be payable before the trial of the action. That is borne out by his witness statement of 26th May 2010. I am unclear why, given that by 26th May he knew what he had to do, he did not put in any further evidence necessary and make the application envisaged by paragraph 4 of the 7th April order, either on 28th May or as soon as possible thereafter. He seems to have decided to appeal instead. But the fact is, Miss Cooper argued, that it was because of his own understandable mistake that he did not put evidence before the Master which went to the time for payment of the costs. I can accept that, and I have no difficulty with considering on this appeal the fresh evidence which the defendants first put before Eady J. However, the curious reality is that the defendants' appeal, as far as this argument is concerned, is not directed to any mistake supposedly made by the Master, who did not have the benefit of the evidence said to justify the different order which the defendants now seek. Such are the tangles into which unrepresented litigants are apt to get themselves.

21. Miss Cooper drew my attention to the financial information which Mr Gewanter put before Eady J. Mr Gewanter exhibited to his witness statement (which was dated 17th December 2010) his tax returns for the years ending 5th April 2008, 2009 and 2010, unaudited financial statements of Positive Profile Ltd for the years ending 31st December 2008 and 2009, his payslips, bank statements and bills from his children's private schools. It appears from his evidence that Positive Profile Ltd recorded a loss of £30,000 in 2009, and that at least in 2009 and 2010 he has taken only some £300 per month out of the company (although in some months it has been more). His overdraft was substantial and approaching its limit. Mr Gewanter explained that he had 'depleted' his life savings and resorted to selling household items and borrowing from relatives to make ends meet and keep his overdraft within bounds. He asserted in conclusion that it would be a 'breach of justice to harm the First and Second Defendants by a cost order before the main trial has been heard and the truth of the allegations have (sic) been heard'. I note that he did not say – or at least not expressly - that if he had to meet the costs orders he would be unable to afford representation at trial.

22. Miss Cooper submitted on the basis of Mr Gewanter's evidence that it was clear that to make the outstanding costs orders payable before the end of the proceedings would have a serious effect on him. It was necessary to balance that financial difficulty against the prejudice to the claimant in being kept out of her money, which she submitted

would be no prejudice. She therefore urged the court to vary the Master's order so that the costs were payable at the conclusion of the proceedings.

23. Mr Eardley accepted, humanely and realistically, that if the obligation to pay the summarily assessed costs before trial meant that the defendants would not be able to pay for advice or representation, there would be good reason to defer payment. But on the evidence, he submitted, the threshold was not met. He pointed to the shortcomings of Mr Gewanter's evidence, which was now over a year old: no attempt had been made to supplement it. He observed also that Mr Gewanter had supplied the statements of only one bank account, even though those statements on their face disclosed the existence of a joint account. That was not in fact the limit of the shortcomings of the evidence. There were apparent references to other accounts beyond the joint account, for which no statements were exhibited (for example, in March 2009 there was a transfer of funds from account no. 03106918); Mr Gewanter did not explain the source of a number of very substantial credits to his bank account (for example, some £20,000 in January 2010, and approximately £8400 in October and November 2010); he made no attempt to say what his assets were (he referred to his savings as being 'depleted', not exhausted); and he did not explain how in 2010 he was able to pay termly school fees of some £12000, or to make Gift Aid payments of £932.50, in a year when his earnings were declared to be £5725 from employment and £999 from 'various miscellaneous income' (which itself was not explained). It may be that all these expenses were funded from his savings and by borrowing from relatives, but that was by no means clear.

24. Moreover, the shortcomings of the original witness statement were overshadowed by the fact that the evidence before the court was substantially out of date. Mr Eardley described the witness statement as 'historic', and pointed out that when Mr Gewanter applied for an adjournment of the trial of the action in July 2011, he was able to instruct leading counsel, and that in his witness statement in support of that application, dated 8th July 2011, he referred to having acquired a 'limited amount of funds' to allow him to instruct solicitors and leading counsel to make the application for adjournment. He did not elaborate about the source of those funds or their amount. Mr Gewanter went on to say in his witness statement that it was the defendants' intention to obtain legal advice if the application was successful, to enable their defence and counterclaim to be put forward at trial. That, however, was "contingent on funding becoming available, as a result of the second defendant winning a number of competitive pitches, which I consider it is in a strong position to do". It seems to me remarkable that Mr Gewanter, who is plainly an educated and intelligent man, did not think it right to put in further evidence about the outcome of those pitches, and to bring his evidence of means up to date. Miss Cooper told me on instructions that the second defendant had narrowly missed one of the pitches and won another, but that even the successful pitch did not produce the income expected because of the client's financial difficulties. Mr Eardley made the point also that on Mr Gewanter's own account, the medical advice on which he relied for his application to adjourn the trial came from a private GP and was referred to a consultant psychiatrist who must also have been private. It may be that he had medical insurance; but this is an another example of the way in which his evidence threw up uncertainty rather than resolved it.

25. Nonetheless, I make substantial allowance for the fact that he has in the main had to conduct his defence of this litigation on his own, and that he has been intermittently unwell as a result of stress and depression, which must have made it very difficult for

him to earn an income, and cannot have helped him to focus properly on this complicated litigation. The claimant is a woman of substantial means, and Mr Eardley did not suggest that she would suffer any financial prejudice if the costs orders were not paid until after the trial of the action. He emphasised the value of the salutary effect that costs orders can have. That may well be so, but it seems to me that if compelling Mr Gewanter to pay these costs orders before trial is likely to have a serious effect on his ability to defend the action, the balance of prejudice is all one way. It was for that reason that I concluded that time for payment of the outstanding costs orders should be extended until after the conclusion of the trial.

CLAIMANT'S APPLICATION FOR SPECIFIC DISCLOSURE

26. The claimant obtained an order for specific disclosure of material in seven categories on 24 February 2011, of which the first was 'documents consisting of or evidencing any communications since the beginning of April 2009 between the first or second defendants and the third defendant'. In response to that order, these defendants (through Mr Gewanter) served a further list dated 28th March 2011 confirming at point 18 that they were in possession of email exchanges between the defendants, to the inspection of which by the claimant they objected, on the basis that the documents contained information which was privileged. Privilege was asserted on the basis of common interest with the third defendant. In a letter of 16th May 2011, Mr Gewanter stated that all the email exchanges between himself, his company and Mr Burby were made in contemplation of litigation, and that he was satisfied, as the author of the communications, that 'each document was prepared, or its contents used, to obtain legal advice or to conduct or aid in the conduct of the litigation'. Mr Eardley criticised that approach, with justification, on two grounds: firstly, the test of the purpose of communications was objective, not (as Mr Gewanter appeared to be implying) subjective; and privilege had to be judged at the time when a document came into existence, not if and when it was later used or obtained for the purpose of obtaining legal advice.

27. The claimant's case is that those exchanges are likely to demonstrate whether, and the extent to which, Mr Gewanter collaborated with Mr Burby on his website, and contacted the press in pursuit of a joint strategy to excite press interest in the information which the claimant seeks to protect. On that basis, the claimant argues, they are highly relevant to the determination of the liability of these defendants.

28. So it was that by notice dated 22nd May 2011 the claimant applied for an order pursuant to CPR 31.19(5) that these defendants' claim to privilege in respect of communications between them and Mr Burby between April and September 2009 inclusive should not be upheld, save for any documents which either (a) contained legal advice or (b) came into existence on or after 24th August 2009 and were created for the dominant purpose of obtaining or providing evidence or information for use in the proceedings, and that the first and second defendants should permit inspection of them.

29. The application was previously before the court on 27th May 2011, but Mr Gewanter did not attend, claiming ill health. Tugendhat J adjourned the hearing of the application and ordered that Mr Gewanter should bring copies of the documents to the adjourned hearing. The trial of the action against all three defendants had been due to start in July 2011, but because Mr Gewanter was ill, Slade J directed that the trial of the claim

against Mr Burby should proceed, with the claim against the other defendants to be decided at a later date. As I say, Slade J handed down her judgment on 6th March 2012.

30. Mr Eardley referred me to *Buttes Gas and Oil Co v Hammer* (No.3) [1981] QB 223 for the origins of the privilege, which arose where one person (A) provided a document (in respect of which he was entitled to claim litigation or advice privilege) to another person (B), who had a common interest in the receipt of the document. As Mr Eardley pointed out, this species of privilege is chiefly of significance where (as in *Buttes*) litigation is in contemplation against both A and B, but in the event only B is sued. In principle it applies equally where both A and B are sued, but in that event defendants do not often distinguish between documents in which they assert their own privilege and those in which the privilege technically belongs to their co-defendant. Crucially, to be privileged on the common interest basis, the document in question must have been subject to legal advice or litigation privilege in the hands of A when it came into existence. In other words, common interest privilege is not a free-standing head of privilege but is parasitic on orthodox legal privilege.

31. Mr Eardley accepted that the defendants had a common interest in the defence of this litigation, and it followed that each of them might assert privilege in any communication between them which either (a) consisted of or set out any confidential information between one or more of the defendants and their respective lawyers made for the purpose of giving or obtaining legal advice or assistance (ie where legal advice privilege applied to the original communication), or (b) was a document which came into existence once litigation was in reasonable prospect for the sole or dominant purpose of giving or receiving legal advice, or collecting information for use in the litigation (ie where litigation privilege applied to the document in the hands of at least one defendant). It was accepted by the claimant that within that second category would fall communications between the defendants in which (for instance) they discussed the nature or merits of the claimant's claim, their tactics in the litigation, or where one defendant passed to another information or evidence which he had acquired for the defence of the proceedings.

32. Mr Eardley submitted that litigation was 'reasonably in prospect' when there was more than a mere possibility of a claim being brought. A general apprehension of future litigation was not enough: nor was a distinct possibility that a claim might be made sooner or later; however, the prospect of litigation did not have to be more likely than not (*USA v Philip Morris* [2004] EWCA Civ 330 [66]-[68]). In the present case, he argued that the relevant date was 24th August 2009, the date of the claimant's then solicitors' letter of claim to Mr Gewanter and Public Profile Ltd, complaining about the contents of Mr Burby's website. That letter was the solicitors' first communication with these defendants (apart from a communication to Mr Burby in June which did not make any threat of legal action but merely asked for the website to be amended).

33. There was no issue between the parties on the principles of common interest privilege, nor as to the tests which applied to the determination of legal advice and litigation privilege. The only issue raised by Miss Cooper was whether or not the disputed documents came into existence in the reasonable contemplation of litigation. She argued that the relevant date was earlier than 24th August 2009, but not before 9th June 2009, when the claimant's solicitor, Mr Bateman, had been in contact with Mr Burby (a contact which Mr Bateman, in his evidence before Slade J, seems to have thought was a telephone call, through an intermediary, to let him know that the claimant was aware of

his website). She argued that given the claimant's history as a litigant, given the 'noises off', as she put it, from Mr Bateman, and given that Mr Burby had decided to step up his campaign, it was likely that there would be litigation, and indeed 'inevitable' that an application for an injunction would follow. It could not be the case, she argued, that steps taken by the defendants to 'line up their ducks' were unprotected by privilege. The discussions in the emails, in her submission, were in anticipation of that litigation.

34. In the event, by agreement of the parties I was shown the disputed emails, on the basis that their relevance was conceded. The greater part of them were plainly privileged, and I say no more about that. In respect of a second group of documents, Miss Cooper no longer asserted privilege. There was a third group of emails between Mr Gewanter and Mr Burby dating between 3rd July 2009 and 24th August 2009 which in my judgment were not privileged. They plainly were not covered by legal advice privilege; nor, so far as I could see, had any of them come into existence for the purpose, dominant or otherwise, of giving or receiving legal advice or of collecting evidence or information for use in litigation. They appeared to be predominantly, if not entirely, concerned with strategies devised by Mr Gewanter and his company, which had just been re-instructed by Mr Burby, for applying pressure to achieve a settlement of Mr Burby's claims. They did not appear to be to be part of a process of preparation to resist anticipated litigation. In the circumstances, the question of whether or not, at the time of their creation, litigation was in reasonable contemplation, seemed to me rather less material than counsel's argument had led me to expect, although I have seen nothing to suggest that litigation was any more than a distinct possibility until the receipt of the letter before action. I informed the parties of my conclusions as soon as I had considered the documents.

35. However, two small groups of documents, each consisting of two emails, caused me more difficulty, and I did not see how I could reach a conclusion about them without hearing submissions from Miss Cooper in private and in the absence of Mr Eardley. That is what I decided to do. The first group consisted of an email from a solicitor instructed by Mr Gewanter to a potential source of funding of the legal costs of the application to adjourn the trial, and of that source's response. I wanted reassurance from Miss Cooper that this material was not at variance with any of the evidence given by Mr Gewanter about his sources of funding in his witness statement of 8th July 2011, to which I refer above. In the event, it seemed to me that it was not. That consideration apart, the two emails were plainly privileged. The second group was an email from Mr Burby to Mr Gewanter of 15th July 2011 consisting only of attachments, including a photograph, re-sent to Mr Gewanter by a further email dated 29th July. Miss Cooper told me that the purpose of the email sent to Mr Gewanter on 15th July 2011 was to inform him of the evidence which he intended to deploy in the course of the trial, so that he also could decide whether or not to make use of it to in his defence of the claim against him. I accept that submission, and in my judgment the emails are on the face of it protected by common interest privilege, on the footing that the emails came into existence when litigation was in progress for the dominant – perhaps the sole - purpose of supplying Mr Gewanter with evidence for use in the litigation. However, the photograph attached to the emails did not come into existence for that purpose, and does not become privileged by being attached to a privileged communication. Given that its relevance to the issues in the action is conceded, the photograph (but not the email to which it was attached) is disclosable. Miss Cooper told me that, according her

instructions, it had been deployed in the course of Mr Burby's trial, so it may be that my conclusion takes matters no further forward.

36. I should add that the claimant asked for the hearing of her application to be held in private pursuant to CPR 39.2(3)(a), (c) and/or (g), and an order that there should be no reporting of the proceedings held in private, save insofar as details of those proceedings were contained in any public judgment or order of the court. Public justice is a very important principle, and orders to sit in private or to restrict reporting of proceedings should only be made where strictly necessary; moreover, the court should ensure that the restrictions on the access to the court of press and public, and on reporting, are the minimum necessary to enable justice to be done. Those propositions are clear from the recent decisions of *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42 and *Ambrosiadou v Coward* [2011] EWCA Civ 409. In *JIH*, the order sought by the claimant was for his identity to be protected in the course of the proceedings, which is an order which has already been made in this case and is not challenged. In the present case, the issue was the different one of restrictions on access to and reporting of a discrete interlocutory hearing, and the application had to be considered in the light of the overall order protecting the information which concerned the claimant and protecting her identity from disclosure. In the event, it was possible to hold the hearing in open court (with the exception of Miss Cooper's brief submissions on the two groups of documents: see paragraph [37] above), by dint of counsel taking care not to reveal any private information in their submissions.

37. Miss Cooper was only instructed for the 18th January, and not, as I understood her, for the handing down of this judgment. Given that I had stated my conclusions, with the exception of the two groups of documents to which I refer at [35] above, I heard submissions on costs. On the appeal from the Master, the defendants succeeded to a degree, but not on the basis on which the appeal was launched, and such success as they had (in achieving an order postponing time for payment of the Master's costs orders) was achieved on the basis of the balance of prejudice in the teeth of a number of very good points made by Mr Eardley about the inadequacy of their evidence, of which the crucial exhibits were not shown to the claimant's lawyers until the hearing this morning. In the circumstances, it seems to me that the right order is no order as to the costs of the appeal. On the application for specific disclosure, the claimant has obtained sight of some 20 to 30 emails for which privilege had previously been asserted. It seems to me that the application was plainly justified and was in essence successful. The fact that privilege was rightly claimed for substantial numbers of documents does not alter that. The claimant should have her costs of the application. I was provided with a schedule of the claimant's costs, which came to the alarming total of over £18,000. I appreciate that the claimant's solicitors had to prepare the bundles, which they did extremely well, and I accept Mr Eardley's point that in dealing with a litigant in person it is sensible to include more material than would be necessary against a represented litigant, but the sums involved seem to me to be somewhat disproportionate to the importance of the issue. (Miss Cooper objected that the bundles were only supplied on the morning of the hearing, so were of little use to her client, but Mr Eardley retorted that the defendants were supplied with an index on 16th January and offered a complete set the following day. They did not take up the offer). Moreover, I do not think that a straightforward disclosure point requires so much attention from a partner, and the total number of hours spent on the matter by solicitors and a paralegal before final preparation for the hearing – nearly 50 – seem to me to be excessive. In addition, the hourly rates claimed

are in considerably in excess of the guidelines rates for solicitors based in London SW1. I appreciate that the claimant's solicitors are specialists, but I do not think it fair to expect the defendants to pay for specialist uplift on a straightforward application for specific disclosure. Doing the best I can, I assess the claimant's costs at £12,000, payable by the defendants at the conclusion of the trial of the action. I do so on the footing that none of the costs listed on the schedule relate to the defendants' appeal.